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Family Law

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Preface

I have endeavoured in this book to provide a succinct and clear account of the major aspects of family law. Writing the book has been a difficult task because of the complexity and rapidly changing nature of the subject. A large proportion of the book is devoted to the law relating to children because of its increasing importance. In fact in some universities child law is now taught as a separate course. I would have liked the book to have been more discursive but with so much to cover this has not been possible. Some of the questions at the end of chapters may, however, stimulate further thought and discussion.

I have attempted to emphasise those areas of family law which are currently important, so that some topics (e.g. nullity, desertion as a fact for divorce) are given less attention than in other textbooks. Some topics (e.g. welfare benefits, human-assisted reproduction), although important, have been dealt with briefly, since a detailed examination is outside the scope of this book. Interjurisdictional issues have also been omitted except in the context of child abduction. I have also excluded the historical development of family law, except in the context of divorce. Students who are interested in the historical background to family law should consult Bromley and Lowe, *Bromley's Family Law* (1992). The other standard textbook which students can consult is Cretney and Masson, *Principles of Family Law* (1990). A short bibliography is included at the end of the book.

At the time of writing, although cases on the Children Act 1989 are beginning to be reported, it is still too early to estimate the success and impact of that Act, and also of the new child support provisions which are being introduced under the Child Support Act 1991.

I would like to thank my husband John for his advice and support and our children Tom and Lizzie for their tolerance while normal family life was suspended.

This book is dedicated to the memory of my dear friend Marilyn Sutton, who died in August 1992.

I have endeavoured to state the law on the basis of the materials available to me as at 31st March 1993.

KATE STANDLEY

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Table of Statutes

Abbreviations of Major Statutes

AA 1976	Adoption Act 1976
CA 1989	Children Act 1989
CAA 1983	Child Abduction Act 1983
CACA 1985	Child Abduction and Custody Act 1985
CSA 1991	Child Support Act 1991
DPMCA 1978	Domestic Proceedings and Magistrates' Courts Act 1978
DVMPA 1976	Domestic Violence and Matrimonial Proceedings Act 1976
FLA 1986	Family Law Act 1986
I(PFD)A 1975	Inheritance (Provision for Family and Dependants) Act 1975
LPA 1925	Law of Property Act 1925
LR(MP)A 1970	Law Reform (Miscellaneous Provisions) Act 1970
MA 1949	Marriage Act 1949
MCA 1973	Matrimonial Causes Act 1973
MEA 1991	Maintenance Enforcement Act 1991
MHA 1983	Matrimonial Homes Act 1983
MPPA 1970	Matrimonial Proceedings and Property Act 1970
MWPA 1882	Married Women's Property Act 1882

1 Introduction

1.1 The Function, Scope and Nature of Family Law

Various attempts have been made to define the function of family law. Bromley and Lowe in *Bromley's Family Law* (1992) describe family law as having four distinct but related functions: defining and altering status; providing mechanisms for resolving disputes; providing physical and economic protection; and adjusting and dividing property. Eekelaar in *Family Law and Social Policy* (1984) describes family law as performing at least three general functions: protective, adjustive and supportive. These roughly correspond to those of Bromley and Lowe. Defining the functions of family law not only helps us to understand the nature of family law, but also provides a set of criteria or goals by which we can judge its success or failure. We can ask, for instance, whether family law adequately performs its protective function, and we may decide, perhaps in the context of cohabitees or of domestic violence, that the law does not. However, whether or not family law adequately performs these functions also depends on how far the boundaries of family law should extend: in other words, on its scope.

The scope of family law partly depends on whether we give the word 'family' a wide or a narrow definition. There are different ways of defining a family. It can be defined as members of the same household, or as a group of people related by blood, or as a group of parents and children. In some cultures the extended family is important, but in this country the word 'family' usually refers to the nuclear (i.e. immediate) family. The word 'family' has no legal definition and no legal personality, but statutes instead give rights and remedies to individual family members (spouses, parents, guardians and children). Family law is mainly concerned with the nuclear family (father, mother and children) and not with the extended family (grandparents, aunts, uncles and cousins), but the boundaries of family law are not completely fixed and other family members and other persons can sometimes apply to the courts, notably under the Children Act 1989, although leave of the court may be required. Family law is concerned not only with spouses, but also with cohabitees, although their legal rights and remedies are more limited.

We have established that family law is mainly concerned with the rights, duties and remedies of the immediate family, but how far do the boundaries of the subject extend? The family, and consequently family law, cannot exist in a vacuum and the latter must inevitably interact with other areas of the general law (i.e. contract, trusts, tort and criminal law). Certain specialised areas of the law also affect families, e.g. tax law, labour law, education law, social welfare law. Traditionally, however, the study

of family law does not extend to these specialised areas of law in any detail, but is confined to marriage, divorce, cohabitation and related financial and property issues, including some of the law relating to children. Family law is thus not concerned with all the law affecting the family, but concentrates instead on the creation and removal of status (e.g. marriage, divorce, parenthood), on the legal consequences flowing from the creation and removal of status, and on protection for family members (e.g. injunctions against violence and payment of maintenance). The parameters of family law also extend into the area of child law, so that adoption and local authority powers and duties in respect of children are traditionally included. New developments in human reproductive technology and surrogacy are also often included.

It may help us to understand the nature of family law if we consider what sort of work a family law solicitor does. A solicitor who specialises in family law deals mainly with divorce and related financial and property issues, including disputes about children on divorce. Solicitors also often deal with the legal problems arising from domestic violence. Some solicitors specialise in work involving children, particularly in relation to local authority powers to make orders for care, supervision and emergency protection. Solicitors must be specially qualified to represent children.

Family law, because of its human element, is based on relatively few fixed principles. This is particularly true as far as children are concerned, where there is only one main principle, the welfare of the child. When dealing with children judges are even unwilling to talk about presumptions of law but prefer instead to talk about 'considerations'. Family law cases are decided on flexible discretionary rules and the courts are usually unwilling to lay down guidelines, especially in respect of financial and property distribution on divorce where the facts and circumstances of each case are different and must be carefully considered by the court. This is also true in relation to children. Earlier cases do not usually create precedents for later cases, which often makes predicting the outcome of cases difficult for legal advisers. This uncertainty, plus evidence that different courts sometimes reached markedly different decisions on similar facts was one of the Government's main justifications for removing child maintenance from the courts into the Child Support Agency, with maintenance calculated by a mathematical formula. Because of the discretionary nature of family law and because there may be several reasonable solutions to a family dispute, the Court of Appeal is unwilling to overturn discretionary decisions made at first instance unless wrong in law or outside a band of reasonable decisions and therefore plainly wrong (see *G* v. *G (Minors) (Custody Appeal)* [1985] 1 WLR 647, [1985] 2 All ER 225, [1985] FLR 894). Legal advisers must bear this in mind when considering whether or not to appeal.

The discretionary nature of family law makes it difficult not only for legal advisers when attempting to predict the outcome of a case, but also for students, as each case depends on its facts. A good knowledge of

statute law is essential. Although there is considerable discretion, many family law statutes in fact contain statutory checklists of specific criteria which must be applied by the courts when considering whether and, if so, how to make an order, e.g. see s.1(3) Children Act 1989 and s.25 Matrimonial Causes Act 1973. The proposed reforms of adoption law recommend the introduction of statutory guidelines for adoption similar to those in the Children Act.

Adjudication of family law disputes takes place within an accusatorial and not an inquisitorial system, where the judge as neutral arbiter hears the arguments of both sides before coming to a decision. However, the emphasis in family law today is on conciliation and negotiation rather than on litigation, and many cases are settled out of court. Many solicitors are members of the Solicitors' Family Law Association which aims to encourage conciliatory rather than litigious approaches to the resolution of disputes. The Family Law Bar Association also has similar aims.

1.2 Sources of Family Law

Family law is found in Acts of Parliament and in cases in which judges have applied and interpreted the law contained in Acts of Parliament. Very little family law is governed by the common law (i.e. judge-made law), although there are exceptions, notably in the areas of trusts and contract law. Rules relating to practice and procedure are contained in secondary legislation (e.g. the Family Proceedings Rules 1991) and in Practice Directions made by the President of the Family Division of the High Court, who is the senior judge in that court. The United Kingdom is also a signatory to several Conventions which apply to family law, notably in respect of child abduction and the reciprocal enforcement of maintenance obligations.

1.3 The Courts Administering Family Law

There is no family court in England and Wales, although attempts have been made to introduce one. After the introduction of the Children Act 1989 in October 1991 changes were made to the courts dealing with family matters. Family cases are heard in family proceedings courts (that part of magistrates' courts dealing with family matters), in county courts or in the Family Division of the High Court. Some proceedings can be heard in any of these three courts (e.g. those under the Children Act 1989), but some must be heard in a particular court (e.g. undefended divorces in the county court).

Public law cases under the Children Act are generally commenced in the family proceedings courts, but can be transferred between courts at the same level or up to courts with increased jurisdiction, i.e. for reasons of

complexity, urgency or to consolidate proceedings, provided the transfer is not detrimental to the child. Private law cases under the Children Act may be commenced in any court. Other private law cases must be commenced in specific courts, but can be transferred to the High Court. (Public law involves local authorities and other public bodies, e.g. applications for care, supervision or emergency protection orders. Private law involves disputes between private individuals, e.g. divorce proceedings, applications for ancillary relief, injunctions, residence and contact orders.)

Family Proceedings Courts

Cases in family proceedings courts (the lowest tier of the courts) are heard by lay and stipendiary magistrates, who are specially trained in family work and assisted by the clerk of the court. Magistrates can make private law orders (e.g. orders for financial provision and domestic violence injunctions under DPMCA 1978), although they have a more limited jurisdiction than the superior courts and most solicitors usually prefer to use the county court. They can make adoption orders concurrently with the county court and High Court. Most public law cases under the Children Act 1989 (e.g. for care or supervision orders) begin here, but can be transferred to the county court or High Court.

County Courts

These are the most important family courts and deal with all family matters. Most county courts are designated 'divorce county courts', which grant decrees of divorce, nullity and judicial separation. They also hear applications for ancillary relief on divorce, nullity or judicial separation. Injunctions relating to domestic violence can be granted by the county court, i.e. under the DVMPA 1976 or under the court's inherent jurisdiction. Section 17 MWPA 1882 applications can be heard in the county court, and the court has jurisdiction to make declarations, e.g. as to beneficial ownership of property. Certain county courts are designated as care centres and family hearing centres for Children Act 1989 proceedings, which are staffed by specially qualified judges. The county court also has a limited jurisdiction to deal with wardship matters. Difficult, lengthy or serious public or private law cases can be transferred to the High Court.

Family Division of the High Court

The Family Division of the High Court consists of the President and 15 High Court judges. The Family Division hears wardship cases, child abduction cases under the Hague and European Conventions and appeals and cases transferred from family hearing centres or family proceedings courts under the Children Act 1989. Private law proceedings

in the county court can be transferred to the High Court and from the High Court to the county court, depending on the complexity, difficulty or gravity of the case (ss. 38 and 39 Matrimonial and Family Proceedings Act 1984).

Appeal from the family proceedings court, the county court and the Family Division of the High Court is to the Court of Appeal and then to the House of Lords.

1.4 Legal Aid

Some parties, depending on their means, may qualify for Legal Aid, i.e. financial assistance from the State towards the cost of legal expenses. The various schemes are administered by the Legal Aid Board under rules laid down by the Lord Chancellor. Legal Aid is not necessarily 'free', for a party who receives Legal Aid may be required (depending on his or her means) to pay to the Legal Aid Board a contribution, either by way of a lump sum or by 12 monthly instalments.

Legal Aid takes several different forms:

(i) legal advice and assistance (the Green Form Scheme);
(ii) Legal Aid; and
(iii) assistance by way of representation.

(i) Legal Advice and Assistance (the Green Form Scheme)

The Green Form scheme enables a client to obtain legal services up to a limited value in respect of advice and assistance (e.g. correspondence) given by a solicitor. As Legal Aid is not available for undefended divorces (i.e. virtually all divorces), the Green Form scheme enables a petitioner seeking an undefended divorce to obtain assistance from a solicitor, who gives advice and prepares all necessary documents, although these must be signed by the petitioner in person rather than the solicitor, since the scheme does not enable the latter to go on the court record and thus take steps in the proceedings. Respondent spouses may also receive assistance under the scheme. Eligibility is determined by a simple means test administered by the solicitor, and a contribution may be required. Although the Green Form scheme is inappropriate for contested ancillary matters (e.g. concerning children, property or maintenance) the parties may be able to obtain Legal Aid for these purposes (see below).

(ii) Legal Aid

Legal Aid is not available for undefended divorce but is available (at least in theory) for defended divorce. However, since the policy of the courts

and of the Legal Aid Board is to discourage lengthy and expensive contested hearings conducted in an atmosphere of bitterness which only too clearly demonstrates that the marriage in question is dead, Legal Aid is in practice hardly ever granted. This policy has been responsible to a much greater extent than legislation for the virtual demise of the contested divorce hearing – in 1991 not one decree was granted in a defended divorce case. Legal Aid is, however, available for injunctions, ancillary relief on divorce, orders relating to children and any other matter which raises a substantial question of law. Eligibility is means-tested and also dependent on whether the applicant has a reasonable case to argue. In some cases emergency Legal Aid can be granted, i.e. before full investigation of the applicant's means or of the merits of the application (although a *prima facie* case must be made out).

Costs are at the discretion of the court. They are generally awarded to the successful party, but different statutory rules apply if one or both of the parties is legally aided. If a legally aided party is successful, then costs are usually awarded in his or her favour, and the costs recovered paid into the Legal Aid Fund. If a legally aided person is unsuccessful the court will only order him or her to pay the successful party's costs in exceptional circumstances.

Under the so-called 'statutory charge' the Legal Aid Board is given a first charge for the benefit of the Legal Aid Fund on any property 'recovered' (i.e. in a successful claim) or 'preserved' (in a successfully defended claim) by the legally aided party. Certain property is exempt from the charge (e.g. periodical payments and the first £2500 in money or property recovered or preserved) and the Legal Aid Board can postpone enforcement of the charge where the property is a home to be used by the legally aided person or his or her dependants and this purpose is stated in the order or agreement. The charge can be transferred to another house so that the legally aided person can move house. If the assisted person has been awarded cash, enforcement of the charge can also be postponed, but only if it is to be used to purchase a home and the purpose is stated in the court order or agreement. The charge can be substituted to a new home.

(iii) Assistance by way of Representation

This scheme allows the client to extend the scope of the Green Form scheme to cover representation in the family proceedings court.

At the time of writing Parliament is considering proposals put forward by the Lord Chancellor which if implemented will drastically reduce the availability of Legal Aid and the Green Form scheme through substantial reductions in the maximum net income limits which determine eligibility. Furthermore, where a contribution is payable under the terms of a Legal Aid certificate the proposals provide for the amount of each contribution to be increased and for contributions to continue until all the costs

incurred under the certificate have been repaid. This brief description of Legal Aid must therefore be read in the light of the eventual outcome of these proposals which, hardly surprisingly, are viewed by family law practitioners as unjustified and retrograde.

Summary

1. Family law performs different functions, e.g. adjustive, supportive, protective.
2. Family law is mainly concerned with the nuclear family and deals with the creation and removal of status and the legal consequences flowing therefrom. Family law also performs a protective function, especially where children are concerned.
3. Because of its human element, family law cases are often decided by applying flexible and discretionary rules.
4. There is no family court in England and Wales. Family cases are heard in family proceedings courts, county courts and the Family Division of the High Court. Appeals from these courts are to the Court of Appeal and then to the House of Lords.
5. Depending on the means of the applicant, Green Form assistance is available for undefended divorce and full Legal Aid for ancillary and other matters.

Exercises

1. If we define family law as having adjustive, protective and supportive functions, which topics in this book would fit into each of these categories?
2. Another way of looking at family law is in terms of public and private law. Public law deals with the interaction between the individual and the State and private law with the interaction between private individuals.

   Which topics in family law would fit into each of the public and private law categories and where might they overlap, if at all?
3. What are the current trends and controversial issues in family law?

Further Reading

Hoggett and Pearl, *Family Law and Society: Cases and Materials* (1992) Butterworths.

Recent editorials of *Family Law* and the *Journal of Child Law*.

Part I

Marriage

In Part I we look at marriage. The word 'marriage' has different meanings. It can be used to refer to a social institution, or to the ceremony of marriage, or to the state of being married. In Chapter 2 we consider these different meanings of marriage and look at the institution of marriage, the ceremony of marriage and marriage as a status from which certain legal consequences flow. Marriage also has important property and financial consequences (see Chapters 4 and 5), and affects entitlement to property on death (see Chapter 16).

2 Marriage and its Legal Consequences

In this chapter we consider how a valid marriage is created and the legal consequences of marriage. As some couples enter into an engagement (i.e. an agreement to marry) before going through the ceremony of marriage, the law relating to engagements is also considered.

2.1 Introduction

In *Hyde* v. *Hyde* (1866) LR 1 P & D 130 Lord Penzance said:

> 'I conceive that marriage, as understood in Christendom, may . . . be defined as the voluntary union for life of one man and one woman to the exclusion of all others.'

In some respects this statement is true. A marriage must be 'voluntary', otherwise it is voidable on the ground of lack of consent, and it must be heterosexual and monogamous, otherwise it is void (see Chapter 3). It is not true today, however, except from a strictly Christian point of view, to say that marriage is for life, for many marriages end in divorce, and the Church itself, while not endorsing divorce, recognises that marriage is not necessarily for life. In fact the recommendations of a committee established by the Archbishop of Canterbury led to the reform of divorce law and the introduction of irretrievable breakdown of marriage as the sole ground for divorce (see Chapter 6).

Marriage today must be seen against a background of increasing cohabitation. Many couples are choosing to live together rather than marry. Another trend is that people are tending to marry much later than they used to (in 1971 27 per cent of all brides were teenagers but in 1987 this had dropped to 13 per cent). As many marriages end in divorce, many people are marrying for the second or third time. With increasing cohabitation and more than one in three marriages ending in divorce, we might question whether the institution of marriage is under threat.

Sometimes a marriage is preceded by an engagement, i.e. an agreement to marry.

Engagements or Agreements to Marry

Special rules applicable to engagements are laid down in ss.1–3 of the Law Reform (Miscellaneous Provisions) Act 1970 (LR(MP)A 1970). Before

this Act came into force, an engagement was considered to be an ordinary contract so that an action for breach of contract, or what was called an action for breach of promise, could be brought if one party broke off the engagement, and damages could be awarded to the innocent party. As it was considered to be contrary to public policy for engaged couples to be forced into marriage rather than having to risk paying damages for breach of promise, s.1 LR(MP)A 1970 abolished the action for breach of promise and provided that agreements to marry were no longer to take effect as legally binding contracts. The Act also laid down other provisions relating to engagements (see below).

Sometimes when an engagement is terminated a dispute about property may arise. On termination of an engagement a party cannot apply for financial provision and property adjustment orders under Part II Matrimonial Causes Act 1973, which can be applied for by a spouse on divorce, nullity or judicial separation (*Mossop* v. *Mossop* [1989] Fam 77, [1988] 2 WLR 1255, [1988] 2 All ER 202, [1988] 2 FLR 173). However, engaged couples possess certain limited rights in respect of property similar to those of spouses during marriage. Section 2(1) of the 1970 Act provides that when an engagement is terminated, any rule of law relating to the beneficial entitlement of spouses also applies to any property in which either or both parties to the engagement had a beneficial interest during the engagement. Consequently, as a result of s.2(1), certain matrimonial property statutes also apply to engaged couples when their engagement is terminated. Thus, under s.37 Matrimonial Proceedings and Property Act 1970 a party to an engagement, like a spouse, can apply for a beneficial interest in property which he or she has substantially improved, although it is also open to an engaged or formerly engaged person to apply instead for an ordinary declaration from the court that he or she has a beneficial interest under a trust (see Chapter 4). An engaged person, like a spouse, can also bring an application under s.17 Married Women's Property Act 1882 (see Chapter 4) to settle a dispute about ownership of property, but the application must be brought within three years of the termination of the engagement (s.2(2)). In *Shaw* v. *Fitzgerald* [1992] 1 FLR 357 a married man entered into an agreement to marry, but the agreement was later terminated. He applied under s.17 for a property dispute to be settled, and the question for the Court of Appeal was whether there was jurisdiction under s.17 to resolve a dispute arising out of an agreement to marry which was unenforceable at common law (i.e. because the man was already married). Scott Baker J in the Court of Appeal held there was jurisdiction under s.17, provided an agreement to marry existed, whether or not the agreement was enforceable at common law.

The 1970 Act also makes provision in respect of engagement gifts. It abolished the common law rule that the person responsible for terminating the engagement was not entitled to any engagement gifts given by the other party. Section 3(1) thus provides that either party to an engagement who makes a gift to the other, on the condition (express or implied) that it

shall be returned if the agreement is terminated, is not prevented from recovering the property merely because he or she terminated the agreement. Whether engagement gifts from third parties (i.e. friends and relatives) belong to one or both parties on termination of the engagement depends on the donor's intention, and, in the absence of intention, there may be an inference that gifts from relatives belong to the related party (by analogy with *Samson* v. *Samson* [1982] 1 WLR 252, [1982] 1 All ER 780, see Chapter 4). An engagement ring, however, is presumed to be an absolute gift, i.e. to be kept, unless subject to an express or implied condition that it will be returned if the marriage does not take place (s.3(2)). An engagement ring which is a family heirloom could for instance be returned to the donor.

2.2 Contracting a Valid Marriage

When parties marry they enter into a legal contract so that much of the terminology is that of contract law. To contract a valid marriage, the parties must have the capacity to marry and must comply with certain formalities laid down by the law. Breach of certain rules, like breach of contract, may render the marriage void *ab initio* or voidable. However, the marriage contract differs from ordinary contracts, for unlike ordinary contracts where the parties are free within limits to define their own rights and obligations, many of the legal consequences of marriage are imposed by the law, e.g. a spouse has maintenance obligations to the other spouse and has parental responsibility for any children. The rules relating to capacity to marry and to the formalities which apply to marriage contracts also differ from those of ordinary contracts and are defined in special statutes (see below).

Failure to comply with the rules relating to capacity to marry and the formalities of marriage may render a marriage void (s.11 MCA 1973). Failure to comply with certain less fundamental requirements may render a marriage voidable (see Chapter 3). We will first consider capacity to marry and then the formalities of marriage.

Capacity to Marry

The parties to a marriage must have the capacity to marry, otherwise the marriage is void (s.11 MCA 1973). Parties to a marriage have the capacity to marry if they are:

(a) not within the prohibited degrees of relationship;
(b) over the age of 16;
(c) not already married; and
(d) respectively male and female.

(a) Not within the Prohibited Degrees of Relationship

Marriages between certain relatives related by blood or by marriage are prohibited (s.11(a)(i) MCA 1973). Rules of prohibited degrees of relationship exist to prevent inbreeding with the danger of mutant genes developing, and they also discourage incest. The prohibited degrees of relationship between blood relatives (i.e. those related by consanguinity) are laid down in the Marriage Act 1949. The rules of prohibited degrees of relationship are not as strict today as they once were and there are fewer restrictions on relationships created by marriage (i.e. by affinity) (see the Marriage (Prohibited Degrees of Relationship) Act 1986). The rules of prohibited degrees of relationship are briefly as follows.

A man cannot marry his mother, daughter, granddaughter, sister, aunt or niece, but can marry his step-daughter, step-mother, step-grandmother, step-daughter or mother-in-law. The same rules apply to a woman in respect of her male relations. There are, however, certain restrictions, so that a man can only marry his step-daughter if she has not been brought up by him as a child of the family in his household. A man can also marry his daughter-in-law provided they are both over 21 and his wife and son are dead. Adopted children are generally in the same degrees of prohibited relationships in respect of their birth parents and other blood relatives, but fewer restrictions exist in respect of the relations they acquire by adoption, so that a man can marry his adopted sister.

(b) Over the Age of 16

A marriage is void if either of the parties is under the age of 16 (s.2 Marriage Act 1949; s.11(a)(ii) MCA 1973). Where a party to a marriage is over 16 but under 18 the consent of the following persons is needed to the marriage (s.3 Marriage Act 1949 as amended by Sch.12 para.5 Children Act 1989): each parent who has parental responsibility for the child; each guardian; anyone with whom the child lives under a residence order; and the local authority where the child is subject to a care order. If the child is a ward of court, the court's consent is also needed (s.3(6) Marriage Act 1949). Where consent is not given the marriage is, however, unlikely to be void, particularly as children with sufficient maturity and understanding now have a greater say in decisions relating to them (see Chapter 9). Consent can be dispensed with if a parent is absent or suffers from some disability, and where consent is not given an application can be made for the court to consent to the marriage (s.3(1)(a) and (b) Marriage Act 1949).

(c) Not Already Married

A party to a marriage must not be already married, otherwise the later marriage is void (s.11(b) MCA 1973). A spouse who remarries without his or her first marriage being terminated by death or decree of divorce or

nullity (except where the first marriage was void) commits the crime of bigamy. It is therefore advisable for a spouse who wishes to remarry, where the other spouse has disappeared and/or is thought to be dead, to obtain a decree of presumption of death and dissolution of marriage under s.19 MCA 1973. A party to a marriage is presumed dead if he or she has been absent for at least seven years (see Chapter 7).

(d) Respectively Male and Female

The parties to a marriage must be respectively male and female, otherwise the marriage is void (s.11(c) MCA 1973). It is not therefore possible to contract a valid homosexual or lesbian marriage, and as English law has adopted a narrow definition of what it is to be male or female, a transsexual (i.e. a person who has undergone a sex-change operation) cannot contract a valid marriage. In *Corbett* v. *Corbett* [1970] 2 WLR 1306, [1970] 2 All ER 33 the male partner petitioned for a decree of nullity where the respondent, also a man, had undergone a sex-change operation involving the removal of his male genitals and the construction of an artificial vagina. Ormrod J held that a person's biological sex is fixed at birth and cannot be altered by a sex-change operation. The marriage was void as both parties were male. The respondent was male by chromosonal, gonadal and genital criteria. In *R* v. *Tan* [1983] QB 1053 the male defendant in defence to a criminal charge unsuccessfully argued he was not a man for the purposes of the Sexual Offences Acts 1956 and 1967.

Several transsexuals have taken the UK to the European Court of Human Rights alleging that the UK is in breach of the Convention of Human Rights, but the European Court has endorsed the approach of the English courts. In *The Rees Case* [1987] 2 FLR 111 the applicant, who had undergone a sex-change operation, argued that the UK was in breach of the European Convention of Human Rights under which men and women have a right to marry and to have a private family life (Arts.8 and 12). The European Court rejected these arguments, holding there had been no breach of the Convention, as Art.12 referred to a traditional marriage between persons of the opposite biological sex. *Rees* v. *UK* was endorsed in *Cossey* v. *UK* [1991] 2 FLR 492, where Caroline Cossey, a transsexual, argued that UK laws preventing transsexuals from marrying and having their birth certificates changed were in breach of the Convention. The European Court of Human Rights accepted the UK's argument that a person's biological sexual identity is fixed at birth and that as marriage is for procreation the biological test should continue to be the test of sexual identity. However, there were strong dissenting judgments, which may indicate a change of public opinion about transsexualism since *Rees* (see also *B* v. *France* [1992] 2 FLR 249). Nevertheless, it is unlikely that transsexuals, lesbians and homosexuals will be given the right to marry, particularly as marriage is still considered by many, especially the Church, to be for procreation and must therefore be consummated (see Chapter 3).

Formalities of Marriage

Not only must the parties to a marriage have the capacity to marry, but they must comply with certain legal formalities relating to the ceremony of marriage. The aim of formalities is to create legal certainty by providing proof by public record that a marriage has actually been contracted, and when it was contracted. All marriages must therefore be registered. It is important to establish when and whether a valid marriage has been created because marriage has important consequences, e.g. where the parties are married and one spouse dies intestate (i.e. without making a will) the other spouse becomes entitled in law to the other party's estate. Another aim of formalities is to establish whether the necessary consents to the marriage have been given and whether there are any lawful impediments to the marriage taking place (e.g. that the parties are already married or are under age). Before going through the solemnisation of marriage, the parties must therefore comply with certain preliminary legal formalities. Failure to comply with these formal requirements may render the marriage void and anyone intentionally infringing them may commit a criminal offence.

The rules relating to the formalities of marriage are mainly contained in the Marriage Act 1949. The rules are complex; marriage can be celebrated in different ways and different preliminary procedures must be complied with, depending on whether the marriage takes place within a religious or civil framework. Special rules apply in exceptional cases, e.g. where a party to a marriage is terminally ill or detained in prison. Proposals have been made to clarify the law and to give those marrying a wider choice as to the place of ceremony (see below).

We will consider civil marriages first, then Church of England marriages and finally those celebrated by other religious ceremonies.

(a) Civil Marriages

Preliminaries

A civil marriage is a non-religious marriage ceremony and can only be solemnised on the authority of a superintendent registrar's certificate (with or without licence) or the Registrar General's licence. All religious marriages, other than those celebrated according to the rites of the Church of England, can also only be celebrated after complying with one of the following preliminaries, i.e. either:

(i) a superintendent registrar's certificate;
(ii) a superintendent registrar's certificate with licence; or
(iii) the Registrar General's licence.

(i) A Superintendent Registrar's Certificate This is the most commonly used preliminary procedure. Both parties must give written notice of their

intended marriage to the local superintendent registrar in the area or areas in which each of them has resided for the previous seven days (s.27(1) Marriage Act 1949). A fee must be paid. Notice must be accompanied by a declaration that there is no impediment to the marriage, that the required consents have been given or dispensed with and that the residence requirements have been satisfied (s.28 Marriage Act 1949). Notice of the intended marriage is entered in the marriage book and publicly displayed in the register office for 21 days. If at the end of this period there has been no objection to the marriage, the registrar issues a certificate, after which the marriage can be solemnised within three months (s.31 Marriage Act 1949).

(ii) A Superintendent Registrar's Certificate with Licence This is similar to the superintendent registrar's certificate procedure above, except that only one party need give notice to the registrar in the district where either party has resided for the previous 15 days, provided the other party is resident in England and Wales. There is no public display of the notice, and, if there is no objection to the marriage, the superintendent registrar issues the certificate and a licence after the expiry of one whole day after giving notice (s.32 Marriage Act 1949), after which the marriage can take place. This preliminary procedure was originally intended to be used in more exceptional circumstances than the ordinary certificate but is now often used (22 per cent of civil marriages in 1987), as merely by paying a slightly higher fee, the parties avoid public display of their intended marriage and can, provided no impediment to the marriage has been shown or the issue of the certificate has not been forbidden, obtain the certificate at any time after the expiration of one whole day after giving the notice and thereby marry more quickly.

(iii) The Registrar General's Licence This preliminary procedure is only used in exceptional circumstances, e.g. when a person is seriously ill and cannot be moved to a place where the marriage can be solemnised. It authorises solemnisation of marriage in a place other than a registered building or registered office (Marriage (Registrar General's Licence) Act 1970). However, a simpler and less restrictive procedure exists under the Marriage Act 1983 which enables persons housebound due to disability or illness or persons detained in prison or detained due to mental ill-health to be married where they are living or detained on the authority of a superintendent registrar's certificate.

Solemnisation of a Civil Marriage Once one of the preliminary procedures above has been complied with, thereby giving authorisation for the marriage, solemnisation of a civil marriage usually takes place in the register office in the district where one or both of the parties reside, although it can take place in other authorised buildings. The ceremony is public and secular, but the marriage can be followed by a religious ceremony in a church or chapel (s.46 Marriage Act 1949). The parties

must declare there are no lawful impediments to the marriage and exchange vows ('I call upon these persons here present to witness that I, John Smith, do take thee, Jane Brown, to be my lawful wedded wife' and Jane Brown likewise). The wedding must be witnessed by at least two witnesses. Some registrars remind the parties of the solemn nature of the vows they are making.

(b) Church of England Marriages

A Church of England marriage can only be solemnised according to the rites of the Church of England after the publication of banns, or after the grant of a common licence or a special licence, or after a superintendent registrar's certificate (see above) (Part II Marriage Act 1949).

(i) Publication of Banns This is the most commonly used preliminary procedure. Banns (i.e. notice of the marriage) must be entered into an official register and publicly declared by the clergyman in the parties' respective parish churches (or in the church which is their normal place of worship) in three successive Sunday morning services preceding the marriage. The parties must give at least seven days' notice to the clergyman and provide him with their names, place(s) and duration of residence, and state whether they consent to the marriage. They need not state their ages or whether, if over 16 but under 18, parental or other consent has been given. Any objection to the marriage must be declared when the banns are published. Once the banns have been published, and provided no one objects, the marriage can take place.

(ii) Common Licence A common licence can be granted by the bishop of a diocese and allows the parties to marry in church without the publication of banns and without the seven-day notice requirement. Before a common licence can be granted, one party must swear an affidavit (a signed written statement) that there are no lawful impediments to the marriage, that the residence requirements are satisfied and that the required consents have been given. The licence allows the marriage to take place in the church in the parish where one of the parties has had his usual place of residence for 15 days prior to the licence or in the church which is the usual place of worship of either or both of the parties.

(iii) Special Licence A special licence is only used and granted in exceptional circumstances by and at the discretion of the Archbishop of Canterbury. It allows a marriage to be solemnised according to the rites of the Church of England in any place and at any time.

Solemnisation of a Church of England Marriage Once one of the above preliminary procedures has been complied with (or a superintendent registrar's certificate granted), the marriage is solemnised by a clergyman according to the rites of the Church of England in one of the churches

where the banns were published and in the presence of two witnesses. A clergyman can refuse to marry the parties if one or both of the parties has had a former marriage dissolved and the other party to that marrige is alive, but cannot refuse to do so on the ground of religious belief. Except where a marriage is authorised by a special licence, the marriage must be solemnised between 8 a.m. and 6 p.m., and must be solemnised within three months of the publication of banns, licence, or entry in the superintendent registrar's marriage book.

(c) Non-Anglican Religious Marriages

A non-Anglican religious marriage, other than a Quaker or Jewish marriage, can only be solemnised by a religious ceremony after one of the civil preliminaries described above has been complied with, i.e. on the authority of a superintendent registrar's certificate (with or without licence) or a Registrar General's licence.

Solemnisation takes place in a registered building (ss.41, 43 and 44 Marriage Act 1949), but can also take place where a person is housebound or detained. A registered building is any building registered by the Registrar General for the solemnisation of marriage which has first been certified as a 'place of religious worship' under the Places of Worship Registration Act 1855. Some Sikh and Hindu temples and Moslem mosques are registered. In *R* v. *Registrar General ex p Segerdal* [1970] 2 QB 697, [1970] 1 All ER 1 Segerdal, a minister of the Church of Scientology, applied for an order of mandamus in proceedings for judicial review against the Registrar General's refusal to hold that the Church of Scientology was a place of religious worship. His application was refused, the court holding that religion for the purpose of the 1855 Act required some reverence or veneration of God as a supreme being.

The marriage must be attended by an 'authorised person' (usually the religious person conducting the ceremony) and must take place in the presence of two witnesses and be open to the public. The ceremony can take any form, provided that during the ceremony the declarations required by the Marriage Act 1949 are made, i.e. that there are no lawful impediments to the marriage and that they take each other to be his or her lawful wedded wife or husband in the presence of two witnesses.

Quaker or Jewish Marriages

Quaker or Jewish marriages can only be solemnised on the authority of a superintendent registrar's certificate (with or without licence) or the Registrar General's licence, but special additional procedures must be complied with. Quakers must make special declarations when giving notice (s.47 Marriage Act 1949) and both parties to a Jewish marriage must profess to belong to the Jewish religion (s.26(1)(d) Marriage Act 1949). Quaker and Jewish marriages are celebrated according to their own religious rites, but need not take place in a registered building, in public

or before an authorised person. These marriages, like all marriages, must be registered.

Critique

Several criticisms have been made of the legal rules relating to the formalities and ceremony of marriage and proposals have been made for reform (see the Government White Paper, *Registration: Proposals for Change*, Cm 939, 1990, following a Green Paper, *Registration: A Modern Service*, Cm 531, 1988). The law can be criticised for being unnecessarily complex and confusing, and for failing to take sufficient account of the needs of those who marry. The Green Paper stated that marriage procedures were 'unnecessarily complex and restrictive' and reflected 'the needs and conditions of the early nineteenth century rather than those of the late twentieth centrury'. The Government recommended that the present system be simplified and streamlined, for instance by providing a standard 15-day period between giving notice and the ceremony taking place. It also proposed that those wishing to marry should be given greater choice. They should be able to marry in different buildings, not just a register office, and in any district in England and Wales, not just the district where one or both of them resided. The Government recommended that local authorities should have responsibility for their local registration service and should contract with stately homes, hotels and other similar buildings for marriages to take place there in order to give those marrying a greater choice. Anthony Bradney ('How not to marry people – formalities of the marriage ceremony' (1989) Fam Law 408) criticised the Green Paper for failing to discuss what the consumer wants in terms of the actual ceremony of marriage and for failing to give sufficient attention to the needs of minority religions.

If the parties to the marriage have the capacity to marry and have complied with the necessary formalities of marriage then they will have contracted a valid marriage. However, where the parties fail to comply with less fundamental requirements than capacity and formalities (e.g. non-consummation, lack of valid consent) a marriage may be avoided by decree of nullity. We consider void and voidable marriages in the next chapter, but before we do so, we will briefly consider the legal consequences of marriage.

2.3 The Legal Consequences of Marriage

Marriage creates a legal status, that of being married, from which various rights and duties flow. Financial and property consequences are considered in more detail in Chapters 4 and 5. Parental obligations and responsibilities are considered in Chapter 9.

Today for all purposes in law and in equity a husband and wife are separate legal personalities. They can own property solely or jointly and they can bring proceedings in tort and contract separately either against third parties or against each other (Law Reform (Married Women and Tortfeasors) Act 1935; s.1 Law Reform (Husband and Wife) Act 1962). They can also enter into contracts with each other. Husbands and wives have not always had separate personalities. Before the end of the nineteenth century, a husband and wife on marriage became one legal personality, namely that of the husband. However, a series of statutes passed at the end of the nineteenth century and during the first part of the twentieth century gave spouses separate legal personalities, so that not only do husbands and wives now have separate legal personalities, but they also have the same rights and obligations. They have mutual obligations of financial support to each other and to their children and they both have parental responsibility.

On marriage, the wife traditionally takes the surname of her husband but she is not legally obliged to do so, as a person can use any surname he or she likes, except to perpetrate a fraud. Some wives, however, prefer to keep their unmarried name for business or professional purposes.

The couple must consummate their marriage, otherwise the marriage may be avoided (see Chapter 3), and they have mutual rights of sexual intercourse, which must be reasonable, i.e. it must not be brutal, violent or perverted. Unreasonable sexual intercourse or refusal to have intercourse could constitute unreasonable behaviour and grounds for divorce (see Chapter 7), and the victim (usually the wife) can seek an injunction to protect her from violence (see Chapter 15). Unreasonable sexual intercourse can also be a criminal offence. In *R* v. *Kowalski* [1988] 1 FLR 447, for example, the Court of Appeal held that a husband was guilty of indecent assault by forcing his wife to submit to indecent forms of sexual intercourse. A husband may also commit the crime of rape. In *R* v. *R* [1991] 4 All ER 481 the House of Lords held that a husband could be guilty of raping his wife under s.1 Sexual Offences (Amendment) Act 1976, thereby overruling the common law rule that by marriage a wife impliedly consented to sexual intercourse. Before *R* v. *R* one of the few advantages of being a cohabitee, rather than a spouse, was that a cohabitee partner could commit the crime of rape.

During marriage there is a duty of marital confidentiality. In *Argyll* v. *Argyll* [1967] Ch 302, [1965], 1 All ER 611 the defendant wife, two years after she had divorced the plaintiff, wrote an article in the *News of the World* about her former husband's private life, thereby divulging certain marital confidences. In an action for breach of confidence he was granted an injunction preventing further disclosure.

For the purposes of the criminal law, the spouse of the accused is a competent witness for the prosecution, the accused and any co-accused, except where the spouses are jointly charged, when neither is competent to give evidence for the prosecution if either of them is liable to be convicted

(s.80 Police and Criminal Evidence Act 1984). A spouse can be compelled to give evidence against the other spouse unless they are jointly charged, although where jointly charged they can be compelled to give evidence where the charge involves certain offences against a child under the age of 16 (s.80 Police and Criminal Evidence Act 1984).

Marriage today is thus a partnership of equals with husbands and wives having separate legal personalities. Both have parental responsibility for their children and this responsibility continues on and after marriage breakdown (see Chapter 9).

Summary

1. The institution of marriage must be seen against a background of increasing cohabitation (see Chapter 17) and increasing divorce (see Chapters 6 and 7).
2. Special rules relating to engaged couples are contained in ss.1–3 Law Reform (Miscellaneous Provisions) Act 1970, i.e. damages cannot be obtained for breaking an engagement, and special rules exist in relation to property, gifts and engagement rings.
3. Marriage is a contract which can only be legally created if the parties have the capacity to marry and comply with certain formalities relating to the ceremony of marriage (i.e. in respect of the preliminaries and solemnisation of marriage). Failure to comply with these requirements may render the marriage void (s.11 MCA 1973). The rules relating to the ceremony of marriage are mainly contained in the Marriage Act 1949.
4. Parties have the capacity to marry if they are: not within the prohibited degrees of relationship; over the age of 16; not already married; and respectively male and female.
5. The parties to a civil marriage or to a religious marriage, other than a religious marriage celebrated according to the rites of the Church of England, can only marry on the authority of a superintendent registrar's certificate (with or without licence) or the Registrar General's licence, although special provision is made for housebound and detained persons.
6. A marriage celebrated according to the rites of the Church of England can only take place after the publication of banns, or on the grant of a common licence, special licence or a superintendent registrar's licence.
7. Proposals for reform of the law of marriage have been made but never implemented.
8. Certain legal consequences flow from the status of marriage, the main one being that husbands and wives have separate legal personalities and can own property separately and can bring actions in tort and contract against each other and separately or jointly against third parties. They both have parental responsibility.

Exercises

1. Fred and Jane have just broken off their engagement. Together they bought furniture and fittings for their new house, which was in Fred's name. They were also given many presents. Fred says that all the property is his, including the

house, even though Jane decorated it, and he also wants the engagement ring back. Jane thinks she is entitled to an interest in the house, the ring and the other property.

Advise Jane.

Would it make any difference if Jane was married?

2. Advise Tom and Jill who want to marry immediately.
3. Why are there strict rules relating to the contract of marriage? Do you think these rules need improving? If so, how?
4. Do you think the law should allow transsexuals to marry?

Further Reading

Registration, Proposals for Change (White Paper, Cm 939, 1990).
Registration: A Modern Service (Green Paper, Cm 531, 1989).
Bradney, 'How not to marry people: formalities of the marriage ceremony' (1989) Fam Law 408.

3 Void and Voidable Marriages – the Law of Nullity

In this chapter we consider void and voidable marriages and look at the law of nullity. The law is laid down in the Matrimonial Causes Act 1973 (MCA 1973). Nullity is considered in Part I on Marriage, because, by considering the grounds on which a marriage can be annulled, the requirements needed to create a valid marriage can be identified and discussed.

3.1 Introduction

A person wishing to have his or her marriage annulled can petition for a decree of nullity, which can be granted on certain grounds depending on whether the marriage is void or voidable (ss.11 and 12 MCA 1973). Like divorce, nullity is granted in two stages, first decree nisi and then decree absolute (s.1(5)). A party to a voidable marriage cannot legally remarry until a decree absolute of nullity has been granted. A party to a void marriage, on the other hand, does not need a decree and can marry without having to obtain one, as no valid marriage was ever contracted. Unlike divorce, a decree of nullity can be sought in the first year of marriage (s.3). On the grant of a decree of nullity the court under Part II MCA 1973 has the same powers as it has on divorce to make orders for financial provision and property adjustment (see Chapter 8), which is why a party whose marriage is void may decide to petition for a decree of nullity.

Today very few spouses petition for a decree of nullity (in 1991 619 nullity petitions were filed), although decrees were once commonly sought. Because divorce is easier and quicker to obtain today and there is little or no stigma attached to divorce, there is little to be gained by seeking a decree of nullity, except perhaps where a spouse has a religious objection to divorce. It may in fact be more harrowing to petition for nullity as medical evidence may be required and nullity proceedings, unlike those for undefended divorce, take place in open court. Nullity decrees are however occasionally sought, and sometimes in the context of arranged marriages (see below).

Before we consider the grounds for nullity, we will consider the distinction between void and voidable marriages.

3.2 The Void–Voidable Distinction

A marriage which does not satisfy certain legal requirements can be void or voidable on certain grounds (see ss.11 and 12 MCA 1973 respectively). A void marriage is one that is void *ab initio*, i.e. there was no marriage created at all in the first place. A voidable marriage is one that was valid in the first place but for some reason or other is not valid later on. A voidable marriage is only annulled after decree absolute of nullity and until then the marriage must be treated as existing (s.16 MCA 1973). The classic statement of the distinction between a void and voidable marriage is that of Lord Greene MR in *De Reneville* v. *De Reneville* [1948] P 100 at 111, [1948] 1 All ER 56 at 60:

> 'A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it; a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.'

With a void marriage, as Lord Greene MR says, it is not necessary to have a decree as there is no marriage to annul, so that a person can enter into a valid second marriage without obtaining a decree. However, in practice, a decree is advisable, because a decree provides evidence that the marriage is void and enables the parties to apply for ancillary relief for themselves and their children under Part II MCA 1973 in the same way as spouses can on divorce (see Chapter 8). With a voidable marriage a decree of nullity must be sought, because until a decree is granted a person remains married and cannot legally remarry, and ancillary relief can only be sought if a decree is granted. With a void marriage, a decree can be sought not only by a party to the 'marriage', but by a third party and even after the death of one of the parties, e.g. a relative could seek a decree that a marriage is void in order to claim entitlement to the estate of the deceased, to which the deceased 'spouse' would have been entitled under the laws of intestacy (see Chapter 16). A decree of nullity in respect of a voidable marriage can only be sought by a party to the marriage.

3.3 Grounds on which a Marriage is Void

The grounds which render a marriage void relate to more fundamental requirements of marriage than those which render a marriage voidable. The grounds rendering a marriage void, which were discussed in Chapter 2 when we considered how a valid marriage was contracted, are laid down in s.11 MCA 1973. A marriage is void if:

(a) the marriage is not a valid marriage under the Marriage Acts 1949 to 1986 (that is to say where:

  (i) the parties are within the prohibited degrees of relationship;
  (ii) either party is under the age of 16; or
  (iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage);

(b) at the time of the marriage either party was already lawfully married;
(c) the parties are not respectively male and female; or
(d) in the case of a polygamous marriage entered into outside England and Wales, either party was at the time of the marriage domiciled in England and Wales.

One of these grounds is sufficient on its own for a marriage to be void. There are no defences available for a void marriage as there are for a marriage that is voidable (see below).

3.4 Grounds on which a Marriage may be Voidable

The grounds on which a marriage may be voidable are laid down in s.12 MCA 1973. A marriage can be avoided by decree of nullity on one or more of the following grounds:

(a) non-consummation of the marriage due to the incapacity of either party;
(b) non-consummation of the marriage due to the respondent's wilful refusal;
(c) lack of valid consent to the marriage by either party, whether in consequence of duress, mistake, unsoundness of mind or otherwise;
(d) that at the time of the marriage, although capable of giving valid consent, either party was suffering (continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage;
(e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;
(f) that at the time of the marriage the respondent was pregnant by some person other than the petitioner.

We will consider each of these grounds in more detail. Most of the case-law exists in relation to non-consummation and lack of consent, particularly in consequence of duress.

(a) Non-consummation: Incapacity (s.12(a))

A marriage is consummated by the first act of sexual intercourse after the marriage ceremony and, according to Dr Lushington's definition in *D-E*

v. *A-G* (1845) 1 Rob Eccl 279, consummation must be 'ordinary and complete'. Unlike rape, where any degree of penetration is sufficient, consummation therefore requires full penetration, but can take place without ejaculation, if a condom is worn, if there is *coitus interruptus* or if one or both of the parties is infertile (*Baxter* v. *Baxter* [1948] AC 274, [1947] 2 All ER 886); *Cackett* v. *Cackett* [1950] 1 All ER 677; *White* v. *White* [1948] 2 All ER 151; *R* v. *R* [1952] 1 All ER 1194). The incapacity to consummate must exist at the date of the petition and must be permanent and incurable or only curable by a dangerous operation (*S* v. *S* (*otherwise C*) [1954] 3 All ER 736; *M* v. *M* [1956] 3 All ER 769). Incapacity includes both physical incapacity (e.g. some kind of genital deformity) and psychological incapacity, but with the latter there must be a positive psychological aversion and invinciple repugnance to intercourse (*Singh* v. *Singh* [1971] 2 WLR 963, [1971] 2 All ER 828). It is irrelevant that a party is capable of having intercourse with another person. A party to a marriage can petition for a decree of nullity on the basis of their own or the other party's incapacity to consummate, as s.12(a) refers to the incapacity of 'either party', unlike s.12(b) which refers to the wilful refusal of 'the respondent'.

(b) Non-consummation: Wilful Refusal to Consummate (s.12(b)

Wilful refusal to consummate, which is often pleaded in the alternative to incapacity to consummate, is more concerned with psychological reasons for failure to consummate than s.12(a). Wilful refusal has been defined as 'a settled and definite decision come to without just excuse' (Lord Jowitt LC, *Horton* v. *Horton* [1947] 2 All ER 871). If the respondent can find a 'just excuse' a decree may be refused. A 'just excuse' might arise in the context of an arranged marriage (see below), where a husband refuses intercourse after the civil ceremony of marriage but before the religious ceremony has taken place, although if he delays in arranging or refuses to arrange the religious ceremony, a decree of nullity may be granted (see *Kaur* v. *Singh* [1972] 1 WLR 105, [1972] 1 All ER 292).

Instead of petitioning for nullity on the ground of non-consummation due to incapacity or wilful refusal, a party to a marriage can petition for divorce on the basis of unreasonable behaviour (s.1(2)(b) MCA 1973). This avoids the embarrassment caused by having to have the medical examination which may be needed to establish non-consummation. However, a spouse wishing to terminate a marriage quickly (i.e. within the first year of marriage), or who objects to divorce, will have to apply for a decree of nullity.

(c) Lack of Valid Consent to the Marriage (s.12(c))

A marriage is voidable if there is no valid consent to the marriage due to duress, mistake, unsoundness of mind or otherwise. We have already seen that one of the aims of marriage formalities is to establish whether the

parties consent to the marriage. Sometimes, however, in rare cases, despite apparent consent, there is no true consent to the marriage, and, if this is proved, the marriage may be avoided. Consent to a marriage is only valid if given freely and voluntarily by a person capable of giving consent. Either party to a marriage can petition for a decree of nullity on the basis of their own and/or the other party's lack of consent as s.12(c) refers to lack of consent by either party.

Duress

Duress may vitiate consent and provide a ground for nullity when a party has been forced to marry against his or her will. There is no statutory definition of duress. In *Szechter* v. *Szechter* [1970] 3 All ER 905 Sir Jocelyn Simon P said that to establish duress it was necessary to prove

> 'that the will of one of the parties thereto had been overborne by genuine and reasonably held fear caused by threat of immediate danger to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock.'

In *Szechter*, where the petitioner wife had married the respondent merely to escape from a political regime in Poland, the test was satisfied. The *Szechter* test (i.e. that of the overborne will) was approved and applied by the Court of Appeal in *Singh* v. *Singh* [1971] 2 WLR 963, [1971] 2 All ER 828, where a woman entered into a Sikh arranged marriage against her own wishes but to satisfy the wishes of her parents. The petition failed as there was no evidence, applying the *Szechter* test, that her will had been overborne by a threat of immediate danger to life. The *Szechter* test was also applied in *Singh* v. *Kaur* (1981) 11 Fam Law 152. The overborne will test is a very stringent test as the court is unlikely to annul a marriage without evidence of real duress. However, as the test of duress is thought to be subjective (i.e. it is the effect of the duress on the particular person involved that counts), a party who is vulnerable and emotionally sensitive is likely to be able to prove duress more easily than someone with a stronger, more ebullient personality. In *Hirani* v. *Hirani* [1983] 4 FLR 232 the Court of Appeal, Ormrod LJ giving the leading judgment, stated there was no need to prove a threat of danger to life, limb and liberty, but the question to be asked was 'whether the pressure . . . is such as to destroy the reality of consent and overbear the will of the individual'. On the facts of the case, in contrast to *Singh* v. *Singh* (above), Ormrod LJ held that the petitioner, a girl of 19 who had entered into an arranged marriage with a man she had never seen, had clearly had her will overborne, thus vitiating her consent. A decree was granted.

The case of *Szechter* also raises the issue of 'sham' marriages whereby a person enters into a marriage for an ulterior motive, e.g. to acquire citizenship or to defeat immigration law. In *Vervaeke* v. *Smith* [1983] AC 145, [1982] 2 All ER 144, where a Belgian prostitute married a British

citizen to acquire British citizenship and escape deportation, the House of Lords held that the marriage was valid even though the parties did not intend to live together. 'Sham' marriages are therefore valid marriages, provided the parties freely consent. Perhaps the words 'or otherwise' in s.12(c) could be used to justify a policy decision by the courts not to uphold 'sham marriages'.

Mistake

Mistake invalidating consent usually involves a mistake about the identity of the other party or about the nature of the marriage ceremony. In *Valier* v. *Valier* (1925) 133 LT 830 a marriage was annulled where the husband, an Italian who knew little English, had met and married an English girl in a ceremony which he thought was an engagement ceremony. In *Mehta* v. *Mehta* [1945] 2 All ER 690 a similar marriage was annulled where an English woman went through a marriage ceremony mistakenly believing it to be a ceremony of religious conversion. With mistaken identity there has to be a mistake as to the person and not to his or her attributes, e.g. a mistaken belief at the time of marriage that the person you are marrying is a virgin or a socialist does not vitiate consent. Marriage to the wrong identical twin could, however, constitute mistake, thereby vitiating consent.

Unsoundness of Mind

Unsoundness of mind can constitute lack of consent, although what constitutes unsoundness of mind is unclear. In *Re Park* [1953] 3 WLR 1012, [1953] 2 All ER 1411 Singleton LJ stated that unsoundness of mind would invalidate a marriage if *at the time of the ceremony* a party was incapable of understanding the nature of the marriage and the obligations and responsibilities involved. A petitioner can also petition on the basis of mental disorder (see below). Bromley and Lowe (*Bromley's Family Law*, 1992) suggest that if someone entered into a marriage under the influence of alcohol or drugs, the marriage could be avoided on the ground of lack of consent due to unsoundness of mind.

(d) Mental Disorder

Either spouse can petition for nullity on the ground that he or she or the respondent was at the time of the mariage suffering from mental disorder (continous or intermittent) within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfit for marriage.

(e) Venereal disease

A decree of nullity may be granted where the petitioner can prove that at the time of the marriage the respondent was suffering from venereal disease in a communicable form.

If contagious forms of venereal disease are grounds for nullity, then AIDS should perhaps also be a ground. Under the present law, a party to a marriage whose partner has AIDS can only terminate the marriage by petitioning for divorce on the ground that the marriage has irretrievably broken down, which it may not have done. In some circumstances (e.g. where a spouse has contracted AIDS from a blood transfusion) there would also be no fact on which to base irretrievable breakdown, as contracting AIDS might not amount to unreasonable behaviour.

(f) Pregnancy *per alium*

A decree of nullity may be granted if the petitioner can prove that at the time of the marriage the respondent was pregnant by some other person.

3.5 Bars to Nullity where a Marriage is Voidable

Under s.13 MCA 1973 there are certain bars (i.e. statutory defences) to a petition for a decree of nullity sought on the ground that the marriage is voidable (i.e. under s.12). The court cannot grant a decree of nullity sought on any s.12 ground if the respondent proves:

(a) the petitioner knew it was open to him or her to have the marriage avoided, but whose conduct led the respondent reasonably to believe he or she would not do so; *and*
(b) it would be unjust to the respondent to grant the decree.

This defence is based on approbation by the petitioner so that the petitioner is estopped from having the marriage annulled. In *D* v. *D* [1979] Fam 70, [1979] 3 All ER 337 the husband's petition for nullity was refused as he had agreed to the adoption of two children, thereby leading the wife to believe that he would not seek to have the marriage avoided.

Where the petition is sought on one or more of the last four grounds (i.e. lack of consent, mental disorder, venereal disease or pregnancy by another person), a decree can only be granted where proceedings are brought within three years of marriage or, if not, then only with leave of the court (s.13(2)). Leave can only be granted where the petitioner during those three years has at some time suffered from a mental disorder within the meaning of the Mental Health Act 1983 and in all the circumstances of the case it would be just to grant leave (s.13(4)). With grounds (e) and (f) (i.e. venereal disease and pregnancy by another person) a decree can only be granted if the petitioner was ignorant of the disease or the pregnancy at the time of marriage (s.13(3)).

3.6 Consequences of Nullity

With a void marriage, a decree of nullity has the effect of declaring there never was a valid marriage. With a voidable marriage, the marriage is treated as existing up to the time decree absolute of nullity is granted (s.16 MCA 1973). Any children born of a voidable marriage are therefore legitimate because they are born within marriage. A child of a void marriage whenever born is treated as legitimate, if at the time of the insemination resulting in the child's birth or the child's conception, or at the time of the marriage (if later), both or either of the parties reasonably believed their 'marriage' was valid (s.1(1) Legitimacy Act 1976 as amended by s.28 Family Law Reform Act 1987). Where a child is born after s.28 Family Law Reform Act 1987 came into force (i.e. after 4 April 1988), it is presumed that one of the parties to a void marriage reasonably believed at the time of insemination or conception or at the date of marriage (if later) that the marriage was valid.

A decree absolute of nullity, where the marriage is voidable, allows a party to remarry should he or she wish to do so. A party to a void marriage can remarry with or without a decree of nullity, as there was never a valid marriage in the first place.

On a petition for nullity the court can under Part II MCA 1973 make an order for maintenance pending suit (s.22), and on granting a decree or at any time afterwards make orders for financial provision (s.23) and for property adjustment (s.24), including an order for sale of property under s.24A for the parties and/or to or for the benefit of any children of the family (see Chapter 8). A person who has obtained a decree of nullity can apply for reasonable provision out of the other party's estate after his or her death under the Inheritance (Provision for Family and Dependants) Act 1975 (see Chapter 16). In order to prevent hardship, a person who in good faith entered into a void marriage but who obtained no decree can also apply under the 1975 Act for reasonable financial provision out of the estate of a deceased 'spouse'.

A decree absolute of nullity, like a decree absolute of divorce, terminates all the rights a party has by virtue of his or her marital status, e.g. rights of occupation under the Matrimonial Homes Act 1983; rights of intestate succession; and rights to maintenance and protection under the Domestic Proceedings and Magistrates' Courts Act 1978.

3.7 Nullity and Arranged Marriages

Although 'the law of nullity has lost much of its practical significance' (Cretney and Masson, *Principles of Family Law*, 1991), nullity decrees are sometimes sought in the context of arranged marriages involving ethnic minorities such as Sikhs. Sometimes one or both of the parties may seek to

have the marriage annulled on the ground or grounds of non-consummation due to wilful refusal or lack of consent caused by duress, e.g. pressure from parents and relatives to enter into an arranged marriage. Arranged marriages usually take place in two stages, i.e. a civil ceremony in a register office followed by a religious ceremony, after which the couple are married in the eyes of their religion and can consummate their marriage. The onus in some religions, such as the Sikh religion, is on the male partner to arrange the religious ceremony and in some cases he has refused to do this, whereupon a petition for nullity has been sought on the ground of wilful refusal to consummate.

In *Kaur* v. *Singh* [1972] 1 WLR 105, [1972] 1 All ER 292, although the marriage had taken place in the register office, the husband had not arranged the religious ceremony because he said he was too busy doing his doctorate, although he later admitted he had no intention of arranging the ceremony. The court held that failure to arrange the religious ceremony constituted an implied wilful refusal to consummate the marriage and a decree was granted. In *A* v. *J (Nullity Proceedings)* [1989] 1 FLR 110, which involved an arranged Indian marriage, the wife refused to go through a religious ceremony. She was unhappy about her husband and wanted the religious ceremony postponed indefinitely. Her husband petitioned for a decree of nullity on the basis of her wilful refusal to consummate. Anthony Lincoln J held that wilful refusal was established on the facts of the case as a religious ceremony was an essential precondition to cohabitation. A decree was granted, for although both parties had been at fault, there was no just cause in all the circumstances of the case for refusing to grant a decree.

3.8 Should the Grounds for Voidable Marriages be Abolished?

Except in the context of arranged marriages, or where someone has a religious objection to divorce, nullity decrees are rarely sought. Most people prefer instead to petition for divorce. In 1991, only 508 decrees nisi of nullity were granted as opposed to 153,258 decrees nisi of divorce. There are several reasons for the declining significance of nullity. Divorce is more socially acceptable and also much easier to obtain today than it once was, because of less restrictive grounds and because of the special procedure (see Chapter 7). At one time the only way to avoid the restrictive divorce law was for a party to a marriage to petition for a decree of judicial separation (see Chapter 7) or for a decree of nullity. Spouses would sometimes petition for nullity for religious reasons, not only because they had a religious objection to divorce, but so that they could get married in church in the future. With the decline in religion and greater tolerance of divorce by the Church this is no longer necessary.

From time to time there has been discussion about whether the concept of a voidable marriage should be abolished and the grounds assimilated

into the law of divorce. In 1970 the Law Commission (Law Com No 33) examined the law of nullity but concluded that the concept of the voidable marriage should be retained for several reasons. One reason was that a significant minority of people preferred for religious reasons to petition for nullity instead of divorce. Another was that there was more social stigma attached to divorce than to nullity. A decree of nullity could also be sought in the first year of marriage, whereas a petitioner (at that time) had to wait three years to present a petition for divorce. All these justifications for retaining the voidable marriage can now be refuted. We no longer have the three-year bar on divorce, and nullity petitions are rarely sought for social or religious reasons. There is thus a stronger argument today for the abolition of the concept of the voidable marriage. Nullity proceedings, unlike divorce, also require a full hearing and in some cases require embarrassing medical evidence to be obtained and put before the court. The main drawback with divorce, however, is that a decree cannot be sought in the first year of marriage. That bar could be removed, but if proposals for divorce over a period of time are introduced (see Chapter 7), it would seem unfair to force someone to wait a year for divorce where they had married, say, under duress or where their marriage had never been consummated.

Summary

1. A marriage is void on certain grounds (s.11 MCA 1973) or voidable on certain grounds (s.12 MCA 1973). A nullity decree, unlike a decree of divorce, can be sought in the first year of marriage (s.3 MCA 1973). Nullity takes place in two stages, i.e. decree nisi followed by decree absolute.
2. A void marriage is a marriage that never existed and a decree is not necessary, although it enables the parties to apply for ancillary relief under Part II MCA 1973. A marriage is void if: there is no valid marriage under the Marriage Acts 1949 to 1986; the parties are within the prohibited degrees of relationship; either of the parties is under the age of 16; either party is already married; the parties are not respectively male and female; or, in the case of a polygamous marriage, either party was domiciled in England and Wales.
3. A marriage can be annulled under s.12 MCA 1973 if there has been non-consummation (due to incapacity or wilful refusal), or if at the time of the marriage there was lack of consent (due to duress, mistake, unsoundness of mind or otherwise), mental disorder, venereal disease, or the respondent was pregnant by some other person.
4. Statutory bars (defences) exist for a voidable marriage (s.13 MCA 1973).
5. A decree of nullity has certain legal consequences. A party to a voidable marriage can remarry after a decree absolute of nullity has been granted. On nullity, rights under certain matrimonial statutes are lost. A decree of nullity allows the parties to apply for ancillary relief under Part II MCA 1973.
6. In 1970 the Law Commission rejected the argument that the grounds for voidable marriages should be assimilated into the grounds for divorce. However, the arguments against abolishing grounds for voidable marriages are less compelling today.

Exercises

1. Vijay is the 18-year-old daughter of Hindu parents, who have arranged for her to marry a young Hindu called Bhatia. Vijay finds him repulsive and does not want to marry him, but because her parents threated to throw her out of the house the marriage took place at the register office. This ceremony was to be followed by a religious ceremony, but Vijay refused to go ahead with the ceremony. Vijay and Bhatia have not lived together and have not had sexual intercourse.

   Advise Vijay.

2. Fred and Mary married three months ago on the understanding that their marriage was purely for companionship and they would have no sexual relationship. Fred has now decided he wants more than just companionship, but Mary refuses to have intercourse with him. Fred wishes to have the marriage annulled, but Mary wishes to remain married to Fred, as she gave up a well-paid job to marry him and thinks their marriage is quite satisfactory without sex.

   Advise Fred and Mary.

3. Do you think that the concept of the voidable marriage should be retained or abolished?

4. Before the marriage ceremony Bob drank six double whiskies to give him courage to marry Jane. A week later he wants to terminate the marriage because he says he did not know what was going on at the ceremony.

   Advise Bob

Further Reading

Bradley, 'Duress and arranged marriages' (1983) MLR 499.
Bradney, 'Arranged marriages and duress' (1984) JSWL 278.
Bradney, 'Transsexuals and the Law' [1987] Fam Law 350.
Gordon, 'Arranged marriages: for entry or for love?' (1987) Fam Law 224.
Law Commission, *Nullity of Marriage* (Report No 33, 1970).
Taitz, 'A transsexuals's nightmare: the determination of sexual identity in English law' (1988) IJLF 139.

4 Husbands and Wives – Rights in Property

In this chapter we consider the property rights of husbands and wives. We look at how they acquire ownership of property and what procedures exist for solving disputes. Most property disputes between spouses relate to the matrimonial home. Ownership and occupation of the matrimonial home and what happens to the matrimonial home on a spouse's bankruptcy are therefore considered. Property rights on the death of a spouse are considered in Chapter 16. Many of the rules relating to the property ownership of spouses during marriage also apply to cohabitees (see Chapter 17). Acquiring a beneficial interest in property is particularly important for cohabitees on relationship breakdown, as the court has no discretionary jurisdiction to allocate and distribute property belonging to cohabitees in the same way it has for spouses on divorce, nullity or judicial separation. Some of the property principles in this Chapter are also important if there is a dispute about property when an engagement is terminated (see Chapter 2).

4.1 Introduction

Husbands and wives during marriage are generally subject to the same property principles as other individuals, although with some exceptions, notably in respect of occupation of the matrimonial home. Most property disputes between spouses do not occur during marriage but on marriage breakdown when the court in proceedings for divorce, nullity or judicial separation has wide and flexible discretionary powers under Part II Matrimonial Causes Act 1973 to make property adjustment orders irrespective of legal or beneficial ownership but according to specified statutory criteria such as the needs of the parties (see Chapter 8). Questions of entitlement to property, however, sometimes arise during marriage, for instance in respect of the matrimonial home where there is a dispute with a third party or where in rare instances the parties do not divorce. A spouse may wish to establish an interest in property on the death of the other spouse instead of having to rely on a claim made under the Inheritance (Provision For Family and Dependants) Act 1975 (see Chapter 16).

Before we consider the development of property law applicable to spouses, it is important to realise that English law recognises two sorts of ownership which can exist alongside each other in respect of the same piece of property, i.e. legal ownership and equitable or beneficial ownership. This means, for example, that a husband can be the owner in law of

the matrimonial home while holding it at the same time on trust for himself and his wife in equity. Many spouses, however, own property (notably the matrimonial home) jointly as co-owners both at law and in equity. There are two forms of co-ownership in English law. Property can be owned by co-owners as joint tenants or as tenants in common. Spouses who are joint tenants each own the whole interest in the property and as individuals own no separate share. On the death of one joint tenant, the other joint tenant is entitled to the whole property under the so-called right of survivorship (*jus accrescendi*). Tenants in common, on the other hand, each own a separate share of the property so that on death there is no automatic right of survivorship and the share passes to the person named in the will or according to the rules of intestate succession (see Chapter 16).

The Development of Matrimonial Property Law

Because husbands and wives have separate legal personalities, any property belonging to a spouse before marriage remains that spouse's property on and during marriage, unless there is evidence of an express or implied intention that the property is to be jointly owned. There is no concept of community of property in English law. Before the end of the nineteenth century the position was different, as on marriage any property belonging to a wife would vest in her husband. However, after pressure for reform s.1 Married Women's Property Act 1882 introduced a system of separation of property. The introduction of a separate property regime had many advantages for women, e.g. property owned before marriage remained hers, her earnings belonged to her and not to her husband, and she could buy property during marriage in her own name. However, the new system had certain disadvantages for the wife, particulary in respect of occupation and ownership of the matrimonial home which was usually owned by the husband. To mitigate these injustices certain statutory reforms were made. The Married Women's Property Act 1964 was passed to remove injustice caused by the common law rule that any property bought by a wife from housekeeping money given to her by her husband belonged to her husband, by providing that such property should belong to them both in equal shares.

Another reform was introduced by s.37 Matrimonial Proceedings and Property Act 1970, which was passed to enable a non-owning spouse to acquire a beneficial interest in any property (including the matrimonial home), where he or she had made a substantial contribution in money or in money's worth (i.e. by labour) to the improvement of that property. Although still in force, both the 1964 Act and the 1970 Act have lost much of their significance, as the divorce courts now have wide powers to adjust property rights and the matrimonial home is usually jointly owned. Besides these statutory provisions, a spouse who wishes to establish a beneficial interest in property can apply instead for a declaration that he or she has a beneficial interest under a trust under the general principles of equity,

which is often the more usual procedure. Important statutory reforms were also introduced by the Matrimonial Homes Act 1983, which gave the non-owning spouse a right to occupy the matrimonial home (see below).

From time to time other reforms have been mooted but never implemented, often because changes in the law have made reform unnecessary. A system of community of property was recommended in the 1960s, whereby property would be divided up equally between the parties on divorce to minimise the unfairness of the separate property regime. Community of property, although existing in many civil law jurisdictions, was, however, never introduced. Another reform mooted was the introduction of a statutory right of co-ownership of property, which the non-owner would have to register. Statutory co-ownership was never implemented and, as most spouses today jointly own their matrimonial home, reform is no longer so necessary. The Law Commission also recommended a presumption of joint ownership of personal property, but this has not been implemented.

Procedures for Solving Property Disputes between Spouses

A property dispute between a husband and wife can be settled by an application under s.17 Married Women's Property Act 1882. A spouse can also apply for a bare declaration under the general law (e.g. to establish an interest under a trust or contract) in the High Court or county court. Where property is co-owned, a dispute about sale can be settled in an application under s.30 Law of Property Act 1925. Proceedings can also be brought to establish a beneficial interest in property under s.37 Matrimonial Proceedings and Property Act 1970. Applications for orders in respect of occupation of the matrimonial home (e.g. injunctions to oust a spouse) can be granted under the Matrimonial Homes Act 1983 and are particularly useful where there is domestic violence (see Chapter 15).

Section 17 Married Women's Property Act 1882

Where there is a dispute about ownership or possession of any property (e.g. the matrimonial home, car, shares, an antique) a spouse can apply to the county court or High Court under s.17 Married Women's Property Act 1882, when 'the court may . . . make such order with respect to the property as it thinks fit'. Under s.17 the court only has jurisdiction to *declare* existing rights of ownership; it cannot *create* rights (see dicta of the House of Lords in *Pettitt* v. *Pettitt* [1970] AC 777, [1969] 2 All ER 385). The court has certain other ancillary powers in s.17 proceedings. It can order sale of the property in dispute (s.7(7) Matrimonial Causes (Property and Maintenance) Act 1958), and where the property has been sold the court can make an order in respect of the proceeds of sale of any property representing the original property (s.7(1) Matrimonial Causes (Property and Maintenance) Act 1958). An application to settle a property dispute can also be made under s.17 MWPA 1882 and s.7 of the 1958 Act by a

person who is engaged to be married provided the application is brought within three years of the termination of the engagement (s.2(2) Law Reform (Miscellaneous Provisions) Act 1970) (see Chapter 2). A person who has obtained a decree absolute of nullity or divorce can also apply under s.17, provided the application is made within three years of the date on which the marriage was dissolved or annulled (s.39 Matrimonial Proceedings and Property Act 1970).

In practice s.17 applications are rarely made as most disputes occur on divorce when the court can adjust property rights rather than just declare them. However, an application under s.17 might be useful to declare a spouse's rights of ownership in the matrimonial home in order to defeat a claim to possession by a third party (e.g. a mortgagee or the trustee in bankruptcy). An application under s.17 could also be useful in the rare situation where a divorced person has remarried, when an application for a property adjustment order under s.24 MCA 1973 cannot be made (s.28(3) MCA 1973), provided the application under s.17 is brought within three years of decree absolute. In *Bothe* v. *Amos* [1976] Fam 46, [1975] 2 All ER 321 both spouses had remarried. Consequently the wife applied under s.17 MWPA 1882 for a share of leasehold premises where she and her husband had conducted a joint business venture during their marriage. Once this three-year period has expired, an application for a bare declaration as to ownership can be made or an application for an order for sale under s.30 Law of Property Act 1925 (see below).

4.2 Ownership of personal property

The rules for determining the ownership of personal property (i.e. property other than land) are generally the same for married couples as they are for other individuals, but with the exception of certain legislative reforms mentioned above (i.e. s.17 MWPA 1882, s.37 MPPA 1970, MWPA 1964). Spouses are subject to the general law of property, contract and trusts. Only on marriage breakdown is the position different. The Law Commission has criticised the rules for determining ownership of personal property during marriage as being 'arbitrary, uncertain and unfair' (*Family Law: Matrimonial Property*, Law Com No 175, 1988), as the rule that title to property passes presumptively to the person who purchases it creates injustice, because most spouses intend property to be jointly owned during marriage. To remedy this injustice, the Law Commission recommended a presumption of joint ownership of personal property. However, despite the unfairness of rules relating to personal property ownership, personal property disputes do not often occur during marriage, as the value of such property does not usually justify the cost of litigating, and as disputes about property tend to arise on marriage breakdown. Any dispute which does arise during marriage is likely to be about the matrimonial home (i.e. real property), because it is a valuable capital asset and because it provides accommodation for the

parties and their children. However, where spouses have substantial assets (e.g. shares or valuable antiques) a dispute about ownership might arise and could be settled by an application for a declaration of ownership under s.17 MWPA 1882 in respect of existing rights, or for a declaration in an ordinary action by the non-owner that he or she has a beneficial interest in equity or an interest under a contract.

An interest in personal property can be created (a) expressly or (b) by implication.

(a) Express Creation of Interests in Personal Property

An interest in personal property, unlike land, can be created or transferred at law and in equity without written formalities (see *Paul* v. *Constance* [1977] 1 WLR 527, [1977] 1 All ER 195 below). Where property is valuable it may, however, be advisable to have written evidence of ownership.

Entitlement to personal property depends on whether there is a valid contract (i.e. agreement, offer, acceptance, consideration, intention, etc.) or an interest in equity under a trust. As a general rule, title to personal property passes to the spouse who purchases it, unless there is any evidence of contrary intention, eg that it is jointly owned. With a gift, where there is no deed, ownership depends on whether the donor intended to transfer the gift, who the intended donee or donees are (i.e. was the gift for one spouse or for both spouses), and whether the gift was delivered (i.e. handed over).

In *Samson* v. *Samson* [1982] 1 WLR 252, [1982] 1 All ER 780 an application under s.17 Married Women's Property Act 1882 was brought to settle a dispute about ownership of certain chattels including wedding gifts. The Court of Appeal rejected the wife's argument that there was a presumption that wedding presents are jointly owned. The Court of Appeal held that the donor's intention was the determining factor, but where there was no evidence of intention, there was an inference that gifts from relatives or friends of a spouse were gifts to that particular spouse. The Court of Appeal also stated that a gift of property made to one spouse could become the property of both spouses by subsequent conduct.

The case of *Paul* v. *Constance* [1977] provides an example of an interest in personal property being created orally in equity under an express trust without the need for writing. The case involved an unmarried couple, but the principles are the same for husbands and wives. The Court of Appeal held that the woman had an interest in equity under a trust in respect of a bank account in her male cohabitee's sole name, as she had been authorised to draw on the account and he had often told her that the money in the account was as much hers as his. This was evidence of an intention that she should have a joint interest in equity. In *Re Cole (A Bankrupt) ex p The Trustee of the Property of the Bankrupt* [1964] Ch 175, [1963] 3 All ER 433, on the other hand, the wife claimed that certain personal property (furniture etc.) belonged to her and not to the trustee in bankruptcy on her husband's bankruptcy. Her husband had taken her to his new house and shown her all the contents saying, 'Look. It is all yours'.

The question for the court was whether the gift had been completely perfected, i.e. had there been transfer of the property and an intention to tranfer? The Court of Appeal held there had been no change of possession or delivery, so that the gift of the furniture had not been perfected. Had she provided consideration the outcome would have been different. Here the wife was a volunteer (i.e. someone who has provided no consideration) and it is a rule of equity that 'equity will not assist a volunteer'.

(b) Implied Interests in Personal Property

Rights of ownership in personal property can also arise by implication, i.e. under a trust, a contract, estoppel or under certain statutory provisions that apply to spouses.

Trusts

Spouses (and others) can acquire rights in personal property under a resulting trust or a constructive trust, although these trusts are much more important in the real property context, particularly for cohabitees (see Chapter 17).

Resulting Trusts A spouse can argue that he or she has an interest in personal property under a resulting trust, which arises as a presumption of law, rebuttable by evidence of a contrary intention, when money is paid as a contribution to real or personal property, e.g. where a wife pays money into a bank account in the sole name of her husband, she can argue that she has an interest in the bank account in proportion to her contribution in equity under a resulting trust, although the husband could rebut the presumption of resulting trust by arguing that the money was intended to be all his. Resulting trusts at one time were sometimes rebutted by the so-called presumption of advancement, an evidential rule whereby a gift was presumed when a husband transferred property to his wife or children but not presumed when a wife tranferred property to her husband or children. The presumption of advancement is considered archaic today as it is unequal in its application to men and women (see dicta in *Pettitt* v. *Pettitt* [1970] AC 777, [1969] 2 All ER 385). The Law Commission in its report (*Family Law: Matrimonial Property,* Law Com No 175, 1988) recommended the removal of the discriminatory aspect of the presumption.

Constructive Trusts A spouse can acquire an interest in personal property owned by the other spouse by arguing that he or she has an interest in equity under a constructive trust, which may arise where there is evidence of an express or implied common intention that the non-owning spouse in law should have an interest plus evidence that the claimant spouse has acted in reliance of this intention. The advantage of arguing on constructive trust principles is that, unlike under a resulting trust, a spouse may acquire rights of ownership in equity, whether or not he or she has

made any financial contribution, and may acquire a larger share of the property than a share proportionate to financial contribution. The disadvantage of constructive trust principles is that they are arguably vaguer than those relating to resulting trusts.

Proprietary Estoppel

As an alternative to trusts a non-owning spouse can acquire an interest in property owned by the other spouse on proprietary estoppel principles, i.e. the non-owner spouse can argue that the owner spouse led the non-owner to believe he or she would have an interest in property, and, relying on that belief, the non-owner acted to his or her detriment. Another option is to bring proceedings under certain statutory provisions.

Statutory Provisions

Under s.37 Matrimonial Proceedings and Property Act 1970 a spouse can, where he or she has made a substantial contribution in money or in money's worth (i.e. labour) to the improvement of either real or personal property, acquire a share or an enlarged share (as the case may be) of that property, provided there is no express or implied agreement to the contrary. It would also be open to a non-owning spouse to argue that he or she has an interest by virtue of s.1 Married Women's Property Act 1964, which provides that where a husband pays a housekeeping allowance to his wife, any money derived from that allowance and property bought with that money belong to the husband and wife in equal shares. However, these Acts, while still in force, are rarely used, and the Law Commission has recommended that the 1964 Act be repealed.

Bank Accounts

Disputes about personal property sometimes arise in the context of bank accounts, either in respect of ownership of the fund itself or of property bought with the funds.

Where a bank account is held in the name of one spouse alone, then *prima facie* at law and in equity the money in that account belongs to that spouse, i.e. unless there is evidence of a contrary intention or a contribution to the fund by the other spouse when an interest may arise under an implied or an express trust (see *Paul* v. *Constance* above).

Where a bank account is held in joint names then *prima facie* the money in the account belongs to both spouses at law and in equity in equal shares. This rule is subject to evidence of a contrary intention, e.g. that the account was put into joint names for convenience so that both parties could draw on the account but that joint beneficial ownership was not intended. In *Marshal* v. *Crutwell* (1875) LR 20 Eq 328 a joint account was held to be joint in name only, as the husband had transferred his funds into the joint account so that his wife could draw out money because he

suffered from ill-health and could not do so himself. Consequently on his death the balance did not pass to his wife as his survivor. A joint account opened initially for convenience may, however, come to be regarded as a true joint account after a period of time (e.g. after 50 years in *Re Figgis dec'd* [1969] 1 Ch 123, [1968] 1 All ER 999). Where one spouse alone provides the funds for a joint account the court may hold that the funds and property bought with the funds are owned by that spouse and that the account is joint only in name. In *Heseltine* v. *Heseltine* [1971] 1 WLR 342, [1971] 1 All ER 952 it was held that property bought with money from a joint account fed by the wife was hers, so that when the marriage ended property purchased in the husband's name was held by him on trust for her. However, the court is more likely today to adopt the approach in *Jones* v. *Maynard* [1951] Ch 572, [1951] 1 All ER 802 (see below).

What about property bought with funds in a bank account? The general rule is that *prima facie* the property belongs to the purchaser, whether or not the bank account is in joint or sole names. In *Re Bishop dec'd* [1965] Ch 450, [1965] 1 All ER 249 the spouses withdrew large sums of money from their joint bank account and purchased investments (shares) in their own names. Stamp J stated the general rule that unless the account is specifically opened for the limited purpose of purchasing joint investments, there is a presumption that the spouse in whose name the investments are bought is entitled to the whole beneficial interest. This presumption can, however, be rebutted by evidence of contrary intention as it was in *Jones* v. *Maynard* [1951], where Vaisey J held that investments purchased by the husband with money from an account held jointly with his wife belonged to them both in equal shares, even though the husband had made larger contributions to the joint account than his wife. It was their intention to pool their resources and to use the fund to buy property jointly. Vaisey J stated:

> 'In my judgment, when there is a joint account between husband and wife, and a common pool into which they put all their resources, it is not consistent with that conception that the account should thereafter . . . be picked apart, and divided up proportionately according to the respective contributions of husband and wife . . .'

Should the Law Relating to Ownership of Personal Property be Reformed?

Although a spouse can acquire ownership or co-ownership of personal property where *prima facie* at law there was none, most couples in fact do not litigate about ownership of personal property or bother to transfer property solely owned into joint names. Property disputes usually only arise on marriage breakdown. However, despite the fact that personal property disputes hardly occur during marriage, the Law Commission believes there is an argument in favour of reform and in its report (*Family Law: Matrimonial Property*, Law Com No 175, 1988) recommended the

introduction of a presumption of joint ownership of personal property during marriage where such property was purchased for or transferred to one or both spouses for their joint use or benefit. This presumption would be subject to a contrary intention and would not extend to property purchased or transferred for business purposes. The Law Commission summarised its views as follows:

> 'The present law is unsatisfactory because its application may not result in co-ownership of property even when a married couple desire this. Actual ownership may be held to depend on factors which neither party considered significant at the time of acquisition. In its treatment of money allowances and gifts of property the law discriminates between husband and wife.'

4.3 Ownership of the Matrimonial Home

During marriage the question of ownership of the matrimonial home is more likely to arise than that of ownership of personal property, because of the value of the home as a capital asset and because a spouse may wish to establish a right of ownership to defeat a claim by a third party to possession. The sole owning spouse may have mortgaged the matrimonial home to a bank as security for a loan to pay for the house itself or to finance a business. If that spouse fails to pay the mortgage, the bank can bring an action for possession so that the house can be sold and the loan recovered from the proceeds of sale. Under s.70(1)(g) Land Registration Act 1925 a person in actual occupation with a beneficial interest takes priority over any third party (e.g. a mortgagee, trustee in bankruptcy or prospective purchaser). The non-owning spouse can therefore claim a beneficial interest in the home (e.g. under a resulting or constructive trust) which coupled with actual occuption may defeat the claims of a third party, or entitle the non-owning spouse to a share of the proceeds of sale if the house has to be sold (see *Williams & Glyn's Bank Ltd* v. *Boland* [1981] AC 487, [1980] 2 All ER 408 and *Lloyds Bank plc* v. *Rosset* [1990] 2 WLR 867, [1990] 2 FLR 155).

Entitlement to the matrimonial home during marriage is determined by the same principles of property, trust and contract law that apply to other individuals. These principles are particularly important to cohabitees who on relationship breakdown are not subject to any discretionary rules for the allocation of property in the way that married couples are on divorce, nullity or judicial separation (see Chapter 8). Most disputes about ownership of real property (i.e. land) occur in fact in the context of cohabitees (see Chapter 17).

Unlike personal property, rights in land can only be acquired by complying with certain strict written formalities which exist to create certainty in land transactions. A deed is therefore needed to convey or create a legal estate in land (s.52 Law of Property Act 1925 (LPA 1925)),

and no interest in land can be created or disposed of except by a signed written document (s.53(1)(a) LPA 1925). Any declaration of trust in respect of land or any interest in land must also be manifested and proved in writing (s.53(1)(b) LPA 1925).

A right of ownership in the matrimonial home can therefore only be created expressly by complying with these formalities. An implied right of ownership in the matrimonial home may, however, be acquired on the basis of (a) a trust; (b) an estoppel; or (c) under statute. A right of ownership in the matrimonial home cannot be implied under a contract because of the formality requirements mentioned above and because s.2 Law of Property (Miscellaneous Provisions) Act 1989 now requires contracts for the disposition of land or any interest in land to be in writing. It may, however, be possible to acquire a right of occupation by means of a contract (see e.g. *Tanner* v. *Tanner* [1975] 1 WLR 1346).

(a) Acquiring an Interest under a Trust

We have seen above that interests in land can only be transferred or acquired by complying with written formalities. However, s.53(2) LPA 1925 provides that the requirement of writing for the creation and disposition of interests in land under s.53(1)(a) and for declarations of trusts in respect of land under s.53(1)(b) 'does not affect the creation or operation of resulting, implied or constructive trusts'. A non-owning spouse can therefore claim under s.53(2) that he or she has an interest in equity in the matrimonial home as a beneficial owner under a trust despite the absence of writing, i.e. despite there being no deed or conveyance.

A beneficial interest in the matrimonial home (or other property real or personal) can be acquired under a resulting or a constructive trust.

Acquiring an Interest under a Resulting Trust

A non-owning spouse can argue that he or she has an interest in equity in the matrimonial home under a resulting trust, which arises where someone who is not the owner of property contributes money towards its purchase. In the absence of a contrary intention (i.e. that the money was a gift or a loan or other shares were intended) the person who contributes the money acquires an interest under a resulting trust in equity in proportion to his or her contribution. In *Dyer* v. *Dyer* (1788) 2 Cox Eq Cas 92 Eyre CB stated:

> 'The clear result in all the cases, without a single exception, is that the trust of a legal estate . . . whether taken in the name of the purchasers and others jointly, whether in one name or several, whether jointly or successive, results to the man who advances the purchase money.'

For example, if the matrimonial home was bought by the husband in his name, but his wife contributed to the mortgage payments, she can claim she has an interest in the house in equity under a resulting trust

proportionate to those payments. On sale she would be entitled to a share of the proceeds of sale, or, if she wished to remain in occupation, she could possibly defeat a claim for possession by a third party. It would also be open to the wife to claim an interest under a constructive trust. The main disadvantage of arguing on the basis of a resulting trust is that the contributor of purchase money may only receive a proportionate share of the beneficial interest, whereas he or she might acquire more under a constructive trust. However, it may be more difficult to convince the court of the existence of a constructive trust unless there is clear evidence of intention (see below).

A resulting trust was established in *Sekhon* v. *Alissa* [1989] 2 FLR 94, which involved a dispute between a mother and a daughter, but the same principles apply to spouses and cohabitees. The house was bought in the name of the defendant daughter, who contributed £15 000 to the purchase price and her mother paid the balance (about £20 000). Both paid for improvements to the property. The mother claimed on the basis of a resulting trust that, although the house was bought in her daughter's name, it was purchased as a joint commercial venture and they both intended to own it in proportion to their respective financial contributions. The daughter contended she was the sole owner in law and equity, as her mother's contribution was intended as a gift, or alternatively, an unsecured loan. The question for the court was what was the actual or presumed intention of the parties at the time of the conveyance, i.e. was the contribution a gift, an unsecured loan or was the mother intended to have a beneficial interest in the property? The Chancery Division of the High Court held that the law presumed a resulting trust in the mother's favour, unless that presumption could be rebutted by evidence that she intended a gift or a loan. On the balance of probabilities the court held it was intended that the mother should have a beneficial interest.

Financial contribution to the purchase only raises a presumption that the contributor has a beneficial interest under a resulting trust. The presumption can be rebutted by evidence of contrary intention. Although making payment raises the presumption of a resulting trust, the mere spending of money alone is insufficient to establish an interest. There must be proof of an intention that the contributor should have an interest. In the absence of a communicated contrary intention, such interest will be proportionate to contribution (*Springette* v. *Defoe* [1992] 2 FLR 388).

Acquiring an Interest under a Constructive Trust

The non-owning spouse can acquire an interest in the matrimonial home under a constructive trust. With a constructive trust, financial contribution to the purchase price is not necessarily needed, but helps to establish evidence of intention that the house is to be jointly owned in equity (see Lord Bridge *obiter* in *Lloyds Bank plc* v. *Rosset* below). The principles on which constructive trusts are established are vaguer than those for resulting trusts, so that it is likely to be more difficult to predict the

outcome of a case. With a constructive trust all the circumstances of the case are relevant both to the existence of such a trust and to the quantum of the beneficial interest once a trust is established. The non-owner spouse claiming an interest in the matrimonial home must argue that he or she is entitled to an interest in equity by virtue of an express or implied agreement that he or she is to have such an interest, and that he or she acted to his or her detriment on the basis of that agreement. Where the non-owner has made a contribution to the purchase price or there has been some oral agreement between the parties about a share in the property, the court is more likely to hold there is evidence of intention and thus an interest existing under a constructive trust, provided there is some detrimental action.

Judicial willingness to find interests under constructive trusts has fluctuated in the development in the law. At one time Lord Denning MR in the Court of Appeal was imposing constructive trusts ('new-style' constructive trusts) based on broad notions of unconscionability, despite the principles laid down by the House of Lords in *Gissing* v. *Gissing* [1971] AC 886, [1970] 2 All ER 780 and *Pettitt* v. *Pettitt* [1970] AC 777, [1969] 2 All ER 385. With the case of *Burns* v. *Burns* [1984] Ch 317, [1984] 1 All ER 244 (see Chapter 16) there was a return to orthodoxy and the application of strict property principles was endorsed by the Court of Appeal. It is the acts of the parties that matter and the court cannot impose a trust merely to do justice in a particular case. The circumstances in which a trust can be established are now more restricted but possibly more certain after the decision of the House of Lords in *Lloyds Bank plc* v. *Rosset* [1990].

There are three House of Lords decisions which lay down the principles to be applied to establish a constructive trust: *Pettitt* v. *Pettitt*, *Gissing* v. *Gissing* and *Lloyds Bank plc* v. *Rosset*. Although not expressly overruling *Pettitt* v. *Pettitt* and *Gissing* v. *Gissing*, *Lloyds Bank plc* v. *Rosset* represents the current approach. In *Rosset* the house was in the husband's sole name and the wife helped to renovate the house but made no financial contribution to its purchase or renovation. The marriage had broken down. The house was charged to a bank as security for a loan, but the wife knew nothing of this, and when the husband went into debt the bank claimed possession of the house and an order for sale. The wife, by way of defence, claimed she had a beneficial interest in the house under a constructive trust and this coupled with her actual occupation gave her a right under s.70(1)(g) Land Registration Act 1925 to resist the claims of the bank, i.e. she had an overriding interest. The House of Lords held *inter alia* that she had no beneficial interest by way of a constructive trust, as her activities in relation to the renovation of the house were insufficient to justify the inference of a common intention that she was to have a beneficial interest. Lord Bridge, who gave the leading opinion, stated *per curiam* that any judge required to resolve a dispute between former partners as to the beneficial interest in the home should always have in the forefront of his mind the critical distinction between two different types of situation where a constructive trust might arise:

(i) where there is an express agreement or arrangement to share the beneficial interest; and
(ii) where there is no evidence of an express agreement or arrangement.

We will consider each of these situations in turn.

(i) Where there is an Express Agreement or Arrangement to Share the Beneficial Interest In this situation, Lord Bridge said a claimant would only have to show that he or she had acted to his or her detriment or significantly altered his or her position on reliance of the agreement. Some act of detrimental reliance is required because of the equitable maxim, 'equity will not assist a volunteer', i.e. equity will not assist someone who has not provided consideration. Finding the express agreement is the difficult part of the exercise, and the spouse (or cohabitee) will have to trawl back through his or her relationship to find evidence of an intention or agreement, but once found, establishing detrimental action on the basis of the intention or agreement is usually relatively easy.

The intention plus detrimental reliance approach endorsed by the House of Lords in *Rosset* evolved from *Eves* v. *Eves* [1975] 1 WLR 1338, [1975] 3 All ER 768 and *Grant* v. *Edwards* [1986] Ch 638, [1986] 2 All ER 426 and is similar to the principles of proprietary estoppel. The parties in these two cases were cohabitees, but the principles also apply to spouses. In *Eves* v. *Eves* the house was in the man's sole name but at the time of purchase he had told his female cohabitee that, had she been 21 years old, he would have put the house in their joint names. He admitted in evidence that this was an excuse for not putting her name on the title deeds. After they moved in she did extensive and substantial decorative work, including breaking up the concrete in the front garden with a sledge-hammer and disposing of it in a skip. The Court of Appeal held she had a beneficial interest, for, although there was no writing, the parties had orally made their intentions plain. In such a case, it was held that the court did not have to look for conduct on which the intention could be inferred, but only for conduct by the claimant which amounted to acting on that intention which it would not have been reasonable for her to embark on, unless she was to have an interest in the house. Brightman LJ stated that if the work had not been done, the common intention on its own would not have been enough, and if the common intention had not been orally plain, the work would not have been conduct from which the intention could have been inferred.

In *Grant* v. *Edwards* the house was in the joint names of the male cohabitee and his brother. The male cohabitee had told his cohabitee that he would have put her name on the title had he not considered it might be detrimental to her pending divorce proceedings. He paid the deposit and the mortgage, and she made substantial contribution to the household expenses. The Court of Appeal, applying *Eves* v. *Eves*, held she was entitled to a beneficial interest. There was a common intention that she should have a beneficial interest and there was evidence of conduct (e.g.

substantial contribution to housekeeping and bringing up the children), which amounted to acting on that intention which it would not have been reasonable to have expected her to embark on, unless she was to have an interest in the house.

In *Midland Bank plc* v. *Dobson and Dobson* [1986] 1 FLR 171 there was evidence that the husband and wife had a common intention to share the beneficial ownership of the matrimonial home, but the wife's claim failed as she had not acted to her detriment on the basis of that common intention. She had made no direct contribution to the purchase of the house and her indirect contributions (buying household items and decorating the house) were not related to the common intention. A case post-*Rosset* where a beneficial interest was established was *H* v. *M* (*Property: Beneficial Interest*) [1991] 1 WLR 1127, [1992] 1 FLR 229, where the sole owner of the family home told his cohabitee that the family home was in his sole name for 'tax reasons' and that when they were married it would be half hers. This was evidence of a common intention that the house should be jointly owned, and, as she had acted to her detriment, she had a beneficial interest. She was granted a half-share of the house (see Chapter 17).

(ii) Where there is no Evidence of an Express Agreement or Arrangement In the second of Lord Bridge's categories of situations in which a constructive trust might arise, the court must rely on the conduct of the parties, both as the basis from which to infer a common intention to share the property beneficially, and as the conduct relied on to give rise to a constructive trust. With this category of cases, Lord Bridge was extremely doubtful whether anything less than a direct contribution to the purchase price would be sufficient, and stated that neither a common intention that a house is to be renovated as a 'joint venture' nor a common intention that the house is to be shared by the partners and children as the family home throws any light on the partners' intentions with respect to beneficial ownership of the property.

The two earlier decisions of the House of Lords, *Pettitt* v. *Pettitt* and *Gissing* v. *Gissing*, are in this second category as there was no evidence of any express agreement or common intention that the non-owning spouse should have a beneficial interest in the matrimonial home. In *Pettitt* v. *Pettitt* the husband, who had done small DIY jobs on the house (i.e. decorated the house internally, built a wardrobe and an ornamental garden well), argued in an application under s.17 MWPA 1882 that he had an interest in the proceeds of sale of the matrimonial home which had been purchased by his wife in her sole name. The House of Lords dismissed his claim. The work was too 'ephemeral', so that there was no justification for imputing to the spouses a common intention that he was to have a beneficial interest in the property by reason of the work done. In *Gissing* v. *Gissing*, heard by the House of Lords shortly after *Pettitt*, the wife claimed a beneficial interest under a constructive trust in the house owned by the man. There was no express agreement that she

should have a beneficial interest. She had made no financial contribution to the acquisition of the house, but she had bought some furniture and equipment for the house and bought clothes for herself and her son. The House of Lords held it was impossible on the facts to draw an inference that there was a common intention that she should have an interest under a constructive trust. The House of Lords in *Gissing* took a more restricted approach than it did in *Pettitt*. Lord Morris said:

> 'The court does not decide how the parties might have ordered their affairs; it only finds how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had.'

It is clear after *Rosset* that a constructive trust cannot be imposed just to do justice in a particular case and that, although payment of money may be proof of an intention to have a beneficial interest, payment of money on its own is insufficient to establish an interest. Slade LJ stated in *Thomas* v. *Fuller-Brown* [1988] 1 FLR 237, 240:

> 'under English law the mere fact that A expends money or labour on B's property does not by itself entitle A to an interest in the property. In the absence of an express agreement or a common intention to be inferred from all the circumstances or any question of estoppel, A will normally have no claim whatever on the property in the circumstances. The decision of the House of Lords in *Pettitt* v. *Pettitt* makes this clear.'

In *Thomas* v. *Fuller-Brown* the male cohabitee did substantial work on the house owned by the woman (e.g. built a new kitchen, did electrical and plumbing work and built a new kitchen). His claim to a beneficial interest failed as there was no evidence of an intention that he was to have an interest.

After *Rosset* it is therefore likely to be more difficult to establish an interest under a constructive trust than hitherto and where there is no express agreement that the non-owner in law is to have an interest in equity, then direct contribution to the purchase price may be needed. The requirement of direct contribution to the purchase price in the second of Lord Bridge's categories means that the requirements for a constructive trust are now similar to those for a resulting trust.

Quantification of the Beneficial Interest

Once it has been established that the person claiming a beneficial interest is entitled to such an interest, the court must determine the quantum (i.e. the amount) of this interest. To do this the court considers what the parties intended, taking into account all the circumstances of the case including indirect contributions such as payment of household expenses and bringing up children. In *Risch* v. *McFee* [1991] 1 FLR 105, where a

beneficial interest had been established by virtue of a common intention and acts of detrimental reliance on the basis of that intention, the judge took into account a loan. The date for assessing what would be the equitable share of the beneficial interest is what would be equitable on the date of sale and not the date of separation (*Turton* v. *Turton* [1988] Ch 542, [1987] 2 All ER 641). The court, having established that a party has a beneficial interest, essentially decides what is just in the particular case.

(b) Acquiring an Interest under an Estoppel

An interest in the matrimonial home can be acquired under the equitable doctrine of proprietary estoppel. An estoppel arises where a spouse (cohabitee or any other person) has acted to his or her detriment on the basis of a belief encouraged by the other spouse that he or she is to have an interest in the property in question and it would be inequitable to deny the claimant spouse an interest in equity. To succeed in a claim based on estoppel, the plaintiff must prove: detriment; reliance; expectation on his or her part; and acquiescence on the other party's part. With proprietary estoppel the emphasis is on action rather than on agreement. The disadvantage of bringing an action based on estoppel rather than on trusts is that once an estoppel is proved, the court has a discretion to decide what remedy is necessary to 'satisfy the equity', and rather than giving the claimant a right of ownership (i.e. a share of the property or proceeds of sale) the court may give the claimant merely a right of occupation or financial compensation. Another disadvantage of estoppel is that an interest under an estoppel arises only when the remedy is granted, whereas a beneficial interest under a trust arises from the time the claimant acted to his or her detriment on the basis of the agreement. This may be important when a third party is claiming an interest.

In *Pascoe* v. *Turner* [1979] 1 WLR 431 the female cohabitee, who was the defendant's housekeeper and had lived with him for many years, was successful in a claim based on estoppel in having the legal estate transferred to her. When the relationship broke down he had told her the house and its contents were hers, and in reliance of that statement she made substantial improvements to the property. The Court of Appeal held there was an equitable estoppel, as the man had encouraged and acquiesced in his former partner's actions which she had performed in reliance of his encouragement and acquiescence. On these facts she would also have been likely to have acquired an interest under a constructive trust in Lord Bridge's first category of cases in *Rosset*, as there was evidence of an express agreement that she was to have a beneficial interest plus detrimental reliance. In *Maharaj* v. *Chand* [1986] AC 898, [1986] 3 All ER 107, a case from Fiji to the Judicial Committee of the Privy Council, the woman succeeded in an action based on estoppel thereby resisting a possession action by the man.

A claimant is, however, unlikely to be as successful as the housekeeper in *Pascoe* v. *Turner*, who received a considerable windfall, i.e. the whole

legal estate. In *Coombes* v. *Smith* [1986] 1 WLR 808, [1987] 1 FLR 352 a claim based on estoppel failed as the woman's acts of reliance (e.g. becoming pregnant, leaving her husband), performed in an expectation of acquiring an interest in property, were held to be insufficient. In *Greasley* v. *Cooke* [1980] 1 WLR 1306, [1980] 3 All ER 710 it was held that the burden of proof is on the party creating the expectation of an interest in property (i.e. the owner) to show his or her actions did not induce the other party to act in reliance of this expectation. In *Coombes* v. *Smith* the defendant man was able to prove that the plaintiff woman had not relied on the expectation he had engendered.

(c) Acquiring an Interest under Statutory Provisions

Two statutory provisions exist under which spouses (not cohabitees) can claim a beneficial interest in the matrimonial home: s.1 Married Women's Property Act 1964; and s.37 Matrimonial Proceedings and Property Act 1970. These are rarely used by married couples as most property disputes arise on divorce. These two Acts have been discussed already in the context of personal property (see 4.2 above).

4.4 Occupation of the Matrimonial Home

In this chapter so far we have been concerned with rights of ownership in property. We now consider rights of occupation. Under the Matrimonial Homes Act 1983 (consolidating the Matrimonial Homes Act 1967 and other Acts) a spouse has a statutory right to occupy the matrimonial home, i.e. a right not to be evicted from the home unless the court orders otherwise. The MHA 1967 was introduced to protect the non-owning spouse (usually the wife) in case the owning spouse (usually the husband) should decide to sell or otherwise deal with the property. Proceedings are frequently brought under the MHA 1983 for injunctions to protect victims of domestic violence (see Chapter 15). Unlike spouses, cohabitees have no statutory rights of occupation. A cohabitee's rights of occupation depend on whether or not he or she has a right of ownership (legal or beneficial) or a right under a contract (express or implied) (see Chapter 17).

We will consider: (a) 'rights of occupation' and orders under s.1; (b) rights of occupation and third parties; and finally (c) other rights conferred by the Matrimonial Homes Act 1983.

(a) Rights of Occupation and Orders under s.1

Under s.1 Matrimonial Homes Act 1983 the non-owning spouse is given statutory rights of occupation (s.1(1)) and either spouse can apply for orders relating to occupation (s.1(2)).

Rights of Occupation

Where one spouse has rights of occupation by virtue of a beneficial estate or interest or under a contract or by statute, the other spouse not so entitled has the following statutory 'rights of occupation' (s.1(1)):

'(a) if in occupation, a right not to be evicted or excluded from the dwelling-house or any part thereof except with the leave of the court given by an order under this section;
(b) if not in occupation, a right with leave of the court so given to enter into and occupy the dwelling-house.'

Any rights under the Act end on death or termination of marriage, although an order made during marriage may direct otherwise (s.2(4)).

Orders

Provided one spouse has rights of occupation, either spouse may apply to the court under s.1(2) for an order

'(a) declaring, enforcing, restricting or terminating those rights, or
(b) prohibiting, suspending, or restricting the exercise by either spouse of the right to occupy the dwelling-house, or
(c) requiring either spouse to permit the exercise by the other of the right to occupy the dwelling-house.'

A victim of domestic violence may for example apply for one of these orders whether or not she is the owner of the matrimonial home to remove her husband (an ouster order) and to allow herself back in (a re-entry order). A spouse who wishes to remove the other spouse from the house so that it can be sold with vacant possession can also apply for an order under s.1(2).

Principles to be Applied

Where an application for an order is made under s.1 the court may make such order as it thinks just and reasonable having regard to four criteria laid down in s.1(3), i.e. the conduct of the spouses in relation to each other and otherwise; their respective needs and financial resources; the needs of any children; and all the circumstances of the case. In *Richards* v. *Richards* [1984] AC 174, [1984] FLR 11 the House of Lords held that these criteria must be given equal weight so that the needs of any children must not be given priority (see Chapter 15). In *Kaur* v. *Gill* [1988] Fam 110, [1988] 2 All ER 288 the Court of Appeal held that 'all the circumstances of the case' apply to a third party's interests and needs and not just to those of spouses and children. When making an order the court can except part of

the dwelling house from occupation (e.g. where a trade or business is being carried out) (s.1(3)(a)).

(b) Rights of Occupation and Third Parties

Prior to the Matrimonial Homes Act 1967 (later the MHA 1983), the non-owning spouse's right to be housed by the other spouse was at common law only a right *in personam*, and therefore incapable of binding a third party (e.g. a mortgagee or purchaser) with or without notice of that right (see House of Lords in *National Provincial Bank Ltd* v. *Ainsworth* [1965] AC 1175, [1965] 2 All ER 472). The 1967 Act was passed to remove the problems and injustices created by the *Ainsworth* decision, particularly for wives, who at that time often had no right of ownership in the matrimonial home, and were consequently in a particularly vulnerable position should their husband decide to sell the house. The provisions of the MHA 1967 were later consolidated into the Matrimonial Homes Act 1983. Under the 1983 Act, a spouse's statutory right of occupation can be protected against a third party, provided the right of occupation has been registered as a charge on the property, i.e. as a Class F Land Charge (unregistered land) or a notice (registered land) (s.2(1)). A third party (e.g. prospective purchaser or mortgagee) takes free of those occupation rights if they are not registered (see *Kaur* v. *Gill* [1988] Fam 110, [1988] 2 All ER 288).

Whereas an order under s.1 can be applied for in respect of any dwelling-house which has at some time been the matrimonial home of the spouses concerned, a spouse is entitled to register only one charge, i.e. only occupation rights in respect of one house can bind a third party. The Chief Land Registrar can cancel registration if satisfied that the marriage has been terminated by death or decree of a court, or occupation rights have been terminated by court order (s.5), and, where a charge is already registered, can cancel the registration of the first charge (s.3).

Problems can arise when a spouse has occupation rights which are registered as a charge and which that spouse refuses to release (which must be done in writing, see s.6). In *Wroth* v. *Tyler* [1974] Ch 30, [1973] 1 All ER 897 the husband, who had contracted to sell the matrimonial home not knowing that his wife had registered a charge, was held liable in damages to the prospective purchaser for breach of contract. This sort of problem is less likely to occur today, however, as most matrimonial homes are jointly owned.

(c) Other Rights Conferred by the Matrimonial Homes Act 1983

Right to Make Payments Towards the Matrimonial Home

Where a spouse with rights of occupation in respect of whole or part of the matrimonial home makes any payment in money or in money's worth towards any liability of the other spouse in respect of rent, rates,

mortgages or other outgoings affecting the matrimonial home, that payment made or work done is to be treated as good as if made or done by the other spouse (s.1(5)), e.g. a non-owning wife with rights of occupation can remain in rented accommodation or resist a possession action by a mortgagor if she can pay the rent or mortgage.

Ancillary Powers to Order Various Payments

If the court has made an order under the Act it has jurisdiction to make certain ancillary orders, e.g. to order the spouse in occupation to pay occupation rent (s.1(3)(b)), and to impose on either spouse obligations as to repair and maintenance of the property and the discharge of any other liabilities in respect of the property (s.1(3)(c)).

Rights in Respect of Mortgaged Property

Under s.8 a spouse with rights of occupation of the matrimonial home possesses certain rights where the house is subject to a mortgage and the other spouse is the mortgagor. A mortgage does not affect a spouse's right of occupation, but a spouse with rights of occupation under the Act does not have larger rights of occupation against the mortgagee than the other spouse unless those rights are a charge affecting the mortgagee (s.8(2)). A spouse with occupation rights who can meet the other spouse's mortgage liabilities under s.1(5) (see above) can apply at any time before the action is finally disposed of to be made party to enforcement proceedings brought by a mortgagee against the mortgagor spouse. The court must allow the applicant to be made a party if there is no special reason against it and is satisfied that the applicant will be able to make payment or do such things which might affect the outcome of the proceedings, or that the mortgagor may be able to seek relief under s.36 Administration of Justice Act 1970 (s.8(2)), e.g. a wife who can afford to pay the mortgage can apply to be made party to possession proceedings brought by a mortgagee bank or building society against her husband (the mortgagor) who has defaulted on the mortgage payments. Where a spouse has registered a charge in respect of occupation of the matrimonial home, a mortgagee must notify that spouse of any enforcement proceedings (s.8(3)).

Rights in Respect of Rented Property

A spouse of a tenant has occupation rights during marriage and cannot be evicted by the other spouse without leave of the court (s.1(1)(a)) and can apply for those rights to be declared, enforced, restricted or terminated, e.g. a wife living in a rented flat could seek and be granted an ouster injunction under s.1(2)(b) whether the flat is privately rented or council accommodation and whether it is rented by herself jointly with her husband or in her husband's name alone (see e.g. *Davis* v. *Johnson*

[1979] AC 264, [1978] 1 All ER 1132 and see Chapter 15). A spouse's right of occupation for so long as the marriage subsists is to be treated as possession for the purpose of the Rent Acts. Thus a spouse is given security of tenure under the Rent Act 1977 and the Housing Act 1988. The spouse of a tenant can also take over payment of the rent if the other spouse defaults (s.1(5)).

4.5 Order for Sale of the Matrimonial Home under s.30 Law of Property Act 1925

Where the spouses are co-owners (i.e. joint tenants or tenants in common) of the matrimonial home it is held on a statutory trust for sale (ss.34 and 36 LPA 1925), which imposes an obligation on the spouses to sell the property but with a power to postpone sale. The trust for sale is considered to be a somewhat artificial device in the matrimonial context because the last thing the spouses usually intend is for the house to be sold. Where the co-owning spouses (i.e. the trustees for sale) cannot agree on the sale of the matrimonial home or any requisite consent cannot be obtained, an application can be made under s.30 Law of Property Act 1925 when the court can make 'such order as it thinks fit', e.g. an order that the house be sold. Cohabitees can also bring applications under s.30 in respect of the 'quasi-matrimonial' home, e.g. see *Re Evers' Trust* [1980] 1 WLR 1327, [1980] 3 All ER 399; *Dennis* v. *McDonald* [1982] 2 WLR 275, [1982] 1 All ER 590) (see Chapter 17). An application under s.30 can also be made by third parties (e.g. a mortgagee or the trustee in bankruptcy (see below)), as s.30 provides that 'any person interested' can apply to the court for an order directing the trustees to give effect to the trust, whereupon the court may make such order as it thinks fit.

In an application under s.30 the court only has jurisdiction to consider existing property rights. It cannot adjust property rights in the way the court can in ancillary proceedings for divorce. The court in exercising its discretion under s.30 considers the underlying purpose for which the trust was created, i.e. was the matrimonial (or quasi-matrimonial) home bought for a home or for some other purpose, such as an investment? Where the property was intended as a home, and particularly where there are young children, sale will not generally be ordered (per Salmon LJ in *Rawlings* v. *Rawlings* [1964] 2 All ER 804), but where the property is no longer needed as a home the court will make an order that the house be sold (see e.g. *Jones* v. *Challenger* [1961] 1 QB 176, [1960] 1 All ER 785). The court is not only reluctant to order sale where there are children, but also where it would be inequitable to do so, e.g. where sale would destroy a business carried out in the property (see e.g. *Bedson* v. *Bedson* [1965] 2 QB 666, [1965] 3 All ER 307). The court in a s.30 application may order occupation rent to be paid by the person in occupation (*Dennis* v. *McDonald* [1982] 2 WLR 275, [1982] 1 All ER 590).

4.6 The Matrimonial Home on Bankruptcy of a Spouse

On bankruptcy, the trustee in bankruptcy can apply for an order for sale of the matrimonial home under s.30 Law of Property Act 1925. Such application is made in the bankruptcy court (s.336(3) Insolvency Act 1986), when the court can make such order as it thinks just and reasonable applying certain statutory criteria.

In an application for sale under s.30 LPA 1925 in relation to property jointly acquired by the spouses as a matrimonial home neither spouse has a right to demand a sale while that purpose still exists (see above). However, when a person becomes bankrupt, the position is different, for part or all of the beneficial interest in the matrimonial home may vest in the trustee in bankruptcy, who must realise the bankrupt's assets to meet the demands of the creditors. On bankruptcy a conflict can sometimes arise between the interests of the family who wish to remain in occupation and the interests of the bankrupt's creditors. Before the Insolvency Act 1986 came into force, in weighing up the conflicting claims of the parties (i.e. those of the trustee in bankruptcy and those of the bankrupt's spouse and any children), the court had to ask 'whose voice in equity in all the circumstances ought to prevail?' (per Goff LJ in *Re Holliday* [1981] Ch 405, [1980] 3 All ER 385).

The court must now apply the test laid down in the Insolvency Act 1986, so that in cases involving sale of the matrimonial home on bankruptcy, the court must make such order under s.1 Matrimonial Homes Act 1983 or under s.30 Law of Property Act 1925 as it thinks just and reasonable having regard to:

'(a) the interests of the bankrupt's creditors,
(b) the conduct of the spouse or former spouse, so far as contributing to the bankruptcy,
(c) the needs and financial resources of the spouse or former spouse;
(d) the needs of any children, and
(e) all the circumstances of the case other than the needs of the bankrupt'. (s.336(4))

However, at the end of a period of one year beginning with the vesting of the bankrupt's estate in the trustee in bankrupty, 'the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations' (s.336(5)). In other words, the family have one year's breathing space before sale, after which the bankrupt's creditors outweigh all other considerations, so that sale will be ordered unless the circumstances of the case are exceptional.

Re Citro (A Bankrupt) and Another [1991] Ch 142, [1990] 3 All ER 952, [1991] 1 FLR 71 concerned two matrimonial homes, each owned by one of two brothers who were in business together but who had become bankrupt. At first instance, the judge applying *Re Holliday* [1981]

declared that the beneficial interest in each home was owned by the bankrupt and his wife in equal shares, but postponed orders for sale until the youngest children of the bankrupts attained the age of 16, as immediate sale would cause hardship. The Court of Appeal reversed the decision, ordering that sale should not be postponed. Nourse LJ stated that the broad effect of earlier authorities was that the voice of the creditors would usually prevail over the voice of the other spouse so that sale would be ordered within a short period. The voice of the other spouse would only prevail in exceptional circumstances. His Lordship stated that, while one could sympathise with a wife who would have to move out of the matrimonial home, possibly unable to find comparable housing and with schooling and other problems, these were not exceptional circumstances justifying the refusal of an order for sale. *Re Holliday*, where a sale was not ordered, was distinguished as the wife in that case had succeeded in postponing sale because it was unlikely that postponement would cause the creditors any great hardship.

On bankruptcy, sale of the matrimonial home is therefore likely to be ordered, unless the circumstances are exceptional.

Summary

1. Spouses during marriage have the same property rights as other persons with some statutory exceptions (eg. s.37 MPPA 1970, s.1 MWPA 1964, s.17 MWPA 1882), but notably in respect of statutory rights of occupation under the MHA 1983.
2. Questions of entitlement to property usually arise on divorce, not during marriage, although a spouse may wish to establish a right of ownership in the matrimonial home to defeat a claim to possession (e.g. by a mortgagee or the trustee in bankruptcy), to assert a claim against a prospective purchaser, or to establish an interest in property on the death of a spouse rather than applying under the Inheritance (Provision for Family and Dependants) Act 1975 (see Chapter 16) when a spouse has made no or inadequate provision in a will. These rules for acquiring rights in property are also applicable to cohabitees although certain statutes specifically apply only to spouses, e.g. s.37 MPPA 1970, s.1 MWPA 1964.
3. Where spouses own property jointly, they own it as joint tenants or tenants in common. Rights in property can be legal rights or equitable rights (i.e. rights arising under a trust). Property can be owned simultaneously in law and equity.
4. Husbands and wives are separate personalities for the purpose of property law; there is no doctrine of community of property in English Law as there is in some jurisdictions.
5. A dispute between spouses during marriage can be settled by an application under s.17 MWPA 1882, s.37 MPPA 1970, s.1 MWPA 1964, s.30 LPA 1925, or by a declaration in the county court or High Court.
6. Ownership of personal property is presumptively determined by who purchases the property and in whose name it is held. With gifts of personal property, where there is no deed, ownership depends on the intention of the donor and

whether the gift was transferred. Rights of ownership in personal property can be acquired expressly or impliedly (i.e. under a trust, estoppel or contract), and often without formalities.

7. With bank accounts, funds in the account presumptively belong to the spouse or spouses in whose name the account is held, but the presumption can be displaced by a contrary intention.
8. Disputes about ownership of the matrimonial home usually arise on divorce, when a property adjustment order can be made at the discretion of the court under the MCA 1973. Contracts for the sale of land and trusts in respect of land must be in writing (s.2 LP(MP)A 1989; s.53 LPA 1925), but an interest can be acquired under a trust (resulting or constructive) (s.53(2) LPA 1925), or possibly by proprietary estoppel. An interest can also be acquired under s.37 MPPA 1970.
9. Spouses have statutory rights of occupation under the MHA 1983. A right of occupation in respect of the matrimonial home can be enforced against a third party, provided the non-owner has registered his or her right, i.e. by a Class F land charge. The MHA 1983 confers other rights on spouses, e.g. to apply for ouster injunctions (see Chapter 15), to take over payment of rent or mortgage, or to be joined in a mortgage possession action.
10. Spouses and others can apply for an order for sale of the matrimonial home under s.30 LPA 1925.
11. On bankruptcy, the court under the Insolvency Act 1986 in deciding whether to order sale of the matrimonial home must weigh up the needs of the creditors, bankrupt's spouse and children, and all the circumstances of the case, but one year after bankruptcy a sale will be ordered unless the case is exceptional.

Exercises

1. 'The present law is unsatisfactory because its application may not result in co-ownership of property even when a married couple desire this. Actual ownership may be held to depend on factors which neither party considered significant at the time of acquisition' (Law Commission, *Family Law: Matrimonial Property*, 1988).

   What do you think?
2. Advise Jane of her rights of ownership in respect of the following items of property, on the basis that she will not be seeking a divorce from her husband, David:

   (i) Shares bought by Jane from funds in their joint bank account, which mainly consists of David's earnings.
   (ii) A washing machine bought by David.
   (iii) A painting by Picasso bought at auction by Jane but paid for by David.

3. Wendy's husband, Henry, who has been adjudicated bankrupt, is the sole owner in law and equity of the matrimonial home. Henry had told her several times the house was as much hers as his, but Wendy has made no financial contribution to the property, although she did decorate the bedrooms.

   Advise Wendy.

Further Reading

Clarke, 'Children of bankrupts' (1991) J Ch L 116.
Ferguson, 'Constructive trusts – a note of caution' (1993) LQR 114.
Gardner, 'Rethinking family property' (1993) LQR 263.
Gray, *Elements of Land Law* (1987) Butterworths.
Hayton, 'Equitable rights of cohabitees' (1990) Conv 370.
Law Commission, *Family Law: Matrimonial Property* (Law Com No 175, 1988).
Miller, 'Occupation of the family home and the Insolvency Act 1985' (1986) Conv 393.
Warburton, 'Trusts, common intention, detriment and proprietary estoppel' (1991) Trust Law International 9.

(see also reading list to Chapter 17.)

5 Financial Provision for Spouses during Marriage

In this chapter we look at the financial provision that can be made for spouses during marriage both by the courts and by the State. Financial provision for spouses on divorce is considered in Chapter 8. Spouses (and cohabitees) have obligations to provide financial support for their children (see Chapter 11).

5.1 Introduction

At one time at common law a husband had a duty to maintain his wife financially, in return for her giving up to him any property she owned on marriage. Today, however, spouses have mutual obligations of financial support to each other during marriage so that either spouse can apply for financial provision. The obligation of spouses to provide financial support for each other during marriage and sometimes on divorce is one of the most important differences between marriage and cohabitation, for a cohabitee has no duty to maintain his or her partner either during the relationship or on its breakdown, although cohabitees do have duties of financial support towards their children (see Chapter 17).

Most spouses seek financial provision from the courts on marriage breakdown (i.e. on divorce, nullity or judicial separation), but sometimes a spouse may need to seek maintenance from the other spouse during marriage. Financial provision during marriage can be sought under the Domestic Proceedings and Magistrates Courts Act 1978 from the magistrates' court (i.e. the family proceedings court) or under s.27 Matrimonial Causes Act 1973 from the county court or High Court. In practice, applications are not very common. Where the parties are still married, but divorce proceedings are pending, a spouse can apply for maintenance pending suit under s.22 MCA 1973 (see Chapter 8). Rather than applying for relief under these statutes some spouses make private agreements (i.e. maintenance or separation agreements), which are subject to the general rules of contract law, but which are open to closer scrutiny by the courts than ordinary contracts. Spouses can also seek financial support from the State.

5.2 Applications under the Domestic Proceedings and Magistrates' Courts Act 1978

Under Part I Domestic Proceedings and Magistrates' Courts Act 1978 (DPMCA 1978) magistrates' courts have jurisdiction to order a spouse to make financial provision to the other spouse and/or to make financial provision for a child of the family, although the Child Support Act 1991 has severely cut back the courts' powers to make provision for children (see Chapter 11). The magistrates' jurisdiction originated in the nineteenth century in the criminal jurisdiction of the magistrates' court to make maintenance orders (also separation and custody orders) where a husband was convicted of an aggravated assault on his wife, and was the first real statutory protection for wives who were the victims of domestic violence. Later Acts extended these powers and the DPMCA 1978 was eventually passed to bring the magistrates' courts' jurisdiction into line with that of the divorce courts, so that the grounds for making maintenance orders and the guidelines that must be applied are virtually the same in both courts. Magistrates also have jurisdiction under the 1978 Act to grant orders for the physical protection of spouses and their children (see Chapter 15).

Orders

A party to a marriage can apply under the DPMCA 1978 for one or more of the following orders:

(i) an order for periodical payments and/or a lump sum (s.2);
(ii) a consent order for periodical payments and/or a lump sum (s.6); or
(iii) an order for periodical payments where the parties have been living apart by agreement and one of the parties has been making periodical payments (s.7).

The magistrates' court, unlike the divorce court, cannot make secured periodical payments or property adjustment orders. There is no limit on the amount of periodical payments that can be ordered, but lump sums must currently not exceed £1000. Lump sums can be ordered to be paid by instalments (s.75 Magistrates' Courts Act 1980) and the instalments can be varied (s.22 DPMCA 1978). The magistrates have jurisdiction to make interim orders (s.19 DPMCA 1978).

(i) Orders for Periodical Payments and Lump Sums

A party to a marriage can apply under s.2 for an order for periodical payments and/or a lump sum, which can be made in favour of a spouse and/or to or for the benefit of a child of the family, although most child maintenance is now sought, calculated and enforced under the Child

Support Act 1991 (see Chapter 11). An order can be sought on one or more of the following grounds (s.1):

(a) Failure of the other spouse to provide reasonable maintenance for the applicant spouse There is no definition of 'reasonable maintenance'. Each case depend on its facts, but the court, when deciding whether and how to make an order on this ground or on ground (b) below, must consider the matters laid down in s.3(1) and (2), first consideration being given to the welfare of the child.

(b) Failure of the other spouse to provide, or to make proper contribution towards, reasonable maintenance for any child of the family This is similar to ground (a) but relates to failure to provide reasonable maintenance to a child of the family. A child of the family is defined in similar terms to a child in the divorce legislation, i.e. a child of both parties to the marriage, and any other child who has been treated by both parties as a child of the family, other than a foster-child placed with them by a local authority or voluntary organisation (s.88(1) DPMCA 1978 as amended by Sched.13 para.43(b) Children Act 1989). Where a child is not a child of the respondent (e.g. a step-child or private foster-child) the court must consider the extent of any responsibility and the basis on which the respondent assumed that responsibility for the child (s.3(4)). No order can be made in favour of a child who has attained the age of 18, unless the child is being educated or undergoing vocational training or special circumstances exist (s.5(1) and (3)).

(c) The other spouse has behaved in such a way that the applicant spouse cannot reasonably be expected to live with that spouse This ground is identical to the behaviour fact for divorce in s.1(2)(b) MCA 1973 (see Chapter 7), and the magistrates take the same approach as the divorce court, i.e. whether the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent, taking into account the personalities of the parties (*Bergin* v. *Bergin* [1983] 1 WLR 279, [1983] 1 All ER 905). This ground could include, e.g., adultery or violent behaviour.

(d) The other spouse has deserted the applicant spouse This ground is similar to the desertion fact for divorce, although desertion need not be for at least two years.

Matters which the Court Must have Regard to in Exercising its Powers under s.2

When deciding whether to make an order under s.2 and, if so, in what manner, the court must have regard to all the circumstances of the case (including certain specified matters), first consideration being given to the welfare of any child of the family (s.3 of the 1978 Act as amended by the

Matrimonial and Family Proceedings Act 1984). These guidelines are almost identical to those the divorce court must apply when making orders for ancillary relief on divorce (see Chapter 8). The magistrates must take into account *inter alia* actual or potential income and earning capacity, financial needs and obligations, standard of living, age of the parties, duration of the marriage, physical or mental disabilities, contributions to the welfare of the family, and conduct of the parties it would be inequitable to disregard (s.3(2)). Specific additional matters must be considered when making orders to or for the benefit of a child of the family (s.3(3)) and in favour of a child of the family who is not a child of the respondent (s.3(4)).

(ii) Consent Orders

Under s.6 DPMCA 1978 the magistrates can make a consent order for financial provision (i.e. periodical payments and/or lump sum) for a spouse and/or to or for the benefit of a child of the family, provided either party has agreed to make such provision and it is not contrary to the interests of justice to do so (s.6(1)(a) and (b)). There is no limit on the amount of the lump sum payable as there is for a lump sum made under s.2 (see above). The court can alter the terms of the agreement for financial provision if the original terms are contrary to the interests of justice or fail to provide for or make proper contribution towards the financial needs of the children. Consent orders are rarely sought.

(iii) Orders for Periodical Payments where the Parties have been Living Apart by Agreement and One Party has been Making Periodical Payments

Under s.7 the court can make an order for periodical payments (not a lump sum) to a spouse and/or child of the family where the parties have lived apart for a continous period of more than three months but are not in desertion, and where in the three months preceding the application one spouse has been making periodical payments to the other spouse and/or a child of the family. The guidelines in s.3 apply. Applications under s.7 are rarely made. Most applications for maintenance during marriage, if made at all, are for financial provision under s.2.

Duration of Orders

The duration of an order for periodical payments to a spouse is at the discretion of the court, but the order cannot begin earlier than the date of the application and terminates on the death of either party (s.4(1)). An order for periodical payments for a spouse can continue in force even though a marriage is subsequently dissolved or annulled, but automatically terminates on the remarriage of the payee except in respect of any arrears owing (s.4(2)). The maximum duration for interim orders for

periodical payments is three months (s.19(5)(b), but this may be extended for a further period or periods not exceeding three months (s.19(6)(b)). The duration of orders in favour of children is governed by s.5.

Orders are effective and can be enforced where the parties are living together, but periodical payments orders made in favour of a spouse by consent or otherwise or for interim maintenance cease to be effective where the parties live together or resume living together for a continuous period of more than six months (s.25(1)). An order in favour of a child is not affected by resumed cohabitation, unless the court directs (s.25(2)). An order under s.7 (i.e. based on the voluntary agreed separation of the parties) ceases to be enforceable where the parties resume living together (s.25(3)).

Restriction on Orders where there are Children

Where an application is made for any order and there is a child of the family under the age of 18, the court must not dismiss the application or make a final order until it has decided whether to exercise any of its powers under the Children Act 1989 with respect to the child (s.8). As proceedings under the 1978 Act are family proceedings, the magistrates can make any order under s.8 Children Act 1989 (i.e. residence, contact, prohibited steps or specific issue order) (see Chapter 9).

Variation

Under s.20 the court has wide powers to vary or revoke periodical payments on an application by either party to the marriage, and can suspend and revive payment, backdate the variation to the date of the application and, in some circumstances, substitute an order for periodical payments with an order for a lump sum whether or not an order for a lump sum has already been made. In exercising its powers to vary orders, the court must, so far as it appears just to do so, give effect to any agreement between the parties, but where there is no agreement or the court decides not to give effect to an agreement, then the court must consider all the circumstances of the case (including any change of the matters to which the court was required to have regard when making the order applied for), first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18.

Enforcement of Orders

An order for the payment of money under the 1978 Act is enforceable as a 'magistrates' court maintenance order' (s.32(1)) and can be enforced by the Clerk of the Court through whom payment is made. An order can be enforced by an attachment of earnings order (i.e. an order that the payer's employer deducts certain payments from the payer's pay) whether or not the payer has defaulted, i.e. it can be made when the order is made (Maintenance Enforcement Act 1991). Under the Maintenance Enforce-

ment Act 1991 the party ordered to make payment can be fined up to £5000 for failure to make periodical payments and under the same Act the court can order payment to be made by standing order or by direct debit. In the last resort, as breach of an order is contempt of court, the payer may be committed to prison. A warrant of distress (i.e. where the payer's property is seized and the proceeds are used for the payment of the debt) is another option, but rarely used. Where a debt is very substantial, the order can be registered in the High Court.

5.3 Applications under s.27 Matrimonial Causes Act 1973

Under s.27 Matrimonial Causes Act 1973 a party to a marriage can apply to a divorce county court or the High Court for an order for periodical payments (secured or unsecured) and/or a lump sum for him or herself and/or to or for the benefit of a child of the family on the ground that the other party has failed to provide reasonable maintenance for the applicant (s.27(1)(a)), or has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family (s.27(1)(b)). These grounds are the same as those in s.1 Domestic Proceedings and Magistrates' Courts Act 1978 (above), and allow an application to the superior courts, whether or not any other matrimonial relief is being sought. Applications are very rare (there were only 71 in 1989 and no reference made in the 1991 *Judicial Statistics*).

The court, when considering whether the ground is made out, and, if so, what order to make, performs the same sort of exercise as the court does when making an order for ancillary relief on divorce when applying the 's.25 guidelines', although because the parties are not divorcing, the clean break doctrine (see Chapter 8) is not relevant to an application under the Act.

5.4 Private Separation and Maintenance Agreements

Sometimes during marriage spouses make their own agreements about financial provision, i.e. a 'separation agreement' in which the parties agree to live apart and make provision for maintenance and other matters relating to property and care of the children, or a 'maintenance agreement' which specifically provides for financial provision. These agreements, which can be oral or written, are contracts and therefore subject to the general rules of contract, i.e. there must be an intention to enter into legal relations, the agreement must be supported by consideration or made under seal, and there must be no evidence of e.g. duress, misrepresentation or mistake. The remedies of damages, specific performance and injunction are available depending on the terms of the agreement and the circumstances relating to its breach. However, unlike ordinary contracts, contracts made during marriage are subject to closer

scrutiny by the courts, and it is not possible to oust the jurisdiction of the court. Any provision in a maintenance agreement restricting any right to apply to a court for an order containing financial arrangements is void (s.34(1) MCA 1973). The court can also vary or revoke the terms of a maintenance agreement or insert new terms on application by either party to the marriage (s.35 MCA 1973). Where a maintenance order provides for payments to continue after the death of either party, the surviving party or the deceased's personal representatives can apply to any county court or the High Court for variation of the agreement (s.36 MCA 1973).

Although spouses can make their own private agreements, they should be wary of the dangers of doing so, particularly where such agreements are expressed as being in full and final settlement. In *Edgar* v. *Edgar* [1980] 1 WLR 1410, [1980] 3 All ER 887 (see Chapter 8) the wife during marriage entered into a separation agreement, which provided *inter alia* that she receive a lump sum. On divorce, she made an application for ancillary relief and the judge increased the lump sum. On appeal, the Court of Appeal held she was bound by the earlier private agreement, as there was no evidence of inequality of bargaining power. There had been no misconduct by her husband during negotiations leading up to the agreement, and she had entered into the agreement against legal advice. The increased order was therefore set aside.

Private maintenance agreements are not precluded by the Child Support Act 1991 but such an agreement does not prevent any party to the agreement applying to the Child Support Agency for a maintenance assessment with respect to the child. Any provision in the agreement restricting the right of a person to apply for a maintenance assessment is, however, void (s.9(4) CSA 1991).

5.5 Financial Provision from the State

State welfare benefits take many different forms and eligibility is determined by widely different and frequently complicated rules, depending on the particular category of benefit in question. A full discussion is outside the scope of this book, but it is necessary to describe briefly the principal forms of benefit, since the rights and obligations attaching to a number of categories of State benefit can have a profound economic effect upon the persons and families concerned.

State benefits divide into two categories: those which are income-related and those which are not. The latter category subdivides into contributory and non-contributory benefits.

The income-related benefits which we will consider are Income Support and Family Credit (the most important benefits) and the Social Fund. Of the non-means-tested benefits only the non-contributory Child Benefit will be considered. Lastly, the 'liable relative' procedure, whereby the DSS (Department of Social Security) can recover payments of Income Support, in whole or in part, from 'liable relatives' is described.

Income Support

Persons over the age of 18 (married or unmarried) and certain persons over the age of 16 (e.g. those who have a child or suffer severe handicap) can claim Income Support for him or herself and other members of the family unit (i.e. spouse, partner, children under 19 living with the claimant for whom the claimant is responsible). To qualify for Income Support the claimant must have no income or an income below an 'applicable amount', must not be in paid work of more than 16 hours a week, and must be available for and actively seeking employment. The 'applicable amount' is specified by regulations. With spouses or cohabitees the income and capital of the whole family unit (except children's capital) is aggregated. Where spouses or cohabitees are living separately they can claim separately and their income and capital can be treated separately. If the claimant's actual income is below the 'applicable income' the difference is paid as benefit. Capital assets are also taken into account, and spousal and child maintenance payments may reduce entitlement.

Family Credit

Family Credit can be claimed by low-income families with children where the claimant or his or her partner is working. Single persons or couples can apply. To qualify for maximum Family Credit the income of the family (excluding Child Benefit, the first £15 of any maintenance payments and children's earnings) must be below the 'applicable amount' determined by regulations. Capital is also taken into account.

The Social Fund

Persons in receipt of Income Support or Family Credit can apply for a non-discretionary grant from the Social Fund, e.g. for maternity, funeral and cold-weather expenses. Persons in receipt of Income Support can apply for discretionary repayable loans from the Social Fund for 'important intermittent expenses' to meet short-term needs or living expenses for a period of not more than 14 days. Loans can also be granted for expenses caused by an emergency or disaster, whether or not the claimant is on Income Support.

Child Benefit

Child Benefit is paid weekly to those responsible for one or more children (usually the mother) at a flat rate for each child regardless of need. A child for this purpose is: a child under 16; a child under 18 who is not receiving full-time education but in respect of whom certain conditions are satisfied; or a child under 19 who is receiving full-time non-advanced education (i.e. not studying for a degree or HND). A person is responsible for a child if he or she has a child living with him or her, or is contributing to the cost of

providing for a child at a weekly rate not less than the Child Benefit payable, i.e. the claimant need not be a parent or relative of the child. When more than one person cares for the child (e.g. where a joint residence order is in force (see Chapter 9)), the parents (or other persons) can agree how to share Child Benefit, or the Secretary of State can decide. Where there are competing claims for Child Benefit, a person with whom the child lives takes priority over a person contributing to the cost of providing for a child; a wife takes priority over her husband where they are residing together; a parent takes priority over a non-parent; and an unmarried mother takes priority over an unmarried father where they are residing together.

'Liable Relatives'

A man or a woman is liable for the purposes of Income Support to maintain his or her spouse and any children of whom he or she is the parent, i.e. a married person must maintain the other spouse and any children, but cohabitees must only maintain their children. Liability to maintain a spouse terminates on divorce unless a court orders otherwise, but liability to maintain a child, like parental responsibility, continues. A man or woman is only liable to maintain his or her child by birth, not any 'child of the family' (i.e. not a step-child or foster-child) unless a court orders otherwise. The liable relative legislation applies only in cases where a claim has been made for Income Support and enables the DSS Benefits Agency to trace liable relatives who must contribute to the claimant's support. The Department will, after identifying the liable relative, attempt to achieve a voluntary agreement with him or her. Failing this, application may be made to the magistrates' court by the Secretary of State for an order directing the liable relative to pay regular sums, which are usually ordered to be paid weekly. Contribution is determined by a formula. Where a liable relative has financial obligations for a child the caring parent may be obliged to apply for child support and provide the Child Support Agency with information about the liable parent (see Chapter 11).

Summary

1. The common law obligation of a husband to maintain his wife has largely been superceded by statute. Husband and wives have a mutual duty to provide each other with financial support during marriage.
2. Financial provision for a spouse can be sought from the courts during marriage under DPMCA 1978 and under s.27 MCA 1973.
3. Some spouses make private maintenance agreements.
4. Benefits can be paid by the State for spouses and their children where the spouses (and others) are below certain income levels, e.g. Income Support, Family Credit, and payments from the Social Fund. Child Benefit is awarded at a

flat rate for each child to a spouse (usually the mother) or others who are responsible for a child.

5. Certain persons are 'liable relatives' for the purpose of State benefits and may be liable to make payment.

Exercises

1. Prudence, who has a religious objection to divorce, is suffering violence from her spouse who is also failing to provide her and their children (including a local authority foster-child) with maintenance.

   Advise her.

2. Gill, a 16-year-old with a small baby, but who works for 18 hours per week, wants to know whether she is entitled to any welfare benefits.

   Advise her.

3. Sue and Mike, who are divorced, have a joint residence order in their favour in respect of Bob, who is 17 and is studying for his A levels.

   Who is entitled to Child Benefit, if any?

Further Reading

Wood, 'The Social Security Act 1990: the clean break rejoined' (1991) Fam Law 31.

Part II

Divorce and its Consequences

In Part II we consider divorce and its consequences. Chapter 6 deals with the evolution of divorce law, because without an understanding of the historical background it is difficult to understand the present law and arguments in favour of reform. In Chapter 7 we consider how a divorce is obtained and other matters, such as conciliation and proposals for the reform of divorce law. Chapter 8 deals with the financial and property consequences of divorce. Although mention is made in Part II of children involved in the divorce process, children on divorce (e.g. questions of whom the child should live with after divorce, contact and parental responsibility) are dealt with in Chapter 10 in Part III on Children.

6 The Development of Divorce Law

In this chapter we consider the development of divorce law, but first the decrees of presumption of death and of judicial separation are briefly considered.

6.1 Introduction

A decree absolute of divorce terminates a valid marriage and leaves each party free to remarry. A decree absolute of nullity in the case of a void marriage does not terminate the marriage because a valid marriage was never contracted (i.e. the marriage was void *ab initio*), although a decree provides evidence that the marriage is void and allows the parties to seek ancillary relief under Part II MCA 1973. A party to a void marriage can therefore legally contract a valid marriage without obtaining a decree of nullity. A voidable marriage is a valid marriage until it is avoided by decree absolute of nullity, after which each party can legally remarry. A marriage is also terminated by death. A decree of judicial separation does not terminate a marriage, but relieves the spouses of any legal obligation to continue living together.

Decree of Presumption of Death

Where a spouse is missing and thought dead the other spouse can petition for a decree of presumption of death and dissolution of marriage under s.19 MCA 1973. If a decree is granted, the petitioner can contract another marriage which remains valid even if the spouse presumed dead subsequently reappears. The court can grant a decree of presumption of death under s.19 if satisfied that reasonable grounds exist for supposing the petitioner's spouse is dead. A spouse is presumed dead if he or she has not been seen for a continuous period of at least seven years. The petitioner must, of course, make reasonable enquiries to establish whether or not the other spouse is alive. A spouse who has been granted a decree of presumption of death cannot commit the crime of bigamy.

Decree of Judicial Separation

A decree of judicial separation relieves the spouses of the duty to live together and can be sought under s.17 MCA 1973. Decrees of judicial separation were once more commonly sought than they are today because divorce was not possible in the first three years of marriage unless there was exceptional hardship on the part of the petitioner or exceptional

depravity on the part of the respondent. Before the county courts and magistrates' courts were given jurisdiction to grant injunctions to protect victims of domestic violence without the need for other proceedings (see Chapter 15), decrees of judicial separation were sometimes sought as a means of obtaining protection against domestic violence as an injunction could be granted in those proceedings.

To obtain a decree of judicial separation, the petitioner must satisfy the court that one of the facts in s.1(2) MCA 1973 exists, i.e. adultery, unreasonable behaviour, desertion, two years' separation with consent, or five years' separation (see Chapter 7). There is no need to establish that the marriage has irretrievably broken down. Once a decree is granted, the petitioner is no longer obliged to live with the respondent (s.18(1)), but the spouses are not obliged to separate. Where a decree of judicial separation is in force and separation is continuing, the surviving spouse is not entitled to the deceased's spouse's property on his or her intestacy, but judicial separation does not affect a will (s.18(2)). The main advantage of obtaining a decree of judicial separation is that the court can make orders for ancillary relief under Part II MCA 1973. While judicial separation is not so common today (1747 decrees granted in 1991), it is sometimes sought by spouses who do not wish to divorce or who cannot divorce because one year of marriage has not elapsed. Divorce is not precluded by a previous judicial separation and the divorce court can treat the decree of judicial separation as proof of one or more of the five facts alleged for divorce (s.4).

Divorce

Divorce is very common worldwide, but Britain, where more than one in three marriages ends in divorce, has the highest divorce rate in Western Europe, being one-third higher than in France and six times higher than in Italy (Eurostat, the statistical office of the European Commission, July 1992). As a result of the high divorce rate, many spouses and children experience the trauma of divorce, and the institutions of the family and of marriage may perhaps be under threat. The number of one-parent families, for instance, has more than doubled in the past twenty years. There is also concern about the economic and financial consequences of divorce, not just for the parties, but for the financial burden divorce throws on to the State. Vast sums of money are paid out on divorce in the form of welfare payments and legal costs, and divorce also causes absenteeism from work and therefore loss of business profits.

The number of divorces has fluctuated over the years. It rose sharply after the Second World War, again in the early 1950s with the introduction of Legal Aid, and also in the early 1970s when the grounds for divorce were extended. In the last few years the number of divorces, although still high, has levelled out. Various factors have been suggested for the increase in divorce, e.g. greater social mobility, the liberation of women, longer life-expectancy, the social acceptability of divorce, the

desire to form companionate marriages, the rise of the permissive society and changing attitudes to marriage generally. The decline of religion and the erosion of the ecclesiastical concept of the sanctity of marriage may also have had an effect. The more liberal divorce law introduced by the Divorce Reform Act 1969 may also have been responsible for the increase in divorces by making divorce easier to obtain. Some people have argued in favour of a more restrictive divorce law to preserve the institutions of marriage and the family, but marriages probably end despite rather than because of divorce law.

In the last few years, because of increasing dissatisfaction with the law, there have been proposals for reform of the substantive law (i.e. the ground for divorce) and of procedure. Proposals for reform have generally been consumer-orientated, the emphasis being on minimising the intensity of divorce disputes and encouraging agreement, thereby making the process less traumatic for spouses and children. If hostility in respect of obtaining a divorce is minimised, the parties are more likely to reach agreement about the consequences of divorce, i.e. in respect of money, property and children. The growth of the conciliation movement (see Chapter 7) has helped to reduce conflict by encouraging spouses on divorce to reach agreement about matters in dispute. The emphasis of reform has been on encouraging the parties to look to the future and to consider the consequences of divorce.

6.2 Development of the Substantive Law

Until the mid-nineteenth century, the ordinary courts and the ecclesiastical courts had no jurisdiction to grant decrees of divorce, although the latter could grant a limited sort of divorce called a divorce *a mensa et thoro*, which, like the decree of judicial separation today, relieved the parties of the legal obligation to live together, but did not leave them free to remarry. The Christian idea of marriage as an indissoluble life-long union prevailed. Anyone wishing to divorce could only do so by private Act of Parliament, a complex, lengthy and expensive procedure only available to a small minority of people. Partly to remedy the inadequacies of the Act of Parliament procedure, the Matrimonial Causes Act 1857 eventually introduced judicial rather than legislative divorce and established the Court of Divorce and Matrimonial Causes with jurisdiction to grant decrees of nullity and divorce. However, divorce continued to be difficult to obtain as there was only one ground for divorce, namely that the respondent had committed adultery, which was an acceptable ground to the Church as there was biblical precedent for it. Besides adultery, a party also had to prove the absence of any collusion, condonation or connivance between the parties. It was particularly difficult for wives to divorce as wives had to prove aggravated adultery, i.e. adultery plus some additional factor, such as incest, cruelty, bigamy, sodomy or desertion. Aggravated adultery was eventually abolished by the Matrimonial Causes

Act 1923, after pressure for reform by the female emancipation movement. Thus, a marriage could only be dissolved by an innocent petitioner proving that the respondent had committed the matrimonial offence of adultery. The terminology was that of the criminal law.

Later on, the Matrimonial Causes Act 1937 introduced further grounds for divorce: cruelty; desertion for a continuous period of at least three years; and incurable insanity. Other than on the insanity ground, divorce was still only possible on proof of a matrimonial offence. The 1937 Act also introduced a bar on divorce in the first three years of marriage, in response to concern that the new more liberal grounds would undermine the institution of marriage. Condonation, connivance and collusion remained as bars.

After 1937, and particularly after the Second World War, there was a sharp rise in the number of people wishing to divorce, and there was a growing dissatisfaction with the law. It seemed wrong to have to prove a matrimonial offence, thereby apportioning blame, when both spouses were often responsible for marriage breakdown. It seemed wrong for a restrictive divorce law to perpetuate a dead marriage which had completely broken down. It was also easy to abuse the system, for instance by fabricating adultery. In response to this general dissatisfaction, a Royal Commission, the Morton Commission, was established, which in its report in 1956 (Cmd 9678) recommended the retention of the matrimonial offence doctrine as the basis for a good divorce law. This was a considerable setback for the proponents of reform, and it was not until the mid-1960s that the publication of two reports (one by the Church of England and the other by the Law Commission) led to changes in the law. In 1963 the Archbishop of Canterbury appointed a committee to study divorce, which in its report (*Putting Asunder*, 1966) recommended that the doctrine of the matrimonial offence should be abolished and be replaced by a principle of irretrievable breakdown of marriage, which would be proved by holding an inquest into the causes of breakdown. Shortly after the publication of *Putting Asunder*, the Law Commission published a report (*Reform of the Grounds of Divorce: The Field of Choice*, Cmnd 3123, 1966) stating that the objectives of a good divorce law should be:

> '(i) To buttress, rather than to undermine the stability of marriage; and
> (ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.'

The Law Commission concluded that a divorce law based on fault (i.e. on a matrimonial offence) failed to satify both these objectives, and, while agreeing with the Archbishop's committee that irretrievable breakdown should be the sole ground for divorce, rejected its proposal that breakdown should be established by holding an inquest into the causes of breakdown.

The Law Commission considered that such an inquest would be distressing for the parties, expensive, time-consuming and essentially untriable, and proposed instead that breakdown should be established on proof of one or more of five facts, three of which would be based on the old matrimonial offences, and the other two on periods of separation. The five facts proposed were: adultery plus intolerability; unreasonable behaviour; desertion for a period of at least two years; two years' separation with consent to the divorce; and five years' separation. The Law Commission also recommended that the new divorce law should incorporate certain policy objectives. It should encourage reconciliation, prevent injustice to economically vulnerable spouses, and should protect children.

The Law Commission's recommendations were enacted in the Divorce Reform Act 1969 (later consolidated in the Matrimonial Causes Act 1973), which came into force on 1 January 1971. Except for certain amendments (notably the 'clean break' provisions introduced by the Matrimonial and Family Proceedings Act 1984) the reforms introduced by the 1969 Act remain the law today. We therefore have a hybrid law of divorce with fault and no-fault grounds, so that the matrimonial offence doctrine remains, and is particulary prevalent, as about three-quarters of divorces today are sought on the basis of adultery or unreasonable behaviour. The Law Commission's belief that most couples would use the new separation grounds was never realised. Allegations of adultery and unreasonable behaviour by petitioners cause hostility and bitterness between the parties, so that one of the main objectives of the 1969 divorce reform (i.e. to minimise bitterness, distress and humiliation) has never been achieved. The failure of the present law to satisfy the original objectives of a good divorce law has formed the basis of proposals for reform (see Chapter 7).

6.3 Development of Procedure

Besides changes in the substantive law (i.e. the ground of divorce), there have also been changes in divorce procedure. Divorce proceedings, because divorce was considered a serious matter, were first heard in London by senior judges, but undefended divorces were later transferred to specially designated divorce county courts (or the Divorce Registry in London), although defended divorces were heard in the High Court. The most important procedural development, however, was the introduction of the special procedure for undefended divorces, which has arguably had a more significant impact on divorce law than substantive law developments.

Before the introduction of the special procedure, defended and undefended divorces were heard in open court with the petitioner giving oral evidence to prove the fact or facts alleged. This was distressing for the parties, who would have intimate details of their marriage exposed in open court, expensive for the parties and the Legal Aid Fund, and also time-

consuming for the court. With the sharp increase in the divorce rate, particularly in the early 1970s with the introduction of more liberal grounds for divorce by the Divorce Reform Act 1969, the courts became overloaded, despite most undefended divorces taking as little as ten minutes to be heard. Divorce procedure was failing to bury a dead marriage with the minimum of distress and humiliation, one of the main aims of a good divorce law.

During the 1970s the special procedure was introduced to remedy these defects in procedure. Latey J in *R* v. *Nottinghamshire County Court ex parte Byers* [1985] 1 WLR 403, [1985] FLR 695 stated that the objectives of the special procedure were to achieve 'simplicity, speed and economy'. In 1973 the special procedure was only available for childless couples divorcing with consent, but in 1975 it was extended to all childless couples, except those petitioning on the basis of unreasonable behaviour, and finally in 1977 extended to all undefended divorces.

All undefended divorces today are therefore dealt with in what is essentially an administrative procedure with minimal judicial involvement. The district judge examines the papers and affidavit evidence to establish whether the fact alleged is proved and that the marriage has irretrievably broken down, and whether there is any reason why the decree should not be granted. A list of petitioners who have satisfied the district judge is drawn up and later read out in open court by the judge, which is all that remains of the public hearing of divorce. There is no need to attend court if a divorce is undefended. Defended divorces, on the other hand, which are very rare (no decrees were granted in defended cases in 1991), are still heard in the High Court in open court with the parties giving oral evidence.

Summary

1. A decree absolute of divorce terminates a valid marriage and allows the parties to remarry should they wish to do so.
2. A decree of presumption of death (s.19 MCA 1973), if granted, allows a party to a marriage to contract a valid second marriage where the party to the first marriage is presumed dead.
3. A decree of judicial separation relieves the petitioner of the duty to cohabit with the respondent (ss.17 and 18 MCA 1973).
4. Divorce is very common and there is concern about the increase in divorce, the problems it creates for the parties and their children and the consequences it has for the State and for the institution of marriage.
5. A decree of divorce could not be obtained in the courts until the MCA 1857 which introduced judicial divorce on the ground of adultery, although wives had to prove aggravated adultery. Aggravated adultery was abolished by the MCA 1923.
6. The grounds of divorce were extended by the MCA 1937 to cover adultery, cruelty, desertion for three years and incurable insanity.

7. The Divorce Reform Act 1969 (later consolidated in the MCA 1973) introduced the present ground for divorce, namely irretrievable breakdown of marriage on proof of one or more of five facts, i.e. adultery, unreasonable behaviour, desertion for at least two years, two years' separation with consent, and five years' separation. Despite the introduction of a more liberal divorce law and the attempt to move away from the doctrine of the matrimonial offence, three of the five facts are still based on fault.
8. The special procedure was introduced for undefended divorces during the 1970s.

Exercises

1. Do you think that a good divorce law can ever buttress the stability of marriage?
2. What reasons can you posit for the increase in the divorce rate and what factors in a marriage do you think make the chance of divorce more likely?
3. From the information in this chapter and the next chapter on divorce, make a time chart listing the major milestones in the development of divorce law.

Further Reading

Davis and Murch, *Grounds for Divorce* (1988) Oxford University Press.
Deech, 'Divorce law and empirical studies ' (1990) LQR 229.
Eekelaar, *Regulating Divorce* (1991) Oxford University Press.
Eekelaar and Maclean, 'Divorce law and empirical studies – a reply' (1990) LQR 621.

7 Obtaining a Divorce

In this chapter we look at how a divorce is obtained and consider divorce procedure, the ground for divorce, and related matters, including protection for certain spouses and also conciliation. Finally, we consider the arguments and proposals for the reform of divorce law. The law is contained in the Matrimonial Causes Act 1973 (MCA 1973) and procedural rules in the Family Proceedings Rules 1991 (FPR 1991).

7.1 Introduction

The spouse who starts off divorce proceedings is called the petitioner and the other party the respondent. When adultery was alleged the third party involved used to be named as co-respondent, but in most cases this is no longer necessary. A divorce is commenced by the petitioner presenting a divorce petition to a divorce county court or the Divorce Registry in London alleging that the marriage has irretrievably broken down (s.1(1)), which is established by proof of at least one of five facts (s.1(2)), i.e. adultery, unreasonable behaviour, desertion, two years' separation with consent to the divorce and five years' separation. A spouse cannot file a petition until one year has passed from the commencement of the marriage (s.3). If the district judge is satisfied that the marriage has irretrievably broken down and a fact is proved, a decree nisi is granted, but a marriage is not dissolved until decree absolute. If there are children, a decree absolute cannot be granted before the judge has considered whether or not to exercise his powers under the Children Act 1989 in respect of any children (see Chapter 10). Where a divorce is sought on either of the separation grounds, a decree absolute may be refused where a respondent has not been satisfactorily financially provided for by the petitioner (s.10) and a decree nisi may be refused if dissolution of the marriage will cause the respondent grave financial or other hardship (s.5).

Once a decree absolute has been granted the parties are free to remarry. A decree absolute also has other effects. Financial provision and property adjustment orders made under Part II MCA 1973 in favour of the parties to the marriage can take effect. A testamentary disposition in favour of a former spouse lapses and any appointment of such former spouse as executor or trustee is ineffective. Social Security and pension rights are affected, and both parties lose rights under certain matrimonial legislation, notably rights of occupation under the Matrimonial Homes Act 1983. However, both parties retain parental responsibility.

An undefended divorce is obtained under the special procedure. Nearly all divorces are undefended, partly because of the futility and cost of defending divorce. Disputed issues often arise in respect of matters ancillary to the divorce, i.e. in relation to money and property, and living and contact arrangements for the children. Reported cases on the ground for divorce are rare, but many cases dealing with property and financial issues are reported because that is where the litigation is on divorce.

7.2 Divorce not Possible within the First Year of Marriage

To uphold the sanctity and institution of marriage by deterring trial marriages and hasty divorces, the MCA 1937 placed an absolute prohibition on divorce in the first three years of marriage, unless the petitioner had suffered exceptional hardship or the respondent had shown exceptional depravity. However, the three-year bar had several drawbacks. It prolonged poor marriages or encouraged allegations of exceptional hardship or depravity which were difficult to adjudicate, and also caused hostility and bitterness between the parties. The three-year bar also caused duplicity of proceedings as unhappily married spouses often petitioned for a decree of judicial separation which was followed not long afterwards by a petition for divorce. Because of these drawbacks, the Law Commission recommended the introduction of a one-year bar, as to have no bar at all would undermine the sanctity of marriage. The Commission considered that unhappily married couples unable to petition for divorce in the first year of marriage were sufficently protected; they could petition for a decree of judicial separation or of nullity, apply for financial provision in the magistrates' courts, and obtain injunctions against violence where needed. As a result of the Law Commission's recommendations s.1 Matrimonial and Family Proceedings Act 1984 was enacted (now s.3(1) MCA 1973), which provides that no petition for divorce shall be presented to the court before a period of one year has expired from the date of the marriage. This is a strict rule. In *Butler* v. *Butler* [1990] 1 FLR 114 the wife filed a petition for judicial separation 11 months after the date of marriage, which was later amended to one of divorce and a divorce was granted. The Queen's Proctor intervened, and the court held that the one-year rule was an inescapable statutory bar. There was no discretion to overrule it, even where there had been a genuine and honest mistake. The petition was declared null and void, as a fresh petition should have been presented instead of the judicial separation petition being amended. Despite the one-year rule, anything that happened in the first year of marriage (e.g. unreasonable behaviour or adultery) can be used as evidence in divorce proceedings (s.3(2) MCA 1973).

If the aim of a good divorce law is to minimise bitterness, one might ask whether a statutory bar is needed at all. However, the Law Commission in its proposals for reform of divorce law has recommended its retention.

7.3 Procedure

The court has jurisdiction to hear a petition for divorce (and also for nullity or judicial separation) if on the date proceedings are commenced either of the parties is domiciled in England and Wales or has been habitually resident in England and Wales for at least one year before the date on which proceedings are commenced (s.5(1) and (2) Domicile and Matrimonial Proceedings Act 1973).

Divorce procedure differs according to whether the divorce is (a) undefended or (b) defended. Virtually all divorces today are undefended, because of the expense and futility of defending a divorce, and because Legal Aid is rarely granted for this purpose.

(i) Undefended Divorce

An undefended divorce is obtained under the special procedure. Divorce proceedings are commenced by the petitioner presenting a petition to a divorce county court (i.e. a specially designated county court) or, in London, the Divorce Registry. The petition informs the respondent and the court of the basis on which the petitioner seeks a decree of divorce and must contain information specified by the rules of court (see r.2.2 FPR 1991), e.g. names, addresses of the parties and their children under 16 or in full-time education, occupations of the parties and details of the marriage. The petition must also contain a statement that the marriage has irretrievably broken down, the fact or facts relied on, brief particulars of such individual fact or facts, and a prayer setting out any ancillary relief claimed.

The petition is sent to the court accompanied by the marriage certificate, statement of arrangements for the children on Form M4 (if there are children under 16 or in full-time education) and reconciliation certificate on Form M3, and a fee is paid, unless the petitioner is able to claim exemption therefrom under the Green Form scheme (see Chapter 1). The reconciliation certificate is a document signed by the solicitor (if any) acting for the petitioner, certifying whether he has discussed with the petitioner the possibility of a reconciliation and has given details of persons qualified to help to effect a reconciliation. A copy of the petition is then sealed by the court and served on the respondent. This is accompanied by forms known respectively as Notice of Proceedings (explaining the effect of the petition and informing the respondent of the procedure involved) and Acknowledgement of Service, which latter document the repondent should complete, sign and return to the court within eight days, failing which a further copy of the petition may be served upon him personally and an affidavit filed to prove such service. In the Acknowledgement of Service the respondent should state whether the petition has been received, whether he or she intends to defend the divorce, whether consent to the divorce is given if sought on the basis

of two years' separation with consent, and also whether he or she intends to apply for ancillary relief or for orders in respect of the children. The Acknowledgement of Service may be signed by either the respondent or his solicitor, save that, where the fact relied upon is two years separation with consent of the respondent and the respondent does in fact consent, then the respondent must sign in person.

Once the Acknowledgement of Service has been returned to the court and the respondent does not wish to defend, the petitioner (or the petitioner's solicitor) must file a written request for directions and an affidavit and questionnaire in specified form, sworn by the petitioner providing evidence of the fact relied on. These papers are then considered by the district judge who, if satisfied that the fact is proved and that the marriage has irretrievably broken down, files a certificate to that effect and a day is fixed for the judge to pronounce decree nisi. Both parties receive a certificate and notice of the date and place for the pronouncement of decree nisi by the judge in open court, which neither the parties nor their legal representatives need attend.

The marriage is not terminated by decree nisi but by decree absolute which is granted on the application of the petitioner six weeks or more after decree nisi, or by the respondent three months or more after decree nisi. The gap between decree nisi and decree absolute enables a respondent to appeal and the Queen's Proctor and other persons to intervene to show just cause why a decree should not be made absolute. Such intervention was formerly a real possibility (e.g. if the parties were found to have colluded the decree absolute would be refused), but is now very rare. Where there are children of the family, the divorce cannot be made absolute until the district judge has considered whether the court should exercise any power under the Children Act 1989 (s.41) (see Chapter 10). Orders in respect of children (e.g. financial provision, property adjustment or with whom the child shall live) can be ordered and take effect before decree absolute. Other than maintenance pending suit, which terminates on decree absolute, other orders in favour of spouses (i.e. for financial provision and property adjustment) can be made before but cannot take effect until after decree absolute. In divorces based on either two or five years' separation, the divorce may not be made absolute in some circumstances (see 7.5 below).

(ii) Defended Divorce

Defended divorce proceedings begin in the same way as undefended divorce proceedings, but the respondent in the Acknowledgment of Service indicates an intention to defend. Such an indication does not of itself cause the proceedings to become defended, but must be followed by the filing of an answer within 29 days of receipt of the notice of proceedings. There is then exchange of pleadings by counsel and the hearing takes place in open court with oral evidence being given and cross-examination of both parties.

7.4 The Ground for Divorce and the Five Facts

There is only one ground for divorce, namely that the marriage has irretrievably broken down (s.1(1) MCA 1973), but one or more of the following facts must also be proved (s.1(2) MCA 1973):

(a) the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
(b) the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
(c) the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
(d) the parties have lived apart for a continous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the divorce; or
(e) the parties have lived apart for a continous period of at least five years immediately preceding the presentation of the petition.

There must be proof both of irretrievable breakdown of marriage and proof of at least one fact, as s.1(4) provides that once a fact is proved the court shall grant a divorce unless it is satisfied on all the evidence that the marriage has not irretrievably broken down. The need for both irretrievable breakdown and a fact has led to some rather unsatisfactory decisions. In *Richards* v. *Richards* [1972] 1 WLR 1073, [1972] 3 All ER 695 the petitioner wife satisfied the court that the marriage had irretrievably broken down, but failed to satisfy the court that her husband, who was mentally ill, had behaved in such a way that she could not reasonably be expected to live with him. In *Buffery* v. *Buffery* [1988] 2 FLR 365 the Court of Appeal was also satisfied that the marriage had irretrievably broken down, but not satisfied that unreasonable behaviour had been proved, as s.1(1) and (2) had to be construed disjunctively.

We will consider each fact in turn.

Adultery (s.1(2)(a))

To obtain a divorce on the basis of adultery, the petitioner must prove that the respondent has committed adultery and that the petititioner finds it intolerable to live with the respondent (s.1(2)(a)), and must also prove that the marriage has irretrievably broken down. Many divorces are sought on the adultery fact. By alleging adultery a petitioner can obtain a divorce relatively quickly, instead of having to wait at least two years to petition on the basis of separation. It is open to a spouse to petition for a divorce on the basis of unreasonable behaviour instead of or besides adultery.

Adultery occurs when voluntary heterosexual intercourse takes place between two people who are not married to each other, but at least one of whom is married to a third party. If intercourse is not voluntary (e.g. because of rape, duress or mental disorder), then adultery may not have

occurred. To satisfy the adultery ground the petitioner must also prove that he or she finds it intolerable to live with the respondent. Intolerability was added to buttress the stability of marriage (a policy aim of the 1969 divorce reform), so that a single act of adultery on its own would not be sufficient to end a marriage. Before *Cleary* v. *Cleary* [1974] 1 WLR 73 it was unclear whether the intolerability had to relate to the adultery, but in *Cleary* the Court of Appeal held that adultery and intolerability were two separate and unrelated facts as s.1(2)(b) does not say 'in consequence of the adultery'. The petitioner therefore need not show that the adultery caused the intolerability. In *Cleary* the wife committed adultery, but her husband forgave her and took her back. She then started corresponding with another man and went out at night leaving her husband with the children. This was held to be intolerable behaviour and, although not linked with the earlier adultery, a decree was granted.

The degree of proof needed to establish adultery is thought to be slightly higher than the balance of probabilities, the degree of proof required in civil cases, but in practice the degree of proof does not matter so much today, as defended divorces are rare and establishing adultery under the special procedure merely involves saying 'yes' or 'no' on a prescribed form.

The court cannot grant a decree nisi based on an act of adultery if the spouses have lived together for a period or periods added together exceeding six months after the petitioner knew the respondent had committed such act (s.2(1) MCA 1973). In *Biggs* v. *Biggs* [1977] 1 All ER 20 the court was satisfied there had been adultery but not that the marriage had irretrievably broken down, as the parties had been living together for more than six months after decree nisi. The court refused the petitioner's application for the decree nisi to be made absolute and rescinded the decree nisi. If the parties have lived together for a period of less than six months, that period can be disregarded in determining whether the petitioner finds it intolerable to live with the respondent. The aim of these provisions is to encourage reconciliation, one of the policy aims of the 1969 reforms (see Chapter 6).

Unreasonable Behaviour (s.1(2)(b))

Unreasonable behaviour is the most commonly alleged fact. Like adultery, it enables a petitioner to obtain a divorce quickly. About half the total number of petitions for divorce are based on unreasonable behaviour. Besides proving irretrievable breakdown, the petitioner must prove that he or she cannot reasonably be expected to live with the respondent. It is the effect of the respondent's behaviour on the petitioner which is relevant and not whether the respondent's behaviour is unreasonable. The term 'unreasonable behaviour' is thus misleading. As it is the effect of the respondent's behaviour on the particular petitioner which matters, the test for establishing whether it is reasonable for the petitioner to live with the respondent is a subjective test. Bagnall J in *Ash* v. *Ash* [1972] Fam 135, [1972] 1 All ER 582 said the question to be asked is:

> 'can this petitioner, with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent?'

His Lordship stated that a violent or alchoholic petitioner, for example, could reasonably be expected to live with a respondent with similar attributes. In *Livingstone-Stallard* v. *Livingstone-Stallard* [1974] Fam 47, [1974] 2 All ER 766 Dunn J adopted a similar test of unreasonableness:

> 'would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?'

This test was approved by the Court of Appeal in *O'Neill* v. *O'Neill* [1975] 1 WLR 1118, [1975] 3 All ER 289, and endorsed in *Buffery* v. *Buffery* [1988] 2 FLR 365. In *Birch* v. *Birch* [1992] 1 FLR 564 the wife petitioned for divorce on her husband's behaviour as his attitude to her was dogmatic, nationalistic and dictatorial. She, on the other hand, was sensitive and had taken a passive role during their 20-year marriage, putting aside her own interests until the children had grown up. The county court judge dismissed her petition, but the Court of Appeal granted her a decree nisi because the judge had used an objective test when the correct test was subjective.

Behaviour can include both acts and omissions, i.e. either doing something or failing to do something. Divorces are granted for a wide range of different sorts of behaviour. In *O'Neill* v. *O'Neill* [1975] the petitioner stated that her husband had a withdrawn personality, doubted the paternity of the children, and had spent two years 'improving' the flat, which included mixing cement on the living-room floor and leaving the lavatory door off for about eight months. Evidence of violence and drunken behaviour is also likely to satisfy the behaviour fact (see e.g. *Ash* v. *Ash*). Victims of domestic violence, whether or not they have sought the immediate protection of non-molestation and ouster injunctions (see Chapter 15), may decide to petition for divorce on the basis of unreasonable behaviour. Some behaviour may, however, be too trivial for a decree to be granted as it was in *Buffery* v. *Buffery* [1988], where the wife alleged her husband was insensitive. She said he never took her out, and that after the children had left home they had nothing to talk about and nothing in common. Her petition was dismissed as his behaviour was insufficient to satisfy the ground. An accumulation of trivial incidents may, however, be sufficient to constitute unreasonable behaviour as they were in *Livingstone-Stallard* v. *Livingstone-Stallard* [1974], where, according to Dunn J, the wife 'was subjected to a constant atmosphere of criticism, disapproval and boorish behaviour on the part of her husband'.

Financial irresponsibility can also constitute unreasonable behaviour (see e.g. *Carter-Fea* v. *Carter-Fea* [1987] Fam Law 131).

What if the behaviour is not the fault of the respondent, where, for instance, the respondent is mentally or physically ill? The answer depends on the facts of each case. In *Katz* v. *Katz* [1972] 1 WLR 955, [1972] 3 All ER 219 the wife succeeded in obtaining a decree where the husband had been committed to hospital several times as a manic depressive and had constantly criticised her, calling her a tramp and a slut. She was seriously affected by his behaviour and had attempted suicide. The court held the test to be applied was whether, after making allowances for the respondent's disabilities and the temperament of both parties, the character and gravity of his behaviour was such that the petitioner could not reasonably be expected to live with her husband. In *Richards* v. *Richards* [1972] the husband was also mentally ill. After seven years of marriage he had started suffering from moodiness and withdrawal. The petitioner was disturbed at night by his insomnia and assaulted by him but not caused injury. Her petition was dismissed, because, although the marriage had irretrievably broken down, the behaviour fact was not satisfied. In *Thurlow* v. *Thurlow* [1975] 3 WLR 161, [1975] 2 All ER 979 the wife, an epileptic, was bedridden and bad-tempered. She threw objects at her husband and wandered the streets causing him distress. He worked full-time and found it difficult to care for her and the stress affected his health. Rees J stated:

> 'If the behaviour stemmed from misfortune such as onset of a mental illness or from disease of the body, or from accidental physical injury, the court will take full account of all the obligations of the married state. These will include the normal duty to accept and to share the burdens imposed upon the family as a result of the mental or physical ill-health of one member. It will also consider the capacity of the petitioner to withstand the stresses imposed by the behaviour, the steps taken to cope with it, the length of time during which the petitioner had been called upon to bear it and the actual or potential effect upon his or her health.'

A decree nisi was granted. *Thurlow* v. *Thurlow* demonstrates the subjective approach to the question of behaviour. The question is essentially one of fact and degree, taking into account all the circumstances of the particular case.

To encourage reconciliation, the spouses can live together for a period or periods added together not exceeding six months after the last instance of the behaviour alleged, without losing the right to petition for divorce (s.2(3)). The court must ignore this period of time in determining whether it is unreasonable for the petitioner to live with the respondent. If the spouses live together for a period exceeding six months after the last proven instance of behaviour, the court can take that into account when determining what is reasonable.

The fact that so many divorces are sought on the basis of unreasonable behaviour has been one of the main arguments for reform of the law,

because allegations of unreasonable behaviour, like adultery, tend to increase rather than minimise bitterness and hostility, making an amicable settlement of the consequences of divorce (i.e. in respect of money, property and children) less likely.

Desertion (s.1(2)(c))

Desertion is rarely alleged as a fact by petitioners, who usually rely instead on unreasonable behaviour or separation. Despite the rarity of desertion petitions, there is a huge body of case-law on desertion, partly because desertion existed as a ground for divorce before the Divorce Reform Act 1969 came into force. Because of the declining significance of desertion, only the basic requirements necessary to satisfy the desertion fact are mentioned here.

Desertion must be for a continuous period of at least two years immediately preceding the presentation of the petition. The case-law has established that to prove desertion there must be: factual separation; an intention by the respondent to desert; no consent by the petitioner to the desertion; and no just cause to desert. Constructive desertion is also possible, i.e. a spouse who behaves in such a way that he or she drives the other spouse out of the matrimonial home can be in desertion.

The reconciliation provisions apply. There must be an aggregate of two years of desertion, but periods of resumed cohabitation, if not more than six months in total, do not prevent the desertion being continuous (s.2(5)).

Two Years' Separation with Consent (s.1(2)(d))

To succeed in obtaining a divorce on this fact the petitioner must prove that the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, and that the respondent consents to a decree being granted. As with all the other facts, the petitioner must also prove that the marriage has irretrievably broken down. The respondent must have the capacity to consent and be given such information as will enable him or her to understand the effect of a decree being granted (s.2(7)). The court must be notified of the respondent's consent to the decree being granted. The respondent notifies such consent by filing a notice to that effect signed by the respondent personally, but a statement in the Acknowledgement of Service signed by the respondent (and solicitor, if any) is also treated as notice of consent (r.2.10 FPR 1991). Consent can be withdrawn at any time until decree nisi when proceedings must be stayed (r.2.10). After decree nisi, but before decree absolute, the respondent can apply to have the decree nisi rescinded, where the petitioner misled the respondent, intentionally or unintentionally, about any matter which the respondent took into account in deciding whether to consent to the decree (s.10(1) MCA 1973).

Some of the case-law on two years' separation with consent has been concerned with the question of whether or not the spouses have been living apart for the purpose of s.2(6), which provides that 'A husband and

wife shall be treated as living apart unless they are living with each other in the same household'. A couple living under the same roof can in fact be living in separate households. In *Fuller* v. *Fuller* [1973] 1 WLR 730, [1973] 2 All ER 650 the wife left her husband to live with another man. Her husband became ill with only a short time to live, and the doctor advised he should not live alone. The wife allowed him to live in a flat in her new household as a lodger. Her husband had a separate bedroom but she did his washing and cooking. Both spouses treated the marriage as being over. Four years later the husband was still alive and still lodging with his wife. A decree was granted as they were not living in the same household. In *Mouncer* v. *Mouncer* [1972] 1 WLR 321, [1972] 1 All ER 289, on the other hand, the spouses were held not to be living in separate households. They slept in separate bedrooms, but the wife prepared the meals which they ate together with the children. They both cleaned the house, although the husband did his own washing. The husband did not wish to live with his wife, but wished to stay in the matrimonial home and help look after the children. He petitioned for divorce on the basis of two years' separation with consent. A decree was refused as the absence of a normal physical relationship and affection were insufficient to constitute living apart for the purposes of s.1(2)(d). In *Santos* v. *Santos* [1972] Fam 247, [1972] 2 All ER 246 the Court of Appeal held that, besides actual physical separation, there also had to be some recognition by the spouses that the marriage was at an end, as separation cases required careful scrutiny by the court because of the need to buttress the stability of marriage. Even if *Santos* was correctly decided, the decision is now largely rendered nugatory because of the special procedure, and because the emphasis today is on getting rid of the empty shell of a dead marriage with minimum distress and humiliation, rather than on buttressing the stability of marriage.

Where a divorce is sought on the basis of two years' separation with consent, the respondent may be able to postpone decree absolute on proof that he or she has not been sufficiently financially provided for (s.10 MCA 1973) (see below). Under the reconciliation provisions, when calculating the period of separation, no account is taken of a period or periods not exceeding six months in all during which the parties resumed living together (s.2(5)), but there must be an aggregated period of actual separation of at least two years.

The two years' separation fact was introduced by the Divorce Reform Act 1969 to move away from fault. However, the number of petitions sought on this fact has not been as great as the reformers anticipated. While a divorce sought on this fact has the advantage of not involving any allegation of fault, it has several disadvantages. First, it does not provide a quick means of obtaining a divorce. Second, effecting a separation may be difficult, particularly when housing is in short supply and expensive. Third, there may also be problems obtaining consent to the divorce. These disadvantages were cited by the Law Commission as arguments against introducing separation as a new sole ground for divorce, even though it exists as a ground for divorce in other jurisdictions (see 7.7).

Five Years' Separation (s.1(2)(e))

Very few spouses petition for divorce on the basis of five years' separation because of the need to wait five years. To succeed on this fact, the parties must have lived apart for a continuous period of at least five years preceding the presentation of the petition. No consent is needed to the divorce. As for two years' separation the petitioner must establish factual separation, although separation may be proved, even though spouses are living under the same roof. A decree absolute can be delayed until the petitioner has made adequate financial provision for the respondent (s.10) and a decree nisi can be refused if granting the divorce would cause the respondent grave financial or other hardship (s.5). The six-month reconciliation provision also applies (s.2(5)).

7.5 Protection for the Respondent: ss.10 and 5 MCA 1973

Under ss.10 and 5 MCA 1973 'innocent' respondents (i.e. those being divorced under either of the separation facts and who have therefore committed no matrimonial offence) are given special protection.

Section 10 MCA 1973

Under s.10(2) a respondent, where a divorce is sought on either of the separation facts (i.e. under s.1(2)(d) or (e)), can ask the court to consider his or her financial situation after divorce. The court must thereupon not grant decree absolute unless satisfied the petitioner should not be required to make any financial provision for the respondent or the court considers the provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances (s.10(3)). However, despite s.10(2) and (3), the court may make the decree absolute if it is desirable to do so without delay and the court has obtained a satisfactory undertaking from the petitioner that he will make such financial provision for the respondent as the court may approve (s.10(4)).

However, few applications are in fact made by respondents under s.10, not only because the court has wide discretionary powers to allocate and redistribute money and property on divorce under Part II MCA 1973 (see Chapter 8), but because few petitioners petition on the basis of separation. An application under s.10 may, however, be useful as a tactical manoeuvre to put pressure on a petitioner to sort out the financial position rather than risk failing to obtain a decree absolute. In *Garcia* v. *Garcia* [1991] 3 All ER 451, [1992] 1 FLR 256 s.10 was used to enforce maintenance payments for a child of the family and to delay issue of decree absolute where the petitioner had failed to keep up with maintenance payments for a child of the family provided for in a separation agreement made under Spanish law. The Court of Appeal held that the protection afforded a respondent under s.10 was not confined to future

financial provision, but extended to remedying past financial injustice and unfulfilled past obligations, as the court's duty under s.10(3) was to look at all the circumstances of the case.

An application under s.10 may therefore be useful where there are likely to be problems with the enforcement of financial provision orders, or where the court considers the petitioner should make financial provision for the respondent which the court has no jurisdiction to order under ss.23 and 24 MCA 1973, e.g. in relation to a pension, or where the petitioner is a beneficiary under a trust. In *Hardy* v. *Hardy* (1981) 2 FLR 321 the Court of Appeal held the divorce should not have been made absolute until reasonable financial provision for the wife had been made, where the petitioner was the son and assistant trainer of a wealthy bookmaker and racehorse trainer but only earning a minimum salary. Application by a respondent for his or her financial position to be considered by the court is made by notice on Form M12.

Section 5 MCA 1973

Under s.5 a respondent has a complete defence to a divorce based on five years' separation (i.e. under s.1(2)(e)) if it is proved that he or she will suffer grave financial or other hardship if the divorce is granted, so that it would be wrong in all the circumstances to dissolve the marriage. Section 5 differs from s.10 in that the court can actually refuse to grant a decree nisi rather than merely delay decree absolute. The hardship must result from the dissolution of the marriage and not from the fact of separation, and can include the loss of the chance of acquiring a benefit which the respondent might acquire if the marriage were not dissolved (s.5(3) MCA 1973). Such a loss could include, for instance, loss of a right on divorce to succeed under the other spouse's will or intestacy or loss of pension rights. Most cases brought under s.5 have been in relation to pension rights. In *Le Marchant* v. *Le Marchant* [1977] 1 WLR 559, [1977] 3 All ER 610 the wife on divorce would lose her entitlement to an index-linked pension payable if she survived her husband. The Court of Appeal held this was *prima facie* grave financial hardship, and stated that the petition would be dismissed or adjourned unless the husband could remedy this hardship. Her husband made a proposal which was accepted by the Court of Appeal and the divorce was granted. Loss of pension rights where the respondent is relatively young is unlikely to constitute 'grave hardship' (see e.g. *Mathias* v. *Mathias* [1972] Fam 287, [1972] 3 All ER 1).

The s.5 defence is hardly used, partly because few divorces are sought on the basis of five years' separation, and also because the defence is rarely successful if pleaded. Financial loss to the respondent can usually be compensated for in other ways (e.g. by State benefits or by some proposal put forward by the petitioner). The court is likely to consider it is better to end the marriage, despite the possibility of grave financial hardship. Although the s.5 defence is rarely pleaded, and if pleaded, rarely succeeds, loss of pension rights on divorce is a serious matter, as a pension

(after the matrimonial home) is often the spouses' most valuable asset. To remedy injustice caused by loss of pension rights various proposals for reform have been made. Pensions could be split on divorce, or a divorced wife allowed to return to court on the other spouse's retirement to obtain a share of the pension, although this could be criticised for being contrary to the 'clean break' on divorce (see Chapter 8).

Section 5 covers not just financial hardship but other hardship. 'Other hardship' defences are rare, and have usually been brought for religious or social reasons, where the respondent has argued that divorce will make him or her a social outcast because of the social or religious attitudes in the community. In *Banik* v. *Banik* [1973] 1 WLR 860, [1973] 3 All ER 45 a Hindu wife unsuccessfully opposed a decree under s.5 on the ground that as a Hindu woman she would by divorce become destitute and be treated as a social outcast. In *Lee* v. *Lee* (1973) 117 SJ 616 the hardship involved a respondent wife caring for her son aged 42 who suffered from multiple sclerosis. The defence was successful at first instance, but by the time the case reached the Court of Appeal the son had died.

7.6 Reconciliation, Conciliation and Mediation

Conciliation and mediation are not the same as reconciliation, which is is concerned with encouraging spouses to sort out their marital problems in order to prevent divorce. Encouraging reconciliation was one of the policy aims of the 1969 divorce reforms to buttress the stability of marriage. Certain provisions in the MCA 1973 aim to encourage reconciliation. The petitioner's solicitor (if any) must certify in prescribed form whether or not he has discussed reconciliation with the parties (s.6(1)), and a decree nisi can be rescinded where the parties have effected a reconciliation and consent to an order rescinding the decree (r.2.48 FPR 1991). Certain provisions allow periods of resumed cohabitation aggregating not more than than six months to be ignored when proving a fact (s.2). Reconciliation aims to prevent divorce occurring, whereas conciliation and mediation involve the use of techniques to help divorcing spouses to reach agreement about the consequences of divorce, such as arrangements for their children or to help settle disputes about property and financial matters.

While the reconciliation provisions are of little importance as there is little chance of saving and little to be gained by saving a dead marriage, conciliation and mediation are increasingly recognised as important techniques for helping couples to cope with the consequences of divorce, and are part of a growing awareness of the need to move away from an adversarial model of divorce, and of the need to protect children. Conciliation provides a way of reducing the need for litigation, thereby reducing legal costs and also the trauma and bitterness suffered by the parties. Conciliation was defined by the Finer Committee (Cmnd 5629, 1974) as:

> 'assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or a

separation, by reaching agreements or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, disposition of the matrimonial home, lawyers' fees, and every other matter arising from the breakdown which calls for a decision on future arrangements.'

Conciliation in practical terms involves both parties sitting down with a neutral arbitrator who helps the parties identify issues in dispute and discover how to resolve them. The aim of the process is not for the conciliator to impose a solution on the parties but for the parties themselves to explore the possibilities of reaching agreement. In *Re D (Minors) (Conciliation: Privilege)* (1993) *The Times*, February 12 the Court of Appeal held that, given the importance of conciliation in proceedings concerning children, statements given in the course of conciliation are confidential and cannot therefore be disclosed in proceedings under the Children Act 1989, unless a statement indicated that the maker had in the past caused or was in the future likely to cause significant harm to a child.

Conciliation is practised in out-of-court and in-court schemes.

Out-of-court schemes Many independent voluntary conciliation bodies exist (e.g. Asian Family Mediation Service, Catholic Conciliation Service) which, although supported by the courts, exist outside the court structure. These independent voluntary bodies are members of the National Association of Family Mediation and Conciliation Services (NAFMCS), whose Code of Practice aims to create uniformity of practice among the different organisations. The conciliators are usually qualified social workers or marriage guidance counsellors. These schemes mainly aim to settle disputes about children on divorce. Mediation, on the other hand, aims to settle disputes not only about children but also finance and property with the help of legally qualified mediators. The Family Mediation Service, for example, offers a comprehensive mediation service on all issues arising on divorce and separation.

In-court schemes Most courts run their own in-court conciliation schemes, whereby the parties, their legal advisers and the divorce court welfare officer meet in a room separate from the court to attempt to reach agreement about disputed issues. If the couple reach agreement an order is made. If not, then the district judge gives directions for the trial of the issue.

While there is widespread support for conciliation, it has also been subject to criticism. One criticism is the absence of any clear idea about what conciliation really involves, resulting in considerable diversity of practice. There has also been concern that agreements reached by conciliation are not always those of the parties but may have been imposed by the conciliator, or imposed by the party in the stronger bargaining position.

There was some concern about the court welfare officer combining his role as conciliator with that of court reporting officer, but that problem was solved by a *Registrar's Direction* [1986] 2 FLR 171, stating that welfare officers acting as conciliators should not report in the same case. While the Law Commission, the Booth Committee (see below) and other bodies have recognised the importance of conciliation, the Government has done little to promote it and there are no plans for the Government to introduce a national conciliation scheme. In 1982 an Inter-Departmental Committee on Conciliation reported that, although conciliation performs an important role, government funding of out-of-court schemes was unjustified as those schemes were more expensive than in-court schemes. A Conciliation Project Unit was set up at the University of Newcastle-upon-Tyne and reported in 1989. The Unit concluded that out-of-court conciliation was more expensive but had important social benefits, and recommended that a national service be established with a network of local services independent of the court which would provide both conciliation and counselling services. Conciliation is thus likely to continue to play an important role, particularly if the proposals for reform of divorce law are implemented, although there are no proposals to make conciliation compulsory.

7.7 Should Divorce Law be Reformed?

The argument and rationale for reform of divorce law is based on two broad policy objectives: first, the need to minimise hostility and bitterness between the parties by concentrating on promoting cooperation and agreement between them; and second, to emphasise the importance of the consequences of divorce (i.e. in respect of money, property and children) and to encourage divorcing couples to adopt a forward-looking approach. As Lord Scarman stated in *Minton* v. *Minton* [1979] AC 593, [1979] 2 WLR 31, [1979] 1 All ER 79:

> 'An object of the modern law is to encourage the parties to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.'

Another objective has been to emphasise that divorce is a process and not an event. These objectives have formed the basis of proposals for reform of divorce procedure and the ground for divorce. The Booth Committee (see below) was established to study divorce procedure, its remit being to make recommendations to mitigate the intensity of disputes, encourage settlements, and to provide further for the welfare of the children of the family. The growth of the conciliation movement and the proposed new ground for divorce, the 'process over time', also reflect these objectives. We will consider proposals for reform of divorce procedure and then for the ground for divorce.

Reform of Procedure

The special procedure which is available for all undefended divorces was introduced as a result of a general dissatisfaction with earlier divorce procedure and was a significant event in the development of divorce law (see Chapter 6). However, the special procedure has been criticised and recommendations made for its reform. The Booth Committee on Procedure in Matrimonial Causes reported in 1985 and stated that under the special procedure the registrar (now the district judge) could do no more than merely 'rubber-stamp' the application, because the court was not in a position in most cases to make findings of fact, e.g. to establish the effect of the respondent's behaviour on the petitioner. The Committee felt the law was thus little respected and little understood and that the special procedure increased bitterness. With these criticisms in mind the Booth Committee recommended several reforms of procedure. To encourage agreement, the Committee recommended joint applications for divorce and a system of initial hearings in which the parties could reach a settlement or identify areas of disagreement. They also recommended changes of terminology to make the law more understandable, and recommended that details of behaviour be omitted from the petition to minimise hostility and bitterness. The Booth proposals will be incorporated into the proposed new divorce law if it is implemented.

Reform of the Substantive Law (i.e. the Ground for Divorce)

In *Facing the Future – A Discussion Paper on the Ground for Divorce* (Law Com No 170, 1988) the Law Commission reported on divorce law and made suggestions for reform. Prior to that there had been no review of divorce law since the Law Commission's proposals for reform of the ground for divorce in 1966 (*Reform of the Grounds of Divorce – The Field of Choice*, Cmnd 3123, 1966), although since then there had been frequent calls for reform, for instance by the Booth Committee, the Law Society, MPs and academics. The present law was considered to be an improvement on the earlier law, but it was generally felt that the major aim of the 1969 reform to move away from fault and the doctrine of the matrimonial offence had not been achieved in practice, as most divorces were sought on the fault facts of adultery and unreasonable behaviour. A hybrid system of divorce therefore existed, with fault and no-fault grounds existing side by side. Many parties continued to apportion blame with one party being unfairly stigmatised when both parties were often to blame. Allegations of fault encouraged the parties to adopt entrenched and hostile positions making settlement about the consequences of divorce (i.e. in respect of finance, property and children) difficult. The reforms proposed by the Law Commission were to introduce a truly and not artificially no-fault divorce which would encourage the parties to reach agreement and to consider and face up to the consequences.

The Law Commission analysed the present law (see *Facing the Future – A Discussion Paper on the Ground For Divorce* Law Com No 170, 1988) by considering whether the original objectives of the 1969 reform had been achieved, namely did divorce law buttress the stability of marriage and dissolve a marriage with maximum fairness? It concluded the law had not achieved these objectives and was neither easily understandable nor respected. Proving a fact had become a meaningless formality, with petitioners exaggerating the fact in order to obtain a divorce, and, although a marriage had irretrievably broken down, a decree could not be granted unless a fact had been proved. The Commission also said that divorce law had a juggernaut effect, as once the parties had started out on the divorce process there was little scope for reconciliation, conciliation and negotiation. Most of all, the Law Commission felt the law failed to recognise that divorce is not a final product but part of a massive transition for the parties and their children.

The Law Commission discussed reform by considering alternative models of divorce law (i.e. fault, no-fault and mixed systems), but concluded that a no-fault model was best. After discussing the advantages and disadvantages of different no-fault models (i.e. marriage breakdown, separation, mutual consent and unilateral demand), the Commission decided in favour of retaining irretrievable breakdown as the ground for divorce, but with divorce available at the end of a period of time. Divorce over a period of time had many advantages. It would encourage the parties to cooperate and to consider the practical consequences of divorce and would reinforce the idea that divorce is a process and not an event. Conciliation and mediation would not be compulsory, but would fit in well with the proposed model, as would the procedural reforms recommended by the Booth Committee.

In *Family Law: The Ground for Divorce* (Law Com No 192, 1990), the Law Commission described how the process over time would work and drew up a draft Bill. Its recommendations, which were greatly influenced by the Booth Report, included changes in terminology. 'Petitioner' and 'respondent' would become 'applicant' and 'respondent', a 'petition' would become an 'application', and a 'decree' an 'order'. The period over time would be set in motion by a joint or sole initial statement in prescribed form that the marriage had broken down, which would be lodged at the court with other documents. After that there would be a 12-month period for consideration and reflection, during which proof of breakdown would be established, practical difficulties resolved, and the consequences of divorce considered. Optional conciliation, mediation and counselling would be available during that period. No later than 12 weeks from making the initial statement the court would hold an initial hearing to make a preliminary assessment to monitor the progress of the arrangements being made, to identify issues in dispute and to dispose of any matters which could be disposed of. Financial provision and property adjustment orders under ss.23 and 24 MCA 1973 in respect of children could be made at this hearing, and the court could also perform its duty

under s.41 MCA 1973 (see Chapter 19). During this period the parties would be free to apply for an order under the Children Act 1989 or for any order for ancillary relief under the MCA 1973, and the court would have power to make final orders in respect of financial provision and property adjustment at any time during the period of reflection and consideration rather than leaving them until decree nisi as at present. The court at its own motion or on application would have power to postpone divorce in certain circumstances, i.e. where the court would be likely to exercise its powers under the Children Act 1989, where financial provision for a spouse or child had not been made, and where, in exceptional circumstances, a respondent would suffer hardship.

The parties would not be required to separate during the 12-month period, but some parties would probably choose to do so. At the end of the 12-month period an application for divorce could be made by one or both of the spouses together with a declaration that their marriage had irretrievably broken down and asking for a divorce order, which the court would automatically issue, provided the application had been made in the required form, the period of time for reflection and consideration had passed and the statement of marital breakdown had not been withdrawn. Spouses would be able to make a statement of marital breakdown within the first year of marriage but an application for a divorce would not be possible unless at the time of the application the parties had been married for one year and eleven months.

The Law Commission's proposals have not yet been implemented. Shortly after the proposals were published, the Lord Chancellor, Lord Mackay, indicated that he wished to see some element of fault retained, so that a divorce could be refused where one party was innocent of any wrongdoing and did not wish for a divorce. He said that, despite much public support for the Law Commission's proposals, 'there is a strong feeling in some people's minds that the Law Commission did not recognise sufficiently clearly the need to strengthen the institution of marriage'. The Law Society's Family Law Committee's reaction to the Lord Chancellor's response to the new proposals was one of disappointment, its Chairman stating: 'The whole basis on which you get a divorce must change. At present you have a ridiculous system where you manufacture divorces with flimsy conduct petitions. It is vital to get away from this.'

Summary

1. Nearly all divorces today are undefended and dealt with under the special procedure.
2. A divorce is commenced by the petitioner presenting a divorce petition to a divorce county court (or the Divorce Registry in London). The other party is called the respondent. Divorce involves a two-stage procedure, i.e. decree nisi and then decree absolute. Only after decree absolute is the marriage terminated.

3. Divorce is not possible within the first year of marriage (s.3(1) MCA 1973).
4. There is one ground for divorce, namely irretrievable breakdown of marriage (s.1(1) MCA 1973). Breakdown is established on one or more of five facts (s.1(2) MCA 1973): (a) adultery; (b) unreasonable behaviour; (c) desertion for a period of at least two years; (d) two years' separation with consent to the divorce; and (e) five years' separation. There must be proof of irretrievable breakdown and proof of at least one fact.
5. The adultery fact requires proof of adultery and proof that the petitioner finds it intolerable to live with the respondent, although the intolerability need not relate to the adultery.
6. The test for 'unreasonable behaviour' is not whether the behaviour is unreasonable, but whether the petitioner can reasonably be expected to live with the respondent when he or she has behaved in a particular way. The test is subjective.
7. Desertion must be for a continuous period of at least two years and requires: factual separation; an intention to desert; no consent by the petitioner to the desertion; and the respondent must have no just cause to desert. Constructive desertion is possible.
8. For the separation grounds (i.e. two years' separation with consent to the divorce and five years' separation) separation can be under the same roof, provided the parties are living in separate households, i.e. a question of fact in each case.
9. Section 10(2)(3) and (4) MCA 1973 enables a respondent to delay decree absolute until the court is satisfied about financial arrangements made by the petitioner for the respondent.
10. Section 5 MCA 1973 provides a complete statutory defence for a respondent, when a divorce is brought solely on the basis of five years' separation, if the respondent can prove that the dissolution of the marriage will cause him or her grave financial or other hardship.
11. Conciliation and mediation are techniques used both in court and out of court to encourage the settlement of disputes on divorce. Reconciliation provisions exist in the MCA 1973 and FPR 1991 to prevent a marriage from ending in divorce.
12. Proposals for reform of procedure and reform of the ground of divorce have been made, but not yet implemented.

Exercises

1. Ann has been married for ten months to Bob, but he goes out drinking every night with his friends, arrives home drunk and collapses into bed. She wants to divorce him.

   Advise Ann.

   Would it make a difference if Ann were an alcoholic?
2. Jane and Peter have been married for six years. Last year Peter was sent to prison and has two more years to serve. Jane has stopped visiting Peter in prison as she wants to marry Ben. She wants a divorce, but Peter does not.

   Advise Jane.
3. How does divorce law protect respondents?
4. Why does the Law Commission consider the law needs reforming?
5. *Judicial Statistics* since 1989 provide no information on the fact alleged for divorce, which suggests the choice of fact is no longer considered very

significant. The following were taken from *Judicial Statistics, Annual Reports 1989*. What statements can you make about them?

	Total petitions	*Petitions on this fact*	*Husband petitioners*	*Wife petitioners*
Adultery	184 610	51 650	19 920	31 370
Behaviour	"	89 050	12 460	76 590
Desertion	"	2 050	650	1 390
Two years' separation and consent	"	30 610	11 460	19 150
Five years' separation	"	10 100	4 670	5 430

Further Reading

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Law Commission, *Facing the Future – A Discussion Paper on the Ground for Divorce* (Law Com No 170, 1988).

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Roberts, 'Systems or selves? Some ethical issues in family mediation' (1990) JSWL 6.

Roberts, 'Who is in charge? Reflections on recent research on the role of the mediator' (1992) JSWFL 372.

Roberts, 'Mediation in the lawyer's embrace' (1992) MLR 258.

Walker, 'Divorce – whose fault? Is the Law Commission getting it right?' (1991) Fam Law 234.

Walker, 'Conciliation in the 1990s' (1991) Fam Law 12.

8 Finance and Property on Divorce

In this chapter we consider how the financial and property resources belonging to the parties to a marriage are distributed on divorce. Compared with obtaining a divorce (see Chapter 7), finance and property on divorce is a lengthy topic with a considerable body of case-law, because this is where the litigation occurs on divorce. Children on divorce are considered in Chapter 10, which deals with residence and contact arrangements. Chapter 11 deals with financial support for children both on divorce and at other times.

8.1 Introduction

During marriage spouses have mutual obligations to provide financial support for each other, but on divorce the position changes. One spouse's obligation to support the other spouse financially depends on whether the court makes an order to that effect or the parties themselves formally or informally agree to do so. However, spouses during marriage and on and after divorce have continuing obligations to provide financial support for their children, as parental responsibility is ongoing. Consequently, parents may be made to pay maintenance by the Child Support Agency under the Child Support Act 1991 or sometimes by court order (see Chapter 11).

During marriage property rights of spouse are mainly determined by the general rules of property law (see Chapter 4). With property on divorce the position is different, for the court has very wide and flexible discretionary powers to distribute and allocate property, irrespective of ownership but according to certain statutory criteria, such as the needs and resources of the parties. In this respect, spouses on relationship breakdown are in a more favourable position than cohabitees (see Chapter 17).

The law relating to finance and property on divorce is contained in Part II Matrimonial Causes Act 1973 (MCA 1973), and procedural rules are contained in the Family Proceedings Rules 1991 (FPR 1991). Orders in respect of financial provision and property adjustment can be sought in the county court or High Court in proceedings for ancillary relief on divorce. Both parties to the divorce (i.e. the petitioner and the respondent) are entitled to apply. These orders can be made in favour of a spouse and/or to or for the benefit of a child of the family. Specified statutory criteria must be applied by the court when considering whether and, if so, in what manner to make an order (ss.25, 25A). Orders can be varied to take account of changes which occur after an order has been made (s.31).

Orders under Part II can also be made on a decree of nullity or of judicial separation.

Nearly all divorces are undefended and therefore obtained under the special procedure, which is relatively straightforward. With money and property the position is different, for many spouses enter into bitter and protracted disputes about money and property on divorce, sometimes resulting in litigation, even though most solicitors encourage and adopt a conciliatory approach and the Solicitors' Family Law Association and the Family Law Bar Association are committed to the negotiation and settlement of ancillary matters. Despite conciliatory approaches, some couples spend vast sums of money on legal costs, particularly where substantial assets are involved, and in some cases the amount spent on legal costs substantially reduces the assets available for distribution on divorce (see e.g. *B* v. *B* (*Financial Provision*) [1989] 1 FLR 119). In *Evans* v. *Evans* [1990] 1 FLR 319, [1990] 2 All ER 147, where the costs were out of all proportion to the assets available (the husband's were £35 000 and the wife's £25 000), Booth J in the High Court, with the concurrence of Sir Stephen Brown, President of the Family Division, laid down guidelines for family law practitioners in the preparation of substantial ancillary relief cases to prevent assets available for distribution being reduced by expensive and time-consuming litigation. These guidelines stated *inter alia* that, to keep legal costs to a minimum, affidavit evidence should be kept short, inquiries should be made in one questionnaire, joint valuers for both parties should be instructed and unnecessarily precise and meaningless valuations and duplication of documents should be avoided. These guidelines are contained in *Practice Direction* [1990] 1 WLR 575. Although many spouses do litigate about financial and property matters on divorce, many reach agreement between themselves or by negotiation between their solicitors. Sometimes agreements are incorporated into a court order called a consent order (s.33 MCA 1973 and see below).

A wide spectrum of different situations exists in which the courts exercise their discretionary jurisdiction to make financial provision and property adjustment orders. Some parties are wealthy, and orders for vast sums of money are made, but, at the other end of the spectrum, the court may have to consider financial provision and property issues in the context of State benefits and local authority housing. Some of the problematic areas relate to the enforcement of orders and disclosure of assets. Some of the areas of controversy are in respect of pensions on divorce, the 'clean break' and the new child maintenance provisions under the Child Support Act 1991 (see Chapter 11).

Before we consider applications for ancillary relief it must be remembered that a petitioner's failure to make adequate or satisfactory financial provision can in separation cases postpone decree absolute and in five years' separation cases can be an abolute bar to divorce (see 7.5). Divorced couples also retain a right to apply for a property dispute to be settled under s.17 Married Women's Property Act 1882 for up to three years after divorce, which might be useful where a party has remarried,

when an application cannot be made for an order for a spouse under MCA 1973 (see 4.1). A divorced spouse can also apply to have a property dispute settled under s.30 LPA 1925 (see 4.5). Engaged couples on relationship breakdown cannot apply for orders under Part II MCA 1973 (*Mossop* v. *Mossop* [1988] (see 2.1)).

8.2 Making an Application for Ancillary Relief

Procedural rules for making applications for ancillary relief (i.e. financial provision and property adjustment orders) are contained in the Family Proceedings Rules 1991 (FPR 1991). Application is made to the divorce court seized of the divorce petition and should be made by the petitioner in the divorce petition, or by the respondent in the answer when filing an answer to the petition, if the divorce is defended. If the divorce is not defended, the respondent must file a separate form asking for ancillary relief. To commence proceedings for ancillary relief, the applicant must serve notice on the respondent in the correct form. Once a prayer for relief is included in the petition, there is no time limit on the application so that application can be made many years after decree absolute and the petitioner can come back to court at any time to claim ancillary relief provided it has not already been awarded. In *Twiname* v. *Twiname* [1992] 1 FLR 29 the wife was granted a decree of divorce in 1974 and her husband was ordered to pay her maintenance, but no lump sum was ordered. In 1989 he sold his business for £6 million and she applied for increased maintenance and a lump sum. The husband argued that the lump sum application should be struck out, as such an order after so many years would cause him hardship and be an abuse of the court. These arguments were rejected by the Court of Appeal. Purchas LJ held that the court had jurisdiction to hear the application as s.23(1) MCA 1973 provides that the court has jurisdiction to order a lump sum on granting decree of divorce or at any time thereafter. *Twiname* caused an outcry in the media because the decision was considered to be contrary to the clean break doctrine (see below).

Where ancillary relief is not sought in the petition or in the respondent's answer, leave of the court is required before an application can be made, unless the parties agree to the proposed order (r.2.53(1) and (2) FPR 1991). Leave is usually given if the applicant has a seriously arguable case and a reasonable chance of succeeding in the application. Leave may be refused if there has been serious unwarranted delay or it would be unjust or oppressive to the respondent to make the order. A respondent who does not file an answer (i.e. if the divorce is undefended) can apply for ancillary relief at any time without leave (r.2.53(3)). A party who has remarried and who has not applied for ancillary relief cannot apply for an order, except for periodical payments or a lump sum for a child of the family (s.28(3)). Where an application has already been made by a remarried party, the application can be heard, except where the applica-

tion is made for periodical payments for a spouse, which automatically terminate on remarriage. These rules about remarriage apply whether or not the second marriage is void or voidable. A party who enters into a void or voidable second marriage must apply for ancillary relief in nullity proceedings. Whether or not there is remarriage, an order cannot be made after the death of either of the parties.

Affidavits giving details of all assets must accompany the application unless the parties are agreed on the order to be made (r.2.58(2) and (3) FPR 1991), and there is a strict duty to make full and frank disclosure of relevant information. The court can enable one party to obtain additional information from the other (r.2.63 FPR 1991) and can order discovery of documents (r.2.62 FPR 1991). Expert evidence can be called, although to minimise costs the parties should instruct joint valuers, and only a general rather than a detailed valuation should be made (see *Evans* v. *Evans* above). The hearing for ancillary relief usually takes place before the district judge in the county court, although he can refer the case to a judge (r.2.65 FPR 1991). Contested matters are transferred to family hearing centres for trial (see Chapter 1). A complex or serious case can be transferred to the High Court (s.39 Matrimonial and Family Proceedings Act 1984). Except for maintenance pending suit and orders for children, an order cannot be made unless decree nisi has been granted and if made, cannot take effect until decree absolute.

8.3 Orders

The court can make the following orders for ancillary relief:

(a) maintenance pending suit (s.22)
(b) financial provision orders (s.23)
(c) property adjustment orders (s.24)
(d) orders for the sale of property (s.24A)

These orders can be made in favour of a party to a marriage and/or to or for the benefit of any child of the family, although most applications for child maintenance must be brought under the Child Support Act 1991 (see Chapter 11). Children, however, continue to be entitled to lump sum and property orders from the courts, and certain children remain entitled to maintenance by court order.

(a) Maintenance Pending Suit (s.22)

Under s.22 MCA 1973 the court can make an order for maintenance pending suit which provides a party to a marriage with short-term maintenance (i.e. periodical payments) pending the outcome of the divorce suit (8721 orders were made in 1991). The order can take effect on presentation of the divorce petition but terminates when the divorce

suit is determined, which in most cases is on decree absolute, although the court can make the order for a shorter period. The court can make such order as it thinks 'reasonable', which largely depends on the parties' needs and resources. Although the s.25 guidelines do not expressly apply to maintenance pending suit, the court performs a similar exercise but not so meticulously as when making other orders. The court has a considerable discretion and, in a suitable case, can order substantial maintenance pending suit. In *Re T (Divorce: Interim Maintenance: Discovery)* [1990] 1 FLR 1 a wealthy husband was ordered to pay his wife £25 000 per annum as interim maintenance pending suit.

(b) Financial Provision Orders (s.23)

Under s.23 the court can make orders for financial provision, i.e. (i) periodical payments and (ii) lump sum orders. These orders can be made in favour of the parties to the marriage and/or to or for the benefit of a child of the family. Orders in favour of children can be made and take effect before decree nisi. The children must be under the age of 18, but orders can also be made to or for those aged over 18 who are being educated or trained, or where special circumstances exist (ss.23(1)(f), 29(1) and (3)). Orders in favour of a party to a marriage can be made on or after decree nisi, but, unlike maintenance pending suit, cannot take effect until decree absolute. When making orders in favour of spouses or children the court must apply statutory guidelines laid down in s.25. When making orders in favour of a party to a marriage the court under the clean break provisions must also consider whether to terminate the financial obligations of the spouses to each other (s.25A(1)).

We will consider first periodical payments and then lump sums.

(i) Periodical Payments Orders

Under s.23 the court can make orders for periodical payments (i.e. maintenance) for the parties to the marriage and/or to or for the benefit of any children of the family (except where the parties must apply for child maintenance under the Child Support Act 1991). If granted, the order will order payment of income to be made on a regular basis, e.g. weekly, monthly or annually. Orders in favour of a party to a marriage automatically terminate on that party's remarriage (s.28(1)). This automatic termination of periodical payments on the payee's remarriage may create a strong disincentive for a divorced person to remarry, particularly as the courts do not treat long and settled cohabitation as equivalent to marriage, although the court in variation proceedings may reduce or discharge the original order where a divorced spouse cohabits after divorce.

Periodical payments can be secured or unsecured. If unsecured, payment is made from unsecured income. However, if sufficient assets are available, particularly where the payer may default on payment, the

court may decide to make a secured order, whereby capital assets, such as shares, are charged as security for payment, usually by being transferred to trustees. If the payer defaults, income from the assets is used to make payment. Besides protecting the payee against the payer defaulting on payment, secured payments also prevent a payer from disposing of assets and provide protection on bankruptcy. After the payer's death the payee can also benefit from payment from a secured order made before the payer's death. Secured orders, however, are rarely made, as most parties have insufficient capital assets, other than the matrimonial home, which the court does not usually charge.

According to *Judicial Statistics, Annual Report 1991* (Cm 1990) in 1991 the following orders for periodical payments were made for spouses in the county court: fixed-term orders (12 955), orders pending further order (14 278). Under s.25A (clean break) 11 047 applications were dismissed. The court made 40 562 periodical payments orders in favour of children.

(ii) Lump Sum Orders

Lump sum orders can be made in favour of a party to a marriage and/or to or for the benefit of a child of the family (s.23(1)(c) and (f)). A lump sum could, for example, be ordered in favour of a party to a marriage to effect a clean break between the parties, or where there is a risk that periodical payments may not be paid. Sometimes very substantial lump sums are ordered. In *Gojkovic* v. *Gojkovic* [1992] Fam 40, [1990] 2 All ER 84, [1990] 1 FLR 140 a lump sum of £1.3 million was ordered to be paid to the wife, where the parties had built up a thriving hotel and property business with assets worth over £4 million. Lump sums are often ordered to adjust the parties' capital assets.

A lump sum order can be granted to enable liabilities and expenses reasonably incurred by a party to a marriage and/or a child of the family prior to the application to be met (s.23(3)(a) and (b)). A lump sum can be ordered to be paid in instalments ((s.23(3)(c)), and where a lump sum order is deferred or payable by instalments, payment of interest can be ordered (s.23(6)).

Although the 's.25 guidelines' and the clean break provisions apply, the Court of Appeal is unwilling to lay down guidelines (see *Gokjovic* v. *Gokjovic*), so that the size of the lump sum depends on all the circumstances of the case. A computer program devised by accountants called the '*Duxbury* calculation' (after *Duxbury* v. *Duxbury* [1987] 1 FLR 7, where it was mentioned for the first time) is sometimes used to calculate a lump sum in cases where substantial assets are available. The program takes into account variables (e.g. inflation, life expectancy, income tax, capital growth of and income produced by investments) to calculate a lump sum figure which invested will produce sufficient income for the payee for life. Purchas LJ in the Court of Appeal in *Vicary* v. *Vicary* [1992] 2 FLR 271 stated, however, that while the *Duxbury* calculation was a useful guideline, it should never be allowed to derogate in anyway from

the exercise of judicial discretion to take into account all the circumstances of the case under s.25. (See also *B* v. *B* (*Financial Provision*) [1990] 1 FLR 20 and *Gojkovic* v. *Gojkovik* [1992] where each wife was awarded a greater sum than that calculated under the *Duxbury* calculation because of their respective contributions to their marriage.)

A lump sum made in favour of a party to a marriage, other than a lump sum payable by instalments, is a 'once and for all' (i.e. final) order and cannot be varied under s.31. The plural reference to 'lump sums' in s.23(1)(c) allows for more than one lump sum to be made in any one order (e.g. by instalment) (see *Coleman* v. *Coleman* [1973] Fam 10, [1972] 3 All ER 886; *Sandford* v. *Sandford* [1986] 1 FLR 412). However, to avoid the potentiality for injustice caused by the finality of lump sum orders, proceedings can be adjourned (*Davies* v. *Davies* [1986] 1 FLR 497), but not usually for more than four or five years (*Roberts* v. *Roberts* [1986] 1 WLR 437, [1986] 2 All ER 483, [1986] 2 FLR 152). In *MT* v. *MT* (*Financial Provision: Lump Sum*) [1992] 1 FLR 362 the spouses on divorce had no assets from which a lump sum could be ordered, but the husband was certain to inherit a substantial sum from his father's estate under German law (the father was aged 83). Bracewell J held that to do justice in a case where there was a long marriage, the court has a discretion to adjourn an application for a lump sum where there is a real possibility of capital from a specific source being available in the near future (see also *Michael* v. *Michael* [1986] 2 FLR 389). A divorced spouse can apply many years later for a lump sum where one has not already been made, but where it has been applied for in the petition (see *Twiname* v. *Twiname* above).

Lump sum orders in favour of children are not final orders as the court's power to make such lump sum orders (and periodical payments) for children is 'excercisable from time to time' (s.23(4)). In practice, lump sums are rarely made in favour of children, unless there are substantial assets. The court may also consider it undesirable to order the lump sum to be paid to a spouse for the benefit of a child of the family as the spouse may dissipate the fund and use it for the wrong purpose (*Griffiths* v. *Griffiths* [1974] 1 WLR 1350, [1974] 1 All ER 932). A lump sum order in favour of a child cannot be postponed to take effect on majority, as the aim of the MCA 1973 is to make financial provision for children as children and dependants, and no order should be made unless a spouse has capital assets out of which to pay it (*Kiely* v. *Kiely* [1988] 1 FLR 248).

(c) Property Adjustment Orders

Under s.24 the court can make the following property adjustment orders: (i) transfer of property order; (ii) settlement of property order; and (iii) variation of settlement order.

These orders can be granted in favour of a party to a marriage and/or a child of the family on decree nisi or at any time afterwards. Property for the purpose of s.24 is anything capable of being valued in money or in

money's worth, including property owned by a party before marriage and acquired after marriage but before the application for ancillary relief is determined. The court can also take into account property likely to be acquired in the future as foreseeable future resources under s.25(2)(a)), e.g. pensions and inheritances. When deciding whether to make any property adjustment order and, if so, in what form, the court must apply the statutory guidelines laid down in s.25 and the clean break provisions (s.25A(1)).

Most orders for property adjustment on divorce are concerned with what should happen to the matrimonial home.

(i) A Transfer of Property Order (s.24(1)(a))

A transfer of property order directs a party to the marriage to transfer specified property to the other spouse and/or to or for the benefit of any child of the family. Any property can be transferred (e.g. car, furniture, stocks and shares), but the order is commonly used to transfer the matrimonial home from one party to the other, usually to the party with whom the children will live. The transferor may be given a charge over the house for a fixed amount or for a percentage of the value, which is realisable at a later date, e.g. when the house is sold. In some cases the transferee may be ordered to pay the transferor a lump sum representing the latter's share in the former matrimonial home. A transfer of property is sometimes ordered to effect a clean break between the parties, e.g. whereby the husband is ordered to transfer investments to his wife so that she can live on the income; or the husband transfers the matrimonial home to his wife with or without her making some compensating payment, but with her agreeing perhaps to forego any claims for spousal maintenance.

(ii) A Settlement of Property Order (s.24(1)(b))

A settlement of property order directs a party to a marriage to settle property to which he or she is entitled for the benefit of the other party to the marriage and/or any child of the family. A settlement occurs where property is held on trust for certain beneficiaries. A settlement of property order called a '*Mesher* order' can be made in respect of the matrimonial home, but these orders have hidden disadvantages unforeseen by the court at the time they were commonly being made, and consequently are now rarely made (see below).

(iii) A Variation of Settlement (Antenuptial or Post-nuptial) Order (s.24(1)(c) and (d))

This order can be made for the benefit of the parties and/or the children of the family. Under a settlement, property is held on trust for certain beneficiaries who have a life interest in the property. Settlements provide a

way of tying up and protecting property in wealthy families, and were once commonly made in contemplation of marriage before the introduction of separation of property in order to prevent the husband from acquiring his wife's property on marriage. The courts rarely vary settlements as settlements are rare. However, in *E* v. *E* (*Financial Provision*) [1990] 2 FLR 233 the court on divorce ordered £1.25 million to be transferred from a settlement held on discretionary trusts to the wife and children.

All property adjustment orders made on divorce are 'once and for all' orders, so that they cannot be varied under s.31 and further orders cannot be sought (see below).

(d) Orders for the Sale of Property

Under s.24A the court can make an order for the sale of property (or proceeds of sale of property) in which either or both spouses have a beneficial interest, but only when making or having made an order for secured periodical payments, a lump sum or property adjustment. Section 24A gives the court an ancillary power when making those orders. An order for sale can be made on or after decree nisi but cannot take effect until decree absolute (s.24A(3)).

Section 24A was inserted into the MCA 1973 by the Matrimonial Homes and Property Act 1981 on the recommendation of the Law Commission, as the courts, while having wide and flexible powers on divorce to adjust property, were severely restricted by having no statutory power of sale. Section 24A provides the court with a useful enforcement mechanism where there has been or is likely to be non-compliance with an order, e.g. where a divorced spouse has failed to comply with a lump sum order, the court can order sale of that spouse's property and direct the proceeds of sale to be paid to the party who should have received the lump sum (s.24A(2)(a)). The court can defer sale until a specified event has occurred or a specified period of time has expired (s.24A(4)), eg a husband could be ordered to pay a lump sum to his wife by a specified date, and the court could direct that if it is not paid, sale of some asset will be ordered and payment made from the proceeds. The court can also order that property be offered for sale to a specified person or persons (s.24A(2)(b)). A third party with an interest in the property in dispute (in most cases a mortgagee) must be allowed to make representations to the court and the third party's interest must be included among the circumstances of the case when the court performs its s.25 exercise (s.24A (6)).

8.4 How the Court Exercises its Jurisdiction to Make Orders

Section 25 MCA 1973 lays down detailed guidelines which the court must consider when making orders for financial provision and property

adjustment. The court under the 'clean break' provisions (s.25A) must also consider whether it should terminate the mutual financial obligations of the parties to the marriage. We will consider first the s.25 guidelines and then the clean break provisions. Additional guidelines which the court must apply when making orders for children are also laid down in s.25 (see Chapter 11).

The 's.25 Guidelines'

The s.25 guidelines must be considered by the court when exercising its powers to make orders for periodical payments, lump sums, property adjustment and sale of property. The court must have regard to all the circumstances of the case, first consideration being given to the welfare of any child of the family (s.25(1)). Certain specified matters must also be considered when making orders in favour of a party to a marriage (s.25(2)) and when making orders in favour of a child of the family (s.25(3) and (4)). These s.25 matters are not exclusive. Other matters can also be considered and the court possesses a considerable degree of discretion in deciding whether or not to make an order, and, if so, how. There is no exact scientific formula for assessing what order to make. Each case depends on its own facts, but the central question is one of needs and available resources. The Court of Appeal is unwilling to lay down guidelines (*Gojkovic* v. *Gojkovic*, see above) and predicting the outcome of a case is difficult. This unpredictability was one of the Government's arguments for taking child maintenance out of the courts into a government agency with assessment being calculated by a statutory formula (see Chapter 11).

The court must consider under s.25(1):

All the circumstances of the case, but first consideration is the welfare of the child (s.25(1)) When making any order (in favour of a party to a marriage and/or a child of the family) the court must consider all the circumstances of the case, but must give first consideration to the welfare of any child of the family who has not attained the age of 18. The court under s.25(1) need therefore not consider any family members over the age of 18 who are dependent on parents because of education, vocational training or some other reason such as illness or disability, although orders can be made in favour of them (s.29(3)). However, dependent family members can be considered under other statutory guidelines, e.g. under financial obligations and responsibilitiies or contribution to the welfare of the family (s.25(2)(b) and (f)).

The welfare of any child is first not paramount and the court can make a clean break order in respect of a party to the marriage whether or not there are children (*Suter* v. *Suter and Jones* [1987] Fam 111, [1987] 2 FLR 232, [1987] 2 All ER 336). The courts are sometimes unwilling, however, to impose a clean break between the parties, even when the party with whom the children are living is financially self-sufficient. The court may prefer instead to make a nominal order (e.g. 5p per annum), as it did in *Suter*,

which can be varied if anything unforeseen happens in the future (see below).

The court, when considering whether to make an order in favour of a party to a marriage and, if so, in what manner, must, besides s.25(1), also take into account the following matters:

The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire (s.25(2)(a)) Under this section the court must consider any actual or potential financial or property resource of the parties. The court can also impute a notional earning capacity to a party to a marriage, so that a divorced spouse cannot become unemployed or refuse to seek employment or promotion to escape a claim for ancillary relief by the other party (see e.g. *Hardy* v. *Hardy* (1981) 2 FLR 321, where the husband worked for his father for much less than he could elsewhere). Future earning potential is a particularly important consideration when the court is deciding whether to terminate the financial obligations of the parties under the clean break provisions.

'Financial resources' is widely interpreted. In *Schuller* v. *Schuller* [1990] 2 FLR 193 the Court of Appeal stated that the word 'resources' is entirely unqualified; there are no words of limitation on it. The court can therefore take into account e.g. business profits, interest on investments, insurance policies, pension rights, and welfare benefits. The following have been taken into account as 'financial resources': a future inheritance but only where a party is certain to inherit and death is imminent (*Michael* v. *Michael* [1986] 2 FLR 389; *Roberts* v. *Roberts* [1986] 1 WLR 437, 2 All ER 483, [1986] 2 FLR 152; *MT* v. *MT* (*Financial Provision: Lump Sum*) [1992] 1 FLR 362; *K* v. *K (Conduct)* [1990] 2 FLR 225); damages for personal injury (*Daubney* v. *Daubney* [1976] Fam 267, [1976] 2 All ER 453; *Wagstaff* v. *Wagstaff* [1992] 1 FLR 333); a beneficial interest under a discretionary trust outside the jurisdiction (*Browne* v. *Browne* [1989] 1 FLR 291); the income of a new spouse or cohabitee (*Macey* v. *Macey* (1982) FLR 7). However, earlier cases create no precedents for later cases, so that the fact that damages, for example, were taken into consideration in one case does not mean they will necessarily be taken into account in another.

Although 'financial resources' is widely interpreted, the court has warned against too detailed an assessment of resources because of the cost involved (see *Evans* v. *Evans* above). In *B* v. *B* (*Financial Provision*) [1989] 1 FLR 119, where £50 000 had been spent by the parties on litigation about a lump sum, Anthony Lincoln J in the Family Division stated that the s.25 guidelines enjoined the court to take into account a spouse's resources but that involved a general and not a detailed consideration of the sources of income.

The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future (s.25(2)(b)) Under this section the court considers present and foreseeable future financial needs, obligations and responsibilities. Financial needs include the provision of accommodation and general living expenses. If there are children, the financial needs of the parent with whom the children will live are likely to be greater than those of the other parent, particularly where the caring parent cannot work, and the court takes these facts into account. Financial needs can include the needs of a child not fathered by a divorced father. In *Fisher* v. *Fisher* [1989] 1 FLR 423, which caused an outcry in the media, the Court of Appeal in a variation application rejected a divorced husband's arguments that the court should not take into account the needs of the child of his former wife that had been fathered by another man who had disappeared.

The court only considers reasonable needs. In *Leadbetter* v. *Leadbetter* [1985] FLR 789 it was held that a wife could not justify the purchase of a three- rather than a two-bedroomed house even though the husband's assets totalled about £1.5 million, but in *Delaney* v. *Delaney* [1990] 2 FLR 457 it was reasonable for the husband on marriage breakdown to take out a mortgage of £30 000 to buy a house for his new partner and which would provide a place for his children to stay.

The standard of living enjoyed by the family before the breakdown of marriage (s.25(2)(c)) Although the court must consider the standard of living enjoyed by the parties before marriage breakdown, it is usually impossible, unless there are substantial assets, for the parties to enjoy the same standard of living as they did before divorce.

The age of each party to the marriage and the duration of the marriage (s.25(2)(d)) The age of each party and the duration of the marriage must be considered, for these factors are relevant to the financial needs and obligations of the parties. The court would expect a young childless woman whose marriage has been short to seek employment and she may be awarded no maintenance at all, whereas the needs of an older woman whose marriage was long are likely to be different.

What about cohabitation before marriage? The general rule is that obligations and needs begin on and not before marriage (*Foley* v. *Foley* [1981] 2 All ER 857, (1981) 2 FLR 215; *Krystman* v. *Krystman* [1973] 1 WLR 927, [1973] 3 All ER 247). However, in certain cases, premarital cohabitation may be considered relevant as it was in *Kokosinski* v. *Kokosinski* [1980] Fam 72, [1980] 1 All ER 1106, (1980) 2 FLR 205, where the parties were unable for political reasons to marry for many years. In exceptional cases periods of cohabitation after divorce may also be considered (*Chaterjee* v. *Chaterjee* [1976] Fam 199, [1976] 1 All ER 719).

Any physical or mental disability of either of the parties to the marriage (s.25(2)(e)) This provision is staightforward, allowing the court to take into account any physical or mental disability of either of the parties.

The contribution which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family (s.25(2)(f)) Under this section both financial and other contributions must be taken into account, such as a wife's contribution to looking after the home and caring for the children. This section highlights the difference between spouses and cohabitees on relationship breakdown. Cohabitees are in a much worse position (see Chapter 17). In *Burns* v. *Burns* [1984] Ch 317, [1984] 1 All ER 244, for instance, the female cohabitee failed to establish an interest under a trust in the former home even though she had cared for the home and the children for about twenty years. Failure to make contribution can also be taken into account, as it was in *West* v. *West* [1978] Fam 1, [1977] 2 All ER 705, where the wife refused to set up home with her husband but looked after the children at her parents' house. In *Vicary* v. *Vicary* [1992] 2 FLR 271 the wife's contributions to the family were taken into account, even though she had made no financial contribution to the family assets. Purchas LJ held that no distinction should be made between a wife who had contributed directly to a business and one who had supplied the infrastructure and support for the family, while the husband was able to prosper and accumulate wealth.

The conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it (s.25(2)(g)) Only conduct of an extreme kind is taken into account, otherwise this section would contradict the aim of the 1969 reforms to move away from fault (see Chapter 6). The aim of divorce law is not to apportion blame for the breakdown of marriage. In *Wachtel* v. *Wachtel* [1973] Fam 72, [1973] 1 All ER 829 Lord Denning MR rejected the husband's argument that the wife's adultery was conduct under s.25(2)(g), and stated that conduct must be 'obvious and gross' before it can be taken into account. The following conduct has been taken into account: causing serious injury to a spouse (*Jones (M)* v. *Jones (W)* [1976] Fam 8, [1975] 2 WLR 606); malicious persecution by a schizophrenic spouse (*J(HD)* v. *J(AM)* (*Financial Provision: Variation*) [1980] 1 WLR 124, [1980] 1 All ER 156); dissipating the family assets (*Martin* v. *Martin* [1976] 2 WLR 901, [1976] 3 All ER 625); committing adultery with a father-in-law (*Bailey* v. *Tolliday* [1983] 4 FLR 542); husband's alcoholism causing disagreeable behaviour and neglect of the home (*K* v. *K* (*Conduct*) [1990] 2 FLR 225).

An example of extreme conduct occurred in *Evans* v. *Evans* [1989] 1 FLR 351, where the wife was convicted of inciting others to murder her husband who, since their divorce in 1953, had regularly paid her maintenance. The Court of Appeal dismissed her application to have periodical payments increased, holding that, while not every spousal homicide or attempted

homicide would necessarily involve a financial penalty, the court would be losing sight of reality if it were to condemn a man who had religiously complied with maintenance orders for some 35 years to continue payment to a wife who had solicited others to murder him. In *Duxbury* v. *Duxbury* [1987] 1 FLR 7 the husband appealed against a lump sum order made in favour of his wife on the ground that her adultery should be treated as conduct under s.25(2)(g). His appeal was dismissed by the Court of Appeal, Ackner LJ stating that the s.25 exercise was essentially a financial and not a moral exercise, save where in the opinion of the court it would be inequitable to disregard conduct. Where both parties are to blame the court may refuse to take extreme conduct into account, as it did in *Leadbetter* v. *Leadbetter* [1985] FLR 789, where the wife who had a drink problem had committed adultery with several men and her husband had taken a teenage girl as a partner and fathered a child by her.

In the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit (for example, a pension) which by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring (s.25(2)(h)) On divorce a spouse may lose certain rights of entitlement to property, e.g. to a pension, to the surrender value of an insurance policy, to future business profits or to the sale of a business. On divorce a spouse also loses a right to succeed to any property on the other spouse's intestacy, and any gift in a will to a spouse is revoked (see Chapter 16). Under s.25(2)(h) the court can take into account any lost future benefits when making orders for ancillary relief. The court may decide to increase an order for financial provision to compensate for the loss of future benefits or make a deferred lump sum order, payment to take effect at a future date (see e.g. *Milne* v. *Milne* (1981) 2 FLR 286), such as on the retirement of the payer. The court can adjourn the proceedings until retirement but will usually only do so for two or three years.

With pensions on divorce the position remains unsatisfactory, as the court is often precluded by the terms of the pension scheme or by statute from assigning pension rights. Wives, in particular, suffer because, with low-paid jobs and shorter years of service, many women are unable to accumulate a large pension. There has been much criticism of pensions on divorce and calls for reform, for instance by the Law Society (*Maintenance and Capital Provision on Divorce*, 1991) and others. One way of solving the problem would be to introduce pension-splitting, whereby pension assets accumulated during marriage would be split on divorce. Another would be to introduce pension adjustment orders.

Although the s.25 guidelines must be applied by the court when deciding whether to make an order, and, if so, in what manner, they do not provide specific guidance, and the Court of Appeal has refused to lay down more specific guidelines (see *Gojkovic* v. *Gojkovic* above). At one time the courts often used the so-called 'one-third' rule as a starting point

(i.e. as a rough rule of thumb) to assess the parties' income and capital needs (see *Ackerman* v. *Ackerman* [1972] Fam 225, [1972] 2 All ER 420 and *Wachtel* v. *Wachtel* [1973] Fam 72, [1973] 1 All ER 829). Applied to income it would order the husband to pay periodical payments to his wife to bring her income (if any) up to one-third of the spouses' joint income. The one-third approach was discredited in later decisions and is rarely used today, but it was applied in *Bullock* v. *Bullock* [1986] 1 FLR 372 and *Dew* v. *Dew* [1986] 2 FLR 341 as a starting point to calculate capital distribution. Another approach adopted by the courts as a starting point was the 'net effect' approach whereby the parties' respective incomes and resources are compared on the basis of a hypothetical order having been made and the hypothetical order adjusted accordingly.

Besides applying the s.25 guidelines, the court must in some circumstances consider whether to effect a clean break between the parties to the marriage.

The 'Clean Break' Provisions (s.25A)

When exercising its powers to make orders for financial provision and property adjustment in favour of spouses, the court must under s.25A consider whether to effect a clean break between the parties to a marriage either to take effect at once or at some time in the future. Section 25A was inserted into the MCA 1973 by Part II Matrimonial and Family Proceedings Act 1984 after the Law Commission had recommended that greater weight should be given to a divorced wife's earning capacity and to the desirability of both parties becoming financially self-sufficient on divorce where appropriate (*The Financial Consequences of Divorce*, Law Com No 112, 1982). Prior to s.25A, the court could only impose a clean break by dismissing a claim for periodical payments where a spouse agreed to it, so that the court had to make at least a nominal order (e.g. 5p per annum) (See *Dipper* v. *Dipper* [1981] Fam 31, [1980] 1 FLR 286). The aim of the clean break is to encourage the parties 'to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down' (per Lord Scarman in *Minton* v. *Minton* [1979] AC 593, [1979] 2 WLR 31, [1979] 1 All ER 79). In this respect the clean break fits in with the rationale of proposed divorce reforms which encourage the parties to look to the future and consider the consequences of divorce rather than to dwell on the past (see Chapter 7).

Section 25A only imposes a duty on the court when deciding whether and, if so, how to make orders for periodical payment, lump sums, property adjustment or for sale or property *in favour of spouses* (s.25A(1)). It has no application to orders to or for the benefit of children, as parental responsibility for children continues after divorce. Section 25A(1) imposes a general duty on the court to consider whether it would be appropriate so to exercise its powers to make orders in favour of spouses that 'the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court

considers just and reasonable'. The other two subsections in s.25A impose specific duties on the court in respect of periodical payments. When making a periodical payments order (secured or unsecured), the court must consider whether to make the order for a term sufficient to enable the payee 'to adjust without unjust hardship to the termination of his or her financial dependence on the other party' (s.25A(2)). The court can also dismiss an application for periodical payments made on or after divorce, with a direction that no further application be made, if it considers no continuing mutual obligation should be imposed on the parties (s.25A(3)).

Part II Matrimonial and Family Proceedings Act 1984 also inserted other provisions into the MCA 1973 to facilitate a clean break. When making a periodical payments order for a fixed term, the court can direct that no application be made for an extension of that term in variation proceedings under s.31 (s.28(1A)). Changes were also made to s.31 so that the court could consider effecting a clean break in variation proceedings. Under s.31(7) in any application to vary periodical payments (secured or unsecured) made in favour of a party to a marriage, the court must

> 'consider whether in all the circumstances . . . it would be appropriate to vary the order so that payments under the order are required to be made or secured only for such period as will in the opinion of the court be sufficient to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments.'

A new section (s.15(1)) was also inserted into the Inheritance (Provision for Families and Dependants) Act 1975, allowing the court on an application by a party to a marriage on the grant of decree of divorce or at any time afterwards to prohibit an application by a party to a marriage under s.2 of the 1975 Act for reasonable financial provision against the estate of the applicant on his or her death (see Chapter 16).

The court can therefore effect a clean break between the parties in an application for periodical payments either by:

- dismissing the periodical payments application;
- dismissing the periodical payments application with a direction that the applicant shall not make further application (s.25A(3);
- making a limited-term periodical payments order (s.25A(2); or
- making a limited-term periodical payments order (s.25A(2)) with a direction that no application for variation of that term should be sought in variation proceedings under s.31 (s.28(1A)).

In variation proceedings the court can also make a limited-term order for periodical payments (s.31(7)).

To allow for the loss of periodical payments or for the fact they are for a limited term, the court can make compensating lump sum and/or property adjustment orders. Whether or not the court decides to exercise

its discretion to order a clean break depends on all the circumstances of each case. Where the parties have substantial assets it is easier to effect a clean break as the court can order payment of a lump sum representing capitalised maintenance payments. In *Attar* v. *Attar* (*No. 2*) [1985] FLR 653 the husband, with assets of £2 million, was ordered to pay his wife a lump sum of £30 000 to effect a clean break on divorce, the marriage having lasted only six months. A clean break order also provides a useful means of minimising hostility in an acrimonious dispute (see e.g. *C* v. *C* (*Financial Provision*) [1989] 1 FLR 11 below).

Although the court is under a duty to consider whether or not it should terminate the financial obligations of the parties, there is no presumption that a clean break should be ordered (Butler-Sloss LJ in *Barrett* v. *Barrett* [1988] 2 FLR 516) and the Court of Appeal has also warned about treating the clean break as a principle (*Clutton* v. *Clutton* [1991] 1 All ER 340, [1991] 1 FLR 242). The court must apply the s.25 guidelines and is likely to be particularly concerned about future income and earning capacity (s.25(2)(a)) and future financial needs, obligations and responsibilities (s.25(2)(b)). Other important considerations are likely to be the duration of the marriage and the ages of the parties and any children. The courts are unwilling, however, to make orders which make unrealistic expectations of a spouse's capacity for economic independence, for instance, where a wife has been married for several years, has brought up the children and has gained no qualifications. In *M* v. *M* (*Financial Provision*) [1987] 2 FLR 1 the husband contended that under s.25A periodical payments to his wife should be terminated after five years. Heilbron J in the Family Division held it would be inappropriate, unjust and realistic in view of her age (47 years) and her inability to find employment, despite her genuine attempt to do so. She had also lost the chance of a secure future which her husband's pension would have provided, and, in any event, the husband could apply in the future for variation under s.31 should his financial position deteriorate.

Although children are the first consideration for the court when deciding whether or not to make orders for financial provision and property adjustment (s.25(1)), the court can impose a clean break where there are children (*Suter* v. *Suter and Jones* [1987]). However, the courts may be unwilling in practice to impose a clean break where children may suffer as a result of terminating spousal obligations. The court may prefer instead to make a deferred order or a nominal order where there are children (see e.g. *Whiting* v. *Whiting* [1988] 1 WLR 565, [1988] 2 All ER 275, [1988] 2 FLR 189). Even where the child is not a child of the parties the court may take this into consideration when deciding whether to impose a clean break. In *Fisher* v. *Fisher* [1989] 1 FLR 423 a former husband applied *inter alia* to have maintenance payments to his former wife discharged on the basis of a clean break under s.31(7), i.e. in variation proceedings. The court at first instance took into account the fact that his former wife had had a child by another man from whom she was unable to obtain financial relief for the child. The husband appealed to the Court of

Appeal, arguing that when the court was invited to exercise its discretion under s.31(7), neither party was entitled to rely on any reduction of earning capacity which had been within their control, i.e. in *Fisher* the birth of a child. His appeal was dismissed. *Fisher* v. *Fisher* was criticised by the media and other commentators. The *Daily Telegraph* headline was 'Divorced husband must pay for his ex-wife's affair', and many considered the case to be contrary to the clean break. Despite these criticisms, the court under s.31(7) must consider all the circumstances of the case and can only terminate financial obligations *where appropriate to do so*. To have ignored the child in *Fisher* would have been to have ignored one of the circumstances of the case.

A clean break was ordered in the following three cases, which illustrate the factors the courts consider important when terminating spousal financial obligations. In *C* v. *C* (*Financial provision*) [1989] 1 FLR 11 there were substantial assets available and the dispute between the parties was acrimonious. The wife was 44 and had a considerable earning capacity, being fluent in several languages. Ewbank J held that in these circumstances, it would be undesirable for the husband to be under a lifelong obligation to pay her periodical payments and accordingly made a deferred clean break order terminating periodical payments when their younger child would be grown up. In *Hedges* v. *Hedges* [1991] 1 FLR 196 the Court of Appeal dismissed an appeal by the wife against a deferred clean break order made at first instance because of the age of the parties, the short duration of their marriage, the fact that they had no children and that both had accommodation. In *Waterman* v. *Waterman* [1989] 1 FLR 380 after a very short marriage where there was one child (aged five), living with the mother who had earning capacity, the Court of Appeal refused to overturn a clean break order that periodical payments to the wife should terminate in five years' time.

The courts have been criticised for failing to order a clean break in cases where the facts are such that it is appropriate to do so. Bernadette Walsh (see reading reference below) criticised *Whiting* v. *Whiting*, where the majority of the Court of Appeal, Balcombe LJ dissenting, refused to make a clean break order under s.31(7) MCA 1973 and s.15 Inheritance (Provision for Family and Dependants) Act 1975, but upheld a nominal order made at first instance, even though the wife had qualified as a teacher and had a steady job. The Court of Appeal considered a nominal order (i.e. a 'backstop order') was necessary to protect the wife and children, thereby allowing them to apply in variation proceedings should unforeseen events occur, such as the mother losing her job or becoming ill. The majority of the Court of Appeal held that the judge at first instance had no obligation to vary the original order and impose a clean break unless there were compelling reasons to do so, and as there was a wide discretion under ss.31(7) and 25A, the judge had not been plainly wrong. Balcombe LJ, however, in a strong dissenting judgment stated that to make a nominal order just in case something should happen in the future

was to negate entirely the aim of the clean break introduced by Parliament for reasons of social policy.

The Court of Appeal's unwillingness in *Whiting* and in other cases may, however, not necessarily indicate an unwillingness to apply the clean break doctrine on divorce, but the need to apply the principle in *G v G (Minors) (Custody Appeal)* [1985] 1 WLR 647, [1985] 2 All ER 225, [1985] FLR 894, i.e. that appellate courts should not interfere with discretionary decisions of the lower courts unless those decisions are plainly wrong. In fact there is an increasing trend towards clean break lump sum and property orders. In 1991 11 047 applications for periodical payments were dismissed and 42 483 lump sum and property orders made in the county court. A clean break will not, however, be ordered where it would cause injustice.

8.5 The Matrimonial Home on Divorce

The matrimonial home, which for most couples is their most valuable capital asset, is often the subject of a dispute on divorce. One party may wish to keep the house as a home for the children, but the other may wish to sell the house to realise its capital value. If the house is of little value, the housing market is depressed and there is little alternative housing available, there may be many problems to be solved. The court has a considerable discretion when deciding what should happen to the matrimonial home on divorce, and has a range of different orders which it can make in respect of the matrimonial home irrespective of ownership.

The court could order one party to the marriage to transfer the matrimonial home or his or her share of the matrimonial home to the other party with or without the latter making any compensating payment. Sometimes the matrimonial home is transferred to one party to effect a clean break, e.g. it could be transferred to the wife with her forbearing to claim periodical payments. In the following cases the matrimonial home was transferred to the wife, although in appropriate cases it is open to the court to transfer the matrimonial home to a husband: *Hanlon* v. *Hanlon* [1978] 1 WLR 592 (husband, a police officer, had rent free accomodation); *Bryant* v. *Bryant* (1976) 120 Sol Jo 165 (husband had failed to pay maintenance, had been bound over for cruelty and had spent time in prison for disobeying injunctions and court orders). The party to whom the matrimonial home is transferred will only be ordered to make compensating payment to the transferor if the transferee has sufficient assets available, although a loan or mortgage could be taken out to cover payment as the wife did in *Potter* v. *Potter* [1990] 2 FLR 27.

At one time, particularly in the 1970s, the court would frequently make what was called a '*Mesher* order' (named after *Mesher* v. *Mesher* heard in 1973 but reported [1980] 1 All ER 126). A *Mesher* order is a settlement of property order (s.24(1)(b)) whereby the matrimonial home is settled on both parties on trust for sale in certain shares with sale postponed until, e.g. the youngest child reaches the age of 17 or finishes

full-time education. The order can cover other contingencies, such as death, remarriage, cohabitation or allowing the person in occupation to move home before the trust for sale is exercised, to prevent the problem that occurred in *Thompson* v. *Thompson* [1986] Fam 38, [1985] FLR 863 (see below). *Mesher* orders are particularly useful where there are children, as the person with whom the children are to live (usually the wife) can occupy the house with the children until they have grown up, when the house can be sold and the proceeds of sale divided between the parties.

Mesher orders are now, however, rarely ordered as they have certain drawbacks, which were not foreseen when they were first being made by the courts during the 1970s and 1980s. First of all, they postpone problems for wives in occupation who on sale (e.g. when the children reach 18) may have insufficient funds from the proceeds of sale to buy a new home. Second, in some cases, dependent 'children' over the age of 18 continue to need accommodation. Third, *Mesher* orders are contrary to the clean break, as, until sale, the parties are tied to being joint owners, thereby restricting their chances of financial self-sufficiency. One of the main problems of *Mesher* orders, however, is that being property adjustment orders they cannot be varied under s.31 MCA, i.e. they are 'once and for all' orders. *Carson* v. *Carson* [1983] 1 WLR 285, [1983] 1 All ER 478 demonstrates the drawbacks of *Mesher* orders. In *Carson* a *Mesher* order was made on divorce. Later on the wife's financial position became difficult and the husband was in arrears with maintenance payments. She sought an order that her husband transfer to her his share of the former matrimonial home in exchange for her foregoing any claim to maintenance. The Court of Appeal dismissed her appeal, as the court had no jurisdiction under s.31 to vary a *Mesher* order. Ormrod LJ admitted there were drawbacks with *Mesher* orders as the wife in *Carson* would have to sell the matrimonial home and, with only half the proceeds of sale and very little by way of periodical payments, she would be in a most unfavourable position to rehouse herself.

Another problem associated with a *Mesher* order occurred in *Thompson* v. *Thompson* [1986] Fam 38, [1985] FLR 863, where under the terms of a consent order the divorced couple had agreed that the former matrimonial home should be held jointly on trust for sale, with sale postponed until the youngest child reached 17 or finished full-time education. Later on, the wife wished to sell the house and move to a different area, but her husband refused to agree to the sale because it would upset the children's schooling and make his access visits difficult. The wife therefore applied for an order enforcing the sale, but the judge refused her application, stating he had no jurisdiction to make the order, as a property adjustment order (i.e. the *Mesher* order) could not be varied under s.31. However, the Court of Appeal allowed her appeal, holding that the court had jurisdiction to hear an application for sale before a prescribed event (i.e. here the youngest child reaching 17 or finishing full-time education), provided the object of the application was to give effect to the spirit and

purpose of the original order. Had her application had the effect of producing a substantially different order from that contemplated by the original order, then the application would have been one for variation which would have been prohibited by s.31, being an application for variation of a property adjustment order. The Court of Appeal made an order for sale under s.24A. Although the Court of Appeal in *Thompson* was able to find a sensible and practical answer to a problem created by a *Mesher* order unforeseen at the time the original order was made, the reasoning is somewhat dubious for it seems that what the wife wanted was clearly a variation of the terms of the original property settlement order, which was precluded by s.31.

Despite the unpopularity of the Mesher order, there may be some situations when it will be appropriate for the court to order one. In *Clutton* v. *Clutton* [1991] 1 All ER 340, [1991] 1 FLR 242 Lloyd LJ stated *obiter* that a *Mesher* order might provide the best solution where family assets were sufficient to provide both parties with a roof over their heads if the matrimonial home were sold at a later date, but the interest of the parties required the children to stay in the matrimonial home. His Lordship stressed, however, that, where there were any doubts about a wife's eventual ability to rehouse herself, then a *Mesher* order should not be made. A *Mesher* order was not made in *Clutton* as it was uncertain whether two-thirds of £50 000 would be sufficient for the wife to rehouse herself in a few years' time. The court held that a '*Martin* order' (see below) did not suffer from the same disadvantage. The Law Commission (*Family Law: The Ground for Divorce*, Law Com No 192, 1990) has recommended that variation of property settlement orders (i.e. *Mesher* orders) should be allowed in exceptional circumstances to avoid the problems and injustices that can occur.

Another option for the court is to make a '*Martin* order' in respect of the matrimonial home (named after *Martin* v. *Martin* [1978] Fam 12). This is an order giving one party (usually the wife) the right to occupy the house until her death, remarriage or cohabitation, after which the house is held on trust for sale and the proceeds of sale divided up in certain shares (see e.g. *Chadwick* v. *Chadwick* [1985] FLR 606; *Harvey* v. *Harvey* [1982] Fam 83, [1982] 1 All ER 693, (1982) FLR 141; *Clutton* v. *Clutton* [1991]). *Martin* orders are preferred to *Mesher* orders as the wife effectively has a life interest in the house, unless, for example, she remarries or cohabits. A *Martin* order is similar to a *Mesher* order in that certain events trigger sale of the matrimonial home, but those events are such that the wife can live in the house for as long as she requires and are not tied in to the children.

Another option is for the court to order that the matrimonial home be transferred to one party but subject to a charge in favour of the transferor, representing the value of the transferor's interest in the home which will be realised on sale at a later date (see e.g. *Knibb* v. *Knibb* [1987] 2 FLR 396 and *Popat* v. *Popat* [1991] 2 FLR 163). In *Clutton* v. *Clutton* [1991] the husband was ordered by the registrar to transfer to his wife his entire interest in the matrimonial home, subject to a charge in his favour of

£7000, not to be enforced until January 1991. He appealed asking for a *Martin* order, i.e. an order that sale be postponed until his wife died, remarried or cohabited, on terms that he should have one-third of the proceeds of sale should any of those events occur. The Court of Appeal, Lloyd LJ giving the leading judgment, held that the judge should have made a *Martin* order in the proportions of one-third to the husband and two-thirds to the wife. Even though the husband had greater earning capacity than his former wife, it was manifestly unfair not to make a *Martin* order, as the transfer of property order deprived the husband for ever of any share in the sole capital asset of the marriage. The Court of Appeal held that the judge at first instance was plainly wrong. Lloyd LJ said that one of the aims of the clean break was to decrease bitterness and the effect of the order had not been to do this.

Another option is for the court to order that the matrimonial home be sold under s.24A and the proceeds of sale be divided up in such proportions as the court thinks fit. However, this order can only be made ancillary to the court's power to make orders for financial provision and property adjustment. An order for sale is a useful means of effecting a clean break between the parties if there is sufficient capital in the matrimonial home to enable the parties to rehouse themselves with the proceeds of sale, e.g. the wife could be given a lump sum from the proceeds of sale representing capitalised maintenance payments, which could be calculated using the *Duxbury* calculation.

If there is any danger that the spouse who owns the matrimonial home will sell it to a third party before the court has exercised its powers on divorce under ss.24 and 24A, the other spouse should register his or her statutory right of occupation under the Matrimonial Homes Act 1983 (see Chapter 4), or obtain an injunction under s.37 MCA 1973 or under the inherent jurisdiction of the court to prevent or set aside the actual or threatened sale of the property (see 8.8 below).

The matrimonial home may be subject to the Legal Aid Board's statutory charge (see Chapter 1).

8.6 Private Arrangements

Many parties, instead of litigating about financial and property matters on divorce, reach agreement about these matters by themselves or by negotiation between solicitors. Some make separation or maintenance agreements. Others make agreements which are incorporated into a court order called a consent order (68 369 consent orders were made under s.33A MCA 1973 in the county court in 1991). The emphasis in family law is on conciliatory approaches with the parties reaching agreement to minimise bitterness and hostility on divorce. As Lord Scarman said in *Minton* v. *Minton* [1979] AC 593, [1979] 2 WLR 31, [1979] 1 All ER 79, 'The law now encourages spouses to avoid bitterness and to settle their property and money problems'. Many solicitors belong to the Solicitors'

Family Law Association, which aims to mimimise conflict by encouraging and promoting agreement between the parties on divorce. Many parties do not litigate.

However, despite the emphasis being on encouraging agreement, the parties to divorce are not completely free to make agreements. The court retains a supervisory role. It is not possible, for instance, to oust the jurisdiction of the court in a maintenance agreement (s.34(1) MCA 1973), and consent orders can only be made after the parties have provided the court and each other with information specified by the rules of court (see r.2.61 FPR 1991). We will consider separation and maintenance agreements and then consent orders.

Separation and Maintenance Agreements

Sometimes parties to a marriage make their own private separation or maintenance agreements before or on divorce. A separation agreement relieves the parties of the duty to cohabit and usually makes provision for other matters, such as maintenance, distribution of property and care of the children. A maintenance agreement deals with financial provision for the parties and/or their children. These agreements have certain advantages: they can be drawn up cheaply without the need to attend court and they encourage amicable settlement. However, they also have certain disadvantages as the case of *Edgar* v. *Edgar* [1980] 1 WLR 1410, [1980] 3 All ER 887 illustrates. In *Edgar* the wife prior to divorce made a private separation agreement with her husband, a multi-millionaire, that he would pay her £100 000 and she would not seek any further provision. She made the agreement, despite her solicitor's advice that she would obtain a better settlement in divorce proceedings, as she was anxious to get away from her husband on relationship breakdown and tie up financial arrangements quickly. Later on in divorce proceedings the judge refused to give effect to the private separation agreement and ordered the husband to pay her a lump sum of £760 000. However, on the husband's appeal, the lump sum order was set aside by the Court of Appeal who held her bound by the earlier agreement. The crucial question, the Court of Appeal held, was not whether there was a disparity of bargaining power but whether it had been exploited. On the facts, she had received legal advice and there was no evidence of adverse conduct by her husband during the negotiations leading up to the agreement. The Court of Appeal held there was no justification for going behind the agreement. Ormrod LJ stated that a large disparity between the sum agreed and the sum that might have been awarded in divorce proceedings was insufficient of itself for the court to ignore the agreement and order a lump sum. In *Camm* v. *Camm* (1982) 4 FLR 577 *Edgar* v. *Edgar* was distinguished on its facts, the Court of Appeal holding that the wife should not be bound by an agreement made between her and her husband on marriage breakdown but before divorce, as at the time of the agreement the wife had been under great

pressure and the agreement was unfair. The wife had acquiesced in an unsatisfactory arrangement and should not be held bound to it. Ormrod LJ stated that agreements made during the throes of divorce were unreliable and should not be considered as contractual bargains. Here there was a huge disparity between the incomes and standard of living of the parties and his Lordship held this was not desirable.

The court has jurisdiction to alter maintenance agreements under ss.34 and 35 MCA 1973. A provision in a maintenance agreement restricting any right to apply to a court for an order containing financial arrangements is void (s.34(1)). The court has jurisdiction to alter the terms of the agreement where a change of circumstances would have made the agreement different and where there is no financial provision made for a child of the family (s.35(2)(a) and (b)). The court can insert new terms, or vary or revoke the order.

Consent Orders

Agreements made between the parties about financial provision and property adjustment on divorce can be incorporated into a consent order. Like maintenance and separation agreements, consent orders have certain advantages: they encourage amicable settlement between the parties, which has a beneficial effect on the parties and their children; they are cheaper and more predictable than litigation; and the parties need not attend court. They also have disadvantages: there may be problems of disclosure; there is a risk that a more favourable order could be obtained in court proceedings than under the agreement; there may be duress; and there is also a danger that a person involved in a divorce dispute may not be in the best position to make an agreement and may succumb to an unfavourable agreement just to escape from a marriage.

However, there are certain safeguards and restrictions in respect of consent orders. First, a consent order can only contain orders the court has jurisdiction to make under the MCA 1973 (i.e. orders for financial provision, property adjustment and sale of property). Second, the court can only make a consent order if information prescribed by the rules of court is provided by the parties (s.33A), e.g. duration of the marriage, age of the parties, capital resources, proposed accommodation, arrangements for the children, whether a party is remarried or cohabiting or plans to remarry or cohabit, and 'any other especially significant matters' (r.2.61 FPR 1991). Failure to provide this information can result in a consent order being set aside for non-disclosure as it was by the House of Lords in *Livesey (formerly Jenkins)* v. *Jenkins* [1985] AC 424, [1985] 1 All ER 106, [1985] FLR 813, where the wife had failed to disclose her engagement to be married which had taken place just before her application for the consent order. The House of Lords stressed, however, that not every failure to make full and frank disclosure would justify an order being set aside. Consent orders are not lightly set aside by the courts as they are intended to encourage settlement.

However, failure to make full and frank disclosure is a serious matter and the court, besides setting aside the order or varying its terms, may order costs as a penalty against the party failing to make disclosure. The House of Lords in *Dinch* v. *Dinch* [1987] 1 All ER 818, [1987] 2 FLR 162 stated *obiter* that it was the imperative duty of lawyers advising parties as to the terms of a consent order to define with precision exactly what the parties intended and to consider the impact of any terms agreed on, particularly as lump sum and property adjustment arrangements cannot be varied under s.31 whether made by consent or in contested proceedings.

The court when considering whether to make a consent order must not just 'rubber-stamp' the proposed arrangement but must consider all the circumstances of the case and apply the s.25 guidelines and the clean break provisions in s.25A. The court usually approves the agreement as the fact that it has been drawn up and agreed to by the parties, usually with legal advice, is *prima facie* proof of its reasonableness. Consent orders can be set aside in much the same way as ordinary contracts, e.g. for failure to make full and frank disclosure, duress, mistake or misrepresentation, although the Court of Appeal in *Potter* v. *Potter* [1990] 2 FLR 27 stated that a consent order made in matrimonial proceedings is not an ordinary contract. There is also power to vary the terms of a consent order under s.31, but lump sum and property orders are final 'once and for all' orders just as they are in contested proceedings. To set aside lump sum and property adjustment orders it is necessary either to appeal, or to appeal out of time, against the order, and/or to apply to have the consent order set aside on the basis of, for instance, misrepresentation, duress or non-disclosure (see 8.9 below).

8.7 Enforcement of Orders for Ancillary Relief

An order of the court for ancillary relief, whether made by consent or in contested proceedings, is useless if there is non-compliance. In some cases, particularly with maintenance payments, payers are recalcitrant and steps must be taken to enforce the order. Lump sums and periodical payments can be enforced in the following ways.

Lump Sums

A lump sum can be enforced by:

(i) *an order for sale of property under s.24A* made in the orginal order or at a later date (the district judge can execute the transfer or conveyance if necessary);
(ii) *a writ of execution*, whereby the bailiff in the county court (sheriff in the High Court) seizes goods belonging to the payer representing the value of the lump sum;

(iii) *garnishee proceedings* where payment is ordered to be made by a third party (e.g. bank or building society where the payer has an account);
(iv) *a charging order*, charging some capital asset (e.g. land) with the lump sum owed; or
(v) *a judgment summons*, where an order is made by the judge for payment by a certain date and by instalments where appropriate, which can be reinforced by suspended committal order, i.e. an order that the payer be committed to prison if the lump sum is not paid.

Periodical Payments

Periodical payments can be enforced in the same way as lump sums (see above) and also by:

(i) *an attachment of earnings order*, whereby the payer's employer is ordered to deduct payment from earnings;
(ii) *registration in the magistrates' court* (which can be done at the time the order is made if non-payment is likely), whereby payment is made to the clerk of the justices and a record of payment is kept (no record exists in the High Court or county court), and where the magistrates have a power of committal to prison for those who default.

During 1991 8396 applications to have maintenance orders registered in magistrates courts were granted in the county courts and 2312 attachment of earnings orders were made.

With secured periodical payments there is no problem of enforcement because property belonging to the payer is charged with payment (see 8.3 above). Under the Maintenance Enforcement Act 1991 the magistrates' court, county court and High Court can, when making or varying orders for child or spousal maintenance, order payment by standing order and can order the payer to open a bank account for this purpose. The court can also make an attachment of earnings order at the time of making the order (previously the court could only do so if the payer agreed or was in default).

8.8 Injunctions to Protect Matrimonial Assets

A party to a marriage may dispose or attempt to dispose of matrimonial assets to defeat the other party's claim to ancillary relief on divorce, e.g. by selling or giving them away or sending them out of the jurisdiction. To prevent this happening and to preserve matrimonial assets pending the outcome of a claim for ancillary relief, an applicant can apply for a *Mareva* injunction or an injunction under s.37 MCA 1973. A party to a

marriage who believes there has not been full and frank disclosure of all relevant assets (e.g. the husband's business assets), and that there is a danger that any evidence (e.g. bank statements etc.) may be destroyed, can apply for an *Anton Piller* injunction. Where there is a danger that a party to the marriage may leave the jurisdiction before a claim for ancillary relief has been settled, a writ *ne exeat regno* can be sought.

These injunctions provide a useful means of ensuring that justice is done between divorcing parties, but they are remedies of last resort and only granted by the court at its discretion in exceptional circumstances if strict criteria are satisfied. They are not granted as a matter of routine, as they are considered to be draconian remedies existing at the limit of the courts' powers. In an emergency they can be granted *ex parte* but a hearing *inter partes* must take place as soon as possible afterwards. The applicant has a duty of full and frank disclosure and can be asked to give an undertaking in damages lest the injunction is wrongly granted. Breach of an injunction is contempt of court, which may result in committal to prison.

(i) S.37 and *Mareva* injunctions

An injunction can be granted under s.37 MCA 1973 or under the inherent (i.e. non-statutory) jurisdiction of the court to protect an existing legal or equitable right (s.37 Supreme Court Act 1981; s.38 County Courts Act 1984). Such injunctions have the effect of freezing assets pending the outcome of a claim for ancillary relief on divorce. Overseas assets can be frozen, unless there are problems of enforcement by a foreign court (*Hamlin* v. *Hamlin* [1986] 1 FLR 61). A *Mareva* injunction can be granted under the court's inherent jurisdiction whether or not there is an intention to defeat or avoid a claim for ancillary relief on divorce, but a s.37 MCA injunction requires evidence of intention.

Injunctions under s.37 MCA 1973

Where an application is made for an order under ss.22, 23, 24, 27, 31 or 35 MCA 1973, the court can under s.37 make an order as it thinks fit restraining a respondent from making any disposition or otherwise dealing with property done with the intention of defeating a claim for financial relief (s.37(2)(a)). An intention to dispose of assets by spending them for one's own benefit, rather than transferring them to a third party, can constitute a disposition under s.37(2)(a) (per Anthony Lincoln J in *Shipman* v. *Shipman* [1991] 1 FLR 250, see below). The court can also set aside a disposition of property already made if made with the intention of defeating a claim for financial relief and, if set aside, financial relief or different financial relief would have been granted (s.37(2)(b)). A disposition can be set aside even though an order for financial relief has already been made (s.37(2)(c)), except for a disposition made to a *bona fide* purchaser for valuable consideration (other than marriage consideration) with no notice of the intention to defeat a claim for financial relief

(s.37(4)). Intention to defeat the claim must be proved, but intention is presumed if the disposition or other dealing occurs less than three years before the application for financial relief (s.37(5)).

In *Roche* v. *Roche* [1981] Fam Law 243 the husband had been granted substantial damages after a serious accident. The wife wished to apply *inter alia* for a lump sum order on divorce, and, to ensure the husband did not dispose of his damages claim, she was granted an injunction in the county court under s.37 to restrain him from dissipating a quarter of his damages. This decision was upheld by the Court of Appeal as the injunction would cause the husband no hardship. In *Sherry* v. *Sherry* [1991] 1 FLR 307 the Court of Appeal also granted a wife an injunction under s.37 restraining her husband from selling property or disposing of assets.

Mareva Injunctions under the Inherent Jurisdiction

Where the intention required by s.37 MCA 1973 is absent an injunction may be granted under the inherent jurisdiction of the court. In *Shipman* v. *Shipman* [1991] 1 FLR 250 Anthony Lincoln J in the Family Division rejected the wife's application under s.37(2)(a), as there was no evidence of any intention by the husband to dispose of his severance pay to defeat the wife's claims to ancillary relief on divorce, but nevertheless granted an injunction under the inherent jurisdiction of the court. Under the inherent jurisdiction the plaintiff must have a good arguable case and the balance of convenience must favour the grant of the injunction (*American Cyanamid Co.* v. *Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504). An injunction will not be granted where it is too oppressive or a third party's rights will be prejudiced. However, dicta in *Shipman* suggest that the requirements for making a *Mareva* injunction in the matrimonial context are not as stringent as they are in the commercial context. In *Ghoth* v. *Ghoth* [1992] 2 FLR 300 the wife was granted a *Mareva* injunction under the inherent jurisdiction covering all the husband's assets worldwide, except for assets to meet his ordinary living expenses and legal expenses arising from proceedings. On appeal, the Court of Appeal limited the injunction to cover a certain specified sum of money in his New York bank account and to jewellery in England. A *Mareva* injunction must, therefore, be restricted to the maximum amount of property likely to be awarded in divorce proceedings.

(ii) An *Anton Piller* Injunction

This injunction can be granted under the court's inherent jurisdiction to ensure the respondent does not dispose of evidence (e.g. bank statements, accounts etc.) which may be useful at the hearing for ancillary relief, particularly where a party to the marriage suspects the other party is not making full and frank disclosure. The order allows a named person or persons to enter premises to search for and seize relevant documents. Because of the civil liberties implications, such orders are considered to be

draconian remedies of last resort and are only made in exceptional circumstances if there is a strong *prima facie* case. Only the High Court can grant them (*Practice Direction* [1988] 2 All ER 103). In *Emmanuel* v. *Emmanuel* [1982] 1 WLR 669 a wife was granted *ex parte* an *Anton Piller* order in ancillary proceedings on divorce to permit her to enter premises occupied by her husband to inspect and remove for copying documents relating to his income and capital. There was a strong *prima facie* case that her husband had failed to produce relevant documents in the past and that they might be removed and destroyed. Justice required an *Anton Piller* order to be made, particularly as the husband had shown he was ready to flout the court's authority (he had served six weeks in prison for contempt for failing to comply with earlier orders).

(iii) A Writ of *ne exeat regno*

This order, which is rarely used in practice, orders a spouse, who is likely to leave the jurisdiction with assets to avoid a claim for ancillary relief, to remain in the jurisdiction. The order directs the tipstaff, an officer of the court, to arrest the respondent and bring him or her before a judge. The respondent's passport may also be seized.

8.9 Changes of Circumstances Once an Order has been Made

Three procedures are available to a party to a marriage where circumstances change after an order for ancillary relief has been made or where new circumstances which existed before or at the time of the original order are discovered later on:

(i) an application to have the original order varied under s.31 MCA 1973;
(ii) an appeal against the original order, which may require an application for leave to appeal out of time if the appeal was not lodged within the required time limit; or
(iii) an application to have the orginal order set aside either due to some factor existing at the time the order was made (e.g. non-disclosure, fraud, mistake, or duress) or because some unforeseen event subsequent to the order (e.g. death) has invalidated the basis of the original order.

We will consider each of these three procedures in turn.

(i) Variation under s.31 MCA 1973

Most applications under s.31 MCA 1973 are for variation of periodical payments. A divorced wife, for instance, may want periodical payments

increased to keep up with inflation. A divorced husband may want them decreased or discharged because he feels his former wife no longer needs them, or because he can no longer afford to pay them. Under s.31 the court has wide powers to vary or discharge certain orders or temporarily suspend and revive any provision contained in them (s.31(1)). These powers exist whether the order was made in contested proceedings or in the form of a consent order, but only the following orders can be varied (s.31(2)):

- maintenance pending suit;
- periodical payments;
- lump sum payable by instalments; or
- sale of property order made under s.24A(1).

Variation of child maintenance (i.e. child support) in most cases is dealt with by the Child Support Agency under the Child Support Act 1991. Lump sum orders not payable by instalment and property adjustment orders, whether made in consent orders or in contested proceedings, cannot be varied under s.31 MCA 1973, as they are 'once and for all' orders. The court in a variation application is entitled to look at all the circumstances of the case afresh and not just at the circumstances that have changed (per Cazalet J in *Garner* v. *Garner* [1992] 1 FLR 573).

The court has other powers under s.31. It can remit the payment of any arrears due under any order for maintenance pending suit, interim maintenance or periodical payments (s.31(2A)). Where the original order was for periodical payments for a limited term, application can be made in variation proceedings for an extension of that term, unless the original order prohibited such an application under the clean break provisions (s.28(1A)). The court cannot make a property adjustment order as a way of varying an order for periodical payments, and cannot make a lump sum order as a means of varying an order for periodical payments to a spouse made on divorce under s.23 or during marriage under s.27 where there has been failure to provide reasonable maintenance (s.31(5)). One way round these restrictions is for the order for periodical payments to be discharged on the payer's offering or undertaking to pay a lump sum (see e.g. *S* v. *S* [1987] 1 FLR 171). Breach of the undertaking, like breach of an order, is contempt of court.

When exercising its powers under s.31, the court must consider all the circumstances of the case, including any changes in any of those matters the court had to consider when making the original order (i.e. those laid down in s.25 MCA 1973), but must give first consideration to the welfare of any child of the family (s.31(7)). The clean break doctrine is also enshrined in s.31, for in relation to any periodical payments order, the court must consider whether in all the circumstances of the case it is appropriate to vary the order so that payments will be made for a limited term sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of those payments (s.31(7)(a)).

The rationale for lump sum orders (other than those payable by instalment) and property adjustment orders not being open to variation under s.31 is to create finality in litigation so that the parties on marriage breakdown can look to the future with certainty and make plans without worrying whether orders made on divorce will be overturned. However, this finality has created hardship and difficulty in some cases, particularly in the context of *Mesher* orders made in respect of the matrimonial home (see above).

In *Potter* v. *Potter* [1990] 2 FLR 27 a problem occurred in respect of a lump sum order made in a consent order on divorce, in which it was agreed that on the wife's payment of a lump sum to her husband by a certain date, he would transfer to her all his interest in the former matrimonial home. She failed to pay the sum by the specified date, whereupon her husband argued he was no longer bound to transfer his interest in the matrimonial home as the court had no jurisdiction to extend the time limit for payment of the lump sum, as variation of a lump sum was not permitted under s.31. The Court of Appeal, applying *Thompson* v. *Thompson* [1986] (see above), held that a consent order, like any other order, should be construed to give effect to its spirit and purpose. The true purpose of the original order in this case had been to enable the wife to buy out the husband's interest in the matrimonial home and the time limit was only to clarify the time in which the wife had to raise the money. Her right to a transfer of the matrimonial home could not be defeated by a delay caused by no fault of her own, but that of the building society which was to pay her a lump sum under a mortgage. The Court of Appeal held it was not necessary on this construction of the consent order to decide as a matter of law whether the court had jurisdiction to vary a lump sum order by varying the time limit.

Although a property adjustment order is a final order, a charge in respect of the former matrimonial home can be redeemed at an earlier date than that specified in the order, unless the terms of the order prohibit redemption, as an order authorising redemption of a charge is not a variation under s.31 (*Popat* v. *Popat* [1991] 2 FLR 163).

The court's lack of jurisdiction to vary lump sum and property adjustment orders made on divorce forces some parties to resort to alternative procedures, i.e. to appeal, or to appeal out of time, against the original order and/or apply to have the order set aside.

(ii) Appeals and Appeals out of time

Where circumstances have changed and an application cannot be made in variation proceedings as the original order is for a final order (i.e. lump sum or property adjustment), a party can appeal or seek leave to appeal out of time, where the date before which an appeal must be lodged has passed (five working days). If leave is granted, the court must reconsider the original order. Applications for leave to appeal have been sought in three broad categories of situation: where there has been a change in the

value of the property in the order; where a party to the order has unexpectedly died shortly after the order; or where a party remarries or cohabits shortly after the order.

The courts are unwilling to set aside orders easily, and principles restricting appeals out of time were laid down by the House of Lords in *Barder* v. *Barder* [1988] AC 20, [1987] 2 All ER 440, [1987] 2 FLR 480. The aim of the '*Barder* principles' is to provide certainty and finality in litigation (thereby upholding the doctrine of the clean break), and to prevent the courts being flooded with claims where final orders cannot be varied or set aside. Only where there has been some injustice will an appeal out of time be granted. The *Barder* principles apply to orders whether or not made by consent.

In *Barder* a consent order was made on divorce expressed to be in full and final settlement, and ordering *inter alia* that the husband transfer to his wife his half-share in the matrimonial home. Four weeks after the order was made, but outside the five-day time limit for lodging an appeal, the wife killed both children of the marriage and then committed suicide. On death her property would go under her will to her mother. The husband sought leave to appeal out of time against the original order (it could not be varied under s.31 as it was a property adjustment order), arguing that the basis on which the original order had been made had been fundamentally altered by the unforeseen change of circumstances, i.e. the death of his wife and children. The House of Lords gave leave to appeal out of time, and, having heard the appeal, held that the order should be set aside. However, the House of Lords stressed that not every unforeseen change of circumstances would lead to an appeal out of time being granted, but would only be granted if all four of the following four conditions were satisfied:

(i) the new events relied on had invalidated the fundamental basis or assumption on which the original order had been made, so that, if leave to appeal was granted, the appeal would be certain or very likely to succeed;
(ii) the new events had occurred within a relatively short time of the original order being made – probably less than a year;
(iii) the application for leave to appeal had been made promptly; and
(iv) the grant of leave would not prejudice third parties who had aquired in good faith and for valuable consideration an interest in the property subject to the order.

In *Hope-Smith* v. *Hope-Smith* [1989] 2 FLR 56 the *Barder* principles were applied, where the wife sought leave to appeal in respect of an order made on divorce that her husband pay her a lump sum out of the proceeds of sale of the matrimonial home then valued at £116 000. The husband delayed in selling the house, so that, with the rapidly rising housing market at that time, the lump sum no longer reflected the true value of the house which had risen to £200 000. The wife sought leave to appeal against

the original order as the court had no jurisdiction to vary the lump sum in variation proceedings under s.31. The *Barder* principles were satisfied and the Court of Appeal granted leave to appeal and held that the *Barder* principles also applied to the determination of the substantive appeal, i.e. the appeal on its merits. The Court of Appeal substituted an order that was fair and equitable where on sale of the former matrimonial home 40 per cent of the net proceeds of sale would be paid to the wife. In *Hope-Smith* the wife's leave to appeal was allowed despite her application being two years after the original order was made, which suggests that the one-year requirement in *Barder* may be flexible.

A case with similar facts to *Hope-Smith* was *Rooker* v. *Rooker* [1988] 1 FLR 219, where the wife under a consent order made on divorce was to receive *inter alia* a lump sum from the proceeds of the immediate sale of the former matrimonial home. The property was not sold until two years later, and the wife sought an increase in the lump sum, not by seeking leave to appeal out of time, but by arguing that the court had jurisdiction under s.31 to vary the lump sum order since the fundamental basis of the order had been frustrated by the supervening event (i.e. the husband's deliberate procrastination in the sale of the property). However, the Court of Appeal dismissed her appeal as the consent order itself had provided for application to be made to the court for enforcement of its terms and she had failed to have it enforced. She therefore had a remedy and the original order had not been vitiated by a subsequent event. In *Edmonds* v. *Edmonds* [1990] 2 FLR 202 the Court of Appeal, applying the *Barder* principles, refused to give the husband leave to appeal out of time where the house, which the judge had valued at the original hearing at £70 000, had been sold by the wife six months later for £110 000, as at the time of the original order it was known that the value of the property would certainly increase, but the husband had failed to call evidence of its valuation. In *Thompson* v. *Thompson* [1991] 2 FLR 530, on the other hand, the wife was granted leave to appeal out of time where, a week after the five working days for lodging an appeal had expired, the husband had sold his business for £45 000, which at the time of the hearing had been valued at £20 000. Mustill LJ, however, stated that lawyers advising parties who might be considering appealing out of time should be aware of the severity of the *Barder* principles to make sure the courts were not swamped by meritless applications.

In *Chaudhuri* v. *Chaudhuri* [1992] 2 FLR 73 the husband sought leave to appeal out of time where the wife had remarried and sold the former matrimonial home 14 months after he had been ordered to transfer it to her on divorce. Balcombe LJ in the Court of Appeal refused leave to appeal, as the order had contemplated the possibility of the wife's remarriage and that she would not always remain in the matrimonial home. There had not been a sufficient change of circumstances to invalidate the basis of the original order, and too long a time had elapsed since the order had been made. His Lordship was not convinced that, even if leave were given, the appeal would be certain or very likely to succeed.

(See also *Wells* v. *Wells* [1992] 2 FLR 66, where the wife remarried six months after the matrimonial home had been transferred to her on divorce.)

How the court exercises its jurisdiction once leave to appeal has been given is demonstrated in *Smith* v. *Smith (Smith and Others Intervening)* [1992] Fam 69, [1991] 2 FLR 432, [1991] 2 All ER 306, which, like *Barder*, involved a wife committing suicide shortly after an order on divorce had been made. In *Smith* an order was made that the wife receive a lump sum representing half the family assets which were worth £107 000. A few months later she committed suicide, leaving her estate, including the lump sum, to her daughter. The husband was given leave to appeal against the order (lump sums cannot be varied under s.31) and the judge set aside the order, the wife no longer having any 'needs' under s.25 and ordered the estate to repay the lump sum to the husband. The daughter appealed to the Court of Appeal. Butler-Sloss LJ stated that the appeal to the judge was not an appeal but a rehearing so that the principles of *G* v. *G* [1985] did not apply, i.e. that a higher court can only interfere with a discretionary decision made by a lower court when the decision is plainly wrong. Butler-Sloss LJ said the correct approach was to start the s.25 exercise from the beginning and consider what order should be made on the basis of the new facts (ie on the basis that the wife was known only to have a few months to live). Applying the s.25 guidelines, Butler-Sloss LJ held that recognition should be given to the wife's significant contribution to the marriage as long as it did not act to the detriment of the husband's needs and reduced the lump sum to £25 000.

An appeal or leave to appeal is sometimes made to set an order aside, either because the order cannot be varied or because a consent order is expressed to be in full or final settlement.

(iii) Setting the Original Order Aside

An application can be made to set aside an order which has been made on an improper basis (e.g. where there has been non-disclosure, duress or misrepresentation), or where changes of circumstances have subsequently occurred which were not foreseen at the time the original order was made. An appeal or appeal out of time is sometimes made in conjunction with an application to set an order aside (see e.g. *Barder* v. *Barder*) as lump sum and property adjustment orders cannot be varied under s.31. Applications to set orders aside often occur in the context of consent orders, particularly where there has been a failure to disclose specified information laid down in the rules of court.

Livesey (formerly Jenkins) v. *Jenkins* [1985] AC 424, [1985] 1 All ER 106, [1988] FLR 813 is the leading case on setting aside orders for non-disclosure. Although the case concerned a consent order, the same principles apply to orders for financial provision and property adjustment made in contested proceedings. In *Livesey* v. *Jenkins* a consent order was made in full and final settlement, the wife agreeing to forgo all claims

in respect of finance and property on the husband's transferring to her his half-share of the matrimonial home. Three weeks later she remarried and two months later put the former matrimonial home up for sale. Her husband appealed out of time against the consent order asking for it to be set aside on the ground that he was induced to agree to its terms by a misrepresentation by his wife as to the true position. At first instance and in the Court of Appeal his appeal was dismissed, the Court of Appeal holding that there was no duty on the wife to disclose her engagement. The House of Lords, however, allowed his appeal, holding that where the parties wished the court to exercise its discretion under ss.23 and 24 they were under a duty in both contested and consent proceedings to make full and frank disclosure of all material matters which the court was statutorily to have regard to (i.e. under s.25 MCA 1975) in order to exercise its discretion properly. Their Lordships emphasised, however, that the importance of encouraging a clean break after divorce meant that orders for financial provision and property adjustment orders should not be set aside lightly, and would only be set aside if the absence of full and frank disclosure had led the court to make an order which was substantially different from one that would have been made had there been full and frank disclosure. Proof of failure to disclose material facts is thus not on its own a sufficient ground for setting aside an order. On the facts of the case, the wife's engagement was a material circumstance directly relevant to the parties' agreement about financial provision and property adjustment and she was therefore under a duty to disclose it before the agreement was put into effect by means of the consent order. Her failure to disclose the engagement therefore invalidated the consent order which was set aside and the case was remitted for a rehearing.

We can see therefore that not every case of non-disclosure will result in an order being set aside. The principle in *Livesey (formerly Jenkins)* v. *Jenkins* is virtually the same as that for appeals out of time in *Barder* v. *Barder*. With appeals out of time and applications to set aside an order the change of circumstances must be such that a fundamentally different order would have been made had these circumstances been known. The policy of the law is to encourage finality in litigation, particularly where an order has been made to effect a clean break between the parties, and particularly where made by consent. On the other hand, the court, in order to do justice between the parties, must in the exercise of its discretion perform its statutory duty under s.25 and consider all the circumstances of the case. If relevant circumstances have not been put before the court either because they were not disclosed or because they were not known or foreseen at the time the order was made, then those new circumstances must be taken into consideration, which may necessitate an amendment to the terms of the order (as in *Hope-Smith* v. *Hope-Smith*) or the order being set aside and a fresh order substituted (as in *Barder* v. *Barder*). Whether or not an order will be set aside depends on the facts of each case. In *Vicary* v. *Vicary* [1992] 2 FLR 271 a consent order was made on divorce, the wife consenting *inter alia* to accept

£250 000 in full and final settlement. The wife subsequently discovered that the husband had disposed of certain assets worth £2.8 million which had not been disclosed. The consent order was set aside.

8.10 The Impact of a New Partner on Financial Provision and Property Orders Made on Divorce

When making orders for financial provision and property adjustment in contested proceedings or by consent either initially or in variation proceedings, the court takes into account the fact that a party to a marriage is living with a new partner after divorce. In performing its statutory duty under s.25 the court must consider the parties' financial resources (s.25(2)(a)) and financial needs (s.25(2)(b)), both of which are which are likely to be affected by a relationship with a new partner. In *Suter* v. *Suter and Jones* [1987] Fam 11, [1987] 2 FLR 232, [1987] 2 All ER 336 the Court of Appeal held that the male cohabitee living with the divorced wife should be expected to make a contribution to living expenses in order to reduce her former husband's maintenance obligation. Before making a consent order the parties must disclose whether or not they are or intend to marry or cohabit (FPR 1991), as this fact is relevant to a proper exercise of the court's discretion. In *Livesey (formerly Jenkins)* v. *Jenkins* (see above) failure to disclose an imminent engagement was a material fact justifying the setting aside of a consent order. Some orders (e.g. *Mesher* orders, *Martin* orders and consent orders) are often made subject to a party's marriage or settled cohabitation (see above).

Whether and to what extent the court takes into account the new partner depends on what assets the former spouses possess and what obligations they have. It would be clearly unjust and unrealistic to expect a husband of limited means to pay substantial periodical payments or a large lump sum to his former wife if she were being maintained by a new partner (see e.g. *MH* v. *MH* (1982) 3 FLR 429, where the former husband's maintenance to his wife was reduced to allow for the fact that she had some financial support from her cohabitee). On the other hand, if there are substantial assets to distribute, a husband, say, may be justified in paying a large lump sum to a wife who is living with a new partner. In *S* v. *S* [1987] 1 FLR 71, for instance, a lump sum of £400 000, representing capitalised maintenance, was ordered to be paid to the wife even though she was living with a wealthy boyfriend, and in *Duxbury* v. *Duxbury* [1987] 1 FLR 7 the wife's cohabitation was ignored in calculating capitalised maintenance where the husband was a millionaire.

With periodical payments, the law makes a distinction between whether a divorced spouse is cohabiting with or is married to the new partner. Periodical payments to a party to a marriage automatically terminate on remarriage, but not on cohabitation. This distinction is open to criticism on the ground that it encourages cohabitation rather than marriage,

although a settled decision not to remarry to avoid automatic loss of maintenance could constitute conduct which it would be inequitable to disregard under s.25(2)(g). However, the court has stated that even long-term or settled cohabitation after divorce cannot be equated with remarriage. The leading case on cohabitation after marriage is *Atkinson* v. *Atkinson* [1988] Ch 93, [1988] 2 FLR 353, where the husband in an application for variation under s.31 argued *inter alia* that long-term and fixed cohabitation should be equated with remarriage so that his periodical payments to his former wife should terminate in the same way as they would have done under s.28(1) had she been married. The Court of Appeal rejected this argument, holding there was no statutory requirement or binding or persuasive authority that the courts should give decisive weight to an ex-wife's cohabitation or that a settled state of cohabitation should be equated with remarriage. However, the Court of Appeal held on the facts of the case that her cohabitation and her reasons for not marrying clearly constituted a change of circumstances within s.31(7) which it would be inequitable to disregard as conduct under s.25(2)(g). However, as there was no evidence that she would be able to adjust without undue hardship to the termination of maintenance, the husband's appeal was dismissed. It is difficult to see how the courts in practice could ever equate long term cohabitation with remarriage as it would be asking the court to perform the impossible task of having to make qualitative judgments about different sorts of cohabitation. *Atkinson* was applied in *Hepburn* v. *Hepburn* [1989] 1 FLR 373, where Butler-Sloss LJ in the Court of Appeal refused to overturn a nominal periodical payments order made at first instance to an ex-wife, even though she was cohabiting with a wealthy man, for long-term cohabitation was not equivalent to remarriage.

Summary

1. Financial provision and property adjustment orders can be sought on divorce (or on nullity or judicial separation) under Part II Matrimonial Causes Act 1973 in proceedings for ancillary relief. Orders can be made for a spouse and/or to or for the benefit of a child of the family, although child maintenance (child support) must be sought in most cases from the Child Support Agency under the Child Support Act 1991.
2. The court can order: maintenance pending suit (s.22), periodical payments (s.23), a lump sum order (s.23), a property adjustment order (s.24), and/or an order for sale of property (s.24A).
3. The court must apply the s.25 guidelines when considering whether to make an order, and, if so, in what manner.
4. The court must also apply the clean break provisions when making orders in favour of spouses in original (s.25A) and in variation proceedings (s.31(7)).
5. Most property disputes on divorce are about the matrimonial home, in respect of which various orders can be made, e.g. transfer with or without

compensating payment, '*Mesher* order' (but no longer popular), '*Martin* order', order for sale.

6. Private agreements (i.e. separation or maintenance agreements) can be made on divorce. A consent order can be made incorporating an agreement but consent orders can only be granted on the basis of information prescribed by the Family Proceedings Rules 1991, and the order can only contain the orders the court has jurisdiction to make under Part II MCA 1973, i.e. financial provision and property adjustment orders. Consent orders can be set aside for non-disclosure and on other grounds.
7. Orders can be enforced in various ways but the Maintenance Enforcement Act 1991 has improved enforcement mechanisms.
8. Injunctions can be granted to protect matrimonial assets pending an order for ancillary relief, i.e. s.37 or *Mareva* injunction, *Anton Piller* order and writ *ne exeat regno*.
9. Where there are changes of circumstance after an order has been made, that order can be varied under s.31 MCA 1973, appealed against (which may necessitate an appeal out of time), or be set aside on various grounds, e.g. non-disclosure, duress, mistake.
10. New partners after divorce can be taken into account by the court when making orders for ancillary relief. Periodical payments automatically terminate on remarriage but not on cohabitation, and settled cohabitation is not treated as being equivalent to remarriage, although cohabitation may be considered as part of all the circumstances of the case and also under the s.25 guidelines.

Exercises

1. 'The modern practice is to favour the clean break whenever possible.' (per Balcombe LJ in *Harman* v. *Glencross* [1986] 1 All ER 545 at 557.) Is this true?
2. Beryl was divorced from Dennis ten years ago, and, although she claimed a lump sum at that time, no order was made. She has just heard that Dennis is about to inherit £5 million from a wealthy aunt who is terminally ill.

   Advise Beryl.
3. Linda, whose application for ancillary relief is pending, has heard that her husband, Jim, is about to sell their villa in Portugal to defeat any claims she might have on divorce and is about to leave the jurisdiction. She also suspects Jim has not disclosed the true value of his business assets. Advise Linda.
4. Why are '*Mesher* orders' no longer popular?
5. Two months ago a consent order was made in Phil and Sue's divorce proceedings in which it was agreed that Sue would have the former matrimonial home in return for her not claiming maintenance. Phil has just discovered that Sue has remarried and that she had been engaged before the consent order was made.

   Advise Phil.

Further Reading

Cretney, 'Money and divorce, a quarterly retrospective: needs and principles' (1990) Fam Law 89.

Cretney, 'Divorce and the low income family' (1990) Fam Law 377.

Cretney, 'Divorce and the high income family' (1991) Fam Law 171.
Goodhart, 'Occupational pension schemes and divorce – a new proposal' (1988) Trust Law and Practice 120.
Hodson, 'The new partner after divorce' (1990) Fam Law 27 and 68.
Ingleby, 'Buy now, pay later: the hidden costs of negotiated settlements to matrimonial disputes' (1988) JSWL 50.
Law Society, *Maintenance and Capital Provision on Divorce* (1991).
Masson, 'Pensions, dependency and divorce' (1986) JSWL 343.
Mears, 'The clean break v the courts. The illogical backstop' (1989) Fam Law 398.
Mears, '*Fisher* v. *Fisher*, an exercise in logic' (1990) Fam Law 36.
Salter, '*Thompson*: A further gloss on *Barder*' (1992) Fam Law 50.
Walsh, '*Whiting* v. *Whiting*: Whither the clean break principle?' (1989) Fam Law 157.
Wright, 'Financial provision, the clean break and the search for consistency' (1991) Fam Law 76.

Part III

Children

In Part III we consider children. Chapter 9 is an introduction to the topic. Other chapters deal with more specific aspects of the law relating to children, i.e. divorce (Chapter 10), financial support (Chapter 11), abduction (Chapter 12), children and local authorities (Chapter 13) and finally adoption (Chapter 14).

9 Children – An Introduction

In this chapter, by way of introduction to the topic of children, we consider the emergence of children's rights, the influence of the *Gillick* case, the legal position of children born outside marriage, parenthood, wardship and the Children Act 1989. In subsequent chapters we consider specific aspects of the law relating to children.

9.1 The Emergence of Children's Rights

Over the centuries, but particularly during the twentieth century, children have acquired more rights and more freedom to make their own decisions, particularly where they are mature and intelligent. This has not always been the case. At one time a child's wishes were largely ignored, as parents, particularly fathers, had more or less absolute rights over their children. In *Re Agar-Ellis* (1883) 24 Ch D 317 the father had taken his children away from their mother after a dispute about whether they should be brought up as Roman Catholics or Anglicans. One of the children, a girl aged 16, wished to spend her holidays with her mother and an application was made to the court. Cotton LJ dismissed the application, holding that, in the absence of any fault on the father's part, the court had no jurisdiction to interfere with a father's legal right to control the custody and education of his child, which at common law were vested entirely in a father. We can see how the position of children has changed if we compare *Re Agar-Ellis* with *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, [1986] 1 FLR 224, where the House of Lords held that a child of sufficient age and understanding could consent to contraceptive treatment without parental consent (see below). Today, the father in *Re Agar-Ellis* might have been guilty of the criminal offence of child abduction under the Child Abduction Act 1984, or of the common law offence of kidnapping. In *R* v. *D* [1984] AC 778, [1984] 2 All ER 449 a father was convicted of kidnapping his daughter whom he had snatched in breach of an order made in wardship. The father's argument that he was not guilty because he had a right to take the child was rejected by the House of Lords.

During this century the children's rights movement has grown. In 1959 the United Nations passed a Declaration of the Rights of the Child. In 1979, International Year of the Child, the Children's Legal Centre was established in London, and in 1989 the United Nations' Convention on the Rights of the Child was adopted, which aims to encourage governments worldwide to recognise the importance of children in society and to give them protection. However, enforcing the Convention is likely to be

difficult, as there is no court to enforce it as there is under the European Convention of Human Rights.

The development of society's attitude to the corporal punishment of children illustrates how differently children are treated today. At one time it was acceptable for parents and others to beat children. Parents today can still use physical punishment but it must be reasonable, otherwise they may commit a criminal offence or the child may be taken into care. During the last few years, however, there has been pressure for reform to make it illegal for parents to inflict corporal punishment on their children and in some countries it is illegal. Corporal punishment was abolished in State schools by the Education (No 2) Act 1986, and several cases relating to the corporal punishment of children have also been successfully brought by parents against the UK under the European Convention of Human Rights (e.g. see *Re Campbell and Cosans* (1982) 4 EHRR 293). However, corporal punishment is not illegal in private schools and in *Costello-Roberts* v. *UK* [1993] *The Times*, March 26 the judges in the European Court of Human Rights voted five to four to reject claims that the United Kingdom breached the human rights of a seven-year-old pupil at a private school who was beaten by his headmaster. The punishment was not severe enough to constitute degrading punishment under Article 3 of the Convention.

In the development of children's rights there has generally been a move away from authoritarian and paternalistic approaches towards more permissive and liberal ones. However, while some advocates of children's rights have argued in favour of total freedom for children, the law must strike a balance between recognising that children should have greater rights of self-determination as they near majority (i.e. the age of 18), while also recognising that children need the protection of the law.

9.2 The *Gillick* Case

Gillick v. *West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, [1988] 1 FLR 224 was a landmark decision in the development of children's rights as it brought about a recognition that children, particularly those of sufficient age and understanding, should have a greater say in decisions concerning them. The Children Act 1989 reflects some of the *Gillick* philosophy, as in contested s.8 order proceedings (see 9.7 below) and in care and supervision proceedings (see 13.3) the court must have regard to the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding) (s.1(3)(a)). Children can also with leave of the court apply for s.8 orders, although leave can only be granted if the child has sufficient understanding to make the proposed application (s.10(8)). On the other hand, as the child's welfare is the court's paramount consideration (s.1(1) Children Act 1989), the child's wishes can be overridden if contrary to his or her best interests. The child's wishes are not paramount and, although there are many references to the child's welfare in the Children Act 1989

and in other child legislation, nowhere is there any express reference to children's 'rights'. The *Gillick* case was also important because it emphasised that parents do not have rights in respect of their children but responsibilities and duties, and this concept of parental responsibility is enshrined in the Children Act 1989.

In *Gillick* a Department of Health and Social Security (DHSS) circular was sent to doctors advising them *inter alia* that they would not be acting unlawfully if in exceptional circumstances they prescribed contraceptives to girls under the age of 16 without first obtaining parental consent, provided they did so in good faith. Mrs Gillick, an ardent Roman Catholic with teenage daughters, brought an action against the DHSS and her local hospital authority seeking a declaration that the circular was illegal on two grounds: first, it enabled doctors to break the criminal law by causing or encouraging unlawful sexual intercourse under the Sexual Offences Act 1956; and, second, the circular was inconsistent with her parental rights. The case went to the House of Lords, which held there was no rule of absolute parental authority over a child until a fixed age, but that parental authority dwindled as the child grew older and became more independent. The law recognised parental rights only in so far as they were needed for the child's protection, so that it was more appropriate to talk of duties and responsibilities than rights. Parental rights, if any, yielded to the right of the child if of sufficient understanding and intelligence to make his or her own decisions. Consequently a girl under 16 did not merely by reason of her age lack legal capacity to consent to contraceptive treatment. Neither had any offence under the Sexual Offences Act 1956 been committed, as the *bona fide* exercise of a doctor's clinical judgement negated the necessary *mens rea*. Lord Scarman, drawing on Blackstone's *Commentaries on the Laws of England*, stated:

> 'The underlying principle of the law . . . is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.'

Gillick has not, however, given children absolute rights. In fact the House of Lords stressed that not obtaining parental consent to contraceptive treatment would only happen exceptionally. Cases since *Gillick* have shown that the impact and scope of *Gillick* have not been as great as was thought at the time of the decision. It seems that the scope of children's rights very much depends on all the circumstances of the case. While *Gillick* was applied to a case in Canada, so that a teenage girl's wish to have an abortion was held to prevail over her parents' objections to it, other cases have established that both the courts and parents can override a child's wishes even if a child is '*Gillick* competent', i.e. mature and intelligent enough to make an informed decision. '*Gillick* competency' is only one of the circumstances of the case. In *Re R (A Minor) (Wardship: Medical Treatment)* [1992] Fam 11, [1991] 4 All ER

177 a local authority applied in wardship for leave to administer medical treatment to a 15-year-old girl suffering from psychotic behaviour without obtaining her consent. Although when lucid and rational she had sufficient maturity and understanding to comprehend the treatment being recommended (i.e. she was '*Gillick* competent'), the Court of Appeal, applying *Gillick*, held that she did not have the necessary capacity to consent. Lord Donaldson MR stated that those who had parental rights and responsibilities and the court in its wardship jurisdiction could consent on the child's behalf and override the wishes of the '*Gillick* competent' child, if the circumstances of the case required it. His Lordship said he did not understand *Gillick* to mean that, if a child is '*Gillick* competent', the parents cease to have a right of consent.

Proponents of children's rights (e.g. the Children's Legal Centre) welcomed the decision in *Gillick* and also the factor in the statutory checklist in the Children Act 1989 requiring the court to consider the ascertainable wishes and feelings of certain children, and saw them as part of a move to give children greater rights of self-determination. However, it seems a child is only '*Gillick* competent' *when it is appropriate*, so that an anorexic 16-year-old, for instance, is not '*Gillick* competent' when it comes to the question of consent to medical treatment in a life or death situation when her refusal to consent to medical treatment can be overridden by the court (see *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758, [1993] 1 FLR 1, [1992] 4 All ER 627).

Despite these cases limiting and defining the scope of *Gillick*, it is still true to say that children do now have greater rights to have their wishes considered and to apply and be heard in court proceedings than they have ever had before. In *Re AD (A Minor)* [1993] Fam Law 42 a girl of 14 applied for orders under s.8 Children Act 1989 because she wished to live with her boyfriend's parents and not her own parents in the aftermath of divorce. The case was eventually dealt with by the High Court in wardship. There was considerable media coverage of the case with headlines that children were seeking to 'divorce' their parents. The President of the Family Division, Sir Stephen Brown, stressed, however, that the case was not one of a child seeking to divorce her parents and said that he did not expect this to be a frequent type of application. His Lordship did, however, state that an application by a child under the Children Act should be dealt with by the High Court and if commenced in the family proceedings court or county court then transferred as soon as possible to the High Court.

9.3 Non-marital Children

Many children are born outside marriage (4 per cent of children in 1960 but 28 per cent of children in 1990). At one time these children were treated much less favourably by the law than those born to married parents. They could not be buried in consecrated ground and were not

entitled to succeed to property on intestacy or to receive maintenance. Over the years these disadvantages have been removed. It is now even considered inappropriate to call children born outside marriage 'illegitimate' children. They must be called non-marital or extra-marital children. Under the Legitimacy Act 1976 non-marital children can be legitimised in various ways. Under s.1 a child born of a void marriage can be treated as legitimate if at the time of insemination, conception or celebration of marriage one or both parents reasonably believed the marriage was valid, although reasonable belief is now presumed after s.28 Family Law Reform Act 1987. A non-marital child can also be legitimised by his or her parents' marriage (ss.2 and 3 Legitimacy Act 1976). Non-marital children became entitled to maintenance in the magistrates' court in what were called affiliation proceedings. Financial provision orders for children born to unmarried parents (and any other child) can now be sought under s.15 and Schedule 1 Children Act 1989, and maintenance can be sought from the Child Support Agency under the Child Support Act 1991 (see Chapter 11).

The Family Law Reform Act 1987 made certain reforms to remove the unjustifiable legal discrimination against non-marital children after recommendations made by the Law Commission (*Illegitimacy*, Law Com No 118, 1982). Part I of the 1987 Act lays down a general principle which provides that with respect to any laws passed or instruments made after the commencement of the 1987 Act (4 April 1988), whether a child's parents are married or not is irrelevant, unless a contrary intention is found. On intestacy, children of unmarried parents are also entitled to succeed to property under the Administration of Estates Act 1925 in the same way as the children of married parents (ss.18–21 FLRA 1987).

However, in some areas of the law, discrimination against children born outside marriage remains, as s.1 Family Law Reform Act 1987 does not apply retrospectively. Under the British Nationality Act 1981, for example, a child of unmarried parents can only acquire British citizenship or be registered as a British citizen when his or her mother is a British citizen or settled in the UK (except where the parents subsequently marry, s.47). A child of married parents, on the other hand, can acquire British citizenship or be registered as a British citizen when his or her father *or* mother is a British citizen or settled in the UK. Consequently a child born of an unmarried British father and a foreign mother is not a British citizen unless his or her parents marry. Another important difference between non-marital and marital children is that the unmarried father does not have automatic parental responsibility for his child, although he can acquire it under s.4 Children Act 1989 (see Chapter 17).

9.4 Parents

In this section we briefly consider becoming a parent, alternative parents, and finally the concept of parental responsibility.

Becoming a Parent

The word 'parent' has different meanings. Married parents, unmarried parents, parents-in-law, adoptive parents, step-parents, foster-parents and god-parents are all 'parents'. The court in respect of a ward and a local authority when a child is in care can also be described as 'parents' as they stand *in loco parentis*. With some parent–child relationships there is a biological relationship between the parent and child, which gives rise to a legal relationship, but with others the legal relationship may be one created or imposed by the law, e.g. a person with a residence order in his or her favour acquires parental responsibility. Sometimes it may be necessary to establish whether a father is a biological parent in order to establish a legal relationship between him and the child. This may be necessary, for example, to determine whether a father is obliged to pay maintenance to his child under the Child Support Act 1991. Today with DNA and sophisticated blood-testing techniques it is easier to establish who is a child's biological parent.

Some couples who wish to have children are unfortunately unable to have them, and resort instead to medically assisted techniques. Some women may have children by artificial insemination (i.e. not by copulation and ejaculation), where the woman's egg is fertilised either by sperm from her partner (AIH) or from a donor (AID). Where a child's mother is married and her husband has consented to her being artificially inseminated, the child is treated in law as the child of the partners to that marriage and not the child of any other person (s.27 Family Law Reform Act 1987). Other women have children by means of human-assisted reproduction such as *in vitro* fertilisation (IVF), where the sperm and egg of the partners or of the partner and donor are fertilised outside the body and the fertilised egg replaced in the mother's womb (i.e. the 'test-tube baby'). In some cases, instead of IVF, an egg can be fertilised by the husband's sperm in the donating woman's body and the resulting embryo transferred to the wife's womb. Modern technological advances in the field of assisted reproduction have been rapid and have raised difficult medical ethical issues. Because of these developments the Warnock Committee into Human Assisted Reproduction and Embryology was established to look into the subject of assisted reproduction and in 1984 published a report, the Warnock Report (Cmnd 9314). Its findings resulted in the Human Fertilisation and Embryology Act 1990 being passed.

Some couples resort to surrogacy to have a child, whereby under a surrogacy arrangement a woman (the 'birth' mother) agrees to have a child for someone else (the 'commissioning' parents) to whom she will hand over the child at birth. Surrogacy is not as widespread in this country as it is, for instance, in the United States of America. In fact the 'Baby Cotton' case (*Re C (A Minor)(Wardship: Surrogacy)* [1985] FLR 846), which caused much media comment, involved a surrogacy arrangement between an English woman, Kim Cotton, and an American couple

made via an American agency. Although surrogacy arrangements can be made privately between individuals, it is a criminal offence in this country under the Surrogacy Arrangements Act 1985 to set up a surrogacy agency commercially, to advertise surrogacy services and to negotiate a surrogacy arrangement for money. Where there is a dispute about a child born of a surrogacy arrangement (e.g. the birth mother wants to keep the child in breach of the arrangement with the commissioning mother) an application can be made in wardship or for a s.8 order under the Children Act 1989 for the dispute to be settled, when the welfare of the child is the court's paramount consideration. In *Re P (Minors) (Wardship: Surrogacy)* [1987] 2 FLR 421, for example, the court in wardship refused to order that twins aged five months be transferred from the birth mother, a single parent, to the commissioning father and his wife, even though they could offer the child a better environment both materially and intellectually. Before the Human Fertilisation and Embryology Act 1990 came into force, surrogacy had some rather strange consequences, for the commissioning parents, including the genetic father, had to adopt the child in order to become the child's legal parents. Under s.30 of the 1990 Act a husband and wife can apply to the court within six months of the child's birth for an order for the child 'to be treated in law as the child of the parties to a marriage' (s.30(1)), but this is not yet in force.

'Alternative Parents'

Most children are brought up by parents with whom they have a biological link, but some children are cared for and brought up by other parents, such as step-parents, foster-parents or a guardian. Other children may be adopted (see Chapter 14).

(i) Step-Parents

A step-parent is not a biological parent but a parent created by marriage, i.e. a child acquires a step-parent if one of his or her parents remarries. Step-parents have legal obligations towards their step-children, e.g. to provide financial support (i.e. maintenance) for any child 'treated by them as a child of the family' (see Chapter 11). A step-parent also has certain rights in respect of a step-child. A step-parent can, for example, apply to adopt a step-child (see Chapter 14). Before the Children Act 1989 came into force, step-parents (and foster-parents) could apply for a custodianship order, which gave them custody rights in respect of a child but which, unlike an adoption order, was revocable, i.e. capable of being discharged. Custodianship has gone, but has been replaced by similar provisions in the Children Act 1989, allowing step-parents (foster-parents and others) to apply for a residence order in respect of a child with or without leave of the court, depending on how long the child has lived with the step-parent (see 9.4 below). A step-parent is also entitled to apply for other s.8 orders with leave of the court.

(ii) Foster-Parents

A foster-parent is somebody acting *in loco parentis* on a fairly settled basis in respect of a child, but who has no legal parental responsibility for the child and who is not usually a relative or step-parent. There are two types of foster-parent: those who care for a child under a private fostering arrangement (like the foster-parents in *J* v. *C* [1970] AC 668, [1969] 1 All ER 788) and those who are local authority foster-parents. Although both types of foster-parent have no parental responsibility for the child in law, unless they acquire it under a residence order or by being appointed a guardian, they nevertheless have an obligation to care for the child and may be liable in negligence or guilty under the criminal law if they fail in their duties. Both types of foster-parent are also subject to the control and supervision of the local authority, although different rules and regulations apply to each group.

(iii) Guardians

Before the Children Act 1989 came into force, parents could simultaneously be both parent and guardian of a child and could also appoint different sorts of guardian (a guardian of the person or a guardian of the estate, i.e. the child's property). However, in 1988 the Law Commission in its report on *Guardianship and Custody* (Law Com No 172) recommended the abolition of parental guardianship (as it confused the two concepts of parenthood and guardianship), and also the abolition of the power to appoint different sorts of guardian. Its recommendations were enacted in ss.5 and 6 Children Act 1989, with the exception that an unmarried father can be a guardian, and the High Court under its inherent jurisdiction can appoint the Official Solicitor to be the guardian of the child's estate (s.5(11) and (12)).

With the exception of the guardian of the estate (i.e. The Official Solictor), all guardians have parental responsibility for the child (s.5(6)). Like a parent, a guardian must therefore care for the child and ensure the child is educated. A guardian can also apply for orders under the Children Act 1989 and can consent to the child's adoption. However, unlike a parent, a guardian has no legal duty to make a financial contribution towards a child. A guardian is consequently not a 'liable relative' for the purpose of Income Support, and orders for financial relief under the Children Act 1989 and child support under the Child Support Act 1991 cannot be made against a guardian. The Law Commission felt that to impose financial obligations on guardians might deter their appointment. A guardian has no right to succeed on the child's intestacy and a child cannot become a British citizen under the British Nationality Act 1981 because his or her guardian is resident or settled in the UK.

A guardian can be appointed privately or by the court.

Private Appointment A guardian can be appointed privately by one or both parents who have parental responsibility (s.5(10)) (i.e. not an unmarried father without parental responsibility) or by a guardian of the child (s.5(3) and (4)). Appointing a guardian is a simple procedure and, although the appointment can be made in a will, it need not be. An appointment is effective if made in writing, dated and signed by the appointor. An unsigned appointment made in a will is effective if signed at the direction of the testator in accordance with s.9 Wills Act 1837. An unsigned appointment not made in a will is effective if signed at the direction of the appointor in his presence and in the presence of two witnesses who must each attest the signature (s.5(5)). The person appointed guardian has parental responsibility for the child (s.5(6)).

Guardianship only takes effect on the death of the child's surviving parent, except where the deceased parent (or guardian) had a residence order in his or her favour and the surviving parent does not have one (s.5(7), (8) and (9)). This provision seems tortuous, but enables a divorced parent with a residence order in his or her favour in respect of the child to appoint a guardian (e.g. his or her cohabitee or new spouse) who on the death of the appointor becomes the child's guardian despite the child's other birth parent being alive, provided the latter parent does not have a residence order in his or her favour. The fact that guardianship in this situation hinges on whether or not a residence order has been made in favour of a parent is open to criticism as being somewhat arbitrary, particularly as the court under the no order presumption (s.1(5) Children Act 1989) may have decided that a residence order is not necessary for the child's welfare. Another problem is that on the death of the parent with a residence order in his or her favour two people (i.e. the guardian and the other parent without the residence order in his or her favour) both have parental responsibility for the child. This may lead to conflict which, failing resolution by the parties, will have to be resolved by the court in an application for a s.8 specific issue order. Conflict may also arise between a guardian and an unmarried father, because where an unmarried mother is survived by an unmarried father with no parental responsibility, guardianship takes effect on the mother's death, for otherwise the child would be left with no person having parental responsibility for him or her. After the unmarried mother's death, the unmarried father could, if he has not already done so, apply for parental responsibility under s.4 Children Act 1989, but any dispute between the guardian and the unmarried father (whether or not he has parental responsibility for the child) will have to be settled by an application for a specific issue of prohibited steps order under s.8 Children Act 1989 (see 9.7 below).

Appointment by the Court The court (i.e. the family proceedings court, county court, or High Court) can make an order appointing any individual applicant to be the child's guardian where the child has no parent with parental responsibility or a parent or guardian with a residence order in his or her favour has died while the residence order

was in force (s.5(1)). Any individual can apply to be appointed guardian, e.g. an unmarried father without parental responsibility, a friend or relative.

The court can also appoint a guardian in the same circumstances at its own motion in any family proceedings (see 9.7 below), i.e. when no application has been made for an order but the court considers an order should be made (s.5(2)). The court can only appoint a person (not a local authority or a voluntary organisation) to be a guardian, but it can appoint more than one guardian and can appoint a guardian even though one has already been privately appointed. When deciding whether or not to make an appointment, the child's welfare is the court's paramount consideration and the other s.1 provisions apply, except the statutory checklist in s.1(3).

As the appointment of guardians is itself a family proceeding (s.8(4) Children Act 1989), the court instead of, or in addition to, appointing a guardian can make either on application or at its own motion any s.8 order (i.e. residence, contact, specific issue or prohibited steps order), when both the welfare principle and the statutory checklist apply.

Revocation and Disclaimer of Appointment Section 6 Children Act 1989 provides for the revocation and disclaimer of the appointment of guardians. A later private appointment (i.e. one made by a parent with parental responsibility or a guardian) revokes an earlier private appointment (including one in an unrevoked will or codicil) made by the same person in respect of the same child, unless the clear purpose of the later appointment is to appoint an additional guardian (s.6(1)). A person who has made an appointment can revoke that appointment (including one made in an unrevoked will or codicil) by a written and dated instrument signed by him or signed at his direction in his presence and in the presence of two witnesses each of whom must attest the signature (s.6(2)). A person who has made an appointment (other than by will or codicil) can revoke that appointment by destroying the instrument or getting someone else to destroy it in his presence (s.6(3)). Revocation of a will or codicil containing an appointment revokes that appointment (s.6(4)).

A person privately appointed a guardian can disclaim that appointment by an instrument in writing signed by him within a reasonable time of his first knowing the appointment has taken effect (s.6(5)).

Any appointment (i.e. private or court appointment) can be terminated by the court on the application of anyone with parental responsibility for the child, the child concerned with leave of the court, or the court at its own motion in any family proceedings (s.6(7)).

9.5 Parental Responsibility

Under the Children Act 1989 the emphasis is on parental responsibilities and not parental rights. Only married parents and the unmarried mother

have automatic parental responsibility (s.2(1) and (2)), but other persons can acquire it, e.g. by court order or by becoming a guardian on the death of a parent. An unmarried father has no automatic parental responsibility for his child (s.2(2)), and can only acquire it under s.4 Children Act either by written agreement with the mother in the correct form or by court order. This lack of parental responsibility for unmarried fathers might be considered discriminatory, but to give unmarried fathers automatic parental responsibility would result in rapists and fathers of children conceived during a casual relationship acquiring parental responsibility. The National Council for One-Parent Families was strongly against giving unmarried fathers automatic parental responsibility. In Scotland, however, the Scottish Law Commission is considering whether to give unmarried fathers automatic parental rights.

More than one person can have parental responsibility for the same child at the same time (s.2(5)), and parental responsibility does not come to an end because some other person subsequently acquires it (s.2(6)). Parental responsibility is not therefore lost when a child goes into local authority care, and continues after divorce, nullity or judicial separation. Parental responsibility only comes to an end on the child's majority, the child's death, or by virtue of a court order, i.e. an adoption order terminates the parental responsiblity of the birth parent(s); an order under s.4 Children Act 1989 can remove parental responsibility from an unmarried father; an order discharging a care order terminates a local authority's parental responsibility; and an order terminating wardship terminates the court's responsibility for a child.

Persons with parental responsibility can act independently of each other in meeting that responsibility, unless some other Act or some other provision in the Children Act 1989 requires the consent of more than one person in a matter affecting the child (s.2(7)). Thus each parent can unilaterally take decisions about the child without always having to consult the other parent, e.g. the father could consent to the child having an emergency operation where the mother is unavailable, or the mother could decide to leave the child with a particular babysitter before the husband arrives home from work. Parental responsibility cannot be exercised unilaterally, however, where it is contrary to statute, e.g. joint parental consent is needed for adoption under the Adoption Act 1976 unless consent is dispensed with, and where a s.8 residence order is in force with respect to a child, a parent (or any other person) cannot unilaterally take the child out of the jurisdiction for more than one month or change the child's surname without the written consent of all those with parental responsibility or leave of the court (s.13(1) and (2) Children Act 1989). It is also a criminal offence under the Child Abduction Act 1984 for a person with parental responsibility to remove a child within or outside the jurisdiction without the consent of certain other persons, including those with parental responsibility for the child (see Chapter 12). A parent cannot exercise parental responsibility in a way which would be incompatible with a court order made under the Children Act 1989 (s.2(8)), e.g. it

would be contempt of court for a parent to remove a child from the care of a local authority in breach of a court order or to refuse to allow a child to emigrate with a parent in breach of a s.8 specific issue or prohibited steps order. Where those sharing parental responsibility cannot agree on a particular course of action (e.g. with whom the child should live on divorce, whether the child should have medical treatment, whether the child's name should be changed) then the dispute can be settled by application for a s.8 specific issue or prohibited steps order for the court to decide the dispute, when the child's welfare is the court's paramount consideration (s.1(1)).

A person with parental responsibility cannot surrender or transfer any of that responsibility to another person but may arrange for some or all of it to be met by one or more persons acting on his behalf (s.2(9)), and the person with whom such an arrangement is made can be a person with parental responsibility (s.2(10)). Under these sections it is possible to place the child with someone acting *in loco parentis* (e.g. childminder, babysitter, friend or relative) or someone else with parental responsibility (e.g. other parent, grandparent with residence order in his or her favour). However, a person with parental responsibility cannot escape liability under the criminal or civil law by delegating responsibility to some other person (s.2(11)), so that the onus is on a parent to make proper arrangements for a child, e.g. a parent who left a child with an au pair without checking the au pair's credentials might be criminally liable if the child suffered harm.

What is 'Parental Responsibility'?

Section 3(1) Children Act 1989 defines parental responsibility as:

> 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.'

However, this definition is vague and tells us nothing about the true nature and scope of parental responsibility, which must be deduced from case-law and statutory provisions other than the Children Act 1989. We will look first at rights and then at duties. Parents have no absolute or fundamental rights in respect of the child as the child's welfare always prevails to modify any rights that parents have (see dicta in *Gillick*) and parental rights wane as the child grows up and reaches majority. Despite the emphasis on parental responsibilities parents do in fact have certain rights in respect of their children, particularly against third parties and the State, e.g. parents have a right to be party to proceedings under the Children Act 1989, to bring actions in the court in respect of their children and a right to remain in contact with their children when their children are in care (s.34 Children Act 1989).

While statute law and case-law provide no list of parental rights, duties, powers and responsibilities, and the Children Act 1989 puts the emphasis on responsibilities rather than rights, it is generally recognised that

parents do possess certain clearly defined rights in respect of a child. In fact s.3(1) mentions the word rights. Parental rights, however, are not absolute rights, and the scope and nature of any right depends on the nature of the right in question, the age and maturity of the child and all the circumstances of the case. When a child is young and needs protecting, parental rights and responsibilities are likely to be more extensive than when the child is older, unless the child is suffering, or is at risk of suffering, significant harm when the State will have to intervene. As the child nears majority parental rights decline and in some circumstances may be virtually non-existent as they were in *Gillick*, although cases post-*Gillick* have shown that parents and the courts can in some circumstances override the wishes of the '*Gillick* competent' child (see above).

Parents have the following rights, duties and responsibilities in respect of a child, although these rights are not fundamental or absolute, but are qualified rights:

(i) A Right to the Physical Possession of the Child

The criminal and civil law relating to child abduction (see Chapter 12) and the restriction under s.13 Children Act 1989 on a child subject to a residence order being removed out of the UK for more than one month without the consent of all persons with parental responsibility indicate that a parent has a right to the physical possession of the child. This right is also emphasised by the fact that under the Children Act 1989 a parent can ask a local authority to hand over the child if the child is not subject to a care order or an emergency protection order. Indeed one of the central policy aims of the Children Act is that children who are accommodated in care under a voluntary arrangement under Part III of the Act can be taken back by a parent at any time.

The Children Act 1989 has abolished the concept of custody. Whether this will in the private law context of divorce diminish a parent's right to possession of the child remains to be seen. In the public law context, parental rights to possession of the child have arguably been strengthened, as a child cannot be removed from a parent without a court order. Prior to the Children Act parental rights could be removed by an administrative resolution made by the local authority. Under the Children Act there are also better safeguards for parents in respect of emergency intervention by local authorities than there were under the old law and also a presumption in favour of contact with a child in care.

(ii) A Right to Contact with the Child

Before the Children Act 1989 the word 'access' was used and not 'contact'. Now, on and after divorce, a parent who wishes to remain in contact with a child, where the other parent is uncooperative, must apply for a s.8 contact order (see Chapter 10). The contact order and the presumption of reasonable contact with children in care under s.34 indicate that parents

have some sort of right to have contact with the child even though it is not an absolute right, e.g. local authorities can apply for contact between the child and its parent or parents to be terminated, as a preliminary step, for example, to the child's adoption. The law encourages parent–child contact, as parents are considered to be the primary care-givers and as maintaining contact is considered to be beneficial for a child. If contact is not maintained when a child is in care, then the chances of rehabilitating the child with its family are reduced. Although the law encourages contact, the case-law has emphasised that contact is a right of the child (see *M* v. *M* [1973] 2 All ER 81). There is, however, no fundamental parental right of contact in the human rights sense (see *Re KD (A Minor)* [1988] AC 806, [1988] 1 All ER 577, [1988] 2 FLR 139), as any right of contact is always subject to the welfare of the child, and in an extreme case, where contact is detrimental to the child, a local authority can obtain a care or emergency protection order, and, if necessary, terminate contact and make plans for the child's adoption.

(iii) A Right and a Duty to Educate the Child

Parents have certain rights and duties in respect of their child's education. Under ss.35 and 36 Education Act 1944 a parent has a duty to ensure that a child between the ages of five and 16 receives 'efficient, full-time education suitable to his age, ability and aptitude, either by regular attendance at school or otherwise'. The words 'or otherwise' mean there is no obligation on a parent to send a child to school, i.e. a parent can educate a child at home. However, parents who fail to ensure their child's education (whether at home or at school) can be prosecuted under ss.39 and 40 of the 1944 Act and a local education authority can obtain an education supervision order under s.36 Children Act 1989 where a child fails to attend school. Parents have a right to choose which school their child attends and education authorities must comply with parental wishes unless this would be prejudicial to efficient education or to an efficient use of resources (s.76 Education Act 1944; s.6 Education Act 1980). Parents have a right of appeal against a refusal of a place at a chosen school (s.7 Education Act 1980). Parents must also be provided with information about schools, e.g. curriculum, discipline, school policy etc. A parent also has a right to withdraw a child from religious education provided by the school (s.7 Education Reform Act 1988).

(iv) A Right to Choose the Child's Religion

This is a common law right (see *Re Agar-Ellis* above), but is also provided by statute. Parents under the Education Reform Act 1988 have a right to remove their child from religious instruction and school assemblies where they object on religious grounds. The importance of religion is also reflected in statutory provisions relating to fostering and adoption placements when the local authority must consider the child's religious

beliefs, if any. However, where a child of sufficient age and understanding objects to being brought up in a religion chosen by his or her parents it is difficult to see how such a child could be prevented from following another religion unless it was subversive or harmful.

(v) A Right to Consent to Medical Treatment

The *Gillick* case has not removed the right of parents to consent to a child's medical treatment. In fact the DHSS circular stated that doctors should work on the presumption that parents should be consulted before contraceptives were prescribed. Where the child is not a mature minor parental consent is needed to medical treatment and even where the child is '*Gillick* competent', the child's wishes can be overridden where any treatment or lack of treatment will harm the child physically. Under s.8 Family Law Reform Act 1969 children over the age of 16 can give valid consent to their own surgical or dental treatment, although this right is subject to any rule at common law (i.e. the wishes of a child over 16 can be overridden by the court as they were in *Gillick*).

Where an operation is a serious one, such as a life-saving operation or sterilisation, the court rather than the parents may have to decide the matter. This is usually done by making the child a ward of court when the court has to decide what is in the best interests of the child. The Official Solicitor's practice note (*Practice Note: Official Solicitor: Sterilisation* [1990] 2 FLR 530) states that prior approval of the High Court is required in virtually all sterilisation cases. Consent of the court is not required, however, where sterilisation is needed for therapeutic reasons (*Re E (A Minor) (Medical Treatment)* [1991] 2 FLR 585). In *Re B (A Minor) (Wardship: Sterilisation)* [1988] AC 199, [1987] 2 All ER 206, [1987] 2 FLR 314 the House of Lords in wardship authorised the sterilisation of a mentally retarded 17-year-old girl, but in *Re D (Sterilisation)* [1976] Fam Law 185, [1976] 1 All ER 326 sterilisation was refused because the court felt the girl might at a later date be able to give informed consent to the operation. Sometimes, the court has to make very difficult and harrowing decisions about life-saving treatment for a child. In R*e B (A Minor)(Wardship: Medical Treatment)* (1981) [1990] 3 All ER 927, [1981] 1 WLR 1421 the court ordered that a small baby born with Down's syndrome should be given a life-saving operation to remove an intestinal blockage where the parents refused to consent to the operation. In *Re J (A Minor) (Wardship: Medical Treatment)* [1990] 3 All ER 930, [1991] 2 WLR 140, [1991] 1 FLR 366 on the other hand, the Court of Appeal dismissed an appeal by the Official Solicitor against a decision of the High Court in wardship where the judge had ordered that a severely disabled baby should not be reventilated if his breathing stopped. Where a child needs a life-saving operation and the parents or the child refuse to give consent (e.g. a Jehovah's Witness refuses to consent to a blood transfusion, see *Devon County Council* v. *S* [1993] Fam Law 40) the Department of Health has advised doctors that they are unlikely to be liable for assault

and should, where necessary, treat a child without waiting for a court order giving them authority.

(vi) A Right to Consent to the Child's Marriage

A marriage where one or both of the partners is a child under the age of 16 is void (s.11 MCA 1973) (see Chapters 2 and 3). Where the child is over 16 but under 18, parents and others with parental responsibility must give their consent to the marriage, although failure to do so is unlikely to invalidate the marriage (s.3 Marriage Act 1949) (see Chapter 3). Where consent is not forthcoming, the child may apply to the court for the court's consent.

(vii) A Right and Duty to Choose the Child's Surname

A child by convention takes the father's surname and not the mother's maiden name, although this is not compulsory. A parent can choose any surname for the child, but where a residence order is in force with respect to a child, that child's surname cannot be changed without the written consent of all those with parental responsibility or leave of the court (s.13(1)(a) Children Act 1989). If a child objects to a change of name or wants to change his or her name but the parents object, then the child can seek leave to apply for a s.8 specific issue or prohibited steps order. The court can grant leave if the child has sufficient understanding to make the proposed application (s.10(8)).

(viii) A Right to Consent to the Child's Adoption

Under the Adoption Act 1976 parents (other than an unmarried father without parental responsibility) have a right to consent to the adoption of their child, but their consent can be dispensed with on certain grounds (see Chapter 14).

(ix) A Right to Discipline the Child and Administer Reasonable Punishment

While it is probably true to say that a parent has a right, or perhaps a duty to discipline a child, a parent must only inflict reasonable corporal punishment, otherwise a parent may be guilty of a criminal offence. Today there is pressure for reform, notably from a group called EPOCH (End Punishment of Children), to make it illegal for parents to administer corporal punishment.

(x) A Right to Administer the Child's Property and Enter into Contracts on the Child's Behalf

(xi) A Right to Appoint a Guardian

(xii) A Right to Apply to the Court under the Children Act and in Other Proceedings

(xiii) A Right to Consent to a Child Being Removed from the Jurisdiction

What Duties do Parents Have?

Parents have duties as well as rights. An important parental duty is to maintain the child, i.e. to look after the child physically and to provide financial support (see Chapter 11). Children also need emotional support. A parent or any other person with parental responsibility may be negligent or guilty of an offence if he or she fails in these duties. Parents must also ensure that a child is educated (see above).

Before we consider the Children Act 1989, wardship must be considered briefly. Although wardship is less used now since the Children Act 1989, it still remains an important jurisdiction in difficult cases involving children.

9.6 Wardship

The essence of wardship is that once a child is warded the situation is frozen and the court itself stands *in loco parentis* so that no important step in the child's life can be take without the court's consent (i.e. the so-called 'major steps' principle). Wardship is part of the inherent (i.e. non-statutory) jurisdiction of the court and is of ancient origin, going back to the time when the King in his role as *parens patriae* (parent or protector of the realm) owed a duty to his subjects to protect their persons and their property. This *parens patriae* or inherent jurisdiction is sometimes used today not only to protect children but also to protect adults who do not have the capacity to consent to medical treatment because of some mental disability. Responsibility for the exercise of the *parens patriae* jurisdiction eventually moved from the King to the Lord Chancellor and into the Courts of Chancery, and in 1875 into the Chancery Division of the High Court under the Judicature Acts 1873–75. Under the Administration of Justice Act 1970 the wardship jurisdiction was moved into the Family Division of the High Court. Wardship is only one of the court's inherent powers and the High Court can also make orders under its general inherent jurisdiction (see below).

The wardship procedure is governed by the Supreme Court Act 1981 and wardship proceedings are family proceedings for the purposes of the Children Act 1989 (s.8(3)(a)). Only the High Court has jurisdiction to ward a child. A child is warded as soon as the application is made, but ceases to be a ward if an application to hear the case is not made within 21 days of the initial application (i.e. the originating summons) (s.41(1) and (2) Supreme Court Act 1981). The Official Solicitor is usually appointed as the child's guardian *ad litem* and makes detailed enquiries

and prepares reports giving the child a voice in the proceedings. The initial appointment is before the district judge but the main hearing is heard by a judge. The judge must decide first of all whether the High Court should exercise its jurisdiction in wardship. In some cases the court may decide it has no jurisdiction to make the child a ward of court, as there are limits on the jurisdiction both at common law and under statute, e.g. wardship cannot be used to ward an unborn child *(Re F (In Utero)* [1988] Fam 122, [1988] 2 All ER 193, [1988] 2 FLR 307) or to commit a child into the care of or under the supervision of a local authority (s.100(2)(a) Children Act 1989). Once the court decides it has jurisdiction in wardship, it can exercise a wide range of powers. It can make orders under the Children Act 1989 as wardship is a family proceeding for the purposes of the Act (s.8(3)(a)), so that the court in the exercise of its wardship jurisdiction can therefore make: any s.8 order; a s.37 order to direct a local authority to make enquiries about a child (see below); an order for financial provision under the Schedule 1 Children Act 1989 (see Chapter 11); or appoint a guardian (see above). In wardship proceedings the welfare of the child is the court's paramount consideration where the child's upbringing or the administration of his property are in issue (s.1(1) Children Act 1989).

The Children Act has severely cut back the use of wardship by local authorities who before the Act were using wardship to take children into care instead of using special statutory procedures which existed. Section 100(2)(a) provides that wardship cannot be used to place a child in the care or under the supervision of a local authority. In the private law context, although there is no express prohibition in the Children Act against private individuals using wardship, it is only likely to be resorted to in rare cases, and even then jurisdiction may be declined by the courts. Not only is wardship expensive but the s.8 specific issue and prohibited steps orders allow all courts (i.e. family proceedings court, county court and High Court) to make flexible orders similar to those once only available in wardship. Wardship exists only as a residuary jurisdiction providing a safety net for complex and difficult cases.

Apart from wardship, the High Court also has a general inherent power to protect children, which is exerciseable whether or not the child is a ward of court. Proceedings under the inherent jurisdiction are family proceedings under the Children Act (s.8(3)(a)), so that the court has jurisdiction to make s.8 orders except where a child is in care, when only a residence order can be made. The inherent jurisdiction can be used, for instance, by local authorities to settle a question about a child in care. This is because no court can exercise the wardship jurisdiction to make a child in care under a care order a ward of court (s.100(2)(c)), and because a care order and wardship are mutually exclusive, as a care order brings wardship to an end (s.91(4)). Local authorities wishing to use the inherent jurisdiction must first obtain leave of the court (s.100(3) Children Act 1989). In *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 785, [1992] 4 All ER 627 a local authority applied under s.100(3) and (4)

Children Act for permission to arrange medical treatment for a 16-year-old anorexic girl in their care who was refusing medical treatment and to do so without her consent if necessary. The Court of Appeal unanimously gave its consent under the court's unlimited inherent *parens patriae* jurisdiction, holding that the jurisdiction extended beyond the powers of a natural parent. The Court of Appeal also held that although s.8 Family Law Reform Act 1969 gave minors who had attained the age of 16 a right to consent to surgical, medical or dental treatment, that consent could be overridden by the courts but not those with parental responsibility for the child. The Court of Appeal also held that the High Court's inherent jurisdiction in relation to children is equally exercisable whether or not the child is a ward of court.

As no s.8 order can be made in favour of a local authority on an application by a local authority when a child is in care (s.9(1) and (2)), the court must therefore use its non-statutory inherent powers to resolve questions about children in care. The court could make a s.8 residence order in favour of a party (other than a local authority), but the court is unlikely to do so because a residence order discharges a care order, which would undermine the powers and duties of the local authority to safeguard and promote the child's welfare (*Re W*, see 13.6). Although the inherent jurisdiction exists whether or not the child is warded, it is only likely to be used in unmutual cases such as *Re W* above. In *Re O (A Minor) (Medical Treatment)* (1993) *The Times*, March 19 Johnson J held that the inherent jurisdiction of the court was the most appropriate legal framework to consider a contested issue relating to emergency medical treatment for a child, and ordered that O be given a blood transfusion despite the objections of the parents who were Jehovah's Witnesses. An interim care order, an emergency protection order or a specific issue order were not appropriate. Even where a local authority had parental responsibility his Lordship stated that the consent of the court would be needed in such a case.

9.7 The Children Act 1989

Although we have already considered certain provisions of the Children Act, it is important to understand the background to the Act and its orders and principles in more detail.

During the 1980s there was much discussion and examination of both the private and the public law relating to children, which resulted in the Children Act being passed. The Act came into force on 14 October 1991 and was described by the Lord Chancellor, Lord Mackay, as 'the most comprehensive and far-reaching reform of child law which has come before Parliament in recent memory'. The fusion of private and public law in the Act resulted from the fact that the Law Commission was examining the private law relating to children (see the Law Commission's *Report on*

Guardianship and Custody, Law Com No 172, 1988) at the same time as the Government was examining the public law (see the White Paper, *The Law on Child Care and Family Services*, Cm 62, 1987).

The Children Act 1989 is 'comprehensive' for, with the exception of the criminal law relating to children, education and adoption law, the Act contains virtually all the civil law relating to children. Prior to the Act child law was contained in many different statutes which had been passed in an *ad hoc* fashion to protect children when there was found to be a gap in the law which needed filling. Many of these Acts have been repealed by the Children Act (e.g. Guardianship of Minors Act 1971, Guardianship Act 1973, Children and Young Persons Act 1969) and many have been substantially amended (e.g. s.41 Matrimonial Causes Act 1989, see Chapter 10). The Act is also 'far-reaching', not only because it covers most of the civil law relating to children, but also because important new philosophies are enshrined in the Act. Government reports and public inquiries relating to the management of child abuse by social workers and other agencies had a considerable influence on these changes of philosophy (see e.g. *A Child in Trust: Report of the Panel of Inquiry Investigating the Circumstances Surrounding the Death of Jasmine Beckford* (London Borough of Brent, 1985)). The Cleveland Report (*The Report of the Inquiry into Child Abuse in Cleveland 1987*, Cm 412, 1988), which severely criticised the over-zealous intervention of the local authority in cases of actual and suspected child abuse in Cleveland, had a particularly important influence on the reforms enshrined in the Act, especially in respect of emergency protection for children and the need for inter-agency cooperation. The decision of the House of Lords in *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] (see above) also had a significant impact on the Act, as children of sufficient age and understanding can bring proceedings under the Act and also have their views taken into account by the court. The concept of parental responsibility rather than parental rights also represents a new shift of philosophy in the Act, stressing the positive ongoing nature of parental involvement in bringing up children and removing the adversarial undertones of the word 'rights'. The emphasis in the Act is on self-determination for both parents and children with a policy of minimum State intervention. The court under the no-order presumption in s.1(5) can only make an order where it is better for the child than making no order at all, and local authorities must work in partnership with parents with court orders only being sought where it is really necessary to protect a child, i.e. one who is suffering, or who is at risk of suffering, significant harm. The aim of the Act is to restrict intervention into family life by the courts and local authorities unless really necessary for the child's welfare.

Another major aim of the Act is to provide a flexible court structure and a flexible range of orders available in all court proceedings. Most applications under the Act are brought in the magistrates' court sitting as a family proceedings court, but provision is made for cases to be transferred to the county court or High Court where the case is urgent,

serious or where the proceedings should be consolidated. Certain family members are given greater rights under the Act, e.g. unmarried fathers can acquire parental responsibility and third parties such as grandparents can apply under the Act with leave of the court.

The General Principles

The general principles of the Children Act 1989 are contained in Part I of the Act.

(i) The Welfare of the Child

Under s.1(1):

> 'When a court determines any question with respect to –
> (a) the upbringing of a child; or
> (b) the administration of a child's property or the application of any income arising from it,
> the child's welfare shall be the court's paramount consideration.'

The child's welfare is thus the paramount consideration in both private law proceedings (i.e. under Part II) and in public law proceedings (i.e. for care and supervision orders under Part IV and emergency protection under Part V).

The child's welfare is also important under other legislation, but is not always the paramount consideration when important adult interests are also involved. When making financial provision and property adjustment orders on divorce under Part II MCA 1973 the court must give 'first consideration' rather than paramount consideration to the welfare of any child of the family (see Chapter 8). When making ouster orders the court must apply the four criteria laid down in s.1(3) Matrimonial Homes Act 1983, one of which is 'the needs of any children', but in *Richards* v. *Richards* [1984] AC 174, [1984] FLR 11, the House of Lords held that children are only one consideration and not the paramount consideration when the court is deciding whether to make an ouster order, so that children are not given priority when occupation rights of adults are in dispute (see Chapter 15). In *Gibson* v. *Austin* [1993] Fam Law 20, a domestic violence case where a father sought an ouster injunction against a violent mother, Nourse LJ in the Court of Appeal stated that the decision in *Richards* had not been overruled by the provisions of the Children Act. With adoption, the court or adoption agency must give first consideration and not paramount consideration to safeguarding and promoting the welfare of the child throughout his childhood, as adoption involves important parental interests (see Chapter 14). The welfare principle in s.1(1) also does not apply to application for leave to apply for any s.8 order (*Re A and W (Minors) (Residence Order: Leave to Apply)* [1992] 2 FLR 154).

(ii) The Statutory Checklist (s.1(3))

What is best for a child's welfare depends on all the circumstances of the case, but welfare is a vague concept. However, the Children Act introduced a statutory checklist of factors which the court must have regard to when considering whether to make, vary or discharge a s.8 order in contested proceedings (s.1(4)(a)), or when the court is considering whether to make, vary or discharge an order under Part IV of the Act, i.e. orders for care and supervision (s.1(4)(b)). The checklist does not apply to emergency proceedings under Part V of the Act as a consideration of all the factors in the checklist would inhibit emergency action.

Under s.1(3) the court must have regard in particular to:

'(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) his physical, emotional and educational needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question.'

This list is not exclusive and other factors can be taken into account, as s.1(3) states that the above factors 'in particular' must be considered by the court. The last factor (g), unlike all the other factors, does not directly refer to the child, but enables the court to consider whether any other power available under the Children Act should be used. The welfare of the child may be better promoted by a different order or no order at all.

Section 1(3)(a) allows children of sufficient age and understanding to participate in the decision-making process (see *Gillick* above), but Thorpe J in *Re J (A Minor)* (1992) *The Times*, May 14 in the Family Division held that, although the child's wishes were at the top of the statutory checklist, they were not to be given any priority over the other factors in the list.

The statutory checklist is considered in more detail in Chapter 10, which deals with children on divorce.

(iii) The No-Order Presumption (s.1(5))

The no-order presumption was introduced for the first time by the Children Act as part of the general policy of the Act to place the primary responsibility for children on their parents with court orders only being made in the last resort. Section 1(5) provides:

> 'Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.'

Behind this presumption is a recognition that court orders often exacerbate problems rather than solve them. On divorce, where the emphasis is on minimising hostility and bitterness and reaching agreement, an order, such as a residence order, may increase hostility between the parties with harmful repercussions for the child, so that it may be better not to make an order. Andrew Bainham, conducting research at the University of East Anglia, has found that the courts in a vast number of cases are now making no orders at all on divorce, whereas before the Children Act custody and access orders were usually made as a matter of course on divorce.

Similarly in the public law context, where the emphasis is on local authorities working with other agencies in voluntary partnerships with parents to promote the welfare of children, it may also be better not to make an order. In *B* v. *B* (*A Minor*) (*Residence Order*) [1992] 2 FLR 327 a grandmother applied for a residence order in respect of her 11-year-old granddaughter, but at first instance the no-order presumption was applied and no order granted. However, in the Court of Appeal Johnson J granted the residence order, because the facts of the case were unusual. The child lived with the grandmother and a residence order would give the child some security and the grandmother parental responsibility which she needed to make day-to-day decisions concerning the child, e.g. medical treatment and school arrangements.

(iv) Avoidance of Delay (s.1(2))

The Children Act 1989 recognises that delay is harmful for a child. Section 1(2) provides:

> 'In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.'

To minimise delay, the court must draw up a timetable in respect of proceedings for s.8 orders (s.11) and for care and supervision orders (s.32), and the court can give directions and the rules of court make provision to avoid delay. Children's issues must be determined as soon as possible so that minimum disruption is caused to the child's life and the child is not left in limbo. This may avoid the sort of dreadful delay that occurred in *J* v. *C* [1970] AC 668, [1969] 1 All ER 788, where the House of Lords finally decided what should happen to the child about five years after he had initially been made a ward of court. To avoid delay,

proceedings can be transferred either vertically or laterally between the family proceedings court, the county court and the High Court.

Orders under the Children Act 1989

Section 8 Orders

A knowledge of the following s.8 orders is crucial to an understanding of the Children Act as, although they are mainly granted in proceedings brought by private individuals (e.g. on divorce), they can in some circumstances be granted in the public law context (e.g. a residence order, which is the only s.8 order the court can make in respect of a child in care of a local authority, can be made in care proceedings, provided the application for the residence order is not made by the local authority itself (s.9(1) and (2)). The aim of s.8 is to provide a flexible range of orders available in all courts in all family proceedings, although the court must only make an order if better for the child than making no order at all (see the no-order presumption above). The welfare principle in s.1(1) applies and the court must apply the statutory checklist in s.1(3) in contested proceedings when making, varying or discharging a s.8 order (s.1(4)(a)). The no-delay principle in s.1(2) also applies.

Under s.8 the court can make the following orders on application or at its own motion in any family proceedings, i.e. without an application being made. Family proceedings are defined in s.8(3) and cover a wide range of proceedings (see below).

A Residence Order This is an order

> 'settling the arrangements to be made as to the person with whom the child is to live.'

Residence orders are mainly applied for on divorce to settle a dispute about with which parent the child should live (see Chapter 10). They replace the old custody order, the aim being to remove the claim right implicit in and the adversarial undertones of the word 'custody'. With a residence order, it is a question of where the child is to live and not to whom the child belongs, and, even if an order is made, both parents retain parental responsibility. Other persons can apply for residence orders in repect of a child with or without leave of the court (s.10). A residence order is the only s.8 order that can be made in respect of a child in local authority care (s.9(1)), although it cannot be applied for by or made in favour of a local authority (s.9(2)). A parent or some other interested person can therefore apply for a residence order where a child is in local authority care, and a residence order, if granted, automatically brings a care order to an end (s.91(1)).

A residence order made in favour of a person without parental responsibility confers parental responsibility on that person (s.12(2)), although that person cannot, like a parent, consent to or refuse to consent

to adoption or appoint a guardian for the child (s.12(3)). A residence order does not deprive any other person of his or her parental responsibility (s.2(1)). Where a residence order is made in favour of an unmarried father who has no parental responsibility, the court must make a s.4 order giving him parental responsibility (s.12(1)). A residence order can be made in favour of two or more persons who do not live together and the order can specify the periods during which the child is to live in the different households concerned (s.11(4)), e.g. the order could state that the child is to live with the mother during the school terms and with the father for two weeks during each school holiday. Once a residence order is made a child's surname cannot be changed or the child removed from the United Kingdom, other than for a period of up to one month by the person in whose favour the residence order was made, without the written consent of every person having parental responsibility for the child or with leave of the court (s.13 (1) and (2)), e.g. the person with whom the child is living under a residence order can legally take the child on holiday abroad without the other parent's consent, but if he or she wanted to stay abroad longer than a month or to emigrate the permission of the other parent or the court would be needed (see Chapter 12).

A contact order This is an order

> 'requiring the person with whom the child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.'

Contact replaces the old concept of access and gives effect to the importance of children maintaining links with parents and other family members on family breakdown. A contact order cannot be made in respect of a child in care and cannot be applied for by or made in favour of a local authority (s.9), as contact in respect of a child in care of a local authority can be ordered under s.34 Children Act (see Chapter 13). Section 8 contact orders can be applied for on divorce when a father, say, wishes to remain in contact with his child. A 'named person' can be any person (e.g. a relative or friend) and 'otherwise' can mean, for example, contact by letter or telephone.

A Prohibited Steps Order This is an order

> 'that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court.'

This order, which is effectively an injunction, gives all courts powers similar to those which before the Children Act 1989 were only available to the High Court in the exercise of its wardship jurisdiction under the 'major steps' principle (see 9.6 above). A prohibited steps order can be

used, e.g. to restrain a parent from taking the child out of the jurisdiction, to restrain a named person from associating with the child, to restrain a parent from unilaterally making a decision about the child's education or consenting to medical treatment. A prohibited steps order cannot be made to achieve the same result that could be achieved by a residence or contact order or be made in any way denied to the High Court under its inherent jurisdiction under s.100(2) (s.9(5)).

A Specific Issue Order This is an order

> 'giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.'

This order can be made to settle any dispute which has arisen or may arise in respect of the exercise of parental responsibility, i.e. whether between those exercising that responsibility or others. A specific issue order could be made to settle a dispute arising in respect of e.g. the child's education or medical treatment, whether the child should move abroad with a parent, whether the child's surname should be changed. Before the Children Act such disputes were settled by making the child a ward of court when the court under its wardship jurisdiction would decide what was in the best interests of the child.

Like the prohibited steps order a specific issue order cannot be used in place of a residence or contact order or to order a child to be placed or accommodated in care or under the supervision of a local authority which is denied to the High Court under the exercise of its inherent jurisdiction by virtue of s.100(2) (s.9(5)).

In what Proceedings can s.8 Orders be Made?

Section 8 orders can be made in family proceedings either on an application or at the court's own motion (when any question arises in family proceedings as to the welfare of any child (s.10(1)) or on an application in free-standing proceedings made under the Children Act 1989 (s.10(2)).

'Family proceedings' for the purposes of the Children Act 1989 can be classified into three broad categories of proceedings (s.8(3)) so that s.8 orders can be made in:

- *wardship proceedings and parens patriae proceedings under the inherent jurisdiction of the High Court*
- *proceedings under various statutes other than the Children Act 1989*, i.e. the Matrimonial Causes Act 1973; the Domestic Violence and Matrimonial Proceedings Act 1976; the Adoption Act 1976; the Domestic Proceedings and Magistrates' Courts Act 1978; ss.1 and 9 Matrimonial Homes Act 1983; and Part III Matrimonial and Family Proceedings Act 1984; or

- *proceedings under Parts I, II and IV of the Children Act 1989* Part I proceedings are for s.4 parental rights orders and guardianship orders. Part II proceedings are for s.8 orders, orders for financial relief for children (s.15 and Schedule 1) and family assistance orders (s.16). Part IV proceedings are for care and supervision orders (s.31) and contact orders (s.34).

Part V emergency proceedings are not family proceedings.

Thus s.8 orders can be applied for or made at the court's own motion in many different civil proceedings involving children besides proceedings under the Children Act, e.g. in wardship proceedings, proceedings relating to domestic violence, divorce or adoption.

Who can Apply for s.8 Orders?

Any s.8 Order The following persons can apply for any s.8 order (s.10(4)): any parent of the child (this includes the unmarried mother and the unmarried father, whether or not the father has parental responsibility); any guardian of the child; any person with a residence order in his or her favour with respect to the child; any person prescribed by the rules of court; any person with leave of the court. Local authorities cannot apply for any s.8 order where a child is in care (s.9(1) and (2)).

Where an application is made for leave to apply for a s.8 order by any person other than the child, the court must in particular consider: the nature of the proposed application; the applicant's connection with the child; any risk of the proposed application disrupting the child's life to such an extent that the child would be harmed; and (where the child is being looked after by a local authority) the local authority's plans for the future and the wishes and feelings of the child's parents (s.10(9)). Where a child applies for leave to apply for a s.8 order, the court can only grant leave if satisfied that the child has sufficient understanding to make the proposed application (s.10(8)). The child's welfare is not paramount in any application for leave (per Balcombe LJ in Re *A and W (Minors) (Residence Order: Leave to Apply)* [1992] 2 FLR 154.

A Residence or Contact Order Besides the persons listed above who can apply for *any* s.8 order the following persons can also apply for a residence or contact order (s.10(5)): any party to a marriage (whether or not subsisting) where the child is a child of the family; any person with whom the child has lived for at least three years which need not be continuous but which must have begun not more than five years before, or ended more than three months before, the application is made; any person with the consent of the per-son(s) in whose favour a residence order is in force with respect to the child, the consent of the local authority where the child is in care, and/or the consent of each person (if any) having parental responsibility for the child; anybody under the rules of court or with leave of the court (see above).

Other Orders under the Children Act 1989

A wide range of other orders can also be made under the Children Act. We can broadly classify these orders as: (a) private law orders; (b) public law orders; and (c) 'hybrid orders', i.e. orders which overlap the private and public law domains.

(a) 'Private law' orders

(i) *Parental responsibility order (s.4)* An unmarried father has no automatic responsibility in respect of his child but can acquire it either by written agreement with the mother on a prescribed form or by court order.
(ii) *Order appointing a guardian for the child (s.5)* The court can appoint a person to be the child's guardian.
(iii) *Orders for financial relief (s.15)* The court can under s.15 make orders for financial relief for children, which are laid down in Schedule 1 (see Chapter 11).

(b) 'Public law' orders (see Chapter 13)

(i) *Care and supervision orders (s.31)* Where a child is suffering, or is likely to suffer, significant harm, the court can, if certain threshold criteria are satisfied and the child's welfare requires it, make a care order putting the child in the care of a local authority or a supervision order putting the child under the supervision of a local authority officer or probation officer.
(ii) *Child assessment order (s.43)* Where there is reasonable cause to suspect a child is suffering, or is likely to suffer, significant harm and an assessment of the child's health and development or the way in which it is treated is needed the court can make a child assessment order.
(iii) *Emergency protection order (s.44)* Where there is reasonable cause to believe that a child is likely to suffer significant harm, the court can in certain circumstances make an emergency protection order which authorises the removal from, or retention of the child in, certain accommodation.
(iv) *Orders for parental contact with child in care (s.34)* Where a child is in the care of a local authority the authority must allow parents and certain other persons to have reasonable contact with the child, and the court can make orders in respect of contact.
(v) *Education supervision order (s.36)* Where a child of compulsory school age is not being properly educated, the court can on the application of the local education authority make an education supervision order in favour of that authority.

(c) 'Hybrid' orders

(i) *Family assistance order (s.16)* The court in any family proceedings can make a family assistance order requiring either a probation officer or local authority officer (e.g. social worker) to be made available to advise, assist and (where appropriate) befriend any person named in the order. Before the order can be made the local authority in the area in which the child lives or is to live must agree to making an officer available (s.16(7)). Only a parent or guardian of the child, any person with whom the child is living or who has a contact order in his or her favour with respect to the child, or the child him or herself can be named in the order (s.16(2)). This order can be made whether or not another order is made in the proceedings (s.16(1)), but it must only be made in exceptional circumstances and only where everyone named in the order (other than the child) has consented to the order being made (s.16(3)). It can last only for a maximum of six months (s.16(5)). Where a family assistance order and a s.8 order are both in force with respect to a child, the probation officer or local authority officer involved can ask the court to vary or discharge the s.8 order (s.16(6)).

(ii) *Order for local authority to investigate the child's circumstances (s.37)* Where in any family proceedings a question arises in respect of the child's welfare and it appears it may be appropriate for a care or supervision order to be made in respect of that child, the court may direct the appropriate local authority to undertake an investigation into the child's circumstances (s.37(1)).

Summary

1. Children now have greater rights of self-determination than they once had, particularly after the decision of the House of Lords in *Gillick*, but the court can override the wishes of a *'Gillick* competent' child where the child's welfare requires it.
2. Some couples may have to resort to assisted reproduction techniques or to surrogacy to have a child. The Human Fertilisation and Embryology Act 1990 governs assisted reproduction. Under the Surrogacy Arrangements Act 1985 it is a criminal offence to make surrogacy arrangements on a commercial basis.
3. Step-parents and foster-parents have obligations to children in their care and rights to bring proceedings under the Children Act.
4. A guardian can be appointed for a child privately or by the court (ss.5 and 6 Children Act 1989).
5. Parents (but not the unmarried father) have parental responsibility (see ss.2 and 3 Children Act 1989). Parents also have certain rights and duties at common law and under statute, but parental rights are not absolute.
6. Under the wardship jurisdiction children can be made wards of court, but the Children Act has cut back the use of wardship, particularly by local authorities.

Children can in certain cases be protected under the court's general inherent (i.e. *parens patriae*) jurisdiction.

7. The Children Act 1989 has consolidated most of the civil law relating to children. The general principles of the Act are laid down in s.1 (i.e. wardship principle, principle of non-delay and no-order presumption). In contested s.8 order proceedings and in care and supervision proceedings under Part IV of the Act the court must apply the statutory checklist in s.1(3).
8. Different orders can be made under the Children Act, notably s.8 orders (i.e. residence, contact, prohibited steps and specific issue orders) and care and supervision and emergency protection orders.

Exercises

1. Henry and Wendy have an intelligent 16 year old daughter, Sarah, who is threatening to leave school and run away with her boyfriend, Dave, and join a strange religious sect.

   What can Henry and Wendy do?
2. Do you think unmarried fathers should have been given automatic parental responsibility?
3. Mary is terminally ill and cohabiting with John. They have two children, Sam, born of their relationship, and Ben, born of Mary's previous marriage. Mary wants to appoint a guardian for the children. John has no parental responsibility for Sam. Mary (not her former husband, Ron) has a residence order in her favour in respect of Ben.

   Advise Mary.

   What difference would it make, if any, if Mary had no residence order in her favour?
4. Sue, who is 16, is in care of the local authority under a care order. She needs a sterilisation operation because she is severely mentally retarded but sexually promiscuous.

   Advise the local authority.
5. In *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758 at 770 Lord Donaldson MR said that 'good parenting involves giving minors as much rope as they can handle without an unacceptable risk that they will hang themselves.'

   How does this statement apply to the case-law on children?

Further Reading

An Introduction to the Children Act 1989 (1989) HMSO.
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Alston, Parker and Seymour (eds), *Children, Rights and the Law* (1992) Oxford University Press.
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10 Children and Divorce

In this chapter we consider children whose parents divorce. Where there is a dispute about a child on divorce, orders must be sought under the Children Act 1989. Chapter 9 also deals with these orders as well as the applicable principles. Financial support for children is considered in Chapter 11.

10.1 Introduction

Many marriages end in divorce and many children are consequently involved. It has been estimated that about one child in five under the age of 16 is likely to experience his or her parents' divorce. Children suffer considerable emotional trauma when their parents break up. They suffer fear, anger, withdrawal, grief and guilt, their educational development is likely to suffer, they are more likely to become delinquent and their own marriages are more likely to end in divorce (see research by Wallerstein and Kelly, *Surviving the Breakup*, 1980). Freeman (*Rights and Wrongs of Children*, 1983) describes children as the 'victims' of divorce. The law recognises that these children need protection and one of the policy aims of divorce law and proposals for reform is to provide some protection. One of the ways of doing this is for divorce law to minimise hostility and bitterness between spouses, as children are less likely to suffer when their parents part amicably. Conciliation and mediation coupled with negotiation between solicitors help to resolve disputed issues about children and other matters, thereby smoothing the process of divorce for all concerned. Some divorcing couples, however, are unable to agree about residential and contact arrangements for their children, and, if unwilling to seek conciliation or conciliation does not work, must apply to the court under s.8 Children Act 1989 for residence, contact and, if necessary, other orders in respect of their children, when the court will have to decide what is best for the child.

Both married parents have automatic parental responsibility for their children which continues after divorce (see Chapter 9), so that parents have continuing obligations on and after divorce to provide financial and other support for their children. The provision of financial support in most cases is determined by the Child Support Agency under the Child Support Act 1991 but in some cases by the courts (see Chapter 11). When the court is making any orders for ancillary relief under Part II Matrimonial Causes Act 1973 in favour of the spouses or to or for the benefit of any child of the family, the child's welfare is the first consideration (s.25(1) MCA 1973), so that the accommodation needs of

any children on divorce are an important consideration when the court is making orders for ancillary relief in respect of spouses, particularly in respect of the matrimonial home (see Chapter 8).

10.2 Duty to Children in Divorce Proceedings

One of the policy aims of divorce law, as mentioned above, is to protect any children involved. One way in which the law does this is under s.41 Matrimonial Causes Act 1973 (MCA 1973), whereby the district judge must look at the arrangements made for the children on divorce and consider whether to exercise any of the court's powers under the Children Act 1989. In exceptional circumstances the district judge can delay decree absolute so that further consideration can be given to the children. Where a divorce is sought on either of the separation grounds, the court can under s.10 MCA 1973 delay decree absolute where a child is not financially provided for (see *Garcia* v. *Garcia* in Chapter 7).

Section 41, which was amended by the Children Act, reflects one of the underlying philosophies of that Act, i.e. that of minimal State intervention, with parents having primary responsibility for their children and a duty to make their own arrangements on divorce with court intervention only where really necessary (see also the no-order presumption in s.1(5) Children Act 1989, see Chapter 9).

Under s.41(1) MCA 1973 (amended by Sched. 12 para. 31 Children Act 1989) the court in divorce, nullity or judicial separation proceedings must consider:

'(a) whether there are any children of the family to whom this section applies; and
(b) where there are any such children, whether (in the light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare) it [i.e. the court] should exercise any of its powers under the Children Act 1989 with respect to any of them.'

Under s.41(2) the court can direct that a decree of divorce or nullity should not be made absolute, or a decree of judicial separation not be granted, until the court orders otherwise, if it appears to the court that:

'(a) the circumstances of the case require it, or are likely to require it, to exercise any of its powers under the Act of 1989 with respect to any such child;
(b) it is not in a position to exercise the power or (as the case may be) those powers without giving further consideration to the case; and
(c) there are exceptional circumstances which make it desirable in the interests of the child that the court should give a direction under this section.'

The court's duty under s.41 applies to any child of the family who has not reached the age of 16, unless the court directs otherwise (s.41(3) MCA 1973). A 'child of the family' is a child of both parties to a marriage and any other child treated by both parties as a child of their family other than local authority or NSPCC foster-children and the word 'child' includes the illegitimate child of one or both of the parties (s.52 MCA 1973). The district judge must therefore consider arrangements for all the children of the family, e.g. natural and adopted children, privately fostered children, and step-children.

A parent need not attend court as the s.41 procedure, like the special procedure, is an administrative exercise. The district judge examines the Statement of Arrangements for Children (Form M4), which accompanies the divorce petition and must be signed by the petitioner, and, if possible, agreed with by the respondent (r. 2.2(2) FPR 1991). If satisfied that the court need not exercise its powers under the Children Act, the district judge certifies to that effect (r.39(2) FPR 1991). If not satisfied, he can direct that further evidence be filed, order a welfare report or order that one or both of the parties attend before him (r.2.39(3) FPR 1991).

The pre-Children Act 1989 s.41 procedure was criticised for its brevity and for the lack of any follow-up supervision of arrangements for the children. Freeman wrote: 'This provision can offer children at best only minimal protection' (*Rights and Wrongs of Children*, 1983). The new s.41 could be open to the same criticisms, and possibly more so now that the court performs a less interventionist role than before the Children Act. However, to give the district judge a more interventionist role by making decree absolute dependent on arrangements for the children could be detrimental to a child's best interests. The Children Act recognises that delay is detrimental to a child (see s.1(2)), and prolonging an unhappy marriage might have a more harmful effect on a child than ending the marriage as quickly and as painlessly as possible. Under the new divorce proposals, a divorce will not be granted until issues including arrangements for the children have been resolved during the period of consideration and reflection. Whether this will actually benefit children remains to be seen.

Although s.41 aims to give children on divorce some protection, it does not settle any dispute between parents on divorce about where and with whom the child should live and whether the child should have contact with a parent. Where parents cannot agree about these arrangements and cannot resolve them by conciliation then a s.8 order under the Children Act must be sought, i.e. a residence, contact, prohibited steps or specific issue order. Other family members, children and other persons can apply for s.8 orders, but only with the leave of the court (s.10), and the court at its own motion can also make s.8 orders in family proceedings. However, the judge can only make an order either on application or at the court's own motion if making the order is better for the child than making no order at all (s.1(5)). When deciding whether to make an order and, if so, what order, the child's welfare is the court's paramount consideration

(s.1(1)), and the principle that delay is detrimental to the child (s.1(2)) and the no-order presumption (s.1(5)) also apply (see Chapter 9). In contested proceedings the court must also apply the statutory checklist in s.1(3) (see below and also Chapter 9).

The two main issues which may arise in relation to children on divorce are whom the child should live with and whether the child should have contact with a parent or anybody else. Where parents on divorce cannot agree on other matters (e.g. education, medical treatment, taking a child out of the jurisdiction), parents (and others) can apply for a s.8 prohibited steps or specific issue order (see Chapter 9).

10.3 With Whom Should the Child Live? Residence Orders

Before the Children Act 1989, a dispute between parents on divorce about their children was resolved in a custody dispute, where the court would usually make a sole or joint custody order and grant care and control to one parent (usually the mother) and access to the other (usually the father). In its *Report on Guardianship and Custody* (Law Com No 172, 1988) the Law Commission criticised the concepts of custody, care and control and access. The term custody was open to criticism because it created a parental claim right, which increased hostility and bitterness between the parties on divorce by creating winners and losers with detrimental consequences for their children. The residence order was therefore introduced with the emphasis being on the child's living arrangements and not on which parent has a greater claim to the child. Parents have responsibilities, not claims. Access orders were replaced by contact orders.

Where there is a dispute about with whom the child shall live on divorce, a parent and others (including the child) can apply for a residence order which is (s.8(1)):

> 'an order settling the arrangements to be made as to the person with whom a child is to live.'

The court can make a 'joint residence order', as s.11(4) provides:

> 'Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned.'

A residence order could specify, for instance, that a child lives with his mother during school terms and with his father during school holidays. It is thought that the courts are unlikely to make joint residence orders routinely (see Bainham, *Children: The New Law*, 1990), but s.11(4) gives the court the option of doing so where in a child's best interests. In most cases the child's welfare is likely to be best promoted by living in a settled

place. In *Riley* v. *Riley* [1986] 2 FLR 429, a case under the pre-Children Act 1989 law, the Court of Appeal failed to sanction a shared care and control arrangement, although it had been working successfully for some time, but in *J* v. *J (A Minor) (Joint Care and Control)* [1991] 2 FLR 385 joint care and control was ordered. However, the emphasis in the Children Act is on joint and shared parental responsibility and, as many parents today share child-rearing responsibilities, there may be cases where a joint residence order would best promote the child's welfare, unless of course the court considers it better for the child to make no order at all (s.1(5)).

If the court makes a residence order in favour of one parent, both parents retain parental responsibility (see Chapter 9), so that the non-residential parent has a right to be involved in decisions relating to the child, e.g. education, accommodation, religious upbringing, medical treatment. Any dispute will have to be settled by an application for a s.8 specific issue or prohibited steps order. Despite having joint parental responsibility, parents can act unilaterally and can also delegate responsibility, e.g. to a baby-sitter or teacher. However, where a residence order is in force no person can change the child's surname or take the child out of the United Kingdom for more than one month without the written consent of every person with parental responsibility or leave of the court (s.13(1)). The residential or non-residential parent or any other person can therefore take the child abroad for up to one month, but a longer stay could constitute an offence of child abduction if done without the consent of all those with parental responsibility (see Chapter 12). The consent of both parents is also needed for the child's adoption (Chapter 14).

A residence order made in favour of one or both parents who each have parental responsibility ceases to have effect if the parents live together for a period of more than six months (s.11(5)).

A residence order can be made in favour of other persons, not just the child's parents. If made, those persons acquire parental responsibility for the child. A child of divorcing parents can therefore apply, with leave of the court, for residence, contact and other s.8 orders, although the court can only grant leave if the child has sufficient understanding (see *Re AD (A Minor)* [1993] Fam Law 43 in Chapter 9).

How Does the Court Exercise its Power to Make a Residence Order?

When determining whether or not to make a residence order (and other orders), and in what manner, the court's paramount consideration is the welfare of the child (s.1(1) Children Act 1989). Where the proceedings are contested the court must consider the statutory checklist, i.e. the factors contained in s.1(3) (see below and also Chapter 9). This list is not exclusive and other factors can be considered as the section says 'in particular'. How the courts will apply these factors is as yet unclear, because there are few reported cases, but they are is likely to take a similar approach to that taken by the courts in the law prior to the Children Act 1989, where the welfare of the child was also paramount. The court may, however, because

of the no-order presumption in s.1(5), be less willing to make an order than previously, and there is some evidence that this is in fact the case.

The court under s.1(3) must consider the following:

(a) *The ascertainable wishes and feelings of the child (considered in the light of his age and understanding)* Where the child is intelligent and mature enough to make an informed decision, the child's wishes (e.g. to live with a particular parent or other person on divorce) may determine the matter, all other things being equal. The mature minor's wishes are given greater weight than they used to be, particularly after the *Gillick* case (see Chapter 9). Advocates of children's rights, such as the Children's Legal Centre, were pleased to see children's wishes placed at the top of the statutory checklist, but the children's wishes must be given equal weight with the other statutory criteria (per Wood J in *Re J (A Minor)* [1992]). Despite Wood J's dicta, where all other things are equal, a child's wishes may tip the balance, provided the child has sufficient understanding.

(b) *Physical, emotional and educational needs* Physical needs include the provision of accommodation and care, but the child's emotional needs are also important, so that the court will not necessarily make an order in favour of the wealthier parent. In *Re McGrath (Infants)* [1893] 1 Ch 143 Lindley LJ stated that 'the welfare of the child is not to be measured by money alone nor by physical comfort only'. As far as needs are concerned, in cases prior to the Children Act 1989 the courts often stated that a baby or a young child needed its mother so that care and control should be awarded to her, i.e. the so-called 'maternal preference factor'. In *C* v. *C (Minors: Custody)* [1988] 2 FLR 291 Heilbron J said:

> 'All things being equal it is a good thing for a young child to be brought up by his mother, although that is not to say that fathers cannot also look after children of that age and even younger; they can and they do.'

Re K (Minors)(Wardship: Care and Control) [1977] Fam 179, [1979] 1 All ER 647 involved a custody dispute between the mother, who had formed an adulterous relationship with a younger man, and the father, who was a Church of England clergyman. The Court of Appeal upheld the decision made at first instance giving custody care and control to the mother, Stamp LJ holding that 'by the dictates of nature the mother is the natural guardian, protector and comforter of young children', even though the father in this case was an unimpeachable parent and the justice of the case favoured his having custody. With changes in child-rearing practices and greater involvement of fathers, the rule that a mother is best, particularly for babies and young children, is a consideration rather than a presumption. In *Re S (A Minor) (Custody)* [1991] 2 FLR 388 Butler-Sloss LJ stated:

> 'it is natural for young children to be with mothers but where it is in dispute, it is a consideration but not a presumption.'

Butler-Sloss LJ in *Re A (A Minor) (Custody)* [1991] 2 FLR 394 reiterated that there is no presumption that the mother is to be considered the primary care-giver in preference to the father, but said that where children were very young the unbroken relationship of mother and child would be difficult to displace, unless the mother was unsuitable to care for them. Residence orders are therefore likely to be made in favour of mothers rather than fathers, particularly where children are young. This is partly because working fathers often find it difficult and expensive to make daytime caring arrangements. The court is also likely to consider a child's welfare is best promoted by maintaining the status quo, which in most cases involves the mother looking after the child, particularly where young. In *Re W (A Minor) (Residence Order)* [1992] 2 FLR 332, where the dispute concerned a newborn baby, Lord Donaldson MR said there was a rebuttable presumption of fact that the best interests of a baby are served by being with a mother.

Another consideration under the previous law, which is also likely to be relevant under the Children Act, is the importance of keeping brothers and sisters together on divorce to satisfy their emotional needs and maintain the status quo. To separate a child from his brothers and sis-ters on divorce could have disastrous emotional consequences for the child. In *Adams* v. *Adams* [1984] FLR 768 the mother sought custody of her daughter, but not her son. Her application failed because the court felt that it was better for the children to keep them together. Dunn LJ said:

> 'All these cases depend on their own facts, but it is undesirable, other things being equal, that children should be split when they are close together in age and obviously fond of one another. Children do support one another and give themselves mutual comfort, perhaps more than they can derive from either of their parents.'

The court's unwillingness to split up siblings is demonstrated in *B* v. *K (Child Abduction)* [1993] Fam Law 17, where Johnson J in the Family Division in an application under the Hague Convention, refused to order the return of a young child to Germany as he would be devastated if he were separated from his siblings who were old enough (nearly nine and seven) to have their wishes not to return to Germany taken into account.

The child's educational needs are also important. If a child is happily settled in a particular school, the court may be reluctant to make a residence order which would change those arrangements. Parental attitude to education may also be important. In *May* v. *May* [1986] 1 FLR 325 one of the reasons for granting the father care and control was that he placed greater emphasis on academic achievement than the mother and her cohabitee. However, each case turns on its facts.

(c) *Likely effect on the child of change of circumstances* This factor is similar to the continuity of care or status quo factor which was an

important consideration under the old law. In *D* v. *M (Minor) (Custody Appeal)* [1982] 3 WLR 891, [1983] 4 FLR 247 the Court of Appeal gave the mother custody as the child (aged one and a half) had lived with her since birth and it would upset the child to move him. Ormrod LJ said:

> 'it is generally accepted by those who are professionally concerned with children that, particularly in the early years, continuity of care is a most important part of a child's sense of security and that disruption of established bonds is to be avoided whenever it is possible to do so.'

The court may decide on balance that it is best to preserve the status quo, so that where the child has been living with a particular parent in a particular house in a particular environment for some time, the court is unlikely to consider it to be in the child's best interests to make a residence order that he or she live elsewhere. In *J* v. *C* [1970] AC 668, [1969] 1 All ER 788, a leading pre-Children Act decision of the House of Lords containing important dicta about the welfare principle, the court was very concerned about uprooting the child, who had lived for most of his life in England with private foster-parents, and sending him back to live in Spain with his natural parents. Lord MacDermott emphasised the importance of continuity of care:

> 'a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of . . . close and anxious attention . . .'

A change of circumstances is likely to be more traumatic for the child the longer he or she has been settled with a particular parent in a particular environment. In *Allington* v. *Allington* [1985] FLR 586 the father had only looked after the child for ten weeks, which was insufficient to establish a status quo and the court ordered the child should live with the mother. In *Re H (A Minor: Custody)* [1990] 1 FLR 51, on the other hand, the Court of Appeal was unwilling to disturb the status quo, where an 11-year-old boy who had been taken by his father from India to England, had adjusted to his new way of life in England with his uncle and aunt. The Court of Appeal held it would be disastrous to move him, although he had only been in England a year and the father had failed to keep his side of the bargain that he would inform the mother in India of their son's progress.

The quality of the status quo is important. The more satisfactory the status quo, the stronger the argument for not interfering with arrangements. However, in *Riley* v. *Riley* [1986] 2 FLR 429 the Court of Appeal disturbed the status quo by disapproving of a shared-care arrangement, which had successfully lasted for three years, although the court can now make a joint residence order (s.11(4)). Despite the decision in *Riley*, the status quo is an important factor to be taken into account by the courts.

(d) *Age, sex, background and any of the child's characteristics the court considers relevant* The older the child, the more likely the court is to heed his or her wishes because of s.1(3)(a) (see above). The child's sex may also be relevant. Dicta in the old law suggested that girls are better off with their mothers (see *Re K* above) and older boys better off with their fathers (per Lord Denning MR in *W* v. W. [1968] 3 All ER 408), but whether this is true or not depends on the circumstances of each case. These factors are considerations and not presumptions. The only presumption is that no order should be made unless necessary for the child's welfare. Under s.1(3)(d) the child's religious preferences, racial and cultural background, health and disabilities can also be considered.

(e) *Any harm the child has suffered or is at risk of suffering* Harm includes physical or emotional harm, but harm is a question of fact and degree in all the circumstances of the case. If a father has sexually abused his child it is unlikely to be in the child's best interests for a residence order to be made in the father's favour, but leaving a child with a child-minder or an au pair all day might also harm a child emotionally. Two areas of controversy in the case-law prior to the Children Act 1989 were concerned with the question of whether a child should be brought up by a Jehovah's Witness or by a lesbian parent.

Parents who are Jehovah's Witnesses

The courts are more tolerant about religion or lack of a religion than they used to be. The poet Shelley, for instance, was refused custody of his children because of his atheism (*Shelley* v. *Westbroke* (1817) Jac 266n). Today on divorce a parent's religious beliefs are unlikely to be important in deciding where the child should live under a residence order, unless those religious beliefs are likely to be detrimental to the child's welfare by having a subversive influence on the child. It would be an important consideration, for example, if a parent were a member of the Church of Scientology (see *Re B and G (Minors) (Custody)* [1985] FLR 134), or if the religion were to deprive a child of normal social contact. An intelligent and mature child's religious preferences might also be an important consideration.

In some cases prior to the Children Act the courts were concerned about Jehovah's Witnesses having custody, because of the danger of the child being indoctrinated and being used to proselytise the religion. The child would not celebrate Christmas or birthdays and the parent would probably refuse to consent to the child having a blood transfusion. Being a Jehovah's Witness is not likely on its own to dissuade the court from making a residence order in a parent's favour, but, all other things being equal, the court may decide that the child's welfare is better promoted by making the residence order in favour of the other parent or some other person. The court's concern about making a residence order in favour of a Jehovah's Witness could be assuaged by requiring a parent to give an

undertaking to the court, e.g. not to involve the children in house-to-house visits (see *Re C (Minors) (Wardship: Jurisdiction)* [1978] 2 All ER 230). Breach of an undertaking, like breach of a court order, is contempt of court.

Whether a Jehovah's Witness will obtain a residence order in his or her favour depends on all the circumstances of the case, with the child's welfare the paramount consideration. In *T* v. *T* (1974) 4 Fam Law 190 custody of two children was given to the father and not to the Jehovah's Witness mother because her life revolved round the Bible. The court was concerned that she might indoctrinate her children, and, as she did not allow them to celebrate Christmas and birthdays, she might isolate them from the rest of the world. The mother was given access on her undertaking not to take them to Jehovah's Witness meetings. In *Jane* v. *Jane* (1983) 4 FLR 712 the court was concerned about the problem of blood transfusions, but solved the problem by giving actual custody to the mother, so that the children would live with her, but legal custody to the father so that he could consent to medical treatment including blood transfusions if needed. Under the Children Act this sort of order is not possible as both parents have parental responsibility. A solution in these circumstances might be to have a residence order in favour of a Jehovah's Witness backed up with a prohibited steps or specific issue order relating to the blood transfusion issue and an undertaking not to indoctrinate the children. The court with the consent of the persons named in the order might consider the possibility of making a s.16 family assessment order in a suitable case (see Chapter 9).

Lesbian Mothers

Should a lesbian mother have a residence order in her favour? This is a difficult question, but the courts might make a residence order if conducive to the child's welfare, particularly as some of the concerns articulated in the earlier case-law about the likely harm to the child are, it seems, unfounded. Three main arguments have been advanced against a lesbian mother being allowed to have her child live with her on divorce: first, the child's mental health may be affected as the child may develop emotional and behavioural problems which may lead to psychiatric disorders; second, the mother's lesbianism may affect the sexual identity of the child; and third, as society is generally intolerant of lesbianism, the child may be stigmatised by peers, relatives and others. None of these arguments, it seems, has been substantiated by research. Children of lesbian mothers are not necessarily disadvantaged and do not necessarily adopt the same life-style.

In *S* v. *S (Custody of Children)* [1980] 1 FLR 143 the judge at first instance gave custody to the father and not to the lesbian mother, applying dicta of Lord Wilberforce in *Re D* [1977] AC 617 (a case involving a homosexual father's consent to adoption), as to give custody to the mother would scar the children for life. The Court of Appeal

refused to overturn the decision. In two later cases, *C* v. *C (A Minor) (Custody: Appeal)* [1991] 1 FLR 223 and *B* v. *B (Minors) (Custody, Care and Control)* [1991] 1 FLR 402, the lesbian mother in each case was successful in obtaining custody, which may indicate greater judicial tolerance of lesbianism. In *C* v. *C* the county court judge gave custody to the lesbian mother, as he did not consider the mother's lesbianism a relevant fact to put into the balance. The Court of Appeal overturned the decision, stating that while lesbianism *per se* would not deprive a mother of custody, lesbianism was nonetheless an important consideration, as the ideal environment in which to bring up a child was still considered to be in the home of caring heterosexual parents. The Court of Appeal held that the county court judge had therefore exercised his discretion wrongly by failing to perform the balancing exercise as if the lesbian relationship did not exist. The Court of Appeal remitted the case to the Family Division of the High Court where Booth J, after rehearing the case, ordered that the child should live with the lesbian mother and her girlfriend.

In *B* v. *B* Callman J was concerned about the child being stigmatised, but gave custody to the lesbian mother because the consultant psychiatrist giving evidence stated that fears about a child's sexual identity and possible stigmatisation were unsupported by research and were not proved in the particular case. A child was more likely to suffer stigmatisation from its peers about his or her own personal traits rather than about a mother's lesbianism. The mother was a loving mother with a good understanding of the psychological needs of children. The maternal preference and status quo considerations prevailed.

Judges and society generally seem more tolerant of lesbianism, so that a lesbian mother may be successful in obtaining a residence order in her favour, provided she is an exemplary parent with a good understanding of the problems her lesbianism might cause the child. She must not be a militant lesbian and she must show the court that she has a happy and settled lesbian relationship, and that her lesbian partner is also a caring and understanding person.

There has been no reported case where a child has been ordered to live with a homosexual father.

(f) *Capability of each parent of meeting the child's needs* Whether a parent can provide accommodation, love, emotional security and intellectual stimulation are important considerations. A parent who is an alcoholic or drug addict is unlikely to be capable of caring for a child. Where a parent cannot meet the child's needs during the daytime because of work commitments, that parent's arrangements for the child are likely to be an important consideration.

(g) *Range of powers available to the court under the Children Act 1989* Proceedings for a residence order are family proceedings (s.8(3)), so that the court has jurisdiction in those proceedings to make other orders on application or at its own motion. The court can therefore make

any of the following orders: any s.8 order; a s.16 family assessment order but only with the consent of those named in the order; an order appointing a guardian; or a s.37 direction that a local authority investigate the child's circumstances (i.e. where the court considers a care or supervision order may be appropriate). These orders are discussed in more detail in Chapter 9.

The above statutory checklist of factors which the court must consider in contested proceedings is not exclusive and other factors can be considered, as s.1(3) says 'in particular'. While each case turns on its facts and earlier cases do not provide precedents for later ones, certain factors (e.g. the child's wishes, continuity of care or maintaining the status quo, maternal preference, keeping siblings together) may weigh more heavily in the balance than others. Sometimes a case may be finely balanced and the court will have to make a difficult and often harrowing decision about with which of two caring and loving parents the child should live, although the court can at its discretion make provision for shared residence (s.11(4)) or make no order at all (s.1(5)).

Although the Children Act aims to get rid of the idea that parents are winners and losers by placing the emphasis on the residential arrangements for the child and on joint parental responsibility, the non-residential parent may consider him or herself a loser, particularly as contact arrangements are often difficult to sustain and many parents (particularly fathers) eventually lose contact on divorce.

10.4 Contact with the Child

On divorce where there is a dispute about contact the non-residential parent can apply under s.8 Children Act 1989 for a contact order, which is:

> 'an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.' (s.8(1))

Prior to the Children Act a parent would apply for an access order. The contact order is thought to be more child-centred and orders the residential parent to allow the child to have contact with a named person, and accords with the old law where access was described as a right of the child (per Wrangham LJ in *M* v. *M* [1973] 2 All ER 81). The Children Act emphasises the joint and continuing nature of parental responsibility, and contact with children on divorce enables this responsibility to be exercised. Contact with parents and others should be maintained as in most cases it is beneficial for the child. Although the Children Act only gives statutory recognition to the presumption of contact in the public law context (see s.34 and Chapter 13), dicta in the

case-law stress that there is a presumption of contact in the private law context on divorce. In *Re M (Minors) (Access)* [1992] Fam Law 152 Balcombe LJ said that the question to be asked when considering cessation or resumption of access (now contact) is whether there are any cogent reasons why the child should not have access, not whether or not access is beneficial for the child.

The court on divorce is therefore very unlikely to deprive a child of parental contact, unless the circumstances of the case are exceptional, e.g. if the father is likely to abuse the child sexually or otherwise (*H* v. *H and C (Kent County Council Intervening)* [1989] 3 All ER 740), but, even then, contact may be allowed if not detrimental to the child (*C* v. *C (Child Abuse: Access)* [1988] 1 FLR 462; *L* v. *L (Child Abuse: Access)* [1989] 2 FLR 16; *Re R (A Minor) (Child Abuse: Access)* [1988] 1 FLR 206). One way to protect such a child at risk of abuse would be to allow the child to have contact with the father only in the presence of a friend or relative or welfare officer. A s.16 family assistance order might be useful to protect the child and provide counselling and advice to the family, although the consent of all those named in the family assistance order (other than the child) is needed (see Chapter 9).

When considering whether to make a contact order and, if so, what sort of order, the court must apply the welfare principle (s.1(1)) and, in a contested application, the statutory checklist (s.1(3)). An order will only be made if better for the child than making no order at all (s.1(5)). A contact order requiring one parent to allow the other parent to have contact with the child ceases to have effect if the parents live together for a continuous period of at least six months (s.11(6)). Other family members and the child can apply for a contact order with leave of the court (see Chapter 9).

A contact order may allow reasonable contact leaving it up to the parents to make their own arrangements, but in some cases the court may be more specific about contact arrangements and define frequency, time, duration and place of contact. Section 8(1) states that the child can visit, stay or otherwise have contact with the parent or other named person. 'Otherwise' could mean, for instance, contact by letter or telephone.

Summary

1. Many children suffer when their parents divorce.
2. Under s.41 Matrimonial Causes Act 1973 the district judge must consider the proposed arrangements for the children, and consider whether to exercise his powers under the Children Act 1989. In exceptional circumstances decree absolute can be postponed so that arrangements for the children can be given further consideration.
3. Where there is a dispute about where and with whom a child should live on divorce, and about contact with a child, an order can be sought under s.8 to settle the dispute (i.e. residence and contact orders). Other disputes can be settled by a s.8 specific issue or prohibited steps order.

4. The court can make a s.8 order on application by the parent and by other persons, including the child. Other persons and the child need leave of the court to apply. The court can also make a s.8 order at its own motion in family proceedings (see Chapter 9).
5. The court must apply the welfare principle (s.1(1)), i.e. the child's welfare is the court's paramount consideration. In contested proceedings the court must apply the statutory checklist (s.1(3)). The no-delay principle (s.1(2)) and the no-order presumption (s.1(5)) also apply.
6. Both parents retain parental responsibility for the child on divorce.
7. Maintenance for the child on divorce (and at other times) can be sought from the Child Support Agency under the Child Support Act 1991 and, in some cases, the courts. Lump sum and property adjustment orders for children can be sought in the courts (see Chapter 11).

Exercises

1. Helen and Paul are divorcing but cannot agree about with whom their children (Lucy aged two and Mark aged five) should live. Since their separation ten months ago Helen has been looking after the children and Paul works full-time. Mark has a particularly close relationship with his father.

   Advise Helen and Paul.
2. Would it make any difference to your answer to question 1 if Helen had formed a lesbian relationship with Christine, who is a Jehovah's Witness?
3. Robert and Sarah are divorcing and have an intelligent 15-year-old daughter, Liz, who wants to go and live with her best friend's parents.

   Advise Liz.

Further Reading

Boyd, 'What is a "normal" family? *C* v. *C (A Minor) (Custody: Appeal)*' (1992) MLR 269.

Bradley, 'Homosexuality and child custody in English law' (1987) Int JL and Fam 155.

Elliott and Richards, 'Children and divorce: educational performance and behaviour before and after parental separation' (1991) Int JL and Fam 258.

Elliott and Richards, 'Parental divorce and the life chances of children' (1991) Fam Law 481.

Elliott et al, 'Divorce and Children' (1990) Fam Law 309.

Kelly, 'Children's post-divorce adjustment' (1991) Fam Law 52.

Maclean and Wadsworth, 'The interests of children after parental divorce: a long-term perspective' (1988) Int JL and Fam 155.

Richards, 'Post-divorce arrangements for children: a psychological perspective' (1982) JSWL 133.

Richards, 'Divorce research today' (1991) Fam Law 70.

Standley, 'Children and lesbian mothers: *B* v. *B* and *C* v. *C*' (1992) J Ch L 134.

Tasker and Golombok, 'Children raised by lesbian mothers' (1991) Fam Law 184.

11 Financial Provision and Property Orders for Children

11.1 Introduction

Both married and unmarried parents have financial obligations to their children, which is one way in which parents fulfil their parental responsibilities. Step-parents in some circumstances also have similar obligations. The law relating to the provision of financial relief for children (i.e. maintenance, lump sum orders or property orders) is fragmented; financial relief can be claimed under different statutory provisions in different court proceedings or from the Department of Social Security. Even the terminology is confusing; maintenance is referred to as support, and financial relief can also include property orders.

Maintenance for children is currently in a state of flux. Under the Child Support Act 1991 all applications for child maintenance, except in a small category of cases (see below), are currently being moved during a four-year transition period (i.e. between 5 April 1993 and 7 April 1997) into the Child Support Agency run by the Department of Social Security. During this period certain applicants will remain entitled to apply for maintenance from the courts and even at the end of the transition period in 1997 maintenance for certain children will be determined by the courts and not by the Agency (e.g. for certain disabled children, for children whose parents have high incomes, in school fees cases, or where children have married or are step-children). Despite the Child Support Act 1991 the courts retain and will continue to retain jurisdiction to make lump sum and property adjustment orders for children. It is therefore necessary in this chapter to consider the jurisdiction of the courts as well as the function and powers of the Child Support Agency. Court orders to or for the benefit of a child can be sought in matrimonial proceedings (i.e. under Part II MCA 1973 on divorce, nullity or judicial separation or under DPMCA 1978 during marriage) (see also Chapters 5 and 8). Otherwise an application can be made under the Children Act 1989.

Children may also be indirectly provided with financial support from the State as one parent is automatically entitled to Child Benefit and may be entitled to claim Income Support and Family Credit (see Chapter 5). Besides private law parental obligations to maintain children, parents have certain public law obligations. The Department of Social Security can recover Income Support in respect of children from 'liable relatives', for instance from the father when the mother is claiming Income Support for herself and their children (see Chapter 5). Under the Child Support

Act 1991 caring parents and other persons in receipt of certain welfare benefits also have a duty to provide the Secretary of State with information so that absent parents can be traced and ordered to pay maintenance where necessary. Local authorities can also claim financial contribution towards the maintenance of children in care and parents may also be liable to pay their children's fines when convicted of a criminal offence.

We start this chapter by considering child maintenance from the Child Support Agency under the Child Support Act 1991 because of the importance of maintenance (lump sums and property orders are rarely sought except where parents are wealthy) and because the courts will eventually only have a limited jurisdiction to make maintenance orders for children.

11.2 Child Support Maintenance under the Child Support Act 1991

Why the Need for Reform?

The Child Support Act 1991 was introduced to improve the payment of maintenance to children after recommendations and proposals for reform were made by the Government in a White Paper, *Children Come First* (Cm 1264, 1990). The Act is based on a recognition that children have a right to be maintained and that parents, not the State, have a responsibility to maintain them. Indeed, under the Act an absent parent has a *duty* to provide maintenance for a child being cared for by the other parent or by some other person. Several arguments were advanced by the Government for the need for reform. A major argument was that many parents were failing to pay maintenance to their children so that the burden was increasingly being thrown on to the State and consequently on to the taxpayer. In 1981–2, for instance, £1.75 billion was paid out in welfare benefits to lone-parent families, but in 1988–9 this figure had increased to £3.6 billion with 60 per cent of lone parents seeking Income Support. The Government also found there was uncertainty, unpredictability and unfairness in the maintenance system because the discretionary jurisdiction of the courts to make orders based on all the circumstances resulted in different orders being made in different courts even where the facts were similar. In one survey of two cases with almost identical facts, one county court ordered a father to pay £5 per week to his child and another ordered a father to pay £50. Court proceedings were also slow, taking on average 48 days in the magistrates' court and 131 days in the county court. There were also problems enforcing orders with parents, usually fathers, refusing to make payment. The Government concluded that the child maintenance system was unnecessarily fragmented, uncertain, inconsistent, slow and ineffec-

tive, and made proposals for reform based on systems of child support existing in Australia and the USA.

How the Scheme Works

Under the Child Support Act 1991 child maintenance for most children is gradually being moved into the Child Support Agency. This Agency is staffed by Department of Social Security child support officers who assess maintenance according to a mathematical formula on the basis of information supplied by parents and/or government departments (e.g. the Inland Revenue). The aim of the formula is to eradicate inconsistencies and uncertainties which existed and continue to exist under the discretionary court system. However, the court retains jurisdiction to order child maintenance in certain cases during the transition period and even after that period (see below). It also retains jurisdiction to make lump sum and property adjustment orders to or for the benefit of children (see below and Chapter 8). Besides assessing maintenance (which is reviewed regularly), the Agency collects and enforces payment and has wide powers to demand information from parents and employers with penalties for refusal or non-cooperation. Appeals are not to a court but to another child support officer and then to a tribunal, although appeals on points of law go to the Child Support Commissioner and then with leave to the Court of Appeal. An aggrieved party retains a right to seek leave to apply for judicial review of any decision and/or to ask the Ombudsman (the Parliamentary Commissioner for Administration) to investigate any alleged maladministration. Questions of parentage are determined by the courts (s.27). Parents remain entitled to make their own maintenance agreements but any term in the agreement restricting application to the Agency is void (s.9).

The provisions of the Child Support Act 1991 are being introduced during a transition period from 5 April 1993 to 7 April 1997 as follows:

5 April 1993	All new cases (i.e. where no court order is in force at 5 April 1993), whether or not the applicant is claiming welfare benefits.
5 April 1993 to 7 April 1996	All existing welfare benefits cases.
11 April 1994	Agency becomes responsible for *collection* and *enforcement* of s.8 'top up' court orders (i.e. in high-income, school fees, or disabled child cases).
8 April 1996	Agency becomes responsible for the *collection* and *enforcement* of spousal and other forms of maintenance.

8 April 1996 to 6 April 1997	Non-welfare benefits cases requiring variation of court orders will have phased access to the Agency according to the surname of the person with care of the child: A–D (8 April 1996); E–K (1 July 1996); L–R (7 October 1996); S–Z (6 January 1997).
7 April 1997	Full access to the Agency in all cases.

The Basic Principles

The 1991 Act does not impose a general child maintenance responsibility on all parents but only on each parent in respect of a 'qualifying child' (s.1(1)), who for the purposes of the Act is a child who has an 'absent parent' (s.3(1)). It is important to establish the meaning of 'child' because children not coming within the definition remain entitled to maintenance by court order. The meaning of a 'child' is defined in s.55.

A 'child' is:

- a person under the age of 16;
- a person under the age of 19 and receiving full-time education (which is not advanced education) at a recognised educational establishment or elsewhere if the education is recognised by the Secretary of State; or
- a person under the age of 18 who satisfies prescribed conditions laid down in regulations made by the Secretary of State.

A person is not a 'child' for the purposes of the Act if he or she is or has been married, even if the marriage was void or avoided by decree of nullity (s.55(2)).

The Act only applies to 'absent parents'. An 'absent parent' is defined in s.54 as a person who in law is the father or mother of the child (i.e. the biological parent which therefore includes married and unmarried parents whether or not the father has parental responsibility). Step-parents are therefore not included and step-children may be entitled to maintenance by court orders. A parent is an 'absent parent' if he or she is not living in the same household as the child *and* the child has his home with a 'person with care' (s.3(2)). A 'person with care' is a person with whom the child has his home and who usually provides the day-to-day care for the child (whether exclusively or in conjunction with another person), other than certain categories of persons prescribed by the Secretary of State (s.3(3)). Thus, a parent, a guardian, a person with a s.8 Children Act residence order in his or her favour and others caring for a child in his or her home can apply to the Agency for maintenance support where that child's parent (or parents) is absent. Either the person with care of the child or the absent parent can

apply to the Agency for a maintenance assessment (s.4(1)) and can also apply for arrangements to be made for collection and enforcement of maintenance payable, if desired (s.4(2)). A fee for assessment and for collection and assessment (where opted for) must be paid. Once the Agency has made a maintenance assessment the absent parent has a *duty* to make the required periodical payments (defined as 'child support maintenance') and by doing so is taken to have met his or her responsibility to maintain (s.1(2) and (3)).

Absent parents and caring persons can choose whether to apply to the Agency, but a caring person in receipt of welfare benefits (i.e. Income Support, Family Credit, Disability Working Allowance) *must* apply and *must* provide specified information without unreasonable delay to enable the Secretary of State to recover maintenance on his or her behalf from the absent parent (s.6(6)). The caring person in receipt of Child Benefit also impliedly authorises the Secretary of State to recover maintenance from the absent parent unless he or she (i.e. the caring parent) or the child will suffer harm or undue distress (s.6(2) and(3)). A caring parent in receipt of welfare benefits who fails to cooperate under s.6 can have his or her welfare benefits reduced (s.46).

Under s.2 the Secretary of State or any child support officer must consider the welfare of the child when exercising any 'discretionary power' under the Act. This 'welfare principle', unlike the Children Act 1989, does not make the child's welfare paramount and is likely to be of little practical importance because it does not apply to the calculation of the maintenance assessment but only to discretionary powers. The child's welfare might be relevant, for example, to the exercise of the Secretary of State's discretion under s.6 when deciding whether a mother and child might suffer violence or undue distress if the absent parent were named, or under s.46 when deciding whether a mother should suffer a reduction in benefit for non-compliance, delay or non-cooperation.

Maintenance Assessment

Schedule 1 of the Act and complex regulations contained in secondary legislation provide a formula for the calculation of maintenance. Because of the complexity of the regulations only an outline of the scheme is given here. Assessment is based on Income Support rates, thereby allowing maintenance to be regularly adjusted.

The child's *maintenance requirement* (i) and the *assessable income* of the parent(s) (ii) must be calculated first of all before the *maintenance assessment* (iii) can be made.

(i) Child's Maintenance Requirement

The child's maintenance requirement consists of Income Support allowances which would be paid to each child and the caring parent but with Child Benefit deducted, i.e. Income Support child allowance for each child,

family premium, lone-parent premium and Income Support adult personal allowance and lone-parent premium (where applicable) are aggregated and Child Benefit for each child deducted from the total. Each child's maintenance requirement is aggregated as the maintenance requirement is worked out per family not per child (unless the children have different fathers).

(ii) Assessable Income

Maintenance is only calculated and payable from a parent's assessable income, which is calculated by deducting exempt income (i.e. reasonable housing costs and notional Income Support adult personal allowance) from net income (i.e. wages or salary less income tax, national insurance contributions, and 50 per cent of pension contributions). A 'protected level of income' exists to prevent an absent working parent paying maintenance from being pushed below Income Support levels thereby becoming dependent on Income Support. The White Paper stated that it would be pointless to alleviate one family's dependency on Income Support by creating dependency in another. There is also a maximum ceiling on maintenance payments which is calculated by a statutory formula. Where an absent parent has a very high income, application can be made to the court for a 'top up' order under s.8 of the Act.

(iii) The Maintenance Assessment

To determine the amount of maintenance payable it is necessary first of all to add together the assessable income of the absent parent and the caring parent and to multiply the total by 0.5. The amount of maintenance to be paid by the absent parent depends on whether the result of this initial calculation is more or less than the qualifying child's (or children's) maintenance requirement.

Where the result of this calculation is equal to or less than the maintenance requirement then the amount of maintenance to be paid by the absent parent is his or her assessable income multiplied by 0.5 (i.e. half of his or her assessable income).

Where the result of the calculation is more than the maintenance requirement an additional 25 per cent of income is payable, subject to a maximum limit. The aim of this additional amount is to make parents with higher incomes pay proportionately more maintenance so that their children can enjoy their higher standard of living.

Enforcement

The Agency can ensure payment is made by instructing payment to be made by standing order and can order the payer to open a bank account for this purpose (s.29). Deductions from earnings orders can be made (s.31). If payment is not made, a 'liability' order can be sought from the

magistrates' court against the liable person (s.33), which may be enforced by distress (s.35), or in the county court by garnishee proceedings or a charging order (s.36) and in the last resort by imprisonment (s.40).

The Role of the Courts

At the end of the four-year transition period the court will only have jurisdiction to order maintenance for children in certain limited circumstances, i.e.

- to 'top up' maintenance in high-income cases when a maximum assessement has been made (s.8(6));
- to order maintenance in respect of certain disabled children (s.8(8));
- to make orders in respect of 'children' who do not come within the definition in s.55 (see above), e.g. step-children, married or formerly married children, children over 16 not in full-time education or those receiving advanced education.

The courts retain their jurisdiction to make lump sum and property adjustment orders to or for the benefit of children (see 11.3 below) and in related matters which arise when parents divorce, e.g. to make residence or contact orders (see Chapter 10).

Critique

Child maintenance from the Agency calculated by a mathematical formula has certain advantages. The provisions should create greater consistency and predictability and better enforcement mechanisms, thereby reducing the Government's and indirectly the taxpayer's liability to pay State benefits.

However, many criticisms have been made of the Act. One criticism is that the provisions, particularly the regulations, are too complex and detailed, which makes it difficult for interested parties to understand and for lawyers and other advisers to ascertain and to keep up to date. Calculation of maintenance is by a computer program which is not available to the public and there is some concern about calculation of maintenance as evidence suggests that DSS calculations are frequently wrong. The DSS also requires a considerable amount of information to be disclosed, which in some cases is likely to be very complex.

A major criticism is that the use of a rigid formula to assess maintenance leaves no scope for discretion and negotiation. The Solicitors' Family Law Association voiced concern about the cost of the scheme and felt the money could be better spent on improving the court system and funding conciliation and mediation schemes. The Family Courts Campaign (Consortium) criticised the scheme for being inconsistent with the underlying aim of the Children Act 1989 to create an integrated but flexible court system for children where all issues relating to children could

be dealt with in one forum. The scheme could also be criticised for isolating child maintenance on divorce from other related matters, such as spousal maintenance and property orders and lump sums for spouses and/or children. Provision for appeals has also been criticised for failing to allow appeals on discretionary issues and for the fact that most appeals are to the Agency and not to the courts. Maintenance via the Agency and continual reviews of maintenance may also make it difficult for the courts to effect a 'clean break' on divorce.

Although it is difficult to predict whether the new scheme will be an improvement on the courts, one area of concern relates to contact with children when parents separate or divorce. Under the Act if a child spends at least 104 nights a year on average with the absent parent, that parent's child maintenance support is proportionately reduced. Perhaps we shall see more parents jostling for contact orders and one wonders whether the court in some cases may be more willing to make a contact order and less willing to apply the 'no-order presumption' because of the absent parent's need to establish the requisite contact to qualify for reduced maintenance.

Before we consider the jurisdiction and function of the courts to make orders for children, it must be noted that the Child Support Agency will eventually also be responsible for the collection and enforcement (not assessment) of maintenance orders, including spousal maintenance, made in the courts.

11.3 Financial Provision and Property Orders for Children in Matrimonial Proceedings

During marriage and on divorce the court can make orders for financial provision (periodical payments and/or lump sums) for a child of the family (see also Chapters 5 and 8). During marriage the magistrates' court under the Domestic Proceedings and Magistrates' Courts Act 1978 and the county court under s.27 Matrimonial Causes Act 1973 can make financial provision orders for spouses and for any child of the family. On divorce, nullity or judicial separation, the county court can make orders for financial provision for the parties to a marriage and for any child of the family under Part II Matrimonial Causes Act 1973. 'A child of the family' under the DPMCA 1978 and MCA 1973 is a child in relation to one or both of the parties to a marriage, including an illegitimate child of one or both of those parties, and any other child treated by the parties as a child of the family, other than a child placed with them by a local authority or voluntary organisation (s.52(1) MCA 1973; s.88(1) DPMCA 1978). Thus step-children and privately fostered children are included.

Both the DPMCA 1978 and the MCA 1973 lay down the same statutory criteria which must be applied by the court when making or considering whether to make orders for financial provision for children.

The court must consider all the circumstances of the case with first consideration being given to the welfare while a minor of any child of the family (s.25(1) MCA 1973; s.3(1) DPMCA 1978). Where the court is considering whether to make an order in favour of a child and, if so, in what manner, it must consider in particular the following matters (s.25(3) MCA 1973; s.3(3) DPMCA 1978):

(a) the financial needs of the child;
(b) the income, earning capacity (if any), property and other financial resources of the child;
(c) any physical or mental disability of the child;
(d) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained; and
(e) some of the criteria also applicable in relation to the parties to the marriage (i.e. income, financial needs, standard of living, physical or mental disability of the parties to the marriage, but not each of the party to the marriage's age, contribution to the family, inequitable conduct, or loss of future benefits).

Where the court is making or considering whether to make an order against a party to a marriage in favour of a child of the family who is treated by that party as a child of the family (e.g. a step-child, privately fostered child, niece, nephew or grandchild), the court must also consider (s.25(4) MCA 1973; s.3(4) DPMCA 1978):

(a) whether that party assumed any responsibility for the child's maintenance, and, if so, the extent, the basis and duration of that responsibility;
(b) whether that party in assuming and discharging that responsibility did so knowing that the child was not his or her own; and
(c) the liability of any other person to maintain the child.

An order for financial provision (i.e. periodical payments or lump sum) for a child cannot be made in favour of a child who has reached the age of 18 unless the 'child' is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation (whether or not the 'child' will be in gainful employment), or where special circumstances exist justifying an order (ss.29(1) and (3) MCA 1973; ss.5(1) and (3) DPMCA 1978). A 'child' over 18 can intervene in matrimonial proceedings to claim financial provision for educational instruction or vocational training, even though his parents' decree absolute has been granted many years earlier (*Downing* v. *Downing (Downing Intervening)* [1976] Fam 288).

Where an application is made under DPMCA 1978 in respect of a party to the marriage or a child of the family, the magistrates must consider whether or not to exercise any of its powers under the Children Act 1989 in respect of the child (s.8 DPMCA 1978). As proceedings

under the DPMCA 1978 and Part II MCA 1973 are family proceedings under the Children Act 1989, the court on application or at its own motion can make any s.8 order in respect of a child (i.e. residence, contact, specific issue or prohibited steps order) (see Chapter 9). Property orders for children can also be made under the Matrimonial Causes Act 1973.

11.4 Financial Relief under the Children Act 1989

Under s.15 and Schedule 1 of the Children Act 1989 the court has jurisdiction to make orders for financial relief for children against one or both parents (including step-parents). Orders for financial relief are made in family proceedings and are orders for periodical payments, lump sum, settlement of property, and transfer of property.

Applicants

The court can make an order for financial relief for a child on the application of (Sched.1 paras.1 and 2):

- *a parent*, i.e. married parent, divorced parent, unmarried parent, adoptive parent, and any party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family (e.g. step-parent or private foster-parent) (para.16(2) and s.105);
- *a guardian of the child*;
- *any person in whose favour a residence order is in force with respect to the child*;
- *a 'child' aged 18 or over who either is, will be, or (if an order were made) would be receiving educational instruction or vocational training (whether or not while in gainful employment), or where special circumstances exist*, but an order cannot be made if the applicant's parents are living with each other in the same household (para.2(4)) and/or an order for periodical payments was in force in favour of the applicant immediately before he reached the age of 16 (para.2(3)). Only periodical payments and/or a lump sum can be ordered in favour of a 'child' over 18 (para.2(2)), and only against birth or adoptive parent(s) (para.16).

The court at its own motion can also make any order for financial provision for a child under Schedule 1 when making, varying or discharging a residence order (para.1(6)) and where the child is a ward of court (para.1(7)).

Orders

The court can make the following orders for 'financial relief' against one or both parents:

- *periodical payments (unsecured or secured)* to the applicant for the benefit of the child or to the child himself;
- *a lump sum* to the applicant for the benefit of the child or to the child himself;
- *a settlement of property* for the benefit of the child;
- *a transfer of property* to the applicant for the benefit of the child or to the child himself.

The High Court or county court can make any of the above orders, but the family proceedings court can only make orders for periodical payments and lump sums (not property orders) and up to a financial limit. If the court makes an order for financial relief on the application of a parent, guardian or person with a residence order in his favour, it can at any time make a further order for periodical payments or a lump sum to or for the benefit of a child under the age of 18, but only one settlement or transfer of property order can be made (para.1(5)). Where the court makes an order on the application of a 'child' aged 18 or over it can from time to time make a further periodical payments or lump sum order (para.2(8)).

Principles Applied by the Court

Under Sched.1 para.4(1) the court in deciding whether to exercise its powers to make orders for financial relief and, if so, in what manner, must have regard to all the circumstances of the case including:

(a) the actual and foreseeable income, earning capacity, property and other financial resources and
(b) financial needs, obligations and responsibilities of: any parent of the child; the applicant; and/or any other person in whose favour the court proposes to make the order (but only those of the mother and father where the court is considering whether or not to make an order under para.2, i.e. in respect of a 'child' aged 18 or over);
(c) the financial needs of the child;
(d) the income, earning capacity (if any), property and other financial resources of the child;
(e) any physical or mental disability of the child;
(f) the manner in which the child was being, or was expected to be, educated or trained.

The child's welfare is not paramount in deciding an application for financial provision and property orders under the Children Act 1989; the court must apply the statutory guidelines (*K* v. *K* (*Minors: Property Transfer*) [1992] 2 FLR 220).

Where a person is not the mother or father of the child (e.g. a step-parent, private foster-parent) the court must also consider: whether

responsibility has been assumed by that person and, if so, its extent, basis and duration; whether the person assuming responsibility knew that child was not his; and any other person's liability to the child (Sched.1 para.4(2)).

Summary

1. Maintenance for children (i.e. child maintenance support) can be sought from the Child Support Agency under the Child Support Act 1991 where maintenance is calculated by a mathematical formula. The absent parent has a duty to pay maintenance to a person caring for his or her child if required to do so by the Agency. The absent parent or the person with care of the child can apply but caring persons in receipt of certain welfare benefits must apply and must provide certain information promptly to enable the absent parent to be traced. Caring persons in receipt of welfare benefits who fail to cooperate risk having such benefits reduced, but where the caring person or child may suffer harm or undue distress these requirements can be waived. The Agency not only assesses maintenance but arranges for collection and enforcement. The provisions of the Child Support Act 1991 are being implemented during a four-year transition period but by 7 April 1997 virtually all applications for child maintenance must be brought via the Agency.
2. Maintenance, lump sums and property adjustment orders can be sought to or for the benefit of children in the county court in matrimonial proceedings under Part II MCA 1973 (i.e. on divorce, nullity or judicial separation) (see also Chapter 8).
3. Maintenance and lumps sums to or for the benefit of children can be sought in the magistrates' court under DPMCA 1978 (see also Chapter 5).
4. Orders for financial relief (i.e. periodical payments, lump sums, settlements and transfers of property) can be sought under s.15 and Schedule 1 Children Act 1989.

Exercises

1. The White Paper, *Children Come First*, was cynically described by some commentators as *'Treasury Comes First'*. Do you think this comment was justified?
2. Make a list of the advantages and disadvantages of moving most child maintenance from the courts into the Child Support Agency.
3. Do you think spousal maintenance would benefit from being transferred from the courts to an agency similar to that of the Child Support Agency?
4. In Scotland children can apply to the Agency. Can you think of any reason why children in England and Wales were not given the same rights?
5. Mike is 19 years old and studying for a law degree but knows nothing about family law. His parents have separated but have refused to give him financial help with his studies.

   Can you give him any advice?
6. Do you consider it just that an unmarried father has no automatic parental responsibility, but does have an obligation to maintain his children?

Further Reading

Children Come First: The Government's Proposals on the Maintenance of Children (Cm 1264, 1990, HMSO).
Barnett, 'Reflections on the Child Support Act 1991' (1993) J Ch L 77.
Bird, 'The Child Support Act 1991: an outline' (1991) Fam Law 478.
Burrows, 'Child Support Act 1991 – why we need to know about it now' (1992) Fam Law 342.
Eekelaar, 'A Child Support Scheme for the United Kingdom: an analysis of the White Paper' (1991) Fam Law 15.
Eekelaar, 'Child support – an evaluation' (1991) Fam Law 511.
Hayes, 'Making and enforcing child maintenance obligations: will the proposed scheme cause more harm than good?' (1991) Fam Law 105.
Leigh, 'The Child Support Act 1991: its relationship with the Children Act 1989' (1992) J Ch L 177.
Wikeley, 'The Maintenance Enforcement Act 1991' (1991) Fam Law 353.

12 Child Abduction

12.1 Introduction

Child abduction is one of the more distressing consequences of family breakdown and is increasing. Reunite, the National Council for Abducted Children, has estimated that each week during 1991 up to 26 children (mostly under the age of eight) were abducted to 53 different countries, of which only a third were Convention countries. Factors such as the high divorce rate and greater worldwide mobility resulting in more international marriages have increased the incidence of abduction.

The criminal law and the civil law provide some protection for abducted children and their parents. The Child Abduction Act 1984 makes child abduction a criminal offence and the Child Abduction and Custody Act 1985 brings into English law two international Conventions enabling Contracting States to work together to effect the return of abducted children: the Hague Convention on the Civil Aspects of International Child Abduction (the 'Hague Convention') and the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children (the 'European Convention'). Although countries are steadily making these Conventions part of their legal systems (see Appendix for list of Contracting States), many children are abducted to non-Convention countries. There is other legal protection for abducted children. The Family Law Act 1986 facilitates the return of children abducted within the UK, and the Children Act 1989 restricts removal from the UK when a residence or care order is in force and enables prohibited steps and specific issue orders to be applied for to prohibit abduction or to settle a dispute about taking the child abroad. Most of the reported case-law on child abduction is concerned with the application and construction of the Hague Convention.

Child abduction occurs when a child is illegally brought into or illegally taken out of the jurisdiction of England and Wales, but the case-law under the Conventions only deals with children illegally brought into this country. How courts in other countries deal with children abducted from England and Wales and other parts of the UK depends on whether the country to which the child has been abducted is party to either of the Conventions, and even then, the application and construction of the Conventions depend on the courts in that country. Where a country is not party to either Convention, the child's return depends on that country's general law. In some countries, fathers, not mothers, have rights in the child, so that return may be difficult and, in many cases, impossible.

General information and advice on child abduction can be obtained from the Child Abduction Unit, which acts as the Central Authority under the Conventions for coordinating child abduction and making administrative arrangements to secure the child's return. Since April 1992 the Official Solicitor has been responsible for the Unit. Where a child has been abducted to a Convention country, application can be made under one of the Conventions and the Central Authority can seek the child's voluntary return or, if unsuccessful, institute proceedings. Where a child has been abducted to a non-Convention country, proceedings will have to be taken in that country, but the Child Abduction Unit can provide advice, and the Consular Department of the Foreign and Commonwealth Office, while unable to give legal advice, can provide names of foreign lawyers who can correspond in English.

Tracing a Child

One of the problems of abduction is that tracing the child's whereabouts before the legal machinery can be set in motion is often difficult, expensive and time-consuming. This may work against the child's return, as the longer it takes to trace the child, the more likely the child will be settled in its new environment. There are various ways of tracing a child. Where a child has been abducted within the UK, information which may help in tracing the child can be obtained from certain government departments, e.g. from the DSS, the Passport Office, the NHS Central Register, and the Ministry of Defence where forces' personnel are involved. Where a child has been abducted out of the jurisdiction the Foreign and Commonwealth Office and Embassies in the country to which the child has been abducted can help. The court can also order anyone with information about a child to disclose that information (s.33(1) Family Law Act 1986).

12.2 Preventing Abduction

Where there is a risk of child abduction preventative measures must be taken, as once the child has left the jurisdiction the chances of finding and returning a child are slim. Tracing a child is difficult and some countries are particularly uncooperative. Where there is a danger of removal, a parent must be vigilant, and can consider taking certain legal steps to prevent the child's removal. A parent (or other person) can seek: (i) a court order; (ii) passport control; and (iii) police assistance.

(i) Court Order

Where a risk of abduction exists it is advisable to seek an order prohibiting removal. Under s.8 Children Act 1989 a prohibited steps

order, or a residence order (which places an automatic ban on removal) can be sought, or an application can be made to have the child warded (see Chapter 9). The court has jurisdiction in exceptional circumstances to make an *ex parte* residence order (*Re B (A Minor) (Residence Order: ex parte)* [1992] 2 FLR 1). This might be useful when abduction is imminent. However, Johnson J in *M* v. *C (Minors) (Residence Order: Ex Parte)* [1993] Fam Law 41 stressed that an *ex parte* residence order should be rarely applied for and rarely granted except in the most compelling of circumstances.

A court order is useful not only because breach of the order is contempt of court, but also because the order can make provision for the surrender of passports (s.37 Family Law Act 1986). Although not needed for the police to institute a port alert (see below), an order also provides evidence of a genuine risk of abduction. A court order is needed to bring the European Convention and the Family Law Act 1986 into operation, and, although an order is not needed to invoke the Hague Convention, an order makes it easier to prove the right of custody needed under that Convention. An order will also be useful if a parent wants to institute proceedings or seek the help of various agencies in a non-Convention country. The court could make a specific issue or prohibited steps order where the child has been abducted but might refuse to do so if there are problems of enforceability (*Re D (Child: Removal from Jurisdiction)* [1992] 1 WLR 315).

An unmarried father without parental responsibility is in a particularly precarious position (see *C* v. *S* below), and should consider acquiring parental responsibility under s.4 Children Act 1989 and an order prohibiting removal. He can also consider applying for a residence order, which, if granted, not only automatically prohibits the child's removal, but the court must at the same time make an order giving him parental responsiblity for his child (s.12(1)).

Although Spain is a party to the Hague Convention, Spanish law has held that any dispute about a child is governed by the parents' own national law. An unmarried father living in Spain with no parental responsibility is thus in a particularly vulnerable position if his child is abducted (see (1992) Fam Law 226).

(ii) Passport Control

A restriction on the child's or the likely abductor's passport can impede abduction. A parent can object in writing to the Passport Department of the Home Office to the child being issued with a passport without leave of the court or the consent of every person with parental responsibility. Where the child has a passport or is included on a parent's passport the court can order surrender of that passport where an order exists restricting removal (s.37 Family Law Act 1986). As any s.8 order can contain conditions or directions, such an order could be made conditional on a suspected abductor depositing his passport with his solicitor.

(iii) Police Assistance: the 'All Ports Warning'

A parent (or other person) who suspects a child may be abducted can inform the police. As child abduction is a criminal offence (see below), the police can arrest anyone abducting or suspected of abducting a child. The police can also bring into effect a port alert called the 'All Ports Warning System', whereby details about the child and the abductor are sent by the police national computer to immigration officers at ports and airports across the country, who assist the police in trying to prevent the child from leaving the country. To avoid wasting police time, the police can only institute a port alert if the application is *bona fide*, i.e. there is a real and imminent threat of actual or threatened removal. The person seeking assistance must provide the police with as much information as possible, e.g. about the child, the abductor, likely time of travel, port of departure etc. A court order is not needed to institute the port alert but does provide evidence of a *bona fide* case of abduction. Where the child is aged 16–18 an order is needed as it is not a criminal offence under the Child Abduction Act 1984 to abduct a child over 16. The child's name remains on the ports' stop list for four weeks but further applications can be made.

A child can be removed from the UK legally or illegally. We will consider legal removal and then illegal removal.

12.3 Legal Removal of a Child from the Jurisdiction

A parent can legally take a child out of the UK provided no statute or court order prohibits removal and everyone with parental responsibility consents. Where a residence order or care order is in force no person can take the child out of the UK for more than one month without the written consent of all those with parental responsibility or leave of the court (ss.13(1) and 33(7) Children Act 1989), and child abduction is a criminal offence under the Child Abduction Act 1984 (see below). If a parent could unilaterally decide to take a child out of the jurisdiction for a long period, the other parent's parental responsibility would be difficult to exercise.

In some cases, particularly on divorce, a parent may wish to take a child out of the jurisdiction of England and Wales (e.g. to emigrate), but the other parent may object, in which case the dispute will have to be settled by the court under the Children Act either by an application for a specific issue or prohibited steps order or, where a residence order is in force, by an ordinary application for the court's consent. The court, when deciding whether to give leave to go abroad, must apply the welfare principle and other s.1 principles, although the statutory checklist will only apply to a s.8 order application (s.1(4)) (see Chapter 9). In some cases it will be traumatic for the child to go abroad leaving behind the other parent,

relatives and friends, particularly where maintaining contact will be difficult. The court is likely to be interested in the parent's reasons for going abroad, arrangements abroad, contact arrangements, and any likely cultural difficulties for the child. The child's wishes will also be important. Where a child of sufficient age and understanding does not wish to go abroad that is likely to be a particularly important consideration. The reported cases are pre-Children Act cases but the court is likely to take a similar approach under the Children Act.

In all the reported cases, except *Tyler* v. *Tyler* [1989] 2 FLR 158 (see below), permission to take the child out of the jurisdiction was granted, as the welfare of the child was considered to be inextricably linked to the caring parent's wish to go abroad, i.e. a thwarted parent might take his or her frustrations and bitterness out on the child (see e.g. *Lonslow* v. *Hennig (formerly Lonslow)* [1986] 2 FLR 378). In *M* v. *M (Minors) (Removal from the Jurisdiction)* [1992] 2 FLR 303 the Court of Appeal, applying *Lonslow* v. *Hennig*, held that, provided a parent's proposals to move the child were reasonable, permission to leave the jurisdiction should be refused only where it was clearly shown to be against the interests of the child. In *Re F (A Ward)(Leave to Remove Ward Out of the Jurisdiction)* [1988] 2 FLR 116 an 'ambitious' mother was given permission to take her son with her to the USA where she had a good job.

In *Tyler* v. *Tyler* the court in wardship proceedings refused to give the mother permission to emigrate to Australia with the children, as it was not in their best interests. They had a close relationship with their father who had access (i.e. contact) and it would cause bitterness. The court felt the mother could cope with the disappointment of not being given permission, and would not allow her disappointment to damage the children's relationship with their father. Had the mother been less accommodating and likely to take her frustration out on the children, the outcome of the case might have been different. Whether the concept of joint and ongoing parental responsibility under the Children Act will result in the courts being less willing to authorise removal remains to be seen, although it is probably unlikely.

12.4 Illegal Removal: the Criminal Law

A person who abducts or attempts to abduct a child may commit a criminal offence under: (a) the Child Abduction Act 1984; or (b) the common law.

(a) Child Abduction Act 1984

Certain persons 'connected with the child' (s.1) and 'other persons' (s.2) can commit a criminal offence under the Child Abduction Act 1984 if the child is under the age of 16.

Persons 'Connected with the Child'

Under s.1 it is an offence for a person 'connected with a child' under the age of 16 to take or send that child out of the UK without the 'appropriate consent'. Persons 'connected with a child' under s.1 are: a parent (including the unmarried father if there are reasonable grounds for believing he is the father); a guardian; any person with a residence order in their favour; or any person with custody of the child (s.1). 'Appropriate consent' for the purpose of s.1 means the consent of: the mother; the father (only if he has parental responsibility for the child); a guardian; any person with a residence order in force in his or her favour; or any person with custody of the child s.1(2)(a). The leave of the court, where granted under or by virtue of any provision of Part II Children Act 1989, is also required, and where a custody order is in force, the leave of the court which granted custody (s.1(2) (b) and (c)). A person with a residence order does not commit a criminal offence by taking a child out of the jurisdiction for less than one month without consent, unless in breach of a s.8 order (s.1(4)). A person does not commit an offence under s.1 where: (a) he or she believed the other person had consented or would have consented had that person been aware of all the relevant circumstances; (b) he or she had taken all reasonable steps to communicate with the other person but had been unable to communicate; or (c) the other person had unreasonably refused to consent (except where the person refusing consent has a residence order in force or custody of the child, or the person taking the child out of the UK is in breach of a UK court order) (s.1(5) and (6)).

'Other Persons'

Under s.2 any 'other person' commits an offence of child abduction if, without lawful authority or reasonable excuse, he takes or detains a child under the age of 16 so as to remove the child from the lawful control of any person having lawful control of the child, or so as to keep the child out of the lawful control of any person entitled to lawful control (s.2(1)). Married parents and the unmarried mother and other persons connected with the child do not come within s.2(1). An unmarried father, however, is an 'other person' for the purpose of this section, unless he is a guardian of the child, has a residence order in his favour, or has custody of the child. An unmarried father has a statutory defence, if he can prove that he is the child's father or at the time of the offence he reasonably believed he was the child's father (s.2(3)(a)). Any 'other person' also has a defence if he or she believed that at the time of the alleged offence the child had attained the age of 16 (s.2(3)(b)).

(b) The Common Law Offence of Kidnapping

The common law offence of kidnapping may be committed if a child is abducted unlawfully (*R* v. *D* [1984] AC 778, [1984] 2 A11 ER 449).

Kidnapping remains an offence despite the 1984 Act and is relevant where the child is over 16, as such a child does not come within the 1984 Act. Where the child is under 16 and the person removing the child is a person 'connected with' the child under s.1 Child Abduction Act 1984, the consent of the Director of Public Prosecutions is needed to bring a prosecution for the common law offence of kidnapping (s.5 CAA 1984).

12.5 Child Abduction within the UK

The Family Law Act 1986 enables court orders relating to children made in one part of the UK to be recognised and enforced in another part of the UK, e.g. a s.8 Children Act 1989 order made in England and Wales can be registered and enforced in Scotland or Northern Ireland. Once registered, the court in that country has the same powers of enforcement as if it had made the original order, although in enforcement proceedings a parent and any other interested party can object to the order being enforced on the ground that the original order was made without jurisdiction or that because of a change of circumstances the original order should be varied. The court can stay the proceedings or dismiss the application for enforcement (ss.30 and 31), but the court is likely to enforce the order. The 1986 Act makes other provisions relating to child abduction. The court can order disclosure of the child's whereabouts (s.33), order recovery of the child (s.34), restrict removal of the child from the jurisdiction (s.35), and order the surrender of passports (s.37).

12.6 International Child Abduction: The Hague Convention

Part I Child Abduction and Custody Act 1985 brings into UK law the Hague Convention on the Civil Aspects of International Child Abduction, signed at The Hague in October 1980. The Convention is set out in Schedule 1 of the 1985 Act. The general aims of the Hague Convention are: first, to secure the prompt return of children wrongfully removed or retained in a Contracting State; and second, to ensure that rights of custody and access under the law of one Contracting State are respected in another (Art. 1). (For countries which have ratified the Hague and European Conventions see the Appendix.) The Hague Convention, unlike the European Convention, is concerned with breaches of rights rather than court orders, so that an applicant need not have a court order to apply. The Convention can be invoked in respect of a child under the age of 16 who was habitually resident in a Contracting State, but who has been wrongfully removed to or retained in another Contracting State in breach of a custody or an access right (Art.4). The courts also have jurisdiction to make access orders under the Convention (*C* v. *C (Minors) (Child Abduction)* [1992] 1 FLR 163). The reported English case-law on the Hague Convention only deals with children illegally brought into England

and Wales from other Contracting States. Only the High Court has jurisdiction to hear applications under the Convention (s.4 CACA 1985). The High Court also has jurisdiction, on an application by any person appearing to the court to have an interest in the matter, to make a declaration that the removal of a child from, or his retention outside, the UK is wrongful under Art. 3 of the Hague Convention.

Article 3 states that removal or retention are wrongful where:

'(a) it [i.e. removal or retention] is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.'

Article 3 also states that the 'rights of custody' in Art. 3 (a) can arise by law, or by virtue of a judicial or administrative decision, or under a legally effective agreement. In *Re J (Abduction)* [1990] 1 FLR 276 removal was held to be wrongful where the child was a ward of court, as the High Court was an 'institution' within Art.3 that could determine a child's place of residence (i.e. when the child is warded, the court stands *in loco parentis*) (see Chapter 9). Removal can be wrongful whether or not a court order forbids removal, i.e. it can be wrongful where it is implicitly wrongful under the general case-law of the country from which the child has been removed (*C* v *C (Minors)(Child Abduction)* [1992] 1 FLR 163).

When the Children Act 1989 came into force and removed the concept of custody, there was concern that children abducted from England and Wales might not come within the Hague Convention, because wrongful removal or wrongful retention required a breach of a 'custody' right. This concern was unfounded, as Art.5(a) of the Convention states that 'rights of custody' 'shall include rights relating to the care of the person of the child, and, in particular, the right to determine the child's place of residence', which means that 'rights of custody' are within the scope of the Children Act. There was also concern that the no-order presumption under s.1(5) Children Act 1989 might cause problems in abduction cases, but, where there is a risk of abduction, the court is unlikely not to make an order.

There must be wrongful removal and/or wrongful retention of a child in another Contracting State before an application can be made under the Hague Convention. The House of Lords has held that wrongful removal and wrongful retention are two mutually exclusive concepts (*Re H; Re S (Abduction: Custody Rights)* [1991] 2 FLR 262). 'Wrongful removal' occurs when a child is wrongfully removed from his place of habitual residence in breach of a right of custody, e.g. where a parent removes a child from England and Wales without the consent of the other parent (whether or not there is a residence order in force). 'Wrongful retention'

occurs where, at the end of a period of lawful removal, a parent refuses to return a child to his country of habitual residence, e.g. where a parent at the end of a holiday or at the end of the permitted one month abroad under a residence order decides not to return with the child.

The Convention is based on the presumption that an abducted child should be returned to its place of habitual residence, where the court in that country can settle the dispute about the child. During the first year after wrongful removal or retention, there is a greater onus on returning the child as the court must order the child's return, unless one of the Art.13 'defences' below is proved (Art.12). After the first year, the court must also order the child's return, unless the child is 'settled in its new environment' (Art.12) or one of the Art.13 'defences' below is proved.

Grounds for Refusing to Order Return

The court can refuse to order the child's return at any time if one or more of the following grounds in Art.13 is proved, i.e. that:

'(a) the person, institution, or other body having care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'

Article 13 also provides that a judicial or administrative authority can refuse to order the child's return if the child objects to being returned and has attained an age and degree of maturity where it is appropriate to take account of the child's views. In *B* v. *K (Child Abduction)* [1993] Fam Law 17 Johnson J held that two children aged nearly nine and seven years, who had been wrongfully removed from Germany to England, had attained an age and degree of maturity at which it was appropriate to take account of their views.

The English case-law on the Hague Convention (and the European Convention) only deals with children brought from other Contracting States into England and Wales. In the last few years there have been increasing numbers of cases brought under the Hague Convention, and these have shown that return of an abducted child is usually ordered, i.e. the Art.13 defences rarely succeed. A similar approach is also likely to be taken by the courts in other Contracting States to which children from the UK are abducted. In *Re E (A Minor)(Abduction)* [1989] 1 FLR 135 Anthony Lincoln J stated:

'In my judgment there is a very heavy burden indeed upon a person alleged to have abducted a child in bringing himself or herself within the provisions of Article 13, and the court should hesitate very long before

> it grants what is in effect an exemption from the urgency which is a characteristic of this Convention and the Act incorporating it.'

Only in exceptional cases is return refused and even if an Art.13 'defence' is proved the court retains a discretion to order return or not. The rationale of the Convention is for Contracting States to work together to effect the speedy return of children to their country of habitual residence where the court in that country can decide what is best for the child. A decision under the Convention concerning the return of the child is not to be taken to be a decision as to the merits of any custody issue (Art.19).

In the following cases the Art.13 defences were rejected and the abducted child was returned to his or her country of habitual residence, which is the usual approach of the courts. In *Re E (A Minor) (Abduction)* [1989] 1 FLR 135 the father, who had brought the child to England from Australia, alleged under Art.13(b) that there was a grave risk that the child's return would place the child in an intolerable situation because of the mother's promiscuity and drug-taking, but the Court of Appeal ordered the child's return. In *Re C (A Minor) (Abduction)* [1989] 1 FLR 403 the mother, who had brought the child to England from Australia, argued under Art.13 that return would expose the child to psychological harm. The Court of Appeal ordered the child's return, Lord Donaldson MR stating:

> 'Save in an exceptional case, our concern should be limited to giving the child the maximum possible protection until the courts of the other country . . . can resume their normal role in relation to the child.'

In order to ensure the speedy return of an abducted child, and as proceedings under the Convention are only summary, oral evidence must be admitted sparingly (per Butler-Sloss LJ in *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548). It is also contrary to the underlying purpose of the Convention to allow the abductor to insist on suspending the Convention's mandatory procedures while an investigation is made into a child's wishes (per Waite J in *P* v. *P (Minors) (Child Abduction)* [1992] 1 FLR 155).

In *Re S (A Minor) (Abduction)* [1991] 2 FLR 1 the mother, who had brought her 12-year-old daughter from the USA to the UK, argued under Art.12 that the child had 'settled in her new environment' (i.e. in England), and under Art.13 that to order return would put the child in an intolerable position. She also argued that removal of the child first to Canada and then to England had effected a change in the child's habitual residence. The Court of Appeal rejected these arguments, applying dicta from *Re P* [1964] 3 All ER 977, where Lord Denning MR had stated: 'Quite generally I do not think the child's ordinary residence can be changed by one parent without the consent of the other'. The Court of Appeal ordered her return. In *Re A and Another (Minors: Abduction)*

[1991] 2 FLR 241 the Court of Appeal rejected a mother's submissions under Art.13 that the father had acquiesced in her retention of their children in England whom she had brought from the USA.

Acquiescence is sometimes argued as a defence, and is a question of fact in each case. An application for custody in the child's country of habitual residence is a strong indication of no acquiescence, but a failure to make an application does not necessarily indicate acquiescence *(Re A and Another) (Minors: Abduction)* [1991], see above; *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548). In *Re A (Minors) (Abduction: Custody Rights)* [1992] 2 WLR 536, [1992] 1 All ER 929 the Court of Appeal held that the father, who had written a letter to the mother to say he would not fight to get the children back, had acquiesced in the mother's wrongful removal of the children from Australia to England. The majority of the Court of Appeal held that 'acquiescence' in Art.13(a) could be signified by express words or conduct or by silence or inaction and was not a continuing state. Balcombe LJ, however, in a dissenting judgment stated that the main object of the Convention was to require the immediate and automatic return to their state of habitual residence of children wrongfully removed or retained and that 'acquiescence' did not refer to a single expression of agreement taken in isolation from all the surrounding circumstances.

C v. *S* (*Minor: Abduction: Illegitimate Child*) [1990] 2 All ER 961, [1990] 2 FLR 442, which went to the House of Lords, rang warning bells for English unmarried fathers with no parental responsibility, who might find themselves in the same position as the Australian father. In *C* v. *S* the unmarried mother left Australia and came with the child to live in England, whereupon the father promptly obtained an order in the Australian courts giving him sole custody and guardianship of the child and a declaration that the removal was wrongful under Art.3 of the Convention. He applied to the English courts for the child's return, but the House of Lords held there had been neither wrongful removal nor wrongful retention. The unmarried father had no rights of custody capable of being breached so that there had been no wrongful removal. Neither was there wrongful retention, despite the Australian court giving the father custody, as the child had ceased to be habitually resident in Australia before the court order had been made, because the unmarried mother could unilaterally determine the child's place of habitual residence. The crucial fact of the case was that the couple were unmarried so that the father possessed no right of custody on the mother's departure and the mother could therefore unilaterally decide to change the child's place of habitual residence. Had the parents been married and the child an intelligent older child, the decision might have been different. The decision does seem, however, to fly in the face of the main aim of the Convention, which is to effect the return of abducted children. After all, had the English court ordered the child's return, it would have been open to the Australian court to have authorised the

child's removal to England (compare *Re E (A Minor) (Abduction)* [1989] above).

A rare case where the child's return was refused by the English court was *Re R (A Minor) (Abduction)* [1992] 1 FLR 105, where the court refused to order the return of a 14-year-old girl who threatened to commit suicide if she were returned to Germany (see also *S* v. *S (Child Abduction: Child's Views)* [1992] 2 FLR 492 and *B* v. *K (Child Abduction)* [1993] Fam Law 17).

12.7 International Child Abduction: The European Convention

Part II Child Abduction and Custody Act 1985 brings into effect in UK law the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children, which was signed in Luxembourg in May 1980. The Convention is contained in Schedule 2 of the 1985 Act. Like the Hague Convention, the European Convention creates an international network of Contracting States who work together to return abducted children who are under the age of 16 and who have no right to determine their own place of residence. Unlike the Hague Convention, the European Convention requires the existence of a custody decision, i.e. a decision made by any judicial or administrative authority relating to the care of a child, including a right to determine the child's place of residence or a right of access to the child (Art.1(c)). The European Convention deals with the recognition and enforcement of custody decisions where there has been 'improper removal of a child', by allowing any person who has obtained a custody decision in a Contracting State to apply to a Central Authority in another Contracting State to have that decision recognised or enforced in that State (Art.4). Its rationale is similar to that of the Family Law Act 1986 (see above) in that an order which was made in a Contracting State other than the UK must be recognised in each part of the UK as if made by a court having jurisdiction in that part (s.15(2) CACA 1985), unless the grounds in Arts.9 and 10 are made out (s.15(2)(a)). The Convention applies to custody decisions made before or after the child's wrongful removal across an international frontier from one Contracting State to another (Art. 12). Article 1(d) defines 'improper removal' as removal of a child across an international frontier in breach of an enforceable custody decision given in a Contracting State and includes failure to return a child across an international frontier at the end of a period of a right to access or other temporary stay (i.e. this is roughly equivalent to wrongful removal and retention under the Hague Convention but the terminology is different).

Before a foreign custody decision of a Contracting State can be enforced in England and Wales it must be registered (ss.15(2)(b) and 16 CACA 1985). Application for registration can be made to the High Court

by any person who has rights under the custody decision. The High Court can refuse to register a decision, thereby refusing recognition and enforcement, on certain procedural (Art.9) and/or substantive grounds (Art.10) or where an application for the child's return is pending under the Hague Convention (s.16(4) CACA 1985). In no circumstances can the orginal foreign custody decision be reviewed as to its substance (Art.9(3)), i.e. the merits of the custody decision cannot be questioned.

Rights of access are also recognised and enforced (as they are under the Hague Convention), subject to the same conditions as custody decisions, although the authority in the State addressed can make conditions about access, taking account in particular of undertakings as to access made by the parties (Art.11).

Grounds for Refusal to Register an Order

Under Arts.9 and 10 the court can, if certain grounds are proved, refuse to register an order, and thereby fail to recognise and enforce it, but is unlikely to do so, as the aim of the European Convention, like the Hague Convention, is to foster international cooperation to effect the return of abducted children. Article 8 mandatorily requires a Contracting State to return a child, provided the application to register the custody decision is made within six months of removal, but most Contracting States, including the UK, have not implemented Art.8.

Procedural Grounds

Under Art.9 a court can refuse to register (and thereby refuse to recognise and enforce) a custody decision made in another Contracting State where there was some procedural irregularity, i.e. where:

(a) the custody decision was given in the absence of the defendant or his lawyer, who were not given sufficient notice of the proceedings to arrange a defence, except where notice of proceedings could not be served as the defendant had concealed his whereabouts;
(b) the custody decision was made in the absence of the defendant or his lawyer and the authority lacked jurisdictional competence; or
(c) the custody decision is incompatible with an earlier custody decision which was enforceable before the child was removed, except where the child has had his habitual residence in the territory of the requesting State for one year before his removal.

Ground (c) is tortuously worded, but essentially aims to prevent 'forum shopping', e.g. where a person fails to obtain custody in France but obtains custody in Germany, and the child is improperly removed to England, the English court can refuse to recognise the German custody order, unless the child had his habitual residence in Germany for one year before his removal.

Substantive Grounds

Under Art.10 the court can *inter alia* refuse to register (and thereby refuse to recognise and enforce) a custody decision where:

(a) the effects of the custody decision are manifestly incompatible with the fundamental principles of family and child law in the State addressed (e.g. the welfare principle in England and Wales);
(b) the effects of the custody decision are no longer in accordance with the child's welfare due to a change of circumstances, which can include the passage of time but not a mere change of the child's residence after an improper removal; or
(c) at the time proceedings for the custody decision were instituted in the State of origin the child was a national of the State addressed or was habitually resident there and no connection existed with the State of origin or the child was a dual national of both Contracting States and was habitually resident in the State addressed.

Before reaching a decision under ground (b) the authority in the State addressed must ascertain the child's views (unless impracticable having regard to his age and understanding) and may request appropriate enquiries to be carried out (Art.15(1)). Proceedings for recognition and enforcement can also be adjourned on certain grounds under Art.10.

In *Re K (A Minor) (Abduction)* [1990] 1 FLR 387 an unmarried father had taken the child (a girl aged seven) from Belgium to England. The mother successfully applied to have a Belgian custody order recognised, registered and enforced by the English court under the European Convention despite the father's arguments that the child was happy and preferred living in England, and that the Belgian custody decision was manifestly no longer in accordance with the child's welfare (Art.10(1)(b)). Latey J in the Family Division stated that under the Hague and European Conventions the welfare of the child was not paramount but qualified. The issue was not whether the child's welfare would be better served by being in England with her father or in Belgium with her mother, but whether the effects of the Belgian order were manifestly in accordance with the child's welfare. It was also an issue which required a speedy resolution. The fact that the child had spent a long time in England was an important consideration, but as she was well-adjusted and mature for her age, she would adjust to returning to Belgium to a close family circle, whereas the father's arrangements for her care were uncertain. Latey J said the court would have come to the same conclusion even if the child's welfare had been the court's paramount consideration. His Lordship also stated that as proceedings under the Convention were summary proceedings and not, like wardship, an issue on the merits, the court welfare officer's task was limited to ascertaining the child's wishes and no more.

In *Re G (A Minor) (Child Abduction: Enforcement)* [1990] 2 FLR 325 a Belgian mother, who had taken the child from Belgium to England,

contended that the Family Division should refuse recognition of a Belgian custody decision on three grounds: she had not been duly served with documents (Art.9(1)(a)); the effects of the Belgian order were manifestly incompatible with the welfare principle in English law (Art.10(1)(a)); and, by reason of a change of circumstances, the order was no longer in accordance with the child's welfare (Art.10(1)(b)). Booth J rejected all these arguments. Refusal was discretionary under Art.9(1)(b) and the mother had had every opportunity to inform the Belgian court that she had not been given notice. There was no breach of the welfare principle, and, although the child had been living in England for ten months, the mother had to go further than just prove the child was happy and well-settled, but had to prove that the Belgian court order was manifestly no longer in accordance with the child's welfare.

A rare case where the court refused to recognise and enforce a custody decision was *Re F (Minors) (Custody: Foreign Order)* [1989] 1 FLR 335, where the mother had brought the children from France to England. Booth J dismissed the father's application to register the order because of his 21-month delay in instituting proceedings and because there had been a material change of circumstance (i.e. the mother's acceptance that access by the father was in the children's best interests). The mother had always been the prime carer and there were inherent dangers in removing the children from her. Booth J refused to register and enforce the French order but under the wardship jurisdiction awarded care and control to the mother with staying access to the father.

12.8 International Child Abduction: Non-Convention Countries

Where the Conventions do not apply (e.g. where a child is over 16 or has been removed from a non-Convention country) decisions about abduction are made in wardship proceedings, where the question of whether a child should be returned is determined according to the welfare principle. In the development of the law there has been some ambivalence as to whether these cases should be dealt with summarily or on their merits (see e.g. *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 All ER 913 and *Re R (Minors) (Wardship: Jurisdiction)* (1981) 2 FLR 416). However, *Re F (A Minor) (Abduction: Jurisdiction)* [1991] Fam 25, [1990] 3 All ER 97, [1991] 1 FLR 1 established that in non-Convention cases, like cases under the Conventions, the presumption is on ordering the child's return. In *Re F*, after a summary hearing, the Court of Appeal ordered the return to Israel of two children abducted to England by their father, for, although Israel was not a party to the Hague Convention (it is now), similar principles applied. Consequently, the presumption lay in favour of ordering their return, unless the court in Israel would apply principles which were unacceptable to the English courts and unless any contra-

indications similar to the defences under Art.13 Hague Convention existed. Thus, whether a child is abducted into the UK from a Convention or a non-Convention country, the emphasis is on returning the child and on fostering cooperation between legal systems, with the appropriate forum for deciding the child's future welfare being the court in the country of the child's habitual residence, unless return would gravely harm the child.

12.9 Conclusion

Although the Conventions have helped facilitate the return of abducted children, many problems remain, e.g. tracing a child is difficult and expensive and many countries are not parties to the Conventions. A major problem is that, even if legal proceedings can be instituted in non-Convention countries, the courts in those countries may not order the child's return, because, unlike courts having jurisdiction under the Conventions who must apply uniform principles of law, the courts in non-Convention countries can only apply their own principles of law. In Muslim countries, which are generally not parties to the Conventions, only a father has rights in his child so that an application by a mother to have her abducted child returned is unlikely to succeed.

What can be done to help children and parents who experience abduction? A charity called Reunite (the National Council for Abducted Children) exists to help parents whose children have been abducted, but this can only scratch the surface of the problem. In *Re F (A Minor) (Abduction: Jurisdiction)* [1991] Balcombe LJ stated that rapid accession to the Hague Convention by all nations would be a welcome advance towards the recognition of the rule of law by all nations. The House of Commons in 1990 established a working party on abduction, which made certain recommendations in respect of abduction, e.g. granting Legal Aid to help mothers fight their cases in foreign courts, marking children's passports in cases of family dispute, and appointing a Children's Commissioner to take up cases with foreign courts and governments and to intercede on behalf of children. The working party also recommended that courts should be more willing to listen to parents who showed there was a threat of abduction and police and courts should be quicker to respond. A group of MPs with the support of Reunite has recently recommended the abolition of family passports to prevent abduction. Children should instead be issued with their own passports which should contain details of any court orders. None of these recommendations has, however, been implemented. The development of conciliatory approaches to divorce may help to reduce abduction, but with increasing numbers of marriages ending in divorce the chances are that child abduction is likely to remain a problem.

Summary

1. Child abduction is an increasing problem. Advice on child abduction can be sought from the Lord Chancellor's Department Child Abduction Unit.
2. A child can legally be taken out of the jurisdiction provided there is no court order prohibiting removal and every person with parental responsibility consents. If consent is not forthcoming a court order must be sought (e.g. specific issue and/or prohibited steps order under s.8 Children Act 1989) or the child warded. Where a residence order is in force, there is an automatic prohibition against removal from the UK for more than one month unless consent of those with parental responsibility or the court's leave is obtained (s.13 Children Act 1989).
3. The following steps can be taken to prevent abduction: court order, passport control, and police assistance including the 'All Ports Warning'.
4. Child abduction is a criminal offence under the Child Abduction Act 1984 and can constitute the criminal offence of kidnapping.
5. The Family Law Act 1986 enables court orders made in one part of the UK to be enforced in another part of the UK.
6. The Hague Convention (to which the UK is a party) enables Contracting States to work together to return children wrongfully removed from their country of habitual residence or wrongfully retained in another Contracting State, subject to certain defences.
7. The European Convention (to which the UK is a party) enables a custody decision made in one Contracting State to be recognised, registered and enforced in another where the child has been improperly removed, subject to certain defences.
8. Where children are illegally brought into England and Wales from non-Convention countries, the courts apply similar principles to those of the Conventions, i.e. there is a presumption in favour of return unless harmful to the child.
9. Although the law gives more protection to abducted children than it did, many problems remain.

Exercises

1. Advise Ruth, who has a residence order in her favour in respect of her son, Ben, aged six. She wants to emigrate to Australia, but her former husband will not consent.

   What difference would it make, if any, if Ben was 12 and said he did not want to go?
2. David and Carol are unmarried and have a daughter, Ann, aged 10. Carol went with Ann to France on holiday two months ago and has decided to stay there.

   Advise David, who wants Ann back. What difference does it make if David has parental responsibility for Ann?
3. Wilhelm has been brought from Germany by his father, Hans, to live in England without the consent of his mother, Frieda, who lives in Germany. Wilhelm is eight years old and says he hates his mother and does not want to return. A year after

Wilhelm was abducted Frieda obtained a declaration in the German court that Wilhelm's removal was wrongful and she has come to England to seek his return.

Advise Hans.

4. Why did the father in *Re A (Minors) (Abduction: Custody Rights)* [1992] 2 WLR 536, [1992] 1 All ER 929 fail to have his children returned (see also *Re A (Minors)(Abduction: Custody Rights) (No2)* [1992] 3 WLR 538) whereas the father in *Re A and Another (Minors: Abduction)* [1991] 2 FLR 241 was successful?

Were these decisions correctly decided?

Further Reading

De Cruz, 'International child abduction and custody: the judicial response in the English courts' (1990) J Ch L 83.

Everall, 'Child Abduction after the Hague Convention' (1990) Fam Law 169.

Everall, 'The Hague Convention, the Children Act and other recent developments' (1992) Fam Law 164.

Mears, 'Removal of children from the jurisdiction' (1989) Fam Law 322.

Sachs, *Child Abduction* (1992) Jordans.

Sachs, 'The views of the child in abduction cases: *Re R* and *S* v. *S*' (1993) J Ch L 43.

Standley, 'International child abduction: the Hague and European Conventions' (1991) J Ch L 137.

Stone, 'The habitual residence of a child' (1992) J Ch L 170.

13 Children and Local Authorities

In this chapter we consider the role of local authorities towards children and their families. The law is contained in the Children Act 1989 and in secondary legislation in the form of rules of court and regulations. The *Guidance* (1991, HMSO) provides professionals working with children with an understanding of the principles of the Children Act and its implications for policies, procedures and practice.

13.1 Introduction

One of the main philosophies of the law relating to children is that parents and not the State have primary responsibility for their children and this is reflected in the Children Act 1989. Sometimes, however, when parents fall down in their responsibilities, the State intervenes to protect children. Criminal sanctions may be imposed on parents who harm children and the civil law also provides protection in various ways, e.g. injunctions can be obtained to protect children from violence (see Chapter 15) and parents can be made to provide maintenance (see Chapter 11). Sometimes, however, a child is suffering, or is at risk of suffering, such harm that the State has a duty to intervene to provide parents with advice and assistance, and in serious cases to remove children temporarily or permanently from parents by court order. The State's function to protect children is entrusted to local authorities, who have a statutory duty to ensure that parents and others fulfil their responsibilities to children. Each local authority carries out these duties by means of its Social Services Department whose social workers have various duties laid down by statute and regulations, e.g. to provide assistance to children in need, to investigate cases where children are or may be suffering harm, to inspect various persons and premises, and to keep registers and records about problem families. Local authority powers and duties are laid down in the Children Act 1989 and in regulations. Part III Children Act 1989 covers local authority support for children and families. Parts IV and V deal with compulsory intervention by local authorities, i.e. when it becomes necessary for a local authority to apply for a court order to protect a child. Local authorities have other duties towards children under the Children Act, e.g. the provision, registration and inspection of community and voluntary homes for children, the inspection and supervision of foster-parents and their homes, and the protection of certain children accommodated for long periods in health and educational establishments.

In this chapter we consider local authority duties under Parts III, IV and V of the Act. Before we do so we will consider the background to the

Children Act 1989 and the general principles and policies in the Act relevant to children and State intervention by local authorities. Reference should also be made to Chapter 9 which deals in detail with the Children Act.

The Children Act 1989

Background to the Act

Prior to the Children Act 1989 the statutory duties of local authorities towards children were mainly contained in two statutes: the Child Care Act 1980 which covered children in 'voluntary' care (i.e. not by court order); and the Children and Young Persons Act 1969 which covered children in 'compulsory care' (i.e. by court order). As a result of pressure for reform changes were made to the law, and local authorities' duties to children, other than adopted children (see Chapter 14), are now contained in the Children Act 1989.

Attitudes towards State intervention into family life are often ambivalent, so that local authority social workers are in an invidious position. Sometimes they are criticised for being too interventionist, and at other times for not being interventionist enough. During the 1970s and 1980s there were swings of public attitude to intervention by local authorities into family life. During the 1970s social workers were sometimes criticised for not intervening enough into family life to protect children, which came to a head in 1973 when Maria Colwell was tragically killed by her step-father after she had been moved back home from foster-parents (see the *Report of the Committee of Inquiry into the Care and Supervision provided in relation to Maria Colwell*, 1974, HMSO). Children at risk of injury or harm were generally considered to be better off if they were moved away from their parents into children's homes and foster-homes. During the 1980s the pendulum swung the other way and local authorities were often criticised for intervening too readily into family life. Children were considered better off if they remained with their parents rather than being removed into often unsatisfactory children's homes. In the late 1980s the Cleveland affair brought to public attention the dangers of too intrusive an approach by local authorities into family life, where children suspected of being sexually abused were taken into care on the evidence of two paediatricians without other agencies being consulted. The findings of the Cleveland Enquiry (*Report of the Enquiry into Child Abuse in Cleveland 1987*, Cm 412, 1987) chaired by Butler-Sloss J had a strong influence on the principles and policies enshrined in the Children Act, e.g. the Cleveland Report recommended *inter alia* better inter-agency cooperation to protect children and better safeguards for parents and children where emergency intervention was necessary. The Children Act was enacted against this background of concern about State intervention and attempts to achieve a balance between family autonomy and State intervention, i.e. between necessary and unnecessary intervention. The Act

was based on the recommendations of a Government White Paper, *The Law on Child Care and Family Services* (Cm 62, 1987). The *Gillick* case also had a strong influence on the Act (see Chapter 9).

Principles and Policies of the Act

The general policy of the Act is on keeping children within their families, with parents, not the State, having primary responsibility for children. Local authorities must provide help and assistance for families and children and only in the last resort where a child is suffering, or is likely to suffer, significant harm is State intervention justified. The Act reinforces this policy of non-intervention in several ways. Under the no-order presumption the court must not make an order unless making an order is better for the child than making no order at all (s.1(5)), and local authorities must work in partnership with parents to promote and safeguard the welfare of children to prevent their going into care. Removing a child from his parents is considered a serious matter requiring proof that the child is suffering or is likely to suffer significant harm and can only be effected by a court order. This is quite different from the old law under which a local authority could acquire parental rights in respect of a child by an administrative resolution.

In proceedings involving local authorities the child's welfare is the court's paramount consideration (s.1(1)), and, in care and supervision proceedings (not emergency protection proceedings) the court must apply the statutory guidelines in s.1(3) (i.e. wishes and feelings of the child, needs etc.). The court must also bear in mind the principle that delay is detrimental to a child (s.1(2)). An important change in the Act is that local authorities' power to use wardship has been cut back (see Chapter 9). Under the previous law local authorities often used wardship as a way of taking a child into care instead of using the procedures available under the Children and Young Persons Act 1969.

Importance of Inter-Agency Cooperation

Although local authorities have primary responsibility for instituting court proceedings to protect children they have a duty to cooperate with and consult other agencies so that a decision is taken about a child after a proper investigation of all the circumstances. The importance of inter-agency cooperation was stressed in the Cleveland Report. Social workers must therefore consult teachers, the police, doctors, probation officers and other people involved with the child and consider their views. Inter-agency cooperation is facilitated by the Area Child Protection Committee, which deals with general issues (e.g. planning, training, procedure and policy), and by the Child Protection Conference, which works at local level and decides what action should be taken in respect of a particular child (see *Working Together Under the Children Act 1989*, 1991, HMSO). The Child Protection Conference also decides whether the child should be placed on

the Child Protection Register and also sits as a committee to review from time to time plans for the child, including whether the child's name should be removed from the Register. Parents have no right under the Children Act to attend the Child Protection Conference, but must only be excluded in exceptional circumstances, and, where excluded, must be allowed to express their views in other ways (see *Working Together*).

13.2 Local Authority Support for Children and Families

Under Part III Children Act 1989 local authorities must provide support for children in need and their families and others. In this context the word 'family' includes any person with parental responsibility for a child in need or any other person with whom the child is living (s.17(10)), so that it can include e.g. a relative, friend or the unmarried father with or without parental responsibility. Services can only be provided for the family or any member of the family of the child in need, if those services are provided to safeguard or promote the child's welfare (s.17(3)).

Local authorities' duties under Part III are towards children in need. A child is in need for the purposes of Part III of the Act if (s.17(10)):

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision of services (i.e. by a local authority under Part III of the Act);
(b) his mental or physical health or physical, intellectual, emotional, social or behavioural development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
(c) he is disabled (i.e. he is blind, deaf or dumb, suffering from mental disorder of any kind, or substantially or permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed (s.17(11)).

Local authorities have a duty to provide children in need with (i) services; (ii) day care; and certain other children in need must be provided with (iii) accommodation.

(i) Services for Children in Need

Under Part III Children Act 1989 local authorities have a general duty to safeguard and promote the welfare of the children in their area who are in need and, so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs (s.17(1)). This general duty to children in need and their families is facilitated by the performance of specific duties and powers laid down in Part I of Schedule 2 (s.17(2)), e.g.

identification and assessment of children in need, advertising available services, keeping a register and providing services for disabled children, preventing neglect and abuse, providing accommodation for those who are ill-treating or are likely to ill-treat children in order to reduce the need for criminal or civil proceedings, reintegrating children in need with their families, promoting contact between a child and his family. Where a child in need is living with his family appropriate services must be provided, e.g. advice, activities, home help, travelling assistance and assistance to enable the child and his family to take a holiday. Local authorities must establish 'family centres', where children, parents, those with parental responsibility or carers can come for advice, guidance, or counselling, and for various social and cultural activities. Local authorities must also, when making day-care arrangements or recruiting local authority foster-parents, consider different racial groups to which children in their area belong. Services can be assistance in kind or exceptionally in cash (s.17(6)) and conditions can be imposed as to repayment, unless a person is receiving Income Support or Family Credit (s.17(7)). Before giving assistance or imposing conditions the financial means of the child and his parent must be considered (s.17(8)). Local authorities must facilitate the provision of similar services by other bodies such as voluntary organisations (e.g. NSPCC, Dr Barnado's) and may delegate their powers to other bodies (s.17(5)).

(ii) Provision of Day Care

Local authorities must provide appropriate day care (i.e. care or supervised activity during the day) for pre-school children in need and may provide day care for other children who are not in need (s.18(1), (2) and (4)). Schoolchildren in need must be provided with care or supervised activities outside school hours or during school holidays (s.18(5)) and children not in need may be provided with care or supervised activities (s.18(6)). The Act contains lengthy provisions for the review of day care, in particular the provision of child-minders for children under the age of eight.

(iii) Provision of Accommodation for Certain Children in Need

An important duty for local authorities is the provision of accommodation for certain children in need (ss.20–5). Some families may need help, for instance, when a parent dies or is ill or for some other reason cannot cope with or care for a child.

Under s.20(1) a local authority must provide accommodation for any child in need up to the age of 16 who appears to require accommodation as a result of:

'(a) there being no person who has parental responsibility for him;
(b) his being lost or having been abandoned; or

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.'

Accommodation must also be provided for children over 16 if the local authority considers the child's welfare is likely to be seriously prejudiced if accommodation is not provided (s.20(3)). Accommodation in a community home can be provided for someone aged 16 to 21 if it would safeguard or promote his welfare (s.20(6)).

The emphasis in these provisions is on parents and other carers working in voluntary partnerships and making voluntary agreements with local authorities for the child to be looked after in accommodation away from home. Accommodation can be provided by the local authority by placing the child with another family, with a relative, with some other suitable person or in a children's home (s.23(2)). Any family, relative or other person providing accommodation is described as a local authority foster-parent (s.23(3)), and arrangements for fostering and supervision and inspection of foster-parents and their premises must be carried out by the local authority (see Arrangements for Placement of Children (General) Regulations 1991; Foster Placement (Children) Regulations 1991). There are also provisions in the Children Act governing accommodation in children's homes.

These provisions relating to accommodation replace the concept of 'voluntary care' which existed under the previous legislation, the Child Care Act 1980. The concept of 'voluntary care' was abolished by the Children Act 1989 to make a clear distinction between children in care under a court order (i.e. under Part IV) and those who are merely being 'accommodated' or 'looked after' by a local authority under a voluntary arrangement made between parents and social workers (i.e. under Part III). A child 'accommodated' by the local authority is not therefore in care and the local authority does not obtain parental responsibility for the child which it does when the child is subject to a care or emergency protection order. Consequently any person with parental responsibility for the child can object to the provision of accommodation, and, if they can provide or make arrangements to provide accommodation, the local authority cannot continue to provide accommodation (s.20(7)). Persons with parental responsibility have a right to remove the child at any time from local authority accommodation without giving notice (which they had to give under the previous law) (s.20(8)), except where the child is 16 or over and agrees to being provided with accommodation (s.20(1)). As the arrangement is voluntary the local authority must comply with the wishes of those with parental responsibility unless the child is suffering, or is is likely to suffer, significant harm, in which case an application for a court order (e.g. care or supervision order or emergency protection order) may be necessary. Before providing accommodation the local authority must, as far as is reasonably practicable and consistent with the child's welfare, ascertain the child's wishes about the provision of accommoda-

tion and give due consideration to these wishes having regard to the child's age and understanding (s.20(6)). Once the child is being accommodated by the local authority the child is described as being 'looked after' by the local authority, whereupon the local authority has certain statutory duties in respect of that child (ss.23–30). Children who are in care under a court order are also described as being 'looked after' and similar duties are owed to those children under the same sections.

13.3 Care and supervision proceedings

In some circumstances voluntary arrangements and services and accommodation provided under Part III of the Act do not work or it may come to the notice of a local authority that a child is being or is likely to be harmed, e.g. sexually or physically abused. In these circumstances the local authority may have to intervene to obtain a care or supervision order in court proceedings under Part IV of the Act or for an emergency protection order under Part V where urgent action is needed.

A care order places the child in the care of a designated local authority. A supervision order puts the child under the supervision of a designated local authority or a probation officer. In proceedings for a care or supervision order the welfare of the child is the court's paramount consideration and the other s.1 principles apply (see Chapter 9). Care or supervision orders can only be made in respect of a child under the age of 17, but not if the child is married (s.31(3)). The court can make a care order *or* a supervision order; it cannot make both. As Part IV proceedings are 'family proceedings' (s.8(3)) the court can also make s.8 orders (i.e. residence orders etc., see Chapter 9) either on an application or at the court's own motion; e.g. the court, instead of making a care order, could make a residence order in favour of a relative, friend or other person whether or not an application has been made.

Who can Apply for Care or Supervision Orders?

Only a local authority or an 'authorised person' (i.e. authorised by the Secretary of State) can initiate care or supervision proceedings. The only 'authorised person' is the National Society for the Prevention of Cruelty to Children (NSPCC) (s.31(9)), but in practice most applications are by local authorities as they have a duty under the Act to investigate cases where children are suffering, or are likely to be suffering significant harm (ss.37 and 47). Parents, guardians, friends, relatives and children cannot apply, but as a local authority has a duty to investigate any reported harm to a child, a parent, relative or child can give a Social Services Department details of any harm or suspected harm, whereupon the local authority must make enquiries, provide assistance under Part III of the Act or, where necessary, bring proceedings for a care or supervision order under Part IV. In some cases a local authority may need to take emergency action under Part V of the Act.

The 'Threshold Criteria' for Making a Care or Supervision Order

The court must be satisfied that certain minimum 'threshold criteria' laid down in s.31(2) are satisfied before it can make a care or supervision order. The court must also apply the s.1 principles: i.e. the welfare principle (s.1(1)), the no-delay principle (s.1(2)), the statutory checklist (s.1(3)) and the no-order presumption (s.1(5)). The court may decide not to make an order if an order would not be best for the child and, as care and supervision proceedings are family proceedings, it can make any s.8 order (see Chapter 9).

Under s.31(2) the court may only make a care or supervision order if it is satisfied:

> '(a) that the child concerned is suffering, or is likely to suffer, significant harm; and
> (b) that the harm, or likelihood of harm, is attributable to –
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him; or
> (ii) the child's being beyond parental control.'

Under s.31(2) the court must therefore be satisfied that the child is suffering, or is likely to suffer, significant harm *and* that the harm is caused either by inadequate parental care or the child being beyond parental control. It does not matter whether the child being beyond control is the parent's or the child's fault (*Re O (A Minor) (Care Order: Education: Procedure)* [1992] 2 FLR 7).

The crucial word in s.31(2) is 'significant', which is not defined in the Act. The word 'significant' is open to wide interpretation and whether harm is 'significant' will depend on all the circumstances. For instance, whether hitting a child is significant harm will depend on factors such as the degree and frequency of punishment and the child's age. The Department of Health's *Guidance* (Vol. 1 para. 3.21) states:

> 'Minor shortcomings in health or minor deficits in physical, psychological or social development should not require compulsory intervention unless cumulatively they are having, or are likely to have, serious and lasting effects upon the child.'

Not only is the word 'significant' vague, but the word 'care' in s.31(2)(b)(i) is also vague and is also not defined in the Act. 'Care' is likely to include not just care in the physical sense (i.e. providing the child with food, clothing and warmth), but love and affection. Playing truant for two or three years and only going to school for 28½ days during 1991 was 'significant harm' to justify a care order in *Re O* [1992] above. The test of care is objective; it is what a 'reasonable parent' would be expected to give to the particular child and, where the child is disabled or sick or a small baby, a higher standard of care is likely to be expected of a reasonable

parent. In *Re S and R (Minors) (Care Order)* [1993] Fam Law 43 it was held that 'care' in s.31(2)(b)(i) of the threshold criteria refers to the care the parent or other carer whose lack of care had caused the harm, and not the care which others carers might give. The care of other carers is only relevant once the threshold test is met.

Section 31(9) defines the meaning of certain s.31(2) terms. 'Harm' is defined as ill-treatment or the impairment of health (physical or mental) or development (physical, intellectual, emotional, social or behavioural), and 'ill-treatment' includes sexual abuse and forms of ill-treatment which are not physical. Section 31(10) provides that where the question of harm suffered by a child turns on the child's health or development, his health or development must be compared with that which could reasonably be expected of a similar child. According to the *Guidance* the word '"similar" . . . will require judicial interpretation, but may need to take account of environmental, social and cultural characteristics of the child.' (Vol. 1 para. 3.20). In *Re O* [1992], where a care order was made in respect of a 15-year-old girl who had continually played truant, Ewbank J held that 'a similar child' meant a child of equivalent intellectual and social development.

Section 31(2) only covers present and future harm (i.e. suffering or at risk of suffering). Past harm is therefore insufficient on its own to justify a court order, although evidence of past harm may indicate a risk of future harm as it did in *D (A Minor)* v. *Berkshire County Council* [1987] AC 317, [1987] 1 All ER 20, where a baby born with drug-withdrawal symptoms was taken into care under a care order made under the pre-Children Act law despite the present-tense wording of the law.

The criteria in s.31 are only a minimum set of 'threshold criteria', and even if proved, the court has a discretion whether or not to make a care or supervision order (it 'may' make an order). In some cases the court may decide that it is better to make no order or to make a s.8 order. If the court makes a residence order in care or supervision proceedings it must also make an interim supervision order, unless the child's welfare is safeguarded without such an order (s.38(3)).

The Effect of a Care Order

A care order imposes a duty on the local authority to receive and keep the child in its care (s.33(1)). A care order also gives the local authority parental responsibility for the child and the power to determine the extent to which the child's parent or guardian may meet his or her parental responsibility for the child where necessary to safeguard and promote the child's welfare (s.33(3) and (4)). Although the local authority has parental responsibility, it cannot consent or refuse to consent to adoption, appoint a guardian or change a child's religion (s.33(6)). Parents do not lose parental responsibility while a care order is in force and under s.34 there is a presumption of reasonable contact between the child in care, parents and others (see below). A parent remains entitled to do what is reasonable

in all the circumstances of the case for the purpose of safeguarding and promoting the child's welfare (s.33(5)) and retains any right, duty, power and responsibility in relation to the child and his property under any other enactment (s.33(9)), e.g. decisions about education, consent to marriage. While a care order is in force the child's surname cannot be changed and the child cannot be removed from the United Kingdom without the written consent of all those with parental responsibility for the child or leave of the court (s.33(7)), although a local authority can take the child out of the UK for up to one month (s.33(8)(a)) and can under Sched. 2 para. 19 arrange (or assist in arranging) for the child in care to live outside England and Wales subject to the court's approval. Once in care the child is described as being 'looked after' by the local authority whereupon the local authority has various duties and powers in respect of the child. A care order discharges any s.8 order, a supervision order and a school attendance order, and terminates wardship (s.91).

Effect of a Supervision Order

A supervision order (unlike a care order) does not vest parental responsibility in a local authority, but puts the child under the supervision of a designated local authority or a probation officer (s.31(1)(b)), who must advise, assist and befriend the supervised child and take such steps as are reasonably necessary to give effect to the order (s.35(1)(a) and (b)). The supervisor can apply to have the supervision order varied or discharged where the order is not complied with or the supervisor considers the order is no longer necessary (s.35(1)(c)). Parts I and II of Schedule 3 list more specific powers in respect of supervision, e.g. the supervisor can give directions that the child live in a certain place, attend at a certain place and participate in certain activities. A supervision order can require the child to have a medical or psychiatric examination, but only with the child's consent if the child has sufficient understanding to make an informed decision and only if satisfactory arrangements have been or can be made for the examination. A supervision order ceases to have effect at the end of one year, although the supervisor can apply to have the order extended for up to three years (Schedule 3, Part II).

Interim Care or Supervision Orders

It may be necessary for the court to make an interim care or supervision order to protect the child, for instance, while various enquiries and reports are made. However, as delay is detrimental to the child (see s.1(2)), interim orders are limited in duration as it is important for a final decision to be made about the child. The court can only make an interim care or supervision order where proceedings for a care or supervision order are adjourned or the court gives a direction under s.37(1), i.e. a direction that the local authority investigate the child's circumstances (s.38(1)). In either case there must be reasonable grounds for believing that the threshold

criteria for making a care or supervision order exist (s.38(2)). If the court in care or supervision proceedings makes a residence order, an interim supervision order must also be made, unless the child's welfare is satisfactorily safeguarded without making one (s.38(3)). There is no limit on the number of interim orders that can be made, but interim orders are of limited duration (s.38(4) and (5)). They are effective for the period specified in the order but in any event cease to have effect after eight weeks. An interim order can give directions for the child to have a medical or psychiatric examination or other assessment or that no examination or assessment should take place (s.38(6) and (7)), although a child with sufficient understanding to make an informed decision can refuse to consent to the examination or assessment (s.38(6)).

Discharge and Variation of Care and Supervision Orders

A care order can be discharged or substituted by a supervision order; a supervision order can be varied or discharged (s.39). When exercising these powers the court must apply the welfare principle and the other s.1 provisions (e.g. the statutory checklist and the no-order presumption). A further application to discharge a care or supervision order or to substitute a supervision order for a care order cannot be made for six months after the disposal of the original application except with leave of the court (s.91(15)).

(i) Discharge of a Care Order

A care order can only be discharged as variation would undermine a local authority's responsibility for a child. Application for discharge can be made by any person with parental responsibility, the child himself or the local authority (s.39(1)). Only the following have the requisite parental responsibility: married parents; unmarried mother; unmarried father with parental responsibility; and guardian of the child. Other interested persons (e.g. unmarried father without parental responsibility, relatives, foster-parents) who wish to challenge a care order can apply for a residence order which (if granted) discharges the care order (s.91(1)), but, with the exception of the unmarried father without parental responsibility, leave of the court is required. A person in whose favour a residence order is granted acquires (if he or she does not already have it) parental responsibility for the duration of the order, and if a residence order is made in favour of an unmarried father the court must also make an order giving him parental responsibility (s.12(1)). As a care order discharges a residence order (s.91(2)), a person who formerly had parental responsibility under a residence order cannot apply for discharge of a care order unless they qualify as above. Applications for discharge of care orders are usually made in fact by local authorities who at every statutory case conference must consider whether to apply for discharge of a care order (Review of Children's Cases Regulations 1991). Instead of dischar-

ging the care order the court may substitute a supervision order without the need to satisfy the significant harm test in s.31(2) (s.39(4) and (5)).

(ii) Discharge and Variation of Supervision Orders

Any person with parental responsibility for the child, the child or the supervisor can apply to have a supervision order varied or discharged (s.39(2)). A supervision order can also be varied on an application by a person with whom the child is living, if the original order imposes a requirement which affects that person (s.39(3)).

Contact with the Child in Care

The Children Act 1989 recognises the importance of children in care (and those accommodated by the local authority under Part III of the Act) maintaining contact with parents, relatives and friends. Contact is presumed to be beneficial, as the family is considered to be the best environment for a child and contact facilitates rehabilitation. Under s.34 there is a presumption of reasonable contact and orders relating to contact can be made when the care order is made or later on (s.34(10)). A local authority is expected to make proposals about contact when applying for a care order (Department of Health, *Guidance and Regulations*, Vol. 3 para. 6.2), and before making a care order the court must consider any contact arrangements the local authority has made or proposes to make and invite the parties to the proceedings to comment on them (s.34(11)).

Once a child is in care the local authority must allow the child reasonable contact with: his parents; any guardian; and any person who had a residence order in his favour or care of the child under an order made under the inherent jurisdiction of the High Court either of which was in force immediately before the care order was made (s.34(1)). Contact between the child and those who are entitled to reasonable contact can only be terminated by court order made on the application of the local authority or the child. Under the order the local authority can be authorised to refuse contact (s.34(4)). The court can also make other orders as appropriate in respect of any contact between the child and any named person on an application by the local authority or the child (s.34(2)). Those entitled to reasonable contact and other persons (with leave) can apply for an order for contact with the child, which the court can order as appropriate (s.34(3)). The court can also make an order about contact at its own motion when making a care order or in any family proceedings in connection with a child in local authority care (s.34(7)). The court can impose appropriate conditions in any s.34 order (s.34(5)). In exercising its jurisdiction under s.34 the court must apply the general principles in s.1 of the Act.

In *Re B (Minors) (Care: Contact: Local Authority's Plans)* [1993] 1 FLR 543 the local authority applied under s.34(4) to terminate contact between the children and their mother in order to make plans for the children to be

placed with prospective adopters. Rehabilitation was no longer possible. At first instance, the county court judge terminated contact, but the guardian *ad litem* appealed. The Court of Appeal, Butler-Sloss LJ giving the leading judgment, allowed the appeal and held that, as the child's welfare is the court's paramount consideration in an application for contact under s.34, the court can require the local authority to justify its long-term plans for a child, even though the local authority has parental responsibility for the child under a care order (s.33(3)).

In *Re C (A Minor: Care Order)* (1992) *The Times*, August 18 the justices made a care order and an order terminating contact between the mother and the child but ordering the guardian *ad litem* to have continued contact. Ewbank J in the Court of Appeal held that the court had jurisdiction to make orders for contact, but in this case the guardian *ad litem* should not have continued contact as that would fetter the local authority's powers.

The court can make an interim contact order under s.34(4) as the court has complete discretion under s.34 (*W. Glamorgan CC* v. *P (No 1)* [1992] 2 FLR 369). The court can vary or discharge any contact on the application of the local authority, the child concerned or the person named in the order (s.34(9)). Where an application for an order under s.34 has been refused, further application in respect of the same child cannot be made for six months except with leave of the court (s.91(17)). As one of the policies of the Children Act is for local authorities to work together in partnership with children and their families the local authority and the person in whose favour the order was made can (instead of going back to court for variation or discharge) make an agreement about contact, provided the child, if of sufficient understanding, agrees (reg. 3 Contact with Children Regulations 1991).

Despite the presumption of contact the local authority can refuse contact without a court order for up to seven days as a matter of urgency and where necessary to safeguard or promote the child's welfare (s.34(6)), but can only do so if written notice of that decision has been given to the child concerned (if he or she has sufficient understanding) and to any person with whom there is a presumption of reasonable contact (reg. 2 Contact with Children Regulations 1991).

Procedural Matters

Care or supervision proceedings normally commence in the magistrates' family proceedings court, but can be vertically transferred to the county court or High Court (to consolidate proceedings or in urgent or serious cases) or laterally transferred to another magistrates' family proceedings court (to consolidate proceedings or in urgent cases). An application for a care or supervision order can be made on its own or in any other family proceedings (s.31(4)), e.g. under the Domestic Violence and Matrimonial Proceedings Act 1976 where there has been domestic violence.

Besides the local authority, the child and any person with parental responsibility are automatically parties to care or supervision proceedings,

although other persons can apply to be joined (r.7 Family Proceedings Courts (Children Act 1989) Rules 1991).

Appointment of Guardian ad litem

In care and supervision proceedings the court must appoint a guardian *ad litem* for the child, unless a guardian is not needed to safeguard the child's interests (s.41(1)). A guardian *ad litem* is usually a qualified social worker selected from a local authority panel of guardians *ad litem* who must be independent of the parties to prevent a conflict of interest arising. Besides having a general duty to safeguard the interests of the child in the manner prescribed by the rules of court (s.41(2)(b)), a guardian has certain specific duties, e.g. to ascertain the child's wishes and whether the child has sufficient understanding, to investigate all the circumstances, to interview people involved, to inspect records, and to appoint professional assistance. The guardian *ad litem* has a right to examine and copy local authority records relating to a child (including the minutes of any Child Protection Conference), which can be admitted in evidence (s.42). When the investigation has been completed the guardian *ad litem* must make a written report advising what should be done in the interests of the child, which (unless the court directs otherwise) must be filed at the court seven days before the hearing date and copies served on all of the parties. This report usually has a considerable influence on the court.

The guardian must appoint a solicitor to act for the child (if not already appointed) and must give instructions on the child's behalf, except where the child is able and wishes to give instructions himself which conflict with those of the guardian, when the solicitor must take instructions from the child.

Appeals

Any party to the original proceedings for a care or supervision order can appeal against the making of or refusal to make a care or supervision order (including an interim order). Appeals from the magistrates' family proceedings court are to the High Court, and from the county court and High Court to the Court of Appeal. The principle in *G* v. *G (Minors) (Custody Appeal)* [1985] 1 WLR 647, [1985] 2 All ER 225, [1985] FLR 894 applies, i.e. the appeal court will not interfere with a discretionary decision made by a lower court unless the decision exceeds a band of reasonable discretion or the decision is plainly wrong.

13.4 Emergency Protection of Children

Part V Children Act 1989 makes provision for the emergency protection of children who are suffering, or at risk of suffering, significant harm.

Different orders can be made which are subject to certain safeguards, e.g. they are of short duration and open to challenge. These safeguards exist to prevent unjustifiable State intrusion into family life and were introduced after recommendations made by the Cleveland Enquiry (see above). In some cases emergency action will be followed by an application for a care or supervision order.

Under Part V local authorities also have various investigative duties when informed that a child who lives or is found in their area is the subject of an emergency protection order or is in police protection, or the local authority has reasonable cause to suspect that such child is suffering, or is likely to suffer, significant harm (s.47(1)). Once a local authority has obtained an order, necessary enquiries must be made to decide what action should be taken to safeguard or promote the child's welfare (s.47(2)).

Part V proceedings are not 'family proceedings' (see s.8(4)), so that the court cannot make a s.8 order on application or at its own motion. When considering whether to make orders under Part V the child's welfare is the court's paramount consideration (s.1(1)), the no-delay principle (s.1(2)) applies and the court can only make an order if it is better for the child than making no order at all (s.1(5)). However, the statutory checklist (s.1(3)) does not apply, as to have to ascertain the child's wishes and feelings, needs etc. would be time-consuming and would defeat the whole purpose of an application under Part V, which is for immediate short-term emergency protection.

The following are available for emergency protection: (i) child assessment order; (ii) emergency protection order; and (iii) police protection.

(i) Child Assessment Order

Under s.43 the court can make a child assessment order, i.e. for the child to be produced for a medical or other assessment or examination to establish whether the child is or is likely to be suffering significant harm. This order can only be made where those responsible for the child are unlikely to cooperate with the local authority but the situation is not urgent enough to justify an emergency protection order.

The court can make a child assessment order on the application of a local authority (or the NSPCC) if satisfied that (s.43(1)):

> '(a) the applicant has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm;
> (b) an assessment of the state of the child's health or development, or of the way in which he has been treated, is required to enable the applicant to determine whether or not the child is suffering, or is likely to suffer, significant harm; and
> (c) it is unlikely that such an assessment will be made, or be satisfactory, in the absence of an order under this section.'

The court can make an emergency protection order instead of a child assessment order if the grounds for an emergency protection order exist and the court considers one should be made (s.43(4)). The child assessment order must specify the date when assessment is to begin and must last no longer than seven days from that date (s.43(5)). Once an order is in force any person in a position to do so must produce the child to the person named in the order and comply with any directions in the order (s.43(6)). The order authorises any person carrying out the assessment or part of the assessment to do so in accordance with the terms of the order (s.43(7)), but a child with sufficient understanding to make an informed decision can refuse to have the medical or psychiatric examination or other assessment regardless of any terms in the order authorising assessment (s.43(8)). A child can be kept away from home (e.g. in hospital) only if necessary for assessment and only in accordance with directions and for the period or periods of time specified in the order (s.43(9)). The order must also contain directions about contact (s.43(10)). Before the application is heard, the local authority (or NSPCC) must take reasonably practicable steps to ensure that notice of the application is given to the child's parents, anyone with parental responsibility, any person caring for the child, anyone who has contact with the child either under a s.8 contact order or a s.34 order, and also to the child (s.43(11)). The notice requirement is to ensure where possible that the hearing takes place *inter partes* to prevent unjustifiable intervention. The rules of court make provision for variation and discharge (s.43(12)).

(ii) Emergency Protection Order

A local authority (or NSPCC) or 'any person' can apply for an emergency protection order under s.44, although most applications are made by local authorities who have a duty under the Act to investigate cases of actual or suspected harm to a child (s.47).

Applications by any Person

Under s.44(1)(a) the court can make an emergency protection order on the application of any person (e.g. parent, relative or NSPCC, but usually the local authority) if satisfied there is reasonable cause to believe the child is likely to suffer significant harm if:

'(i) he is not removed to accommodation provided by or on behalf of the applicant; or
(ii) he does not remain in the place in which he is then being accommodated.'

The responsibilities of an applicant can be transferred to a local authority if in the best interests of the child.

Application by a Local Authority

Under s.44(1)(b) the court can make an emergency protection order on the application of a local authority, but only if satisfied that:

'(i) enquiries are being made with respect to the child under s.47(1)(b) [i.e. because the local authority has reasonable cause to believe a child is suffering, or is likely to suffer, significant harm]; and
(ii) those enquiries are being frustrated by access to the child being unreasonably refused to a person authorised to seek access and that the applicant has reasonable cause to believe that access to the child is required as a matter of urgency.'

There are similar requirements for an application by the NSPCC (s.44(1)(c)).

Application in all cases is made to the magistrates' family proceedings court, except where a duty to investigate has arisen under a s.37 order (see Chapter 9) or there are other proceedings pending in a higher court. Otherwise the application cannot be transferred to a higher court. In a real emergency application can be made to a single justice and can be made *ex parte* with leave of the clerk, although, wherever possible, proceedings must be heard *inter partes*. The order can be granted in the first instance for up to eight days, but a subsequent application can be made by a local authority (or NSPCC), when the court can grant one extension of up to a further seven days, but only if there is reasonable cause to believe the child is likely to suffer significant harm if the order is not extended (s.45). The order (when made or when in force) can give directions and impose conditions about contact and about medical or psychiatric examination or other assessment, including a condition that no examination or assessment be carried out unless the court directs (s.44(6) and (7)). However, a child of sufficient understanding to make an informed decision is entitled to refuse the examination or asssessment (s.44(6)). Directions in the order can be varied at any time (s.44(9)).

Effect of an Order

An emergency protection order directs any person in a position to do so to comply with any request to produce the child to the applicant (s.44(4)(a)) and authorises the child's removal to and retention in accommodation provided by the applicant or prevents the child's removal from any hospital or other place where the child was being accommodated immediately before the order (s.44(4)(b)). It is a criminal offence to obstruct a person authorised to remove the child or to prevent the child's removal (s.44(15)). An emergency protection order gives the applicant limited parental responsibility for the child (s.44(4)(c)), i.e. the applicant must only accommodate and keep the child in accommodation to safeguard the child's welfare and only take such action in meeting his

parental responsibility for the child as is reasonably required to safeguard or promote the child's welfare (having regard in particular to the duration of the order). The applicant must also comply with regulations made by the Secretary of State (s.44(5)). While the order is in force the applicant (e.g. the local authority) cannot remove a child from his or her home or retain the child in a place for longer than is necessary to safeguard the child's welfare and must return the child or allow the child to be removed when safe to do so (s.44(10)). The child can be returned to the care of the person from whom he was removed or, if that is not reasonably practicable, then to the parent, someone with parental responsibility or such other person as the applicant with the agreement of the court considers appropriate, although while the order is in force the applicant can exercise his powers again with respect to the child where it is necessary to do so (s.44(11) and (12)). The applicant must (subject to directions in the order as to contact and medical assessment or examination) allow the child reasonable contact with the following persons and any person acting on his behalf: parents, any other person with parental responsibility, any person with whom the child was living immediately before the order was made, and any person with a right to contact under a s.8 contact order or under a s.34 order (s.44(13)).

No Appeal but Discharge Possible

There is no appeal against the making of or refusal to make an emergency protection order, but an application can be heard to discharge an order 72 hours or more after the original order was made (s.45(9) and (10)). Provided the order was not extended and unless any of them were given notice of and attended the hearing at which the emergency protection order was made, the following persons can apply for discharge: the child, his parent, any person who is not a parent but who has parental responsibility for the child, or any person with whom the child was living immediately before the order was made.

(iii) Police Protection

Under s.46 the police have certain powers in emergency cases involving children. A constable who has reasonable cause to believe a child would otherwise be likely to suffer significant harm can remove that child to accommodation and keep the child there or prevent a child being removed from any hospital or other place where he or she is being accommodated (s.46(1)). The local authority must be notified as soon as is reasonably possible and given reasoned details of steps taken and proposed to be taken and details of where the child is accommodated. The child must also be notified of any plans, if capable of understanding them, as must parents, those with parental responsibility and anyone with whom the child was living. As soon as is reasonably practical an inquiry must be carried out by a designated officer (s.46(3)(e)), and once concluded the

officer conducting the inquiry must release the child unless there is reasonable cause for believing the child would be likely to suffer significant harm (s.46(5)). A child cannot be kept in police protection for more than 72 hours, but during that time a designated officer may apply for an emergency protection order on behalf of the appropriate local authority and must do what is reasonable in all the circumstances of the case to safeguard or promote the child's welfare, which includes allowing parents and certain other persons to have such contact (if any) with the child as is both reasonable and in the child's best interests (s.46(6), (7) and (10)). While the child is in police protection, the constable or designated officer does not have parental responsibility but must do what is reasonable to safeguard or promote the child's welfare (s.46(9)(b)).

13.5 Local Authorities' Duties to Children 'Looked After' by Them

Local authorities have duties under the Children Act 1989 towards children 'looked after' by them, i.e. whether accommodated under a voluntary arrangement or under a care order (s.22(1)). The local authority must safeguard and promote the child's welfare and make such use of services available for children cared for by their own parents as appears reasonable in the case of the particular child (s.22(3)). Before making a decision about a child being looked after or proposed to be looked after, the local authority must ascertain the wishes and feelings of the child, his parents, any other person with parental responsibility and any other relevant person (s.22(4)), and must consider their wishes in respect of the child's religion, racial origin and cultural and linguistic background (s.22(5)). The local authority must advise, assist and befriend the child, with a view to promoting his welfare when he ceases to be looked after by them (s.24(1)). They must encourage rehabilitation by allowing the child to live with his family unless contrary to his welfare (s.23(6)), and ensure that the accommodation provided is near the child's home and that brothers and sisters remain together (s.23(7)). A local authority's general duties to a child are facilitated by more specific duties e.g. by the inspection of foster-parents, other persons with whom the child can be placed and children's homes.

13.6 Challenging Local Authority Decisions about Children

Sometimes, parents, relatives, the child and others (e.g. foster-parents) may be dissatisfied with action taken or not taken by a local authority. In some cases it may be possible to resolve a grievance informally, particularly as the policy of the Act is to encourage cooperation and agreement between all concerned, but if this is impossible, certain procedures can be resorted to: (i) under the Children Act 1989; (ii) under

the general law; (iii) under the complaints procedure; or (iv) to the local government ombudsman.

(i) Challenges under the Children Act 1989

One way of challenging a local authority is to appeal against a care or supervision order or apply to have it discharged (see above). An application to discharge an emergency protection order can be made but not an appeal. Application can also be made under s.34 to challenge a decision about contact. Another option is to apply for a s.8 residence order which automatically discharges any care order (s.91(1)), but the court is unlikely to grant leave to apply for a residence order where it would interfere with a local authority's plans. In *Re A and W (Minors) (Residence Order: Leave to Apply)* [1992] 2 FLR 154 a foster-mother sought leave to apply for a residence order to challenge a local authority decision forbidding her to foster children in local authority care. Leave was refused. The Court of Appeal held that the court had a duty to consider the local authority's plans for the child (i.e. under s.10(9)(d)(i)), but as a local authority's general duty was to safeguard and promote the welfare of any child in care (s.22(3)), the court would not grant leave to depart from those plans which were intended for the welfare of the child. Any change of plan might be harmful to the child. Balcombe LJ also stated that the welfare principle in s.1 did not apply to applications for leave under s.10, which required the court to consider specific matters.

Re A and W is similar to the approach in *A* v. *Liverpool City Council* [1982] AC 363, [1981] FLR 222, where the House of Lords under the pre-Children Act law held that the wide statutory duties and powers of local authorities towards children should not be circumscribed by applications in wardship to challenge those duties and powers. An application in wardship could be brought to challenge a local authority decision under the Children Act, but the court is likely to apply the *Liverpool* principle, particularly as under the Children Act a child cannot now be simultaneously a ward of court and in the care of the local authority (ss.100(2)(c) and 91(4)) and as to ward a child might undermine a local authority's plans for the child.

The Secretary of State can declare a local authority to be in default if that authority has failed without reasonable cause to comply with a duty under the Children Act 1989 and can require compliance within a specified period (s.84).

(ii) Challenges under the General Law

Local authorities, like private individuals, are subject to the civil and the criminal law, so that an action in negligence could be brought against a local authority or foster-parent, but as the courts do not like to fetter the discretionary powers of local authorities (particularly where children are involved), a negligence action against a local authority is unlikely to

succeed, particularly as it would open the flood-gates. There are also likely to be problems proving foreseeability on the part of the local authority, unless the local authority has failed to supervise a placement. Although an action against a foster-parent may be more likely to succeed, a foster-parent is unlikely to be able to satisfy any damages awarded.

A parent or other aggrieved party can apply to the European Court of Human Rights alleging that the UK is in breach of the European Convention on Human Rights, e.g. of the right to family life (Art.8) or the right to a fair hearing (Art.6) or some other fundamental human right (see e.g. *Gaskin* v. *UK* (1990) 12 EHRR 36, [1990] 1 FLR 167, where an action was brought by a person who had been in local authority care). Such an application, however, can take many years to be determined, and although it may benefit children in general (i.e. if the law is changed) it is unlikely to help the individual child, although damages can be awarded.

An application for the administrative law remedy of judicial review may be a useful remedy for an aggrieved parent or other party, who can apply for an order of *certiorari* to quash a local authority's decision (e.g. to put a child's name on the Child Protection Register) and/or of *mandamus* compelling the local authority to perform a statutory duty (e.g. to provide support under Part III Children Act 1989). The applicant must argue that the local authority's decision should be quashed or the local authority be compelled to act on the ground of illegality, procedural impropriety, and/or irrationality (see per Lord Diplock, *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374). However, before the application is heard on its merits, the applicant must seek leave to apply for judicial review, which is only granted if there is a reasonable chance of the court deciding that the local authority's decision was so unreasonable that no reasonable authority could have ever come to it (see e.g. Balcombe LJ in *R* v. *Lancashire County Council ex p M* [1992] 1 FLR 109). There have been many applications for judicial review of action or inaction by local authorities, e.g. placing a child on the Child Protection Register (*R* v. *Norfolk County Council ex p M* [1989] QB 619, [1989] 2 All ER 359, [1989] 2 FLR 120; *R* v. *Harrow London Borough Council ex p D* [1990] Fam 133, [1990] 3 All ER 12, [1990] 1 FLR 79). The disadvantage of an application for judicial review is that, even if *certiorari* (the more likely remedy) is granted, the local authority only has an obligation to reconsider its original decision on its merits, and provided the later decision is not illegal, procedurally improper or irrational, then it can come to the same decision as it did in the first place.

(iii) Complaints Procedure

Under s.26 Children Act a local authority must establish a formal representation or complaints procedure to deal with complaints made about local authority support for families and their children under Part III Children Act 1989. A complaint can be made by: a child who is being looked after by the local authority or who is in need; a parent; other

persons with parental responsibility; local authority foster-parents; any person who the local authority considers has sufficient interest in the child's welfare to warrant representation being considered; and young people who consider they have been given inadequate preparation for leaving care or for after-care. However, the complaints procedure has certain drawbacks. For instance, wider family members can only make representations at the discretion of the local authority and, although one person hearing the complaint must be independent of the local authority, impartiality is likely to be difficult to maintain. The main drawback, however, is that the complaints procedure is limited to Part III duties and powers, although the Department of Health *Guidance* does suggest that local authorities should consider extending the procedure to cover other matters.

(iv) Local Government Ombudsman

A complaint can be made to the Commissioner for Local Administration (i.e. the Local Government Ombudsman), who must investigate complaints of maladministration by local authorities, but this is a lengthy and limited remedy.

Summary

1. Local authorities have duties and powers under the Children Act 1989 to safeguard and promote the welfare of children. Local authorities must work in partnership with families and children, with compulsory intervention by court order in the last resort.
2. Under Part III local authorities have a duty to provide services for children in need and disabled children, including in particular the provision of day care and accommodation. A child 'accommodated in care' (i.e. under a voluntary arrangement) can be removed by the parent at any time.
3. Under Part IV local authorities (and the NSPCC) can apply for care or supervision orders, which may be granted by the court if certain 'threshold criteria' are satisfied (s.31(2)). The court must also apply the welfare principle and other s.1 provisions. A care order gives the local authority parental responsibility for the child, but a parent does not lose parental responsibility. A supervision order puts the child under the supervision of a designated local authority officer or a probation officer. A care order can be discharged. A supervision order can be varied or discharged. There is a presumption of continuing reasonable contact between parents and others and the child in care unless terminated or restricted by court order (s.34).
4. Under Part V an order can be made for the emergency protection of a child, i.e. a child assessment order (s.43) or emergency protection order (s.44). The police have certain powers of police protection where they have reasonable cause to believe a child is likely to suffer significant harm (s.46).
5. Local authorities have certain duties to children 'looked after' by them (i.e. under a voluntary arrangement or under a care order).
6. Local authorities can be challenged under the Children Act, the general law, the complaints procedure or by an application to the local ombudsman.

Exercises

1. Jane, a single parent, is pregnant and cannot cope with Edward, a lively toddler. She has no friends or relatives to help her.

   What can and must her local authority do if she asks for help?

2. Jeni is about to leave the maternity hospital with her new baby, Dan.
   (i) How would you advise the local authority if it were known to them that she was proposing to live with her boyfriend who was recently convicted of child abuse?
   (ii) What would your advice to the local authority be if Jeni was a single parent who had drunk heavily during her pregnancy but stopped drinking two weeks ago and had promised to turn over a new leaf?
3. The local authority has been told by Sam's GP that Sam (who is six years old) may have suffered non-accidental injury.

   What should the local authority do?

4. George is 14 years old and in care of the local authority, i.e. under a care order. His mother, Sue, is dead. His father, Bill, who was not married to Sue, wants to have the care order discharged and have George live with him.

   Advise Bill on the basis of:
   (i) Bill having no parental responsibility; and
   (ii) Bill having parental responsibility.
5. Why is contact between a child in care, his parents and others important and how is it maintained?

Further Reading

Children Act 1989: Guidance and Regulations (1991) Department of Health.
Working Together Under the Children Act 1989 (1991) Department of Health.
Brasse, 'Section 34: a Trojan horse?' (1993) Fam Law 55.
Everall, 'Judicial review of local authorities after the Children Act 1989' (1991) Fam Law 212.
Fox Harding, 'The Children Act 1989 in context: four perspectives in child care law and policy' (1991) JSWFL 179 and 285.
Gallagher, 'Abuse at the hands of the State' (1992) Fam Law 204.
Lyon and de Cruz, *Child Abuse* (1992), Jordans.
Masson, 'Leave, local authorities and welfare' (1992) Fam Law 443.
Parry, 'The Children Act 1989: Local authorities, wardship and the removal of the inherent jurisdiction' (1992) JSWFL 212.
Parton, *Governing the Family: Child Care, Child Protection and the State* (1991) Macmillan.
Parton, 'The contemporary politics of child protection' (1992) JSWFL 100.
Sunkin, 'Judicial Review and Part III of the Children Act 1989' (1992) J Ch L 109.
White, '*Liverpool* revisited? – *Re A and W (Minors)*' (1992) J Ch L 190.

14 Adoption

14.1 Introduction

A legal adoption is effected by an adoption order which extinguishes parental responsibility in the natural parents and vests it in the adopters. The law of adoption is contained in the Adoption Act 1976. As adoption proceedings are family proceedings the court in adoption proceedings can make any s.8 order (e.g. residence order etc.) (see Chapter 9). The Adoption Rules 1984 govern procedure and the Adoption Agencies Regulations 1983 and various government circulars regulate practice.

Adoption trends have changed over the years. First, there are far fewer adoptions today than there used to be (25 000 adoptions in England and Wales in 1968 but only 6646 orders made in 1991). This is mainly because few babies are available for adoption today as contraception has prevented unwanted babies being born and more babies are kept by single mothers, who are less stigmatised than they used to be. Second, adopted children are usually older children, many with severe mental and physical problems who cannot be cared for by their parents, and others who have been abused or neglected and taken into care by the local authority and placed for adoption where rehabilitation with their families is impossible. Third, there has been an increase in inter-country adoption and a Special Commission of the Hague Conference on Private International Law has recently produced a draft Convention. Fourth, there is a trend to accept and encourage what is called 'open adoption', whereby the adopted child remains in contact with his birth parents and other family members.

Sometimes a child is adopted by a member of his family (e.g. a step-parent or grandparent), but as an alternative to adoption a relative can consider applying for a residence or contact order under s.8 Children Act 1989 (see Chapter 9). The parties to an 'in-family adoption' must notify their local authority of their intention to adopt. Most children, however, are adopted by persons outside the family who have the child placed with them by adoption agencies (i.e. local authorities or approved adoption societies) who control and supervise the placement and ensure the prospective adopters are suitable applicants.

14.2 Adoption Agencies

Only adoption agencies can make arrangements and place children for adoption unless the prospective adopter is a relative or a person acting under a High Court order (s.11). Adoption agencies can only be

established and run by local authorities and approved voluntary adoption societies. Every local authority must establish and maintain an adoption service or ensure that such a service is provided by an approved adoption society (s.1). In fact most local authorities act as adoption agencies providing their own adoption service. The main function of adoption agencies is to screen prospective adopters and supervise placements. Adoption agencies must comply with the Adoption Agencies Regulations 1983, which includes setting up an adoption panel to consider and make recommendations about prospective adoptions and placements.

14.3 The Welfare of the Child

The welfare of the child is the 'first' and not the paramount consideration of the court and any adoption agency. Section 6 Adoption Act 1976 provides:

> 'In reaching any decision in relation to the adoption of a child a court or adoption agency must have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.'

When placing a child for adoption the agency must consider, so far as is practicable, the wishes of the child's parents or guardian about the child's religious upbringing (s.7). Although there is no duty under the 1976 Act for adoption agencies to consider the child's racial or cultural background, a local authority or voluntary organisation looking after a child must consider not only the child's religion, but the child's 'racial origin and cultural and linguistic background' (ss.22(5)(c) and 61(3)(c) Children Act 1989).

An adoption is not complete until an adoption order has been made but in many cases an adoption order is preceded by an application to free the child for adoption.

14.4 Freeing for Adoption

Before applying for an adoption order, and even before placing the child for adoption, an adoption agency can apply to the court for an order declaring that the child is free for adoption (i.e. a 'freeing order') (s.18(1)). An application for a freeing order can only be made with the consent of the child's parent or guardian unless the adoption agency is applying to dispense with that consent under s.18(1)(b). An application to dispense with the consent needed for a freeing order can only be made by a local

authority as a freeing order can only be made in respect of a child in care (s.18(2)(a)). The court can only make a freeing order if each parent (except the unmarried father without parental responsibility) or guardian freely and with full understanding of what is involved has agreed generally and unconditionally to an adoption order being made or the court considers that such agreement should be dispensed with on the grounds in s.16(2) (see below). Although the consent of the unmarried father without parental responsibility is not required, the court must be satisfied that he does not intend to apply for a parental responsibility or residence order under the Children Act or that his application would be likely to be refused if he did apply (s.18(7)). A mother's agreement to adoption is only effective if given at least six weeks after her baby's birth (s.18(4)).

Before making the freeing order the court must be satisfied that each parent or guardian who can be found has been given the opportunity to make a declaration (if so wishing) that he does not wish to be involved in any future question concerning the child's adoption (s.18(6)). If this declaration is not made, each parent or guardian must be informed (if not already informed) by the adoption agency within 14 days following the date 12 months after the freeing order was made as to whether an adoption order has been made and, if not, then whether the child has his home with a person with whom he has been placed for adoption (s.19(2)).

The main advantage of a freeing order is that it removes any anxiety about the birth parents withdrawing their agreement to the adoption, as once an order is made the parental agreement requirement is satisfied and parental responsibility for the child vests in the adoption agency until the adoption order is made or until the freeing order is revoked (s.18(5)). A freeing order, like an adoption order, extinguishes any order under the Children Act 1989 and any maintenance obligation existing under an agreement or court order, except where there is a contrary intention or where the maintenance obligation exists under a trust (ss.18(5) and 12(2)–(4)).

If 12 months after the freeing order was made an adoption order has not been made and the child does not have his home with the person with whom he was placed for adoption, a parent or guardian can apply to have the freeing order revoked on the ground that he wishes to resume parental responsibility for the child (s.20(1)) (unless the parent or guardian has declared he does not wish to be involved in any question concerning the child, see above). An order revoking a freeing order extinguishes the adoption agency's parental responsibility and gives it back to the child's mother and father (if married to the mother at the child's birth). It also revives any parental responsibility agreement or parental responsibility order and any appointment of a guardian (whether or not made by court order) which had been extinguished by the freeing order (s.20(3)). Other than a parental responsibility order or a court order appointing a guardian, an order revoking the freeing order does not revive any other order made under the Children Act or any maintenance obligation existing under an agreement or court order and does not affect any

parental responsibility held by the adoption agency after the freeing order was made but before the order revoking it was made (s.20(3)(a)) (i.e. where the child was subject to a care order).

14.5 An Adoption Order

Although the adoption agency is responsible for the placement of children, the court finalises the adoption by making an adoption order which extinguishes the parental responsibility of the birth parents and anybody else and gives it to the adopters (s.12(1)). Under the Adoption Agencies Regulations 1983 the agency must provide the court with a report giving details about the adoption. The court can appoint a guardian *ad litem* (i.e. an independent social worker, probation officer or, in the High Court, the Official Solicitor) to investigate the case, and in an application to dispense with parental agreement a guardian *ad litem* must be appointed. In deciding whether or not to make an adoption order the court must apply the welfare principle in s.6, but cannot make an order unless it is satisfied that sufficient opportunities to see the child together with one or both of the applicants in the home environment have been given to the adoption agency in an adoption agency placement or in a non-agency placement to the local authority within whose area the home is (s.13(3)). The court can also refuse to make an order where any payment of money has been made in breach of s.57 (s.24(2)), although in *Re Adoption Application AA 212/86 (Adoption: Payment)* [1987] 2 All ER 826, [1987] 2 FLR 291 Latey J held that payment made to a surrogate mother did not contravene s.57 and even if it had done the court could have authorised payment. An adoption order can contain such terms and conditions as the court thinks fit (s.12(6)).

The court can make an interim adoption order giving parental responsibility to the applicants for a probationary period of up to two years and upon such terms as to maintenance of the child and otherwise as the court thinks fit (s.25(1)). However, the court rarely exercises this power, and where there is any doubt about the suitability of the adopters or a chance that the child may be rehabilitated with its parents, the court may decide to make a residence order under s.8 Children Act, which, unlike an adoption order, can be revoked if necessary.

Who Can be Adopted?

Only a child under the age of 18 who is or has not been married can be adopted (s.72(1), s.12(5)). An adopted child can be adopted for a second time (s.12(7)). The child must have spent some time living with one or both of the applicants before an adoption order is made. Where one or both of the applicants is the child's parent, step-parent or relative (i.e. an 'in-family adoption') or the child was placed with the applicants by an adoption agency or under a High Court order, an adoption order can only

be made if the child is over 19 weeks old and at all times during the preceding 13 weeks has had his home with one or both of the applicants (s.13(1)). In all other cases (e.g. an application by a foster-parent or friend), the child must be at least 12 months old and must have lived with one or both of the applicants at all times during the previous 12 months (s.13(2)). The court cannot make an adoption order unless it is satisfied that sufficient opportunities have been given to the adoption agency or the local authority to see the child with the applicant or both applicants (where married) in the home environment (s.13(3)). Parental agreement to the adoption must have been given or dispensed with (s.16) or the child must be free for adoption (see above).

Who Can Apply for an Order?

Married and single persons can apply, and joint and sole applications can be made.

Joint applications can only be made by married couples (s.14(1)), who must both be at least 21 years old, except where one of them is adopting his own child (i.e. the birth parent in a step-parent and birth parent adoption) when that person need only be aged 18 (s.14(1A) and (1B)).

Sole applications can be made by unmarried persons who must be at least 21 years old (s.15). A married person can make a sole application, provided he (or she) is at least 21 years old, and provided the other spouse cannot be found, or they have separated permanently and are living apart, or the other spouse is incapable of applying for an order due to physical or mental ill-health (s.15(1)). Once an application is refused an applicant (or applicants) cannot reapply, unless the court refusing the application states otherwise, or because of a change of circumstances or any other reason the court hearing the reapplication considers it proper to proceed (s.24(1)).

Effect of an Adoption Order

An adoption order gives the adopters parental responsibility for the child (s.12(1)), and extinguishes: any parental responsibility which any person had before the order was made; any order made under the Children Act 1989; and any maintenance duty to the child existing under an agreement or court order, unless the agreement exists under a trust or states otherwise (s.12(3) and (4)).

14.6 Parental Agreement and Dispensing with Agreement

Before an adoption order can be made each parent or guardian must agree to the adoption or have that agreement dispensed with. Agreement is required in order to protect the birth parents' interests, as adoption irreversibly removes parental responsibility. Before making an adoption

order or a freeing order the court must therefore be satisfied that each parent or guardian freely with full understanding of what is involved agrees unconditionally to the making of the adoption order (or freeing order), or that their agreement can be dispensed with on certain grounds (ss.16(1) and 18(1)). The agreement must exist at the time the order is made, but can be withdrawn at any time up till then, although a parent who vacillates about agreement may find his agreement dispensed with on the basis of it being unreasonably withheld (see e.g. *Re H (Infants) (Adoption: Parental Consent)* [1977] WLR 471, [1977] 2 All ER 339). The child's agreement to adoption is not required.

For the purpose of agreement, a guardian is a person appointed under s.5 of the Children Act 1989 (see Chapter 9) and a parent is anybody having parental responsibility for the child under the Children Act 1989 (s.72), i.e. married mother and father, unmarried mother, unmarried father with parental responsibility, a person with a custody or residence order in his favour, a local authority who has a care order, and anyone who holds an emergency protection order. The reporting officer (an independent social worker or probation officer appointed by the court from the Panel of Guardians *ad litem* and Reporting Officers) ensures that parental agreement is freely given and witnesses the formal agreement (s.61). The reporting officer can also provide the court with a report about the case.

Grounds for Dispensing with Parental Agreement

The court can dispense with agreement on the following grounds (s.16(2)), i.e. where a parent or guardian:

(a) *cannot be found or is incapable of giving agreement* The agreement of any parent or guardian can be dispensed with where he or she cannot be found (i.e. after taking reasonable steps) or is incapable of giving agreement. Notice of the adoption proceedings must be served on each person whose agreement is required and, where a person's address is not known, enquiries must be made (e.g. through government departments or by newspaper advertisement). Where a person's whereabouts are known but he or she cannot be contacted that person is deemed not to be found (see *Re R (Adoption)* [1967] 1 WLR 34, where parental agreement was dispensed with as communication with the parents was impossible for political reasons). In *Re L (A Minor) (Adoption: Parental Agreement)* [1987] 1 FLR 400 the birth mother's agreement was dispensed with as she suffered from a mental disorder under the Mental Health Act 1983 and was therefore incapable of understanding the meaning and implication of adoption and of giving a valid and rational agreement.

(b) *is withholding his agreement unreasonably* It may be quite reasonable for a parent to refuse to agree to adoption, but in some cases the court may decide that a parent is so unreasonably refusing to agree to the

adoption that the court can dispense with his agreement. Agreement is commonly dispensed with on this ground. In *Re W (An Infant)* [1971] AC 682, [1971] 2 WLR 1011, [1971] 2 All ER 49 the House of Lords considered the question of unreasonably withholding agreement where an unmarried mother had put W out for adoption within a few days of his birth and he had been placed with the prospective adopters. The mother signed the consent form but later withdrew her consent. By this time W had been living with the prospective adopters for about 18 months. They could offer him a satisfactory and stable home, while the mother was living in one room on State benefits with no hope of obtaining work in the reasonably foreseeable future and with two other children from a previous relationship to look after. The House of Lords dispensed with the mother's agreement on the ground that it was unreasonably withheld and laid down some important statements of principle. In the Court of Appeal Cross LJ had stated there had to be a 'high degree of culpability' in a mother's conduct to deprive her of a child but this test was rejected by the House of Lords. The test was not one of culpability or of callous self-indifference or of failure or probable failure of parental duty or of potential lasting damage to the child, but of reasonableness in all the circumstances. The child's welfare *per se* was not the test but the fact that a reasonable parent would consider the child's welfare made welfare a more or less relevant or decisive factor depending on how the reasonable parent would regard it. Reasonableness was to be judged by an objective test, namely whether a reasonable parent in the same circumstances would withhold consent, rather than whether the particular mother had reasonably done so. However, the court should not substitute its own view for that of the parent. The question to be asked was whether the decision of the parent in the particular case came within a band of reasonable decisions which a parent in the same position would make taking account of all the circumstances.

In what sort of situations have the courts dispensed with consent? In *Re D (An Infant) (Adoption: Parental Consent)* [1977] AC 602, [1977] 2 WLR 79, [1977] 1 All ER 145 a homosexual father refused to consent to his son's adoption, but his agreement was dispensed with as a reasonable father in the same situation would consider the effect of his homosexuality on the child's welfare and wish to protect the child from the dangers of homosexuality by agreeing to the child's adoption. Where a parent vacillates about agreement the court may hold that agreement is being unreasonably withheld. In *Re H (Adoption: Parental Agreement)* [1983] 4 FLR 614 a mother's refusal to agree to her 10-year-old son's adoption was dispensed with as it was not based on her concern for the child's welfare but on other motives, namely her suspicion and dislike of social services. In *Re W (Adoption: Parental Agreement)* [1983] 4 FLR 614, on the other hand, the mother's refusal to consent to her 11-year-old son's adoption was held to be reasonable as the child knew his mother and it was desirable for him to retain contact with her, provided it did not threaten his sense of security with his foster-parents.

(c) *has persistently failed without reasonable cause to discharge his parental responsibility for the child* Agreement can be dispensed with if a parent has persistently failed to discharge his or her parental responsibility for the child.

(d) *has abandoned or neglected the child* The meaning of this ground, which is little used in practice, is straightforward. A parent who, for instance, commits a criminal offence of neglect under s.1 Children and Young Persons Act 1933 or who abandons a baby on the doorstep of the local Social Services Department might have his or her agreement to the adoption dispensed with by the court.

(e) *has persistently ill-treated the child* There is little case-law on this ground, which is rarely used. One or two episodes of ill-treatment would be unlikely to be sufficient; it must persist over a period of time.

(f) *has seriously ill-treated the child* Under this ground one episode of serious ill-treatment might be sufficient to dispense with agreement (e.g. severe sexual abuse of a child).

14.7 Adoption with Contact

As an adoption order can include such terms and conditions as the court thinks fit (s.12(6)), the court can order the adoptive parents to allow the child to have contact with his birth parents and/or any other members of his family. Whether adopted children should remain in contact with birth parents and others is a controversial issue, but proposals for reform recommend more contact (i.e. more 'open adoption'). The main argument against contact is that contact seems to contradict the aim of adoption, which is to sever irrevocably the relationship between the child and its birth parents. Another argument against allowing contact is that contact may undermine the autonomy of the adoptive parents to make decisions about the child. Enforcing contact arrangements may also be difficult. The main argument in favour of contact is that contact is beneficial for the child and should be maintained wherever possible, particularly where the child is older (as is often the case today), and where the child knows his natural parents and other family members and where there is cooperation between all concerned. In *Re C (A Minor) (Adoption: Conditions)* [1988] 2 WLR 474, [1988] 1 All ER 705, [1988] 2 FLR 159 the House of Lords held that conditions as to contact could be made in an adoption order where appropriate. On the facts it was appropriate to order contact as the boy wished to be adopted but wanted to remain in contact with his elder brother, and the adoptive parents were willing to agree to the condition. Lord Ackner, however, stated that a condition as to contact would rarely be in the child's interest unless it was acceptable to the adoptive parents. Where contact

should be maintained the court, instead of making an adoption order, could consider making a s.8 residence order and/or a contact order, which it can do as proceedings under the Adoption Act 1976 are family proceedings for the purpose of the Children Act 1989. However, the disadvantage of doing this is that the child and the adoptive parents are not given the security which adoption provides, as s.8 orders are revocable.

Adopted persons who wish to trace their birth parents and have contact with them can apply to the Registrar General for certain information contained in the Adopted Children's Register. An adopted adult can also obtain a copy of his original birth certificate from the Registrar General (s.51(1)). A birth certificate contains little information, but some agencies and local authorities are willing to disclose information from their records. The Registrar General must also keep an Adoption Contact Register (s.51A) in which an adopted person may register his wish to contact his relatives and relatives may register details of an adopted person's birth.

14.8 Proposals for Reform of Adoption Law

In October 1992 a consultative document on adoption law was published (*Review of Adoption Law: Report to Ministers of an Inter-Departmental Working Group*), making far-reaching proposals for reform of adoption law. A major proposal is that the law should facilitate more 'open adoption' where appropriate, as research and practice have shown that more open arrangements are often beneficial for certain children, particularly as the trend is for older children to be adopted. The report therefore recommends that new legislation should give the courts power to make contact orders in conjunction with adoption orders. The report also recommends that, when considering whether to make a 'placement order' (replacing the freeing order) or an adoption order, the court should have a statutory duty to consider whether to make an alternative order under the Children Act. Other recommendations are made to bring adoption law into line with the Children Act 1989. A new welfare test is recommended to make the child's welfare the paramount, not the first, consideration, except when the court is deciding whether to make an adoption order without parental agreement. The report also recommends that the principles enshrined in the Children Act (i.e. delay is detrimental to the child (s.1(2)) and the no-order presumption (s.1(5)) should be incorporated into adoption law). Also recommended is that new legislation should contain key factors which the court should consider when deciding whether to make a placement or adoption order (i.e. similar to those in the statutory checklist in the Children Act).

A particularly important recommendation is that the court should not be able to grant an adoption order where a child is over the age of 12,

unless that child has agreed to the adoption or his agreement has been dispensed with, which the court would only be able to do if the child was incapable of giving agreement. Also recommended are new grounds for dispensing with parental agreement. The first ground would remain (i.e. where the parent cannot be found or is incapable of giving agreement), but the other grounds would be assimilated into one test, namely that the court could only override a parent's refusal to adoption if the advantages to the child of being part of a new family were significantly greater than those of any alternative option. Although it is not yet known whether these recommendations will be put into effect, it certainly seems to make sense for adoption law to assimilate the Children Act principles and policies, thereby streamlining children's law.

Summary

1. Adoption severs the legal link between the birth parents and the child and creates a new legal link between the adopters and the child. Adoption law is contained in the Adoption Act 1976.
2. A legal adoption can only be effected by an adoption order which is irrevocable and transfers parental responsibility from the birth parents to the adopters.
3. Only local authorities and approved voluntary adoption societies can run adoption agencies, which are responsible for the control and supervision of adoption placements.
4. The welfare of the child is the first consideration of the court and any adoption agency when reaching a decision in relation to the adoption of the child (s.6).
5. A freeing order can be applied for under s.18 before an application is made for an adoption order. The court can only make a freeing order if the parent (other than the unmarried father without parental responsibility) or guardian consents to the adoption or has had his or her agreement dispensed with. Only adoption agencies can make freeing applications. A freeing order can be revoked in some circumstances, but not where a parent or guardian has made a declaration that he or she no longer wishes to be involved in the adoption. A freeing order vests parental responsibility in the adoption agency.
6. A child under the age of 18 who is not or who has not been married can be adopted.
7. Married and unmarried people can apply to adopt a child. Joint and sole applications can be made. Joint applications can be made but only by married couples. A married applicant cannot make a sole application unless the other spouse has disappeared, the parties have permanently separated or the other spouse is ill or disabled. Applicants must be over 21, but a birth parent applicant (i.e. in the case of a step-parent adoption) need only be 18.
8. Parental agreement to adoption can be dispensed with on certain grounds, the most common one being that agreement is unreasonably withheld.
9. An adoption order can contain terms and conditions and can therefore include a condition as to contact.
10. Proposals for reform have been made, notably for 'open adoption' and for children over 12 to consent to adoption.

Exercises

1. Maria wants to apply to adopt a child. She is 22 years old and her husband is terminally ill. Can she do so?
2. Bob, an unmarried father, has sexually abused his daughter, Ann, who is in care under a care order. The local authority is proposing to apply for a freeing order. Bob says he refuses to consent to her adoption, and will apply for parental responsibility for Ann.

   Advise the local authority.
3. What is the effect of a freeing order?
4. Jack is 13 years old and Mr and Mrs Foster, his foster-parents, are applying to adopt him. He wishes to remain in contact with his brother, Mark.

   Advise the parties.
5. Why is the child's welfare the 'first' and not the 'paramount' consideration in adoption law and do you think this is justified?

Further Reading

Review of Adoption Law (Report to Ministers of an Inter-Departmental Working Group) (1992).

Bridge, 'Reforming intercountry adoption' (1992) J Ch L 116.

Lowe *et al.*, 'The pathways to adoption – summary of research findings' (1992) Fam Law 52.

Pickford, 'Promoting natural links – recent cases on adoption' (1992) J Ch L 138.

Part IV

Miscellaneous Matters

In Part IV we consider domestic violence (Chapter 15), death of a family member (Chapter 16) and cohabitees (Chapter 17). The chapter on cohabitees draws together many of the issues considered in the earlier parts of the book.

15 Domestic Violence

In this chapter we look at the protection afforded by the law to the victims of domestic violence and the associated problems of occupation of the home and housing. Occupation rights are also considered in Chapter 4.

15.1 Introduction

Although the term 'domestic violence' could refer to violence between any members of a family or household, it usually refers to violence between spouses and cohabitees, and, while male partners may sometimes be victims of domestic violence (see e.g. *Gibson* v. *Austin* [1993] Fam Law 20), the typical scenario involves the male partner inflicting violence on the female partner, i.e. the so-called 'battered wife'. As it is usually the female partner who seeks a legal remedy against violence, the applicant victim is referred to as 'she' in this chapter. Children who suffer violence at the hands of their parents, whether or not there is any violence between their parents, are given additional protection by both the criminal law (e.g. parents can be prosecuted under the Children and Young Persons Act 1933 for acts of cruelty against their children), and by the civil law (e.g. local authorities can apply for orders under the Children Act 1989 where children are suffering, or are at risk of suffering, significant harm) (see Chapter 13).

Although domestic violence has existed for centuries, the extent and severity of the problem was not seriously recognised until the early 1970s. The work of Erin Pizzey, who established a refuge for battered women in London and published a book, *Scream Quietly or the Neighbours Will Hear* (1974), was largely instrumental in putting pressure on the Government to reform the law, as a result of which the Domestic Violence and Matrimonial Proceedings Act 1976 (DVMPA 1976) and the Domestic Proceedings and Magistrates' Courts Act 1978 (DPMCA 1978) were passed to provide victims of violence with a new range of civil remedies relating both to violence and to occupation of the home. Prior to these Acts a victim of violence could obtain a civil remedy but only ancillary to other proceedings (e.g. divorce or judicial separation) and only in support of a legal or equitable right. The 1976 and 1978 Acts broke new ground by giving county courts and magistrates' courts respectively jurisdiction to grant injunctions in relation to violence and occupation whether or not there were other proceedings and whether or not a legal or equitable right requiring protection existed.

Domestic violence is now recognised as a relatively common social phenomenon existing at all levels of society (in 1991 26 236 injunctions were granted in England and Wales under the DVMPA 1976). These figures, however, are likely to be only the tip of the iceberg as many victims choose to suffer in silence. Research has been done into the causes of violence, and personality traits (e.g. psychopathic, aggressive, jealous personalities) and social influences (e.g. poverty, housing, unemployment) are likely causes of violence. However, whatever the causes of violence, the victims of violence need the full protection of the law.

Victims can obtain civil remedies, i.e. injunctions, in respect of violence and occupation of the home under three main statutes:

- Domestic Violence and Matrimonial Proceedings Act 1976;
- Domestic Proceedings and Magistrates' Courts Act 1978; and
- Matrimonial Homes Act 1983 (occupation only).

The county court (s.38 County Courts Act 1984) and the High Court (s.37 Supreme Court Act 1981) can also grant injunctions ancillary to some other remedy within their jurisdiction but only in support of an existing legal or equitable right. Other remedies exist in the law of tort and in the criminal law. Property law is also important because rights of occupation are closely related to the problem of domestic violence (see Chapter 4). A victim of violence may move with her children into a women's refuge to escape from a violent partner, but that accommodation is likely to be unsatisfactory in the long term so that she may need an injunction to remove her husband or cohabitee from the home, thus enabling her to return. Housing law is also relevant; a victim of domestic violence may need to seek help from her local authority housing department, which has a duty under Part III Housing Act 1985 to give assistance with housing and in some cases provide accommodation. Many wives who have been subjected to violence eventually petition for divorce (e.g. on the basis of unreasonable behaviour), when occupation and ownership of the matrimonial home are dealt with in ancillary proceedings (see Chapter 8). Victims of domestic violence may also be able to obtain compensation under the Criminal Injuries Compensation Scheme.

We shall look briefly first at the protection afforded by the criminal law and then in more detail at the civil law. Housing law implications are considered briefly and the chapter concludes with a critique of the present law and proposals for reform.

15.2 The Criminal Law

'Brutality in the home is just as much a crime as any other sort of violence' (Home Office Circular No. 60/1990), so that the perpetrator of

violence can be prosecuted, e.g. for assault, grievous bodily harm or even murder (see *R* v. *Kowalski* [1988] 1 FLR 447, where a husband was convicted of sexually assaulting his wife). A husband can also be convicted of raping his wife as the House of Lords in *R* v. *R* [1991] 4 All ER 481 abolished the common law rule that a husband could not commit the offence of rape (i.e. non-consensual intercourse), as a wife by marriage impliedly consented to intercourse (see also the Law Commission Report, *Rape Within Marriage*, Law Com No 205, 1992). About 50 000 cases of domestic violence are reported to the police each year and about 100 women are killed by their partner each year according to Home Office figures.

The criminal law, however, provides an unsatisfactory remedy for domestic violence. First, punishing a violent husband or cohabitee is likely to break up the family, often with disastrous emotional and financial consequences for all concerned, when what the woman and children really need is protection from violence. Second, there may be evidential problems proving violence as wives or cohabitees are often unwilling to cooperate with the police and often decide to withdraw their evidence because of feelings of disloyalty or because prosecution and possible conviction will ruin any chance of reconciliation, or because of the fear of further violence. A spouse, however, can be be compelled to give evidence against the other spouse in domestic violence cases (see s.80 Police and Criminal Evidence Act 1984 and also the discussion of the compellability rule in *Rape Within Marriage*, Law Com No 205, 1992). In the past the police have usually been reluctant to intervene in domestic violence disputes, but in the past year or so police attitudes have changed so that they are more willing to intervene. A Home Office Circular (No. 60/1990) recommended that police forces draw up clear policy statements about intervention in domestic violence cases and, where necessary, establish special units. A special domestic violence unit has been established at Scotland Yard and other police forces have similar units. However, despite the criminal law and greater police involvement, most victims of domestic violence seek the protection of the civil law, notably injunctions.

There has recently been some relaxation of the criminal defence of provocation after criticism that the defence, which requires a sudden and temporary loss of self-control, fails to take account of the 'battered wife syndrome'.

15.3 An Action in Tort

A spouse, cohabitee or other family member who is the victim of domestic violence can bring an action in tort against the perpetrator of violence (e.g. for assault, battery, nuisance or trespass). Spouses have separate legal personalities, so that a spouse can bring an action in tort against the other spouse although the court has a discretion to stay proceedings where no

substantial benefit is likely to accrue to either party by the continuation of those proceedings (Law Reform (Husband and Wife) Act 1962). There is no such restriction on cohabitees. However, tort actions are rarely brought by victims of domestic violence as the aim of tort law is to compensate the plaintiff by damages when what is usually wanted is a quick remedy giving the victim immediate protection. Most parties are also unlikely to be able to satisfy the order for damages. Injunctions can be sought in tort proceedings under s.37 Supreme Court Act 1981 and s.38 County Courts Act 1984, but injunctions are more commonly sought in other proceedings (e.g. under DVMPA 1976, DPMCA 1978, MHA 1983 or ancillary to matrimonial proceedings such as divorce). However, where a person falls outside the ambit of these other proceedings (e.g. cohabitees not living together as husband and wife for the purposes of s.1 DVMPA 1976; partners post-divorce; homosexual or lesbian partners; or other family members) a tort action may provide the only means of obtaining an injunction restraining violence or protecting occupation. In *Patel* v. *Patel* [1988] 2 FLR 179, for example, a father sought an injunction in tort against his son-in-law, but the Court of Appeal limited the terms of the injunction as there was no tort of harassment in English law and hence no jurisdiction to restrain the son-in-law from approaching within 50 yards of the home. In *Burnett* v. *George* [1992] 1 FLR 525 the plaintiff on relationship breakdown had been subject to a series of molestations and assaults caused by the defendant, e.g. unwelcome visits to her house and harassment by telephone calls. The Court of Appeal granted her an injunction for, although molestation and interference were not actionable wrongs (to which an injunction could be attached), impairment to health was an actionable wrong under the rule in *Wilkinson* v. *Downton* [1897] 2 QB 57 and *Janvier* v. *Sweeney* [1919] KB 316, i.e. where there is intentional bodily harm.

In *Khorasandjian* v. *Bush* (1993) *The Times*, February 8 the Court of Appeal held there was a tort of harassment in English law and granted an injunction restraining the defendant from harassing, pestering or communicating with the plaintiff by any means including telephone calls to her at her parent's home. In *Khorasandjian* the parties were not married and had never cohabited. The 18-year-old plaintiff was thus unable to apply under s.1 DVMPA 1976. She was granted an injunction even though she had no property right to which the injunction could attach. It was sufficient that her mother with whom she lived had a right to sue. Dillon LJ also stated there would have been no objection if the judge had granted an injunction to restrain the defendant from 'molesting' the plaintiff as the choice of wording was a matter of judicial discretion.

Although the Law Commission has recommended that the law be extended to enable parties other than just spouses and cohabitees to seek remedies against violence instead of having to use the law of tort, it seems that developments in tort law are now providing remedies where previously there were none. In *Godwin* v. *Uzoigwe* [1993] Fam Law 65 the Court of Appeal held that the plaintiff who had been treated by the

defendants for two and a half years from the age of 16 as a menial servant and physically ill-treated was entitled to damages for assault and for the tort of intimidation.

15.4 Injunctions

The injunction, a civil remedy, is the most important and most useful remedy for the victim of domestic violence. Injunctions have several advantages. The main advantage is that they can be obtained quickly and, in a real emergency, *ex parte* (i.e. without the other party being heard), although only in exceptional circumstances because of the natural justice implications of the other party being unable to argue his case (see *Practice Note* [1978] 2 All ER 919). An *ex parte* injunction is only an interim measure and a full hearing takes place *inter partes* as soon as possible afterwards to allow the defendant to put his case before the court. There are also effective methods of enforcing injunctions, for not only is breach of an injunction contempt of court, punishable by fine or imprisonment, but in certain clearly defined circumstances the court can attach a power of arrest to an injunction.

There are two types of injunction: those that relate to violence (called non-molestation injunctions in the superior courts but personal protection orders in the magistrates' courts); and those that relate to occupation (called ouster injunctions in the superior courts but exclusion orders in the magistrates' courts). The use of different terminology for similar orders has been criticised for being unnecessarily complex and confusing, and the Law Commission has recommended the introduction of a single set of orders available in all courts (see below). We will consider injunctions relating to violence and then those relating to occupation.

Injunctions Relating to Violence

Injunctions against violence can be sought under specific legislation (i.e. DVMPA 1976, DPMCA 1978) or under the so-called inherent or non-statutory jurisdiction of the court (now governed by s.38 County Court Act 1984 in the county court and by s.37 Supreme Court Act 1981 in the High Court) when the court can make injunctions ancillary to matrimonial or non-matrimonial proceedings in support of a legal or equitable right. An applicant often has a choice of jurisdictions in which to seek an injunction, e.g. a victim spouse can apply for an injunction against violence in the county court under the DVMPA 1976, in the family proceedings court (magistrates') under the DPMCA 1978, in family proceedings under the Children Act 1989 where there are children, in matrimonial proceedings such as divorce, or in non-matrimonial proceedings such as tort. A cohabitee has a more limited choice and can apply

under the DVMPA 1976, in family proceedings under Children Act 1989 when there are children, or under the general law in support of a legal or equitable right (e.g. in tort).

Injunctions Relating to Occupation

With injunctions relating to occupation the legal position is more complex. After the decision of the House of Lords in *Richards* v. *Richards* [1984] AC 174, [1984] FLR 11 all applications for ouster injunctions by spouses must be brought under the MHA 1983, and under the DVMPA 1976 or the DPMCA 1978 when violence is alleged, unless divorce or other proceedings are pending or being heard, when an application can be made in those proceedings. The House of Lords also held that when an application is made for an ouster injunction in *any* proceedings (i.e. not just under the MHA 1983), the court when deciding whether to grant an injunction must apply the statutory criteria in s.1(3) MHA 1983 whether or not the applicant is a spouse or a cohabitee. The injunction may order the perpetrator of violence to be ousted (an ouster order) and the victim to be allowed back into the home (a re-entry order).

Criteria Applicable to Ouster Orders

Ousting a person from the home they own and occupy is a serious matter, so that the statutory criteria mentioned above must be satisfied before the court will grant an order. The court must apply s.1(3) MHA 1983 which provides that on an application for an ouster or re-entry order:

> 'the court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case . . .'

The House of Lords in *Richards* held that each criterion (i.e. conduct of the spouses, needs and financial resources, needs of the children, and all the circumstances of the case) must be given equal weight, so that the needs of any children are not given priority but are merely one of the factors to be considered The proponents of children's rights criticised *Richards* for failing to make the welfare of children the court's paramount consideration. However, the decision was hardly a retrograde step in the development of children's rights, for all *Richards* does is require a judge to consider all the s.1(3) criteria, not giving one criterion more weight than any other, and the judge retains a discretion, after conducting the correct balancing exercise and weighing all the criteria, to oust a violent father where the children need protecting (see e.g. *T* v. *T* (*Ouster Order*) [1987] 1 FLR 181). A judge's failure to conduct the proper balancing exercise may,

however, provide a ground for a successful appeal (see e.g. *Summers* v. *Summers* [1986] 1 FLR 343).

Although the Matrimonial Homes Act 1983 only applies to spouses (i.e. to the matrimonial home), the Court of Appeal has held somewhat anomalously that the s.1(3) criteria also apply to applications for ouster orders by cohabitees (*Lee* v. *Lee* [1984] FLR 243).

Let us briefly consider how the courts have applied these criteria. One criterion is the conduct of the spouses in relation to each other and otherwise. The conduct of both parties is relevant. In *Blackstock* v. *Blackstock* [1991] 2 FLR 308 the wife left the matrimonial home with the three children of the marriage and applied for an ouster order under the MHA 1983 to remove her husband from the matrimonial home. The order was refused at first instance, as the judge, applying s.1(3) MHA 1983 and stressing the draconian nature of the order, found there was some evidence that the wife had instigated the violence, that the violence was not serious and that the children and their accommodation needs were not an overriding factor. The judge said it would be manifestly unjust to oust the husband if the wife had created the situation, and, in any event, the wife could be adequately protected by a non-molestation undertaking by her husband. The wife's appeal to the Court of Appeal was dismissed, Butler-Sloss LJ reiterating the *Richards* principle that none of the criteria in s.1(3) took priority over any other.

Where the parties' conduct is disputed affidavit evidence is insufficient and oral evidence is needed (see *Harris* v. *Harris* [1986] 1 FLR 12, affirmed by *Shipp* v. *Shipp* [1988] 1 FLR 345). Violence or serious molestation is not always needed to satisfy the conduct criterion, but as an ouster order is considered to be a draconian remedy, an order is not granted routinely (*Wiseman* v. *Simpson* [1988] 1 WLR 35, [1988] 1 All ER 245, [1988] 1 FLR 490). In *Scott* v. *Scott* [1992] 1 FLR 529, for example, the Court of Appeal upheld an order prohibiting the husband from exercising his right to occupy the matrimonial home where there was no violence, because the husband, who would not accept his marriage was over, had repeatedly sought to persuade his wife to effect a reconciliation and had also broken an earlier undertaking.

When the court is considering the respective needs and financial resources of the parties an important consideration is likely to be the housing needs of the parties. The court must also consider the needs of the children, but cannot oust a party solely to protect the children as it may be unfair to the ousted party (see e.g. *Ainsbury* v. *Millington* [1986] 1 All ER 73, [1986] 1 FLR 331; *Blackstock* v. *Blackstock* [1991] above). In some cases the children's needs may be determinative and a violent father will be ousted and the mother and children allowed back into the home. The court must also consider all the circumstances of the case and has a discretion to grant an order (i.e. the court 'may' make an order).

Sometimes instead of granting an injunction the court may accept an undertaking by the perpetrator of violence not to be violent in the future

(see e.g. *Blackstock* v. *Blackstock* above). Breach of an undertaking, like breach of an injunction, is contempt of court.

15.5 Injunctions Ancillary to Other Proceedings

Parties who are not spouses or cohabitees or who are no longer spouses or cohabitees must seek injunctions ancillary to other proceedings in the county court or High Court (s.38 County Courts Act 1984; s.37 Supreme Court Act 1981). However, the court can only grant an injunction in other proceedings in support of an existing legal or equitable right and the terms of the injunction can only extend to protecting that right (*Patel* v. *Patel* [1988] 2 FLR 179; *Chaudhry* v. *Chaudhry* [1987] 1 FLR 347). In *Burnett* v. *George* [1992] 1 FLR 525 the plaintiff's health had been impaired by threats made over the telephone by the defendant. The Court of Appeal held the court had jurisdiction to grant a non-molestation injunction where the molestation threatened the health of an applicant for, although there was no legal right to be free from molestation, there was a right under the common law to be free from intentional impairment to health (i.e. under the rule in *Wilkinson* v. *Downton* [1897] 2 QB 57).

Injunctions Ancillary to Proceedings Involving Children

Where there are children, an applicant may be able to obtain an injunction to protect a child against violence ancillary to family proceedings under the Children Act or in an application under the Children Act itself for a s.8 prohibited steps order or for an order in wardship (see Chapter 9). The court at its own motion (i.e. without an application being made) in any family proceedings (which include proceedings under Parts I, II and IV of the Children Act, DVMPA 1976, DPMCA 1978, MHA 1983 and in wardship) can grant a prohibited steps order or any other s.8 order, e.g. when making a residence order in favour of a victim of domestic violence, the court on application or at its own motion could also insert conditions into the residence order to protect any children from violence and forbidding the perpetrator of violence from entering the home.

Where there are children the law relating to ouster injunctions is unclear, as under the law prior to the Children Act divergent approaches were taken by the Court of Appeal. It is unclear whether an injunction can be granted to protect children or whether it can only be granted in support of an existing legal or equitable right. In *Ainsbury* v. *Millington* [1986] 1 All ER 73, [1986] 1 FLR 331 the applicant mother applied in proceedings under the Guardianship of Minors Act 1971 (repealed by the Children Act 1989) for an order to remove her former cohabitee from a flat of which they were

joint lessees. (She could not apply under DVMPA 1976 as she was no longer living with her cohabitee as husband and wife in the same household to bring her within the ambit of s.1 DVMPA 1976 and, being unmarried, could not apply under the MHA 1983.) The Court of Appeal refused to grant the injunction as she had no legal or equitable right needing injunctive protection other than being a joint lessee of the flat, which was insufficient. There was no jurisdiction to grant an ouster injunction to protect the child in child proceedings. *Ainsbury* v. *Millington* was applied in *M* v. *M* [1988] 1 FLR 225, where the parties were living post-divorce in the former matrimonial home. The Court of Appeal held there was no jurisdiction to grant an ouster order against the former husband under the inherent jursdiction to protect children as the mother had no proprietary interest in the home. In *Wilde* v. *Wilde* [1982] 2 FLR 83, on the other hand, where both parties were living post-divorce in the former matrimonial home of which they were joint tenants, the Court of Appeal, applying *Quinn* v. *Quinn* [1983] 4 FLR 394, took a less restrictive approach and held that the court did have an inherent jurisdiction to grant an ouster injunction where it was necessary to safeguard the welfare of children. Bromley and Lowe (*Bromley's Family Law*, 1992) submit that the approach of the Court of Appeal in *Ainsbury* v. *Millington* and *M* v. *M* is to be preferred so that the court should have no jurisdiction to grant ouster orders to protect children under the Children Act 1989.

However each case turns on its own facts. In *Wilde* v. *Wilde* the former spouses were living together, but in *Ainsbury* v. *Millington* the female cohabitee had not occupied the flat for some time. The law may also be more favourably disposed to former spouses than to cohabitees. In a case similar to *Wilde* there seems no reason why the court should not have jurisdiction to make an ouster order in family proceedings under the Children Act 1989 or under the court's inherent jurisdiction. If ouster orders are made under the Children Act 1989 the rule in *Richards* v. *Richards* (i.e. that children must not be given priority under s.1(3) MHA 1983) applies and not the paramountcy principle in s.1 Children Act. In *Gibson* v. *Austin* [1993] Fam Law 20, a case brought under s.1 DVMPA 1976, Nourse LJ in the Court of Appeal stated that the Children Act 1989 had not overruled the decision in *Richards*, so that when making orders relating to the matrimonial home the court must apply s.1(3) MHA 1983.

15.6 Injunctions under the Domestic Violence and Matrimonial Proceedings Act 1976

The Domestic Violence and Matrimonial Proceedings Act 1976 (DVMPA 1976) was enacted after public pressure for reform to protect the victims of domestic violence and gave county courts jurisdiction to grant spouses

and cohabitees injunctions relating to violence and occupation without the need for instituting matrimonial or other proceedings and without the need to find a legal right to which the injunction could be attached. An application under the 1976 Act can be made to the High Court (r. 3. 9(2) FPR 1991).

The jurisdiction of the county court (and High Court) under the 1976 Act is wider, more flexible and less complex than the jurisdiction of the magistrates' court under the Domestic Proceedings and Magistrates' Courts Act 1978. The 1978 Act only applies to spouses and requires evidence of violence rather than molestation and complex criteria to be satisfied.

Spouses and cohabitees, i.e. 'a man and a woman who are living together with each other in the same household as husband and wife' (s.1(2)) can apply under the 1976 Act. The time for determining whether the parties are living together as husband and wife is the time of the violence and not the time of the application, for otherwise a woman who left home to live, for example, in a refuge would be left without a remedy (*Davis* v. *Johnson* [1979] AC 264, [1978] 1 All ER 1132). Sufficient evidence that the parties are living together as husband and wife must be available to the court before it can invoke its jurisdiction under the 1976 Act (see *Tuck* v. *Nicholls* [1989] 1 FLR 283, which also held that disputed affidavit evidence justified a refusal to grant an ouster order under s.1 but not a non-molestation order). The word 'household' in s.1(2) has been widely construed to give those needing protection a remedy. In *Adeoso* v. *Adeoso* [1980] 1 WLR 1535, [1981] 1 All ER 107 the parties were unmarried joint tenants of a small council flat. When their relationship broke down the woman lived in the bedroom and the man in the sitting room. She did not cook for him or do his washing and they communicated by notes. The man became violent and the woman applied for non-molestation and ouster injunctions under s.1 DVMPA 1976, but the county court judge dismissed her application as they were not living together in the same household. The Court of Appeal allowed the appeal, Ormrod LJ holding that they were clearly living in the same household as they were trapped in an untenable position and needed the help of the court, and to decline jurisdiction would have been unkind to them both.

Orders

The county court has jurisdiction under the 1976 Act to make (s.1(1) and (2)): a non-molestation order; (ii) an ouster order; or (iii) a re-entry order.

(i) A Non-Molestation Order

This is an order restraining the other party from molesting the applicant (s.1(1)(a)) and/or a child living with the applicant (s.1(1)(b)). There is no definition of molestation in the Act, but molestation includes both violent

and non-violent acts, e.g. hanging up scurrilous posters (*Horner* v. *Horner* (1983) 4 FLR 50), searching a handbag (*Spencer* v. *Camacho* (1983) 4 FLR 662), giving the press nude photographs (*Johnson* v. *Walton* [1990] 1 FLR 350). A non-molestation order cannot be granted under the DVMPA 1976 where a spouse or cohabitee intends to remain living with his or her partner (per His Honour Judge Fricker in *F* v. *F* [1989] 2 FLR 451, a county court case which was reported for its interest value, but which was criticised by several commentators).

(ii) An Ouster Order

This is an order relating to occupation of the home of spouses and cohabitees (i.e. the matrimonial and quasi-matrimonial home). The court can order that the other party be excluded from the home, part of the home, or from a specified area in which the home is situated (s.1(1)(c)). The Court of Appeal has frequently emphasised that an ouster order is a draconian remedy of last resort which should not be granted as easily as a non-molestation order and, where evidence is disputed, should not be granted only on the basis of affidavit evidence (*Shipp* v. *Shipp* [1988]; *Whitlock* v. *Whitlock* [1989] 1 FLR 208; *Tuck* v. *Nicholls* [1989]). The principles in s.1(3) MHA 1983 apply (see above). The court has jurisdiction to make an ouster order where there is no violence (*Wiseman* v. *Simpson* [1988], but has a discretion not to do so where it would cause injustice to the respondent.

Before the landmark decision of the House of Lords in *Davis* v. *Johnson* [1978] the Court of Appeal had held in *B* v. *B* [1978] 1 All ER 821 and *Cantliff* v. *Jenkins* [1978] 1 All ER 836 that s.1 DVMPA 1976 was only a procedural section giving county courts a new jurisdiction to grant injunctions but no jurisdiction to interfere with substantive property law rights, i.e. a person without a property right could not oust a person with such a right. In *Davis* v. *Johnson* the parties were unmarried and had lived together for about three years in a flat owned by them both as joint tenants and had a three-year-old child. Johnson was extremely violent and, after a savage attack, the woman went to live in a women's refuge. She applied for an injunction under s.1 DVMPA 1976 restraining Johnson from using violence and ordering him to vacate the flat and not return. The county court and the Court of Appeal, applying *B* v. *B* and *Cantliff* v. *Jenkins*, held there was no jurisdiction to make an ouster order under s.1 where the respondent had a proprietary interest in the home, but the House of Lords, overruling *B* v. *B* and *Cantliff* v. *Jenkins*, allowed the woman's appeal and granted her an ouster order, holding that there was jurisdiction to do so under s.1. However, that section only provided a temporary breathing-space to protect the enjoyment of property rights, and it did not alter substantive property rights. Lord Scarman stated that 'the purpose of the section is not to create rights but to strengthen remedies'. The House of Lords recommended that ouster injunctions should last for no more than a few months and be subject to a time limit.

Practice Note [1978] 2 All ER 1056 states that the court should consider imposing a time limit of up to three months, although the respondent is entitled to apply for an earlier discharge and the applicant can apply for an extension of the injunction.

(iii) A Re-entry Order

This order orders the other party to permit the applicant to enter and remain in the home or part of the home (s.1(1)(d)).

Emergency Applications

In an emergency an application for a non-molestation or an ouster order can be heard after only two days' notice being given to the respondent and in exceptional circumstances an order can be made *ex parte*. Orders made *ex parte* are short-term interim orders which can only be granted if there is a real and immediate danger of serious injury *(Practice Note (Matrimonial Causes Injunction)* [1978] 1 WLR 925; *G* v. *G (Ouster: Ex Parte Application)* [1990] 1 FLR 395). They cannot be sought as a matter of routine and are only granted 'in circumstances where it is really necessary to act immediately' (Ormrod LJ in *Ansah* v. *Ansah* [1977] Fam 138, [1977] 2 WLR 760).

Enforcement: Power of Arrest

Breach of an injunction can be contempt of court punishable by fine or imprisonment, although in family cases committal to prison is regarded as a remedy of last resort because of the drastic effect imprisonment is likely to have on a family. Similar reasons exist for police unwillingness to enter into domestic disputes even though police involvement is now much greater. In some cases, however, committal may be necessary as it was in *G* v. *G* [1991] 2 FLR 506, where the Court of Appeal upheld a sentence of 16 months' imprisonment where the husband had persistently breached a non-molestation order. Bringing contempt proceedings, however, has certain drawbacks. First, it is a relatively slow process when a victim needs immediate protection and, second, as injunctions are civil remedies, the police have no power to arrest a person in breach. To avoid these problems, a power of arrest was introduced by the 1976 Act enabling the county court to attach a power of arrest to a non-molestation or ouster injunction where the respondent has caused actual bodily harm to the applicant and/or child living with the applicant and is likely to do so again (s.2(1)). Because of its severity, the court can only attach a power of arrest in exceptional circumstances (*Harrison* v. *Lewis* [1988] 2 FLR 339), and it should normally not be attached for more than three months (*Practice Note* [1981] 1 All ER 224).

A power of arrest is registered at a police station and allows a police constable to arrest without warrant a person who he has reasonable cause

to believe is in breach of the injunction (s.2(3)). That person must be brought before a judge within 24 hours of arrest and can only be released during that period with the permission of a judge.

A power of arrest can also be attached to an injunction obtained in divorce proceedings (*Lewis* v. *Lewis* [1978] 1 All ER 729) and to an order made under the DPMCA 1978 (s.18).

15.7 Domestic Proceedings and Magistrates' Courts Act 1978

Under ss.16–18 DPMCA 1978 magistrates have similar powers to those available in the county court under the DVMPA 1976 to make injunctions relating to violence and occupation, but only on the application of a spouse. As with the 1976 Act it is not necessary to bring other proceedings to obtain an injunction. In many respects, however, the 1978 Act differs from the 1976 Act: it is more complex and more restrictive in its application; it uses different terminology; it applies only to spouses and not to cohabitees; it requires proof of violence, not merely molestation (i.e. pestering, harassment or psychological harm); and there is no jurisdiction to exclude the perpetrator of violence from an area near the matrimonial home. In practice most applications for injunctions are to the county court in divorce proceedings or under the DVMPA 1976.

Orders

The magistrates' court has jurisdiction to make: (i) personal protection orders (relating to violence); and (ii) exclusion orders (relating to occupation).

(i) Personal Protection Orders

The magistrates can make a personal protection order if satisfied that the respondent has used, or threatened to use, violence against the applicant and/or child of the family and the order is necessary for their protection (s.16(2)). If satisfied, the magistrates may order the respondent not to use, or threaten to use, violence against the person of the applicant and/or against the person of a child of the family, or incite or assist others to do so.

(ii) Exclusion Orders

The magistrates can make an exclusion order if satisfied that the respondent has already used violence against the applicant, or a child of the family or some other person and is now threatening to use violence again against the applicant and/or child of the family, or is doing so in breach of a personal protection order. In either case, the magistrates must

also be satisfied that the applicant and/or child of the family could be in danger of physical injury if an order were not made (s.16(3)). If satisfied, the magistrates can make an order requiring the respondent to leave the matrimonial home and/or prohibiting the respondent from entering the matrimonial home. The order can direct the respondent to permit the applicant to enter and remain in the matrimonial home. An exclusion order does not affect property rights (s.17(4)), and, like an order under the 1976 Act, only provides a short-term remedy.

Emergency Applications

In an emergency the court can make expedited orders (i.e. without giving notice to the respondent), but only in respect of personal protection orders and only if there is imminent danger of physical injury to the applicant or child (s.16(6)). Expedited orders can be made to last for a period of up to 28 days but can be extended on application. Although expedited orders are the magistrates' courts' equivalent of *ex parte* orders granted by the superior courts, the jurisdiction of the superior courts to grant *ex parte* injunctions is wider, for in exceptional circumstances they can also be granted in respect of ouster orders.

Enforcement of Orders: Power of Arrest

To facilitate enforcement the magistrates can attach a power of arrest to personal protection and exclusion orders, but only if satisfied that the respondent has physically injured the applicant or child and is likely to do so again (s.18(1)). A power of arrest has the same effect as a power of arrest obtained under the DVMPA 1976, and must not be attached as a matter of routine. The magistrates must give reasons for doing so and the respondent should be notified of the applicant's intention to seek a power of arrest (*Widdowson* v. *Widdowson* (1983) 4 FLR 121; *McCartney* v. *McCartney* [1981] Fam 59, [1981] 1 All ER 597, (1980) FLR 403).

15.8 Matrimonial Homes Act 1983

The Matrimonial Homes Act 1983 (MHA 1983) gives statutory rights of occupation to spouses (see also Chapter 4). In addition to giving the county court and High Court power to grant ouster injunctions, the Act also gives the court other powers relating to occupation (e.g. transfer of tenancies, payment of mortgages etc.). In *Richards* v. *Richards* (see above) the House of Lords held that the court must apply the criteria in s.1(3) MHA 1983 when deciding whether or not to grant an injunction in respect of occupation (i.e. whether ouster or re-entry order). A major advantage of proceeding under the MHA 1983 is that the court can invoke other powers under the Act (see Chapter 4). In *Kalsi* v. *Kalsi* [1992] 1 FLR 511 the Court

of Appeal held the court had no jurisdiction to make an ouster order under the MHA 1983 against third parties. Here the wife applied for an ouster injunction in divorce proceedings to restrain her husband and his brothers from exercising rights of occupation in the matrimonial home.

15.9 Violence Post-Divorce and Post-Cohabitation

There has been some uncertainty about the legal position of victims of domestic violence post-divorce and post-cohabitation. Former spouses and cohabitees do not come within the ambit of the DVMPA 1976, unless they are living together in the same household as husband and wife, and former spouses and co-habitees do not come within the MHA 1983 or the DPMCA 1978. The law is therefore unsatisfactory and inadequate as violence often occurs post-divorce or post-cohabitation, i.e. on relationship breakdown. In this situation, where the parties have children, the court may intervene to protect children on application or at its own motion either under the Children Act 1989 or under the court's inherent jurisdiction in wardship, e.g. a residence order could be made with a direction under s.11(7) Children Act 1989 that the father does not enter the home or harm the child. The county court under its inherent jurisdiction could protect a child where a mother has a right needing protecting (e.g. her parental responsibility for the child) by analogy with *Wilde* v. *Wilde* (above), where the Court of Appeal held that the court had an inherent jurisdiction in matrimonial proceedings post-divorce to oust the former husband from the home where the welfare of the children needed protection, even though he was still joint owner of the property. (see also *Lewis* v. *Lewis* (1991) *The Times*, May 1). In *M* v. *M (Ouster: Children Act)* [1992] Fam Law 504 the Family Division held that an injunction could be sought ancillary to an application under the Children Act 1989 as the mother had a legal right to which the injunction could be attached, i.e. her right to exercise her parental responsibility.

Where there are no children, divorced spouses can seek injunctions ancillary to matrimonial or non-matrimonial proceedings but only in support of an existing legal or equitable right. In *Lucas* v. *Lucas* [1992] 2 FLR 53 the Court of Appeal held that, where a former spouse had a proprietary interest in the former matrimonial home, the divorce court had jurisdiction to entertain an application for an injunction to exclude the other spouse (i.e. under s.38 County Courts Act 1984). In *Lucas* the wife was the sole tenant of the property and therefore on the authority of *Richards* v. *Richards*, had a legal right which could be protected.

With cohabitees post-cohabitation the courts seem less willing to protect cohabitee victims of violence, even where there are children (see *Ainsbury* v. *Millington* above). In *Pidduck* v. *Molloy* [1992] 2 FLR 202 the Court of Appeal affirmed there was no jurisdiction to grant a non-molestation order under the 1976 Act to an unmarried couple no longer

living together as husband and wife (i.e. post-cohabitation), but recommended that the Act be extended to cover such couples as on relationship breakdown protection against violence was often most needed (cf. *Harrison* v. *Lewis*; *R* v. *S* [1988] 2 FLR 339; *Tuck* v. *Nicholls* [1989] 1 FLR 283). Cohabitees with or without children can, post-cohabitation, seek injunctions in proceedings in support of a legal or equitable right such as a right under the law of tort.

15.10 Should the Law be Reformed?

The law relating to domestic violence and occupation of the family home has often been criticised, particularly for its confusing complexity. As we have seen, injunctions can be sought in many different proceedings under different statutes, each having their own requirements and terminology. As Lord Scarman said in *Richards* v. *Richards* [1984] AC 174, 206–7:

> 'The statutory provision is a hotchpotch of enactments of limited scope passed into law to meet specific situations or to strengthen the powers of the specified courts. The sooner the range, scope and effect of these powers are rationalised into a coherent and comprehensive body of law, the better.'

Another major criticism is that the law fails to protect certain family members who fall outside the legislation, e.g. grandparents, parents physically abused by teenage sons, cohabitees post-cohabitation and spouses post-divorce, when there may be an increased likelihood of violence. Parents it seems are often beaten up by teenage children and the law provides them with inadequate remedies, although a telephone help-line called Parentline now exists.

Criticism can also be made of the s.1(3) MHA 1983 criteria which, after *Richards* v. *Richards*, must be applied to all applications for ouster injunctions and, unlike other legislation (e.g. s.1 Children Act 1989; s.25(1) MCA 1973), fail to give priority to children's welfare. Another criticism is that the reference to conduct in s.1(3) is out of step with the trend in family law, particulary divorce, to move away from conduct (see Chapters 6 and 7). The application of the s.1(3) criteria to cohabitees when the MHA 1983 was enacted to give spouses rights of occupation is also somewhat anomalous and confusing.

The Law Commission, as part of its comprehensive examination of family law, has looked at the problem of domestic violence and occupation of the family home and made recommendations for reform (*Domestic Violence and Occupation of the Family Home*, Working Paper No. 113, 1989; *Family Law: Domestic Violence and Occupation of the Family Home*, Law Com No 207, 1992). The Law Commission stated that existing civil law remedies were 'complex, confusing and lack integration', and recommended the introduction of a single but flexible range of

remedies available in all courts having jurisdiction in family matters, although with some specific limitations on the powers of magistrates' courts. However, the Law Commission recommended that the proposed new scheme should retain the basic present structure so that there should be two types of order, i.e. non-molestation and occupation orders.

For molestation orders the Law Commission proposed there would be no definition of molestation but molestation would cover all forms of molestation. Application would be possible, as at present, without any other proceedings being issued, and in family proceedings orders could be made on application or at the court's own motion. The court would be able to grant an order where just and reasonable to do so having regard to all the circumstances of the case, including the need to secure the health, safety and well-being of the applicant and any relevant child. Any person having some sort of family relationship would be able to apply, i.e. spouses, cohabitees, former spouses and cohabitees, anyone living in the same household (other than employers, lodgers or boarders), close relatives, engaged couples, those having a sexual relationship, parents of a child or someone having parental responsibility for a child, and also parties to the same family proceedings.

The court would also have jurisdiction to make occupation orders (declaratory or regulatory) in respect of any dwelling-house which is, was or was intended to be the joint home of the parties. An order could be made on application without other proceedings having been instigated or on application in family proceedings. The same parties would be able to apply for an occupation order as for a non-molestation order, athough a distinction would be drawn between entitled and non-entitled applicants and between those who are cohabitants, former cohabitants and spouses. Occupation rights granted to non-entitled applicants would only be personal rights, not capable of registration as a charge against the property and not valid against a purchaser. The criteria for regulatory orders would be all the circumstances of the case and in particular: (i) the respective housing needs and resources of the parties and any relevant child; (ii) the respective financial resources of the parties; and (iii) the likely effect of any order, or of any decision by the court not to make an order, on the health, safety and well-being of the parties and any relevant child. The court would, however, have a duty to make an order if it appeared likely that the applicant or any relevant child would suffer significant harm if an order was not made and that such harm would be greater than the harm which the respondent or any relevant child would suffer if the order was made.

The Law Commission also recommended the introduction of various ancillary orders (e.g. in relation to rent and mortgage obligations, repair and maintenance and the possession and use of furniture) to remedy the sort of situation which occurred in *Davis* v. *Johnson*, where the applicant victim, having been successful in obtaining an injunction against her cohabitee under s.1 DVMPA 1976 returned to the flat to find it stripped of its contents.

The Law Commission recommended special provision in respect of magistrates' courts. Magistrates would have the same jurisdiction to make non-molestation and occupation orders as other courts, but with power to transfer a case or refuse jurisdiction in more complex cases where either party had a preexisting legal, beneficial or statutory right to occupy the house. Jurisdiction to transfer tenancies would be restricted to the High Court.

These proposals have not yet been implemented, but the present law of domestic violence and occupation of the family home is complex and confusing and urgently in need of reform particularly to give parties not coming within the present legislative framework more effective remedies.

15.11 Homelessness and Domestic Violence

A victim of violence who is homeless or threatened with homelessness can seek assistance from her local authority housing department which has a range of powers and duties under Part III Housing Act 1985 from providing assistance to providing actual accommodation. A person is homeless under the Act where he or she has no accommodation or has accommodation but cannot secure entry to it or may be subject to violence or threats of violence from someone living there if he or she does occupy it (s.58). A person is threatened with homelessness if he or she is likely to become homeless in 28 days (s.58(4)). A local authority's duty to the homeless depends on whether a person is homeless intentionally or unintentionally and/or has a priority need. Where a person is unintentionally homeless (or threatened with homelessness) and has a priority need, a full housing duty is owed, i.e. to provide that person with accommodation. Where a person is intentionally homeless and has a priority need only a temporary housing duty is owed, and where there is no priority need only advice and assistance need be given. A person has a priority need *inter alia* if he or she has dependent children and is vulnerable (s.59), e.g. old, ill, handicapped, or pregnant. A person can have a priority need where dependent children are living with the applicant intermittently (see *R* v. *London Borough of Lambeth ex p Vagliviello* (1990) 22 HLR 392, where the children were living with the applicant for three and a half days a week).

A victim of domestic violence can therefore inform her local housing department that she is homeless unintentionally, or threatened with homelessness, and that she has a priority housing need, whereupon the local authority is under a statutory duty to find her accommodation. She can do this even if she has been forced to leave home (e.g. to live in a women's refuge) and she is unlikely to need a residence order in her favour if there are any children (*R* v. *Ealing LBC ex parte Sidhu* [1982] 3 FLR 438). The House of Lords has held that a local housing authority is under no duty to house dependent children whose parents have been refused permanent accommodation under the 1985 Act because of their inten-

tional homelessness, and a dependent child does not qualify for priority need (*R* v. *Oldham Metropolitan Borough Council ex p B* (1993) *The Times*, March 19. Some local authorities may require a victim of domestic violence to have exhausted all possible legal remedies before exercising their statutory duty (*R* v *Wandsworth LB ex parte Nimako-Boateng* [1984] FLR 192; *Thurley* v. *Smith* [1984] FLR 875).

The problem today, however, is that even if a local authority does provide housing, a victim of domestic violence and her children are often likely to find themselves living in very unsatisfactory accommodation.

Comment

The problem of domestic violence, particularly of battered wives, is an increasing social problem. According to recent Home Office figures, more than one in four violent crimes involves an attack by men on their wives or partners and between 1985 and 1989 domestic violence incidents more than doubled from 12 160 to 26 555. Women are increasingly seeking help from women's refuges, but these refuges, at a time when they are most needed, are suffering from government and local authority cut-backs. Many are kept going by voluntary helpers and donations from local charities. Even some of the services provided by the Chiswick refuge established by Erin Pizzey in 1971 are under threat. Some improvements have been made (e.g. most urban police forces now have their own domestic violence units) but more refuges are urgently needed.

Summary

1. Domestic violence is a common occurrence, but not until the 1970s were reforms made to give victims the right to apply for injunctions relating to violence and occupation without other proceedings being issued and without the need for an existing legal or equitable right requiring protection.
2. The criminal law gives victims some but not very satisfactory protection.
3. Injunctions are the most useful remedy as they can be obtained quickly and, in some circumstances, can have a power of arrest attached.
4. Injunctions in respect of violence and/or occupation of the home can be sought under certain statutes (i.e. DVMPA 1976; DPMCA 1978). Injunctions in respect of occupation can be sought under the MHA 1983. Where there are children, injunctions may be sought under the Children Act 1989 or in wardship to protect children, but it is unclear whether the court will grant ouster orders merely to protect children. Injunctions can also be sought in matrimonial proceedings (e.g. divorce, nullity or judicial separation) or in non-matrimonial proceedings (e.g. tort). Cohabitees can only seek injunctions under the DVMPA 1976 or ancillary to other proceedings.
5. Ouster injunctions are considered to be draconian remedies. They are not granted routinely and the court must consider the criteria in s.1(3) MHA 1983 whether or not the parties are spouses or cohabitees. Ouster orders can be ordered against a person with a proprietary right but only for a limited time.

6. The Law Commission has made proposals for reform.
7. A victim of domestic violence can seek help from the local authority housing department which has powers and duties under the Housing Act 1985 to house certain people.

Exercises

1. Wendy and Henry are married with a daughter, Kate, aged six. The home is in Henry's sole name. Last week Henry came home drunk and punched Wendy, bruising her badly. He said if she did not leave home he would do it again. Wendy left home with Kate and went to live in a women's refuge which is cramped and uncomfortable. She wishes to return home with Kate but is too terrified to do so. She seeks your legal advice.

   Advise her.

   How would your advice differ if:

   (i) Henry and Wendy were cohabitees but had not had sexual intercourse for six months and were living in separate rooms?

   (ii) Wendy had not been physically hurt but Henry was continually pestering her in public and shouting abuse?

   (iii) Wendy and Henry's marriage had been dissolved by decree absolute but they were still living together in the same house and Henry had forced Wendy to have sexual intercouse against her wishes? Wendy has commenced proceedings under the Children Act 1989 for a residence order in respect of Kate.

   (iv) Wendy wants to continue living with Henry but wants an injunction to stop him drinking?

   (v) Henry's violence is caused by epilepsy?

   (vi) Wendy is Henry's mistress and lives in a flat owned by him?
2. Why, if at all, does the law relating to domestic violence need reforming?
3. A Report on domestic violence by Victim Support (July 1992) recommended the creation of a national telephone help-line and renewed efforts to change the dominant police culture which makes it difficult for officers to deal with domestic violence.

   Can you think of any other ways of protecting victims from violence?

Further Reading

Barton, 'The story of marital rape' (1993) LQR 260.

Barton, 'Rape within marriage' (1991) Fam Law 73.

Borkowski, Murch and Walker, *Marital Violence: The Community Response* (1983) Tavistock.

Brazier, 'Personal injury by molestation – an emergent or established tort' (1992) Fam Law 346.

Edwards and Halpern, 'Protection for the victim of domestic violence: time for radical revision' (1991) JSWFL 94.

Fricker, 'Personal molestation or harassment – injunctions in actions based on the law of torts' (1992) Fam Law 158.

Hayes and Williams, 'Domestic violence and occupation of the family home – proposals for reform' (1992) Fam Law 497.

Hester and Radford, 'Domestic violence and arrangements for children in Denmark and Britain' (1992) JSWFL 57.

Law Commission, *Domestic Violence and Occupation of the Family Home* (Law Com No 207).

Saunders, 'Personal violence and public order: the prosecution of "domestic" violence in England and Wales' (1988) International Journal of the Sociology of Law.

Smith, *Domestic Violence: an Overview of the Literature* (1989) Home Office Research Study 107.

Thornton, 'Homelessness through relationship breakdown: the local authorities' response' (1989) JSWL 67.

Torgbor, 'Police intervention in domestic violence – a comparative view' (1989) Fam Law 195.

Williams, 'Ouster orders, property adjustment and council housing' (1988) Fam Law 438.

16 Death of a Family Member

In this chapter we consider the property rights of a spouse on the death of the other spouse and claims by family members and other dependants for financial provision out of the estate of a deceased person under the Inheritance (Provision for Family and Dependants) Act 1975. Appointing a guardian for a child is considered in Chapter 9.

16.1 Property on Death of a Spouse

We have already considered some of the legal consequences of marriage (see Chapter 2), but another important consequence is that marriage affects a spouse's entitlement to property on the death of the other spouse. A spouse, like any other person, can make a will leaving his or her property to whomsoever he or she wishes, but many spouses do not make wills. When a spouse dies not having made a will (i.e. intestate), the surviving spouse under the rules of intestate succession is favourably treated by the law, and in some cases is entitled to the whole of the deceased spouse's estate. Cohabitees by contrast are not so favourably treated (see Chapter 17).

The devolution of a spouse's property on death depends on whether the deceased spouse has made a will.

Where a Spouse Makes a Will

There is complete freedom of testamentary disposition in English law, so that a spouse, like any other person, can make a will leaving his or her property to whomsoever he or she wishes. This is with the exception, however, of any property owned by the spouses as joint tenants, for under the right of survivorship (*jus accrescendi*) any property held on a joint tenancy devolves to the survivor on the other spouse's death, as each joint tenant has an undivided interest in the whole property. This means that the matrimonial home, if owned by the spouses as joint tenants in law and in equity, passes to the surviving spouse. If, on the other hand, the matrimonial home is jointly owned by the spouses as tenants in common in equity the deceased's undivided share forms part of his or her estate and passes according to the will or according to the laws of intestacy.

A will is only valid if it complies with certain requirements contained in the Wills Act 1837, i.e. the person making the will must be aged 18 years or over and the will must be in writing and signed by the testator in the presence of at least two witnesses each of whom must attest and sign the

will or acknowledge the testator's signature (ss.7 and 9 Wills Act 1887). These formal requirements create certainty and prevent fraud.

A will or a disposition in a will made by a testator before marriage is automatically revoked by marriage (except where the marriage is void), unless the will was made in contemplation of marriage, i.e. at the time the will was made the testator was expecting to marry a particular person and intended the will or disposition not to be revoked by marriage (s.18 Wills Act 1837).

On divorce or nullity, in the absence of any contrary intention in a will, the appointment of a former spouse as an executor or trustee does not take effect and any gift to a former spouse lapses, although this is without prejudice to any right of the former spouse to apply under the Inheritance (Provision for Family and Dependants) Act 1975 (s.18A(1) and (2) Wills Act 1837).

Where a Spouse Does Not Make a Will

When a spouse has not made a will (i.e. on intestacy), special rules apply to the devolution of property on death. The law makes generous provision first for the surviving spouse, next for the children (or the issue of any deceased children) and finally for any other relatives, but in this case only if there are neither surviving spouse, children nor issue of children. In many cases, unless the estate is substantial, the surviving spouse inherits the whole of the deceased spouse's estate. After payment of debts and expenses, the personal representatives must distribute the estate according to the rules of intestate succession which are contained in the Administration of Estates Act 1925 (as amended). The following is only an outline of the devolution of property on intestacy as the law is complex.

- *Where a deceased spouse leaves a spouse and issue (i.e. children and remoter issue)*, the surviving spouse takes the personal chattels, a statutory legacy of £75 000 and a life interest in half the residue (i.e. balance) of the estate. The other half is held on the statutory trusts for the children (or, if any child is deceased, for his or her issue) who during their minority can be paid maintenance out of income and/or lump sums by way of advancement out of capital. On reaching majority the issue become entitled to the capital. Under s.47A Administration of Estates Act 1925 the surviving spouse can insist on the personal representatives redeeming his or her life interest by paying the capital value.
- *Where a deceased spouse leaves a spouse and no issue but blood relatives (i.e. parent, brother, sister, or issue of a brother or sister)*, the surviving spouse takes the personal chattels, a statutory legacy of £125 000 and half the residue absolutely. The other half is held on the statutory trusts for the blood relatives.
- *Where a deceased spouse leaves a spouse but no issue and no blood relatives*, the whole estate passes to the surviving spouse absolutely.

- *Where a deceased spouse leaves no surving spouse*, the estate is held on the statutory trusts for the issue (if any), otherwise the blood relatives take in the following order of priority: parents; brothers and sisters; grandparents; uncles and aunts.
- *Where a deceased spouse leaves no surviving spouse, no issue and no blood relatives*, the whole estate goes to the Crown as *bona vacantia* (i.e. property having no owner), although the Crown can make discretionary provision for dependants and others for whom the deceased might reasonably have been expected to provide.

16.2 The Inheritance (Provision for Family and Dependants) Act 1975

Under the Inheritance (Provision for Family and Dependants) Act 1975 the court has jurisdiction to make orders for financial provision for certain family members and dependants out of a deceased's estate where the deceased under his will or under the law of intestacy (or both) has failed to make reasonable financial provision for them. The aim of the Act is:

> 'to remedy, wherever reasonably possible, the injustice of one, who has been put by a deceased person in a position of dependency upon him, being deprived of any financial support, either by accident or by design of the deceased, after his death.' (per Stephenson LJ in *Jelley* v. *Iliffe* [1981] Fam 128 at 137, [1981] 2 All ER 29 at 36)

Who Can Apply?

Application must be made within six months of the date on which probate or letters of administration were taken out, otherwise with leave of the court (s.4). The following persons can apply (s.1(1)):

(a) *The surviving spouse of the deceased* The surviving spouse can apply. A spouse who has been granted a decree absolute of divorce, nullity or judicial separation in the year before death and where no order for financial provision or property adjustment has been made under ss.23 and 24 MCA 1973 can also apply, when the court, if it is just to do so, can treat the marriage as if it had still existed (s.14(1)). A spouse who has been granted a decree of judicial separation can only apply if the decree was in force and separation was continuing at the date of death (s.14(2)). A spouse who in good faith contracted a void marriage with the deceased can also apply, except where the marriage was dissolved or annulled or the applicant contracted a later marriage during the deceased's lifetime (s.25(4)).

(b) *A former spouse of the deceased who has not remarried* Remarriage is deemed to have taken place whether or not a subsequent or previous marriage is void or voidable (s.25(5)). A former spouse who has remarried

can apply as an applicant under s.1(1)(e) if he or she was being wholly or partly maintained by the deceased.

(c) *A child of the deceased* A 'child' includes an illegitimate child, a child of the deceased born posthumously (s.25(1)), and an adopted child (*Williams* v. *Johns* [1988] 2 FLR 475). The applicant need not be in his or her minority to apply, but must at some time have been a child of the deceased. In *Re Coventry dec'd* [1980] Ch 461 a man aged 48 sought an order under the 1975 Act on the death of his father who had died intestate with the result that his mother became entitled to the estate. The Court of Appeal held that an application by a relatively young and able-bodied person in employment who was able to maintain him or herself would rarely succeed. The son's claim was dismissed. He had an income of £40 per week whereas his mother lived on social security benefits.

(d) *Any person (not being a child of the deceased) who in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage* A step-child or foster-child treated by the deceased as a child of the family can apply and the person applying need not be a minor.

(e) *Anyone else who immediately before the deceased's death was being maintained wholly or partly by the deceased* In this category come all other applicants (e.g. a relative, a cohabitee, a friend, a housekeeper), but an applicant only qualifies as being maintained wholly or partly by the deceased under this section if 'the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or in money's worth towards the reasonable needs of that person' (s.1(3)). Because of the words 'otherwise than for full valuable consideration', an applicant who contributes something in return equal to or more than the deceased's substantial financial contribution may fail in his or her application. This section can be criticised for creating a strong disincentive for someone being maintained to do anything in return.

In *Jelley* v. *Iliffe* [1981] Fam 128, [1981] 2 All ER 29 Thomas Jelley applied for reasonable financial provision out of the estate of Mrs Florence Iliffe, with whom he had lived for many years before her death but who had left him nothing in her will. The Court of Appeal had to consider whether the plaintiff had provided full valuable consideration in return for the deceased, Mrs Iliffe, making a substantial contribution in money or money's worth towards his reasonable needs. Stephenson LJ said the court has to balance what she was contributing against what he was contributing and if she contributed more the case should go to trial. If he made a greater or equal contribution, the application should be struck out as there would be no dependency on his part either because they were mutually dependent or because she was dependent on him. On the facts the Court of Appeal held there was a reasonable cause of action and allowed the trial to proceed.

In *Bishop* v. *Plumley* [1991] 1 All ER 236, [1991] 1 WLR 582, [1991] 1 FLR 121 the applicant, Evelyn Bishop, had cohabited for ten years with the deceased, Douglas Plumley, until his death in November 1984. They had pooled their resources and she had devotedly cared for him since he had started suffering from angina in 1981. On his death he left his estate to his son and daughter and made no provision for her. She therefore applied under s.1(1)(e) of the 1975 Act. At first instance the judge held that she had given full consideration as they had pooled their resouces and the contribution she had made by looking after him as he became more ill equalled the benefits he had given to her (i.e. a secure rent-free home). She appealed to the Court of Appeal, where she argued that her contribution by way of love and support should be disregarded in calculating the benefits flowing from her. The beneficiaries' case was that she had given full valuable consideration by reason of her exceptional care. Butler-Sloss LJ said that the court had first to decide whether the deceased was making substantial contribution in money or in money's worth towards the reasonable needs of the applicant and, if so, whether it was made for full valuable contribution by the applicant. It was a question of fact, not of discretion, but the court must look at the problem in the round and apply a common-sense sort of approach avoiding fine balancing distinctions. If there was substantial contribution and not full valuable contribution by the applicant she would qualify as being maintained wholly or in part. Butler-Sloss LJ allowed the appeal, stating that it could not have been Parliament's intention in passing the 1975 Act to put a person who had given extra devoted care and attention to a partner, particularly one in poor health, in a less advantageous position than a less loving and attentive partner.

What is 'Reasonable Financial Provision'?

Under the Act the court can make various orders where the deceased by his will or under the laws of intestacy (or both) failed to make 'reasonable financial provision' for the applicant (s.2(1)). 'Reasonable financial provision' has a wider meaning for a spouse of the deceased than it has for other applicants. Where the applicant is a spouse of the deceased, other than where a decree of judicial separation was in force at the date of death, 'reasonable financial provision' means 'such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance' (s.1(2)(a)). With all other applicants 'reasonable financial provision' only covers maintenance (s.1(2)(b)).

Orders

Under s.2 the court has jurisdiction to make a range of different orders similar to those the court can make in proceedings for ancillary relief on divorce, nullity or judicial separation under Part II MCA 1973. The court

can order out of the deceased's estate one or more of the following: periodical payments; a lump sum (which can be ordered to be paid by instalments); a transfer of property; a settlement of property for the benefit of the applicant; acquisition of property and its transfer to the applicant or for the settlement of the applicant; variation of antenuptial or postnuptial settlements (where the deceased was one of the parties) for the benefit of the surviving spouse, child of the marriage or child treated by the deceased as a child of the family in relation to the marriage.

Where the court cannot make a final order and the applicant is in need of immediate financial assistance, and property forming part of the deceased's net estate can be made available to meet the applicant's needs, the court can make an interim order (s.5). An order for periodical payments can be varied, discharged, suspended or revived (s.6).

A periodical payments order made in favour of a former spouse or a spouse subject to a decree of judicial separation where separation was continuing at death, automatically ceases to have effect on that party's remarriage except in respect of any arrears due under an order at remarriage (s.19(1)).

The Statutory Criteria

When deciding whether or not the deceased made reasonable financial provision for the applicant, and what order, if any, to make, the court must consider criteria laid down in s.3. The court must consider all the circumstances of the case and all interested parties, but special additional criteria must be considered by the court when the applicant is a spouse/former spouse or child/step-child.

In respect of all applicants the court must consider: the actual or potential financial resources and financial needs of the applicant, any other applicant and any beneficiary of the estate; any obligations and responsibilities the deceased had towards any applicant or towards any beneficiary of the estate; the size and nature of the net estate; any physical or mental disability of any applicant or beneficiary; and any other matter including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

With other applicants additional criteria must be considered. Where an applicant is the deceased's spouse or former spouse, the court must also consider the applicant's age, the duration of the marriage, and the applicant's contribution to the welfare of the family of the deceased (including any contribution made by looking after the home or caring for the family). Where the applicant is the deceased's spouse (except where a decree of judicial separation was in force and separation was continuing at the date of death) the court, besides the above criteria, must also consider what provision the spouse might reasonably have expected to receive if on the date of death the marriage had been terminated by decree of divorce rather than by death. In *Re Moody (deceased)* [1992] 2 All ER 524 the testatrix left her estate (i.e. the matrimonial home which she owned

and savings of £1000) to her step-daughter by a previous marriage. Her husband, who had lived with her in the matrimonial home until she went into a nursing home four years before her death, applied under the 1975 Act. Waite J said the court had first to ask whether the estate made reasonable financial provision for the applicant and, if not, then it had to perform a discretionary exercise to determine what financial provision should be made, having regard *inter alia* to the applicant's age, duration of the marriage and the applicant's contribution to the welfare of the family. The court should also consider what the applicant might reasonably have expected to receive had the marriage ended in divorce, not death. The Court of Appeal held that, had the marriage ended in divorce, not death, an order would have been made allowing the husband to stay in the matrimonial home for the rest of his life and a lump sum order made to the wife to give her additional comforts in the nursing home. The Court of Appeal therefore made a similar order under the 1975 Act.

If the applicant is a child or person treated as a child of the deceased's marriage, the court must also consider the manner in which the applicant was or might be expected to be educated or trained. If the applicant is a person treated as a child of the deceased's marriage, the court must also consider whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, its extent, basis and duration, and whether the deceased did so knowing that the applicant was not his or her child, and also consider the liability of any other person to maintain the applicant.

Where the applicant is a person who immediately before the death of the deceased was being maintained wholly or partly by the deceased (i.e. under s.1(1)(e)), the court must also consider the extent, basis and duration of the deceased's responsibility for maintenance.

Restricting an Application under the 1975 Act

On the grant of a decree of divorce, nullity or judicial separation or at any time afterwards either party to the marriage can apply for an order under s.15 of the 1975 Act, which can be made before but cannot take effect until after decree absolute. Under s.15 the court, if it is just to do so, can order that the other party to the marriage may not on the applicant's death apply for an order under the 1975 Act. Section 15 was inserted into the 1975 Act by the Matrimonial and Family Proceedings Act 1984 as part of the 'clean break' policy on divorce, i.e. to terminate financial obligations between spouses on divorce where in all the circumstances it is just to do so (see e.g. the husband's application in *Whiting* v. *Whiting* [1988] 1 WLR 565, [1988] 2 All ER 275, [1988] 2 FLR 189 in Chapter 8).

Other Powers under the 1975 Act

The court has other powers under the 1975 Act. The court can vary or discharge a secured periodical payments order made on divorce or revive

provisions of such an order suspended in variation proceedings under s.31 MCA 1973 (s.16). A maintenance agreement made between the applicant and the deceased providing for payment at death and after death by the deceased to the applicant can be varied or revoked on an application by the applicant or by the personal representatives of the deceased's estate (s.17). The court can set aside a disposition by the deceased made within six months of death and made with the intention of defeating an application for financial provision under the 1975 Act, where the donee did not give full consideration and where the setting aside would facilitate making financial provision for the applicant under the 1975 Act (s.10). Where a contract was made by the deceased without full valuable consideration with the intention of defeating an application for financial provision under the 1975 Act the court can direct the personal representatives not to pass or transfer whole or part of any money or property involved (s.11). To facilitate making payment to an applicant the court can treat a deceased's interest in property under a joint tenancy or a joint interest existing immediately before death as a severable share of the net estate where it is just in all the circumstances to do so and provided the application is made within six months of the date on which a grant of representation to the estate of the deceased's estate was first taken out (s.9). In *Jessop* v. *Jessop* [1992] 1 FLR 591 the deceased was married but had a mistress with whom he had begun to live as man and wife in a house which they owned as joint tenants. He visited and maintained both families but the wife and the mistress knew nothing of each other. On his death he had left the mistress a considerable lump sum and his share in the house passed to his mistress by survivorship. The deceased's wife applied under the 1975 Act for reasonable financial provision, and the decision turned on whether the deceased's severable half-share of the house could be treated as part of his net estate to the extent of £10 000 and whether the mistress should pay that sum to the wife. The Court of Appeal, allowing the wife's appeal, held that it could, as the deceased's estate had not made reasonable provision for the wife and the court had broad discretionary powers under s.9(1) to treat the deceased's severable share as part of the net estate to the extent of £10 000.

Summary

1. A spouse can make a will leaving his or her property on death to whomsoever he or she wishes. A will is only effective if it complies with the formal requirements laid down in the Wills Act 1837, i.e. the will must be in writing and signed by the testator in the presence of two witnesses who must attest the will.
2. Where a spouse does not make a will the property passes under the rules of intestacy laid down in the Administration of Estates Act 1925 (as amended).
3. A will made before marriage, unless made in contemplation of marriage, is revoked by marriage.

4. On divorce or nullity, in the absence of any contrary intention in the will, the appointment of a former spouse as executor or trustee does not take effect and any gift to a former spouse lapses, although a former spouse can apply under the Inheritance (Provision for Family and Dependants) Act 1975.
5. Under the Inheritance (Provision for Family and Dependants) Act 1975 certain family members and dependants can apply for financial relief out of the deceased's estate where the deceased has failed to make reasonable financial provision for them either under the will or under the law of intestacy (or both).

Exercises

1. Ann is aged 38. Her mother died several years ago. Her father has recently died of cancer and has left all his money (£50 000) and his house to Cancer Research.

   Advise Ann, who feels she is entitled to some of her father's estate.
2. Julia and Paul were divorced two months ago and have three grown-up children. Paul has died in a car crash, leaving no will, but leaving a large fortune. The three children say Paul's property is all theirs, but Julia believes she is entitled to something from Paul's estate, particularly as she was married to him for 20 years and brought up the children and looked after the house while he spent time building up his business.

   Advise Julia, taking into account the following different sets of facts:

   (i) Julia and Paul were divorced two months ago but no order for ancillary relief was made.

   (ii) Julia has recently married a wealthy stockbroker.

   (iii) Julia obtained a decree of judicial separation (not of divorce) four months ago but she and Paul were living together before Paul's death.
3. Peter made a will in contemplation of marriage leaving all his property to his wife, Sue. Peter and Sue were divorced last year. Peter has died.

   Advise Sue.

   What difference, if any, would it make if Peter and Sue were divorced, but Paul had left all his property in his will to their children but the will had only been witnessed and attested by one witness?

Further Reading

Buck, 'Distribution on intestacy: the Law Commission Report No 187' (1990) Fam Law 267.

Law Commission, *Distribution on Intestacy* (Report No 187, 1989).

Sachs, 'Inheritance (Provision for Family and Dependants) Act 1975 – an update' (1990) Conv 45.

17 Cohabitation

17.1 Introduction

Although many couples live together as cohabitees (i.e. as husbands and wives in the same household but without going through a ceremony of marriage), English law does not give them the same rights and responsibilities as spouses. This may have certain advantages (e.g. there is no mutual duty of maintenance), but being a cohabitee has several disadvantages. On relationship breakdown cohabitees are often in a particularly vulnerable position, as any property dispute must be determined according to the general rules of property law, for there is no discretionary jurisdiction to adjust the property rights of cohabitees as there is for spouses on divorce, nullity or judicial separation. On the death of a cohabitee who dies intestate the surviving partner is also not treated as favourably as a spouse. Another possible disadvantage of being a cohabitee is that the unmarried father has no automatic parental responsibility for his child, although both parents have maintenance obligations to their children. Cohabitees can, and sometimes do, make cohabitation contracts to regulate their affairs (e.g. to make arrangements about the allocation of property and other issues should their relationship break down), but most do not in practice do so.

With increasing numbers of couples cohabiting and more children being born outside marriage (28 per cent of children born in 1990), perhaps legislation should be enacted to give cohabitees more rights and remedies, although to do so might undermine the institution of marriage. The Scottish Law Commission has recently considered giving greater statutory protection to cohabitees. It has recommended, for example, that parental responsibility should automatically vest in the unmarried father and has endorsed a statutory basis for cohabitation contracts, the status of which is uncertain under English law. The Commission has also recommended the introduction of 'financial adjustment' orders between cohabitees to which English cohabitees have no recourse either during or after cohabitation.

Some countries have introduced legislation giving the courts discretionary powers to adjust the property rights of cohabitees, e.g. New South Wales, Australia, under the De Facto Relationships Act 1984. Perhaps it is time that England and Wales did likewise.

17.2 Property Rights

(a) Ownership

Cohabitees during their relationship and on relationship breakdown are subject to the general law of property (see also Chapter 4). A number of

statutes which apply to spouses (e.g. s.17 Married Women's Property Act 1882, Married Women's Property Act 1964, s.37 Matrimonial Proceedings and Property Act 1970) do not apply to cohabitees, although from time to time the question of whether statutory reforms should introduce a new property regime for cohabitees has been discussed, particularly as the judges are unwilling to accord them rights. The case of *Burns* v. *Burns* [1984] Ch 317, [1984] 1 All ER 244 provides a good illustration of the disadvantages of being a cohabitee rather than a spouse on relationship breakdown. In *Burns* the female cohabitee (she had taken her cohabitee's name), after a long relationship in which she had brought up the children and looked after the home, failed to gain a beneficial interest in the quasi-matrimonial home owned by her partner. Although, the Court of Appeal expressed considerable sympathy for Mrs Burns, it held that it was the responsibility of Parliament and not the judges to change the law relating to property rights of cohabitees.

Ownership of personal and real property of cohabitees is determined by the general law of contract and trusts, so that the cohabitee who contracts to buy property owns that property, the cohabitee whose name the bank account is in owns the money in that account, and the cohabitee whose name is on the conveyance owns the property conveyed, unless in each case a contrary intention is proved, e.g. that the property should be jointly owned. Many cohabitees do in fact own property jointly, i.e. as joint tenants or as tenants in common.

Most property disputes between cohabitees are in respect of the quasi-matrimonial home and it may be necessary for the non-owning cohabitee to establish an interest on relationship breakdown or to defeat the claims of a third party to possession of the house (e.g. mortgagee, trustee in bankruptcy, prospective purchaser). To establish an interest the non-owning cohabitee can apply to the court for a declaration that he or she has a beneficial interest under a resulting or constructive trust in equity (see Chapter 4 where the relevant rules are explained in detail).

In *H* v. *M (Property: Beneficial Interest)* [1992] 1 FLR 229 (also reported as *Hammond* v. *Mitchell* [1991] 1 WLR 1127) a cohabitee successfully claimed a beneficial interest in property under a constructive trust. In *H* v. *M* a second-hand car dealer and a bunny girl met in Epping Forest and subsequently lived together as cohabitees and had two children. They acquired substantial assets including a bungalow where they lived but which was in the man's sole name. In 1989 their relationship broke down and the woman claimed *inter alia* that she was entitled to a beneficial interest in the bungalow under a constructive trust. In the Family Division Waite J, applying *Lloyd's Bank plc* v. *Rosset* [1990] 2 WLR 867, [1990] 2 FLR 155, held she was entitled to a half share of the bungalow under a constructive trust. There was evidence of a common intention that she should have an interest as he had told her it would be prudent to put the bungalow in his name for tax reasons, and shortly after the purchase had told her not to worry about the future because when they were married the bungalow would be half hers. She had acted to her

detriment on the basis of that common intention by encouraging and supporting him in his commercial ventures. Any non-owning cohabitee wishing to establish an interest under a trust must therefore find evidence which might lead the court to hold there was an common intention to share the property despite the defendant being the sole owner.

There are also procedural problems with disputes between cohabitees. In *H* v. *M*, for instance, Mr H had started proceedings in the Queen's Bench Division and Miss M in the Family Division and the hearing had taken 19 days and cost £125 000. Cohabitees have no procedure for determining disputes equivalent to that of spouses under s.17 Married Women's Property Act 1882, although engaged couples can use the s.17 procedure, provided an application is made within three years of the termination of an engagement (see Chapters 2 and 4). Waite J in *H* v. *M* made certain procedural recommendations intended to save time and reduce costs (cf. the *Evans* v. *Evans* guidelines in Chapter 8). His Lordship said that disputed issues must be identified early on so that the quickest and most effective forum and procedures could be chosen. Discovery orders should also be made early on and strictly enforced. The parties should be encouraged to do their best to settle disputes about chattels, on the understanding that in ordinary cases the court would divide the chattels equally between them. Pleadings or the initial affidavit, his Lordship went on to say, should include as much detail as possible of the language used and the circumstances of the case to prevent vagueness by the claimant and to inform the respondent of the strength of the plaintiff's case.

Where there is no evidence of an express agreement or intention that the non-owning cohabitee is to have a share in equity, the non-owning cohabitee must argue there is an implied agreement or intention that he or she is to have an interest in equity. However, as Lord Bridge stated *per curiam* in *Rosset*, establishing such an interest is likely to be very difficult unless there is some evidence of financial contribution to the property. Lord Bridge emphasised that proof that a property is bought as a joint venture is insufficient on its own to establish a beneficial interest. Similarly, improvements to property by a non-owing cohabitee will not on their own give that cohabitee an interest under a constructive trust. In *Thomas* v. *Fuller-Brown* [1988] 1 FLR 237 the male cohabitee, who had made substantial alterations to the female cohabitee's house, failed to establish a beneficial interest under a constructive trust, although in that case there was some dispute about whether they were engaged to each other.

As an alternative to a constructive trust, a non-owning cohabitee could claim an interest under a resulting trust, provided he or she has made a financial contribution to the purchase of property (see Lord Bridge in *Lloyd's Bank plc* v. *Rosset*, discussed in Chapter 4).

Where both cohabitees have rights of ownership a dispute as to whether the house should be sold can be settled by an application for an order for sale under s.30 Law of Property Act 1925 (see 4.5).

(b) Occupation of the Home

Cohabitees have no statutory rights of occupation of the quasi-matrimonial home, unlike spouses who have rights under the Matrimonial Homes Act 1983. A cohabitee's right of occupation therefore depends on whether he or she possesses a right of ownership (which usually carries with it a right of occupation) or a right to occupy it under a tenancy. A non-owning cohabitee wishing to establish a right of occupation must argue that he or she has a right of occupation by virtue of ownership under a trust or a right of occupation by virtue of an implied contractual licence (*Tanner* v. *Tanner* [1975] 1 WLR 1346; *Coombes* v. *Smith* [1986] 1 WLR 808, [1987] 1 FLR 352 or a licence by estoppel (*Maharaj* v. *Chand* [1986] AC 898, [1986] 3 All ER 107).

A cohabitee can apply for an injunction excluding the other cohabitee from the home and permitting the applicant to enter the home when there has been domestic violence and a cohabitee also has rights under the Housing Act 1985 (see Chapter 15).

(c) Property Rights on Death

A cohabitee, like any other person, has complete freedom to leave his or her property on death to whomsoever he or she wishes provided the will complies with the formalities laid down in the Wills Act 1837 (see Chapter 16). A cohabitee can therefore make a will leaving property to the other cohabitee and/or children. On intestacy the position is different, for the surviving cohabitee, unlike a surviving spouse, is not entitled to the other partner's property as the rules of intestacy to do not apply to cohabitees, although their children are entitled to succeed to property.

A surviving cohabitee who was financially dependent on a deceased partner can, however, apply under the Inheritance (Provision for Family and Dependants) Act 1975 for reasonable financial provision out of his or her partner's estate (see Chapter 16), or seek a declaration as to a beneficial interest in property to prevent that property from going to the deceased's children and family either under the will or under the rules of intestacy (or both).

There has been some concern about the possibility of injustice caused to cohabitees by the rules of intestacy and in its report, *Distribution on Intestacy* (Law Com No 187, 1989), the Law Commission examined the law of intestacy and recommended reforms in respect of cohabitees but these have not been implemented. Because the rules of intestacy make no provision for the surviving cohabitee, it is advisable for cohabitees to make wills.

17.3 Financial Provision

One of the main differences between spouses and cohabitees is that cohabitees have no maintenance obligation to each other. Consequently,

cohabitees have no statutory jurisdiction available in which they can apply for maintenance for themselves, unlike spouses who can apply during marriage and on divorce for financial provision from the other spouse (see Chapters 4 and 8).

With children the position is different as both unmarried parents have obligations to provide maintenance for their children. A cohabitee can therefore apply under s.15 and Schedule 1 Children Act 1989 for financial provision for a child (periodical payments, lump sum or property order), although most applications for child maintenance must now be made to the Child Support Agency under the Child Support Act 1991 (see Chapter 11). In some cases it may be necessary to prove the child's paternity.

Cohabitees are also entitled to welfare benefits from the State (e.g. Income Support, Family Credit, Child Benefit etc.) and, if a claim has been made for Income Support, the other cohabitee may be liable to make payment under the 'liable relative' procedure (see Chapter 4).

17.4 Children

Married parents have automatic parental responsibility for their children, but with cohabitees only the unmarried mother has parental responsibility (s.2(1) Children Act 1989 and see Chapter 9), although an unmarried father can acquire parental responsibility under s.4 Children Act 1989 either by applying to the court for an order giving him parental responsibility or by making a parental responsibility agreement with the mother on a prescribed form (s.4(1)). In *Re C (Minors) (Parental Rights)* [1992] FLR 1 application was made by an unmarried father for a parental rights order under s.4 Family Law Reform Act 1987 (the predecessor to s.4 Children Act 1989). Mustill LJ in the Court of Appeal said that the discretion under s.4 was cast in the widest terms and there were no statutory factors to consider, but the court might be unwilling to grant an order where there were problems of enforceability. His Lordship stated that the court had to consider *inter alia* whether the father had shown sufficient commitment to the children to justify giving him a legal status equivalent to that of a married parent, due attention being paid to the fact that a number of parental rights would be conferred on him by the order. Even if an unmarried father is to have no contact with his child, a parental responsibility order is an important consideration as by virtue of an order the father acquires important rights, e.g. to consent to adoption and to marriage (see *Re H (A Minor) (Parental Responsibility)* [1993] 1 FLR 484, where despite there being no order for contact between father and child, the father was nevertheless entitled to a parental responsibility order).

However, the unmarried father's parental responsibility, unlike the unmarried mother's, is not necessarily permanent and can be terminated by the court on application made by any person having parental responsibility for the child, or the child himself, provided the court grants

leave for the child to apply, which it can only do if the child has sufficient understanding to make the proposed application (s.4(3) and (4)). When deciding whether to grant or terminate parental responsibility, the child's welfare is the court's paramount consideration, but the statutory checklist in s.1(3) does not apply (s.1(4)). The court must apply the no-delay principle (s.1(2)) and the no-order presumption (s.1(5)) (see Chapter 9).

Either cohabitee is a 'parent' for the purposes of the Children Act (whether or not the father has parental responsibility), so that a cohabitee is a parent for the purpose of care, supervision and emergency proceedings under Parts IV and V of the Act (see Chapter 13) and can also apply for any s.8 order (see Chapter 9). If a residence order is granted in favour of a father without parental responsibility, the court must at the same time make an order giving him parental responsibility (s.12(1)). Under s.5 Children Act 1989 an unmarried parent with parental responsibility can appoint a guardian, although any parent (with or without parental responsibility) can apply to the court to be appointed a guardian. This means that an unmarried father without parental reponsibility cannot appoint a guardian but can apply to the court to be appointed and can also be appointed guardian privately, whereupon he acquires parental responsibility (see Chapter 9).

In the context of adoption the unmarried father without parental responsibility is not a parent for the purposes of the Adoption Act 1976 (s.72 AA 1976). Consequently only the consent of the unmarried mother and the unmarried father with parental responsibility is needed for the child's adoption, although the court when considering whether to make an order freeing a child for adoption must be satisfied that the unmarried father without parental responsibility is not intending to apply for a parental responsibility order or residence order under the Children Act 1989 or, if he did, the application would be likely to be refused (see Chapter 14).

17.5 **Protection against Violence**

Cohabitees can use the criminal law and the civil law to provide them and their children with protection against violence (see Chapter 15). Like spouses, cohabitees who suffer domestic violence can apply to the county court under the Domestic Violence and Matrimonial Proceedings Act 1976 for injunctions relating to violence and occupation of the home, provided they are living in the same household as man and wife (s.1(2)). They cannot, however, apply to the magistrates' court under the Domestic Proceedings and Magistrates' Courts Act 1978. Cohabitees can also apply for injunctions in other proceedings, e.g. in tort proceedings, or in family proceedings under the Children Act 1989 where their children need protecting. Such an application may be necessary where cohabitees do not come within the ambit of the Domestic Violence and Matrimonial Proceedings Act 1976, i.e. where they are no longer living together in the

same household as husband and wife. The county court and the High Court can under their inherent jurisdictions grant injunctions in favour of any applicant, including a cohabitee, provided a legal or equitable right exists requiring injunctive protection. Cohabitees, however, unlike spouses, do not have the advantage of being able to apply for injunctions in matrimonial proceedings, e.g. in proceedings for divorce, nullity or judicial separation. They also do not have the advantage of having statutory rights of occupation which spouses have under the Matrimonial Homes Act 1983.

Where application is made for an ouster order (in whatever proceedings), the court will not grant such an order easily, as ouster orders are considered to be draconian orders, which can only be granted at the court's discretion after the court has considered the criteria laid down in s.1(3) Matrimonial Homes Act 1983, which apply even if an application is brought by a cohabitee despite the fact that the 1983 Act as a whole does not apply to cohabitees.

17.6 Cohabitation Contracts

Although there are no reported cases on cohabitation contracts, solicitors are sometimes asked to draft them and, provided there is an intention to create legal relations, a valid agreement and no vitiating factor such as duress, misrepresentation or non-disclosure, the contract is likely to be binding on the parties. The courts today are unlikely to hold such contracts void on grounds of public policy (i.e. because they undermine marriage), but they are likely to be subject to close scrutiny by the courts if challenged. A couple who are contemplating cohabiting or who are cohabiting should consider drawing up a contract making provision, for instance, about ownership of the house, house contents and other possessions, and savings and investments. The contract could also make provision in respect of occupation of the home and arrangements for children should the relationship break down. It is important to make the terms of the contract clear and also for both parties to seek legal advice, otherwise a court might decide that the contract should be set aside for duress, inequality of bargaining power, misrepresentation or failure to make full and frank disclosure.

Summary

1. Cohabitation is common today, but cohabitees have fewer rights than spouses, particularly in respect of property ownership on relationship breakdown or when their partner dies.
2. Property rights of cohabitees are determined by the general law of contract and of trusts; on relationship breakdown the court has no discretion to adjust

property ownership as it has on divorce. A non-owner cohabitee wishing to establish an interest in property (e.g. the quasi-matrimonial home) must do so under a resulting or constructive trust (see Chapter 4).

3. Cohabitees have no statutory rights of occupation. Occupation depends on ownership or whether the cohabitee can establish a right of occupation under a contract (express or implied) or under an estoppel.
4. Cohabitees are free to make wills leaving property to whomsover they wish, including their partner and family, but on intestacy cohabitees (not their children) have no right to succeed to property. Cohabitees can apply under the Inheritance (Provision for Family and Dependants) Act 1975 for financial provision out of the estate of a deceased partner (see Chapter 16).
5. Cohabitees have no obligation to maintain their partner but have an obligation to maintain their children. Cohabitees are entitled to State benefits in some circumstances and may be 'liable relatives' for the purpose of Income Support (see Chapter 5). Cohabitees can apply to the Child Support Agency and for financial relief for their children from the courts under the Children Act 1989 (see Chapter 11).
6. Only the unmarried mother has automatic parental responsibility for the children, but the unmarried father can acquire responsibility either by agreement with the mother on a prescribed form or by court order (s.43 Children Act 1989) (see Chapter 9).
7. Cohabitees have rights and remedies under the criminal and civil law for protection against domestic violence (see Chapter 16).
8. Cohabitees can make cohabitation contracts.

Exercises

1. How do the rights and obligations of cohabitees differ from those of spouses?
2. Do you think cohabitees should be given greater statutory protection?
3. James and Helen lived together for 10 years but James has died recently having left all his property (including the house) to Greenpeace. James was the sole owner of the house but Helen wants to remain there with their two young children. She has not made any financial contribution to the property, although she did decorate the children's bedrooms, and pay for holidays, food and clothing. When they moved in 10 years ago James said, 'Wow, this house is all ours!'.

   Advise Helen.
4. Julia and Paul are unmarried.

   Advise Paul who wishes to acquire parental responsibility for their three-year-old son, George.

   What would the position be if George was 14 and did not like his father?

Further Reading

Barton, 'Cohabitation and Scottish law: another country moves ahead?' (1990) Fam Law 405.

Barton. 'Pre-nuptial and cohabitation contracts: in at the birth' (1992) Fam Law 47.

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Appendix
Contracting States to the European and Hague Conventions on International Child Abduction

The European Convention
Austria
Belgium
Cyprus
Denmark
France
Germany
The Republic of Ireland
Luxembourg
Netherlands
Norway
Portugal
Spain
Sweden
Switzerland
United Kingdom

The Hague Convention
Argentina
Australia
Austria
Belize
Burkina Faso
Canada
Denmark
Ecuador
France
Germany
Hungary
The Republic of Ireland
Israel
Luxembourg
Mexico
Monaco
Netherlands
New Zealand
Norway
Poland
Portugal
Romania
Spain
Sweden
Switzerland

United Kingdom
United States of America
Yugoslavia

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