The Law Commission

Working Paper No. 91

Family Law
Review of Child Law:
Guardianship

LONDON
HER MAJESTY'S STATIONERY OFFICE
£5 net

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This consultative document, completed for publication on 31 July 1985, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission. The Law Commission would be grateful for comments on the consultative document before 31 December 1985.

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First published 1985

ISBN 0 11 730172 8

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Summary

This consultative paper is the first in a series about the law relating to the upbringing of children.

It examines how the law currently provides, by means of guardianship, for third parties to act in place of parents who have died and, having proposed ways in which the existing provisions might be improved, suggests that guardianship might be equally useful in other circumstances, for example, where a sole parent wishes voluntarily to share his or her responsibilities with another, such as a step-parent or the child's father, or as an order which the court might make in exceptional cases to deprive a parent of powers and responsibilities in favour of a third party.

Successive papers will consider the custody and wardship jurisdictions. The aim is to produce a more comprehensive, coherent and intelligible system to provide for the needs of children while they are growing up.

THE LAW COMMISSION
WORKING PAPER NO. 91

FAMILY LAW
REVIEW OF CHILD LAW
GUARDIANSHIP

PART I

INTRODUCTION

The subject matter of the paper

1.1 In this paper we consider the institution of legal guardianship over children who are under the age of majority.[1] We are not concerned with statutes, such as the Mental Health Act 1983, which employ the term "guardianship" for purposes unconnected with the upbringing of children.[2] Nor are we particularly concerned with statutes, including the Education Act 1944,[3] which do deal with the responsibilities of adults towards children but give an extended definition to the term "guardian", often in order to impose duties upon people who have actual care of a child as well as upon those who have a legal relationship with him.

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1 Currently 18: Family Law Reform Act 1969, s.1.

2 For example, the Ancient Monuments and Archaeological Areas Act 1979 contains power to place an ancient monument under guardianship.

3 Section 114(1).

1.2 Legal guardianship has been described[4] as a formula used to attribute powers over the upbringing of a child to a particular individual or individuals. As such, it can be said to ante-date the legal concept of parenthood, but in many circumstances a parent is also a guardian. More commonly, however, the term is used to describe those who are placed in loco parentis to a child after one or both of his parents have died. Such people may be appointed either by testamentary instrument of the parent who has died or by order of a court. In this paper we shall consider both parental and non-parental guardianship, but we shall be mainly concerned with legal responsibility for the upbringing of a child following the death of one or both parents.

The context of the paper: public and private law

1.3 Our work on this subject falls under Item XlX (Family Law) of our Second Programme, which recommends "that a comprehensive examination of family law be undertaken with a view to its systematic reform and eventual codification".[5] In our Nineteenth Annual Report we announced that we had initiated a review of the private law relating to the upbringing of children.[6] The ultimate aim of this review is to bring together into a single comprehensive code the many concepts and procedures used in private law to allocate responsibility for children amongst

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4 Cretney, Principles of Family Law, 4th ed. (1984), p.296.

5 (1968) Law Com. No. 14, p.7.

6 (1985) Law Com. No. 140, para.2.28.

individuals. At the same time, the Department of Health and Social Security has established an inter-departmental Working Party to review the law relating to the child care responsibilities of local authorities.[7] The Commission's family law team is assisting in that review, but the two exercises are separate. Nevertheless, there are points (such as the possible committal to local authority care of a child involved in a dispute between individuals) where the two systems interact and other points (including the care of orphans) where each provides its own solution. In our work on the private law we shall take account of the proposals emerging from the review of the child care law and look towards an entire system of child law which is as simple, clear and consistent as possible.

1.4 Our aims are two. On a technical level we wish to rationalise and simplify a system which contains many gaps, inconsistencies and unnecessary complexities. Secondly, however, we wish to ensure that the law itself accords as best it can with the first and paramount consideration of the welfare of the children involved. We have decided that the best way to conduct such a review is by a series of consultation papers on particular jurisdictions, possibly culminating in a single report. Because of the overlap between the various jurisdictions, it will not be possible to gain a complete picture until all have been reviewed. Hence it may be necessary to reconsider various proposals in the light of consultation and subsequent work and on some matters it will be

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7 Hansard (H.C.), 19 July 1984, Vol. 64, Written Answers, Cols. 325-326.

impossible to form clear views until the review is completed.

1.5 As this paper is the first in the series, it is necessary to give a brief account of the various concepts and procedures with which we shall be concerned. This will also serve to set the present law of guardianship in its wider context. Relevant statutory provisions are reproduced in Appendix A.

Parental powers and responsibilities

1.6 It is common to characterise the legal relationship of parent and child in terms of "parental rights and duties". Not only is the expression much used both generally and in legislation[8] but it also forms the basis of other concepts such as "legal custody".[9] There are three main principles in the legal relationship between parent and child:

(i) Married parents are equally responsible for their child's upbringing;[10] where

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8 For example, Guardianship of Minors Act 1971, s.11A; Children Act 1975, ss.85 and 86; Domestic Proceedings and Magistrates' Courts Act 1978, s.8(4) and Child Care Act 1980, s.3(1).

9 Children Act 1975, s.86: see para. 1.19 below.

10 Guardianship Act 1973, s.1.

parents are unmarried, the mother alone is responsible.[11]

(ii) Where the parental rights and duties are held jointly they may be exercised by one alone unless the other signifies disapproval;[12] disputes can be referred to the courts.[13]

(iii) Whilst the exercise of parental rights and duties can be delegated to other people, the rights and duties themselves cannot be surrendered or transferred without legal process, save that married parents may do so between one another during a period of separation.[14]

1.7 As we have pointed out in an earlier report, "unless and until a court order is obtained, a person with parental rights is legally empowered to take action in respect of a child in exercise of those rights".[15] Hence parental rights and duties are

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11 Guardianship Act 1973, s.1(7) and Children Act 1975, s.85(7).

12 Guardianship Act 1973, s.1 and Children Act 1975, s.85(3).

13 Guardianship Act 1973, s.1(3).

14 Guardianship Act 1973, s.1(2) and Children Act 1975, s.85(2).

15 Illegitimacy (1982), Law Com. No. 118, para. 4.19.

important, mainly to the children themselves in indicating the extent of their parents' powers and responsibilities,[16] but also to third parties in indicating what action may or may not be taken in relation to a child without reference to the parents' wishes[17] or resorting to a court.[18]

1.8 There is little modern judicial discussion of what the "rights" of a parent are and the law on this subject is confusing and unclear.[19] Nor is statute any more helpful. The Interpretation Act 1978 provides[20] that the term "the parental rights and duties" is to be construed in accordance with Part IV of the Children Act 1975, which in turn provides the following "explanation" of the concept:

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16 For example, in seeking consent to marry or to obtain contraceptive treatment (Gillick v. West Norfolk and Wisbech Area Health Authority [1985] 2 W.L.R. 413).

17 Gillick, (ibid.) in which the Court of Appeal, in effect, held that a doctor cannot give a child under 16 contraceptive or abortion advice and treatment without the parent's knowledge and consent.

18 See, for example, Re B (A Minor) (Wardship: Medical Treatment) [1981] 1 W.L.R. 1421 where the court authorised a life saving operation to be performed on a Down's syndrome baby following the intervention of the local authority.

19 The same view was expressed in Law Com. No. 118 (op. cit.), paras. 4.17 and 4.18.

20 Section 5 and Sched. 1.

> "...all the rights and duties which by law the mother and father have in relation to a legitimate child and his property: and references to a parental right or duty shall be construed accordingly and shall include a right of access and any other element included in a right or duty".[21]

1.9 In this exercise, we are considering, not so much the precise content of parental "rights and duties", as the machinery provided by the law for allocating and transferring them. There may well be a need to clarify which particular aspects of the parent-child relationship are affected by the procedure in question - whether, for example, the powers of guardians should be identical to those of parents and if not, in what ways they should differ - but for the time being we regard a comprehensive review of all the possible components of that relationship as impracticable. To attempt to provide a complete list[22] of all a parent's rights and duties would clearly be a large task involving consideration of many difficult and controversial areas. It would require consideration of the inter-relationship between the child's own legal status and capacities and the powers of parents, not only to act on behalf of children who

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21 Section 85(1).

22 A number of writers have compiled lists of what are probably the basic rights and duties, for example, Cretney, Principles of Family Law 4th ed. (1984) pp. 300-308; Bromley, Family Law 6th ed. (1981) Ch.9; Bevan and Parry, Children Act 1975 (1979) paras. 209-230 and Freeman, "What Rights and Duties Do Parents Have?" (1980) 144 J.P. 380.

are too young to act for themselves, but also to direct or control the actions of older children. We doubt whether the list could ever be comprehensive, and if it were, this might be undesirable in the interests of flexibility and capacity to adapt to changes in social circumstances.

1.10 Nevertheless, we are aware of the difficulties of clarifying and simplifying the concepts used in the transfer of parental responsibility without attempting some description of the building blocks with which those concepts are constructed. There may also be some specific points upon which greater clarity would be helpful. We have become aware in the course of this project, for example, of how little is known about the extent of parental powers to control their children's property and finances. We would, therefore, very much welcome views upon whether the Commission should, as part of the current review, attempt either to list or define the content of at least the principal parental "rights and duties" or to examine particular aspects of them. We shall in any event have to consider the position in the light of the decision of the House of Lords in Gillick v. West Norfolk and Wisbech Area Health Authority.[23]

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23 (Court of Appeal) [1985] 2 W.L.R. 413. This has been appealed (a decision is pending) and although specifically about a parent's right to know about and consent to contraceptive and abortion advice and treatment in relation to his child it concerns the more general question of the nature and extent of parental "rights" and their relationship with the principle that the welfare of the child is paramount.

1.11 One thing about which we are certain, however, is that "to talk of parental 'rights' is not only inaccurate as a matter of juristic analysis but also a misleading use of ordinary language."[24] In the great majority of cases in which there are legal proceedings concerning the upbringing of a child, the child's own welfare will be the first and paramount consideration.[25] The parent will not, therefore, be permitted to insist upon action which is contrary to that welfare or to resist action which will promote it.[26] Further, to the extent that the law enables parents to decide how to bring up their children without interference from others or from the state, it does so principally because this is a necessary part of the parents' responsibility for that upbringing and in order thus to promote the welfare of their children.[27] Hence we have said that the connotations of the word "rights" are unfortunate and that it might well be more appropriate to talk of parental powers, authority or responsibilities.[28] In this series of

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24 Law Com. No. 118 (op. cit.), para. 4.18 referring to Eekelaar, "What are Parental Rights?" (1973) 89 L.Q.R. 210. See also Hall, "The Waning of Parental Rights"[1972B] C.L.J. 248 and Dickens, "The Modern Function and Limits of Parental Rights" (1981) 97 L.Q.R. 462.

25 Guardianship of Minors Act 1971, s.1.

26 See, for example, Re D (A Minor)(Wardship: Sterilisation) [1976] Fam. 185.

27 See Gillick (op. cit.).

28 Law Com. No. 118 (op. cit.), para 4.19 and Gillick v. West Norfolk and Wisbech Area Health Authority [1983] 3 W.L.R. 859, 369 per Woolf J.

papers, therefore, we intend, wherever possible, to use the terms "powers and responsibilities" in preference to "rights and duties".

The transfer of parental powers and responsibilities

1.12 Following the initial allocation of responsibility for a new-born child by operation of law, there are several ways in which that allocation may be altered. Two of them, namely adoption and guardianship, involve the appointment of people who will replace a natural parent and thus hold all or virtually all the parental powers and responsibilities. The appointment will often be uncontentious, because the parent replaced has either died or wishes to relinquish the relationship. Guardianship, however, is unique in that the appointment of a guardian does not in itself deprive any parent of his legal powers and responsibilities although it may mean that they have to be shared.[29] Furthermore, the task of a guardian is not to provide a different parent or family for the child but, so far as possible, to stand in the shoes of the parent who has died. Other procedures, including the wardship jurisdiction of the High Court and the various statutory jurisdictions to determine custody or legal custody, involve the dividing up of responsibility between parents or other parties and are more frequently contentious. Parental powers and responsibilities may also be transferred to local authorities by means of care orders or resolutions

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29 Where parental responsibility is shared disputes may, for example, arise between the guardian appointed and a surviving parent: see paras. 3.66-3.81.

passed by the authority. Other people, such as relatives or foster parents, may acquire certain responsibilities because they are actually caring for a child, but do not thereby acquire any parental rights. We shall be dealing in detail with the development and present law of guardianship in Part II of this paper but an outline of the other procedures is given here.

(a) Adoption

1.13 Adoption is the virtually complete and irrevocable transfer of a child from one legal family to another. Not only does it vest "parental rights and duties" in the adopters[30] and extinguish those of the natural parents while the child is growing up; it also constitutes the child a member of his adoptive family for all time and for almost all legal purposes including succession and inheritance.[31] Adoption can only be effected by court order. The agreement of each parent or guardian is required, unless it can be dispensed with on defined grounds or the child has previously been freed for adoption, for which parental consent is again necessary unless it can be dispensed with.[32] A child may be placed with a non-relative with a view to adoption only by an approved adoption agency or by order of the High Court.[33] Prospective adopters

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30 Children Act 1975, s.8 [Adoption Act 1976, s.12].

31 Children Act 1975, Sched. 1 [Adoption Act 1976, ss.39 and 42].

32 Children Act 1975, ss.12 and 14 [Adoption Act 1976, ss.16 and 18].

33 Children Act 1975, s.28 [Adoption Act 1976, s.11].

are subject to careful assessment of their suitability and the child must have lived with them for a while before the order is made.[34] Sole or joint applications may be made, but joint applicants must be married to one another[35] while sole applicants must effectively be single.[36]

1.14 The law of adoption was reviewed by a departmental committee which reported in 1972.[37] Most of the changes recommended by that report were enacted in 1975, but some have only recently been brought into force[38] and others are still awaiting implementation.[39] Because of this recent consideration of the subject it is not intended to include the law of adoption either in this review or in the D.H.S.S. review of child care law.

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34 Children Act 1975, s.9 [Adoption Act 1976, s.13].

35 Children Act 1975, s.10 [Adoption Act 1976, s.14].

36 Children Act 1975, s.11 [Adoption Act 1976, s.15].

37 Report of the Departmental Committee on the Adoption of Children, Cmnd. 5107, chaired, until November 1971, by Sir William Houghton (the "Houghton Committee").

38 For example, the procedure for freeing a child for adoption only came into force on 27 May 1984: The Children Act 1975 and Adoption Act 1976 (Commencement) Order 1983 (S.1 No. 1946).

39 For example, sections 1 and 2 of the Children Act 1975 which relate to a comprehensive adoption service.

(b) Custody in divorce and other matrimonial causes

1.15 Custody differs from adoption in that it has no effect upon wider family relationships, may be accompanied by orders dealing with access or financial provision, and is always subject to later variation or revocation. The majority of custody orders are made in the course of a divorce.[40] A court in proceedings for divorce, nullity or judicial separation may make such order as it sees fit for the "custody and education" of any child of the family under 18, whether or not it also grants the decree.[41] A "child of the family" covers not only a child of both parties to the marriage, but also any other child who has been treated by them both as a member of their family.[42] Custody orders may also be made by a divorce court which grants financial provision to a spouse.[43]

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40 In divorce proceedings in 1982 (the 1983 statistics do not contain separate figures for custody applications) there were 1,620 applications relating to the custody of children in the Principal Registry of the Family Division and 51,086 applications in county courts and district registries, as compared with 2,140 wardship summonses (1983); 39 applications under the Guardianship of Minors Acts 1971-1973 in the High Court, 1,735 in the county court and 12,000 in the magistrates' courts (1983); and about 10,300 applications under the Domestic Proceedings and Magistrates' Courts Act 1978 (1983): Judicial Statistics Annual Report 1983, (1984) Cmnd. 9370, Tables 4. 14, 4.2 and 4.4 respectively and Home Office Statistical Bulletin (Issue L14/84), para 3.

41 Matrimonial Causes Act 1973, s.42(1).

42 Ibid., s.52(1).

43 Ibid., s.42(2).

1.16 There is no statutory definition of the term "custody" for this purpose.[44] The word has been used both in the limited sense of power to control the child's movements[45] and, at the other extreme, as a synonym for guardianship[46] embodying virtually all the powers and responsibilities of a parent. In practice, divorce courts may now divide up almost all of those powers and responsibilities, including any relating to the child's property, in whatever way they see fit. Thus they may grant sole custody to one parent, with or without access to the other parent; or they may grant joint custody to the parents, with day-to-day "care and control" to one of them, so that the other will retain a voice in the more strategic decisions about the child's future; formerly they might have granted sole custody to one parent with care and control to the other, although such orders are no longer thought proper;[47] alternatively, they may simply deal with day-to-day care and control, leaving the wider powers involved in custody to the existing law; an order may even provide for the parents to share the actual care of the child as well as the more strategic responsibilities. However, it has been said that "the parent is always entitled, whatever his custodial status, to know and be consulted about the future

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44 C.f. matrimonial and guardianship proceedings: see paras.1.18-1.19.

45 Hewer v. Bryant [1970] 1 Q.B. 357, 372, per Sachs L.J. and Todd v. Davison [1972] A.C. 392.

46 Hewer v. Bryant (ibid.) p. 373, per Sachs L.J.

47 Dipper v. Dipper [1981] Fam. 31.

education of his children and other major matters"[48] so that the precise effect of even a sole custody order is not entirely clear.

1.17 Divorce court custody orders usually affect only the child and the parties to the marriage in question, one or even both of whom may not be parents of the child. The order will only affect the rights of a parent who is not a party to the marriage if the other parent is such a party.[49] However, any person may seek leave to intervene in the case in order to seek custody or access, and some people may intervene without leave.[50]

(c) Legal custody in matrimonial proceedings in magistrates' courts and in proceedings under the Guardianship of Minors Act.

1.18 Magistrates' courts hearing applications by husband or wife for financial relief under the Domestic Proceedings and Magistrates' Courts Act 1978 may make provision for the "legal custody" of any child of the family under 18, whether or not they also make an order for a spouse.[51] Where no matrimonial relief is sought, or where mother and father are not married to one another, mother or father may apply for "legal custody" under section 9 of the Guardianship of Minors Act 1971.

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48 Ibid., per Cumming-Bruce L.J. at p.48.

49 Matrimonial Causes Act 1973, s.42(5).

50 Matrimonial Causes Rules 1977, r.92(3).

51 Domestic Proceedings and Magistrates' Courts Act 1978, s.8(2).

There is also power, in sections 10 and 11 of that Act, to make orders for legal custody in disputes between guardians and surviving parents, to which we shall refer later in this paper.[52]

1.19 "Legal custody" means "so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent)"[53]. It does not, therefore, include any powers over the child's property. Further, under these provisions, the court cannot grant "legal custody" to more than one person;[54] however, if it grants legal custody to one spouse or parent, it may order that the other retains specified rights other than actual custody, sharing them with the custodial parent.[55]

1.20 In matrimonial proceedings, one or even both of the parties may not be the child's parent[56] and the court cannot make an order unless steps have been taken to notify the parents.[57] The court may make an order in favour of a parent who is not a party to the marriage in question or, at present, in favour of a

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52 See paras 2.20 and 3.82.

53 Children Act 1975, s.86.

54 Domestic Proceedings and Magistrates' Courts Act 1978, s.8(4) and Guardianship of Minors Act 1971, s.11A.

55 Ibid.

56 Domestic Proceedings and Magistrates' Courts Act 1978, s.88(1) which defines "child of the family".

57 Ibid., s.12(2).

third party. However, when the custodianship provisions of the Children Act 1975 (mentioned in the next paragraph) are brought into force, a court which wishes to grant legal custody to a third party in proceedings under either the 1971 or the 1978 Act must treat the case as if the third party had applied, and was qualified to apply, for custodianship under that Act.[58]

(d) Custodianship under the Children Act 1975

1.21 Under provisions which are due to come into force in December 1985,[59] certain people with whom a child is living may apply for "legal custody".[60] A relative or step-parent[61] who has the consent of a person with legal custody (or where there is no such person) may apply after the child has been with him for three months; any other person with consent (or, again where there is no person to give it) may apply after a total of twelve months; where a person with legal custody does not consent the child must have lived with

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58 Domestic Proceedings and Magistrates' Courts Act 1978, s.8(3); Guardianship of Minors Act 1971, s.9(5) and Children Act 1975, s.37(3) and (4); there is no equivalent provision in sections 10 and 11 of the 1971 Act.

59 Hansard (H.C.) 13 May 1985, Vol. 79, Written Answers, Col.36.

60 Children Act 1975, s.33.

61 Step-parents of children involved in divorce or other matrimonial causes are usually excluded, because they may apply under the divorce court's powers discussed at paras. 1.15 and 1.17 above; ibid., s.33(5) and (8).

the applicant for a total of three years.[62] Prospective custodians are subject to assessment by the local authority and the court may also call for a welfare officer's report[63] but there are no statutory qualifications beyond the period of care.

1.22 Custodianship is designed to give people who are caring for a child a degree of legal security, falling short of the complete and final transfer involved in adoption. As with the other custody jurisdictions, the court may make orders relating to access and financial provision,[64] and the parents retain such of their powers and responsibilities as are not contained in legal custody. However, the order is unusual in that it may be revoked, not only on the application of a parent or guardian, but also on the application of the custodian himself or any local authority.[65] If, on revocation, there is nobody with legal custody or the court thinks it undesirable for the person who would otherwise have legal custody to acquire it, the child must be committed to the care of a local authority.[66] These provisions reflect the fact that many of the children to whom the provisions are likely to relate may previously have been in the care of a local authority and there may be no question of them returning to their parents.

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62 Ibid., ss.33(3) and (5).

63 Ibid., ss.39 and 40.

64 Ibid., s.34.

65 Ibid., s.35.

66 Ibid., s.36.

(e) Wardship and other inherent powers of the High Court

1.23 Wardship is an ancient jurisdiction, formerly exercised by the courts of equity and based upon a special protective role which the Crown assumes towards all children. The proceedings are begun in the High Court[67] and can be initiated by anyone with a sufficient interest. Parents may invoke the aid of the court in handling a difficult older child or to settle some dispute between themselves.[68] Others may invoke it, either in order to obtain care of the child[69] or to challenge the parents' decision about some particular aspect of his upbringing.[70] Once a child has been made a ward of court, the court takes over ultimate responsibility for him and must be consulted about every important step which is taken in relation to him. Technically, the court acquires "custody", in the wider sense of the term, but may delegate the exercise of

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67 The Matrimonial and Family Proceedings Act 1984, s.38(2)(b) will enable the High Court, either of its own motion or on the application of any of the parties to the proceedings, to transfer wardship proceedings to a county court. It is, however, not yet in force.

68 For example, where custody is in issue between estranged parents but divorce proceedings have not yet been started and one parent threatens to take the child abroad.

69 For example, foster parents or prospective adopters who wish to retain custody of a child against his natural parent's wishes.

70 As, for example, in Re D (A Minor) (Wardship: Sterilisation) [1976] Fam. 185 where an educational psychologist, concerned by a mother's decision to sterilise an 11 year old girl, made the girl a ward of court.

some of the parental powers and responsibilities to individuals or to local authorities. An individual who is looking after the child will be granted "care and control" rather than custody. Although there are some statutory provisions giving specific powers to the court,[71] for the most part its powers derive from the inherent jurisdiction and have no precise limits. The court is thus usually able to make whatever order seems most in accordance with the first and paramount consideration of the child's welfare.

1.24 The writ of habeas corpus was formerly used in order to enforce the custodial rights of parents and may still be used to recover children from people who have no legal claim to them.[72] However, it is not thought an appropriate means of resolving custody disputes.[73] The power of the High Court to grant declarations[74] or injunctions[75] may also be used in connection with disputes about children.

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71 Family Law Reform Act 1969, ss.6 and 7 and Administration of Justice Act 1982, s.50.

72 Re A.B. (An Infant) [1954] 2 Q.B. 385, where a local authority recovered custody from foster-parents. See also Re G. (Wardship) (Jurisdiction: Power of Arrest) (1982) 4 F.L.R. 538 where habeas corpus appears to have been used by a mother to recover a child from his father.

73 Re K. (A Minor) (1978) 122 S.J. 626.

74 As in Gillick (op. cit.).

75 Re T (Orse. H.) [1963] Ch. 238.

(f) Public law

1.25 In adoption, wardship and all save two[76] of the custodial jurisdictions mentioned earlier, the court has power, where there are exceptional circumstances making it impracticable or undesirable to entrust the child to any individual, to commit him to the care of a local authority. More frequently, local authorities acquire parental powers and duties by means of a care order made in criminal proceedings against a child under 17 or because such a child has been found to be in need of care or control in a number of defined circumstances.[77] Local authorities also have a duty to provide care, without resort to any legal process, for certain children under 17, including those who have no parent or guardian, where the intervention of the local authority is necessary in the interests of their welfare.[78] Once a child has been received into care in this way, it is open to the authority to pass a resolution assuming parental rights over him, and one of the grounds is that his parents are dead and he has no guardian or custodian.[79]

1.26 Whether or not parental rights have been assumed by the authority, a child in their care may well be boarded out with foster parents. The foster

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76 Guardianship of Minors Act 1971, ss.10 and 11; para. 1.18.

77 Children and Young Persons Act 1969, ss.1 and 7(7)(a) and Child Care Act 1980, s.10(2).

78 Child Care Act 1980, s.2(1).

79 Ibid., s.3(1)(a).

parents may sometimes be related to the child, but reception into care enables the authority to pay them a boarding-out allowance.[80] They will, however, be subject to regular visits by the authority's social workers and the child may be removed from them at anytime.[81] This will change if they are appointed custodians, but the authority then has a discretion to continue making payments.[82]

1.27 Where an orphan is not received into care, those who are looking after him may be entitled to a non-contributory social security guardian's allowance[83] even if they have not been appointed legal guardians. However, if they are neither relatives nor legal guardians, they will usually come within the provisions of the Foster Children Act 1980 and thus be under a duty to notify,[84] and subject to supervision by, the local authority.[85]

Guardianship: the first paper in the review

1.28 Several factors have encouraged us to make guardianship the first in our planned series of papers on private law. Historically, it is the oldest of the

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80 Ibid., s.21(1)(a).

81 Boarding-out of Children Regulations 1955 (S.I. No. 1377), Regs. 9, 21 and 28.

82 Children Act 1975, s.34 (6) (as amended).

83 Social Security Act 1975, s.38.

84 Foster Children Act 1980, s.5.

85 Ibid., ss.3,8, 9 and 10.

concepts discussed and the way in which it has developed helps to explain the origins of wardship, custody and the present status of parents. Much of the law relating to guardianship still depends upon the common law; there have been few recent reported cases and reliance has to be placed upon nineteenth century decisions, many of which were concerned with religious upbringing. It is not, therefore, always easy to discover exactly what the current law is. Indeed, complaints about the complexity of the subject have a long history in themselves.[86] Statutory intervention has been piece-meal[87] and must in any event be reviewed in accordance with our overall objective of a single, comprehensive code governing all the present procedures. Finally, it seems desirable in the interests of consistency, that the public and private law relating to orphans should both be under consideration at the same time.[88]

The factual background

1.29 We know very little about the number of legal guardianships at present. We do not even know the numbers of children who are potentially subject to it,

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86 Ranging from Hargrave in Coke upon Littleton, 19th ed. (1832), 88b,n.12: "guardianship ..... must create the most distressing confusion in the mind of students", to the joint Law Commissions' Report on Custody of Children, Jurisdiction and Enforcement within the United Kingdom(1985) Law Com. No. 138, Scot. Law Com. No. 91, paras. 2.48 - 2.52.

87 As will be seen from Part II, below.

88 See para. 1.3.

having lost one or both parents by death. Given the increased expectation of life generally, the risks of this have been diminishing. The number of lone widows with dependent children recorded in the 1981 census for England and Wales was 102,800.[89] The number of one parent families headed by widows has decreased both in absolute terms and as a proportion of the total. Lone motherhood is now more likely to result from divorce, marital separation or illegitimacy than from the father's death.[90] The same appears to be true of lone fatherhood,[91] although the total number of lone fathers of whatever marital status is less than that of lone widows.[92] These statistics do not tell us the total number of children involved, nor do they include those whose surviving parent has found a new partner.[93] On any view, however, the total number of children who lose one parent by death before reaching eighteen will be smaller than the number whose parents divorce or separate. It is clear that the great majority of such children remain with their surviving parents. In 1982 only some 2,300 out of the 93,200 children in local authority care were recorded as being there because one

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89 Household and Family Composition, England and Wales, CEN 81 HFC, Tables 31-33.

90 OPCS monitor (GHS 84/1), Table 5.

91 Census 1981, Household and Family Composition, England and Wales (CEN 81 HFC), Tables 31-33.

92 OPCS Monitor, (op. cit.).

93 As to which see Haskey, "Widowhood, widowerhood and remarriage" (1982) Population Trends 30, p.15.

parent had died and the other was unable to provide care.[94]

1.30 The number of children for whom guardian's allowance is paid may give us a more reliable indication of the number who have lost both parents, although it also covers cases where only one parent is dead but the other is untraceable or serving a prison sentence. These fell from 4,531 in 1961 to 3,441 in 1981 and 2,621 in 1984.[95] It appears that very few orphans are now cared for by the major voluntary organisations and in 1982 there were only some 900 children in the care of local authorities because they had no parent or guardian.[96]

1.31 We suspect that most orphaned children are cared for by relatives, friends, or step-parents without any formal appointment of guardians. Less than one third of the people who died during 1983 left a will which was admitted to probate.[97] Although we understand that people who make a will while their

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94 Report under the Child Care Act 1980: Children in Care in England and Wales, March 1982, Appendix A1.

95 These figures relate to England and Wales only and were obtained from the Department of Health and Social Security. The figures for Great Britain can be found in Social Security Statistics 1984, Table 9.30.

96 Children in Care in England and Wales, March 1982, (op. cit.), Appendix A1.

97 Judicial Statistics, Annual Report 1983, Table 4.1 and Population Trends 39 (1985) Table 9.

children are young are often advised to appoint guardians, few of them will die before the children have grown up. We suspect also that making a will is often left until rather later in life, although it is possible that more wills, together with appointments, will be made by divorcing parents. We understand that it is standard practice amongst some solicitors to advise their clients to do so when the decree absolute is obtained. The numbers of guardians appointed by courts are so low as not to be recorded separately in the judicial statistics.[98]

1.32 Likewise, we know only a little about the practice of guardianship - who is appointed, whether it is normally anticipated that the guardian will care for the child, and whether testators are primarily concerned with the child's upbringing rather than with any property he may have. We have derived some valuable information from a small survey of solicitors practising in the North-East, carried out on our behalf by Mrs J.A. Priest, lecturer in law at the University of Durham, and her account of her findings is reproduced as Appendix B. We hope to be able to discover more in the course of our review. We would very much welcome further information and comment upon the present practice, as well as on the perceived need for the institution itself.

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98 Judicial Statistics (Ibid.), Table 4.4 records only the total of all applications issued and orders made under the Guardianship of Minors Act 1971 and Guardianship Act 1973. The Home Office statistical bulletin on domestic proceedings in magistrates' courts is similarly compiled.

Structure of the paper

1.33 Part II of the paper gives a brief statement of the existing law on guardianship together with its historical development. In Part III we examine the current concepts of both parental and non-parental guardianship, consider the need for them and seek views on a number of ways in which the present provisions might be improved. At the end of this Part, we summarise the main issues raised upon which we would like views. Then, in Part IV, we explore the possibility of extending the concept of guardianship to enable parental responsibility to be transferred or shared in a variety of circumstances while one or both parents are still alive. The ideas discussed in this part of the paper are only tentative; they do not represent even provisional proposals, but are matters on which we would be very grateful for comments.

PART II

THE PRESENT LAW OF GUARDIANSHIP AND ITS HISTORICAL BACKGROUND

Introduction

2.1 This Part of the paper contains a brief summary of the history and present law of guardianship. Full expositions can be found in various legal textbooks.[1]

2.2 The history of the law of guardianship, particularly in its later stages, reflects two of the most important (but slightly divergent) trends in family law. The first is the gradual equalisation of the parental status of a mother and father of a legitimate child. In the second and simultaneous development, however, the parental rights of both mother and father have become less important as the

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1 For the history see, for example, Coke upon Littleton (Co. Litt.) (Hargrave's notes) 19th ed. (1832), Chambers on Infancy (1842), Macpherson's Law Relating to Infants (1842), Simpson, Infants, 3rd ed. (1909) and 4th ed. (1926) and Holdsworth, History of English Law, 7th ed. (1966). For the present law (and history) see, for example, Cretney, Principles of Family Law, 4th ed. (1984), Bromley, Family Law, 6th ed. (1981) and Halsbury's Laws, 4th ed. vol. 24, paras. 536-540.

welfare of the child has risen to be the first and paramount consideration in any litigated issue relating to the custody, upbringing or administration of the property of a child.

2.3 The law of guardianship has developed piecemeal to meet various different requirements through the ages and "no part of our ... law was more disjointed and incomplete".[2] It is a product of common law, equity and statute and although the statutory provisions have been consolidated in the Guardianship of Minors Act 1971 that Act has since been substantially amended and such parts of the common law as are still relevant remain uncertain.

Types of guardian

2.4 The origin of the law of guardianship is deeply rooted in the feudal system of land tenure. Early guardians were, however, largely concerned with the property of a child heir. The different forms of land holding gave rise to different types of guardian. For example, the lord was entitled as guardian in chivalry where land was held in knight service, whereas the next of kin[3] was guardian in socage of an infant

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2 Pollock and Maitland, The History of English Law, 2nd ed. (1968) vol. II, p. 443.

3 From whichever side of the family was unable to inherit the property: thus if the land came from the father the mother might well become guardian in socage. See Co. Litt. 88b.

who inherited land held by socage tenure. There were no general rules as to the persons to be appointed guardians of an infant or as to the rights, powers and responsibilities which were involved.[4] The law of guardianship remained in this rudimentary state until the institution of feudalism disappeared. Thereafter the Court of Chancery developed the concept on behalf of the Crown as parens patriae in relation to infants who needed protection. Guardians were also appointed by the ecclesiastical courts and by the custom of the manor, city or borough. Statute first recognised the appointment of guardians in 1557 and began to provide for it more generally in 1660.

2.5 Thus 19th century commentators were able to distinguish as many as thirteen different kinds of guardians.[5] For present purposes however only three main categories are relevant:

(a) Natural or parental guardians

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4 Holdsworth, (op. cit.) vol. III, p. 511.

5 Pollock and Maitland, (op. cit.), p. 444 and Simpson, 3rd ed., (op. cit.). The latter, at p.183, lists the following: "(1) guardian in chivalry; (2) in socage; (3) by nature; (4) by nurture; (5) by election of the infant; (6) by Statute 4 & 5Ph. & M.c. 8 [see para. 2.6 and n.9]; (7) by Statute 12 Car. II. c.24 [the Tenures Abolition Act 1660]; (8) by Statute 49 and 50 Vict. c.27 [the Guardianship of Infants Act 1886]; (9) by custom; (10) by appointment of the High Court, exercising the jurisdiction formerly exercised by the Ecclesiastical Courts; (11) by appointment of the High Court exercising the jurisdiction of the Court of Chancery; (12) foreign guardians; (13) guardian ad litem".

(b) Non-parental guardians appointed by

(i) testamentary instrument, or

(ii) by the court.[6]

These will be considered in turn. The relevant statutory provisions are set out in Appendix A.

A. Natural or parental guardianship

2.6 The law originally recognised two forms of parental guardianship, by nature and by nurture.[7] Strictly it appears that the former was limited to an heir apparent; it lasted until the age of twenty one and, although the father's claim took priority, the mother and remoter ancestors might also be entitled; in the nineteenth century it was disputed[8] whether this ancient form of guardianship had survived the Tenures Abolition Act 1660. The father, or after his death the mother, was guardian by nurture of all his legitimate children under fourteen, but this only applied if there was no other guardian and for the

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6 This paper is not concerned with guardians ad litem who can be appointed to act on a child's behalf in litigation. Such a guardian is not concerned with the child's general upbringing.

7 See Co. Litt. 88b and Hargrave's notes 12 and 13 thereon; Macpherson, (op. cit.), Ch.IV.

8 On the ground that the father's claim to guardianship of the person of the infant heir to land held in knight service arose because the lord was guardian in chivalry of the estate: see Macpherson, (op. cit.), Ch. IV, section I.

purposes of custody and education not the guardianship of property. In 1557, statute[9] appears to have extended the father's (or failing him the mother's) guardianship of the person of a female child up to the age of sixteen, by creating an offence of abduction.

(i) **The position of the father**

2.7 Whatever the limits of these ancient doctrines, it is clear that, in the eighteenth[10] and nineteenth[11] centuries, the father was recognised as the "natural" guardian of all his legitimate children throughout their infancy. It may be that the Court of Chancery was thereby applying the ancient terms of guardianship by nature and by nurture to a new concept of parenthood,[12] but the effect was that a father alone had control over the person, education, religion and marriage of his children, until they reached the age of discretion and in some respects up to the age of twenty one. The common law courts would enforce his

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9 4 & 5 Ph. & M.c.8; see Simpson, (op. cit.), Ch. 11, section 3; Co. Litt. 88b, and Hargrave's note 14 thereon.

10 Blackstone, Commentaries, Book 1, ch.16, p.452.

11 Macpherson, (op. cit.), p.61.

12 Blackstone, (op. cit.), ch.17, p.460; Simpson (op. cit.), p.106.

custody up to the age of discretion[13] virtually without question, against strangers and mother alike. The Court of Chancery would usually enforce this and other rights, but might intervene against the father in serious cases of misconduct, unfitness or inability.[14] The father's guardianship of his child was, however, regarded as inviolable. His rights, therefore, were never completely abrogated; instead, the court effected his removal by appointing some other person to "act as" guardian in his place[15] and by restraining the father from interfering. In theory the High Court still has such powers of intervention, as part of its inherent jurisdiction,[16] but there have been no recent cases in which they have been exercised. The father alone had the right to appoint a testamentary guardian to act after his death.[17]

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13 In R.v. Howes (1860) 3 El. & El. 332, said to be 14 for boys and (because of the statutory offence of abduction) 16 for girls.

14 See Simpson, (op. cit.), Ch. VIII; also Pettit, "Parental Control and Guardianship", in Graveson and Crane, A Century of Family Law (1957).

15 Re Marquis of Salisbury and Ecclesiastical Commissioners (1876) 2 Ch. D. 29. See also Wellesley v. Wellesley (1828) 2 Bligh N.S. P.C.124; Re England (1830) 1 R & M 499 and Mathew v. Brise (1851) 14 Beav. 341.

16 This is presumably not restricted by the court's statutory powers to remove guardians: see para. 2.19.

17 See para. 2.11.

(ii) The position of the mother

2.8 While the father of a legitimate child was alive, the mother had no claims as "natural" guardian[18] and thus was in no better position than a stranger. If there was no other guardian after the father's death, she was at least guardian for nurture up to the age of fourteen, and some courts might recognise her authority throughout infancy.[19] The Custody of Infants Act 1839 first enabled a mother to apply during the father's lifetime for access to their children and custody of those under the age of seven, provided that she had not been found guilty of adultery. This proviso was repealed in 1873, and her right to apply for custody extended to children under sixteen,[20] and again in 1886 to all under twenty-one.[21] The 1873 Act also provided that custody or control could be given to a mother in a separation deed between her and the father, unless this would not be for the child's benefit.[22] In 1925 the mother was given "like powers" to those of the father to apply to the court in any matter affecting

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18 In the rare event of the infant succeeding to a legal estate in land before his father's death she might perhaps be guardian in socage but there is no indication that this prevailed over the father's natural rights.

19 See Macpherson, (op. cit.), p.65-66.

20 Custody of Infants Act 1873, s.1.

21 Guardianship of Infants Act 1886, s.5.

22 Previously such an agreement would have been void as being contrary to public policy unless the father proved himself to be absolutely unfitted to be a guardian: Swift v. Swift (1865) 34 Beav. 266.

the child.[23] However, in any proceedings relating to a child's custody, upbringing or the administration of the property, the child's welfare was, and still is, prescribed as the first and paramount consideration for the court.[24] The 1925 Act deliberately stopped short of making the mother joint guardian and in the absence of litigation between them the father remained sole guardian. Finally, in 1973[25] the mother and father of a legitimate child were given equal rights and authority in relation to the custody, upbringing and property of their children, the mother's rights and authority being defined as the same as the law allows to a father. Nowhere, however, does statute describe a mother as a "guardian" in the sense of equating her position to the natural guardianship of the father. Indeed, the idea of making parents joint guardians of their children was deliberately abandoned in 1973, because of the potential difficulty of obtaining the consent of both if, for example, the child needed an urgent operation. Instead, mothers and fathers were given equal but separate rights and authority[26] exercisable by one without the other, subject to some sign of disapproval.[27]

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23 Guardianship of Infants Act 1925, s.2.

24 Ibid., s.1 and Guardianship of Minors Act 1971, s.1, which replaces the 1925 Act provision.

25 Guardianship Act 1973, s.1.

26 This formula was the "simple solution" proposed by the Conservative Party Research Committee in their Report, "Fair shares for the fair sex" (1969).

27 See Children Act 1975, s.85(3). It would appear that this is now also the position for all guardians.

(iii) The surviving parent as guardian

2.9 The notion of a parent becoming a child's guardian on the death of the other was first contained in statute in the Guardianship of Infants Act 1886. This provided that a mother should be the guardian of her children on the death of the father, either alone or jointly with any other guardians appointed by the father. Allowing the mother to take over in this way was part of the process of according a mother legal status in relation to her children. The father, of course, continued to be guardian of his children after the mother's death and this was given statutory recognition in the Guardianship of Infants Act 1925. The corresponding positions of mother and father are now set out in section 3 of the 1971 Act. As between the parents of a legitimate child these provisions operate irrespective of any custody orders which may exist. However, under a power first introduced in 1886, if a divorce court has declared a parent unfit to have custody, that parent is no longer entitled as of right to guardianship or custody on the death of the other.[28]

(iv) Illegitimate children

2.10 The common law made no provision for the guardianship of an illegitimate child. The mother was eventually recognised as having the right, subject to court order, to the custody of her child[29] and now has

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28 Matrimonial Causes Act 1973, s.42(3) and (4).

29 Barnado v. McHugh [1891] A.C. 388.

the "parental rights and duties exclusively,"[30] but not guardianship. If the natural father is entitled to legal custody of the child by virtue of an order under section 9 of the 1971 Act, he is included in the definition of "father" for the purposes of section 3 of the Act,[31] and will thus become guardian on the death of the mother. The mother is never explicitly defined as a guardian by the Act. However, if a father with custody has validly appointed a guardian on his death the mother would by implication be in the same position as any other surviving parent acting with a testamentary guardian appointed by the deceased.[32]

B. Non-parental guardianship

(i) Testamentary guardians

2.11 This form of guardianship, which enables a parent to provide for someone to take his place should he die before his children attain their majority, can be traced back to the Tenures Abolition Act 1660.[33] This Act abolished tenure by knight service and converted it into socage tenure. Since guardianship

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30 Children Act 1975, s.85(7).

31 Section 14(3) of the 1971 Act.

32 See para. 2.9.

33 If not earlier, to c.8 (1557) 4 & 5 Ph. & M. This Act, in creating the offence of taking a girl under 16 out of the possession of her parents or guardian, described a guardian as "such other person ... to whom the father ... by his last will and testament or by any other act in his lifetime, hath or shall appoint ... the order, keeping, education or governance of such maid or woman child...." (s.3).

of a knight service tenant had continued until the age of twenty-one and the socage tenure guardianship ended at fourteen, the new arrangements might leave children without a guardian between the ages of fourteen and twenty-one. The Act, therefore, conferred a power on the father[34] of any legitimate[35] child who was under twenty-one and unmarried, to make provision by deed or will for the custody and tuition of such children up to the age of twenty-one. The position of such a guardian was described as equivalent to a "guardian in common socage in law."[36]

2.12 The Guardianship of Infants Act 1886 gave mothers a restricted power to appoint a testamentary guardian. Such an appointment would only take effect, however, when both the mother and father were dead. If the mother pre-deceased the father she only had power to nominate a guardian to act jointly with the father on her death. This was subject to confirmation by the court and was dependent on its finding the father unfit to be sole guardian. In the Guardianship of Infants Act 1925 both parents were given equal powers of testamentary appointment, subject to the veto of the surviving parent. These provisions were consolidated by the 1971 Act.

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34 Ex. p. Edwards (1747) 3 Atk. 519: the father alone had this power. As against a guardian so appointed a mother could not act (Eyre v. Countess of Shaftsbury (1722) 2 P. Wms. 103). Only the court could control such a guardian.

35 Sleeman v. Wilson (1871) L.R. 13 Eq. 36.

36 Section 9 of the Tenures Abolition Act 1660: see discussion of guardian's powers at paras. 2.22 - 2.25.

2.13 Thus both a father[37] and a mother[38] may now by deed or will appoint a guardian or guardians for their children[39] to act after his or her death.[40] A testamentary guardian may disclaim his appointment[41] but he cannot assign[42] or resign[43] it. Having been accepted, guardianship lasts[44] until the child reaches the age of eighteen, or such earlier time as may be specified. It may, however, possibly come to an end

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37 This includes the father of an illegitimate child only if immediately before his death (but not necessarily at the time of the appointment) he is entitled to legal custody of the child by virtue of an order under section 9 of the 1971 Act: section 14(3) of the 1971 Act. See also Report on Illegitimacy (1982), Law Com. No. 118, paras. 7.40 - 7.41.

38 Including the mother of an illegitimate child: Re A., S. v. A (1940) 164 L.T. 230.

39 Including those not yet born or conceived: Halsbury, (op. cit.), para. 531, n.7.

40 Section 4(1) and (2) of the 1971 Act.

41 Ex. p. Champney (1762) 1 Dick. 360; O'Keefe v. Casey (1803) 1 Sch. & Lef. 106.

42 Bedell v. Constable (1668) Vaugh. 177; Mellish v. De Costa (1737) 2 Atk. 14. The instrument of appointment may, however authorise a guardian to appoint a replacement for a guardian who dies: Re Parnell (1872) L.R. 11 P. & D. 379.

43 Spencer v. Earl of Chesterfield (1752) Amb. 146; Re Grays (Minors) (1891) 27 L.R. Ir. 609.

44 See para. 2.19 below for the court's power to remove a guardian.

earlier if the child marries below that age[45] but the Acts[46] contain no restriction on appointing a guardian for a married minor. A testamentary guardian acts jointly with the surviving parent or any guardian appointed by that parent on his death.[47]

2.14 It is, however, open to a surviving parent to object to a testamentary guardian[48] (seemingly at any time during the guardianship) and thus prevent him from acting. In such a case the guardian may apply to the court. A guardian may also apply to the court[49] (again, seemingly at any time during the guardianship) if he considers the surviving mother or father unfit to have custody of the child. In each case the court may either:

(a) refuse to make an order (in which case the mother or father remains as sole

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45 This used to be the rule in the case of a girl but not a boy: Mendes v. Mendes (1748) 1 Ves. Sen. 89. The Acts, however, do not specifically limit guardianship in this way but as a guardian's consent would probably be necessary (see para. 2.30 below) for such a marriage it is unlikely that a court would thereafter permit any interference with the ward: Bromley, (op. cit.), p. 373.

46 Unlike the Tenures Abolition Act 1660: see para. 2.11.

47 Section 4(3) and (5) of the 1971 Act.

48 Section 4(4) of the 1971 Act.

49 Ibid. There is no evidence from the law reports of either of these applications having been made.

guardian and the testamentary guardianship is seemingly revoked); or

(b) make an order that the person appointed as testamentary guardian shall either act jointly with the surviving parent or alone; in the event of the latter order the parent is, in effect, deprived of his guardianship of the child.

2.15 Where there is a surviving parent, then irrespective of whether the guardian acts alone because the parent has been excluded[50] or they act jointly,[51] the court has power to make such order as it sees fit as to the child's custody. It may also make orders concerning the parent's right of access to the child and for the parent to make financial provision (by way of both lump sum and periodical payments) for the child.

(ii) Guardians appointed by the court

2.16 The court's authority to appoint guardians comes mainly from statutory provisions although the

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50 Section 10 of the 1971 Act.

51 Section 11 of the 1971 Act.

High Court still has a residual inherent jurisdiction.[52]

(a) The court's inherent jurisdiction to appoint guardians

This is distinct from the court's jurisdiction in wardship. Wardship developed alongside the court's guardianship jurisdiction, also on the basis of the Crown's role as parens patriae. It was originally exercised by the Court of Chancery and now, like guardianship, is a matter for the Family Division of the High Court. The main distinctions are that a child in respect of whom the court entertains a guardianship application need not be a ward of court,[53] nor will the appointment of a guardian make the child a ward;[54] whereas where a child is made a ward the court is, in effect, the child's guardian and takes over ultimate responsibility for him. A specific order to this effect has been required since 1949.[55] There was some speculation that the court's

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52 The guardianship legislation does not "restrict or affect the jurisdiction of the High Court to appoint or remove guardians or otherwise in respect of minors": section 17(1) of the 1971 Act; or to appoint a guardian of a minor's estate: section 7(2) of the 1973 Act. See also Children Act 1975, section 107(1).

53 Re McGrath [1893] 1 Ch. 143.

54 Law Reform (Miscellaneous Provisions) Act 1949, s.9(1).

55 Ibid.

inherent jurisdiction had thereby ceased[56] but the later view is that this is not the case.[57] The scope of the court's inherent jurisdiction is not clear but there is old authority to the effect that the court can appoint guardians where a child has none[58] (if only for a limited purpose[59]) or where no testamentary guardian has been appointed (even where the father is still alive) if it would be for the child's benefit.[60]

(b) Statutory provisions empowering a court to appoint guardians

2.17 The court[61] may appoint a guardian for a child up to the age of eighteen:

(i) If the court thinks fit, on the application of a prospective guardian,

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56 Re E (An Infant) [1956] 1 Ch. 23.

57 Re N (Infants) [1967] 1 Ch. 512, L. v. L. [1969] P. 25 and Re F. [1973] Fam. 198.

58 As, for example, in Ex p. Wheeler (1809) 16 Ves.Jun 266 and Ex p. Mountfort (1809) 15 Ves. 445.

59 E.g. to consent to the child's marriage: Re Woolscombe (1816) 1 Madd. 213, in the days when in the absence of a parent or guardian able or alive to consent, a petition to the Lord Chancellor was necessary to obtain the required consent for marriage under the age of 21.

60 Johnstone v. Beattie (1843) 10 Cl. & Fin. 42.

61 I.e. the High Court, county court or a magistrates' court, as specified in section 15 of the 1971 Act.

where a minor has no parent[62] or guardian of the person or other person having parental rights with respect to him.[63] Such an appointment can be made notwithstanding the fact that a local authority has, by resolution, assumed parental rights and duties in relation to a child under section 3 of the Child Care Act 1980 and in this event the appointment will terminate the resolution.[64]

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62 "Parent" for the purposes of appointment by the court only includes the father of an illegitimate child if he has a current order for legal custody in his favour: section 14 of the 1971 Act.

63 Section 5(1) of the 1971 Act. This provision was first introduced by the Children Act 1948, s.50, inserting a new provision in section 2 of the Guardianship of Infants Act 1925.

64 Section 5(2) of the 1971 Act and section 5(2)(c) of the Child Care Act 1980 (originally introduced by the Children and Young Persons Act 1963, s.50). Such an appointment does not seem to have the same effect on a care order (made under section 1 of the Children and Young Persons Act 1969 and other statutory provisions), nor does a testamentary appointment override a local authority resolution.

(ii) Where one parent dies without having appointed a guardian.[65] Such a guardian acts jointly with a surviving parent[66] and any guardian subsequently appointed by that parent.[67] The court can apparently appoint someone other than the applicant.

(iii) Where one parent dies and the guardian whom he or she had appointed to act jointly with the surviving parent is dead or refuses to act.[68] The effects are the same as in (ii) above.

(iv) Where the High Court has removed a guardian from office[69] and "deems it to be for the welfare of the minor" to appoint another in his place.[70] This statutory power to appoint following the removal of a guardian does not apply where a testamentary guardian is, in

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65 Section 3(1) and (2) of the 1971 Act. See Re H. (An Infant) [1959] 1 W.L.R. 1163 (the only reported case of a guardian appointed by the court) in which the child's sister was appointed by a magistrates' court joint guardian with the father, although the appointment was set aside on appeal.

66 Ibid.

67 Section 4(6) of the 1971 Act.

68 Section 3(1) and (2) of the 1971 Act.

69 See para. 2.19.

70 Section 6 of the 1971 Act.

effect, removed following an objection by a surviving parent.[71]

2.18 It appears that these powers are very rarely exercised and the case law at present indicates that there are few circumstances where an appointment will be appropriate. If both parents are dead and an application is made because members of the family disagree about where the children should live, it has been said[72] that an application under the 1971 Act is of little help, because the court cannot settle the custody of the child.[73] However, where one parent survives and the Act gives express power to determine custody,[74] the court should not appoint a guardian who applies for that purpose, unless it will be for the welfare of the child to have joint guardians.[75]

Power to remove guardians

2.19 As with the power to appoint guardians the power of removal is based both on statutory provision and the court's inherent jurisdiction.[76] In both cases only the High Court has power to remove a guardian. The inherent power would appear to apply to

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71 See paras. 2.14 above and 2.19.

72 Re N. (Minors) (Parental Rights) [1974] Fam. 40,44 per Arnold J.

73 Sed quaere: see para. 2.20.

74 See para 2.15.

75 Re H. (An Infant) [1959] 1 W.L.R. 1163.

76 Section 17(1) of the 1971 Act and n.16 above.

testamentary guardians,[77] guardians whom the court has itself appointed[78], and, to a limited extent, to natural parental guardians.[79] The statutory power to remove guardians[80] applies to "testamentary guardians[81] or any guardian appointed or acting by the virtue of [the 1971] Act", including the surviving parent guardian. There is also, in effect, power to remove a testamentary guardian to whom the surviving parent objects, by refusing to make any order should the guardian challenge the objection by applying to the court.[82] It seems likely that a court would discharge a guardian on his own application[83] but in all cases the court will only remove a guardian if it is in the interests of the child to do so.[84] Attention has been drawn, in previous papers,[85] to the fact that the court's statutory power to deprive a parent of

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77 See for example, Re McGrath [1893] 1 Ch. 143.

78 See para. 2.16 and the cases cited.

79 See para. 2.7.

80 Section 6 of the 1971 Act.

81 To this extent, the inherent jurisdiction has been superseded.

82 Section 4(4) of the 1971 Act; see para. 2.14 above.

83 There are, however, old cases, for example, Spencer v. Earl of Chesterfield (1752) Amb. 146, where the court refused to discharge a guardian at his own request. See also the authority which says a testamentary guardian cannot resign: para. 2.14 and n. 41 above.

84 Re McGrath [1893] 1 Ch. 143.

85 Illegitimacy, Law Commission Working Paper No. 74 (1979) para. 4.16 and Law Com. No. 118, (op. cit.), para. 7.9.

guardianship is of limited scope: "For example, no court has statutory authority to deprive one parent of such rights while the other is living; there is no power for the court to resolve a dispute between a guardian appointed by the court and a surviving parent by removing guardianship rights from the parent; there is also no power to reinstate the guardianship rights of a parent once those rights have been removed."

Disputes between joint guardians

2.20 Where two or more people acting as joint guardians disagree on a question affecting the child's welfare any of them may apply to the court for its direction and the court may make such order regarding the matters in difference as it thinks proper.[86] As the matter of where a child shall live is bound to affect his welfare, the court may presumably give directions about it under this power, but such directions will not be covered by the usual provisions relating to custody orders.[87] Only where at least one of the guardians concerned is a parent, is there express power to make orders regarding custody, access or maintenance.[88]

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86 Section 7 of the 1971 Act.

87 E.g. section 11A of the 1971 Act, which provides that legal custody may not be granted to more than one person.

88 Section 11 of the 1971 Act; para. 2.18.

C. The powers of guardians

2.21 Neither common law nor statute provides a clear definition of the powers and duties of a guardian. Section 7 of the Guardianship Act 1973 provides that "a guardian under the Guardianship of Minors Act 1971,[89] besides being guardian of the person of the minor, shall have all the rights, powers and duties of a guardian of the minor's estate". The references to guardian of the estate and guardian of the person, however, can only be construed by reference back to the common law and, ultimately, to guardianship in socage.

The historical development of the powers of a guardian

2.22 The first statutory description of a guardian's powers was in the Tenures Abolition Act 1660. Guardians appointed under that Act[90] had the custody and tuition of the child and were enabled to "take into [their] ... custody to the use of such child ... the profits of all lands, tenements and hereditaments of such child ... and also the custody, tuition, management of the goods, chattels and personal estate of such child ... and [could] bring such action in relation thereunto as by law a guardian in common socage might do". Unhappily, this provision initiated the reference back to the common law which remains to

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89 I.e. a testamentary guardian, a surviving parent-guardian or a guardian appointed by the court.

90 See para. 2.11.

this day. The Guardianship of Infants Act 1886, which provided for mothers to be guardians on the death of the father, mothers to be given certain powers of testamentary appointment or nomination[91] and for the court to appoint a guardian if no guardian was appointed or a guardian was unable to or unwilling to act, defined the powers of such guardians as all those in relation to the estate or person of the infant as a guardian appointed under the Tenures Abolition Act had. This definition remained in force until 1973. To the regret of the Joint Committee on Consolidation Bills[92] the 1971 consolidation Act was unable to remove the reference to the 1660 Act definition of a guardian's powers since it was thought that the 1660 Act provided the only authority for certain of the powers of a guardian. The 1973 Act, however, did repeal the old provision in favour of the more modern statement. This statement, however, still rests on the two common law concepts of guardianship of the person and guardianship of the estate.

Guardianship of the estate

2.23 This is akin to trusteeship with the important difference that the child's property is not vested in a guardian as it usually is in a trustee. Following the Law of Property and Settled Land Acts 1925 guardianship of the estate became less significant

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91 See para. 2.12.

92 Minutes of Evidence annexed to the First Report of the Joint Committee on Consolidation Bills, 11 November 1970 (H.C. 29; H.C. 161), p.14.

because a legal estate in land can no longer be held by a minor but instead is held by trustees as statutory owners or, possibly, trustees for sale. In addition, the Trustee Act 1925[93] provides, where the beneficiary is an infant, specific powers of maintenance and accumulation during a minority and a power of advancement. A guardian of the estate has, subject to the rights and powers of statutory owners, personal representatives and trustees for sale, the right to recover rents and profits from the minor's land and to manage his personal estate for the duration of the guardianship, i.e. he can control the income due to the infant and any of the personal profit to which the infant is legally as well as beneficially entitled, but is not entitled to receive or exercise powers over property to which the infant has only beneficial title, except income as it becomes payable. He must account to the minor for the profits and income of the estate received by him.[94] The 1973 Act specifically reserves the inherent power of the High Court to appoint a guardian of a minor's estate either generally or for a specific purpose[95] and where there is such a guardian,

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93 Sections 31 and 32.

94 Halsbury,(op. cit.), para. 536.

95 Section 7(2). The Official Solicitor is, for example, often appointed guardian specifically for the purpose of administering an award made to a child by the Criminal Injuries Compensation Board (where it would be unsuitable for the parents to be involved, for example, if they had caused the injuries) or where a child becomes entitled to a foreign legacy or money from a pension fund or insurance policy, and either his parents are dead or for some reason cannot give an adequate receipt: see para. 2.34 below on parents' powers in relation to their children's property.

a guardian appointed under the 1971 Act (for example, a testamentary guardian) will only be required to act as a guardian of the person.[96]

Guardianship of the person

2.24 The easiest way to define this is to say that it includes all the powers and responsibilities relating to a child which guardianship of the estate does not. The nearest statutory equivalent of the guardianship of the person is the concept of legal custody but the statutory definition of this is circular: legal custody means "so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent)".[97] The distinction between the two concepts is not clear save that guardians (like parents) have power to effect or arrange for the emigration of the child from the United Kingdom which a person with only legal custody does not.[98]

2.25 There is no agreed list of all the "parental rights and duties" which may relate to the person of the child, although many of them now have statutory

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96 Section 7(2) of the 1973 Act. This provision is, however, far from clear. Such an appointment can also be made testamentarily but such a guardian will not be a testamentary guardian (Re Lord Norbury (1875) 9 I. Eq. R. 134) because under the 1971 Act such a guardian is guardian of the person and the estate.

97 Children Act 1975, s.86: see also para. 1.19.

98 Ibid.

recognition and are expressly given to parents, guardians or some wider class of person. A provisional list[99] of the main powers and responsibilities includes the following, but not all may be attributed to guardians:

(i) care, custody and possession[100]

(ii) maintenance[101]

(iii) education[102]

(iv) religious upbringing[103]

(v) discipline[104]

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99 Derived from those of, for example, Cretney, op. cit., p. 300-308; Hall, "The Waning of Parental Rights" [1972B] C.L.J. 248; Eekelaar, "What are Parental Rights?" (1973) 89 L.Q.R. 210; Freeman, "What Rights and Duties do Parents Have?" (1980)144 J.P. 380; Maidment 'The Fragmentation of Parental Rights' (1981) 40 C.L.J. 135 and [1981] J.S.W.L. 21: see n.22 in Part I above.

100 Child Abduction Act 1984, s.1.

101 Supplementary Benefits Act 1976, s.16 (and Child Care Act 1980, s.45).

102 Education Act 1944, ss. 36, 39, 76 and 114; see also Education Acts 1980 and 1981.

103 Children Act 1975, s.13 and 107(1).

104 Children and Young Persons Act 1933, s.1(7).

(vi) medical treatment[105]

(vii) consent to marriage[106]

(viii) agreement to adoption[107]

(ix) arranging for the child to leave the jurisdiction[108]

(x) acting for the child in litigation[109]

(xi) choosing a surname[110]

(xii) appointing a testamentary guardian[111]

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105 Subject to the Family Law Reform Act 1969, s. 8(1); but see Gillick v. West Norfolk and Wisbech Area Health Authority [1985] 2 W.L.R. 413.

106 Marriage Act 1949, Second Schedule, Part 1, paras. 2 & 3 and Part 11.

107 Children Act 1975, s.12(1)(b) [Adoption Act 1976, s.16(1)(b)].

108 See para 2.24 and n's. 97 and 98 above.

109 R.S.C. Ord. 80, r. 2(1) and Woolf v. Pemberton [1877] 6 Ch. D. 19.

110 This is largely a question of usage rather than law although special formalities are prescribed for enrolling a deed poll to evidence the change of name of a minor: the Enrolment of Deeds (Change of Name) Regulations 1983, S.1 No. 680.

111 Section 4 of the 1971 Act: see para. 2.13.

The powers of parents and guardians compared

2.26 Unfortunately it is not possible to say that the powers and responsibilities of guardians are the same as those of parents. In some cases a parent may be said to have powers and responsibilities not possessed by a guardian and to some extent a guardian may be said to have powers not possessed by a parent. The cases in which parents and guardians may have different powers and responsibilities are:

(i) Care, custody and possession

2.27 A guardian will, prima facie, be entitled to actual custody of the child.[112] Where a guardian acts jointly with a surviving parent, there is no authority suggesting that the parent's right will automatically prevail, although in practice this is likely (if only because the parent may otherwise object to the guardian).[113] If the matter is litigated, of course, the welfare of the child will be the first and paramount consideration. Where a child is taken from the custody of a guardian, criminal liability may arise just as it would if the child were in the custody of his parents.[114] A person who has actual custody of a child, even if he does not have legal custody, has

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112 This may be enforceable through habeas corpus proceedings: R v. Isley (1836) 5 Ad. & El. 441, or wardship or, possibly, the court's inherent jurisdiction.

113 See para. 2.14.

114 Child Abduction Act 1984, ss.1 and 2.

the "like duties" as a person with legal custody.[115] These may include the duty to maintain the child,[116] at least to the extent of not neglecting him. A person who has "custody, charge or care" of a child under sixteen may be criminally liable if he wilfully neglects the child in a manner likely to cause unnecessary suffering or injury to health.[117] In this context a parent or legal guardian is presumed to have custody,[118] even, in the case of a parent, if he is not actually living with the child.[119] A parent, but not a guardian, is deemed to have neglected the child if he fails to provide adequate food, clothing, medical aid or lodging for him.[120]

(ii) Access

2.28 It has been suggested[121] that a guardian has no right of access to the child, on the ground that under section 11(a) of the 1971 Act, where there are

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115 Children Act 1975, s.87(2).

116 Cretney, (op. cit.), p. 312.

117 Children and Young Persons Act 1933, s.1.

118 Ibid., s.17.

119 Unless, possibly, he has been deprived of custody by a court order: Brooks v. Blount [1923] 1 K.B. 257.

120 Children and Young Persons Act 1933, s.1(2)(a).

121 Eekelaar, (1973) 89 L.Q.R. 210, 233.

joint guardians, one of whom is a parent, the court is empowered to order access only for the parent. However, in proceedings arising from a dispute between joint guardians the court "may make such order regarding the matters in difference as it may think proper".[122] This presumably includes an order for access; certainly there is no express restriction, as there is in the equivalent provision for disputes between parents.[123] Further, given that the definition of parental rights and duties specifically includes a right of access[124] it would be strange if those rights and duties which comprise guardianship of the person were to exclude it.

(iii) Maintenance

2.29 The liability to maintain imposed on parents by the supplementary benefits legislation[125] does not extend to a non-parental guardian.[126] If the child has property for which the guardian is responsible it is the guardian's duty to apply the income of the property for the child's proper maintenance. What is

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122 Section 7 of the 1971 Act.

123 Section 1(3) of the 1973 Act.

124 Children Act 1975, s.85(1).

125 See n.101 above.

126 See, however, para. 2.27.

"proper", however, depends on the circumstances[127] and an advance of capital can only be made if authorised by the appointment, the court or statute.[128] A guardian is under no specific obligation to expend his own money on maintaining the child; nor can he be ordered to make financial provision for the child in proceedings brought by any other individual, unless his own marriage breaks up and the child has become a child of the family.[129] A guardian who is actually caring for the child may, however, claim a social security guardian's allowance where both parents are dead or where only one parent is dead but the other is either untraceable or serving a prison sentence.[130]

(iv) Consent to Marriage

2.30 Generally speaking the rights of guardians to consent to the marriage of the child under the age of eighteen correspond to those of the parents whom they replace. However the relevant legislation[131] does not provide for consent to be given by a guardian who was appointed by the High Court under its inherent jurisdiction or under section 6 of the 1971 Act in

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127 Carmichael v. Wilson (1830) 3 Mol. 79.

128 Trustee Act 1925, s.32.

129 See paras. 1.17 and 1.20.

130 Social Security Act 1975, s.38. See para. 1.30 above for details of the declining numbers of claims.

131 Marriage Act 1949, s.3 and Second Schedule.

place of a guardian who has been removed. Nor does the legislation provide, in the case of the marriage of an illegitimate child, for the consent of a guardian appointed by the court or by the child's father.[132]

(v) The right to appoint a testamentary guardian

2.31 The statutory power of appointing a testamentary guardian is only available to the father and mother of a child[133] and it seems clear that a guardian has no power himself to appoint a testamentary guardian[134] save, perhaps, if the instrument of appointment so authorises it.[135]

(vi) Administration of a child's property

2.32 The case in which a guardian, but not a parent, may have power is in relation to the administration of the child's property. It is generally assumed that a parent has certain powers of administration over any property his child may have.

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132 See, however, the recommendations in Law Com. No. 118 (op. cit.) para. 14.48(b) and Schedule 1 to the Family Law Reform Bill, annexed to the Report.

133 See paras. 2.11-2.13.

134 Cretney, (op. cit.), p. 311.

135 Re Parnell (1872) L.R. 11 P. & D. 379.

The law on this subject is, however, particularly confused and uncertain.[136] As has been seen, the equal rights and authority of parents in relation to their children derive from those which the father of the child originally had to the exclusion of the mother. This predominant position of the father stems from his natural guardianship of his child.[137] A guardian by nature or for nurture, however, had rights only in relation to the person of the child.[138] A child with landed property would originally have been subject to one of the feudal forms of guardianship (depending on the nature of the property) and although such a guardian may well have been one of the child's parents his powers in relation to that property derived from his status as guardian not as parent. Whether or not the father had any other powers and duties over the

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136 Cretney, (op. cit.), p. 305 and n. 7.

137 See paras. 2.6-2.8.

138 See Simpson, (op. cit.), p.160, citing Co. Litt. 88(b); see also Hargrave's note 12, which states that receiving the profits is not part of the office of guardian by nature, correcting his earlier note 9, which may have implied to the contrary by suggesting that the father would be accountable for any profits received.

property of his child is uncertain.[139] There is, however, authority to suggest that he did not,[140] including the fact that the court has in the past appointed a father to be guardian of the estate.[141] It may be that the father's powers of control over the child's person would include the power to direct the child in the management of property in the child's possession.[142] Thus the 1973 Act[143] in describing parents as having equal rights in relation to the

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139 Blackstone, (op. cit.), p. 462, states that the father may receive profits during the child's minority but must account when he comes of age; Macpherson, (op. cit.), p.63, supports this; but both seem derived from Co. Litt. 88b (see n. 137 above). Blackstone, (op. cit.), p. 453, also suggests that a father is entitled to the benefit of his children's labour, but Simpson, (op. cit.), p.161, could find no authority that he was entitled to their earnings.

140 See, for example, the dictum of the Lord Chancellor of Ireland in M'Reight v. M'Reight (1849) 13 I. Eq. R. 314, 324-5: "the father is merely guardian of the person and guardian by nature, but in neither capacity has he any power over the property of the infant"; but c.f. Macpherson, (op. cit.), p. 65: "It is not surprising that the ancient law, having provided for the father's superintendence, as guardian in socage, of any socage land which a son might have by descent,..., should have omitted to define exactly the father's powers with regard to any land which an infant might have by purchase; for it must have been of rare occurrence...."

141 Ex P. Bond (1846) 16 L.J. Ch.147.

142 See Law Reform Commission of the Australian Capital Territory, Report on the Law of Guardianship and Custody of Infants (1974), p.10.

143 Section 1.

administration of any property belonging to the child, and the Children Act 1975,[144] in defining "parental rights and duties" as "all the rights and duties which by law the mother and father have in relation to a legitimate child and his property", may be misleading.

2.33 Allied to the uncertainty about a parent's position in relation to any property his child may have is the question whether a parent can give a valid receipt on the child's behalf, for example, for a legacy. There is authority[145] to suggest that a parent does not have power to do this but that a guardian does.

2.34 Section 7 of the 1973 Act defines the powers of a guardian under the 1971 Act as being "all the rights, powers and duties of a guardian of the minor's estate, including in particular the right to receive and recover in his own name for the benefit of the minor property of whatever description and wherever situated which the minor is entitled to receive or recover". A guardian under the 1971 Act includes testamentary and court-appointed guardians as well as surviving parent guardians and thus there is the curious possibility that a parent might acquire powers on the death of the other parent which he did not have previously.

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144 Section 85(1).

145 M'Reight v. M'Reight, (op. cit.), and see the cases cited by Cretney, (op. cit.), p. 312 and n. 66 and Law Com. No. 118, (op. cit.), para. 7.3 and n. 9.

Conclusion

2.35 From what we have said above it is, therefore, evident that the inter-relationship between the legal status of parent and guardian is obscure, particularly where a parent is also described as a guardian. In the next Part of this paper we turn to examine ways in which this and some of the other provisions relating to guardians might be clarified.

PART III

THE NEED FOR AND REFORM OF THE CURRENT LAW OF GUARDIANSHIP

Introduction

3.1 The institution of guardianship was originally of concern only to those who had property. It began as a lucrative incident of feudal tenure and developed as a means of safe-guarding a family's property and securing its transmission from one generation to another. Subsequently it became the instrument for maintaining the authority of the father over the upbringing of his children. The modern system of child law, on the other hand, is designed to safeguard the welfare of children while they are growing up. The main question, therefore, is whether we need a system of guardianship in order to safeguard that welfare, either while the parents are alive or after one or both of them have died.

The need for parental guardianship

3.2 The notion of parental guardianship confuses the separate legal concepts of parenthood and guardianship. We have already seen that guardianship was chronologically the first of the two. It could be distinguished from parenthood in that the legal, as opposed to the biological, relationship between parent and child attached, in the main, only to the father. Nowadays, however, both mother and father are recognised as having equal parental status and their relationship with their children is statutorily

described in terms of "parental rights and duties".[1] Both in common parlance and in the law, it is clear that parenthood is now the more important.

3.3 It might be argued to the contrary that guardianship is still the primary institution, in that the Crown is the "general and supreme guardian of all infants"[2] and that parents and other individuals who undertake some of the responsibilities of bringing them up are merely acting as delegates. We do not believe this to be the case, either in theory or in practice. When a child is born in this country, it is his parents who automatically, by operation of law, become responsible for him and continue to have that responsibility throughout his childhood, unless they are deprived of it by court order or other legal process. Parents may be subject to specific duties and restrictions, for example in the matter of education, but for the most part the state is content for them to discharge their responsibilities without interference, unless and until there is specific cause for concern. Where people other than parents are engaged in bringing up children, on the other hand, there is frequently an assumption that those children may require special protection from the law.[3]

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1 Children Act 1975, s. 85(1) and (7): see Appendix A.

2 Blackstone, Commentaries, (op. cit.), Book 1, p. 463.

3 See, for example, Nurseries and Child-Minders Regulation Act 1948, Foster Children Act 1980 and Adoption Act 1958.

3.4 Hence it seems to us both sensible and practical to regard parenthood as the primary concept and to distinguish it from the role of a guardian who acts in loco parentis, in place of a parent.[4] This approach would remove many of the anomalies which exist at present in this area of law. First, it would be consistent with the modern statutes dealing with the relationship between parents and their legitimate and illegitimate children. Secondly, it would enable us to define the powers and responsibilities of guardians in terms of some or all of the parental powers and responsibilities,[5] which would also be consistent with the approach of modern statutes. Finally, it would remove any remaining doubt that the status of mothers and fathers in relation to their legitimate children is equal. There would no longer be any possibility, however remote, that a father retains a superior and

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4 It is interesting to note, by comparison, that guardianship is the fundamental concept and that parents are treated as a species of guardian in, for example, the New Zealand Guardianship Act 1968, Australian Family Law Act 1975 and the British Columbia Family Relations Act 1979. This is also the recommendation of the Law Reform Commission of Saskatchewan, Proposals on Custody, Parental Guardianship and the Civil Rights of Minors (1981) but not the Law Reform Commission of the Australian Capital Territory, Report on the Law of Guardianship and Custody of Infants (1974), which recommended the abolition of parental guardianship(Ch. 11, para. 3).

5 This is, in effect, the recommendation of the British Columbia Law Reform Commission Report on the Authority of a Guardian (1985) Ch. 111, C. Although parents are guardians in British Columbia, the recommendation is that the role of non-parental guardians should be defined by reference to parents.

entrenched position as natural guardian of his children, or that the status of the mother changes on her becoming a "guardian" on the father's death.

3.5 There might, however, be a difficulty, if by repealing the provisions which constitute parents guardians of their children, parents were denied powers and responsibilities which they can claim at present. The difficulty arises from the uncertainty, already discussed,[6] about what the respective powers of parents and guardian are, particularly in relation to the administration of a child's property. We do not consider it necessary to resolve that uncertainty for present purposes, although we consider that it merits further investigation, because it seems to us clear that in modern times parents should have at least the same powers and responsibilities as have guardians, including those relating to the administration of a child's property. The suspicion in which the law appears formerly to have held parents in this respect appears to us no longer to be justified, if indeed it ever was. Infants can no longer hold a legal estate in land and most valuable personal property (save for chattels such as jewellery) is likely to be held by trustees. In the case of other items, it seems to us desirable that parents should be recognised, as they were in some of the older treatises,[7] as having not only the powers but also the responsibilities of a

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6 See paras. 2.26-2.35.

7 See, for example, Blackstone, (op. cit.), Book 1, p. 462.

guardian. The present position is particularly illogical, in that a parent becomes statutory guardian of the estate upon the death of the other,[8] and may thus acquire at that point powers which he did not have previously. It is also curious that, by appointing a testamentary guardian, a parent may be able to confer powers which he himself did not possess.

3.6 We therefore provisionally propose that the common law rule that the father is the natural guardian of his legitimate children and the statutory provisions by which one parent becomes a guardian upon the death of the other should be abolished. We further propose that, for the avoidance of doubt, "the parental rights and duties" should include the present powers of a guardian of the estate.

The need for non-parental guardianship

3.7 Very different considerations apply to the need for guardianship after the death of one or both parents. The question here is whether it is either necessary or desirable to retain a system giving private individuals legal powers and responsibilities over the upbringing of children who are not their own. It is difficult to treat this general question in isolation from the usual way in which such guardians are appointed, for the present system is unique in allowing a legal relationship to be created by private act, without any legal process or independent

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8 Section 3 of the 1971 Act: see Appendix A.

safeguard of the child's welfare. Nevertheless, there are some general observations to be made upon the value of attributing a legal, as opposed to a merely factual, responsibility to those who stand in the shoes of parents who have died.

3.8 In one sense, of course, it can be argued that guardianship is not necessary, because most of these children are cared for quite adequately without any formal appointment. This is particularly the case where a surviving parent retains all the parental powers and responsibilities. Even where both parents are dead, their children are usually cared for informally by family or friends. As people with "actual custody" these informal guardians have the same duties as a person with legal custody[9] and the fact that very few of them apply to a court for ratification of the position perhaps suggests that they feel that nothing more is needed.

3.9 It might perhaps be argued that where the children cannot be adequately cared for in this way, the local authority should assume responsibility for them. The state has already assumed a degree of responsibility for children who have effectively lost both parents, through the provision of social security guardian's allowance to the people who bring them up.[10] Where there are no such people, or the help available to them is insufficient (perhaps because

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9 Children Act 1975, s. 87(2).

10 Social Security Act 1975, s. 38(1).

there are several children in the family) the local authority may receive the children into care.[11] They may then be boarded-out, perhaps with foster parents who are themselves relatives or friends, but who will receive a boarding-out allowance and be required to give undertakings about the children's upbringing which go beyond the duties involved in actual custody.[12] The children will also be protected by the authority's own powers and responsibilities to safeguard their welfare throughout their childhood.[13] These include the power to assume parental rights and duties over them.[14] In effect, therefore, the local authority can become guardian of all those children who cannot be adequately cared for in other ways.

3.10 Nevertheless, while it is important to retain the possibility of local authority care for those children who need it, it is accepted that it is usually better for children to be brought up in private families. Generally, the family and friends of children whose parents have died will want to take care of them and their parents will want to know that this is to happen. We also believe that there are substantial advantages in a system which can give the people who are actually looking after a child some

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11 Child Care Act 1980, s. 2.

12 Child Care Act 1980, s. 21 and Boarding-Out of Children Regulations 1955, S. I. No. 1377, Reg. 20.

13 Child Care Act 1980, s. 18(1).

14 Ibid., s. 3.

legal power and responsibility over him. They will then have a clear responsibility, either to care for the child themselves or to ensure that some other person does so.[15] They will also have the clear authority to take those serious decisions which a child is unable to take for himself, for example in relation to medical treatment, education or getting married.[16] Finally, it gives both adult and child a degree of certainty and security in their relationship and this may be particularly important for a child after the death of a parent.

3.11 Although the evidence is limited and relates to one part of the country alone,[17] we have some reason to believe that, whatever may have been the case in the past, testamentary guardians are now chosen because it is expected that they will look after the child should his parents die. The appointment may well be made in order to avoid doubt or debate within the family in the inevitably stressful period following a death. Where no appointment is made, this can be a sign of family tensions which the deceased was reluctant to exacerbate. In such a case it is important that the courts should be able to settle the matter quickly and without resort to the more elaborate machinery of wardship in the High Court.

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15 See para. 2.27.

16 See paras. 2.25 and 2.30.

17 See Mrs Priest's research in the North East of England described in Appendix B.

3.12 We are conscious that in putting forward these arguments we are presenting a rather different view of the purposes of guardianship from that which may be gleaned from literature[18] or the law reports.[19] It is a view which we believe to be justified by such evidence as we have and by the whole approach of modern child law, which is concerned with the proper care and upbringing of the child. We are also persuaded that at present there is no other legal institution capable of fulfilling the role which guardianship can fulfil. All the available procedures involve resort to the courts, and, wardship apart, only adoption and (when brought into force) custodianship are open to those who might now become guardians.

3.13 Adoption is not generally thought appropriate for arrangements within the family, as it distorts rather than replaces relationships with which the child may already be familiar.[20] It also severs legal ties which may still be important for him in the future, in particular with the relatives of the parent who has died. Guardians, on the other hand, are not substitute parents but substitutes for parents. Guardianship

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18 See, for example, Charles Dickens' Nicholas Nickleby and David Copperfield, and Jane Austen's Sense and Sensibility. See also Treitel, "Jane Austen and the law" 100 L.Q.R. 549, 572-3.

19 See, for example Re H. (An Infant) [1959] 1 W.L.R. 1163 and Re N. (Minors) (Parental Rights) [1974] Fam. 40: see also Part II above.

20 Report of the Departmental Committee on the Adoption of Children (1972) Cmnd. 5107, para. 111.

enables a child to retain his links with all his family and his identity as a member of that family.

3.14 The custodianship scheme, when it comes into force,[21] will have some of the advantages over adoption which guardianship already has. However, it is designed for people who have already been looking after a child for some time (three months in the case of a relative or step-parent and a total of twelve months in other cases)[22] and will not be suitable for cases where a change of home is necessitated by a parental death. There are also advantages in the appointment of guardians who have almost all the powers and responsibilities of parents, including the power to decide whether or not a child should be adopted. Hence, although, as we later explain, we can see scope for harmonising and rationalising the guardianship and custodianship schemes, we do not think that the latter will provide an effective substitute for the former.

3.15 Many of the arguments above apply with particular force only when both parents are dead. Where one is still alive, there is no legal vacuum of responsibility for the child's upbringing and to supply a person to share that responsibility with the surviving parent may be productive of just that

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21 On 1 December 1985; Hansard (H.C.) 13 May 1985, Vol. 79, Written Answers, col. 36.

22 Children Act 1975, s. 33(3), para. 1.21 and Appendix A. Where there is a surviving parent the period is three years unless the parent consents.

conflict and insecurity which it is in the child's interests to avoid.

3.16 Later in the paper[23] we shall discuss ways in which those difficulties might be resolved. For the moment we believe that there are cases in which a child will benefit from having a legal guardian while one parent is alive. The surviving parent may welcome, not only the opportunity to share responsibility with a guardian chosen by the deceased, but also the knowledge that this will provide continuity should anything happen to the survivor. More importantly perhaps, there is now a substantial possibility that the child's parents will be divorced or separated before one of them dies.[24] It may often be in the child's interests for there to be some means of providing a replacement for the custodial parent in the event of his or her untimely death. Whether it is also in the child's interest to enable the non-custodial parent to provide himself or herself with a replacement is a more difficult question to which we shall return.[25]

3.17 In general, therefore, we believe it to be for the benefit of children, firstly, that they are brought up by people who have both a legal and an

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23 See paras. 3.30-3.40 and 3.78-3.81.

24 The total number of children who experience divorce in their family is annually around 160,000: Social Trends 15 (1985), chart 2.18.

25 See paras. 3.36-3.40.

actual responsibility for them, and secondly, in consequence, that the law should provide some means of supplying a person or persons who can step into the shoes of a parent or parents who have died. Indeed, we think it would be desirable if this happened rather more frequently than at present appears to be the case. We therefore turn to the question of how such guardians may be appointed.

A. Testamentary appointments

3.18 As has been seen[26] the law at present allows a parent to appoint a guardian for his children after his death, by means of a testamentary instrument. This enables a parent to make arrangements for someone to look after his children in the event that he cannot do so. To this extent, therefore, it is an exercise of parental responsibility as well as a means by which the child's welfare can be promoted.

3.19 A parent cannot, however, be presumed always to act in the best interests of his child. He might choose a totally unsuitable person to be guardian or choose to exercise his power of appointment in circumstances likely to cause conflict with a surviving parent or existing guardian. Worse still, the power might create an opportunity for commercial exploitation. Indeed one might argue that, since the child's welfare is the paramount consideration, something as important to the child as transferring responsibility for his upbringing should only be

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26 At para. 2.13.

exercisable by a competent authority, such as a court.[27] After all, it has long been established that parents cannot surrender or transfer their parental rights and duties while they are alive.[28] If this is thought to involve unacceptable risks for the children, how much more dangerous might it be when the parents are no longer there to check on their children's welfare for themselves?

3.20 Notwithstanding the above considerations, however, we consider that the advantages of guardianship as a means of providing substitutes for lost parents are such that there should be a system which enables appointments to be made without judicial intervention.

3.21 An alternative to unilateral testamentary appointments might be to devise a system (not unlike the old guardianship in socage[29]) based on an analogy with the intestacy rules. For example, on the death of both of a child's parents his guardianship might fall first to his grandparents (maternal or paternal) if still alive, or failing them to a sister, brother, aunt, uncle, etc. We are far from certain however,

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27 See Council of Europe Recommendation No. R(84) 4 on Parental Rights adopted by the Committee of Ministers of the Council of Europe on 28 February 1984 and Explanatory Memorandum, Part 11, E.

28 Children Act 1975, s. 85(2).

29 See para. 2.4.

that such a system would, in practice, be very easy to operate. Alternatively, guardianship might be added to the responsibilities of executors or administrators of the deceased parents' estate. They would then be obliged to take care of the child themselves or make other arrangements. Perhaps curiously, the Public Trustee is already authorised[30] to accept, as incident to any trusteeship accepted by him, the guardianship of any infant beneficiary and has, on rare occasions, accepted appointment as guardian of the person in such circumstances.

3.22 We do not think, however, that either of these suggestions would be an acceptable alternative[31] to allowing a guardian to be chosen and appointed as such by a parent. We are not aware of any abuse or irresponsibility by parents in the appointment of testamentary guardians or of the operation of any financial incentive. It is to the benefit of all if, as is likely, such arrangements are known about well in advance. Thus, given the advantages of such appointments, for both the parents and the child, it seems to us desirable that there should be a system whereby parents, if they wish, can appoint guardians for their children. Nevertheless, we think that there is a case for introducing certain protective measures

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30 Public Trustee Rules 1912, s. 1. No. 348, r. 6(b)(1).

31 Although they could perhaps be used in addition, for example, where a parent does not make a will or the appointment fails. See also discussion of the circumstances in which court appointments can be made at paras. 3.47-3.50.

into the existing system to provide minimum safeguards for the child. It is important, however, that such safeguards should not act as a deterrent to those parents who are anxious to act responsibly for their children, or to prospective guardians.

Safeguards in the appointment of testamentary guardians

3.23 Given the nature of testamentary appointments, the scope for safeguards is limited. Unlike court appointments there is no real possibility of imposing on parents a legal requirement to regard the child's welfare as the first and paramount consideration.[32] Nor is it possible to introduce anything resembling the system of procedural controls which applies in adoption and custodianship proceedings.[33] Comparison with the provisions which apply to foster parents is, however, relevant since they, like testamentary guardians, are not court appointees. Indeed the arrangement made between a parent and a foster parent is, in principle if not in practice, very similar to that made with a guardian save that one is made during a parent's lifetime and does not confer parental powers and responsibilities.

3.24 The main control over guardians once they have been appointed is the court's power of removal,[34]

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32 Section 1 of the 1971 Act.

33 See paras. 1.13 and 1.21.

34 Section 6 of the 1971 Act: see para. 2.19. The wardship jurisdiction may provide some additional control.

which is exercisable at any time. It would appear that anyone can apply to have a guardian removed and we think this must be right. It enables, for example, a surviving parent to initiate proceedings if co-operation with a guardian proves impossible. Equally the guardian himself could apply, as could a relative or friend or the child himself (if he has a "next friend" other than his parent or guardian to act on his behalf[35]). Further we see no reason why a local authority should not be able to initiate such proceedings if it became aware that the child's welfare was at risk. A local authority, however, would be unlikely to become involved unless there was a risk that the child might need to be received or taken into care or unless they were required to check on the well-being of all children who have guardians.

3.25 At present guardians, even if they are unrelated to the child for whom they are caring in their own home, are exempt from the controls imposed upon private foster parents by the Foster Children Act 1980. Those controls date back to the horrors of the Victorian "baby farming" cases,[36] which revealed a serious risk that people who took in unwanted children for reward would then neglect or ill-treat them. However, the requirement of reward has now disappeared[37] and the general principle seems to be

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35 R.S.C. Ord.80 r.1.

36 These were the subject of investigation by the House of Commons Select Committee on The Protection of Infant Life which reported in 1871.

37 Children and Young Persons Act 1969, s. 72(4) and (5) and Scheds 6 and 7.

that some form of official supervision, however limited, should be exercised over all places where children are likely to live away from home for any length of time.[38] In the case of fostering, control takes the form of notification to the local authority, which may prohibit the placement, must supervise in order to check upon the child's well-being and may take action to remove the child if need be.[39]

3.26 Whilst we are anxious to encourage the appointment of guardians, we are equally anxious that the welfare of children should not be put at risk by giving so much legal power to people whose appointment has not been sanctioned by any independent authority. Hence we raise the question of whether the existing exemption of unrelated guardians from the positive measures in the Foster Children Act 1980 designed to safeguard children might be removed. The provisions would only apply to guardians who are actually caring for the child in the circumstances laid down in the Act and the existing exemption for relatives and custodians would remain, so that relatives acting as guardians would not be affected.

General qualifications or disqualifications

3.27 Section 7 of the Foster Children Act 1980 contains a list of persons disqualified from keeping foster children and it seems to us that this, or some

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38 See n. 3 above.

39 Foster Children Act 1980. The relevant sections of this Act are reproduced in Appendix A.

similar list of unsuitable sorts of people, could equally apply to guardians, either in addition to or separately from the general controls discussed in the preceding paragraph, which apply once the appointment has taken effect. Thus a person might not be eligible to be a guardian if, for example, he had been convicted of a specified offence; had an order removing a child from his care made against him or an application to foster rejected; is over a certain age; is not habitually resident in England and Wales; or is a corporate body.[40]

3.28 Alternatively, a prospective guardian could be required to be married, or to be a relative, step-parent or foster-parent or to have some other defined connection with the child. Where the guardianship is to include guardianship of the estate the guardian

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40 It is not wholly clear whether a corporation can be appointed a guardian, but the 1971 Act uses the term "person", which includes a body of persons corporate or unincorporate unless the contrary intention appears (Interpretation Act 1978, Sched. 1.). We cannot see a clear contrary intention, but it seems arguable that parental powers and responsibilities are of such a human nature that a corporation is ordinarily incapable of exercising them. The most obvious exception to such a principle are local authorities, which are not only required to receive children into care but are also empowered to vest parental rights and duties in themselves or voluntary organisations by resolution (Child Care Act 1980 ss. 2 and 3 and Children Act 1975, s. 85(6)). See also the discussion of the position of the Public Trustee at para. 3.21.

could be required to have some ability to manage property.[41] Because of the circumstances in which guardianship arises it would not be feasible to require, as a qualification, that the child has lived with the person for a period of time, as is the case in custodianship.

3.29 We are inclined to think that disqualifications may be more useful than qualifications but either would require some system of enforcement. Disqualifications could be used either as grounds for removal, making the appointment voidable, or could be treated as rendering the appointment void, or could give rise to a criminal offence.[42] The purpose of disqualifications would be to protect the child from certain types of person who are generally considered to be particularly unsuitable to be involved in bringing up children, and, as a possible side-effect, to direct the minds of testators to the particular suitability to care for children of the people whom they are considering. It might, however, be possible to waive the disqualifications with the consent of a court, the local authority[43] or a surviving parent.

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41 As is required in Ontario: Children's Law Reform Act, R.S.O. 1980, s.50. (In Ontario a guardian is only guardian of the estate.)

42 See Foster Children Act 1980, s. 16(1)(c): anyone who maintains a foster child in contravention of the disqualifications in s. 7 commits an offence.

43 See Foster Children Act, s. 7(1).

Problems of appointing a guardian to act where there is a surviving parent

3.30 The appointment of a guardian to act alongside a surviving spouse contains considerable potential for conflict. Although an appointment may be mutually agreed within a family, as much as between parents, it can equally be a unilateral choice which is unacceptable to a surviving spouse. This problem gives rise to two questions: first, whether it is appropriate in any circumstances for the appointment of a guardian to take effect while there is a surviving parent and secondly, if it is, whether that parent's disapproval of the guardian chosen should have any effect.

3.31 As to the first, it could be argued that the potential for conflict and uncertainty is such that no appointment should take effect until after the death of the surviving parent.[44] However, as we have already pointed out, both the surviving parent and the child may welcome having someone to fill the gap left by the parent who has died. Furthermore, the deceased parent could have expressly provided that the appointment should not take effect until after the survivor's death and may have had good reasons (for example, because of the characteristics or way of life of the other parent) for failing to do so. Hence, we are not inclined to suggest a general restriction in these

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44 This was one of the recommendations of the Law Reform Commission of the Australian Capital Territory in their Report on the Law of Guardianship and Custody of Infants (1974) Ch.11, para. 12.

cases. We think the better approach is to consider what to do in respect of the particular cases where an appointment is made but the surviving parent does not want the guardian to act.

3.32 One possibility would be to add to the list of general disqualifications discussed above the disapproval of the surviving parent or existing guardian or even the child himself (if old enough). Alternatively, the consent of the other parent could be required for any appointment which would take effect during his or her lifetime. The advantage of either of these suggestions would be to clarify matters in advance of the parent's death; the disadvantage is that they would vitiate the appointment in just those cases where the testator may be most anxious to make provision.

3.33 A slightly different approach would be to give the surviving parent a right of objection at the time the appointment takes effect. The present right of veto is, we think, unsatisfactory, largely because it appears to be exercisable at any time after the death of the testator. This makes the guardian's position difficult and precarious, and seems inappropriate given the court's power to remove a guardian at any time if his continuing in office is not in the interests of the child.

3.34 The more difficult question relates to the effect of a parental objection. At present, it

appears that the guardian's appointment terminates automatically.[45] The burden is then upon the guardian to apply to the court if he wishes to act. This seems unsatisfactory if one of the advantages of the testamentary system is to enable a deceased parent to provide for his replacement without the expense of judicial proceedings. An alternative would be to place the burden of taking the case to court upon the surviving parent. We invite views as to which of these alternatives would be best for the child.

3.35 A further point which arises under the present law is that if the surviving parent objects to the testamentary guardian and the guardian applies to the court, the court may either in effect confirm the objection, or order them to act jointly, or remove the surviving parent from guardianship so that the testamentary guardian acts alone.[46] The same options arise if the guardian applies to the court on the ground that the parent is unfit to have custody of the child.[47] Given that the court also has power to settle the custody of the child in disputes between guardians and surviving parents, it is not entirely clear what the additional effect of depriving the parent of guardianship will be. In any event we consider it unnecessary and unsatisfactory. If there is to be power to deprive a parent of all, or almost all, of his parental powers and responsibilities, we think that

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45 Section 4(4) of the 1971 Act; see also para. 2.14 and Appendix A.

46 Ibid.

47 Ibid.

this should be part of a coherent scheme for that purpose rather than an incidental by-product of a dispute with a guardian. We shall discuss the scope for such a scheme in Part IV of this paper.

3.36 Disputes between guardians and surviving parents are particularly likely to arise in a context in which appointments may also be particularly useful, that is following the separation or divorce of the parents. The custodial parent may be well advised to appoint a testamentary guardian, partly in order to make provision for the child in case the non-custodial parent has lost touch or is not interested in looking after the child, but partly in the hope that the appointment will deter the non-custodial parent from recovering the child. Clearly there are many cases in which it would be entirely right for the child to return to the surviving parent, but others in which a sudden move to a parent of whom the child has little or only unhappy recollections would not be in the child's best interests. The divorce court can prevent this by an order that the parent is unfit to have custody,[48] but such orders are rarely made,[49] perhaps largely because they pre-judge an issue which may look very different when it comes to be tried. We have in mind the sort of situation which arose in Re F. (A Minor)(Wardship: Appeal)[50]. In that case, after a stormy marriage, the parents separated when their

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48 Matrimonial Causes Act 1973, s. 42(3) and (4).

49 B. v. B (Declaration of Unfitness)(1976) 3 F.L.R.187.

50 [1976] Fam. 238.

daughter was three and a half. Some months later the father returned, forced the mother and child out of the house, and installed another woman there. The mother was awarded custody at the divorce and the father saw very little of his daughter until she was nearly eight, when the mother died. A few days later the father took her away from the maternal grandmother who had looked after her since her mother became ill. The mother had not appointed a testamentary guardian and the grandmother applied for care and control in wardship proceedings. The case took a year to be heard and was of great difficulty. The trial judge gave care and control to the grandmother but the Court of Appeal, by a majority, decided that she should stay with her father. We are not here concerned with the merits of that decision on the facts, which we do not question, but with the potential risks to the child from such a sudden change of environment coupled with a prolonged period of uncertainty.

3.37 The risk of the occurrence of such cases should clearly be taken into account in any system for resolving disputes between the surviving parent and a testamentary guardian appointed by the custodial parent. The system must not be such as to give the non-custodial parent too great an advantage. We raise later[51] the question whether there might be a prima facie rule that the guardian appointed by the custodial parent is entitled to actual custody unless and until a court order is made. However, this would mean in effect, enabling the custodial parent to assign the

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51 See para. 3.80.

benefit of the custody order in the event of his or her death.

3.38 The other side of the coin is the effect of an appointment by the non-custodial parent. There is at present, no restriction on the power of a "legitimate" parent to make appointments, even where he or she has been deprived of potential guardianship by an order of the divorce court.[52] While it is generally accepted that a child benefits from knowledge of and association with both his parents, it is also clear that children suffer from continued conflict and hostility following a divorce. It is not therefore necessarily in their interests to allow the non-custodial parent to appoint a testamentary guardian who may carry on the conflict even after the parent has died. Thus, it has been suggested that a parent should have power to appoint a guardian only if he has custody [53] or is entitled to custody at the time of the death.

3.39 However, the non-custodial parent may have very good reasons for wishing to retain some influence from his side of the family after he has died. The appointment of a guardian is, for example, one means of securing that the child is not adopted into a new

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52 Ibid., n.48.

53 See Bromley, (op. cit.), p. 366 and the Report of the Law Reform Commission of the Australian Capital Territory(op. cit.), Ch. 11. para.12.

family (unless the guardian's objection to the adoption is unreasonable).[54] Hence, we are not at present inclined to recommend the removal of his right of appointment, although we invite views.

3.40 One solution would be to empower divorce courts to deal with the power of appointment when allocating custody,[55] but the exercise of such a power is difficult because circumstances may change. An alternative method of dealing with the problem would be to impose no restrictions on the power of appointment but to make the appointment subject to the veto of a surviving parent according to his custodial status. Thus, a parent entitled to actual custody might be given the automatic right to veto an appointment made by a parent who was not, subject to the guardian's applying to the court, but a non-custodial parent would have to refer his objection to the court to decide whether or not the appointment should stand.

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54 Children Act 1975, s. 12 [Adoption Act 1976, s. 16].

55 See the Tentative Proposals Relating to Testamentary Custody and Guardianship of Children made by the Law Reform Commission of Saskatchewan (1984), p.3, para. 3, which proposes that where the custody of one has been terminated by written agreement or court order, the testamentary appointment by the custodial person is not effective unless the written agreement provides for custody on the death of the appointor or the court order has denied the other person access to the child.

Methods of appointment of a testamentary guardian

3.41 A testamentary appointment may at present be made by deed or will. These formalities have not changed since they were first specified in the Tenures Abolition Act 1660. We suspect, however, that many people do not make appointments[56] because of ignorance and the association of wills with the disposition of property. Indeed we fear that this is so in cases where the appointment of a guardian would be desirable, for example, where a lone custodial parent has no property to dispose of. Further it would, we think, be unfortunate if people were deterred from appointing guardians by the technicalities involved in making a will or deed. We have, therefore, considered whether the methods of appointment can be improved or changed.

3.42 The technical rules governing the making and particularly the revocation of wills and deeds are complicated. At present, it seems that where a deed is to take effect as a testamentary instrument it must comply with the formalities required for making a will and must be attested.[57] A will (but not a deed) and any appointment made in it, is revoked by marriage[58] but a testamentary appointment would not be revoked by a subsequent deed[59] although a testamentary appointment

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56 See para. 1.31.

57 Ex p. Ilchester (1803) 7 Ves. Jun. 348, 367.

58 Wills Act 1837, s. 18 (as substituted by the Administration of Justice Act 1982, s. 18).

59 Bromley, (op. cit.), p. 366.

by will can revoke one made by deed.[60] One way of clarifying these technicalities might be to provide that an appointment should always be made by will and the power to appoint by deed abolished. Although we expect that the proportion of deeds to wills which are used to appoint guardians must be small, we are not inclined to dismiss this form of appointment. Another possibility might be to provide that appointments can be made by deed but need not comply with the same rules as those made by will.

3.43 Alternatively, we wonder whether it is essential to require that all appointments be made by deed or will or whether some less formal and daunting method might not suffice and even encourage more parents to appoint guardians for their children. For example, appointments might be made by a simple nomination in writing or on some standard form that could be obtained either as part of a will form or separately.[61] Nominations are, however, currently used only for insubstantial property, for example, post office savings, and we would not wish any connotation of insignificance to be attached to a method of appointing a guardian. One advantage, however, of not using a will to make the appointment would be that it would not be necessary to await probate before the appointment took effect. If alternative methods of appointment were to be permitted we think that a later

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60 Shaftesbury v. Hannam (1677) Cas. Temp. Finch. 323.

61 The D.I.Y will forms available at the moment do not include words for the appointment of a guardian.

appointment should always supersede an earlier and a deed, for example, should to this extent revoke an earlier will.

3.44 It might also be thought that, just as wills are revoked by marriage, appointments should be subject to other changes in circumstance, such as divorce, the arrival of additional children or simply the lapse of time, which may render the choice of guardian less appropriate or even forgotten. These are, however, matters which a testator can, if he so wishes, arrange for himself. Moreover, we are more inclined to encourage the making rather than the revocation of appointments. Indeed we regard divorce as a good reason for making an appointment,[62] particularly where there has been a custody dispute.

3.45 Finally the willingness of a guardian to act is obviously an essential feature of any system of testamentary guardianship and we therefore wonder whether it would be helpful to require a guardian's consent as a pre-condition to the appointment.[63] This might avoid the problem, if it is a problem, of an appointment being defeated by a guardian's refusal to act. An alternative might be to encourage testators to

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62 See para. 3.16.

63 See, for example, s. 7(5) of the Mental Health Act 1983 which requires a guardianship application to be accompanied by a written statement from the person named as guardian of his willingness to act.

nominate alternative guardians for this kind of contingency. This would also be helpful if the chosen guardian himself dies before the parent and thus before the appointment could take effect.

B. Court appointments

3.46 There can be no doubt that courts should have jurisdiction to appoint guardians, though it is difficult to imagine many cases in which the current powers of appointment would be exercised. Indeed there is authority[64] to the effect that a guardianship order would not achieve much of practical utility where the care of the child is in issue. We think, however, that guardianship ought to give rise at least to a claim to have the child and in some cases to a prima facie right.[65] In any event, the court's powers are complementary to a parent's powers and in general terms enable a court to fill the gap and provide a guardian where a testamentary appointment has failed or was never made.

Circumstances in which court appointments can be made

3.47 We have already listed in Part II above[66] the various circumstances in which a court can, at present,

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64 See, for example, Re N. (Minors) (Parental Rights) [1974] Fam. 40 and Re H. (An Infant) [1959] 1 W.L.R. 1163; para 2.18.

65 See paras. 3.79 - 3.80.

66 Para. 2.17. The relevant statutory provisions are reproduced in Appendix A.

appoint a guardian. These can be broadly categorised into:-

(a) original appointments, and
(b) replacements.

(a) Original appointments

3.48 At present the court has original power to appoint a guardian both to act alongside a surviving parent[67] and where a child has no parents or guardian or "person having parental rights".[68] We think that there is a case for extending these powers in two ways. First, the court's power should not be restricted to cases where there is no one with any parental status but should be exercisable even where there is someone with some of the parental powers (for example, a custodian) but not all. It would, for example, be unfortunate if the court could not appoint a guardian for an illegitimate child orphaned by the death of his mother because of an access order in favour of a grandmother. Secondly, given that there is already power in the court (and parents) to appoint a guardian alongside a surviving parent, it is perhaps odd that there is no equivalent power to make up the complement to two (or even more) where a sole guardian has been appointed by testamentary instrument or by the court.

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67 Section 3(1) and (2) of the 1971 Act: either where there is no testamentary guardian or the appointee has died or refused to act.

68 Section 5 of the 1971 Act.

3.49 Hence we think that the court should have a general power to appoint one or more guardians wherever one or both of the child's parents are dead and it appears to be necessary in the interests of the child. We also think that, in addition to application by the prospective guardian himself, such an appointment should be possible at the application of someone else, for example a local authority, a sole guardian, a surviving parent or the child himself.[69]

(b) Replacements

3.50 At present the court has power to replace a guardian only where a testamentary guardian has died[70] or refuses to act[71] or where the court has removed a guardian.[72] We can think of no reason, however, why the court should not have a general power, on application from a prospective guardian, an existing parent or guardian or a third party, to replace any guardian appointed by a parent or the court who has died or been removed. The existing provisions do not give a court power of replacement where an appointment is terminated by a parent's objection, with or without a court order. Even if the surviving parent's veto is

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69 It is not clear whether this would be possible under the existing provisions.

70 Section 3 of the 1971 Act: possibly only where the guardian has died before the appointment takes effect.

71 Ibid., again possibly only where the refusal is directed to the initial appointment.

72 Section 6 of the 1971 Act.

to be retained,[73] we see no reason why a general power of replacement should not equally apply in such cases, wherever the welfare of the child so requires.

Criteria and procedure for the appointment of guardians by the court

3.51 At present the only clear criterion which applies to courts in exercising their discretion to appoint guardians is the general principle of section 1 of the 1971 Act. This requires the court, in any proceedings relating to the legal custody, upbringing or property of a child, to regard the welfare of the child as the first and paramount consideration. Presumably this test is used to decide, not only whether a guardian should be appointed, but also who should be appointed. Apart from this there is some authority[74] requiring the court to pay attention to the interests of any surviving parent, any relatives, and the child himself, if he has sufficient understanding.

3.52 There is, however, no provision specifically enabling the court to check upon the suitability of an applicant for guardianship. This strikes us as odd when compared with the automatic checks which are part of the procedures for adoption and custodianship, both of which recognise that there may be a particular need for caution where applications are uncontested. Even where a guardianship application is contested, the

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73 As to which see the discussion at paras. 3.30 - 3.35.

74 Halsbury, (op. cit.), para 535.

court has no power to call for an independent welfare report, as it can in ordinary custody proceedings. We therefore think it desirable to provide some machinery whereby the court may be satisfied as to the interests, and also the wishes, of the child. There are several methods of doing this.

3.53 Firstly, the child could be a party to the proceedings, either automatically or at the court's discretion. He is not, under present procedures in the High Court or county court, required to be a defendant or to be served in the proceedings, but the court may direct this and the child will then be represented by a guardian ad litem, who may (in the High Court) be the Official Solicitor. There is at present no machinery for making him a party to magistrates' court proceedings, nor has the court power to appoint a guardian ad litem as it may in care[75] or adoption[76] proceedings. Although a child is not a party to adoption proceedings (except in the High Court) or, usually, to matrimonial proceedings, there may be a case for giving the child the status of a party in guardianship proceedings as a means of ensuring that his wishes and interests are represented.

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75 Children and Young Persons Act 1969, s. 32B and Child Care Act 1980, ss. 7 and 12F.

76 Children Act 1975, s. 20 [Adoption Act 1976, s. 65].

3.54 Secondly, a court in guardianship proceedings could be empowered to order welfare reports. Such reports are already a standard feature of custody disputes in other proceedings[77] and are provided for in the custodianship procedure.[78] They enable a court to be better informed about the applicant and the child and thus better able to exercise its discretion about what is best for the child's welfare. Such reports could be requested either from the local authority social services department, who are experienced in reporting in adoption and fostering cases, or the probation service, who already provide most of the reports in contentious custody and access cases. Alternatively, or additionally, a report from the local authority could be made a condition of an application as it is in custodianship.[79] We think, however, that it is probably not necessary to make such reports mandatory in all cases; it would be sufficient to give the court discretion.

3.55 We invite views as to the relative merits of each of these procedures. It may be that it is not necessary to provide for reports and make the child a party. In any event the judge can ask to see the child although there are dangers in private meetings and it might be better to ask the welfare officer to see the

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77 E.g. Matrimonial Causes Rules 1977, r. 95(1).

78 Children Act 1975, s. 39.

79 Ibid., s. 40.

child and ascertain his wishes.[80] We are conscious that the respective cost of these suggestions must be taken into consideration, although the number of cases is extremely small. In addition to these procedural requirements we see no reason why such disqualifications or qualifications as may be thought appropriate for testamentary guardians[81] should not equally apply to court appointments.

3.56 Further, where the court finds it impractical or undesirable to appoint a guardian or to make any other order for the care of the child in favour of any individual, it should be empowered to make an order committing the child to the care of the local authority. Such an order can already be made on the failure or revocation of a custodianship order, on the refusal of an adoption order, in wardship and in

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80 See for example, Re A. (Minors) (Wardship: Children in Care) (1980) 1 F. L. R. 100. Although there may be a case for a private interview with the judge in exceptional cases the major difficulty is in ensuring fairness to all parties, particularly if the child says something prejudicial about his parents. It is not thought satisfactory for the judge to promise the child not to reveal what the child confides: Dickinson v. Dickinson (1983) 13 Fam. Law. 174. Magistrates do not have the power to see children in private: Re T., The Times, 16 January 1974, and in our Report on Matrimonial Proceedings in Magistrates' Courts (1976) Law Com. No.77, Para. 10.43 we concluded that they should not be given the power.

81 See paras. 3.27 - 3.29.

custody proceedings,[82] and the absence of such a provision in guardianship proceedings is anomalous. Given that the need to appoint a local authority as a sort of "fall back" guardian is just as much, if not more, likely to arise in guardianship than custody proceedings, we think that such a provision should be included among the court's powers to protect the child. Alternatively, the court could simply be empowered to appoint the local authority guardian. Local authorities may already apply to be appointed guardian (although we are not aware of their doing so) but we consider that the court should be able to act without prior application. We would welcome views as to which is the better solution.

3.57 A final safeguard for the child is the ability of other interested people, particularly relatives, to take part in guardianship proceedings initiated by others.[83] This would acquire increased

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82 Children Act 1975, s. 36; Children Act 1975, s. 17 [Adoption Act 1976, s. 26]; Family Law Reform Act 1969, s. 7(2) and section 2(2)(b) of the 1973 Act and Matrimonial Causes Act 1973, s. 43.

83 At present the position is as follows: in the High Court any person appearing to be interested in, or affected by, the application shall be made a defendant or served with the summons (unless the court dispenses with serving) including a local authority if the child is in care: R.S.C. Ord. 90, r. 6(1); in the county court every person appearing to be interested or affected by the application shall be made a respondent, including a local authority if the child is in care: CCR 1981, Ord. 47, r. 6(1) and in the magistrates' courts any person directly concerned in and any other person who the court permits may attend: Magistrates' Courts Act 1980, s. 69.

importance if, as has been canvassed by the Review of Child Care Law, guardianship applications by local authorities or foster parents might replace the present procedure for assuming parental rights over orphans in care.[84] The case of W. v. Hertfordshire County Council[85] has drawn attention to the lack of standing in the present statutory child care code for members of the extended family of a child in care and it is important that guardianship proceedings should afford them an opportunity of making their views known.

Safeguards after appointment

3.58 As with testamentary guardians, the main control after appointment is the court's power of removal.[86] In addition, the court could be empowered to make supervision orders, as it can in adoption, wardship and all other custody proceedings, where there are exceptional circumstances making it desirable that the child should be under the supervision of some independent person.[87] The supervisor may be a court

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84 Report of the Care of Children Committee (Chairman: Miss M. Curtis) (1946) Cmd. 6922, Para. 425(ii).

85 [1985] 1 All.E.R. 1001 (Court of Appeal), [1985] 2 W.L.R. 892 (House of Lords).

86 Section 6 of the 1971 Act.

87 See s. 2(2) and (3) of the 1973 Act; Matrimonial Causes Act 1973, s. 44; Family Law Reform Act 1969, s. 7(4); Domestic Proceedings and Magistrates' Courts Act 1978, s. 9 and Children Act 1975, s. 17 [Adoption Act 1976, s. 26].

welfare officer or probation officer or the local social services authority. The object is often to provide help and reassurance to both parties after a dispute and it might be particularly useful in cases of conflict between a guardian and a surviving parent.

Jurisdiction

3.59 There are two questions of jurisdiction which arise: the first is which courts should have it and the second is the basis on which it should be exercised. At present the High Court, county courts and magistrates' courts all have jurisdiction in guardianship under the 1971 and 1973 Acts.[88] There is, however, some doubt as to whether they all have equal power to appoint guardians to have all the powers described in section 7 of the 1973 Act, that is guardians who are guardians of the person and who also have the rights, powers and duties of a guardian of the estate. This is because a magistrates' court is specifically not competent to entertain applications involving the administration of property.[89] We presume that this provision must mean that a magistrates' court can appoint a guardian to act as guardian of the person and estate together, but cannot appoint a guardian of the estate alone. Indeed section 7(2) of the 1973 Act clearly attributes the power to appoint a guardian of the estate alone to the High Court only.

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88 Section 15(1) of the 1971 Act: see Appendix A.

89 Section 15(2) of the 1971 Act.

3.60 Neither the county court nor the magistrates' courts have power of removal, although they can, at present, order a testamentary guardian to act to the exclusion of a parent and confirm a parent's objection to the testamentary guardian, thereby effecting his removal. The High Court's monopoly of applications for removal seems to us anomalous and costly and we are not sure that any of these distinctions are necessary. We therefore propose that all courts with jurisdiction in this area of the law should have the same powers in relation to guardians (save that any power to vary an order should be confined to the court which made the original appointment).

3.61 There is, however, the additional question of the inherent jurisdiction of the High Court. The powers of the High Court (inherited from the Chancery or equitable jurisdiction)[90] are preserved by section 17 of the 1971 Act. The scope of this jurisdiction, as we have noted, is not clear, largely because there has been no recent exercise of it. For this reason we do not think that the clarification of it is of pressing importance but we invite views as to whether the statutory powers of appointment (and removal) should be exhaustive, to the exclusion of the inherent jurisdiction.

3.62 The present bases for jurisdiction are virtually the same as the bases for custody orders made under the Guardianship Acts 1971 and 1973, which are

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90 See para. 2.16.

one of the classes of custody order considered in our recent joint report with the Scottish Law Commission on Custody of Children - Jurisdiction and Enforcement within the United Kingdom.[91] In that report we drew attention to the diversity and multiplicity of the present rules of jurisdiction which in guardianship proceedings differ according to whether the case comes before the High Court, the county court or a magistrates' court. Briefly, the High Court has jurisdiction where the child is a British subject or is resident or physically present in England and Wales. The county court and magistrates' courts jurisdiction is broadly based on the residence of the applicant, the respondent or the child.[92]

3.63 In the joint report we recommended new bases of jurisdiction for custody orders in the United Kingdom. Apart from orders made in divorce, nullity and judicial separation proceedings, we recommended that the custody jurisdiction in each part of the United Kingdom should be based upon the habitual residence of the child or, where there is an emergency or the child is not habitually resident anywhere in the United Kingdom, upon the child's presence. We think that the arguments in favour of habitual residence of the child as a basis of jurisdiction[93] are as valid for the appointment of guardians as they are for the making of custody orders.

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91 (1985) Law Com. No. 138, Scot Law Com. No.91.

92 Ibid., paras. 2.12-2.17.

93 Ibid., paras. 4.12-4.17.

C. The content and effect of guardianship

Duration

3.64 Once appointed, subject to removal or death, a guardian will remain in office until the child reaches the age of eighteen and attains his majority[94] and we see no reason to alter this rule. Whether the earlier marriage of a child brings guardianship to an end is uncertain.[95] However, as it is equally uncertain whether marriage releases a child from his parent's control, we are inclined to leave this question open.

3.65 Whether a guardian may, at present, resign his office is uncertain.[96] We do not think, however, that it can be in the interests of the child to have an unwilling guardian; in such a case a guardian should be able to resign. We invite views as to whether or not this should require the sanction of a court order, bearing in mind the general principle that people with parental responsibilities cannot normally surender them without judicial process[97] and the fact that the involvement of the court might result in the appointment of a replacement guardian.[98]

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94 Family Law Reform Act 1969, s. 1.

95 See para. 2.13.

96 Ibid., and n.43.

97 Children Act 1975, s. 85(2): see para. 1.6.

98 See para. 3.50.

The powers and responsibilities of guardians

3.66 It is a defect of the existing concept of guardianship that it is imprecise. We know that it comprises most of (and, in relation to property, perhaps more than[99]) the powers and responsibilities of a parent but we do not know exactly what these are or what the precise differences between parenthood and guardianship are. The obvious solution, following from our earlier suggestion that parenthood rather than guardianship should become the primary concept, would be to say that guardians in general have the same powers and responsibilities as parents (and no more) save in relation to specified matters. The effect of this would be to clarify a guardian's position in some areas and to extend his role in others. We think, however, that a guardian should be under a legal obligation to have regard to any known wishes of the parent whom he replaces, for example, in relation to a child's religious upbringing.

3.67 In general terms we think that guardians should have the following powers and responsibilities in relation to the person of the child. It should be made clear that a guardian is under the same duty as a parent to care for the child either personally or by delegation. At present it seems that a guardian would only be subject to the common law duty to protect a child from physical or moral harm, which applies to anyone who assumes care of a child, and the criminal liability which arises where a person with "custody, charge or care" of the child "wilfully assaults, ill-

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99 See paras. 2.26-35.

treats, neglects, abandons or exposes him in a manner likely to cause unnecessary suffering or injury to health."[100] It seems probable that these provisions of the criminal law are founded on a duty to care but it is by no means clear that the standard of a guardian's duty is as high as that of a parent, particularly as a guardian is under no liability to maintain the child. We see no reason for the duty of a guardian to be any less than that of a parent in these circumstances.

3.68 Where a guardian does not have actual custody of his ward, either because there is a surviving parent, or he has arranged for someone else to exercise this function for him, it has been suggested[101] that a guardian has no claim to access to the child. Nevertheless it is now accepted that a right of access should be included within the parental powers and responsibilities and we see no reason why a guardian appointed in place of a parent should not be allowed access. Even where access is seen as the entitlement of the child,[102] it seems to us wrong that anyone, including a surviving parent, should be able without a court order to prevent the child from taking reasonable advantage of that entitlement. We therefore propose that a guardian should have a right of reasonable access.

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100 Children and Young Persons Act 1933, s.1.

101 See para. 2.28.

102 See M. v. M. (Child: Access) [1973] 2 All E.R. 81, per Latey J.

3.69 At present guardians have no duty to maintain the child at their own expense, cannot be ordered to do so by a court and are not regarded as having such a liability for the purpose of the supplementary benefits legislation. Where the child has property, however, a "guardian of the estate" must apply the child's funds for his benefit. In any event a guardian is usually entitled to claim a social security benefit by way of guardian's allowance. We think that guardians should remain exempt from personal financial responsibility,[103] subject only to the injunctions of the criminal law, so far as applicable, and of the care jurisdiction. We would, however, welcome views on this question.

3.70 In relation to education, medical treatment and religious upbringing we think that a guardian should continue to have all the parental powers and responsibilities, as he has already.

3.71 We think that a guardian should be empowered to discipline his ward in the interests of the ward's welfare. The orthodox view is that parents have the right of lawful correction and others (apart from state schools) only have it if care and control has been

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103 This was also the view of the Law Reform Commission of the Australian Capital Territory, (op. cit.), Ch. 11. para. 15.

delegated to them.[104] A guardian should, however, be in the same position as a parent, that is he should be entitled to punish or to delegate the right if he delegates care and control.

3.72 Further, we see no reason to change the current position whereby a guardian has the same capacity as the parent to arrange for the child to leave the jurisdiction, though this,perhaps more than some of the other powers, must be subject to the wishes of a surviving parent. A guardian does appear to have power at present to change a child's surname. At least a deed poll to evidence a change of name of a minor can be executed on the child's behalf by a "parent or legal guardian."[105] We are not convinced, however, that this is an appropriate or necessary power for a guardian in any circumstances particularly where there is a surviving parent. A child's surname is an important component of the child's identity as a member of a particular family group, and guardianship, unlike adoption, should, we think, preserve rather than erode such ties. However we invite views.

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104 See e.g. Children and Young Persons Act 1933, s.1(7); Bevan, The Law Relating to Children (1973) p.210. However a parent or guardian presumably loses the right if he loses custody, for he cannot then have physical possession: access would not be a sufficient basis for the right.

105 The Enrolment of Deeds (Change of Name) Regulations 1983, S.I. No. 680, Reg. 8.

3.73 We think that a guardian's consent to his ward's adoption should continue to be required as it is as present [106] and that a guardian should in all cases have the same power to consent or withhold consent to the marriage of a child of 16 or 17 as the parent he replaces. We therefore propose that the relevant legislation[107] should be amended accordingly: the omission from the list of persons whose consent is required, of guardians appointed by the inherent jurisdiction of the High Court and those appointed in place of a guardian removed under section 6 of the 1971 Act, should be rectified.

3.74 We find the question whether a guardian should himself be able to appoint a testamentary guardian more difficult. On the one hand such an appointment can be seen as an exceptional parental prerogative that should not be extended to guardians.[108] There is, perhaps, little justification for giving the guardian the power if there is a surviving parent. Cases in which a sole guardian dies before the child reaches eighteen must be so rare that there is no need to recommend any such delegation of the power for those few cases. However, this might be thought inconsistent with the guardian's power to consent (or withold consent) to a child's adoption.

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106 Children Act 1975 s. 12 [Adoption Act 1976, s. 16].

107 Marriage Act 1949, second schedule.

108 This was a recommendation of the Law Reform Commission of British Columbia in their Report on the Authority of a Guardian (1985) Ch. 111. C.

After all, if a guardian can arrange for the child's adoption should he not be able to provide someone to look after the child in the event of his death? The distinction is, perhaps, that adoption has the advantages of judicial safeguards while a testamentary appointment does not. However, if the safeguards on testamentary appointment which we suggest above were to be introduced, the argument against allowing a guardian to appoint a replacement for himself might be diminished. We invite views.

Administration of property

3.75 As we have noted in Part II above[109] there is considerable uncertainty about the relative powers of parents and guardians in relation to the administration of a child's estate. We do not think that this disparity between the position of parents and guardians should be perpetuated. It would not be consistent with our suggestion that parenthood should be the primary concept that guardians should have wider powers than parents, and we therefore propose that in so far as guardians should have powers of administration in relation to property these should be no greater than the equivalent powers of a parent.

3.76 We do not think, however, that there is any merit in continuing to distinguish between guardianship of the person and guardianship of the estate. Although

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109 Paras. 2.32-2.35.

guardianship was originally a device for protecting property it is now primarily concerned with providing for a child's upbringing. Indeed given the availability of the trust as a means of administering family property it could be argued[110] that the old concept of guardianship of the estate is redundant and that guardianship need only relate to the person of a child.[111] In so far as it is possible to be certain about the precise role of a guardian of the estate it seems to be much the same as that of a trustee and the provisions of the Trustee Act 1925, for appointing (and if necessary, removing) trustees and for maintenance and advancement during a minority, protect a child's interests as well as (if not better than) the existing provisions relating to guardianship.[112]

3.77 It would not, however, be appropriate in all cases to confine a guardian's powers to those relating to the person of a child. Powers relating to property could be useful, for example where a child wins on a premium bond or receives a valuable gift.[113] It should be possible, we think, for a guardian to be able to administer the money for the child's benefit.

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110 And has been by the Law Reform Commission of the Australian Capital Territory (op. cit.), Ch. 11. para. 14.

111 Although in Ontario the concept of guardianship applies only to property: Children's Law Reform Act 1980.

112 Indeed the Law Reform Commission of British Columbia (op. cit.) recommended that a guardian of the estate should have all the powers, duties and responsibilities which he would have if he were a trustee: Ch. 111, C.

113 See also para. 3.82.

Equally a guardian should be able to take an undesirable or very valuable gift away from a child and either keep it until he is older or sell it so as to be able to buy something the child needs.

The position of a guardian where there is a surviving parent or another guardian

3.78 Inevitably the exercise of powers and responsibilities by a guardian may differ according to whether the guardian is acting alone or jointly with a surviving parent or guardian and we therefore wonder whether it would be desirable in either case to deprive the guardian of certain powers and responsibilities or to require the prior consent of the parent or guardian. Statute provides that where people hold "parental rights or duties" jointly they may exercise them unilaterally subject to the other signifying disapproval.[114] Should this rule apply to guardians?

3.79 Although it is possible to imagine differences of view in relation to any of the powers and responsibilities discussed above, the question of where the child should live is the one most likely to arise and most difficult to answer. We have considerable doubt whether in law a guardian has any lesser entitlement to actual custody or physical possession of a child than has a parent, even when he is acting with a parent. Where an application to appoint a guardian is made to a court, we see no reason why the court should not be able to make an order

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114 Children Act 1975, s. 85(3).

regarding the custody or care of the child in addition to or instead of appointing a guardian if thought appropriate. Difficulties might however arise in the case of a testamentary guardian. The problems of divorced or separated parents, referred to earlier,[115] are obviously relevant here. We think that it would be an undesirable restriction if only a custodial parent were able to appoint a guardian. Given, however, that in some cases there will be an issue as to who is to have the child as a result, we wonder whether the matter should simply be left to the courts to resolve or whether it would be desirable to have a general rule. It could, for example, be provided that a guardian has the same right to actual custody as a parent; that he has the same right except where acting with a parent; or that actual custody should remain with the parent (or guardian acting in his place) who had the right to it at the time of the death. We invite views.[116]

3.80 Such a rule could, however, only determine the prima facie entitlement and, should recourse to the court be necessary, would only determine on whom the burden of initiating proceedings is to fall.

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115 See paras. 3.30-3.40.

116 In New Zealand, for example, a testamentary guardian has no inherent right to custody, but can apply for an order (Guardianship Act 1968 section 3). The Law Reform Commission of the Australian Capital Territory, (op. cit.), however recommend that a guardian should have custody, subject to a court order, (Ch. 111, para. 13).

Disputes between guardians

3.81 In the event of a dispute between joint guardians, or parent and guardian, on any matter affecting the child's welfare the question can be referred to a court for its direction. However, there is no express provision in the present law for the allocation of legal (or actual) custody or access between guardians as there is between parents[117] or as between a parent and guardian.[118] As we consider that the main purpose of guardianship now is to provide for the care of the child, we propose that it should be made clear that the court may provide for these matters on the application of any guardian. However, this raises the question of whether or not such orders should be assimilated with to the new custodianship scheme when this is brought into force. We return to this question in paragraph 3.84.

Splitting powers and responsibilities

3.82 Under our proposals, guardianship will involve almost all the powers and responsibilities of a parent and the separate concepts of guardianship of the person and guardianship of the estate would disappear. However, it has been possible in the past to appoint

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117 Section 9 of the 1971 Act.

118 Sections 10 and 11 of the 1971 Act.

guardians for particular purposes[119] and we wonder whether this should continue. A testator may, for example, wish to ensure that a member of his own family will have a voice in the child's general or religious education or take care of his small property. The problem with permitting this is that it may enable the guardian to exercise control over a particular aspect of the child's life without having any responsibility for the more mundane matters which may be intimately connected with it and in such a way as to make life more difficult for the person who is actually looking after the child. It is this consideration which has led the courts to disapprove of orders made in divorce proceedings granting sole custody to one person and day to day care and control to another. It would, however, be possible to provide against this by ensuring that the person given the legal right to actual custody of the child should have all the powers and responsibilities of guardianship even if specified powers were to be shared with another guardian.

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119 See, for example, Re Woolscombe (1816) 1 Madd. 213, where a guardian was appointed for the sole purpose of consenting to the child's marriage, and n. 59 in Part 11 above. Further, the High Court has power under its inherent jurisdiction (preserved by s. 7(2) of the 1973 Act) to appoint guardians of the estate alone either generally or for a particular purpose. A testator can probably do likewise, although such an appointment will not constitute the guardian a 'testamentary guardian' according to the statutory definition: In re Lord Norbury [1874] 9 l.Eq.R. 134: see para. 2.23 and n's 95 and 96 thereto.

3.83 There is obviously less objection to allowing courts to grant specific powers than there is to enabling testators to do so. We do not expect that courts would often find it appropriate to fragment parental responsibilities in this way but neither do we think that their powers to do what they think best for the welfare of the particular child in question should be unduly restricted. Hence we invite views.

3.84 One aspect of this question is whether, on the application to appoint guardians, the court should be empowered simply to award legal custody. We consider that there is a good case for allowing the court to make a lesser order instead of appointing a guardian. The main example would be an order for legal custody, which has much the same effect as the appointment of a guardian of the child's person. However, this raises the difficulty of the overlap between guardianship and the new custodianship procedure. Custodianship will be available in cases where one or both parents are dead but is subject to conditions which do not at present apply to guardianship. Some of our provisional proposals, for example, as to the power to call for a welfare officer's report in guardianship cases or to commit to local authority care, will reduce the discrepancy between them. However, except in wardship (or other inherent powers) and proceedings under the Matrimonial Causes Act 1973, any court which wishes to give legal custody to a person who is neither a parent nor a spouse who has treated the child as a member of the family in relation to a marriage which is breaking down, will in future have to treat the case as if the person concerned had applied (and was qualified to

apply) for custodianship. Thus, although the conditions of residence with the child will not apply, the effect of the order will be the same. We invite views upon whether the court should be empowered to grant legal custody in guardianship proceedings and if so whether the same device should be adopted.

3.85 More generally, the overlap between guardianship and custodianship raises the question of whether the two systems might be combined into a single structure dealing with the allocation of parental responsibility to people who are neither parents nor separating or divorcing spouses. Any conclusion on this matter would be premature before our review of the custody jurisdiction is complete but the question is also relevant in the following part of this paper, where we discuss the possibility of extending the concept of guardianship into new fields.

Summary

3.86 To summarise, the issues raised in this Part of the paper are as follows:-

(i) Is there any advantage in continuing to characterise parents as guardians in certain circumstances, or should the description be confined to third parties acting in place of parents?

(Paragraphs 3.2-3.6).

(ii) Is it necessary or desirable to provide for children who have lost one or both of their parents by enabling legal powers and responsibilities in respect of their upbringing to be given to individual third parties?

(Paragraphs 3.7-3.17).

(iii) If so, is it desirable to retain the system whereby parents may make private testamentary appointments?

(Paragraphs 3.18-3.22)

(iv) If a system of testamentary appointment is to be retained:

(a) What, if any, safeguards should be introduced to protect the child? In particular should there be statutory qualifications or disqualifications? Should non-related guardians who are caring for the child be brought within the protections of the Foster Children Act 1980?

(Paragraphs 3.23-3.29).

(b) Should there by any restriction on appointments taking effect where there is a surviving parent, and if not, what provision, if any, should there be to

take account of any objection which the surviving parent might have to the guardian?

Should the position be the same where the surviving parent has previously been deprived of custody in divorce or similar proceedings?

(Paragraphs 3.30-3.37 and 3.40).

(c) Should there be any restriction on appointments by a parent who has been deprived of custody?

(Paragraphs 3.38-3.40).

(d) Is there any need to change the way in which guardians can be appointed - either by amending some of the technical rules relating to the making or revocation of wills and deeds or by providing some alternative method of appointment?

(Paragraphs 3.41-4.45).

(v) In relation to court appointments of guardians:

(a) Is there any reason why the court should not have a general power to appoint (and remove and replace) guardians in any

circumstances, following the death of one or both of a child's parents, where it would be for the welfare of the child?

(Paragraphs 3.46-3.50).

(b) What, if any, criteria and procedures should be introduced to enable the court to check on the suitability of the applicant and to be satisfied as to the interests and wishes of the child?

(Paragraphs 3.51-3.55).

(c) Should the court have power in such proceedings to commit the child to the care of a local authority or to appoint the local authority guardian and, if so, on what grounds?

(Paragraph 3.56).

(d) Should the court be able to make supervision orders to accompany the appointment of guardians?

(Paragraph 3.57).

(e) Should the High Court, county court and magistrates' courts all have equal powers to appoint and remove guardians?

(Paragraph 3.58-3.60).

(f) Is it appropriate to base the court's jurisdiction on the habitual residence of the child?

(Paragraphs 3.61-3.62).

(vi) Should guardians, in general, have the same powers and responsibilities as parents (paragraph 3.65-3.76), if so:

(a) Should there be a requirement that they be exercised in accordance with any known wishes of the parent replaced?

(Paragraph 3.65).

(b) Should they be qualified in any way where the guardian is acting with a surviving parent or another guardian?

(Paragraph 3.77-3.79).

(c) Is it necessary to retain the distinction between guardianship of the person and guardianship of the estate?

(Paragraphs 3.74-3.76).

(vii) In the event of a dispute either between joint guardians or between parents and guardians should the court have the same power to make orders for custody and access as it has when there is a dispute between parents?

(Paragraph 3.80).

(viii) Should it be possible for a court or parent to be able to appoint guardians to exercise particular and specified parental powers and responsibilities?

(Paragraphs 3.81-3.83).

(ix) Is there a case for combining guardianship and custodianship into a single structure dealing with the allocation of parental responsibility to people who are neither parents nor separating or divorcing spouses?

(Paragraph 3.84).

PART IV

POSSIBLE EXTENSIONS OF GUARDIANSHIP

Introduction

4.1 As we have seen, guardianship can be a valuable means by which the responsibility for bringing up a child is allocated or transmitted. Its various advantages have already been mentioned. Although our discussion of the need for the institution was primarily confined to the situation arising on the death of one or both parents our consideration of that particular problem has led us to ask whether there might not be other situations in which the appointment of a guardian might be equally desirable. The concept and procedures of guardianship have two features which distinguish them from others used in the allocation of parental responsibility and which might usefully be extended to other circumstances. First, they enable almost all parental responsibility to be transferred to a person who is neither a parent of the child nor a spouse of the parent and, secondly, they enable this transfer to take place by private voluntary act without resort to a court.

4.2 We must stress that the possibilities raised in this part of the paper are only tentative suggestions. They raise important questions for other

jurisdictions of child law, both public and private, and it would be premature to reach any conclusions on them at this early stage of our review. However we would be grateful for comments at this stage to give us an indication of whether these suggestions are worth pursuing.

4.3 As in the previous Part of this paper we are again considering the possibility of appointments made either by parents themselves or by the court. As very different considerations apply to each we shall deal with them separately.

A. Parental appointment of inter vivos guardians

4.4 At present statute provides that "a person cannot surrender or transfer to another any parental right or duty he has as respects a child".[1] We believe it to be right that a parent should not be able to abdicate responsibility for his children without some formal judicial process such as adoption. Further it has long been recognised that to allow a free market in the transfer of parental responsibilities would seriously threaten the welfare of children. Thus the process of adoption is deliberately designed to incorporate a comprehensive and expert assessment of whether the placement will "safeguard and promote the welfare of the child

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1 Children Act 1975, s. 85 (2), subject to section 1(2) of the Guardianship Act 1973 which relates to separation agreements between husband and wife.

throughout his childhood"[2] and recognises that any payment, whether from parent to adopter, from adopter to parent, or from either to the agent arranging the placement, increases the risk that the arrangement will be far from satisfactory and may even be dangerous.[3] Parents are no longer permitted to make their own adoption placements, save with relatives. The adoption itself can only be effected by court order. Indeed some of the concerns which are currently being expressed about surrogacy arrangements are similarly based on a belief that "trafficking" in children is not in the interests of children.

4.5 A parent may, of course, delegate the care of his children, for example, to a school, relative, nanny, or foster-parent. There are at present no legal controls upon the parent other than the criminal liability for neglect, abandonment or exposure to the risk of unnecessary suffering or injury to health.[4] Such controls as there are, for example, in the Foster Children Act 1980 or the Nurseries and Child-minders Regulation Act 1948, operate upon the people or places providing the care rather than upon the parents. There is a provision in the Foster Children Act enabling regulations to be made requiring notification

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2 Ibid., s.3 [Adoption Act 1976, s.6].

3 Adoption Act 1958, s.50 [Adoption Act 1976, s.57].

4 Children and Young Persons Act 1933, s.1: see para. 2.27.

by parents[5] but no regulations have yet been made. Hence parents are generally free to make whatever arrangements they wish, short of adoption.

4.6 Such an arrangement is always revocable at will by the parent. Indeed it could be said that the inherent instability of private fostering arrangements can itself constitute a risk to the child's welfare. This, coupled with the fact that there may be circumstances in which it might be desirable if those with actual care of the child were specifically empowered (as they are not at present) to exercise parental powers and responsibilities, gives rise to the first possible extension of guardianship.

(i) Delegation of powers and responsibilities to a temporary guardian

4.7 Although many of the arrangements which parents make for other people to look after their children are on a day-to-day basis or of a short term or limited nature, similar informal delegations of the parental role may, or could arise, for example, where a child's parents go abroad for a long period of time or are otherwise prevented from looking after their children by hospitalisation, imprisonment or some prolonged or permanent incapacity. In such a situation it may be thought that a mere delegation of authority is inadequate yet a complete transfer of responsibility to adoptive parents would be totally

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5 Foster Children Act 1980, s. 4.

inappropriate. We therefore ask whether guardianship could be used in such a case? It may be advantageous if the person with actual care of the child were able to exercise parental powers and responsibilities. For example, a child might need an urgent operation while his parents are away or it might be necessary to exercise some powers of administration over the child's property, perhaps to receive and spend a premium bond win on behalf of the child. In other words the person actually caring for the child should, perhaps, have some corresponding legal status. This may be in the interests, not only of the child but also the natural as well as foster parents, in providing security and certainty. If a guardian were to be appointed in such a case he might, especially in relation to property matters, act on a similar basis to a power of attorney. We think that such an appointment should, probably, be capable of being limited to specific matters and that like a power of attorney it should be made by deed.[6] It could, for example, have the advantage of securing who looks after the child against well meaning relatives who might have other ideas. The child's grandmother might easily think that she was the best person to have the child, despite her age, but an appointment in favour of an aunt or sister might prevent the grandmother from trying to change the situation. A disadvantage, however, might be that the parent might find himself bound by decisions taken by the temporary guardian, acting on his behalf. For example, the guardian might enrol the child at a school to which the parent

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6 Powers of Attorney Act 1971, s.1.

objects. One solution would be to provide that a parent could simply share his responsibilities with a guardian along the same lines as the proposals next discussed.

4.8 We invite views as to whether the possible dangers of appointing a temporary guardian outweigh the possible benefits. There seem to us to be a number of circumstances in which such a power could be used to promote a child's welfare. It would be a responsible parent who would want to provide security and re-assurance for his child in such a case, although no opportunity should be given for such an arrangement to be made for reward. If, however, there are difficulties which are thought to be overwhelming, perhaps the powers and responsibilities of a temporary guardian might be restricted accordingly.

(ii) Sharing parental powers and responsibilities with a guardian

4.9 The other possible extension to a parent's power to appoint a guardian which has occurred to us arises where responsibility for a child is actually shared between two people but is only legally exercisable by one of them, for example, where a widowed (or perhaps divorced) mother remarries and the children live with her and the stepfather or where the mother and father of a child live together without being married. We are not in any way suggesting

that a parent should be able to replace him or her self or deprive the other parent of any of his or her powers and responsibilities (or of any right to apply to the court for them) but that the parent should perhaps in certain circumstances be able to share the powers and responsibilities with someone else. The objections noted above to a parent divesting himself of his responsibilities would not apply; there would instead be an additional person with parental responsibility.

4.10 The analogy with guardianship as elaborated in the previous Parts of this paper is obvious. A surviving widowed parent can already, in effect, agree to share his parental powers and responsibilities with a testamentary guardian appointed by the deceased parent, by not objecting to him, and where such an appointment is not made or fails for some reason, a guardian can be appointed by the court, perhaps on the application of the surviving parent.[7] Similarly, the mother of an illegitimate child might choose to marry the child's father, although this might be said to be a legitimation of the father's position rather than a sharing of powers and responsibilities by the mother. However the distinction between the existing system of guardianship and what we are now suggesting is that the surviving parent, not the deceased parent, should be capable of appointing someone to act alongside him during his lifetime and, further, that the circumstances for appointment should not be limited to cases where one parent has died. Is there, we ask, any sense in regarding a dead parent as any better

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7 See paras. 2.13-2.15.

qualified to appoint a guardian than one who is alive (and who will be able to restrict the guardian's actions, if necessary), or in distinguishing between lone parents who have been bereaved and those who have been divorced or never married? There are far more dependent children living with lone parents who are single or who have been divorced than there are living with widowed parents.[8]

4.11 Any proposal to extend guardianship in this way depends, in part, on the reaction to some of the earlier discussion about the power to make testamentary appointments and the position of a guardian where there is a surviving parent.[9] Assuming that it is thought that it should be possible for a testamentary guardian to be appointed, many of the same advantages would apply to an inter vivos appointment. For example, it would enable an arrangement to be made privately, within a family, and avoid the trouble and expense of going to court. Further, it could allow for the responsibility of parenthood to be shared and the welfare of the child could benefit from the continuity and security of having a second adult in loco parentis. From the point of view of the prospective guardian who has been caring for the child anyway an appointment would provide legal authority for his existing position.

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8 General Household Survey, OPCS Monitor, GHS 84/1, Table 5.

9 See Part III, section A.

4.12 Of course there might be disadvantages. As we pointed out in relation to testamentary appointments, a parent cannot be presumed always to act in the child's best interests and it could be thought that giving a lone parent power to share his or her parental powers and responsibilities might expose that parent to undesirable pressures and temptations and provide him or her with an opportunity to confer a favour on an adult rather than a benefit on a child. Such an appointment might also create a potential conflict between a guardian and parent or, if the appointment was made by a custodial parent, between the guardian and the "other" parent. If the welfare of the child were threatened by the appointment the only remedy would be by way of an application to remove the guardian or have the child made a ward of court, or in an extreme case, by the local authority making an application in care proceedings. These arguments obviously have some force but the dangers are, perhaps, no greater than those connected with testamentary appointments for which we have suggested safeguards.[10]

(a) Circumstances in which an inter vivos appointment might be made

4.13 We do not think that it would be appropriate to contemplate the appointment of guardians by the parents of a legitimate child who are still married and living together as a family; by parents who have separated where there has been no formal judicial reallocation of responsibility between them or by parents in respect of whom custody has been allocated

10 Ibid.

but who remain married. The sort of circumstance in which we envisage that it might be feasible is where there is no suitable testamentary guardian to act alongside a widowed parent. (The creation of a power of appointment in these circumstances would probably reduce the post-death court appointment to applications by prospective guardians themselves and, possible replacement appointments following removal.) We also think that there is a case for considering whether the power to appoint should be similarly extended to other types of lone parents such as the mothers of illegitimate children and custodial parents who are now divorced.[11] Both these situations are, however, different from that of the widowed parent in that the other parent will still be alive. In the former case that parent may not have legal status because the mother of an illegitimate child has the parental "rights and duties" exclusively,[12] unless the father has had "rights and duties" conferred on him by a court order.[13] In the latter case the father will not only be alive but will not have lost all his parental powers and responsibilities. There is, therefore, in both these cases, and particularly in the latter, a potential conflict between any guardian appointed and the "other" parent. Even if, as we have stressed above, the effect of the appointment is not to derogate from the other parent's legal status the practical

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11 See n.8 above.

12 Children Act 1975, s.85 (7).

13 Paton v. British Pregnancy Advisory Service Trustees [1979] Q.B. 276, 279-80 per Sir George Baker P.

result may be very different. We therefore invite views as to whether all or any of these lone parents should be empowered to appoint guardians.

(b) People who might be appointed

4.14 A further important consideration, and a possible means by which such appointments could be restricted, is the question of the person with whom a parent might share his or her powers and responsibilities. We have considered the following:

(i) Step-parents

4.15 The clearest case in which such a power might be used is where a lone parent with young children re-marries. Step-parenthood following the death of a natural parent is less common than that following

divorce or, probably, an illegitimate birth.[14] It is clear, however, that an increasing number of children live in step-families. It has also been found that, while many of those families would prefer to "pass" as "normal", others are seeking to acknowledge and accommodate their differences from "normal" families.[15] Nevertheless the step-parent acquires no parental rights or duties as a result of the marriage,[16] although if that marriage breaks down he may be ordered to maintain a child who has been treated as a member of

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14 There are no precise statistics of step-parenthood available, but some indication is given by figures for marriages in the United Kingdom in 1981: of those which were a second marriage for one or both partners, 122,000 involved a divorced person, while only 23,000 involved a widow or widower; 10,000 of these overlapped, involving one of each. (Social Trends 14, 1983, table 2.12). The divorced are far more likely to have dependent children, as divorce is a much more common cause of marriage breakdown in early adulthood than is death. Studies of earlier cohorts suggest that at least half of the women divorced below the age of 45 will remarry within 5 years (Leete and Anthony, "Divorce and remarriage: a record linkage study" (1979) 16 Population Trends p.5). In 1981 there were just over half as many illegitimate live births in England and Wales as there were children under 16 whose parents divorced in that year (Social Trends 14, 1983, tables 2.16 and 2.17). Again studies of earlier cohorts indicate that roughly one-sixth of illegitimate children were living with a step-parent by the age of 11 (Lambert and Streather, Children in Changing Families: A Study of Adoption and Illegitimacy, (1980).

15 Burgoyne and Clark "Reconstituted Families" in Rapoport, Fogarty and Rapoport (eds.), Families in Britain (1982), at p. 300. See also Burgoyne and Clark, Making a Go of It, A study of Stepfamilies in Sheffield (1984).

16 Tubb v. Harrison (1790) 4 TR 118; Re. N. (Minors) (Parental Rights) [1974] Fam. 40.

the family and may apply for custody or access.[17] It has also been said that "there appears to be some general expectation that step-fathers will financially support their step-children" (despite the lack of any public obligation upon them to do so) because of the withdrawal of benefits from mothers who cohabit with or without marriage.[18]

4.16 Hence, although a step-parent may acquire obligations and through living with the family may, in practice, be exercising parental authority, he has no right to make decisions about his step-children. The couple may apply to adopt them, but this is often inappropriate because it severs all legal links with

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17 Matrimonial Causes Act 1973, ss. 23(1)(d)(e)(f)(2),(4), 24(1)(a)(b)(c), 27(6)(a)(e)(f), 42(1) and (2) and 52(1); Domestic Proceedings and Magistrates' Courts Act 1978, ss. 2(1)(c) and (d) and (2), 6(2)(c) and (d), 7(2)(b), 8(2), 11(1) to (4), and 88(1); any court in deciding whether to order a party to the marriage to make provision for a child of the family who is not the child of that party must have regard, inter alia, "(a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility; (b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own; (c) to the liability of any other person to maintain the child."

18 Masson, "Old families into new: a status for step-parents", in M.D.A. Freeman (ed.), State, Law and the Family: Critical Perspectives (1984), at p. 229.

the family of the other parent.[19] The step-parent may also apply for custody in any previous divorce proceedings or, if that is not possible (and when it is in force), for custodianship but the latter involves a complex assessment process and adjudication from which many may shrink.[20] It has also been pointed out that it may be difficult for the court to know whether or not an order will benefit the child when his practical circumstances will remain exactly the same.[21]

4.17 It may well be argued that a surviving parent should be able to share his or her parental rights and duties with a step-parent by means of some formal or

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19 Departmental Committee on the Adoption of Children (Chairman: Sir W. Houghton). Working Paper (1970) paras. 92-94; Report (1972), Cmnd. 5107, paras. 103-110; where an adoption application by a parent and step-parent or step-parent alone would be "better dealt with" under section 42 of the Matrimonial Causes Act 1973, the court is required to dismiss it (Children Act 1975, ss. 10(3) and 11(4)) [Adoption Act 1976, ss. 13(3) and 15(4)]; in other cases, the court will be required to treat an application for adoption by parent and step-parent or by step-parent alone as an application for custodianship if "the child's welfare would not be better safe-guarded and promoted by the making of an adoption order in favour of the applicant, than it would be by the making of a custodianship order in his favour" and "it would be appropriate to make a custodianship order in the applicant's favour": Children Act 1975, s.37(1).

20 Children 1975 Act, s.40 and regulations; see also Masson, (op. cit. at n.18), and Masson, Norbury and Chatterton, Mine, Yours or Ours? a study of step-parent adoption (1983).

21 Masson, (op. cit.), at n.18, at p.234.

extra-judicial act. There is little risk of harm to the children because their home circumstances will not be changed, and they may gain from the additional responsibility for their upbringing being placed upon another adult.[22] The children will retain their legal relationship with the family of the deceased parent, while a step-parent who wishes to assume formal responsibility in this way is likely at the same time to be advised to make sensible provision for his step-children in a will.[23]

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22 It is important to bear in mind that until the doubts expressed by the Houghton Committee, (op.cit.), echoing those of the Association of Child Care officers, in Adoption - The Way Ahead (undated c. 1968), step-parent adoptions were readily granted; that no guardians ad litem in the study referred to at n.20 reported against adoption following the death of a natural parent (see p.81): yet as Ormrod L.J. pointed out in Re D. (Minor) (Adoption by step-parent) (1980) 2 F.L.R. 102, 105, it is "extremely difficult to know what criteria should be used in reaching the decision" because "....in the vast majority of cases it is impossible to show any material advantage to the children in an adoption order over and above custody. So the court has to consider very difficult psychological issues in coming to the conclusion that the matter can be dealt with one way or the other". That the cases amply illustrate this difficulty is demonstrated by Rawlings, "Law Reform with Tears" (1982) 45 M.L.R. 637. There is as yet no case law on the alternative possibility of custodianship following the death of a natural parent as the procedure has not yet been introduced. It may be that the courts would find it easier to decide between some relationship and none at all than between differing degrees of relationship.

23 Succession rights might otherwise be a good reason for granting adoption, although what may be gained from the step-parent and his family cannot be weighed against what may be lost from the natural parent's family.

4.18 It seems to us, therefore, that there may very well be step-parents who would regard being appointed as guardian by and to act alongside their spouse as not only a convenient but an appropriate recognition of their position as regards the children in their care. Guardianship would both preserve their non-parental status yet accord them virtually the same powers and responsibilities as a parent and thus enable them to act legally and actually in loco parentis.

4.19 Inevitably, as we have pointed out above, this suggested extension of guardianship may not be quite so desirable where a non-custodial (or even a natural) father continues to be involved in the child's upbringing. For a child to have three people capable of exercising various parental powers and responsibilities may be confusing or positively harmful. It should also be borne in mind that an appointment by a custodial parent would probably amount to a variation of the custody order. On the other hand it is in just those families that the greatest need may be felt for some legal relationship to cement the factual ties and the disadvantages of adoption may be greatest.[24] One possibility, on the analogy of the present provisions for change of name or leaving the country, would be to permit a custodial parent to make such an appointment only with the consent of the other or with leave of the court.[25] We invite views.

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24 Houghton Committee Report, (op. cit.), paras. 103-110; see also the references cited in n.22.

25 Cf. Matrimonial Causes Rules 1977, rr. 92(8) and 94(2).

(ii) Natural fathers

4.20 Appointing natural fathers as guardians would, as with step-parents, be a simple way to give some legal recognition or legitimation to either a factual situation, where the child's parents are actually living together in a stable relationship, or to the biological fact of paternity where both the mother and father of the child wish to share the legal relationship of parent with their child.

4.21 At present the only way in which a natural father can acquire parental powers and responsibilities is by marrying the mother; but the couple may only want equal authority in relation to the child, not any other part of such an arrangement. Alternatively, a father can apply to the court for an order of legal custody[26] but he cannot have this jointly with the mother. We have recommended, in our report on Illegitimacy,[27] that he should be able to apply to the court for all or any of the parental "rights and duties". Judicial proceedings, however, may be unduly elaborate, expensive and perhaps unnecessary, unless the child's mother objects to the father having powers and responsibilities. As an alternative, guardianship could provide a simple and economic solution, particularly where the parents are living together in a stable relationship. It would also make it unnecessary for the mother to appoint the father a testamentary

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26 Section 9 of the 1971 Act.

27 (1982) Law Com. No. 118, paras. 7.26-7.33.

guardian if she wished him to have the parental rights and duties after her death, for those rights and duties would pass exclusively to him by survivorship.[28]

4.22 The National Council for One Parent Families, in their response to our Working Paper on Illegitimacy,[29] stated that "there is a need to provide a procedure available to all unmarried parents, whether cohabiting or not, to make a mutual declaration of parentage and joint custody, and to register it with the court. Simple forms could be available at the Municipal Offices where births are registered, where such a document could be formalised. This would give full custody rights to unmarried fathers where the mother consents".[30] In our report we rejected this suggestion, primarily because of the pressure which an unscrupulous natural father might put upon the mother, perhaps at the price of an agreement to provide for her or to continue their relationship.[31] However, this argument was applied in the context of a proposal that shared parental rights might flow automatically from the registration of birth. The mother might then be faced with the invidious choice between giving the father rights and depriving the child of official recognition of the identity of his father. We do not

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28 Children Act 1975, s.85 (4).

29 (1979) Working Paper No. 74.

30 National Council for One Parent Families, An Accident of Birth - A Response to the Law Commission's Working Paper on Illegitimacy (1980) at p.9.

31 Law Com. No. 118, para. 4.39.

think that the objection has so much force in relation to a proposal that a mother might be able to choose, by a formal but extra-judicial act, to appoint the father as guardian to act alongside herself.

4.23 There was a further objection to which we attached importance in our report. It is open to the mother to confer parental rights and duties upon a willing father by agreeing to marry him. To allow her to do so by an act which may be thought less beneficial, not only for the child but also for herself, may be thought to debase the institution of marriage.[32] However, there may be many reasons why the mother and father of a child are unable or unwilling to marry one another. If they are able and willing to share responsibility for their child, it may be unfortunate that the child should be deprived of the benefit of a parental relationship with them both for the lack of a similarly simple mechanism for achieving it.[33]

4.24 We do not think that there is any inconsistency between this suggestion for extending guardianship and the recommendations made in our earlier report. Indeed it may be a helpful addition as we understand that the resource implications of enabling fathers of illegitimate children to apply to court for parental rights and duties are being

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32 Ibid., para. 4.40.

33 Criticism of the views expressed in our report includes, for example, Eekelaar, Family Law and Social Policy, 2nd ed. (1984), at p. 143; Ingleby [1984] J.S.W.L. 170, 172, and Bainham [1985] J.S.W.L. 50,52.

considered and an extra-judicial means of acquiring such status could reduce the potential cost of implementing our earlier proposals.

(iii) Cohabitants

4.25 A third category of person with whom a lone parent may wish to share his or her legal powers and responsibilities is the person with whom he or she is cohabiting. We are conscious that as potential guardians cohabitants may not be as apparently suitable as step-fathers or natural fathers, although such a person may very well have voluntarily assumed powers and responsibilities in relation to his partners' children in the same way that a step-parent might. Thus a similar argument for uniting legal status with the actual position could be made out. However, it seems to us that cohabitation (with or without marriage) might more properly be regarded as an additional qualification to the two mentioned above, rather than a qualification in its own right.

(iv) Anyone

4.26 Finally, we should ask why a lone parent should not be able to choose anyone he wishes to act with him as guardian of his child since testamentary appointments are, at present, not restricted in any way. We have reason to suppose that many testamentary[34] (and post-death court appointments[35])

34 From Mrs Priest's survey described in Appendix B.

35 See Re H. (An Infant) [1959] 1 W.L.R. 1163.

are made within families, either aunts or uncles, brothers or sisters or grandparents, and if these are suitable choices for a widowed parent could they not also be for other lone parents? Old friends of the family may also be thought appropriate and thus perhaps a parent's power to appoint should not be restricted. However, a means of sharing parental powers and responsibilities during one's lifetime is, perhaps, different from providing a replacement parent in the event of untimely death and although the mechanism of guardianship could possibly be used in each case, the basis of the appointment might be very different. We would be grateful for comments.

(c) Methods of appointment

4.27 Possibly the most suitable form of appointment, and one that would correspond with one of the ways by which a testamentary guardian can at present be appointed, is by deed. Although many of the advantages of an inter vivos parental appointment would stem from its avoidance of judicial formality we think that any arrangement which confers parental powers and responsibilities warrents a degree of formality in recognition of its significance. We think, therefore, that at least some form of writing should be required.

4.28 We think that consideration should also be given (as in relation to testamentary guardians) to the question whether the prospective guardian's consent should be a pre-requisite, and, further, where the

"other" parent is still alive, whether his consent should also be a pre-requisite. Finally, we see no reason why such other safeguards as are thought appropriate for testamentary guardians should not equally apply to inter vivos appointments, for example, the disqualification of undesirable classes of person.

(d) Revocation and duration of appointment

4.29 There is obviously no scope for revocation of a testamentary appointment once it has taken effect. However, the extent of a parent's capacity to revoke an inter vivos appointment is fundamental to the feasibility of such a scheme. It might not be for the welfare of the child to prohibit revocation but it equally might not be desirable, or in the interests of the child, if a parent were able to make and revoke appointments with any frequency. This might be a particular problem in relation to the appointment of second spouses in view of the higher divorce rate among re-marriages.[36] Thus in the same way as we have proposed the inclusion of safeguards in the mechanics of appointment, any provision for revocation should, perhaps, contain similar safeguards. For example, the power to remove a guardian could be confined to the court, as for testamentary appointments, on the application of anyone and in accordance with the welfare principle.[37] This would ensure that the interests of the child are considered over and above the personal wishes of the parent.

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36 Haskey, Marital status before marriage and age at marriage: their influence on the chance of divorce (1983), Population Trends 32, p.4.

37 See para. 3.24.

4.30 Alternatively, if the parent has power of revocation he should perhaps be required to comply with the same formalities as for appointment, or, perhaps, could be required to give notice in order that a guardian who did not wish to be removed could apply to the court to determine the issue. This might operate in a similar way to a surviving parent's existing right to object to a testamentary guardian.[38] Alternatively, or additionally, where the guardian is a step-parent the appointment could cease automatically on divorce. However the existing powers which the court has[39] to make provision for the children of re-marriages would, perhaps, be sufficient protection. In any event, we think that the court should always have power to remove guardians in the interests of the child, or to make such re-allocation of the powers and responsibilities as might be appropriate.

(e) Content and effect of an *inter vivos* appointment

4.31 Where a guardian is appointed to act alongside a lone parent who has all the powers and responsibilities, either because he or she is widowed or is the mother of an illegitimate child we see no reason why a guardian should not be in the same position as a testamentary or post-death court appointed guardian. Thus, as we have suggested,[40] he

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38 See paras. 2.14 and 3.30-3.40.

39 Matrimonial Causes Act 1973, s.42; see paras. 1.15-1.17.

40 Part III, section C.

should be in virtually the same position as a parent, subject to all the suggestions made in Part III about conflicting interests and possible ways of avoiding disputes between parents and guardians. Where, however, a non-custodial parent is still alive the effect of an appointment may have to be qualified. A parental appointment should, perhaps, be able to confer as many (certainly no more) of the powers and responsibilities as the appointing parent has, with the result that the child may then have three people potentially able to exercise powers and responsibilities in relation to him. As we have said above, a parental appointment should not deprive the other parent of powers and responsibilities nor of his right to apply to the court for re-instatement or access nor, conversely, of his liability to make financial provision for the child.

B. Court appointment of inter vivos guardians

4.32 As regards the circumstances described above we see no reason why, if parents have a power of appointment, the court should not have a complementary power although the cases in which it could be exercised would clearly be rare and limited, perhaps, to a third party application for appointment. Indeed one of the advantages, as we see it, of giving parents the power of appointment is that it could reduce the need for judicial intervention in non-contentious cases. The court, on the other hand, is primarily concerned with disputes and it is in this context that we think that

there may be scope for using guardianship as one of the orders available to courts in allocating parental responsibility to non-parents where parents are still alive. This proposal for extending guardianship is made on the basis that guardianship embraces a bundle of parental powers and responsibilities which enable a third party to act in loco parentis.

4.33 Before discussing this further, however, we think that it might be helpful to note the various circumstances in which third parties can, at present, acquire parental powers and responsibilities while the parents are still alive:

(i) by appointing a guardian to act alongside a surviving spouse;[41]

(ii) by appointing a guardian to act to the exclusion of a surviving spouse;[42]

(iii) by grant of custody in divorce, judicial separation or nullity proceedings, or divorce court proceedings for financial relief, either to a third party (e.g. a grandparent) or to a party to the marriage who is not a parent;[43]

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41 Section 4 of the 1971 Act: see paras. 2.13 and 2.17.

42 Sections 4(4) and 10 of the 1971 Act: see para. 2.14.

43 Matrimonial Causes Act 1973, s.42: see paras. 1.15-1.17.

(iv) by grant of legal custody in matrimonial proceedings in magistrates' courts, again either to a third party or to a party to the marriage who is not a parent;[44]

(v) by grant of legal custody to a third party in proceedings between parents under the Guardianship of Minors Act 1971 or between a guardian and surviving parent under that Act;[45]

(vi) by grant of legal custody to a qualified applicant in custodianship proceedings (when in force[46]); to be qualified an applicant must have had care of the child for a specified period;[47]

(vii) by grant of care and control in wardship;[48]

(viii) by exercise of other inherent powers, for example, to appoint a person to "act as" guardian while the parent is alive.[49]

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44 Domestic Proceedings and Magistrates' Courts Act 1978, s.8: see paras. 1.18-1.20.

45 Sections 9, 10, 11 & 11A of the 1971 Act: see paras. 1.18-1.20

46 Children Act 1975, s.33; see paras. 1.21-1.22.

47 Ibid., s. 33(3).

48 See paras. 1.23-1.24 and 2.16(a).

49 Ibid.

4.34 The complex and fragmentary nature of these powers inevitably gives rise to the question of whether they might usefully be drawn together into a single unified scheme for allocating some or all parental responsibility to non-parents. Devising such a scheme would require answers to the following questions, along with the basic issue of whether it would provide a better framework for securing the welfare of children and the interests of the adults involved.

(i) The effect of orders

4.35 At present, courts can award care and control, legal custody, custody or even guardianship, according to the particular procedure invoked. Is there a case for giving them the same choice of orders in all circumstances in which the possibility of an award of parental responsibility to a third party arises? This might encompass the possibility, not only of ordering the parent to share some of those responsibilities with the third party, but also of depriving the parent of those which are granted to the third party alone.

4.36 In our Working Paper on Illegitimacy[50] it was suggested that it should be made clear that a court can remove one parent from guardianship on the application of the other. This suggestion was made in the light of the recommendation that the father of an illegitimate child should automatically acquire the

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50 (1979) Working Paper No. 74, paras. 4.16-4.17.

parental rights and duties. In the event, our report concluded that he should not do so and it was not felt necessary to pursue the general matter of exclusion,[51] although we did recommend (and the draft Bill so provides)[52] that a court might confer the parental rights on the father exclusively. If there is on occasion a need to exclude a totally unmeritorious parent of an illegitimate child, it is difficult to see why there should not be a similar need in relation to all children. Marriage cannot automatically turn people into good or even "good enough"[53] parents. The wardship jurisdiction may already be exercised to achieve this sort of result because the wardship court can effectively require a third party to exercise the parental rights and duties, although in wardship it is the court which is the guardian. In any event, it is just as possible that there may be a need to exclude a parent from "guardianship" where the child has only one legal parent as it is where he has two.

4.37 However, it was acknowledged that a power to deprive a living parent of much of his or her parental rights and duties would be "potentially far-reaching".[54] The divorce court's power to deprive a

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51 Law Com. No. 118, (op. cit.), para. 7.9.

52 Ibid., para. 7.32 and clause 4 of the Family Law Reform Bill in Appendix A of the Report.

53 Adcock and White, Good-enough parenting - a frame work for assessment, BAAF Practice Series 12 (1985).

54 Working Paper No. 74, (op. cit.), para 4.17.

parent of guardianship has been very rarely used,[55] but in that case the major responsibilities have already been taken away by a custody order. Where there is a case for a third party to apply, it might be thought that only a local authority should be able to achieve such a drastic result. If a parent is so manifestly unable to provide for his child's needs as to justify removal, this may be a matter of legitimate concern to the public authorities. A local social services authority has the staff, facilities and expertise needed to protect such vulnerable children. On the other hand, provided that a suitable private applicant is ready and willing to take responsibility for a child and the procedure provides for a proper assessment of his suitability there may be no need to involve the local authority in assuming long term responsibility.

4.38 There appear to us to be a number of possible advantages in making a guardianship order in such circumstances. First, it would cover more than is at present contained in an order for legal custody [56] but not so much more as to present great difficulty. This could, perhaps, include the power to appoint a testamentary guardian[57] and thus provide continuous protection for the child. Secondly, it would be less extensive than adoption as it would leave intact the child's links with his natural family, for purposes such as inheritance and nationality, and would not cut

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55 See para. 3.36 and n's 48 and 49 thereto.

56 See Children Act 1975, s.86 and para. 1.19.

57 See para. 3.74.

the child off from his other relatives or deprive him of contact with his natural parents. Indeed we would envisage that even if the guardian's agreement were to be required for the child's adoption the parent should retain the right to give or withhold agreement. If guardianship were extended in this way it might contain many of the advantages identified by the Houghton Committee when they recommended that "the law should provide a means, short of adoption, whereby relatives (and in some circumstances foster-parents) already caring for a child may obtain legal recognition of their relationship with the child"[58] including the fact that parents would have the right to apply at any time for the revocation of a guardianship order. The particular concern of the Houghton Committee was that adoption was in many cases an inappropriate solution for relatives as it distorts "the natural relationship not only of the adopters to the child but also of the child to his own parents".[59] Further, as compared with wardship, where the court can make orders in favour of third parties in such a way as to render the third party more or less indistinguishable from a guardian, guardianship has the distinct advantage that the child is not under the continuing surveillance of the court, although, of course, we would envisage that where any guardianship order was made the court would have jurisdiction to vary as well revoke the order.

4.39 However, if courts were to be given power to grant guardianship, legal custody or simply care and

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58 (Op. cit. at n. 19), para. 138.

59 Ibid., para. 111.

control in all cases it might be asked whether there is any need to retain such concepts at all. Why should not the court have power to award any or all of the parental powers and responsibilities as it sees fit? Such a solution would have the merit of flexibility and, in obliging the courts to spell out the effects of their orders, might improve the parties' understanding of the position. In practice, however, we suspect that informal "bundles" of powers, similar to those currently used, would soon have to be devised and the risks of inconsistency and uncertainty might be greater than they are at present. Nevertheless we invite views.

(ii) Circumstances in which guardianship applications could be made

4.40 Statutory orders in favour of third parties can at present only be made in three circumstances:[60]

(a) where there is already litigation between husband and wife or mother and father;

(b) when custodianship is in force, where the child already has his home with the applicant; and

(c) where one or both parents are dead.

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60 See para. 4.33.

Wardship, on the other hand, can be invoked by anyone with a sufficient interest, save where a local authority already has statutory responsibility for the child.[61]

4.41 Our suggestion that guardianship should be among the orders available to the court in custody proceedings inevitably raises the question of whether these are the only circumstances in which such orders should be possible while parents are alive. Even provisional conclusions on this point would be premature before our review of the custody jurisdictions is complete. However, there are at present several circumstances in which a replacement for a living parent is necessary or desirable in the child's interests but can only be supplied through the medium of a care order or the local authority's assumption of parental rights. The possibility that the court, in care proceedings, should be able to award custody to a third party has been raised in the Review of Child Care Law. However, if that third party were able and willing to intervene on his or her own initiative and the court was able to satisfy itself as to the suitability of the arrangement, would there be any need to involve the local authority? Where, for example, both of the child's parents have died and the local authority has received the child into care the authority has a duty, taking into account the child's welfare, to endeavour to secure that care of the child

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61 See A. v. Liverpool City Council [1982] A.C. 363 and Re W. (A Minor) (Wardship: Jurisdiction) [1985] 2 W.L.R. 892.

is taken over by a guardian, relative or friend[62] and failing this where the authority has assumed parental rights over the child the court has jurisdiction to appoint a guardian,[63] the effect of which is to terminate any parental rights resolution.[64] Thus, in relation to orphans, there is already some integration between the public and private law. Although it is not within the scope of this paper to propose further integration we do ask whether the death of a child's parents need be the only circumstance in which third parties should be able to apply for parental powers and responsibilities. If it were thought that some restriction on application was necessary the third parties could be qualified in some way, for example, to relatives or people having some connection with the child or, as in custodianship, to people who have already assumed care of the child.

(iii) Grounds

4.42 At present, in guardianship, custody and wardship proceedings the first and paramount consideration is the welfare of the child[65] and there would be much to be said in favour of applying the same test to any proposed extension of the guardianship jurisdiction, particularly as the proposal is made with the possibility of a unified jurisdiction in mind.

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62 Child Care Act 1980, s.2(1), (2) and (3).

63 Section 5 of the 1971 Act.

64 Child Care Act 1980, s.5(2)(c).

65 Section 1 of the 1971 Act.

However the disadvantage of this is that it might give such wide scope for intervention as to risk unwarranted interference in family relations and inconsistencies in practice.

4.43 It might, therefore, be thought desirable that third party intervention should be subject to different and more restrictive criteria. In which case one solution might be to provide grounds similar to the present ground for committing a child to the care of a local authority in wardship or other family proceedings;[66] namely that there are exceptional circumstances making it impracticable or undesirable for the parental powers and responsibilities involved in guardianship to remain with the parent in question. Alternatively, the grounds might be more specific, and relate to some unfitness or incapacity on the part of the parent or some other circumstantial test as, for example, in the present grounds for dispensing with parental agreement to adoption[67], care proceedings[68] or the assumption of parental rights by resolution.[69]

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66 Family Law Reform Act 1969, s.7(2); Matrimonial Causes Act 1973, s.43(1); Domestic Proceedings and Magistrates' Courts Act 1978, s.10(1); Guardianship Act 1973, s.2(2)(b); Children Act 1975, s.17(1) [Adoption Act 1976, s.26(1)].

67 Children Act 1975, s.12(2) [Adoption Act 1976, s. 16(2)].

68 Children and Young Persons Act 1969, ss. 1(2) and 7(7)(a).

69 Child Care Act 1980, s.3(1).

4.44 The grounds for care proceedings and parental rights resolutions are currently under review,[70] so that were this solution to be preferred no firm conclusions could be reached until that review was completed. It must also be borne in mind that those grounds apply primarily in order to secure care or continued care by the local authority. They may therefore concentrate as much on the need of the child for care and control as they do upon the particular characteristics of the parents. In the situation under discussion, a custody order will often (although by no means always) be available as an alternative, and the qualities of the parents may be the most important fact in deciding whether it is appropriate to deprive them of more.

4.45 Another alternative would be to follow the custodianship model and require the applicant to have had care of the child for a specified period prior to the application.[71] However, in the exceptional circumstances in which guardianship inter vivos orders would be contemplated a suitable guardian might well not have care of the child already and the intervention of the court might be urgently needed in order to protect the child's interests.

(iv) Procedural safeguards

4.46 As we said earlier, it would make sense to have a unified procedure in relation to orders

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70 See para. 1.3.

71 Children Act 1975, s.33(3).

concerned with the allocation or reallocation of parental powers and responsibilities. Following this we have suggested, among other alternatives, that the welfare test might apply across the board. Similarly we think that at least the same level of procedural safeguards should apply to any extension of the guardianship procedure as currently apply in the custody jurisdictions. We have already discussed, in the context of court appointments made after one or both parents have died, various safeguards which we think should be incorporated into that procedure; such as the power to call for welfare reports, representation for the child and supervision orders.[72] The same arguments apply to inter vivos appointments. It might, however, be thought that additional safeguards would be necessary in a procedure to appoint guardians while the parents are still alive, particularly if this involved depriving the parents of their powers and responsibilities. Perhaps, therefore, something more elaborate, along the lines of the existing procedures for adoption or custodianship might be thought appropriate.[73] In addition, some method of monitoring the appointment after it has been made[74] (perhaps involving the local authority) or at least some specific procedure enabling the appointment to be revoked, might be contemplated.

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72 See Part III, section B, paras. 3.51-3.58.

73 See paras 1.13 and 1.21-1.22.

74 See para. 3.58.

(v) Revocation or removal

4.47 The court already has general power to remove guardians under section 6 of the 1971 Act, if it deems it to be for the welfare of the child. If this is thought adequate for guardians acting in place of a parent who has died we see no reason to suppose it would not be equally adequate for guardians appointed inter vivos. As we have said in Part III we think that it should be open to anyone to make an application for removal, including a local authority.[75] We also think that a court should have power to appoint another guardian in place of the one removed, as is currently provided in section 6. And, as in other jurisdictions concerned with the upbringing of children, in the absence of a suitable person the court should be empowered to commit the child to the care of a local authority.[76]

(vi) Courts

4.48 A final factor in the consideration of any proposal to extend the courts' power to appoint guardians, and a possible method of limiting the potentially far reaching effects of such a power, might be to restrict it to the High Court. The existing jurisdiction to appoint guardians lies with the High Court, county court and magistrates' courts.[77] It might be thought desirable to restrict the magistrates'

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75 See para. 3.23.

76 See para. 3.56.

77 See paras. 3.59-3.61.

courts power in the same way as they have no power to entertain applications relating to property.[78] Juvenile courts, however, have jurisdiction to make the equally serious decision to commit children to care.[79]

Conclusion

4.49 As we have already said, because this is the first paper in our review and we have yet to examine the custody jurisdictions and wardship, and the law relating to children in care is also currently under review, it would be premature in this paper to come to any conclusions about the possible ways in which guardianship might be extended. However, we have taken this opportunity to put forward some very tentative ideas and hint at some possible reforms upon which we would welcome views. We have mentioned the idea of a unified jurisdiction. The Scottish Law Commission in their report on Illegitimacy,[80] recommended that the existing powers of the courts in Scotland to make orders relating to tutory, custody and access should be replaced by a general provision giving the court [i.e. the Court of Session or the sheriff courts] power on the application of any person claiming an interest, to make orders relating to parental rights.[81] This is, therefore, one of the possibilities which we shall be considering during the course of our review. For the

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78 Ibid., and s.15(2)(b) of the 1971 Act.

79 Children and Young Persons Act 1969, s.1.

80 (1984) Scot. Law Com. No. 82.

81 Ibid., paras. 9.11-9.13 and Part X, para. 42(a).

moment, however, we would welcome views on (a) whether there is a case for private appointment of guardians to act inter vivos in certain circumstances in particular to enable a widowed or other lone parent to share parental responsibility with, for example, a step-parent; and (b) whether there is a case for any assimilation of the structure and procedures for awarding both guardianship and custody, in particular to people who are not parents of the child.

APPENDIX A

STATUTORY PROVISIONS

Guardianship of Minors Act 1971

1 Principle on which questions relating to legal custody upbringing etc of minors are to be decided

Where in any proceedings before any court (whether or not a court as defined in section 15 of this Act)-

(a) the legal custody or upbringing of a minor; or
(b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof,

is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, in respect of such legal custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

3 Rights of surviving parent as to guardianship

(1) On the death of the father of a minor, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the minor either alone or jointly with any guardian appointed by the father; and -

(a) where no guardian has been appointed by the father; or
(b) in the event of the death or refusal to act of the guardian or guardians appointed by the father,

the court may, if it thinks fit, appoint a guardian to act jointly with the mother.

(2) On the death of the mother of a minor, the father, if surviving, shall, subject to the provisions of this

Act, be guardian of the minor whether alone or jointly with any guardian appointed by the mother; and -

(a) where no guardian has been appointed by the mother; or
(b) in the event of the death or refusal to act of the guardian or guardians appointed by the mother,

the court may, if it thinks fit, appoint a guardian to act jointly with the father.

4 Power of father and mother to appoint testamentary guardians

(1) The father of a minor may by deed or will appoint any person to be guardian of the minor after his death.

(2) The mother of a minor may by deed or will appoint any person to be guardian of the minor after her death.

(3) Any guardians so appointed shall act jointly with the mother or father, as the case may be, of the minor so long as the mother or father remains alive unless the mother or father objects to his so acting.

(4) If the mother or father so objects, or if the guardian so appointed considers that the mother or father is unfit to have the legal custody of the minor, the guardian may apply to the court, and the court may either -

(a) refuse to make any order (in which case the mother or father shall remain sole guardian); or

(b) make an order that the guardian so appointed-
(i) shall act jointly with the mother; or
(ii) shall be the sole guardian of the minor.

(5) Where guardians are appointed by both parents, the guardians so appointed shall, after the death of the surviving parent, act jointly.

(6) If under section 3 of this Act a guardian has been appointed by the court to act jointly with a surviving parent, he shall continue to act as guardian after the death of the surviving parent; but, if the surviving parent has appointed a guardian, the guardian appointed by the court shall act jointly with the guardian appointed by the surviving parent.

5 Power of court to appoint guardian for minor having no parent etc

(1) Where a minor has no parent, no guardian of the person, and no other person having parental rights with respect to him, the court, on the application of any person, may, if it thinks fit, appoint the applicant to be the guardian of the minor.

(2) A court may entertain an application under this section to appoint a guardian of a minor notwithstanding that, by virtue of a resolution under section 3 of the Child Care Act 1980, a local authority have parental rights with respect to him.

6 Power of High Court to remove or replace guardian

The High Court may, in its discretion, on being satisfied that it is for the welfare of the minor, remove from his office any testamentary guardian or any guardian appointed or acting by virtue of this Act, and may also, if it deems it to be for the welfare of the minor, appoint another guardian in place of the guardian so removed.

7 Disputes between joint guardians

Where two or more persons act as joint guardians of a minor and they are unable to agree on any question affecting the welfare of the minor, any of them may apply to the court for its direction, and the court may make such order regarding the matters in difference as it may think proper.

10 Orders for legal custody and maintenance where person is guardian to exclusion of surviving parent

(1) Where the court makes an order under section 4(4) of this Act that a person shall be the sole guardian of a minor to the exclusion of his mother or father, the court may -

(a) make such an order regarding -
(i) the legal custody of the minor; and
(ii) the right of access to the minor of his mother or father,

as the court thinks fit having regard to the welfare of the minor; and

(b) may also, subject to section 12 of this Act, make one or both of the following orders, that is to say -

(i) an order requiring the mother or father to pay to the guardian for the benefit of the minor, or to the minor, such periodical payments, and for such term, as may be specified in the order;

(ii) an order requiring the mother or father to pay to the guardian for the benefit of the minor, or to the minor, such lump sum as may be so specified.

(2) The powers conferred by subsection (1) of this section may be exercised at any time and include power to vary or discharge any order (other than an order for the payment of a lump sum) previously made under those powers.

11 Orders for legal custody and maintenance where joint guardians disagree.

The powers of the court under section 7 of this Act shall, where one of the joint guardians is the mother or father of the minor, include power -

(a) to make such order regarding -

(i) the legal custody of the minor; and

(ii) the right of access to the minor of his mother or father,

as the court thinks fit having regard to the welfare of the minor;

(b) to make, subject to section 12 of this Act, one or both of the following orders, that is to say -

(i) an order requiring the mother or father to pay to the other guardian for the benefit of the minor, or to the minor, such periodical payments, and for such term, as may be specified in the order;

(ii) an order requiring the mother or father to pay to the other guardian for the benefit of the minor, or to the minor, such lump sum as may be so specified;

(c) to vary or discharge any order (other than an order for the payment of a lump sum) previously made under that section.

11A Further provisions relating to orders for custody

(1) An order shall not be made under section 9(1), 10(1)(a) or 11(a) of this Act, giving the legal custody of a child to more than one person; but where the court makes an order under one of those sections giving the legal custody of a minor to any person, it may order that a parent of the minor who is not given the legal custody of the minor shall retain all or such as the court may specify of the parental rights and duties comprised in legal custody (other than the right to the actual custody of the minor) and shall have those rights and duties jointly with the person who is given the legal custody of the minor.

(2) Where the court makes an order under Section 9(1), 10(1)(a) or 11(a) of this Act the court may direct that the order, or such provision thereof as the court may specify, shall not have effect until the occurrence of an event specified by the court or the expiration of a period so specified; and where the court has directed that the order or any provision thereof shall not have effect until the expiration of a specified period, the court may, at any time before the expiration of that period, direct that the order, or that provision thereof, shall not have effect until the expiration of such further period as the court may specify.

(3) Any order made in respect of a minor under section 9(1), 10(1)(a) or 11(a) of this Act shall cease to have effect when the minor attains the age of eighteen.

14 Application of Act to illegitimate children

(3) For the purposes of sections 3, 4, 5, 10 and 14A(5) and (6) of this Act, a person being the natural father of an illegitimate child and being entitled to his legal custody by virtue of an order in force under section 9 of this Act, as applied by this section, shall be treated as if he were the lawful father of the minor; but any appointment of a guardian made by virtue of this subsection under section 4(1) of this Act shall be of no effect unless the appointor is entitled to the legal custody of the minor as aforesaid immediately before his death.

15 Courts having jurisdiction under this Act

(1) Subject to the provisions of this section, 'the court' for the purposes of this Act means -

(a) the High Court;
(b) the county court of the district in which the respondent (or any of the respondents) or the applicant or the minor to whom the application relates resides; or
(c) a magistrates' court appointed for the commission area (within the meaning of the Justices of the Peace Act 1979) in which any of the said persons resides.

(2) A magistrates' court shall not be competent to entertain -

(a)...
(b) any application involving the administration or application of any property belonging to or held in trust for a minor, or the income thereof.

17 Saving for powers of High Court and other courts

(1) Nothing in this Act shall restrict or affect the jurisdiction of the High Court to appoint or remove guardians or otherwise in respect of minors.

(2) Nothing in section 15(4), (5) or (6) of this Act shall be construed as derogating from any jurisdiction exercisable, apart from those provisions, by any court in England or Wales; and it is hereby declared that any jurisdiction conferred by those provisions is exercisable notwithstanding that any party to the proceedings is not domiciled in England and Wales.

Guardianship Act 1973

1 Equality of parental rights

(1) In relation to the legal custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other.

In this Act 'legal custody' shall be construed in accordance with Part IV of the Children Act 1975.

(2) An agreement for a man or woman to give up in whole or in part, in relation to any child of his or hers, the rights and authority referred to in subsection (1) above shall be unenforceable, except that an agreement made between husband and wife which is to operate only during their separation while married may, in relation to a child of theirs, provide for either of them to do so; but no such agreement between husband and wife shall be enforced by any court if the court is of opinion that it will not be for the benefit of the child to give effect to it.

(3) Where a minor's father and mother disagree on any question affecting his welfare, either of them may apply to the court for its direction, and (subject to subsection (4) below) the court may make such order regarding the matters in difference as it may think proper.

(4) Subsection (3) above shall not authorise the court to make any order regarding the legal custody of a minor or the right of access to him of his father or mother.

(5) An order under subsection (3) above may be varied or discharged by a subsequent order made on the application of either parent or, after the death of either parent, on the application of any guardian under the Guardianship of Minors Act 1971, or (before or after the death of either parent) on the application of any other person having the legal custody of the minor.

(6) Section 15(1) to (3) and section 16 of the Guardianship of Minors Act 1971 (jurisdiction and procedure) shall apply for the purposes of

subsections(3) to(5) above as if they were contained in section 9 of that Act, except that section 15(3) shall not exclude any jurisdiction of a county court or a magistrates' court in proceedings against a person residing in Scotland or Northern Ireland for the revocation, revival or variation of any order under subsection (3) above.

(7) Nothing in the foregoing provisions of this section shall affect the operation of any enactment requiring the consent of both parents in a matter affecting a minor, or be taken as applying in relation to a minor who is illegitimate.

7 Powers of guardians

(1) Subject to subsection (2) below, a guardian under the Guardianship of Minors Act 1971, besides being guardian of the person of the minor, shall have all the rights, powers and duties of a guardian of the minor's estate, including in particular the right to receive and recover in his own name for the benefit of the minor property of whatever description and wherever situated which the minor is entitled to receive or recover.

(2) Nothing in subsection (1) above shall restrict or affect the power of the High Court to appoint a person to be, or to act as, the guardian of a minor's estate either generally or for a particular purpose; and subsection (1) above shall not apply to a guardian under the Guardianship of Minors Act 1971 so long as there is a guardian of the minor's estate alone.

33 Custodianship orders

(1) An authorised court may on the application of one or more persons qualified under subsection (3) make an order vesting the legal custody of a child in the applicant or, as the case may be, in one or more of the applicants if the child is in England or Wales at the time the application is made.

(2) An order under subsection (1) may be referred to as a custodianship order,and the person in whom legal custody of the child is vested under the order may be referred to as the custodian of the child.

(3) The persons qualified to apply for a custodianship order are -

(a) a relative or step-parent of the child -

(i) who applies with the consent of a person having legal custody of the child, and
(ii) with whom the child has had his home for the three months preceding the making of the application;

(b) any person -

(i) who applies with the consent of a person having legal custody of the child, and
(ii) with whom the child has had his home for a period or periods before the making of the application which amount to at least twelve months and include the three months preceding the making of the application;

(c) any person with whom the child has had his home for a period or periods before the making of the application which amount to at least three years and include the three months preceding the making of the application.

(4) The mother or father of the child is not qualified under any paragraph of subsection (3).

(5) A step-parent of the child is not qualified under any paragraph of subsection (3) if in proceedings for divorce or nullity of marriage the child was named in an order made under paragraph (b) or (c) of section 41(1) (arrangements for welfare of children of family) of the Matrimonial Causes Act 1973.

(6) If no person has legal custody of the child, or the applicant himself has legal custody or the person with legal custody cannot be found, paragraphs (a) and (b) of subsection (3) apply with the omission of sub-paragraph (i).

(7) The Secretary of State may by order a draft of which has been approved by each House of Parliament amend subsection (3)(c) to substitute a different period for the period of three years mentioned in that paragraph (or the period which, by a previous order under this subsection, was substituted for that period).

(8) Subsection (5) does not apply -

(a) if the parent other than the one the step-parent married is dead or cannot be found, or
(b) if the order referred to in subsection (5) was made under subsection (1)(c) of section 41 of the Matrimonial Causes Act 1973 and it has since been determined that the child was not a child of the family to which that section applied.

(9) For the avoidance of doubt, it is hereby declared that the provisions of section 1 of the Guardianship of Minors Act 1971 apply to applications made under this Part of this Act.

(10) This section and sections 34 to 46 do not apply to Scotland.

35 Revocation and variation of orders

(1) An authorised court may by order revoke a custodianship order on the application of -

(a) the custodian, or
(b) the mother or father, or a guardian, of the child, or
(c) any local authority in England or Wales.

(2) The court shall not proceed to hear an application made by any person for the revocation of a custodianship order where a previous such application made by the same person was refused by that or any other court unless -

(a) in refusing the previous application the court directed that this subsection should not apply, or
(b) it appears to the court that because of a change in circumstances or for any other reason it is proper to proceed with the application.

(3) The custodian of a child may apply to an authorised court for the revocation or variation of any order made under section 34 in respect of that child.

(4) Any other person on whose application an order under section 34 was made, or who was required by such an order to contribute towards the maintenance of the child, may apply to an authorised court for the revocation or variation of that order.

(4A) An application for the variation of an order made under section 34(1)(b) may, if the child has attained the age of sixteen, be made by the child himself.

(5) Any order made under section 34 in respect of a child who is the subject of a custodianship order shall cease to have effect on the revocation of the custodianship order.

(6) A custodianship order made in respect of a child, and any order made under section 34 in respect of the child, shall cease to have effect when the child attains the age of 18 years.

(7) On an application under this section for the revocation or variation of an order made under section 34(1)(b), the court shall have power to suspend the operation of any provision of that order temporarily and to revive the operation of any provision so suspended.

(8) In exercising its power under this section to revoke or vary an order made under section 34(1)(b), the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order.

(9) Where on an application under this section the court varies any payments required to be made under section 34(1)(b), the court may provide that the payments as so varied shall be made from such date as the court may specify, not being earlier than the date of the making of the application.

(10) Where an order made under section 34(1)(b) ceases to have effect on the date on which the child attains the age of sixteen or at any time after that date but before or on the date on which he attains the age of eighteen, then, if at any time before he attains the age of twenty-one an application is made by the child to an authorised court for an order under this subsection, the court shall have power by order to revive the first mentioned order from such date as the court may specify, not being earlier than the date of the making of the application, and to vary or revoke under this section any order so revived.

(11) The powers of a magistrates' court to revoke, revive or vary under section 53 of the Magistrates' Courts Act 1952 an order for the periodical payment of money and to suspend or rescind under section 54(2) of that Act certain other orders shall not apply in relation to a custodianship order or an order made under section 34.

36 Care etc of child on revocation of custodianship order

(1) Before revoking a custodianship order the court shall ascertain who would have legal custody of the child, if, on the revocation of the custodianship order, no further order were made under this section.

(2) If the child would not be in the legal custody of any person, the court shall, if it revokes the custodianship order, commit the care of the child to a specified local authority.

(3) If there is a person who would have legal custody of the child on the revocation of the custodianship order, the court shall consider whether it is desirable in the interests of the welfare of the child for the child to be in the legal custody of that person and -

(a) if the court is of the opinion that it would not be so desirable, it shall on revoking the custodianship order commit the care of the child to a specified local authority;

(b) if it is of the opinion that while it is desirable for the child to be in the legal custody of that person, it is also desirable in the interests of the welfare of the child for him to be under the supervision of an independent person, the court shall on revoking the custodianship order, order that the child shall be under the supervision of a specified local authority or of a probation officer.

(4) Before exercising its functions under this section the court shall, unless it has sufficient information before it for the purpose, request -

(a) a local authority to arrange for an officer of the authority, or
(b) a probation officer,

to make to the court a report, orally or in writing, on the desirability of the child returning to the legal custody of any individual, and it shall be the duty of the local authority or probation officer to comply with the request.

(5) Where the court makes an order under subsection (3)(a), the order may require the payment by either parent to the local authority, while it has the care of the child, of such weekly or other periodical sum towards the maintenance of the child as the court thinks reasonable.

(6) Sections 3 and 4 of the Guardianship Act 1973 (which contain supplementary provisions relating to children who are subject to supervision, or in the care of a local authority, by virtue of orders made under section 2 of that Act) apply in relation to an order under this section as they apply in relation to an order under section 2 of that Act.

(7) Subsections (2) to (6) of section 6 of the Guardianship Act 1973 shall apply in relation to reports which are requested by magistrates' courts under this section as they apply to reports under subsection (1) of that section.

37 Custodianship order on application for adoption or guardianship

(1) Where on an application for an adoption order by a relative of the child or by the husband or wife of the mother or father of the child, whether alone or

jointly with his or her spouse, the requirements of section 12 or, where the application is for a Convention adoption order, section 24(6) are satisfied, but the court is satisfied -

(a) that the child's welfare would not be better safeguarded and promoted by the making of an adoption order in favour of the applicant, than it would be by the making of a custodianship order in his favour, and
(b) that it would be appropriate to make a custodianship order in the applicant's favour,

the court shall direct the application to be treated as if it had been made by the applicant under section 33, but if the application was made jointly by the father or mother of the child and his or her spouse, the court shall direct the application to be treated as if made by the father's wife or the mother's husband alone.

(2) Where on an application for an adoption order made-

(a) by a person who is neither a relative of the child nor the husband or wife of the mother or father of the child; or
(b) by a married couple neither of whom is a relative of the child or the husband or wife of the mother or father of the child,

the said requirements are satisfied but the court is of opinion that it would be more appropriate to make a custodianship order in favour of the applicant, it may direct the application to be treated as if it had been made by the applicant under section 33.

(3) Where on an application under section 9 (orders for custody and maintenance on application of mother or father) of the Guardianship of Minors Act 1971 the court is of opinion that legal custody should be given to a person other than the mother or father, it may direct the application to be treated as if it had been made by that person under section 33.

(4) Where a direction is given under this section the applicant shall be treated (if such is not the case) as if he were qualified to apply for a custodianship order and this Part, except section 40, shall have effect accordingly.

(4A) Where a custodianship order is made by virtue of a direction under subsection (3) or a direction under

section 8(3) of the Domestic Proceedings and Magistrates' Courts Act 1978, the court may direct that the order, or such provision thereof as the court may specify, shall not have effect until the occurrence of an event specified by the court or the expiration of a period so specified; and where the court has directed that the custodianship order, or any provision thereof, shall not have effect until the expiration of a specified period, the court may, at any time before the expiration of that period, direct that the order, or that provision thereof, shall not have effect until the expiration of such further period as the court may specify.

(5) Subsection (1) does not apply to an application made by a step-parent whether alone or jointly with another person in any case where the step-parent is prevented by section 33(5) from being qualified to apply for a custodianship order in respect of the child.

(6) Subsections (1) and (2) do not apply to an application for an adoption order made by the child's mother or father alone.

38 Disputes between joint custodians

If two persons have a parental right or duty vested in them jointly by a custodianship order or by virtue of section 44(2) but cannot agree on its exercise or performance, either of them may apply to an authorised court, and the court may make such order regarding the exercise of the right or performance of the duty as it thinks fit.

39 Reports by local authorities and probation officers

(1) A court dealing with an application made under this Part, or an application which is treated as if made under section 33, may request -

(a) a local authority to arrange for an officer of the authority, or
(b) a probation officer,

to make to the court a report, orally or in writing, with respect to any specified matter which appears to the court to be relevant to the application, and it shall be the duty of the local authority or probation officer to comply with the request.

(2) Subsections (2) to (6) of section 6 of the Guardianship Act 1973 shall apply in relation to reports which are requested by magistrates' courts under this section as they apply to reports under subsection (1) of that section.

40 Notice of application to be given to local authority

(1) A custodianship order shall not be made unless the applicant has given notice of the application for the order to the local authority in whose area the child resides within the seven days following the making of the application, or such extended period as the court or local authority may allow.

(2) On receipt of a notice given by the applicant under subsection (1) the local authority shall arrange for an officer of the authority to make a report to the court (so far as is practicable) on the matters prescribed under subsection (3) and on any other matter which he considers to be relevant to the application.

(3) The Secretary of State shall by regulations prescribe matters which are to be included in a report under subsection (2) and, in particular, but without prejudice to the generality of the foregoing, the prescribed matters shall include -

(a) the wishes and feelings of the child having regard to his age and understanding and all other matters relevant to the operation of section 1 (principle on which questions relating to custody are to be decided) of the Guardianship of Minors Act 1971 in relation to the application;
(b) the means and suitability of the applicant;
(c) information of a kind specified in the regulations relating to members of the applicant's household;
(d) the wishes regarding the application, and the means, of the mother and father of the child.

(4) Subsections (2), (3) and (3A) of section 6 of the Guardianship Act 1973 shall apply to a report under this section which is submitted to a magistrates' court.

85 Parental rights and duties

(1) In this Act, unless the context otherwise requires, 'the parental rights and duties' means as respects a particular child (whether legitimate or not), all the rights and duties which by law the mother and father have in relation to a legitimate child and his property; and references to a parental right or duty shall be construed accordingly and shall include a right of access and any other element included in a right or duty.

(2) Subject to section 1(2) of the Guardianship Act 1973 (which relates to separation agreements between husband and wife), a person cannot surrender or transfer to another any parental right or duty he has as respects a child.

(3) Where two or more persons have a parental right or duty jointly, any one of them may exercise or perform it in any manner without the other or others if the other or, as the case may be, one or more of the others have not signified disapproval of its exercise or performance in that manner.

(4) From the death of a person who has a parental right or duty jointly with one other person, or jointly with two or more other persons, that other person has the right or duty exclusively or, as the case may be, those other persons have it jointly.

(5) Where subsection (4) does not apply on the death of a person who has a parental right or duty, that right or duty lapses, but without prejudice to its acquisition by another person at any time under any enactment.

(6) Subsections (4) and (5) apply in relation to the dissolution of a body corporate as they apply in relation to the death of an individual.

(7) Except as otherwise provided by or under any enactment, while the mother of an illegitimate child is living she has the parental rights and duties exclusively.

86 Legal custody

In this Act, unless the context otherwise requires, 'legal custody' means, as respects a child, so much of the parental rights and duties as relate to the person of the child (including the place and manner in which

his time is spent); but a person shall not by virtue of having legal custody of a child be entitled to effect or arrange for his emigration from the United Kingdom unless he is a parent or guardian of the child.

87 Actual custody

(1) A person has actual custody of a child if he has actual possession of his person,whether or not that possession is shared with one or more other persons.

(2) While a person not having legal custody of a child has actual custody of the child he has the like duties in relation to the child as a custodian would have by virtue of his legal custody.

(3) In this Act, unless the context otherwise requires, references to the person with whom a child has his home refer to the person who, disregarding absence of the child at a hospital or boarding school and any other temporary absence, has actual custody of the child.

Foster Children Act 1980

1 Foster children

Subject to section 2 below, a child is a foster child for the purposes of this Act if he is below the upper limit of the compulsory school age and his care and maintenance are undertaken by a person who is not a relative, guardian or custodian of his.

2 Exceptions to s 1

(1) A child is not a foster child while he is in the care of a local authority or a voluntary organisation or is boarded out by a local authority or a local education authority.

(2) A child is not a foster child while he is in the care of any person -

(a) in premises in which any parent, adult relative or guardian of his is for the time being residing;
(b) in any voluntary home within the meaning of Part VI of the Child Care Act 1980;
(c) in any school within the meaning of the Education Act 1944 in which he is receiving full-time education;
(d) in any hospital, or in any nursing home registered or exempted from registration under the Nursing Homes Act 1975; or
(e) in any home or institution not specified in this subsection or subsection (5) below but maintained by a public or local authority.

(3) A child is not a foster child at any time while his care and maintenance are undertaken by any person -

(a) who is not a regular foster parent and at that time does not intend to, and does not in fact, undertake his care and maintenance for a continuous period of more than 27 days; or
(b) who is a regular foster parent but at that time does not intend to, and does not in fact, undertake his care and maintenance for a continuous period of more than six days.

In this subsection 'regular foster parent' means a person who -

(i) during the period of 12 months immediately preceding the date on which he begins to undertake the care and maintenance of the child in question, and
(ii) otherwise than as a relative or guardian,

had the care and maintenance of one or more children either for a period of, or periods amounting in the aggregate to, not less than three months or for at least three continuous periods each of which was of more than six days.

(4) A child is not a foster child while he is in the care of any person in compliance with a supervision order within the meaning of the Children and Young Persons Act 1969 or a supervision requirement within the meaning of the Social Work (Scotland) Act 1968.

(5) A child is not a foster child while he is liable to be detained or subject to guardianship under the Mental Health Act 1983, or is resident in a residential care home within the meaning of Part I of Schedule 4 to the Health and Social Services and Social Security Adjudications Act 1983.

6) A child is not a foster child -

(a) while he is placed in the care and possession of a person who proposes to adopt him under arrangements made by an adoption agency within the meaning of section 1 of the Adoption Act 1976 or section 1 of the Adoption (Scotland) Act 1978; or
(b) while he is a protected child within the meaning of Part III of the Adoption Act 1976.

3 Local authorities to ensure well-being of, and to visit, foster children

(1) Subject to subsection (3) below, it shall be the duty of every local authority to satisfy themselves as to the well-being of foster children within their area and, for that purpose, to secure -

(a) that the children are visited by officers of the authority in accordance with regulations made under subsection (2) below; and
(b) that such advice is given as to the care and maintenance of the children as appears to be needed.

(2) The Secretary of State may make regulations requiring foster children in a local authority's area to be visited by an officer of the local authority on specified occasions or within specified periods of time.

(3) Until such time as the Secretary of State may by order made by statutory instrument appoint, subsection (1) above shall have effect with the substitution for paragraph (a) of the following paragraph -

> '(a) that, so far as appears to the authority to be appropriate, the children are visited from time to time by officers of the authority; and'.

4 Notification by parents

(1) The Secretary of State may by regulations make provision for requiring parents whose children are, or are going to be, maintained as foster children to give to the local authority for the area where the children are, or are going to be, living as foster children such information about the fostering as may be specified in the regulations.

2) Regulations under this section may include such incidental and supplementary provisions as the Secretary of State thinks fit.

5 Notification by persons maintaining, or proposing to maintain, foster children

(1) A person who proposes to maintain as a foster child a child not already in his care shall give written notice thereof to the local authority in whose area the premises in which the child is to be kept are situated, not less than two weeks and not more than four weeks before he receives the child, unless he receives him in an emergency.

(2) A person who maintains a foster child -

> (a) whom he received in an emergency, or
> (b) who became a foster child while in his care,

shall give written notice thereof to the local authority in whose area the premises in which the child is being kept are situated, not later than 48 hours after he receives the child or, as the case may be, after the child becomes a foster child.

(3) A notice under subsection (1) or (2) above shall specify -

(a) the date on which it is intended that the child should be received or (as the case may be) on which the child was in fact received or became a foster child, and
(b) the premises in which the child is to be or is being kept.

(4) Where a person who is maintaining one or more foster children changes his permanent address or the premises in which the child is, or the children are, kept, he shall give written notice to the local authority -

(a) not less than two weeks and not more than four weeks before the change, or
(b) if the change is made in an emergency, not later than 48 hours after the change,

specifying the new address or premises; and if the new premises are in the area of another local authority, or of a local authority in Scotland, the authority to whom the notice is given shall inform that other authority and give them such of the particulars mentioned in subsection (5) below as are known to them.

(5) At the request of the local authority a person maintaining or proposing to maintain a foster child shall give them, so far as known to him, the following particulars -

(a) the name, sex and date and place of birth of the child; and
(b) the name and address of every person who is a parent or guardian or acts as a guardian of the child or from whom the child was or is to be received.

6 Notification by persons ceasing to maintain foster children

(1) If a foster child dies, the person who was maintaining him shall give, not later than 48 hours after the death, written notice of the death to the local authority and to the person from whom the child was received.

(2) Subject to subsection (3) below, where a person who has been maintaining a foster child at any premises-

(a) ceases to maintain that foster child at those premises, and
(b) the circumstances are such that no notice is required to be given under section 5(4) or subsection (1) above,

that person shall give written notice thereof to the local authority not later than 48 hours after he ceases to maintain that foster child at those premises.

(3) A person need not give the notice required by subsection (2) above in consequence of his ceasing to maintain a foster child at any premises if, at the time he so ceases, he intends within 27 days again to maintain that foster child at those premises; but if -

(a) he subsequently abandons that intention, or
(b) that period expires without his having given effect to it,

he shall give the said notice within 48 hours of that event.

(4) Where a foster child is removed or removes himself from the care of the person maintaining him, that person shall give the local authority at their request the name and address, if known, of the person (if any) into whose care the child has been removed.

7 Persons disqualified from keeping foster children

(1) A person shall not maintain a foster child if -

(a) an order removing a child from his care has been made against him under this Act or (whether before or after the commencement of this Act) under Part I of the Children Act 1958;
(b) an order has been made under the Children and Young Persons Act 1933, the Children and Young Persons Act 1969, or the Children and Young Persons (Scotland) Act 1937, or a supervision requirement has been made under the Social Work (Scotland) Act 1968, and by virtue of the order or requirement a child was removed from his care;

(c) he has been convicted of any offence specified in Schedule 1 to the said Act of 1933 or Schedule 1 to the Criminal Procedure (Scotland) Act 1975, or has been placed on probation or discharged absolutely or conditionally for any such offence;

(d) his rights and powers with respect to a child have been vested under section 2 of the Children Act 1948 or section 3 of the Child Care Act 1980 in a local authority or under section 2 of the Children Act 1948 or section 16 of the Social Work (Scotland) Act 1968 in a local authority in Scotland;

(e) an order under section 1(3) or (4) of the Nurseries and Child-Minders Regulation Act 1948 has been made against him refusing, or an order has been made under section 5 of that Act cancelling, the registration of any premises occupied by him or his registration; or

(f) an order has been made under section 43 of the Adoption Act 1958, section 34 of the Adoption Act 1976 or section 34 of the Adoption (Scotland) Act 1978 for the removal of a protected child who was being kept or was about to be received by him,

unless he has disclosed that fact to the local authority and obtained their written consent.

(2) Where subsection (1) above applies to any person, otherwise than by virtue of this subsection, it shall apply also to any other person who lives in the same premises as he does or who lives in premises at which he is employed.

8 Power to inspect premises

Any officer of a local authority authorised to visit foster children may, after producing, if asked to do so, some duly authenticated document showing that he is so authorised, inspect any premises in the area of the authority in the whole or any part of which foster children are to be or are being kept.

9 Power to impose requirements as to the keeping of foster children

(1) Where a person is keeping or proposes to keep foster children in premises used (while foster children

are kept in them) wholly or partly for that purpose, the local authority may impose on him requirements as to -

(a) the number, age and sex of the foster children who may be kept at any one time in the premises or any part of them;
(b) the accommodation and equipment to be provided for the children;
(c) the medical arrangements to be made for protecting the health of the children;
(d) the giving of particulars to the person for the time being in charge of the children;
(e) the number, qualifications or experience of persons employed in looking after the children;
(f) the keeping of records;
(g) the fire precautions to be taken in the premises;
(h) the giving of particulars of any foster child received in the premises and of any change in the number or identity of the foster children kept in them.

(2) A requirement imposed under this section may be limited to a particular class of foster children kept in the premises; and a requirement imposed under paragraphs (b) to (h) above may be limited by the authority so as to apply only when the number of foster children kept in the premises exceeds a specified number.

(3) A person shall, after such time as the local authority may specify, comply with any requirement imposed on him under this section whenever a foster child is kept in the premises in question.

(4) A requirement imposed under this section shall be imposed by notice in writing addressed to the person on whom it is imposed and informing him of his right under section 11(1) below to appeal against the requirement and of the time within which he may do so.

10 Power to prohibit the keeping of foster children

(1) Where a person proposes to keep a foster child in any premises and the local authority are of the opinion that -

(a) the premises are not suitable premises in which to keep foster children, or

(b) that person is not a suitable person to have the care and maintenance of foster children, or
(c) it would be detrimental to that child to be kept by that person in those premises,

the local authority may impose a prohibition on that person under subsection (2) below.

(2) A prohibition imposed on any person under this subsection may -

(a) prohibit him from keeping any foster child in premises specified in the prohibition; or
(b) prohibit him from keeping any foster child in any premises in the area of the local authority; or
(c) prohibit him from keeping a particular child specified in the prohibition in premises so specified.

(3) A local authority who have imposed a prohibition on any person under subsection (2) above, may ,if they think fit, cancel the prohibition, either of their own motion or on an application made by that person on the ground of a change in the circumstances in which a foster child would be kept by him.

(4) Where a local authority impose a requirement on any person under section 9 above as respects any premises, they may prohibit him from keeping foster children in the premises after the time specified for compliance with the requirement unless the requirement is complied with.

(5) A prohibition imposed under this section shall be imposed by notice in writing addressed to the person on whom it is imposed and informing him of his right under section 11(1) below to appeal against the prohibition and of the time within which he may do so.

12 Removal of foster children kept in unsuitable surroundings

(1) If a juvenile court is satisfied, on the complaint of a local authority, that a foster child is being kept or is about to be received -

(a) by any person who is unfit to have his care, or
(b) in contravention of section 7 above or of any prohibition imposed by a local authority under section 10 above, or

(c) in any premises or any environment detrimental or likely to be detrimental to him,

the court may make an order for his removal to a place of safety until he can be restored to a parent, relative or guardian of his, or until other arrangements can be made with respect to him.

(2) On proof that there is imminent danger to the health or well-being of the child, the power to make an order under this section may be exercised by a justice of the peace acting on the application of a person authorised to visit foster children.

(3) An order under this section made on the ground that a prohibition of a local authority under section 10 above has been contravened may require the removal from the premises of all the foster children kept there.

(4) An order under this section may be executed by any person authorised to visit foster children or by any constable.

(5) A local authority may receive into their care under section 2 of the Child Care Act 1980 any child removed under this section, whether or not the circumstances of the child are such that they fall within paragraphs (a) to (c) of subsection (1) of the said section 2 and notwithstanding that he may appear to the local authority to be over the age of 17.

(6) Where a child is removed under this section, the local authority shall, if practicable, inform a parent or guardian of the child, or any person who acts as his guardian.

13 Search warrants

(1) If it is shown to the satisfaction of a justice of the peace on sworn information in writing -

(a) that there is reasonable cause to believe that a foster child is being kept in any premises or in any part of any premises, and
(b) that admission to those premises or that part has been refused to a duly authorised officer of the local authority or that such a refusal is apprehended or that the occupier is temporarily absent,

the justice may by warrant under his hand authorise an officer of the local authority to enter the premises,

if need be by force, at any reasonable time within 48 hours of the issue of the warrant, for the purpose of inspecting the premises.

(2) Without prejudice to the provisions of subsection (1) above, a refusal to allow the visiting of a foster child or the inspection of any premises by a person authorised to do so under this Act shall be treated, for the purposes of section 40 of the Children and Young Persons Act 1933 (under which a warrant authorising the search for and removal of a child may be issued on suspicion of unnecessary suffering caused to, or certain offences committed against, the child), as giving reasonable cause for such suspicion.

16 Offences relating to foster children

(1) A person shall be guilty of an offence if -

(a) being required, under any provision of this Act or of regulations made under section 4 above, to give any notice or information, he-
  (i) fails to give the notice within the time specified in that provision or,
  (ii) fails to give the information within a reasonable time, or
  (iii) knowingly makes, or causes or procures another person to make, any false or misleading statement in the notice or information;

(b) he refuses to allow -
  (i) the visiting of any foster child by a duly authorised officer of a local authority, or
  (ii) the inspection under section 8 above of any premises;

(c) he maintains a foster child in contravention of section 7 above;

(d) he fails to comply with any requirement imposed by a local authority under this Act or keeps any foster child in any premises in contravention of a prohibition so imposed;

(e) he refuses to comply with an order under this Act for the removal of any child or obstructs any person in the execution of such an order; or

(f) he wilfully obstructs a person entitled to enter any premises by virtue of a warrant under section 13(1) above;

(g) he causes to be published or knowingly publishes an advertisement in contravention of section 15 above or of regulations made under that section.

(2) Where subsection (1) of section 7 above applies to any person by virtue of subsection (2) of that section he shall not be guilty of an offence under subsection (1)(c) above if he proves that he did not know, and had no reasonable ground for believing, that a person living or employed in the premises in which he lives was a person to whom subsection (1) of that section applies.

(3) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding [level 5 on the standard scale], or both.

(4) If any person who is required, under any provision of this Act, to give notice fails to give the notice within the time specified in that provision, then, notwithstanding anything in section 127(1) of the Magistrates' Courts Act 1980 (time limit for proceedings), proceedings for the offence may be brought at any time within six months from the date when evidence of the offence came to the knowledge of the local authority.

(5) A local authority may institute proceedings for an offence under this section.

APPENDIX B

An account by Mrs. Priest of interviews she conducted with solicitors in the North East of England.

The following information was obtained from interviews conducted with 26 solicitors of varying age and experience, who practise in the North East of England in firms which themselves vary in size and location. Thus, most interviews took place in city or town centre offices, but others were conducted at a branch office on an out-of-town council estate; in a New Town; and in a large older village in a former mining area.

For reasons relating to other matters which were explored in these interviews, the selection of solicitors to be interviewed was determined primarily by their regular attendance at the magistrates' domestic court and their constant contact with family law matters. Whereas some degree of specialism is common as regards matrimonial work, it seems that advice and assistance in relation to the making of wills is not generally regarded in most firms as a matter in which particular members will specialise. It is therefore necessary to make two cautionary observations on the information set out below. Firstly, the identification of certain events as being 'triggers' for the making of wills may artificially exclude events with which the solicitors interviewed do not customarily deal and may exaggerate the influence of factors directly related to family law. Secondly,

by comparison with other solicitors who do not have the same level of involvement with family law matters, the solicitors interviewed may attach greater importance to advising on the personal, as well as on the purely proprietary aspects of arranging testators' affairs.

All assertions of fact, expressions of opinion and speculations set out below emanate from the solicitors themselves and are reported without additional comment or elaboration.

WILL-MAKING BEHAVIOUR

The solicitors interviewed were conscious of widespread apathy and even positive reluctance on the part of the general public with regard to the making of wills. Although this was felt to be generally applicable to all sections of society, the majority of solicitors expressly linked low levels of will-making to certain specific economic and social considerations. A failure to perceive wills as being of any practical relevance in the absence of home ownership, and social attitudes which associate will-making with 'men of property' both contribute to a working-class belief that will-making is simply not something that is done by 'people like us'. In the North-East, very high levels of unemployment coupled with a relatively large population of council-house dwellers may accentuate the effect of these factors.

All the solicitors found common ground on the proposition that those people who do in fact make wills generally delay doing so until middle or old age (mid 40s onwards). The information set out below was

obtained in response to questions primarily directed at will-making patterns among testators with minor children. The answers were therefore mainly concerned with people of an age-group regarded by solicitors as atypical of testators as a whole.

The information can most conveniently be presented by categorising testators according to their marital status.

Married couples

Some younger testators in this category come to solicitors to make wills apparently without being prompted by any particular event in their lives - it is simply something they have 'got around to doing', as a matter of ordinary prudence. In most cases however, the making of a will is 'triggered' by some other matter which brings them into contact with a solicitor. Thus, some solicitors mentioned the purchase of a house as a likely occasion for the making of a will. On the other hand, other solicitors either did not regard house purchase as a significant 'trigger', or felt that its significance had declined in recent years - a decline possibly connected with a greater tendency for houses to be conveyed into the joint names of married couples.

Most solicitors considered that, of all possible groups in younger age ranges, parties to a stable ongoing marriage are least likely to make wills - probably as the result of knowledge or assumptions concerning surviving spouses' rights on intestacy. Nevertheless, a significant minority of solicitors singled out for special mention couples intending to fly abroad on holiday unaccompanied by their children.

Separated and divorced parents

There was little evidence of initiative as regards will-making among married people who are simply separated, with no divorce proceedings pending. However, the making of a will containing a testamentary guardian appointment is occasionally triggered by the impending admission to hospital of a custodial parent.

Several solicitors mentioned the occasional importance of making a will to cover the period between estrangement and divorce and reported that they have frequently drawn up hand-written wills at first consultations with clients in matrimonial difficulties. This is perhaps most likely to occur in conjunction with the severance of a joint tenancy in the matrimonial home.

Virtually all solicitors said that they routinely draw attention to the desirability of making a will/new will on divorce. Indeed, one solicitor ensures that all divorcing clients, on obtaining the decree absolute, are sent a standard letter drawing attention to the wisdom of making a will and to the possible availability of financial assistance for that purpose. This particular solicitor estimated that not more than 2% of clients follow up this suggestion, and most other solicitors reported a similarly low frequency of will-making on divorce, though specific and strong advice to individual clients was not usually disregarded. Several solicitors felt that the new format of decrees absolute might prompt more divorced persons to make wills, but a similar number queried whether there is still a real need for will-making on divorce in the ordinary run of cases, given the recent amendments to the Wills Act 1837.

Some solicitors were inclined to attribute the general failure to make wills on divorce to the difficulty experienced by divorcees in making long-term plans and predictions. The fact that the period surrounding divorce is usually a period of relative poverty was also regarded as significant. These solicitors were inclined to regard remarriage as a more significant trigger than divorce. Overall, those solicitors who ventured an opinion were fairly evenly divided on the question whether divorce or remarriage is the more common occasion for making a will but most solicitors considered that clients generally have a low level of awareness as to the effect of remarriage on existing wills and on intestate succession. Thus, a number of solicitors reported that they warn divorcing clients (especially custodial parents) about the consequences of any future remarriage. (In this context, several solicitors indicated that they stress to all testators the importance of re-examining wills every few years with a view both to the continued appropriateness of dispositions of property and to the continued fitness of any persons named as testamentary guardians.)

A will was regarded as particularly likely/desirable on divorce in cases where the matrimonial home is transferred to the (custodial) wife, or where a joint tenancy is severed. In these cases, the disposition of property is the main factor in the mind of the client, and of the solicitor. In such cases too, a solicitor's advice as to the need for a will on remarriage can create difficulties for a client who is uncertain as to whether her children or her new spouse should take the benefit of the property in the event of her death. It was said to be 'not uncommon' for remarried parties to make wills aimed at perpetuating the children's claim

to the property. On the other hand, almost all solicitors referred to the small but not insignificant number of wills made by custodial paarents whose main concern is not with property matters but with the continued exclusion of the non-custodial parent from physical possession of the children. This was seen as particularly likely in the immediate aftermath of a bitter custody dispute on divorce or, at a later stage, following the breakdown or withering away of access by the non-custodial parent. This exclusionary motive may also prompt the making of a will on remarriage naming the new (step-parent) spouse as testamentaary guardian, but most solicitors qualified their remarks on this point by reference to a continued preference among clients for step-parent adoptions as the remedy of first resort.

Widowed parents

This group was generally not regarded as being especially likely to make wills by comparison with other groups.

Unmarried mothers

A significant minority of solicitors made specific mention of cases in which requests for advice by unmarried mothers had led to the making of wills which included (or more accurately, primarily consisted of) the appointment of testamentary guardians. These cases were considered noteworthy because in almost all respects the making of a will was regarded as a quite uncharacteristic action, such testators tending to be young (one reported instance concerned a mother aged 19), unemployed, propertyless, and from a background in which will-making would not be regarded as normal. Such cases are generally prompted by an exclusionary motive as regards the natural father.

TESTAMENTARY GUARDIAN APPOINTMENTS

All solicitors said that they had assisted in the making of wills containing such appointments although the extent of their experience varied considerably, from those for whom such appointments are an 'occasional' or 'rare' occurrence to one solicitor who reported dealing with 'perhaps two a week'.

For the purposes of the following account, appointments may be divided into two broad categories: 'positive' and 'negative' appointments. The term 'positive appointment' is used here to denote cases where the appointment of a testamentary guardian is made primarily as a means of allocating clearly the responsibility for the children in order to secure a smooth transition to a substitute home. The term 'negative appointment' is used to denote cases where the 'job allocation' function of the appointment is linked to, and over-shadowed by, a desire to deny a particular person (usually a non-custodial parent) any opportunity to assume the physical care of the children. One solicitor said that in his experience testamentary guardian appointments are only ever made where this negative factor is present, but this response was not typical.

Married couples

The overwhelming majority of appointments by married couples, and by widowed parents, are positive appointments. If parents do not raise the question of including an appointment when making a will, the solicitors would normally do so. Indeed, the majority of solicitors reported that the first suggestion of such an appointment is usually made by themselves. Few

parents raise the question of a testamentary guardian appointment is specific terms, though a considerably larger number would raise the issue in more general terms by such questions as: What will happen to the children?' and "Should we put in something about the children?'

The experience of the solicitors interviewed suggests that only a negligible percentage of testamentary guardian appointments ever take effect. However, it was said that the ability to include such an appointment in a will can often be a significant source of reassurance to parents.

In making appointments, testators are exclusively concerned with substitute day-to-day personal care of the children; nominating people (normally but not exclusively married couples, and normally but not exclusively relatives) who are expected to take in the children as part of their own family. There is often a reciprocal undertaking on the part of testators to act as guardians of the appointees' children.

A 'significant minority' of testators who have been alerted to the issue still fail to make appointments. This is likely to result from a reluctance to initiate consultations within the family which might lead to ill-feeling (as where, for instance, an appointment would require a choice between two sets of grandparents). Such testators are usually content to assume that someone will step into the breach if the need arises.

A testamentary guardian appointment frequently embodies a previously unspoken but clear understanding within

the family as to whose job it will be to assume responsibility for the children. Sometimes, however, the appointment is made to prevent any confusion or uncertainty arising on the matter.

Although grandparents are frequently mentioned as possible appointees, solicitors tend to advise testators to consider carefully whether such an appointment is wise in view of the grandparents' age. It is very common for aunts and uncles to be named as guardians, especially where they are married with children of their own. Some solicitors advise the appointment of joint guardians in cases where there is a need to involve a 'man of business' not subjectively involved with the children.

Divorced parents

In the experience of the solicitors interviewed, non-custodial parents do not appoint testamentary guardians, nor it seems are they advised to do so, in view of the association of guardianship with physical custody of the children. On the other hand, the making of an appointment is frequently recommended to custodial parents. Some solicitors raise the question as a matter of course during the divorce process; others do so only where there is considerable hostility towards the non-custodial parent. Both positive and negative appointments are made by custodial parents. Positive appointments are especially likely to be made where the non-custodial parent (usually the father) has effectively disappeared from the scene and lost all contact with the children. They may be made at the time of the divorce or at some later stage (possibly prompted by the custodial parent's ill-health or admission to hospital). The testator's primary concern

is to achieve certainty and security as regards the future care of the children, in much the same way as might be expected in the case of a widowed parent. A divorced parent who makes a will on remarriage will often name the new step-parent as testamentary guardian.

Markedly different characteristics are exhibited by those cases in which negative appointments are made. Almost all the solicitors interviewed had encountered such cases and may solicitors clearly regarded them as representing a significant, if numerically small, trigger for the making of wills by custodial parents. Some of these appointments may be attributable solely to the testator's personal hostility and bitterness towards the non-custodial parent, particularly following a hard-fought contest over custody. Often, however, custodial parents will assert the non-custodial parent's unfitness to have custody as their primary motivating factor in making a negative appointment. In these negative appointment cases, testators are clearly seeking a way of assigning the benefit of the custody order made in their favour. They want and expect to be able to nominate someone to stand exactly in their shoes as regards dealings with the non-custodial parent. Thus, since most parents regard a divorce court custody order as giving them 'complete control' over the upbringing of the children, they expect to be able to pass on that complete control to the guardian, and not simply to confer on the guardian rights that are to be held jointly with the surviving parent.

In view of this evidence of negative appointments, it should be borne in mind that many custodial parents do

not make wills. Moreover, as several solicitors pointed out, many are reasonably content at the prospect of the non-custodial parent taking over the care of the children in the event of the custodial parent's death, especially where regular access occurs and where the custodial parent has not remarried.

Unmarried mothers

As noted earlier, several solicitors mentioned cases where unmarried mothers (uncharacteristically) make wills and appoint testamentary guardians. In some instances the appointment is a positive appointment but the majority of this admittedly very small number of cases involve negative appointments aimed at reinforcing the natural father's continued exclusion from a parental role.

Appointments taking effect

Only two solicitors recalled cases of testamentary guardian appointments taking effect. One of these was a 'negative' appointment made by a custodial father who had nominated his adult daughter as guardian of her younger brother. The other case was apparently a 'positive' appointment nominating an uncle as guardian, in a will made shortly before a holiday in the course of which both parents died in an air crash. The negative appointment caused no problems - the guardian and her mother had become reconciled by the time of the father's death and saw no difficulty in assuming joint responsibility for the boy. In the second case however, grandparents had been caring for the children during the parents' holiday and assumed that they would continue to do so. When the parent's will was opened, they indicated an intention to resist the uncle's guardianship. The subsequent history of this case is

unknown since the solicitor interviewed ceased to be involved once the parent's will had been opened.

Applications to court for appointment as guardian

A similar dearth of practical experience was reported here. One solicitor was currently dealing with an application under Guardianship of Minors Act 1971, s.5 by an aunt seeking appointment as guardian of her orphaned grandchild. A third solicitor distantly recalled a case where an application for appointment had been contemplated as a means of facilitating dealings with official agencies by relatives caring for a large family of orphans, one of whom was educationally sub-normal and had other problems requiring institutional care. In the event however, such an application for appointment was not considered necessary.

It was the view of most solicitors that orphans are frequently taken in by relatives with no steps being taken to formalise the position. However, the involvement of the local authority might be sought (under the Child Care Act 19880, s.2) as a means of obtaining the boarding-out allowance. It was felt that de facto caretakers would rarely seek to adopt orphans. The solicitors' view was that families either positively reject or simply do not consider formal adoption (other than step-parent adoptions) because of the distortion of relationships which adoption entails. Nevertheless, two solicitors reported cases of grandparental adoption of a deceased daughter's illegitimate child in circumstances where a desire finally to exclude the natural father was a significant motivating factor.

With only a couple of exceptions, the solicitors looked forward to implementation of the custodianship provisions of the Children Act 1975, and regarded them as potentially very useful. Several solicitors made specific mention of their possible application to cases of de facto adoption of orphans.

Other litigation

A substantial majority of solicitors were able to recount cases involving disputes over the custody of children following the death of either or both of the child's parents and where no testamentary guardian had been appointed.

These included disputes between orphans' maternal and paternal grandparents which were dealt with under the wardship jurisdiction, and a dispute between a non-custodial father and a widowed step-father, dealt with on the father's application under the Guardianship of Minors Act 1971, s.9. One solicitor recalled an application by the sister of a deceased custodial mother to vary the existing custody order. Another recalled a case in which a non-custodial father's attempt to regain the children was resisted, through wardship, by the deceased mother's sister, with whom the mother and children had been living prior to the mother's death. (This last case had been brought to the notice of the local authority which, though concerned, felt unable to intervene since no ground for care proceedings could yet be said to exist.)

The difficulties experienced by widowed step-parents in the absence of a testamentary guardian appointment were frequently mentioned. Moreover, several solicitors referred to cases in which a deceased custodial

parent's cohabitee had sought advice. These cases were regarded as particularly problematical, even where the non-custodial parent did not seek any change in the physical custody of the children. [It may be noted that, in a somewhat different context, most solicitors referred to the difficulty of obtaining legal aid for cases in which there could not be said to be any immediate physical danger to the child (wardship) or any intention to contest an application for custody.]

Printed in the UK for HMSO (2290) Dd738587 C17 9/86 HPLtd So'ton G381

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