CHAPTER 30.

DISPENSATION : UNREASONABLE WITHHOLDING : AFTER 1971

Section 1 - The English decision of the House of Lords

(a) Introduction

30.1 The House of Lords[1] became involved in interpreting the ground of unreasonable withholding of consent or agreement in consequence of two conflicting judgments of the Court of Appeal in 1970.[2] The general principles had been clear and consistent until the judgments of Sachs L.J. and, to a lesser extent, Cross L.J. in Re W (An Infant).[3] Indeed the House of Lords was critical only of these two judgments, of certain aspects of the judgment of Russell L.J. in that case[4] and of a relatively minor segment[5] of the judgment of Diplock L.J. in In re C(L) (An Infant).[6] Otherwise the series of cases beginning in 1951 was not only free from criticism but in many respects positively approved.[7] The importance of the decision of the House of Lords for present purposes lies in its implicit,

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1 Re W (An Infant) [1971] A.C. 682.

2 Re W (an Infant)[1970] 2 Q.B. 589 decided on 13 May 1970 and Re B (An Infant) [1971] 1 Q.B. 437 decided on 8 October 1970. The composition of the Court of Appeal was wholly different in each case.

3 [1970] 2 Q.B. 589.

4 Para. 30.17.

5 Para. 30.5.

6 [1965] 2 Q.B. 449.

7 Especially the approaches of Jenkins L.J. in In re K, (an infant) [1953] 1 Q.B. 117, Lord Denning M.R. in Re L (An Infant) (1962) 106 Sol Jo. 611 and Lord Sorn in A B and C B Petitioners 1963 S.C. 124.

and on occasions explicit, recognition of the distinctive functions accorded to welfare in this analysis.

30.2 The issues for any appellate court are necessarily rather narrow in a matter such as this, where so much depends upon the individual circumstances and the trial judge's decision based upon them. For this reason in Re W (an infant)[8] the House of Lords in effect was answering only two questions: how did the trial judge approach the decision which he made; was that approach correct? The first question merely requires an interpretation of the judge's judgment.[9] The second involves the principles of the legislation. Russell L.J., for instance, indicated that "the [county court] judge's decision went entirely on his view as to the best interests of the child, notwithstanding his self-reminder that on this point that was not the sole consideration."[10] This approach was regarded by the Lord Justice as wrong but he did not go on to elaborate in much detail what would have been the correct approach. The House of Lords placed a fundamentally different interpretation upon the trial judge's decision[11] and concluded that his approach was correct. However, Cross L.J. and in particular Sachs L.J. went very much further than Russell L.J. in explaining how a court should approach the question whether consent was being withheld unreasonably and, in doing so inaccurately, attracted severe criticism.

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8 [1971] A.C. 682.

9 Which may be a difficult task.

10 Re W (an infant)[1970] 2 Q.B. 589 at p.598.

11 Paras. 30.12 and 30.13.

(b) The test of reasonableness

30.3 The nub of the conflict was the role of welfare in the decision whether consent was being withheld unreasonably. There was no support in the Court of Appeal in either case for the proposition that witholding consent would be unreasonable merely because it would be better for the child to live with the adopters rather than with the natural parents.[12] Such a comment may be found in most if not all judgments on this matter since 1951, including the House of Lords in 1971.[13] It was put very succinctly by Lord MacDermott:-

> "... the mere fact that an adoption will be for the welfare of the chhild does not itself necessarily show that a parent's refusal to consent to that adoption is unreasonable..." [14]

This must inevitably be so. Under the earlier legislation an adoption order could not be made unless the court was satisfied that to do so would be for the welfare of the child.[15] If that were also the test of unreasonableness in withholding consent or agreement, the dispensation power on that ground at least[16] would be otiose.[17] The nature of the welfare requirement has already been discussed. There is good reason

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12 Re W (an infant) [1970] 2 Q.B. 589 at p.593 per Russell L.J., at p.604 per Sachs L.J. and at p.607 per Cross L.J.; Re B (an infant) [1970] 1 Q.B. 437 at p.439 per Davies L.J. and at p.447 per Winn L.J.

13 Re W (an infant) [1971] A.C. 682 at p.699 per Lord Hailsham L.C., at p.706 per Lord MacDermott, at p.718 per Lord Hodson and at p.722 per Lord Guest.

14 Ibid. at p.706 per Lord MacDermott.

15 Adoption Act 1958 (7 Eliz. 2, c.5), s.7(1)(b).

16 And probably on the othergrounds also.

17 See e.g. Houghton-Stockdale Report, para. 212; Re P (an infant) (adoption : parental consent) [1977] 1 All E.R. 182 at p.184 per Stamp L.J.

therefore to expect that the role of welfare in establishing the ground of unreasonable withholding of consent or agreement will be in principle different from the part which it played in the welfare requirement.

30.4 The technical point of distinction between the Court of Appeal in Re W (an infant)[18] on the one hand the the Court of Appeal in Re B (an infant)[19] and the House of Lords in Re W (an infant)[20] on the other hand is much more precise. It is probably true that every judge would regard the function of the court in determining the existence of one or other of the grounds for dispensation as identifying whether the parent had forfeited his right to refuse to consent or agree or disqualified himself from the need for his consent or agreement to be obtained.[21] That does not really answer the question which then becomes: in what circumstances is his right forfeited or the parent so disqualified. But this general view emphasises that it is a parent-orientated exercise.[22] This was taken up by Lord MacDermott:-

> "...Parliament cannot have contemplated that the process of adoption would be such as to allow the relationship of parent and child - the blood tie - to be sundered lightly and without good reason. One may therefore assume that it would be contrary to the intention of the Act if a finding of unreasonableness were to be reached at some trivial issue or on grounds which were not clearly established and of substance. Where the natural strength and inherent virtues of the parental bond

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18 [1970] 2 Q.B. 589.

19 [1971] 1 Q.B. 437.

20 [1971] A.C. 682.

21 Re W (an infant) [1970] 2 Q.B. 589 at p.611 per Cross L.J.: Re B (an infant) [1971] 1 Q.B. 437 at p.448 and 449 per Winn L.J.

22 E.g. Re B (an infant)[1971] 1 Q.B. 437 at pp.448 and 449 per Winn L.J.

> continue to exist, they must be anxiously regarded in weighing the circumstances relevant to the question of unreasonableness."[23]

It was not necessary to rely upon such matters of policy in interpreting "unreasonableness". They did nevertheless lend support to the court's ultimate conclusion.

(c) The standard of reasonableness

30.5 The judges disagreed not on the conception of disqualification or forfeiture inherent in all the grounds but on the relationship between the various grounds. It has already been suggested, despite certain judicial statement to the contrary, that the meaning of "unreasonable withholding" cannot be related to the meanings of any of the other grounds for dispensation.[24] In other words, the ground in question is independent of the others. Neither Sachs L.J. nor Cross L.J. specifically indicated an interpretational relationship between the ground of unreasonable withholding of consent and the other grounds. They seemed to infer such a relationship,[25] relying apparently upon Jenkins L.J. in In re K (an infant).[26] But in the House of Lords Lords Hailsham L.C. and MacDermott[27] in particular indicated that, although he described "unreasonable" by reference to the

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23 Re W (an infant)[1971] A.C. 682 at p.708 per Lord MacDermott.

24 Para. 29.21.

25 Re W (an infant) [1970] 2 Q.B. 589 at p.600 per Sachs L.J. and at p.608 per Cross L.J.

26 [1953] 1 Q.B. 117. They also seemed to rely to some extent upon Diplock L.J. in Re C(L) (an infant)[1970] 2 Q.B. 589 at p.600 per Sachs L.J. and at p.608 per Cross L.J.

27 Re W (an infant) [1971] A.C. 682 at pp.699 and 710 respectively.

other grounds, Jenkins L.J. had not limited the meaning of "unreasonable" in that way. "[H]e was content", said Lord MacDermott, "to construe 'unreasonably' according to its ordinary meaning".[28] It seems, therefore, to have been this mistaken view of what Jenkins L.J. meant which led Sachs and Cross L.JJ. to apply the standard of parental culpability, fault or blame to "unreasonableness". This in turn induced them to attribute to welfare a much more restricted role than it required.

30.6 The culpability test propounded by Sachs and Cross L.JJ. was restricted to parental misconduct which would be culpable only vis-a-vis the child.[29] It was, however, culpability to a high degree. As Sachs L.J. said: "In short the degree of culpability to be established is high - as one would expect when an order is sought that has penal[30] aspects."[31] Cross L.J. expressed it more colloquially and perhaps less vigorously:-

> "... the court ... must be able to say: 'This is really too much. Making every allowance for the difficulty of your position, in refusing your consent you are failing to face up to obvious facts. You are shutting your eyes to a blameworthy degree to the very serious consequences which your refusal of consent will almost certainly entail for your child."[32]

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28 Ibid. at p.711 per Lord MacDermott.

29 Re W (an infant) [1970] 2 Q.B. 589 at p.603 per Sachs L.J. and at p.608 per Cross L.J.

30 In the sense that severing the natural bond between mother and child operates as a penalty against the mother.

31 Re W (an infant) [1970] 2 Q.B. 589 at p.600 per Sachs L.J.

32 Ibid. at p.608 per Cross L.J.

This test was rejected by the Court of Appeal in Re B (an infant)[33] and by the House of Lords in Re W (an infant)[34] for a number of reasons. Davies L.J. was at great pains to point out that the ground of unreasonable withholding of consent could not be "coloured" by any of the other grounds:[35] there was no genus nor were the grounds in pari materia. Indeed the inference was quite the reverse:-

> "This clear distinction between misconduct or dereliction of duty on the one hand and unreasonable withholding of consent on the other ... shows that section 5(1)(b) of the Act of 1958 is dealing with an entirely different state of affairs from those covered by sections 5(1)(a) and (2). It also, in my view, strongly suggests that in order to come within section 5(1)(b) no element of misconduct, culpability or blameworthiness is necessary."[36]

Winn L.J.[37] and Lord Hailsham L.C.[38] strongly supported this line of argument. It is now clear beyond doubt, that "there is no reason for interpreting the word 'unreasonably' when it occurs in the statute as importing necessarily any element of culpability."[39]

30.7 Parental conduct infringing the standard of culpability, if that had been the test, would undoubtedly have an effect upon the child. But its consequences for the child were not the reason for its elevation as the standard of unreasonableness. The second principal reason for the rejection of culpability as the standard of unreasonableness

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33 [1971] 1 Q.B. 437.

34 [1971] A.C. 682.

35 Re B (an infant) [1971] 1 Q.B. 437 at p.442 per Davies L.J.

36 Ibid. at p. 443 per Davies L.J.

37 Ibid. at p.448 and 449 per Winn L.J.

38 Re W (an infant) [1971] A.C. 682 at p.696 per Lord Hailsham L.C

39 Idem.

was that it did not properly reflect the meaning of the word "unreasonably", particularly in relation to welfare. In other words, culpability was too stringent a test, bearing in mind the position of the child. Practically every decided case, as Davies L.J. pointed out,[40] indicated that the position of the child was a matter which should not be ignored. These cases in question go some way to establishing clearly what is the position of the child and consequently of his welfare in this process.

30.8 Sachs and Cross L.JJ. seemed particularly anxious to avoid what they called a purely "welfare" approach to deciding whether consent was being unreasonably withheld.[41] Their attempts to some extent forced them to the other extreme of the culpability test. The House of Lords too appeared concerned to reject a decision based upon "pure welfare".[42] It is however by no means clear whether these two objectives are the same. The judgments thus indicate somewhat differing approaches to welfare.

(d) Welfare and reasonableness

30.9 The difficulties seem to have arisen to some extent from the relationship between the welfare requirement[43] and the general ground of dispensation.[44] There was no direct nexus

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40 Re B (an infant) [1971] 1 Q.B. 437 at p.443 per Davies L.J.

41 Re W (an infant) [1970] 2 Q.B. 589 at pp.605 and 607 per Sachs and Cross L.JJ respectively.

42 E.g. Re W (an infant) [1971] A.C. 682 at p. 724 per Lord Guest.

43 I.e. Adoption Act 1958, s.7(1)(b).

44 I.e. unreasonable withholding of consent.

between the provisions. But in the course of their analysis of the ground of unreasonable withholding the courts, in particular the House of Lords, tended to consider the overall scheme of the legislation.[45] That required some reference to the welfare requirement. The initial step in the argument is to distinguish the role of welfare in custody and adoption proceedings. The difference in effect of custody and adoption orders is the justification for the distinctive role of welfare.[46] The care and control of the child is essentially a dynamic but ephemeral matter. Custody is inherently variable. Adoption, on the other hand, is static once the process has created the substituted relationship. The dynamism of the parent-child relationship, whether formed naturally or by adoption, flows from the status thereby created and custody, care and control are part of that dynamism. The consequences of this for welfare are, in theory at least, clear:-

> "... in custody cases the welfare of the child is the first and paramount consideration, but in adoption proceedings the welfare of the child is the second of three separate conditions as to each one of which the court has to be separately satisfied, and the first of which is that the consent of the parent must be forthcoming at the time of the hearing unless the consent has been validly dispensed with by the court under the other provisions of the Act."[47]

The second of these conditions, of course, was the welfare requirement. The Lord Chancellor however appears to have given the grammatical sequence in section 7(1) of the 1958

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45 E.g. Re W (an infant) [1971] A.C. 682 at pp. 693 and 694 per Lord Hailsham L.C.

46 Ibid. at p.693 per Lord Hailsham L.C.

47 Idem.

Act a priority of importance which could be justified only by reference to the policy of the legislation implied from its general scheme. Lord Hailsham L.C. was thus careful to distinguish between the welfare requirement and the standard of reasonableness for the purposes of the general ground of dispensation with consent. The second conclusion is that neither the welfare requirement nor the standard of reasonableness is in any way analogous to the paramountcy of welfare principle in custody proceedings.

30.10 This analysis did not originate with Lord Hailsham L.C. It is no more than an extended version of what Lord Goddard C.J., among others, meant when he, for example, said: "... the mere fact that an adoption order will be for the benefit of the child does not answer the question whether consent is being unreasonably withheld."[48] Indeed all of the Lord Chancellor's colleagues in the House of Lords in Re W (an infant)[49] adopted a similar view. It would seem possible to encapsulate this analysis in a number of simple propositions:-

(a) an adoption order must be for the welfare of the child;

(b) consent must be obtained or dispensed with before an adoption order may be made;

(c) welfare is not the test of an adoption order;

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48 Hitchcock v W B [1952] 2 Q.B. 561 at p.571 per Lord Goddard C.J.

49 [1971] A.C. 682 at p.709 per Lord MacDermott, p.721 per Lord Hodson, p.723 per Lord Guest and p.725 per Lord Donovan.

(d) welfare is not the test of reasonableness in the general ground of dispensation.[50]

The welfare and consent or agreement requirements are both threshold requirements. There is no question of the exercise of a discretion. The satisfaction of these requirements is no more than adjudication. It involves a decision founded upon past or existing events and circumstances, the consequences of which are projected into the future. This is true of the dispensation process at the stage of establishing the grounds relied upon, for they are themselves threshold requirements. There is, therefore, good reason to suppose that welfare could not be the test of reasonableness: partly because welfare would then be a threshold requirement per se[51] and at the same time the test for dispensing with a second threshold requirement;[52] partly because reasonableness itself is an open-ended standard and to apply the test of welfare would be restrictive to the point of substituting an altogether different standard; finally, because welfare is also an open-ended criterion, it could enable considerations to be introduced in a way consistent more with the exercise of a discretion than with the establishment of a threshold requirement.

30.11 These arguments relate only to welfare as the test of reasonableness. There are further propositions implicit in

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50 These four propositions clearly distinguish between welfare and consent or agreement as conditions sine qua non an adoption order may be made and the criteria (constituting the "test") relevant at the point of the exercise of a discretion, whether substantive or interpretational.

51 Which it was independently under section 7(1)(b) of the Adoption Act 1958.

52 I.e. the consent or agreement requirement.

the analysis of Lord Hailsham L.C.[53] which relate more to this aspect of the problem:-

(a) the paramountcy of welfare principle applies to custody proceedings;

(b) it does not apply to any part of adoption proceedings;

(c) the welfare and consent or agreement requirements are conceptually different from the paramountcy of welfare principle;

(d) if welfare is an element in the test of reasonableness, it is neither paramount nor a primary consideration.

Much of this depends upon what is the meaning and function of the paramountcy of welfare principle. This will be discussed fully in the context of custody.[54] But that apart, the immediate question is precisely how welfare operates as an element in the test of reasonableness.

(e) The role of welfare

30.12 Welfare is not the test of reasonableness; nor is it a necessary element in that test. But in practice it is likely never to be absent. It is not always clear in what sense reference is being made to welfare. Sometimes the judicial use on the word is far from precise. In Re W (an infant),[55] for example, while commenting on the county court judge's interpretation of the circumstances, Lord Hailsham L.C. said:

> "...that the learned judge analysed the facts mainly from a welfare standpoint."[56]

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53 Re W (an infant) [1971] A.C. 682 at pp.693 and 694.

54 See paras. 35.85 to 35.96.

55 [1971] A.C. 682.

56 Ibid., at p.702 per Lord Hailsham L.C.

That is not particularly helpful, for the reference to welfare is at best neutral. But he continued:-

> "But this he was bound to do. Not only was he bound to do so from the point of section 7(1)(b) ... but he was bound to do so in order to apply to the facts of the case before him Lord Denning's injunction in Re L."[57] [58]

That injunction, of course, related to the significance of welfare in the test of reasonableness. The Lord Chancellor's comments emphasise the two contexts in which welfare plays a part.

30.13 Lord Hodson expressed himself in a similar but more succinct manner. His conclusion was couched in different terminology: "... the [county court] judge was not, as the Court of Appeal thought, regarding the matter as a 'welfare case'."[59] By that he meant that welfare, in the strictly positive sense, was not the test of reasonableness. Lord Guest, too, used different words. He characterised the welfare requirement in section 7(1)(b) as "pure welfare",[60] which means in effect welfare unaffected by other considerations. Lord Guest thereby inferred that something other than "pure welfare" could be relevant in deciding the question of unreasonably withholding consent or agreement. There is nothing inconsistent in the judgments of the members of the House of Lords, despite a certain difference in their terminology.

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57 (1962) 106 Sol. Jo. 611.
58 [1971] A.C. 682 at p.702 per Lord Hailsham L.C.
59 Ibid. at p. 721 per Lord Hodson.
60 Ibid. at p. 724 per Lord Guest.

30.14 Similar views had been expressed by the various members of the Court of Appeal in both Re W (an infant)[61] and Re B(an infant).[62] Consistently with the House of Lords, they rejected welfare as the test of reasonableness. Differences arose, partly concerning their interpretation of the county court judge's approach and partly concerning the introduction of the culpability standard.[63] Sachs L.J. characterised the county court judge's judgment as "a 'welfare' judgment in which there has been followed step by step a welfare report of a welfare officer".[64] If the House of Lords had taken that view of the trial judge's approach, they would also have rejected it.

30.15 Russell and Cross L.JJ. similarly rejected the welfare approach but in doing so they indicated what part welfare should play in the test of reasonableness. Their views on this aspect of the case remain important.[65] Indeed they were in effect impliedly supported by some of the members of the House of Lords. This point identifies in a dramatic fashion the distinction between the positive or future aspects of welfare and its negative or retrospective aspects. Cross L.J. argued that the county court judge applied the wrong test in asking: "Am I satisfied that the making of the adoption order will promote the welfare of this child?"[66]

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61 [1970] 2 Q.B. 589.

62 [1971] 1 Q.B. 437.

63 Paras. 30.5 to 30.7.

64 Re W (an infant) [1970] 2 Q.B. 589 at p.605 per Sachs L.J.

65 Despite the reversal of their decision by the House of Lords.

66 Re W (an infant)[1970] 2 Q.B. 589 at p.611 per Cross L.J.

Apart from the obvious criticism that this appears to be equating the test of an adoption order and the test for deciding whether consent is being unreasonably withheld, this indicates that the promotion of the welfare of the child is not the correct test. Promotion of the child's welfare, although prima facie it does not indicate a choice, is analogous to deciding in the best interests of the child. It involves an element of comparison and finally choice. In other words, reasonableness has nothing to do with a choice of alternative decisions; nor has it to do with speculation about what would be better for the child. It is perhaps more a realisation of the consequences of the actual decision made.

30.16 The alternative question[67] posed by Cross L.J., which in his view was correct, avoids this difficulty by concentrating upon past and present circumstances. There is, even in relation to that question, an element of speculation. But it is speculation about the consequences of a decision based upon these circumstances, not about which decision among several would be better for the child. It was criticised in the House of Lords[68] but largely for a different reason, namely that the word "blameworthy" indicated an inaccurate standard.[69]

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67 "Am I satisfied that making every proper allowance for the difficulty in which the mother finds herself, she, in refusing her consent, is failing to face up to the realities of the case and is shutting her eyes to a blameworthy degree to the obvious dangers to which she is exposing the child?" Re W (an infant) [1970] 2 Q.B. 589 at at p. 611 per Cross L.J.

68 Re W (an infant) [1971] A.C. 682 at p. 701 per Lord Hailsham L.C.

69 Para. 30.6.

30.17 Russell L.J.'s views seem to indicate a similar distinction between positive and negative welfare. Having eliminated the "best interests of the child" approach, he added:-

> "It is of course right to say that there may be cases in which the circumstances related to the welfare of the child are such that no mother acting reasonably should withhold consent to the adoption. But it seems to me that this requires a clear prognosis of relative harm to the child if the adoption order is not made."[70]

Lord Hailsham L.C. did not accept the last part of this statement.[71] No precise reason was given for this conclusion. Probably the Lord Chancellor was suggesting that just as the test of culpability was so restrictive as to displace reasonableness, so the test of a "clear prognosis of relative harm" would do likewise. The standard, in other words, would be too high to satisfy mere reasonableness. On the other hand, while acknowledging the unacceptable stringency of his standard, it is arguable that Russell L.J.'s approach is basically correct. He was looking at the effect on the child of a decision to withhold consent, that is, "if an adoption order is not made."[72] The need for a "prognosis of relative harm"[73] suggests that the speculative element in the test merely relates to the consequences of the decision. It is not a matter of choice. Welfare is relevant not positively but negatively, not futuristically but retrospectively.

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70 Re W (an infant) [1970] 2 Q.B. 589 at p.598 per Russell L.J.

71 Re W (an infant) [1971] A.C. 682 at p.700 per Lord Hailsham L.J.

72 Re W (an infant) [1970] 2 Q.B. 589 at p. 598 per Russell L.J.

73 Idem.

(f) The nature of welfare

30.18 Having thus discounted firstly the relevance of a "welfare" approach to unreasonable withholding of consent or agreement and secondly the desirability of a positive role for welfare, the courts, as it would be expected, have indicated how the negative role of welfare would operate. In theory at least, this is to what extent a parent should reasonably be expected to take into consideration the consequences of his decision for the welfare of the child. Sachs and Cross L.JJ applied the standard of parental culpability or one not far short of it.[74] According to Sachs L.J.: "The conduct of a mother in disregarding the welfare of her child can, however, be shown to be culpable."[75] Cross L.J. suggested a slightly less stringent test: "... the section envisages a degree and standard of unreasonableness which although not amounting to positive misconduct with regard to the child does not fall far short of it."[76]

30.19 That standard of reasonableness was rejected in Re B (an infant)[77] and by the House of Lords[78] but the test of reasonableness was in effect accepted. The appropriate test has been summed up very succinctly by Winn and Diplock L.JJ. in these words:-

> "... whilst it may be very relevant and, indeed necessary, to consider whether the natural parent has shown indifference to the welfare of the child, I find it difficult to accept that there is any scope for the application of the additional tests of callousness or of self-indulgence in judging any refusal of consent. The true test is that stated by Diplock L.J., I respectfully think, with perfect precision in these terms:[79]

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74 Para. 30.6.

75 Re W (an infant) [1970] 2 Q.B. 589 at p.604 per Sachs L.J.

76 Ibid. at p. 608 per Cross L.J.

77 [1971] 1 Q.B. 437.

78 Re W (an infant) [1971] A.C. 682.

79 Re C (L) (an infant) [1965] 2 Q.B. 449 at p. 471.

> 'The question, indeed, that should be put I would put in these terms: Would a reasonable parent regard a refusal to permit the adoption of the child as involving a serious risk of affecting the whole future happiness of the child?'." [80]

There is no suggestion of a standard of culpability. The test is that of the reasonable parent. The test does not predicate a determination based on possible alternative courses of action. In other words, only one decision is relevant; that is, to refuse to consent or agree. The effect on the child of that refusal is the aspect of welfare relevant to the test of reasonableness. The substance of welfare for that purpose is widely interpreted. The analysis of these judges acknowledges that reasonableness is the test enacted by Parliament. The judiciary have merely interpreted that test to include a negative aspect of welfare.

30.20 The judgment of Davies L.J., on the other hand, although not inconsistent with that of his colleague in the Court of Appeal, indicated a slightly different view of welfare. The relevance of welfare could not be doubted.[81] He described its role as follows:-

> "... one of the matters which a parent ought reasonably to take into account in deciding whether or not to withhold consent should be the prospects and outlook for the child if adopted as compared with those if unadopted; these prospects would include material and financial prospects, education, general surroundings, happiness, stability of the home and the like." [82]

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80 Re B (an infant) [1971] 1 Q.B. 437 at p.453 per Winn L.J.,

81 Re B (an infant) [1971] 1 Q.B. 437 at p.443.

82 Idem. per Davies L.J.

This is a view of the function of welfare wider than that of Diplock L.J. He referred to the "future happiness" of the child.[83] Davies L.J. included more comprehensively the "prospects and outlook" for the child. The suggestion has already been made[84] that any decision on welfare involves an element of speculation in the sense of predicting on the basis of existing circumstances what the consequence of a decision is likely to be. Davies L.J., however, on the face of his comment seemed to advocate a more positive role for welfare when he indicated a comparison between adoption and non-adoption.

30.21 This is a dimension not contemplated by Winn L.J. or Diplock L.J. Does it change the nature of the role of welfare from negative to positive? Probably not. There is only one relevant determination: to refuse consent. There can be no other decision, for, if there were, the present problem would evaporate.[85] The point raised by Davies L.J. is merely whether a reasonable parent should look at the consequences not only of his actual decision but also at the effect on the child of an alternative decision. That is the essence and purpose of the comparison. As such it seems to fall quite consistently within the test of reasonableness. The court is not faced with a choice. There is no question in the present context of the parent changing his decision in the sense of making a choice between alternatives. He has

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83 Para. 30.19.

84 Paras. 5.20 to 5.23.

85 The dispensation power exists only in the event of a refusal to consent or agree.

already made his decision. The issue is hypothetical: should the parent acting reasonably have looked at the consequences not simply of his actual decision but also of the alternatives open to him. The range of relevant consequences has been extended. The role of welfare even with the addition of this dimension remains fundamentally negative.

30.22 There is nothing in the judgments of the House of Lords, it is suggested, to detract from these conclusions. Indeed they lend support to this analysis. Lord MacDermott's views are probably typical of those of his colleagues:-

> " ... where the test of unreasonableness fails to be applied in relation to the welfare of the child, the degree of unreasonableness to be proved must be marked in the sense that the parent whose consent is withheld has ignored or disregarded some appreciable ill or risk likely to be avoided, or some substantial benefit likely to accrue if the child is adopted."[86]

That comment is to some extent a synthesis of the views of both Diplcok and Davies L.JJ. It relates to one decision only but the relevance of the consequences of the alternatives is given as much weight as the effect of the decision to withhold consent. Lord MacDermott thus contributed nothing new to the analysis. He merely expressed it differently.

30.23 Lord Donovan, on the other hand, passed a remark which, although interesting but not vital in the adoption context, will prove to be significant when the analysis turns

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86 Re W (an infant) [1971] A.C. at 682 at p. 709 per Lord MacDermott.

to custody.[87] The idea of welfare involves very generally circumstances which bear directly upon the child: for example, his health, where he lives, what he eats and drinks, his education, his recreation, his economic and financial position. It has been extended to include what has been described generically as psychological welfare.[88] Even that has a direct bearing upon the child. If these aspects may be described as direct or primary welfare, then Lord Donovan has articulated in this context what could be called indirect or secondary welfare. In his words:-

> "While the welfare of the child is not the paramount consideration in adoption cases where the parent withholds consent, it remains a matter of great importance. This is emphasised when one recalls that other matters which have to be taken into consideration become relevant only because of their bearing on that welfare even though this may not be expressly stated."[89]

Although this could expand the role of welfare in custody proceedings, it could arguably be restrictive in this context. It would mean, for example, that any aspect of parental behaviour would be significant only so far as it affected the child. It would presumably exclude the effect of behaviour on the other parent, on the child's own brothers and sisters or indeed on anyone else. Lord Donovan gave an illustration from Re W (an infant).[90] He commented on the natural mother's "frailty ... in relation to men."[91]

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87 See chapter 39.

88 Para. 44.35.

89 Re W (an infant) [1971] A.C. 682 at 726 and 727 per Lord Donovan.

90 [1971] A.C. 682.

91 Ibid. at p. 727 per Lord Donovan.

But, he went on, "that is neither here nor there. It is only because of its possible impact on the child's welfare that any such weakness required to be considered. And the same can be said of other considerations, bearing at one remove only upon the child's welfare but nevertheless pertinent only to that question. The exploration of these matters does not make any judgment predominantly a 'welfare' judgment in any sense which would invalidate it".[92] The relevance of secondary welfare in this sense expands the interests of the child protected by the ground of unreasonable withholding of consent or agreement. At the same time it tends to limit the parental interest accordingly. It is questionable whether this is appropriate here, for neither the consent requirement nor the dispensation process is specifically designed to protect the child or further his interests.

(g) Summary of the function of welfare

30.24 It may be possible at this stage to sum up the function of welfare in relation to unreasonable withholding of consent in a few propositions.

(a) A "welfare" decision is inappropriate because welfare is not the purpose of the requirement nor is it the sole, paramount or even primary consideration in applying the test of reasonableness.

(b) Welfare is not the test of reasonableness.

(c) Welfare is a criterion in applying the test of reasonableness.

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92 Idem.

(d) Welfare is applied negatively in the sense that harm to the child as a consequence of the decision not to consent or agree should be taken into account by a reasonable parent, failure to do which disqualifies the parent from his prima facie statutory right to refuse consent or agreement.

(e) Welfare involves a prediction of the future consequences for the child of the decision to withhold consent or agreement, including a comparison of the consequences for the child of the alternatives open to the parent.

(f) Welfare includes both its primary and secondary aspects.[93]

(h) The achievement of a balance

30.25 It must be borne in mind that the relevance of welfare is merely one aspect of the decision whether consent or agreement has been withheld unreasonably. It is the only aspect which modifies what would otherwise be a parent-orientated exercise. This analysis is directed particularly to the part played by welfare. In doing so the overall pattern should not be distorted. A synthesis will help to achieve that.[94]

30.26 Any decision, either by a parent not to consent or agree or by a court adjudicating on the reasonableness of such

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93 There may be more doubt about this conclusion than any of the others, partly because it is to some extent in conflict with the policy of the adoption legislation and partly because it was articulated only by Lord Donovan. It is however an aspect of welfare important in other contexts.

94 The decision of the House of Lords in the Scottish appeal probes more deeply into this point.

a decision, must reflect the individual circumstances of each case. The test of reasonableness, only meaningful in a particular context, supports that view. Similarly the substance of welfare is meaningful only in the individual case. For these reasons the courts have stressed the need to inquire carefully into individual circumstances, to which they apply an objective test of reasonableness.[95] "Welfare" and "reasonable" attract interpretational discretion and reflect particular circumstances. The overall objective is to achieve a balance between the interests concerned and the circumstances and considerations affecting each interest. This involves determining the relevance of the various considerations, deciding what weight they should be given in relation to each other and coming to a conclusion on that basis. None of these steps is regulated by statute. Even if it were regulated by statute, that would not affect the character of the process. Questions of relevance, weight and application are largely discretionary. The discretion is founded upon the nature of the decision-making process. It is neither interpretational discretion nor substantive discretion. It may be called an administrative discretion. The unusual feature of this particular administrative discretion is that it is an element in the satisfaction of a threshold requirement. It is the general character of this requirement which gives to it its discretionary character.

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95 E.g. Re W (an infant) [1971] A.C. 682 at p.700 per Lord Hailsham L.C., at p.709 per Lord MacDermott, at p.718 per Lord Hodson, at p.722 per Lord Guest and at p.725 per Lord Donovan.

30.27 The courts have not analysed or synthesised unreasonable withholding of consent or agreement in this way. Lord Hailsham L.C. has however talked in terms of "weighing" considerations, putting factors "into the scales" and the like.[96] These metaphors indicate a "balanced" approach. Lord Hailsham L.C. has certainly indicated the discretionary nature of this process, although the nature of the balance is rather complex. It may be easier to explain it in a series of propositions.

(a) Consent or agreement, including dispensation therewith, is a threshold requirement.

(b) Dispensation requires the satisfaction of a threshold requirement, followed by the exercise of a discretion.

(c) One of the threshold requirements or grounds of dispensation is unreasonable withholding of consent or agreement.

(d) Reasonableness is the test of the quality of the decision not to consent or agree.

(e) Welfare is a part of that test.

(f) "Welfare" and "reasonableness" attract interpretational discretion.

(g) To adjudicate "reasonableness" in the individual case requires the court to weigh or balance the relevant considerations.

(h) The balancing function involves an administrative discretion.

(i) Only if the threshold requirement has been satisfied in this way may the court in exercise of its substantive discretion decide whether or not to dispense with consent or agreement.

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96 Re W (an infant)[1971] A.C. 682 at p.700.

This clearly identifies the three types of discretion in the process which itself is part of a threshold requirement:[97] merely, interpretational, administrative and substantive discretions.

(i) The meaning of welfare

30.28 The last aspect of welfare to consider is its meaning. It has already been suggested[98] that the only development of significance between 1951 and 1971 was the extension of the meaning of welfare to include psychological welfare or at least to admit evidence of the risks involved in a change of parentage or actual care. There was medical evidence before the trial judge in Re B (an infant)[99] of the dangers to a child inherent in a transfer back from adopted parents to natural parents whom the child did not know and also a transfer from a stable to an unstable home.[1] The evidence was described by Davies L.J. as "almost overwhelming".[2] That evidence proved to be important in the case.

30.29 There was no medical evidence at all in Re W (an infant).[3] Russell L.J., however, was prepared to take judicial notice of the risks inherent in such transfers. As he said:

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97 It need not, of course, be part of a threshold requirement. It may simply be part of the overall discretion, as in custody proceedings.

98 Paras. 29.61 to 29.66.

99 [1971] 1 Q.B. 437.

1 Ibid. at pp. 445 and 446.

2 Ibid. at p.446 per Davies L.J.

3 [1970] 2 Q.B. 589.

> "I am prepared, as was the judge, to accept without specific evidence in the case that a medical view would be expressed that as a general statement there is a risk of psychological disturbance to the boy if he parts from the proposed adoption."[4]

But that makes very little difference. A court would not normally act upon such knowledge unless the risk could be quantified in relation to the child in question.[5] That could not be done without specific medical evidence. Russell L.J. also pointed out that psychological disturbance could arise when the adopted child found out that his parents were not his "true parents".[6] Cross L.J. expressed similar comments[7] and in the House of Lords Lord Hodson noted without disapproval judicial knowledge of these matters.[8]

30.30 These developments in 1971 have probably made little difference in practice. The courts have always been sceptical about general statements of psychological doctrine. In the absence of specific evidence they would hesitate to act. Despite judicial acknowledgement of this knowledge, this is likely to remain so. It is nevertheless possible for a judge to act upon his judicial knowledge of these matters but it would be a very exceptional case indeed where the decision turned on that particular aspect. These 1971 novelties are thus likely to have little practical consequence.

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4 Ibid., at p.598 per Russell L.J.

5 Idem.

6 Re W (an infant) [1970] 2 Q.B. 589 at p.598.

7 Ibid. at p.610.

8 Re W (an infant) [1971] A.C. 682 at p.720.

Section 2 - The Scottish decision of the House of Lords

(a) Introduction

30.31 It has already been suggested[9] that the position in Scotland was little different from that in England, at least up until about 1970. It was probably quite fortuitous that about three months after giving judgment in Re W (an infant)[10] the House of Lords went through a similar exercise in a Scottish appeal.[11] The Court of Session[12] had the advantage of the Court of Appeal decisions in Re W (an infant)[13] and Re B (an infant)[14] but not of the House of Lords' decision in the former case. That probably made no difference, for the Court of Session was content to follow its earlier decision in A B and C B, Petitioners.[15] Largely for that reason the Court of Session's judgment is superficial in the sense that it did not canvass the major arguments. The necessity for a different approach arose in England only because of the conflict in the Court of Appeal. There was probably no need for the House of Lords to become involved in the Scottish case[16] but in the event it has proved valuable, because in the

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9 Para. 29.48.

10 [1971] A.C. 682.

11 A and B, Petitioners 1971 S.L.T. 258. It is interesting that of the judges who heard the appeals in the House of Lords only one, Lord Guest, was involved in both appeals. Lord Guest apart, therefore, the court was constituted differently for each appeal. Their fundamental unanimity adds weight to their authority. N.B. References are to the report in the Scots Law Times, as the writer has not had access to the more recent Session Cases.

12 1971 S.L.T. 130.

13 [1970] 2 Q.B. 589.

14 [1971] 1 Q.B. 437.

15 1963 S.C. 124.

16 Because there was little doubt about the relevant approach.

event it has proved valuable, because in the Scottish appeal the House of Lords elaborated upon some of the points which were to some extent a matter of inference only in the English appeal. The courts in England were concerned particularly with the standard of reasonableness: whether culpability or something close to culpability was necessary. The House of Lords in the Scottish appeal discussed not only the general role of welfare but also the overall context in which welfare appeared very dramatically but only as a part of the whole process.

(b) The meaning of welfare

30.32 The circumstances in A and B Petitioners[17] were from the point of view of unreasonable withholding at best very marginal. There was no medical evidence, although Lords Reid and Simon adopted the view of the English courts that the risks inherent in changing the parentage of a child were a matter of judicial knowledge.[18] Lord Reid perhaps went further than any of his colleagues in either case by acknowledging not only such judicial knowledge but also a judicial ability to quantify the risks. In his words:-

> "In a case like this I think that a judge is well able to estimate the probable effect of uprooting a child of tender years and transferring it from adopting parents with whom it is happy to its natural parents of whom it has no recollection. In unusual cases medical evidence may be helpful but I should be sorry to see any general tendency to call medical evidence in these cases."[19]

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17 Best described in the note of Sheriff-substitute Prain: 1971 S.L.T. 130 at pp. 130 to 132.

18 1971 S.L.T. 258 at pp. 259 and 264 respectively.

19 1971 S.L.T. 258 at p.259 per Lord Reid.

So far as it may be foreseen at this stage, this is likely to remain a minority view. Indeed it is perhaps questionable how far a judge is competent to estimate such risks.[20]

(c) The approach to the test of reasonableness

30.33 These marginal circumstances coupled with a peculiarly Scottish procedure[21] were a matter of concern for some members of the House of Lords,[22] who thus found themselves with no information or material to question the decision of the sheriff-substitute on the merits of the case. The appeal was ultimately one of law. As Lord Wilberforce suggested, in the absence of any "manifest error of law"[23] it was almost impossible to allow the appeal. The trial judge was in effect beyond challenge on the facts. This is probably an oversimplification of the relationship between law and fact, but it indicates some of the problems for judges of appeal.

30.34 The principal issue for the House of Lords was whether the sheriff-substitute had adopted a "welfare" approach to the question of reasonableness. Sheriff-substitute Prain clearly distinguished[24] between a decision whether consent had been unreasonably withheld and a decision whether the welfare requirement had been satisfied.[25] However, in relation to the former question, he came very close indeed, it is

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20 For further discussion, paras. 45.16 to 45.19.

21 Whereby in place of a proof the matters in issue were remitted to a reporter: 1971 S.L.T. 130 at p. 131. See also para. 45. 13.

22 Particularly Lord Guest and Wilberforce: 1971 S.L.T. 258 at p. 260.

23 1971 S.L.T. 258 at p. 261 per Lord Wilberforce.

24 1971 S.L.T. 130 at p. 132.

25 A distinction indicated also by the House of Lords in the English appeal: para. 30.9.

suggested, to a welfare approach. In his words:-

> "Looked at objectively, it would seem both as regards the characters of those concerned and as regards the spiritual, moral and material aspects of the respective homes, by for the greater benefit to the child would result from leaving him with the petitioners."[26]

In isolation this would seem to suggest that "greater benefit" was the test applied by the trial judge. There are however two reasons which suggest otherwise. Sheriff-substitute Prain did not apply the test of greater benefit in isolation. He went on to examine the question from the point of view of the natural parents. His conclusion was that their "natural claims" had been "weakened by their previous conduct towards this child and by the lack of association between themselves and the child since his birth."[27] The application of the "greater benefit" test pointed in the same direction and in a sense supported the conclusion on the parents' "natural claims".

30.35 If one conclusion had been suggested by the "natural claims" test and a different conclusion indicated by the "greater benefit" test, the decision might have been different but not necessarily invalid. For example, if the welfare test indicated unreasonable withholding while the parents' attitudes were reasonable, apart from welfare, it does not necessarily follow that the parents' refusal to consent would be reasonable. Provided the court looked at all the circumstances, including parental attitudes and

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26 1971 S.L.T. 130 at p. 132 per Sheriff-substitute Prain.

27 Idem.

the welfare of the child, they would have done all that the law requires. The facts before Sheriff-substitute Prain did not comprehend that extreme situation. He adopted, in other words, a balanced approach. Welfare was not isolated.

30.36 The second reason which suggests an approach not solely based on welfare is that the sheriff-substitute treated welfare negatively rather than positively. He used the comparison technique[28] which, as it has been suggested, is quite acceptable. The fundamental point is that the court does not decide which home is better for the child, or, even more negatively, which home would be less harmful to the child. That decision rests with the parent and it is that decision which is characterised as reasonable or unreasonable by the court acting objectively. The conclusion of the court on that point does not determine the child's future. The comparison technique also involves an element of prediction. But that does not detract from the retrospective nature of the approach. As the sheriff-substitute said:-

> "But a consideration of a situation at that time [when the order for adoption is to be granted or refused] necessarily involves an assessment of future prospects and an assessment for the future must take account of events and attitudes in the past."[29]

Thus the trial judge not only quoted the acceptable judicial authorities but he also applied them properly.

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28 I.e. looking at the consequences for the child of the alternatives open to the parent: 1971 S.L.T. 130 at p.131.

29 1971 S.L.T. 130 at p.131 per Sheriff-substitute Prain.

(d) The achievement of a balance

30.37 The judges in the Court of Session added nothing to the analysis. The significance of the House of Lords' decision lies in their explicit recognition of the process as a balancing exercise which was only implicitly acknowledged in the English appeal.[30] Most of Lord Reid's short speech was directed to this point:-

> "I think that a reasonable parent or, indeed, any other reasonable person, would have in mind the interests or claims of all three parties concerned - the child whose adoption is in question, the natural parents, and the adopting family. No doubt the child's interests come first and in some cases they may be paramount. But I see no reason why the claims of the natural parents should be ignored ... And the adopting family cannot be ignored either ... So to balance these claims is no easy task. Often no ideal solution is possible." [31]

This means no more than that the interests of the child and of the natural and the adopting parents are relevant to the issue of reasonableness. Their relative importance is a matter for determination in the individual case. One, as Lord Reid suggested, may predominate in one case but be quite insignificant in another. It is in essence a matter of balance. There can be no legal rules. It is a matter of the acquisition of information, its analysis, the identification of the relevant context and the subsequent determination founded upon these matters: in short, an administrative discretion.

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30 Paras. 30.25 to 30.27.

31 1971 S.L.T. 258 at p.259 per Lord Reid.

30.38 Lord Simon expounded a similar approach based upon a balanced consideration of relevant circumstances. He talked, for example, of bringing the rights and interests of the persons concerned "into just balance",[32] of the "balance of competing claims"[33] and of certain considerations "countervailing".[34] The justification for this view is quite clear and indeed is itself indicative of a balanced approach. As Lord Simon argued:-

> "Although the welfare of the child is not the sole consideration, it is a factor of great importance, because a reasonable parent attaches a great weight to what is best for his child."[35]

Since a reasonable parent adopts a balanced approach, affording appropriate weight to welfare, so a court in adjudicating upon the reasonableness of a parent's decision requires the application of a balanced approach, not by itself but as the test against which to judge the parent's decision.

30.39 A court goes about applying the balanced approach in the same way as a parent would be expected to do: by exercising an administrative discretion. It is perhaps odd to think of a parent "administering" his child but this in effect is the juristic nature of the parental function.[36]

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32 1971 S.L.T. 258 at p.263.

33 Ibid. at p. 264.

34 Idem.

35 Ibid. at p.263 per Lord Simon.

36 Paras. 2.10 and 2.15 to 2.18.

Lord Reid has described this process.[37] Lord Simon has done so even more vividly:-

> "In most of these cases there are a number of contradictory considerations to be weighed. Different minds will attach different weight to the various considerations. But it is to the instance court that Parliament has vouchsafed the primary responsibility of weighing the various conflicting considerations the one against the other. Granted a correct legal approach, the decision is therefore, largely one of fact and degree."[38]

In this sense the parental decision-making process is merely being reviewed by the court. The court itself makes no decision on the welfare of the child. It is thus impossible for the court to come to a "purely welfare" judgment provided the correct approach has been used.

(e) The negative aspect of welfare

30.40 If welfare is simply a consideration to be taken into account by a reasonable parent in deciding whether to consent or agree to an adoption order, subject only to review by the court of that process, the roles played by welfare cannot consistently with that proposition be other than negative. Welfare in other words cannot be the underlying objective of purpose of the process. If it were, its function would be positive rather than negative. Neither the consent or agreement requirement nor the dispensation power is directed towards the welfare of the child. This is particularly

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37 1971 S.L.T. 258 at p. 259.

38 Ibid. at p.264.

true since Parliament has not indicated what part welfare should play in the dispensation process.[39] Welfare has in effect been introduced by the judiciary.

30.41 The tendency in the 1970 English cases was to treat welfare negatively. So it was in the Scottish appeal. Thus neither the parent nor the court is necessarily concerned with what is best for the child. Each is simply required to examine the consequences for the child of the alternative courses open to the parent and to take these consequences into consideration, to the extent that a reasonable parent would incorporate them in his decision whether to consent or agree. In upholding the judgment of the sheriff-substitute Lord Guest relied upon two factors. The first was the "instability of both parents."[40] The second was the negative application of welfare: in Lord Guest's words; "... the disruptive element which must occur in the life of a child now over three years of age by removing him from the home of the adopters who have had him under their care for close on two and a half years to the home of his parents who are really strangers to him."[41] Perhaps even more emphatically Lord Wilberforce regarded the "difficulty and danger of moving the child" as "overwhelming".[42]

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39 Subject only to the primacy of welfare principle in s.3 of the Children Act 1975 and s.6 of the Adoption Act 1976.

40 1971 S.L.T. 258 at p.260.

41 Ibid. at p.260 per Lord Guest.

42 Ibid. at p.261.

30.42 Although none of the other judges expressed the role of welfare in this way, there is nothing to indicate that they would have disapproved. Indeed Lord Simon took a very wide view of the meaning of welfare. The role of welfare is an issue separate from its meaning but they are not unrelated in this context. According to Lord Simon welfare "extends to all factors which will affect the future of the child."[43] This view is wholly consistent with the negative function of welfare.

(f) The natural parents' interest

30.43 On the other hand Lords Simon and Guest introduced an argument which in practice is likely to have a considerable bearing upon the function and possibly even upon the meaning of welfare. It probably has an impact upon every aspect of welfare, including the approach indicated by the courts. In a sense their argument encapsulates a proposition fundamental to the whole dispensation process. Indeed to some extent it reflects the principal policy inherent in the legislation as a whole and used by Lord Goddard C.J. among others as the original justification for a parent-orientated conception of unreasonable withholding of consent or agreement. The argument of Lords Simon and Guest amounts in substance to giving considerable weight to the interests of the parents in the exercise of the administrative discretion vested first in the parents and then on review of their decision in the court.

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43 Ibid. at p.263 per Lord Simon.

30.44 In the circumstances of A and B, Petitioners[44] the interests of the parents did not prevail over those of the child in deciding whether the parents had unreasonably withheld their consent. Indeed some of the judges in the House of Lords clearly had reservations about the merits of the decision.[45] However, on the wider question of the parents' interests, Lord Guest's view may be summed up in three propositions:-

(a) "I can detect no error of law in the sheriff's note. The only criticism which I have to make of his judgment and that of the First Division is that not sufficient importance has been attached to the claims of the natural parents nor to the element of the marriage of the child's parents, albeit at a late stage in the litigation."[46]

(b) "It has been said more than once that, other things being equal, it is in the best interests of a child to be with its natural parents."[47]

(c) "In my view, therefore, strong reasons have to be shown for dispensing with consent when the parents are married, wish to have the child and have suitable accommodation for the child."[48]

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44 1971 S.L.T. 130 and 258.

45 Particularly Lord Wilberforce.

46 1971 S.L.T. 258 at p.260 per Lord Guest.

47 Idem.

48 Idem.

The first comment is valid even if the function of the court is taken to be a review of the exercise of an administrative discretion. It is clearly a matter of discretion how one consideration should be weighed against the others in the circumstances of the individual case. Lord Guest is merely suggesting that he would have given more weight to the parents' interests. This is quite consistent with the nature of the process. Indeed it is a necessary part of it.[49]

30.45 His second comment goes much further. It raises a presumption of general application and, more importantly, it is a proposition incorporating a judgment of a non-legal character. Unless judges are prepared to claim judicial knowledge of such matters,[50] it may arguably be beyond their professional competence. In any event such a judgment, whether justified or not, may be vital in the present and other contexts. His third comment is probably a corollary of the other two statements. It is similar to some of the earlier views enunciated by Lord Goddard C.J. and Jenkins L.J.[51] and to some extent it is simply epexegetical of the presumption that it is best for children to be with their natural parents.

30.46 Lord Guest gave no substantial justification for his views; he merely relied upon Re W (an infant).[52] Lord

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49 In the sense not that he is obliged to attach considerable weight to the parents' interest but only that he must be given an opportunity to do so if he chooses to exercise his administrative discretion in that way.

50 Which they may do: see chapter 45 post.

51 Paras. 29.17 and 29.21.

52 [1971] A.C. 682 in which the House of Lords said very little about the part played by the parents in the test of reasonableness.

Simon, on the other hand, not only took notice of the earlier House of Lords' decision but also founded upon the legislation[53] and the natural incidents and consequences of parental power. It is only the latter argument which sets Lord Simon's analysis apart from the others. He expressed it, as it would be expected, in fairly general terms:-

> "The upbringing of its members until they are in a position to assume independent membership must be the concern of any society. Nevertheless, for a number of reasons, societies generally delegate the main responsibility for the upbringing of their infant members to the natural parents. Hence arises a reciprocal primary right in the natural parents to bring up their own child."[54]

This argument could presumably be extrapolated to almost any context relating to children, provided the law does not otherwise provide. Here in the case of unreasonable withholding of consent or agreement, the relative significance and roles of parental interests and child welfare are not regulated by law.[55] They have however been influenced by the policy of the legislation as it has appeared to the courts. Lord Simon's proposition is understandable and similar ideas have influenced the development of the law over the years.[56] But his proposition lacks any strictly legal foundation. Equally it cannot be challenged legally, for it is part of the administrative discretion contemplated, albeit indirectly, by Parliament. Nevertheless that comment, together with an analysis of the legislation and Lord

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53 Particularly s. 13 of the Adoption Act 1958.

54 1971 S.L.T. 258 at p.262 per Lord Simon.

55 Cf. Children Act 1975, s.3 and Adoption Act 1976, s.6: paras. 30.71 to 30.74.

56 Paras. 32.9 and 32.64.

Hailsham L.C.'s judgment in Re W (an infant),[57] convinced Lord Simon that "the primacy of the natural parent's right [had] thus [been] vindicated."[58] Although Lord Simon went further than Lord Guest, they both recognised the importance of the parental interests in the balanced approach. Lord Simon alone conferred upon it primary significance.

30.47 The various judgments in the Scottish appeal indicate two extremes. The interests of the child, according to Lord Reid, could "come first and in some cases they [could] be paramount",[59] if that is what a reasonable parent should do. Lord Simon, on the other hand, foresaw that the natural parent's right could be the primary consideration. Neither view conflicts with the balanced approach. Nor is it inconsistent with the nature of the parental and consequential judicial decision on the refusal to consent or agree as an exercise of administrative discretion. Indeed it is of the essence of such a discretion that it can accommodate both extremes of significance. In the case in question the natural parent's right was not the conclusive consideration.[60] The trial judge was convinced largely by the effect on the child of the parents' decision not to consent: in other words, by welfare operating negatively to deprive the parents' of their statutory right. In the light of the comments of some of the judges in the House of Lords, the

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57 [1971] A.C. 682.

58 1971 S.L.T. 258 at p.263 per Lord Simon.

59 Ibid. at p.259 per Lord Reid.

60 If it was, it would have changed the test from reasonableness to parental right, which is not within the contemplation of the legislation.

decision was at best marginal but it could not be faulted legally.

Section 3 - The effect of the House of Lords' decisions

30.48 It is in no sense accidental that the analysis has returned to the interests of the natural parents. From Lord Goddard C.J. in Hitchock v W B[61] through Lord Denning M.R. in Re L (an infant)[62] and Lord Sorn in A B and C B Petitioners[63] to Lord Simon in A and B, Petitioners[64] the interests of the natural parents have played a part in terms of judicial presumptions or policy. The interests of the child have also played a part but a part founded on different considerations. Attempts have been made to trace lines of development or directions of change or conflicts in decisions.[65] The year 1962 represented to some the creation of a new approach.[66] That may be true in some senses. But this analysis indicates a coherence and consistency of approach since 1952. The law has not developed. There has been no change. Enlightenment did not suddenly come to the judges. The only judicial aberration, in a sense, was the attempt by the Court of Appeal in 1970[67] to set parental culpability as the standard of reasonableness for the parental decision to refuse consent or agreement to an adoption. But this was quickly rejected by the House of Lords.[68]

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61 [1952] 2 Q.B. 561.
62 (1962) 106 Sol. Jo. 611.
63 1963 S.C. 124.
64 1971 S.L.T. 258.
65 Bevan, pp. 343 and 344; Cretney, pp. 354 to 357; Brown, "Parental Consent to Adoption" 1972 Juridical Review 170 at pp. 172 to 177.
66 Cf. Bevan, p.344, who talked of a change in emphasis rather than a change of approach.
67 Re W (an infant)[1970] 2 Q.B. 589.
68 Re W (an infant) [1971] A.C. 682.

30.49 Why, then, have commentators talked of conflicting decisions,[69] of judges precluding themselves from looking at certain matters[70] or of shifts in emphasis?[71] There has never been any conflict about the question before the court: namely is the parent's decision reasonable? The test is reasonableness. The test never has been the welfare of the child. What is reasonable in one case may be unreasonable in another, for each must depend upon its own circumstances. Circumstances, it is suggested, can never be exactly duplicated. Decisions can never in that sense conflict. Nor, for the same reasons, can applications of the test of reasonableness to the individual case conflict. But one judge's view of the legal context of the approach to reasonableness may conflict with the view of another judge. That is a legal matter. But there is very little evidence of such conflict over the years. The standard of culpability suggested by the Court of Appeal in 1970[72] was one such short-lived conflict.

30.50 The courts have from time to time talked in terms of policies, principles and presumptions. This is probably inevitable when Parliament has not indicated how the matter is to be resolved beyond specifying the test of reasonableness. No court is bound by such policies, principles or presumptions. They are in one sense merely guidelines introduced or implied by the judges for their own benefit. There is nothing

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69 Cretney, pp. 354 to 357; Brown, op. cit. at p. 177.

70 Blom-Cooper L.J., "Adoption and Parental Responsibility" (1957) 20 M.L.R. 473.

71 Bevan, p.344.

72 Re W (an infant) [1970] 2 Q.B. 589.

unlawful in this, provided they are not given the status of binding rules. The question thus is whether the court has effectively restricted its discretion by referring to these policies, principles or presumptions. None of the cases suggest that this has been so.

30.51 There are two possible arguments in this context: that the courts have adopted a "welfare" approach or one largely parent-biased. There is a distinction, in theory at least, between placing considerable weight upon a certain consideration during the decision-making process and affording to that consideration the status of a principle or presumption in advance of an analysis of the circumstances leading to a decision. The former is specific; the latter general. For example, if it were suggested that a girl of six should be with her natural mother and the decision was based, at least to some extent, upon that view, that would operate to restrict pro tanto the exercise of the court's administrative discretion. On the other hand, if the argument were that this girl of six had formed such a close attachment to her natural mother before placement for adoption that to break it permanently would be damaging to her welfare, that would be an acceptable exercise of the administrative discretion. A great deal thus depends upon not merely what approach the judge adopts but also the accuracy of his description of his approach.

30.52 If this distinction is extended to welfare itself, the position becomes clear. If the welfare of the child is a matter upon which the court places such weight as in its

administrative discretion it thinks appropriate, there is no problem. But if the purpose of the process is to do what is best for the child, thus affording to welfare the status of an all-pervading principle or objective, that would amount to the restriction or abrogation of the administrative discretion conferred by Parliament upon the court. It is for such reasons that the courts have unanimously rejected the "welfare" approach.

30.53 The other possible argument is that the courts have restricted their discretion by paying sole or at least significant attention to the position of the natural parents. That this operates to the prejudice of the child's welfare is the comment often made in relation to the early cases.[73] Some commentators regard it as a pejorative criticism; most judges tend to support it. If the courts have generally accepted a parent-biased approach, have they not by so doing restricted their discretion? Yes, but only if that approach has been created by the courts. That is not the position here. This approach has in effect been indicated for the courts by Parliament, because of the context and precise terminology enacted by the legislature.

30.54 Parental consent or agreement is the subject matter of the process. Reasonableness is the test of the quality of the parental decision. Nothing in section 5 of the Adoption Act 1958 or in its later equivalents directly refers to the child or the welfare or interests of the child. It is the decision of the parent not to consent or agree and that alone

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73 E.g. Blom-Cooper, op. cit.

which is for adjudication. Was it reasonable? The question is directed entirely towards the parent. It is scarcely surprising that the method of answering the question is in any way different. The parental approach to the test of reasonableness is thus not the creature of the courts. By the words used Parliament has directed such an approach. A parent-biased view is thus not only valid; it is also mandatory.

30.55 So long as reasonableness is the test, welfare cannot be the test. There is no reason why welfare should not be a consideration which a reasonable parent must take into account in deciding whether to consent or agree. Nor is there any reason why Parliament should not indicate how much weight should be afforded to it. But if in doing so a new and different test were to be introduced, for example, by making welfare paramount, then that approach would be logically indefensible. In effect it would have eliminated reasonableness.

30.56 Although it is not entirely clear that the paramountcy of welfare and reasonableness tests are in this way inconsistent, the Houghton-Stockdale Committee at least thought they were. In their view, "if the child's welfare were declared to be paramount, the test of whether the mother was withholding consent unreasonably could not remain."[74] One of the alternatives would be to substitute for all the current grounds "a general power to dispense with parental consent to adoption if they [the courts] were satisfied that to do so would be for the long-term welfare of the child, this being the first and paramount consideration."[75]

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74 Houghton-Stockdale Report, para. 292.

75 Idem.

This implies that the paramountcy approach involves more than affording a certain weight to welfare in the decision-making process; perhaps it creates an all-embracing principle. Whatever it means, it has not been enacted by Parliament. Instead the legislature have retained the existing scheme but have enacted the primacy of welfare principle in relation to that scheme.[76]

30.57 The reason why the law did not develop, certainly before 1975, is simply that it could not develop once the nature of the parental decision and of the court's approach to reviewing the reasonableness of the parent's decision had been established. That happened in 1952. The courts did not, either then or subsequently, talk in terms of the nature of the decision in this way. Their analysis reflected, as it had to, the language of the legislation. The crucial question was the meaning and application of the test of "reasonableness". It could be no other issue, given the words used by Parliament.

30.58 The word "reasonable" is inherently flexible and depends for its application upon the individual circumstances of a particular case. It attracts interpretational discretion. Given the individuality of its application, the test of reasonableness also involves the act of balancing one against the other whatever considerations are regarded by the adjudicating body as relevant. The relative significance of these considerations is also a matter for determination by the adjudicating body. The standard to be applied is the objective standard of the reasonable parent. This process is

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76 Children Act 1975, s.3.

the exercise of an administrative discretion. Thus it is open to a parent and later to the adjudicating body to decide what "reasonable" means, to decide what matters are relevant, to decide what significance they deserve, to decide how one should be balanced against the other, and finally, but only having exhausted that process, to decide on the merits whether consent or agreement had been withheld unreasonably. The courts have not described their decision making process in this way but that, it is suggested, is fundamentally what they have done and what they are required to do by the legislation.

30.59 If this is true, it becomes apparent why the courts have sometimes appeared to favour welfare at the expense of other matters, placed considerable weight upon the protection of the parents' prima facie genuine views or given effect to some apparently nebulous presumption supporting the blood-tie, the desirability of parental care or even the retention of the status quo. Such decisions are reached within precisely the same statutory framework and, what is more, they appear to be equally valid from the legal point of view. The reason is the flexible nature of the system founded upon these interpretational and administrative decisions.

30.60 This does not mean that the parent or the court has an unfettered discretion. Far from it. The process is more restrictive than if Parliament had provided further guidelines than simply "reasonableness". In a sense, a full

inquiry must be made into all the circumstances, the relevant matters selected and balanced, and a decision reached on that basis. Each aspect of the process needs to be justified. It is much more difficult than deciding whether, for example, the parent has abandoned the child. The peculiarity of this flexible process is that it is juristically the same as deciding whether the parent has abandoned the child: in other words, a threshold requirement.

30.61 Such a system invites criticism. Too much reliance may be placed upon the trial judge's view of the circumstances. The system restricts the ways in which his decision may be reviewed. The judge may misconstrue the policy of the legislation, for example, by favouring the interests of the parent or the child. That criticism assumes knowledge of the policy of the legislation, a matter not always clear and unambiguous. The court may be accused of ignoring social developments or the information produced by sociological and medical research, of acting on false assumptions or indeed of not fully investigating the circumstances.

30.62 These criticisms may be justified. If so, the alternative would be for Parliament to specify the social values to which the courts must give effect, to empower the necessary information to be gathered, to prescribe how the court should go about its task. In other words, rather than dealing with the matter in terms of "reasonableness", a good deal of substantive and ancillary law would need to be enacted. That might simply make Parliament rather than the courts the

target of criticism.

30.63 A further problem would be identifying what social values are desirable. It is unlikely that those specified would be appropriate in every case. In which event some residual discretion would be necessary. That would raise all the problems already discussed. That may well be inevitable. Parliamentary specification of values, at least in general, might prove salutary, provided they are justified scientifically and command reasonable support. But would such a system be different from the present? Yes. It would change the emphasis of the law and give the courts some useful guidance without removing an element of discretion where appropriate.

30.64 Even such a system as that could attract criticism. Such a minimal area of discretion could be abused. The social values enacted by Parliament could be difficult to interpret and apply. They would need to be constantly reviewed, although the enactment of the social values in the delegated form of statutory instruments would obviate part of that problem. The judges would have to review their function in the process. But such a system would make it easier in some respects for them to reach a valid decision.

Section 4 - Subsequent developments and the 1975 Act

(a) Introduction

30.65 None of these possibilities has come about. Welfare has not become the ground for dispensation.

Parliament has not enacted social values. New guidelines have not been introduced. The courts in England[77] and Scotland[78] have applied the approach described by the House of Lords in 1971. The legal context has thus been consolidated over the last few years. Nevertheless in 1976 the question of unreasonable withholding of consent or agreement reached the House of Lords again.[79] Apart from certain technical questions of jurisdiction[80] and certain dicta on the effect of section 3 of the Children Act 1975,[81] the effect of that decision of the House of Lords has been simply to reaffirm the current views. As Lord Wilberforce, for example, indicated:-

> "What, in my understanding, is required is for the court to ask whether the decision, actually made by the father in his individual circumstances, is, by an objective standard, reasonable or unreasonable. This involves considering how a father in the circumstances of the actual father, but (hypothetically) endowed with a mind and temperament capable of making reasonable decisions, would approach a complex question involving a judgment as to the present and as to the future and the probable impact of these on a child."[82]

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77 Re M (an infant) (adoption : parental consent) [1972] 3 All E.R. 321 at p.329 per Sachs L.J.; Re S (an infant) (adoption : parental consent) [1973] 3 All E.R. 88 at p.91 per Davies L.J.; Re B, A minor, S v B (1973) 4 Family Law 75 at pp. 75 and 76 per Scarman L.J.; Re L (an infant) (1974) 5 Family Law 24 at p.24 per Davies L.J.; Re Application No.41 of 1974; re Adoption Act 1958 (1975) 5 Family Law 181 at p.182 per Lord Denning M.R.

78 AB, Petitioner 1976 S.L.T. (Sh. Ct.) 49 at pp.50 and 51 per Sheriff Henderson.

79 Re D (an infant) (parent's consent) [1977] 1 All E.R. 145.

80 The competency of appeals from the county court to the Court of Appeal on matters of fact.

81 Paras. 30.72 to 30.74.

82 [1977] 1 All E.R. 145 at p.150.

This is an accurate synthesis of the movements and trends over the last twenty five years.

30.66 The most important development since 1971 has been the enactment of the Children Act 1975.[83] As already noted, it has introduced certain important changes. The welfare requirement,[84] which played an important but negative role in the test of reasonableness, has been abolished,[85] thus widening the court's discretion in the sense that an adoption order may now be made where it may not technically be for the welfare of the child.[86] This is balanced only by making the need to safeguard and promote the welfare of the child the "first consideration".[87] But the Court of Appeal has decided that this does not apply to the establishment of the ground of unreasonable withholding of agreement.[88] The test of reasonableness thus remains parent-biased, although it continues to require a balanced approach. There is likely to be some criticism of the Court of Appeal's decision for, apart from questions of interpretation, it is probably inconsistent with the philosophy underlying the legislation.

(b) The Houghton-Stockdale Report

30.67 In their analysis of the law the Houghton-Stockdale Committee more or less restricted themselves, quite reasonably, to the law as expounded in the two House of Lords' cases in 1971.[89] Their conclusions on the law are not inconsistent with the foregoing analysis. They recognised that welfare is a matter to be taken into account when deciding whether consent or agreement

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83 Paras. 25.8 to 25.19. 84 I.e. Adoption Act 1958, s.7(1)(b)

85 Children Act 1975, s.108 and Sched. 4, Part IV.

86 An unlikely outcome, however, in practice.

87 Children Act 1975, s.3; Adoption Act 1976, s.6.

88 Para. 30.72.

89 Re W (an infant)[1971] A.C.682 and A and B Petitioners 1971 S.L.T. 258; see the Houghton-Stockdale Report, paras.210 to 215

has been unreasonably withheld.[90] The real problem was what part welfare should play in the process: to leave it open to the discretion of the decision-maker, to make it the primary consideration or to render it paramount or exclusive. The committee may perhaps be criticised for not making it absolutely clear whether their arguments referred either to the test of unreasonable withholding or to adoption generally. Nevertheless, since they quoted[91] with approval from Lord Reid's judgment in A and B, Petitioners[92], they may be taken to have adopted his balanced approach to the test of reasonableness. Their recommendations suggested likewise. They thought that "the law should recognise that there are a number of interests to be considered and put the interests of the child first among them".[93] The first part of that suggestion represents the pre-1975 law in any event. It is the second part which introduced a change. Section 3 of the Children Act 1975 purported to give effect to that change The implication is that the Houghton-Stockdale Committee intended that change to apply to the unreasonable withholding of consent or agreement.

30.68 The use of the word "first"[94] alone in the context of children is a novelty. The statutory formula overall is also new. What is important is that the Houghton-Stockdale Committee and Parliament rejected the paramountcy of welfare principle in relation to adoption. This is well justified in the immediate context unless the test of reasonableness were to be replaced with a test of welfare. That would have so changed the whole emphasis

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90 Houghton-Stockdale Report, para. 211.

91 Ibid., para. 215.

92 1971 S.L.T. 258.

93 Houghton-Stockdale Report, para. 216.

94 I.e. without the words "and paramount".

of the consent or agreement requirement that it would have become redundant. In any event the approach would no longer have been parent-biased; it would have been either neutral or, possibly, child-biased. The committee did not say what "giving first consideration" means. That nevertheless was the only change suggested by the committee and enacted by Parliament.

(c) Parliament

30.69 The Houghton-Stockdale Committee specified the precise aspect of welfare to which the court was required to give first consideration, namely, "the effect of the parent's decision on the long-term welfare of the child".[95] Although the committee paid little attention to the meaning of welfare, this recommendation almost exactly falls into the description of negative welfare identified earlier.[96] Parliament did not accept this formula and instead made "the need to safeguard and promote the welfare of the child throughout his childhood" the object of the first consideration Little was said in Parliament about the meaning of this phrase. Nevertheless it is unlikely to have much impact in practice. In any event, this statutory need probably does not mean anything different from negative welfare.

30.70 Certain members of the House of Lords acting legislatively, on the other hand, said quite a lot about "first" and "paramount" considerations. There was considerable confusion in the House of Lords about the meaning of these two words. Some members seemed hesitant to acknowledge a distinction between the words;[97] others seemed uncertain about

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95 Houghton-Stockdale Report, paras. 216 and 218.

96 Para. 29.36.

97 E.g. (1975) 356 H.L. Deb. 5s. col. 797 (Lord Pannell), 357 H.L. Deb, 5s. col. 1062 (Lord Pannell).

the context of the words. Indeed there was some doubt whether the Bill was merely expressing in statutory form the existing law or introducing some amendment. One of the simplest explanations of the primacy of welfare principle was that of Lord Wigoder:-

> "It means that the most important consideration to be borne in mind is the need to safeguard and promote the welfare of the child, but that is not to overrule all other considerations. It is one of a number of factors, but it remains one which is of prior importance." [98]

Lord Simon spoke to the same effect:-

> "It merely directs the court, the welfare officer or local authority, to consider specifically the welfare of the child and to give its welfare greater weight than other considerations; but it does not say it must prevail over other considerations." [99]

These views give effect, it is suggested, to the ordinary meaning of the words "first consideration" and to the intention of the Houghton-Stockdale Committee. They imply a change in the existing law. It was always open to the court in the exercise of its administrative discretion to place more weight upon the welfare of the child than upon the other considerations, either individually or collectively, provided that to do so was justified in the circumstances of the individual case. This option has now been made mandatory.

(d) The effect of the 1975 Act

30.71 There are two questions to be answered in relation to the new statutory provision. Does section 3 of the 1975 Act apply to the ground of unreasonable withholding of agreement?

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98 (1975) 357 H.L. Deb. 5s. col. 1057 (Lord Wigoder).

99 (1975) 359 H.L. Deb. 5s. col. 544 (Lord Simon).

If so, what are the consequences? The current state of the law is that section 3 does not so apply.[1] But certain comments indicate that this may not be so conclusive as it appears. Section 3 applies "in reaching any decision relating to the adoption of a child." It is difficult to conceive of a wider reference. But it relates only to a "court or adoption agency". Herein lies one problem. Unreasonable withholding of agreement involves, it should be recalled, two decisions: the decision of the parent not to agree to the adoption and the decision of the court whether the decision of the parent was reasonable. The provision does not, clearly, apply to the first decision. It would appear prima facie to apply to the second but on closer analysis it might not so apply to the second decision because the second decision is a judicial review of the first. If section 3 had been extended to apply to the decision of the parent, effectively restricting the parental decision-making process, there would have been no problem. The primacy of welfare principle would have applied. But can that principle be extended obliquely to a court considering the reasonableness of the parental decision? That was probably the intention but the phraseology of section 3 may have thwarted that intention.

30.72 The courts have not pursued exactly that line of argument. The issue arose first in In re B (Adoption: Parental Consent).[2] The view of Cumming-Bruce J. was very clear:-

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1 Re P (an infant)(adoption : parental consent) [1977] 1 All E.R. 182.

2 [1976] Fam. 161.

> "In my view section 3 does change the law as it was under the Act of 1958 in respect of dispensing with consent. The court is still to be careful not to substitute its own judgment for that of the parent. The effect of the section is to impose upon a court responsible for making an objective appraisal of the reasonableness of the parent in withholding consent a duty to regard the welfare of the child as the first consideration in the process of weighing the several conflicting considerations which have to be taken into account."[3]

In this way Cumming-Bruce J. effectively closed the gap between the two decisions identified in the preceding paragraph. But in Re P (an infant)[4] the Court of Appeal thought otherwise. In Stamp L.J.'s view all the grounds of dispensation fell outside the ambit of section 3 of the Act[5] and this narrower construction prevailed.[6]

30.73 On the other hand Ormrod L.J. in the same case took the view that section 3 of the 1975 Act did apply "to the decision to dispense with consent."[7] In the event it made no difference in the case in question, largely because section 3 did not change the law. As he pointed out:-

> "So long as the welfare of the child is not the overriding consideration, I doubt whether there is much practical difference between applying the test established in Re W and treating the welfare of the child as the first or most important consideration."[8]

The same theme was taken up in the later decision of the House of Lords[9], particularly by Lord Simon, but their

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3 Ibid. at p.165 per Cumming-Bruce J.

4 [1977] 1 All E.R. 182.

5 Ibid. at p.185.

6 Ibid. at p.186.

7 Ibid. at p.191.

8 Idem.

9 Re D (an infant)(parent's consent) [1977] 1 All E.R. 145.

comments are obviously not authoritative.[10] In the Scottish House of Lords' decision in 1971,[11] it will be recalled, Lord Reid indicated that welfare was not only relevant, it was also the most important and perhaps in some cases the paramount consideration.[12] If that is so, then, as Lord Simon suggested, section 3 of the 1975 Act was probably "no more than elucidatory and confirmatory of the pre-existing law."[13] This however is giving more weight to Lord Reid's comments than the main trend of the authorities has suggested.

30.74 Several of the judges have thus run together the two questions which were separately identified earlier in this discussion.[14] So the validity of the views of Ormrod L.J. and Lord Simon in particular depends upon whether the substance of section 3 is different from the earlier law. The essence of the earlier law has been described as balance, so that each consideration is given the weight it deserves in the circumstances of the case. There is no stated preference or priority one way or the other. Lord Reid's comments must be seen in that context. Nowhere did he suggest that welfare should as a matter of law predominate. Nor does section 3 of the 1975 Act make welfare the overriding consideration.

30.75 The final point is whether section 3 will alter the decision-making process. Will it make any difference in

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10 Because the original decision of the County Court was made before the 1975 Act had effect.

11 A and B, Petitioners 1971 S.L.T. 258.

12 Ibid. at p.258: see para. 30.37.

13 [1977] 1 All E.R. 145 at p.161.

14 Para. 30.71.

practice? The process under the pre-1975 law comprised the exercise of an administrative discretion. There is now a statutory duty to have regard to all the circumstances. This merely replaces the like duty imposed by the courts upon themselves as a consequence of the nature of the test of reasonableness. The statutory duty nevertheless requires the courts to decide which circumstances are relevant. Implementation of the primacy principle, where it applies, restricts the discretion conferred upon the court by specifying more precisely than earlier the significance of welfare. But even this approach necessitates balancing the relevant considerations and, in reaching a conclusion, giving statutory priority, but not an exclusive character, to welfare. This requires an exercise of the act of administration. The process thus remains an administrative discretion.

30.76 It may be argued that the use of the word "first" introduces further problems. If welfare is first, what is second, third and so on? These questions however misconstrue the nature of the process. It is not a rigid system of prescribed listed priorities. If it were, the process could be reduced to a precise mathematical exercise.[15] To achieve such a system would require much greater detail of specification than merely to give "first consideration" to welfare. "First" therefore does not indicate priority in point of time nor in the sense of a series of priorities. The formula enacts priority of significance or importance. This involves a degree of flexibility. No doubt Parliament

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15 See e.g. (1975) 356 H.L. Deb. 5s. col. 785 (Lady Fisher).

intended that effect partly as a response to the individual circumstances of each case and partly to avoid rigidity.

30.77 This view becomes clear in the light of some of Lord Simon's legislative comments. Distinguishing between paramountcy and primacy, he said:-

> "But the direction that the welfare of the child shall be the first consideration does not mean that the welfare of the child must necessarily, even in case of conflict, overweigh other considerations. It means merely that that is the first thing the social worker, the local authority, the court must direct its mind to and, in fact, a direction that this is what most weight must be given to." [16]

The first part of Lord Simon's final sentence suggests prima facie that welfare is to be accorded some sort of temporal priority. But the second part of his sentence indicates that he is speaking rather of priority of significance. Thus, although Lord Simon's comments are occasionally not completely free from ambiguity, his overall attitude is clear: it is priority of significance.

30.78 The main problem however is how section 3 will affect the test of reasonableness in the context of withholding agreement. Clearly the parent's decision is not directly affected by the primacy of welfare principle.[17] But that is of no consequence until the court is called upon to adjudicate. The ground of dispensation is unaltered. There is no reason to suppose that the existing law will be ignored by the courts except to the extent that it may

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16 (1975) 357 H.L. Deb. 5s. col. 1061 (Lord Simon).

17 Children Act 1975, s.3. does not apply to the parent.

have been amended by section 3. The only modification of present concern is, of course, the application of the primacy of welfare principle. The test remains reasonableness. It is certainly not welfare. But the significance of welfare may now be more precisely formulated. Although the statutory primacy principle applies only to the court in this context, a prudent parent would now be well advised to give to welfare the importance which the court is directed to give to it. Otherwise the parental decision will be at risk.

30.79 The legislation does not, and indeed cannot, explain how the primacy of welfare principle should be applied. That is a matter for the individual case. "Giving first consideration" may mean giving more or less weight to welfare according to the relevant facts and circumstances. Indeed it may be appropriate in the exceptional case to give welfare almost all or almost no weight.[18] But in order to comply with section 3 the court would need to produce very substantial justification for such a decision.

30.80 If this is correct, does section 3 make any difference? There is no doubt that the statutory formulation of the principle forces the court to look at welfare. It cannot be ignored. Moreover, welfare must be given "first consideration". It is an administrative duty only. Parliament has not sought to prescribe any substantive welfare standards. The only relevant standard is the reasonableness of the parent's decision. This does nothing to distort the distinction between interpretational, administrative and substantive discretion.

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18 As Lord Reid had suggested in A and B, Petitioners 1971 S.L.T. 258.

30.81 There is very little so far against which this analysis can be tested. Samuels' "critical appraisal"[19] rejected the discussion of the phraseology as "a somewhat arid semantic exercise".[20] Consistently with that comment, he added little to the technical construction of the legislation. Freeman, on the other hand, considered the issues rather briefly but concluded, consistently with this analysis, that "[t]he very vagueness of 'first consideration' thus gives considerable discretion to those concerned with adoption ...".[21] He did not consider the nature of such a discretion. Cretney's brief view[22] reached conclusions similar to those in this analysis.

30.82 What of the judges' views? Although Cumming-Bruce J. suggested that there was a difference between "first" and "first and paramount", he did not really explain what it was.[23] Stamp L.J. and Sir John Pennycuick in the Court of Appeal[24] did not require to consider the matter. But Sir John rejected the argument that section 3 required greater weight to be attached to welfare rather cursorily:-

> "Such an alteration would not amount to much, if anything, and would involve a consideration so imprecise as to be difficult of application."[25]

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19 Samuels A., "The Children Act 1975 - A critical appraisal: the view of the lawyer" (1976) 5 Family Law 5.

20 Idem. But cf. (1975) 356 H.L. Deb. 5s. col. 797 (Lord Byers).

21 Freeman, n. to s.3.

22 Cretney, (1976) 126 New Law Journal 29 at p.30.

23 In re B (Adoption: Parental Consent) [1976] Fam. 161 at p.166.

24 Re P (an infant) (Adoption: Parental Consent) [1977] 1 All E.R. 182.

25 Ibid. at p. 192.

Ormrod L.J. thought that section 3 simply reflected the existing law.[26] Lord Simon's view was similar[27] but Lord Wilberforce was much more guarded. He was content to note very generally the extent to which "the erosion of the natural parents' rights" had gone.[28] Admittedly no occasion has yet arisen when the courts have been required to consider in detail the meaning of the primacy of welfare principle. Even when such an opportunity occurs, they will more than likely be inclined to deal with the statutory provision in a general and empirical fashion. That is what happened, in England in particular, when the courts were faced with the paramountcy of welfare principle after 1926.[29] It took forty five years to settle the issues raised by judicial reluctance to accept the simple meaning of that provision.[30] Hopefully that will not happen with the primacy of welfare principle.

30.83 Given the state of the authorities there is nothing to suggest that the foregoing interpretation of the primacy of welfare principle is necessarily wrong. Equally there is nothing to indicate that it is correct. What is clear is that Parliament has used language clearly different from that used in relation to the settlement of custody

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26 Ibid. at p.191.

27 Re D (an infant)(parent's consent) [1977] 1 All E.R. 145 at p.161.

28 Ibid. at p.150.

29 Paras. 41.58 to 41.74 and 42.12 to 42.15 and 42.29 to 42.47.

30 I.e. until the decision of the House of Lords in J v C [1970] A.C. 668.

disputes. It cannot be assumed that this was an accident. Indeed the evidence suggests that it was quite deliberate.[31] The application of the primacy principle may be as difficult a matter for the courts as the application of the paramountcy principle has proved to be. The courts do not like exercising discretions, particularly administrative discretions. The reason is that discretions are meaningful only in relation to policy. The Westminster tradition has been not to enact policy. That makes the task of the courts even more difficult. In a sense they are being asked to fulfil a certain function without the aid of rather important tools. Again, it may be suggested, the system has changed to such an extent that the form and content of legislation need to be reviewed.[32]

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31 Such evidence would not necessarily be used judicially in interpreting the provision.

32 A conclusion suggested in other contexts.

CHAPTER 31

SUBSTANTIVE DISCRETIONS AND THE ADOPTION PROCESS

Section 1 - Introduction

31.1 Attention has so far been focussed upon the threshold requirements which must be satisfied before an adoption order can be made: particularly the consent or agreement requirement and the welfare requirement. The most significant feature of the legislation is that these threshold requirements, despite their character as such, involve the exercise of discretions, either interpretational or administrative. This is true also of the dispensation process which is itself, as an alternative to agreement, a threshold requirement. As a process it also involves interpretational and administrative discretions. The final step in each case is a decision on the merits of the application. This involves the exercise of a substantive discretion. Passing reference has been made to such discretions. Now they will be considered in detail.

31.2 The two most important decisions of this type are whether to make an adoption order[1] and whether to dispense with the agreement of a parent[2]. The former order could not be made unless it would be for the welfare of the child[3]. The latter decision could not be reached unless certain grounds were

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1 Adoption Act 1958 (7 Eliz. 2, c. 5), s. 1(1); Children Act 1975 (1975 c. 72), s. 8(1).
2 Adoption Act 1958, s. 5(1); Children Act 1975, s. 12(1)(b)(ii).
3 Adoption Act 1958, s. 7(1)(b), now repealed by s. 108 of and Part III of Sched. 4 to the Children Act 1975.

satisfied: several relating to certain objectively ascertainable aspects of the child's welfare;[4] the most important being unreasonable withholding of agreement, in which welfare was always regarded as a relevant consideration and may now have become the primary consideration;[5] the remainder dealing with situations not directly related to the welfare of the child.[6] What is particularly significant about these two substantive decisions is that the vital elements in each have almost entirely been analysed in terms of the threshold requirements. Little has depended upon the last stage of the process. Welfare might perhaps have been expected to play some part in the decision on the merits of the application. But, as welfare will normally have been considered at the earlier stage, that appears to have exhausted the discussion of welfare and the courts have felt free to reach a decision on the merits almost automatically,or at least without reference to welfare, thereafter.

31.3 There may however be another reason for this. Once the threshold requirements have been fulfilled, the court is faced with a choice, occasionally a number of choices: to dispense with consent;[7] to make an order;[8] to make an interim order;[9] to attach conditions;[10] to remove the child from the applicants pending a decision on the application;[11] to make a provisional adoption order;[12] to revoke an adoption order.[13]

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4 E.g. abandonment or neglect. 5 But see paras. 30.78 to 30.83

6 Where the parent could not be found or was incapable of giving consent or agreement.

7 Adoption Act 1958, s. 5(1); Children Act 1975, s. 12(1)(b)(ii).

8 Ibid., s. 1(1);s.8(1). 9 Ibid., s. 8(1);s.19(1).

10 Ibid., s. 7(3);s.8(7).

11 Adoption Act 1958, s. 34 as substituted by the Children Act 1975, s. 29.

12 Adoption Act 1958, s. 53(1) to be replaced with modifications by the Children Act 1975, s. 25.

13 Adoption Act 1958, s. 26(1).

Under the 1958 Act only the first two powers[14] were necessarily preceded by an examination of the child's welfare[15] but under the 1975 Act only the dispensation power may be preceded by such an examination.[16] Under the 1958 Act each substantive decision was otherwise unregulated but under the 1975 Act each decision is prima facie subject to the primacy of welfare principle in section 3.

31.4 These choices, whether regulated or not, involve a process altogether different from adjudication in the sense already discussed. The court must decide which alternative is to be preferred. It is a forward-looking, future and even to some extent speculative judgment. No doubt it will be based upon past events and considerations. But it is not restricted in that way. Welfare plays a positive rather than a negative part. The issue is not a consideration of the effect on the child's welfare of a decision already made in relation to established circumstances; it is rather to determine which of a number of alternatives would be better or best for the child. The decision is creative not adjudicative.

31.5 In the absence of any statutory guidance such a task is immensely difficult. No purpose or policy is specified: no standard set; no criteria identified. It is not surprising therefore in view of such an open-ended discretion that the

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14 I.e. the power to make an order and the power to dispense with consent or agreement. The provisions of s. 8 of the Adoption Act 1958 and of s. 19 of the Children Act 1975 indicate likewise in relation to interim orders but this has never been judicially confirmed.

15 I.e. assuming that s. 3 applies to the ground of unreasonable withholding of agreement.

16 As a consequence of the repeal of the welfare requirement in the Adoption Act 1958.

courts either have relied heavily upon the substance of the threshold requirements, particularly their welfare aspects, in exercising their discretion or have been prepared to accept the views of the experts on these "intangible"[17] matters. This seems to be what has happened in relation to the decisions whether to dispense with agreement and whether to make an adoption order. In effect the courts have avoided the task of exercising a substantive discretion.

31.6 But in the absence of threshold requirements, especially those in which welfare is relevant to the substance of the decision, there would be nothing to help the court in the exercise of its discretion. In that event the court is forced to rely upon its own resources, to create and apply principles from analogous contexts or to rely upon policies extracted from the legislation. Thus, a fortiori, the courts cannot adopt the expedient of deciding on the merits by reference to the satisfaction of the threshold requirements. They are forced to analyse rather than bypass the main issue. This is a much more difficult task than simply to adjudicate upon threshold requirements.

Section 2 - Specific discretions

(a) Separation of children and parents

31.7 Although the legislation before 1975 did not restrict the exercise of the principal discretions in any way, that did not prevent the courts from limiting their exercise in terms of

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17 For Sheriff-substitute Kermack's rationalisation, see paras. 25.23 to 25.26.

the welfare concept. The courts frequently discussed the welfare of the child, although it is not always clear whether they were doing so in the context of the welfare requirement or the substantive discretion. The overall impression is that they tended to use the welfare requirement as the vehicle for a discussion of welfare. In that event the discretion would become almost redundant. There are, of course, instances when the courts have relied upon their general discretionary power. This happens when the issue concerns not so much one particular aspect of the child's welfare but rather the general benefits accruing to the child from adoption.[18] Such a widening of approach is consistent with the use of the statutory discretion by the courts.

31.8 A good example is the judgment of the Court of Appeal in Re B (M F) (An Infant); Re D (An Infant).[19] The applicants for adoption of their two foster children exhibited a great deal of sympathy for the parents of these children. They suggested, for example, that the parents should visit the children from time to time after the adoption. The children should also, in their view, be kept in touch with their sister who was in the care of her parents. The county council took the predictable view that the continuity of contact between the child and his natural parents after the adoption would be undesirable. For the children to remain foster children would also be better so that the position could remain fluid.

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18 Clearly a matter relevant to any discussion of welfare, including the welfare requirement.

19 [1972] 1 All E.R. 898.

31.9 The Court of Appeal did not refer to any statutory provision.[20] The Lords Justices noted that "[t]he learned judge, in the exercise of his discretion, refused to make the order."[21] The Court of Appeal similarly treated the issue as one of discretion. In doing so, they reversed the order of Judge Stansfield refusing to make an adoption order. There were two reasons. Salmon L.J. was not persuaded that keeping the position fluid, as the county council had recommended, "could conceivably be in the interests of the children."[22] The crux of his discretionary approach may be seen in these words:-

> "As a rule, it is highly undesirable that after an adoption order is made there should be any contact between the child or children and their natural parents. ... There is, however, no hard and fast rule that if there is an adoption it can only be on the terms that there should be a complete divorce of the children from their natural parents ... Although the courts will pay great attention to the general principle to which I have referred, namely, that it is desirable in normal circumstances for there to be a complete break, each case has to be considered on its own particular facts."[23]

31.10 The need for a decision in the light of the individual circumstances of the case is intrinsic to the exercise of a discretion. There can be no question of rules, at least legally binding and enforceable rules. However, where

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20 Which suggests that they were exercising a discretion.
21 [1972] 1 AllE.R. 898 at p. 899 per Salmon L.J.
22 Idem.
23 Ibid. at p. 900 per Salmon L.J.

a court creates prima facie principles or assumptions, it is also open to the court to reject them. That will reflect the circumstances of each case. Thus the discretion operates to defeat a general principle by relying upon exceptional circumstances. That, in effect, is what Salmon L.J. decided. He did not exercise an open-ended discretion. The discretionary powers were available largely to indicate why a principle otherwise of general validity should not be given effect.

(b) Religion

31.11 There are other instances of the exercise of a discretion being used only marginally in this way, where a principle has been either judicially created or positively enacted by Parliament. Religious differences between the adopters and the child can create difficulties for the courts.[24] In the context of the discretionary approach in the Adoption Act 1958, they may be analysed in terms of the welfare requirement or of the exercise of the general discretion. The Court of Appeal in Re G (An Infant)[25] apparently ignored the welfare requirement and argued solely in terms of discretion. County Court Judge Andrew had refused an adoption order because the adopters were Jewish and the child a Protestant Christian. According to Ormerod L.J., "the judge was in error

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24 These difficulties may be resolved in several ways: in terms of the welfare requirement; by giving effect to the primacy of welfare principle; in exercise of the general discretion to make an adoption order; by enabling the parent to attach conditions to his agreement; by enabling the court to attach conditions; by having regard to parental wishes at the stage of placement.

25 [1962] 2 Q.B. 141.

in exercising his discretion on [that] basis ... He had to decide what is best for the child."[26] Questions of religion may thus be relevant but they are certainly not the sole or paramount consideration. On the other hand, even Ormerod L.J. indicated, perhaps erroneously, that "the paramount consideration is the welfare of the child."[27] In doing so he came close to identifying the interests of the child as the purpose of the exercise of the discretion.[28] In any event welfare plays some part in the exercise of this discretion. So too do matters of religious faith. But, as Willmer L.J. was at pains to emphasise, all the relevant matters must be taken into consideration.[29] Thus the general discretionary power comprehends interpretational discretion and administrative discretion in addition to a discretion on the merits. It is in the last context that the welfare or the interests of the child play the most positive or creative role.

31.12 The Scottish case[30] of Jewish adopters and a Christian child may be similarly analysed. An adoption order was in fact made in that case by the judge of first instance. Sheriff-substitute Kermack was obviously influenced by a number of considerations but, despite the inclusion of the welfare requirement by the reporter in his introduction to the Sheriff-substitute's opinion, the latter seems not to have been influenced by that requirement. On the contrary, he seems to

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26 Ibid. at p. 145 per Ormerod L.J.
27 Ibid. at p. 144 per Ormerod L.J.
28 This positive aspect is considered in detail in paras.35.85 to 35.88.
29 [1962] 2 Q.B. 141 at pp. 145 and 146.
30 H and H, Petitioners 1949 S.L.T. (Sh. Ct.) 68. This decision antedated the English Court of Appeal judgment by thirteen years but it was not mentioned in the English proceedings.

have adopted a discretionary approach but one whose target was the welfare or interests of the child. As he said:-

> "The question at issue is the best interests of the child proposed to be adopted. There is no doubt that this may involve social or psychological aspects as well as physical ones." [31]

He was in fact looking at the religious difference more from the social or psychological point of view than from the purely theological point of view.

31.13 These cases suggest that the courts are looking at religion as an aspect of welfare rather than as an independent factor.[32] If this is so, it could be justified because the parental interest in the child's religious upbringing is protected by the parental power in section 4(2) of the Adoption Act 1958 to attach conditions with respect to religion in the grant of parental consent or by the judicial power in section 7(3) to attach conditions generally.[33] The Children Act 1975 however has taken away the parental power[34] but requires the adoption agency to have regard to the parental wishes at the stage of placement for adoption.[35] The onus to investigate this matter thus now lies on the agencies, not on the courts which presumably will now need only to be assured that the agencies have in fact done so. In this sense religion remains a matter of parental concern only indirectly under section 13 of the

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31 Ibid. at p. 68 per Sheriff-substitute Kermack.

32 See also Re E (An Infant) [1963] 3 AllE.R. 874. But there the issue was clouded because wardship proceedings were brought after the termination of the adoption proceedings. It was not strictly a decision on adoption.

33 Paras. 31.18 to 31.28, 34 Children Act 1975, s.108 and Sched. 4 Part III.

35 Ibid., s.13.

1975 Act. If religion is a matter of interest to the child, it will be considered under section 3 of that 1975. The two aspects[36] of religion thus remain separate and independent under the 1975 Act as they were under the 1958 Act.

(c) Male applicants for female children

31.14 These two cases of religious conflict indicate that, in the absence of statutory guidelines, the courts tend to exercise their discretion in a way rather slanted towards the welfare of the child. This is true also where Parliament has provided some indication of its policy. Section 2(3) of the Adoption Act 1958 provided that an adoption order should not be made in respect of an infant who was a female in favour of a sole applicant who was a male, unless the court was satisfied that there were special circumstances which justified as an exceptional measure the making of an adoption order.[37] Parliament has thus used a very simple formula to direct that it is normally undesirable for a female child to be adopted by a male adopter.[38] To do otherwise would be exceptional and require special circumstances. Beyond that the court is given no assistance. Such an order is therefore largely within the discretion of the court.

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36 I.e. the child's interest and the parent's interest.

37 This will be repealed by s. 108 of and Part IV of Sched. 4 to the Children Act 1975. The result will be that, if the male applicant qualifies under s. 11 of the 1975 Act, the child's interest will be protected by the primacy of welfare principle in s. 3 and the general discretion of the court under s. 8(1). See the Houghton-Stockdale Report, paras. 78 and 80.

38 The effect of the amendments specified in the preceding note is unlikely to change the exercise of the discretion.

31.15 The English authorities are generally rather unhelpful. The decision of the Court of Appeal in In re R M, An Infant[39] was based upon issues other than the need for special circumstances to justify adoption of a female by a male.[40] To this extent this aspect was clouded by the other issues. But, in the rather unusual circumstances of that case, there was no evidence of exceptional circumstances and the appeal against the order made by the county court judge was allowed. Nor did the Queen's Bench Divisional Court in R v City of Liverpool Justices; Ex Parte W[41] throw any light on the meaning of special circumstances. The proceedings were very unusual. They took the form of an application for an order of certiorari to quash the adoption order made by the justices. Lord Parker C.J. postulated the need for proof of special circumstances under section 2(2) of the Adoption Act 1950.[42] There was apparently no such proof. He concluded:-

> "In the absence of any affidavit from the justices to that effect [their finding of special circumstances], and having regard to the fact that, in the order which they made, they drew no attention at all to any special circumstances, I think that this case - and, of course, it is an exceptional case - they omitted altogether to consider the provisions of s. 2(2) of the Act [of 1950]."[43]

The granting of an order of certiorari indicates that the

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39 [1941] W.N. 244.
40 I.e. matters of consent and dispensation.
41 [1959] 1 All E.R. 337.
42 The equivalent of s. 2(3) of the 1958 Act.
43 [1959] 1 All E.R. 337 at p. 339 per Lord Parker C.J.

justices exceeded their jurisdiction by disregarding the need for special circumstances. That need, therefore, occupies a position of fundamental importance. The existence of special circumstances is thus a threshold requirement to be satisfied before an order can be made authorising the adoption of a female child by a male adopter. There is, naturally, an element of interpretational and administrative discretion involved in deciding whether the circumstances are special. The substantive discretion, whether or not to make such an order, is the last step in the process. It will probably reflect, to some extent at least, the earlier exercise of the interpretational and administrative discretions. The courts have thus created a structure similar to that enacted overall by Parliament in relation to adoption: namely the satisfaction of threshold requirements followed by the exercise of a discretion.

31.16 The only reported decision which comprises a discussion of the merits of special circumstance is that of Sheriff-substitute Bryson in H, Petitioner.[44] He was very much aware of the need for special circumstances and of the "force of the phrase 'as an exceptional measure'."[45] In his view the specialty of the circumstances was that "the early and unexpected death of the applicant's wife prevented the proposed joint adoption, the applicant is a policeman of

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44 1960 S.L.T. (Sh. Ct.) 3.
45 Ibid. at p. 4 per Sheriff-substitute Bryson.

excellent character, and is able to have the child cared for by his late wife's mother."[46] He did not define or even describe what were special circumstances. That would be an impossible task. But, in the exercise of his interpretational discretion, he decided that these circumstances were special. He concluded:-

> "... and keeping in view the welfare of the child, I think that these special circumstances justify the making of an adoption order."[47]

Welfare was thus relevant as a consideration in the exercise of his administrative discretion, although the legislation did not compel attention to that matter. Nor did the legislation prevent attention being given to welfare. The final part of the process is the link between these special circumstances and the making of an order. That link is "justification". It is the essence of the administrative art of reaching a decision in the light of the individual circumstances of the case; in other words, the exercise of a discretion on the merits or substance of the problem. Sheriff-substitute Bryson, it is suggested, reached his decision impeccably in terms of the legislation. His approach is also indicative of the theme underlying this analysis.[48]

(d) Joint proceedings

31.17 Another example of constraints upon the general discretion to make or refuse an adoption order is where

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46 Idem. 47 Idem.
48 I.e. the relationship between threshold requirements and interpretational, administrative and substantive discretions.

adoption and custody issues are combined in the one suit.[49] Such proceedings cannot be considered in isolation from their component parts. The difficulty is not the creation by the courts or by Parliament of guidelines, presumptions, informal rules or whatever. It is rather the introduction of a new and different dimension. Custody, wardship and similar proceedings are governed by the principle of the paramountcy of welfare. Adoption proceedings are not so regulated. The courts have taken the view that, since the conjunction of custodial and adoption proceedings effectively widens the issue to be "whether the child should be brought up by the father and his wife or be brought up by the proposed adopters,"[50] the proper approach is the one relevant to such a choice, namely the paramountcy of welfare principle. This is sensible, bearing in mind that the question is not whether an adoption order should be made or not but rather which is better of a number of alternatives. It is the nature of the joint proceedings which brings this about rather than a change of principle in relation to adoption. The correct approach thus depends so much upon selecting the relevant context.

(e) The imposition of conditions

(i) General

31.18 The common element in the examples of restraints upon discretions so far discussed has been that they relate to the

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49 Cf. the position where adoption proceedings are followed by wardship proceedings as in Re E (An Infant) [1963] 3 AllE.R. 874. See also paras. 25.45 to 25.47.

50 Re C (M A) (An Infant) [1966] 1 AllE.R. 838 at p. 840 per Ungoed-Thomas J.

power to make an adoption order. There are several other discretionary powers.[51] Religion has been examined in relation to the exercise of the substantive discretionary power. It is also relevant as part of the substance of the judicial power to attach conditions to an adoption order.[52] Under the 1958 Act[53] it was possible for a parent to attach conditions to his consent to adoption for the purpose of securing the religious persuasion in which his child was to be brought up. The point of immediate concern however is the general judicial power to attach conditions.

31.19 This power is clearly discretionary. The 1958 Act did not restrict its scope or exercise in any way, although section 7(3) specifically contemplated the courts requiring the adopter to make provision for the child by bond or otherwise. That particular power has not been re-enacted in the Children Act 1975. The general power remains under the 1975 Act but its exercise will be prima facie restricted by the operation of the primacy of welfare principle in section 3 of the 1975 Act.

31.20 Commentators usually suggest that this power, used infrequently at the best of times, is used, if at all, in the context of securing the parent's wishes on religion or access to the child after adoption.[54] These two matters have also been examined by the courts in the context of the general power to

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51 Paras. 31.11 to 31.13.
52 Adoption Act 1958, s. 7(3); Children Act 1975, s. 8(7).
53 S. 4(2): repealed by the Children Act 1975: see para. 31.13.
54 Clarke Hall and Morrison, p. 1041; Freeman, n. to s. 8(7) of the 1975 Act.

make or refuse an order. Difficulties may thus be created for the courts when these same matters are also examined in the context of imposing terms and conditions on the grant of an adoption order. In the former context religion and access are simply matters for consideration; in the latter context the power is used to secure if not a parental right at least a parental interest. Thus, it is suggested, the function of these aspects of the child's welfare differs in the light of their distinctive contexts.

(ii) Enforceability

31.21 The problem of principal concern to the judges in attaching conditions has been their enforceability. In Re G (An Infant)[55] the Court of Appeal expressed the view that it was consistent with the legislation to refuse to impose conditions in the absence of any provisions for their enforcements. There an undertaking ultimately supported by committal proceedings was not regarded as suitable for solving disputes as to access.[56] Rees J. in In re J (Adoption order: conditions)[57] was also hesitant in accepting such an undertaking. However he latched on to another method of enforcing such an undertaking, namely "for application to be made for the child to become a ward of court and to seek directions of the court as to compliance with the conditions of the adoption order, or of the undertakings given by the adopters."[58] This is no more than one example of the ultimate judicial control of the

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55 [1963] 2 Q.B. 73.

56 But in a later judgment the Court of Appeal suggested that the vagueness of the undertaking was the source of the enforcement difficulties: see In re S (a minor) [1974] The Times, 24 October per Cairns L.J.

57 [1973] Fam. 106.

58 Ibid. at p. 116 per Rees J.

parent-child relationship, whether natural or adoptive. It is nevertheless a novel and imaginative use of the machinery of general judicial control.

31.22 Rees J.'s argument rested partly upon such general grounds and partly upon the capacity of a disinterested third party to activate the wardship machinery. The beneficiary of any condition attached to the order would presumably have available wardship proceedings as a means of enforcement but that would necessarily involve expense and recourse to the court. These consequences were regarded as undesirable. Rees J. was therefore supported in his decision by the agreement of the Official Solicitor to become involved in the case. For, in the words of Rees J., "in this exceptional case the Official Solicitor has agreed to accept a limited and discretionary role of exercising some of the functions of a supervising officer."[59] The absence of the Official Solicitor's involvement would not necessarily detract from the desirability of using wardship proceedings as the sanction for conditions,[60] but his involvement in In re J (Adoption order: conditions)[61] was an important part of Rees J.'s justification for ratifying conditions agreed by the parties to be included in the adoption order.

31.23 The Scottish courts have not had an opportunity to consider enforceability as a judicially-created requirement for

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59 Ibid. at p. 113 per Rees J.
60 As in In re S (a minor) [1974] The Times, 24 October.
61 [1973] Fam. 106.

imposing conditions. Nor is there an example of a condition judicially imposed. Just as Rees J. avoided that final step in In re J (Adoption order: conditions)[62] by recognising the parties' agreement, so Sheriff-substitute Kermack in G D - Petitioners[63] solved the problem by accepting before making an adoption order an undertaking by the child's natural father. In a sense the Scottish case also was exceptional. The maternal grandparent of a legitimate child whose mother had died applied to adopt the child. The child's father consented. The applicants were advanced in years and the curator ad litem suggested that in these circumstances it would be undesirable for the alimentary liability of the father towards the child to be terminated, as it would be on adoption. The father agreed to pay a weekly sum to the relevant children's officer and signed the appropriate letter of obligation. There was no need to make this financial obligation a condition of the order. Enforceability of the obligation as a condition did not arise, for the enforceability of the undertaking achieved the same result.

(iii) The exercise of the power

31.24 Sheriff-substitute Kermack considered that this course was "competent ..., not contradictory to the Act and ... in consonance with its provisions."[64] He was at pains to emphasise that the decision was prompted "purely" by a

62 Idem.

63 1950 S.L.T. (Sh. Ct.) 34.

64 Ibid. at p. 35 per Sheriff-substitute Kermack.

consideration of the interests of the child. The exaction of the weekly sum was not a "penalty on the father", nor a "payment to the adopter in consideration of the adoption" but simply "to prevent the child being put in a worse financial position than he would be without the adoption."[65] The purpose in approving this arrangement was clearly to protect the child's financial interests, at least to some extent. There seems to be no reason to suppose that such an arrangement could not also be achieved in the form of a condition imposed upon an adoption order.

31.25 Rees J. in In re J (Adoption order: conditions)[66] considered not only the enforceability but also the nature and desirability of attaching conditions to an adoption order. His views are consistent with those of Sheriff-substitute Kermack. The issue in the English case was whether an adoption order should include a condition that the child's father should have access to him.[67] There are two problems: the competency and desirability of such a condition. But Rees J. did not analyse section 7(3) of the Adoption Act 1958 in that way:-

> "The terms of that subsection are unambiguous and, upon the face of it, give the court unfettered power to impose any term or condition that the court may think fit. No doubt any condition imposed must not be inconsistent with the

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65 Idem. 66 [1973] Fam. 106.
67 Which raises a general matter of policy, whether contact between an adopted child and his natural parent should be continued after the adoption order has been made.

> fundamental concept of adoption itself, as set out in section 13(1) of the Act. Thus, in my judgment, it would not be a valid exercise of the power given by the subsection to make a final order of adoption subject to the condition that the child should remain in the care and control of some person other than the adopters. Also, no doubt, any condition imposed must be at least designed to be for the welfare of the minor."[68]

Only the last proposition, about the welfare of the child, was not a reflection of the legislation.[69] There is nevertheless no reason on the face of the Act[70] why the condition should not be in the interests of the parents, natural or adoptive, or in the interests of the child or indeed in the interests of all of them. It is understandable why the courts felt obliged to look especially to the interests of the child in this matter. But there was no statutory direction to do so. Indeed, in the circumstances of that case, a condition of parental access to the child could be as much in the interests of the parent as of the child.

31.26 That is not how Rees J. interpreted the Act. He appears to have created a threshold requirement, whose substance was the child's welfare, which had to be satisfied before a condition could be imposed: similar, in other words, to the statutory welfare requirement in section 7(1)(b) of the

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68 [1973] Fam. 106 at p. 115 per Rees J.
69 Either in terms of its underlying policy or its actual provisions.
70 I.e. in this context the 1958 Act.

1958 Act. Sheriff-substitute Kermack,[71] on the other hand, seemed to prefer the view that the child's welfare was more a consideration, albeit an important if not exclusive one, rather than a requirement. There is, it is suggested, a distinction between the two judicial approaches. The view of Sheriff-substitute Kermack approximates more to the formula of the legislation than that of Rees J. but neither judgment precisely reflects the Act. The distinction may not perhaps be quite so clear as this analysis suggests, but a divergence of approach seems manifest. In any event there seems no doubt that the judges have decided that welfare is relevant in deciding whether a condition both can and should be imposed.

31.27 The last reported decision on the power to impose conditions does little to determine which approach is to be preferred. The Court of Appeal in In re S (a minor)[72] approved the reasoning of Rees J. in In re J (Adoption order: conditions)[73] but also emphasised some of the restrictive aspects implicit in Re G (An Infant)[74]. Cairns L.J. indicated that "no condition should be imposed which could be regarded as detracting from the rights and duties of the adoptive parents."[75] This says no more than that a condition cannot be imposed so as to destroy the policy, explicit or implicit, of the legislation. It would be difficult to gainsay this approach, especially if the power to impose conditions were treated as

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71 G D - Petitioners 1950 S.L.T. (Sh. Ct.) 34.

72 [1974] The Times, 24 October.

73 [1973] Fam. 106.

74 [1963] 2 Q.B. 73.

75 In re S (a minor) [1974] The Times, 24 October.

ancillary to the power to make an adoption order. The consequence of such a view is, as Cairns L.J. emphasised, that conditions, particularly of the kind approved in these two cases, should be imposed "only in exceptional circumstances."[76] The trend therefore is for the courts to introduce restrictions into the power to impose conditions, either by formulating threshold requirements or by reducing the wide discretion conferred by Parliament. In either case the interests of the child are central to these judicially created limitations.

31.28 The Children Act 1975 authorises the attachment of terms and conditions[77] but the approach which it directs is slightly different. The power to attach terms and conditions to an adoption order is not in itself restricted.[78] Prima facie section 3 applies.[79] If so, welfare is not merely relevant; it is the first consideration. The difference between the judicial views under the 1958 Act and the statutory direction under the 1975 Act would thus be one of degree only in the context of what is largely an administrative discretion. Parliament has not rejected the limitations created by the courts nor altered their character. It has given to them a more precise formulation.

Section 3 - Conclusion

31.29 The overall judicial attitude to substantive

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76 Idem.

77 S. 8(7).

78 I.e. s. 8 is silent on how the power should be exercised.

79 It is difficult to see how the attachment of a condition to an adoption order does not "relate" to the adoption.

discretions in the adoption process is rather unexpected. Little use has been made of the opportunities recognised by the legislation to deal on a discretionary basis with decisions to make an adoption order and to hold that agreement has been unreasonably withheld. In each instance the courts have preferred to decide the issues almost exclusively in terms of the threshold requirements. At the same time the judicial attitude has been to acknowledge the individual aspects of the process by giving effect in an informal way to the applicational and interpretational discretions inherent in the system as it has been enacted. Welfare was clearly intended to play a part in this somewhat oblique approach, on the one hand in terms of the welfare requirement and on the other by injecting welfare into the test of reasonableness in the dispensation process. The enactment of the primacy of welfare principle is unlikely to make much practical difference in either context.

31.30 This oblique manoeuvre is not possible where threshold requirements have not been prescribed. Most of the instances discussed in this chapter fall into that category. The courts have in this way been forced to exercise a substantive discretion. Judicial reluctance to do so appears from the somewhat vague and imprecise manner in which the courts have approached their task. There is no trend or pattern. This is symptomatic of a discretion but generally courts tend to follow some guideline or another. In some instances attention has been paid to the desirability of reflecting in the adoptive relationship the underlying natural relationship of parent and child. Other instances show an intention to favour the interests of the child. If it is

accepted that the primacy of welfare principle applies to the exercise of these discretions, the effect will be to prefer the latter approach. Section 3 of the 1975 Act, therefore, is likely to be more important in practice in the judicial context of these relatively unimportant areas of discretion than in relation to the vital decisions whether to permit adoption and whether agreement has been unreasonably withheld.

CHAPTER 32

THE HISTORICAL ANTECEDENTS OF THE MODERN LEGISLATION

Section 1 - Introduction

32.1 Official care[1] not only invokes the public interest as the ultimate justification for safeguarding the interests of the child but also recognizes the inter-relationship of the interests of the parent and of the child. Adoption also directs attention to the parent-child relationship but it does so in a way which much less obviously relies upon the public interest for its inspiration. Custody, wardship and related proceedings prima facie encompass the purely personal relationships of parent and child. But these personal relationships, too, are shot through with matters of public interest and policy. The principal difference is that in their case the machinery for resolving these issues is largely judicial.[2] In the official care and adoption processes the machinery is partly judicial and partly official or wholly official.[3] It is the difference in function not in functionary which is important.

32.2 It is fairly clear that the statutory reforms of the late nineteenth and early twentieth centuries[4] were a reflection of public concern for and public interest in the welfare of children.[5] These reforms continue to be to a considerable extent

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1 I.e. the direct intervention of the state acting through the various agencies; e.g. local authorities, children's hearings, even in some respects the courts.

2 But this does not mean that the courts are necessarily restricted to adjudication.

3 Where it is wholly official, that does not mean that the decisions are necessarily administrative.

4 Particularly the Guardianship of Infants Act 1886 (49 & 50 Vict., c. 27), the Custody of Children Act 1891 (54 & 55 Vict., c. 3), and the Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c. 45).

5 Chapter 7.

meaningless except in relation to the earlier law. What is particularly significant is that the earlier law in a very limited and hesitant way recognised the interests of the child.[6] The circumstances of such recognition were rather unusual and to some extent ancillary to the mainstream of developments. Bevan has suggested that the "historical strength [of the father's common law right to custody] still has some influence."[7] Its influence is perhaps even greater than Bevan indicates, for some of its features may be discerned long after the enactment of the paramountcy of welfare principle in 1925.[8]

32.3 The legislation of 1886, 1891 and 1925 applied to Scotland as well as to England with only technical modifications for Scots law. The common law of Scotland was then and still is considerably different from that of England. In particular, it will be seen, the law of Scotland was probably more flexible than English law. The reason, it is suggested, was the position of the Court of Session as a court of law and of equity, in the latter capacity as the natural successor of the Scottish Privy Council. England suffered from the bifurcated approach of law and equity until 1873.[9] It is impossible to predict how the law of Scotland would have developed if the legislation of these years had not applied to that jurisdiction.[10] Scots law was remarkably resilient in the nineteenth century but

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6 See this chapter and chapters 33 and 34.
7 Bevan, p. 256. 8 Chapter 43 in particular.
9 Judicature Act 1873:generally, see Harding, A Social History of English Law (1966, Penguin), pp. 339 to 344.
10 It may not have affected the mainstream of development very much, for the legislation largely reinforced the direction of the law, certainly until the early part of the twentieth century.

this strength seemed to disappear during the early twentieth century, perhaps as a consequence of the somewhat alien legislation. English law likewise may have developed without statutory intrusion for equity was paying considerable attention to the welfare of the child well before 1925. This is mere speculation. The legislation had a clear and important effect on the development of the law[11] but an effect intelligible only in the light of the earlier law.

32.4 The foundations and development of English and Scots law were distinct before the second half of the nineteenth century and even to some extent after the late Victorian reforming legislation. It is impossible in either system to be precise about the duration of trends of development. There are two principal contexts which are of some relevance to children: the relationship between children and their parents, particularly their father; the relationship between them and their guardians. The former relationship was largely a matter of the relatively rigid principle of the paternal power, supplemented by a more flexible approach in the event of the death or inadequacy of the father. The latter relationship has always tended to be controlled more flexibly, partly because the judicial processes involved were characterized by certain features of administration and partly due to the absence of the father. These aspects of flexibility in the parent-child

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11 If only to confirm judicial development.

relationship seem to appear earlier in the Scottish system than in the English system. In any event the change from rigidity to flexibility began to appear in Scotland towards the end of the eighteenth century and in England perhaps slightly later.

32.5 This awakening of a social conscience was reflected by Parliament in the later Victorian period.[12] The flexible element in the statutory approach[13] was to some extent a recognition by the legislature of the judicial status quo. Parliament certainly changed the direction of this approach but it is significant that the movement from rigidity to flexibility was originally brought about by the courts rather than by Parliament.

32.6 It is fortuitous and particularly helpful that in each jurisdiction a substantial treatise was written on the law of children not very long before the reforming legislation.[14] This historical analysis, although made easier by the existence of these scholarly works, is concerned only to examine the role of the child's welfare, firstly under the older rules and then in terms of the more flexible approach adopted towards the end of the eighteenth century and during the first half of the nineteenth century, prior to the major legislation of the Victorian period.

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12 E.g. the custody and guardianship legislation already referred to in this chapter; the industrial and reformatory schools legislation and the prevention of cruelty to children enactments referred to in paras. 14.11 to 14.16; the legislation protecting working children and finally the enactments on education.

13 I.e. the statutory recognition of applicational, interpretational, administrative and substantive discretions.

14 Fraser, Parent and Child and Guardian and Ward (Edinburgh, 1866, 2nd ed.); Macpherson, A Treatise on the law relating to Infants (London, 1842).

Section 2 - Developments in Scotland before the 19th century

(a) The position of the father: the patria potestas.

32.7 The approach to the parent-child relationship may, in large measure, be equated with the nature and extent of the patria potestas. The institutional writers did not deal with this either with precision or in depth.[15] Nevertheless they stressed the importance of paternal authority in a general fashion, not so much as a power in itself but rather as an incident to the implementation of a duty. This, it is suggested, gives a greater opportunity for judicial control over the exercise of the authority than if it had been regarded almost as "sacrosanct", as some English judges were inclined to do.[16]

32.8 Scots law, of course, recognises the division of nonage into pupillarity and minority.[17] This has major consequences for the exercise of the patria potestas. Moreover, it is the source of some of the problems created by the enactment of fundamentally the same rules for Scotland and England in the second half of the nineteenth century. In that sense this aspect of the common law of Scotland has been eroded by the modern legislation. Despite this, it is one of the reasons why Scots law during the earlier period appeared relatively flexible.

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15 Indeed Hume commented in this context that "in our books and systematic works, the rules and maxims of law are, in many instances delivered in broad and sweeping terms; whereas, in truth, a large proportion of these rules are, and must be (if their true objects are to be regarded), very liable to restrictions, modifications and exceptions": Lectures, Vol. 1, p. 251. This may be an early implied recognition of the concept of individualised justice in relation to children.

16 E.g. In re Agar-Ellis, Agar-Ellis v Lascelles (1878) L.R. 10 Ch.D 49 at p. 72 per James L.J.

17 E.g. Stair I.v.2.

32.9 Stair tended to take a fairly authoritarian view of the patria potestas.[18] "Infancy," he wrote, "is when the children are without discretion. And they then are wholly in the power of their parents ... And this is rather an act of dominion in the parents, than from any obligation of the children to submit to them."[19] This paternal authority was different from a wider authority vested in the father: "oeconomical jurisdiction" as Bankton called it.[20] But each was so general and imprecise that it was probably little more than a power of direction[21] in relation to the child's place of residence, mode of life, education, religion and so on. The oeconomical authority seemed to endure longer than the patria potestas. In either case, however, it was not a right with a correlative duty. Bankton, indeed, seemed to regard as more significant the duty placed by nature upon parents "to maintain and educate their children" and in implementation of this alimentary obligation it was "sufficient for the father that he is willing to take them home to his own family, unless he was guilty of maltreatment."[22] This invocation of natural law reflects the earlier canonical duty of children to obey their parents, coupled with the parental duty "to preserve the lives of their children, to nourish them and to see to their upbringing."[23] Anton went further when he suggested that custody was conceded to the parent to enable him to carry out his parental duties.[24] This suggests that custody was an incident to

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18 By which he meant pupillarity. 19 Stair, I. v. 3.
20 Bankton, I. vi. 1: see also Stair, I. v. 6.
21 As Stair seemed to indicate: Stair, I. v. 6.
22 Bankton, I. vi. 13.
23 Anton A.E., "Parent and Child", chapter X in Introduction to Scottish Legal History (Edinburgh, 1958, Stair Society, vol. 20), p. 119.
24 Idem.

parental duties rather than an independent right. If so, patria potestas was perhaps too vague to be meaningful; the law concentrated upon parental duties; and custody is merely the vehicle for implementation of these duties. Bankton's views were consistent with this analysis but Stair dealt with the general principle somewhat differently, almost entirely in terms of paternal power.

32.10 The influence of the patria potestas depends also upon its duration. Stair suggested that the parental authority might subsist even after majority.[25] Bankton indicated that it terminated on attaining minority.[26] Fraser took the view that it remained intact until majority but after pupillarity "it may be easily lost."[27] The courts however seemed to be more certain. One of the earliest cases expressed the matter very clearly:-

> "Albeit the superiour, tutor, or ony uther persoun, have the keiping of the persoun of the pupil, nevertheles the pupil beand of fourtene zeiris compleit, his persoun is not under his keiping, bot he is fre, and at his awin libertie."[28]

The generality of this comment is remarkable but it applied only to the child's person. It was quite different in relation to the child's "landis, gudis and geir" which were not within his control until he reached majority.[29] Similar views were

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25 Stair, I. v. 13. It is not absolutely clear whether he was referring to the patria potestas or the wider oeconomic authority.

26 Bankton, I. vi. 2. He also suggested that the father's "oeconomical" authority could continue after majority but such authority was different from the patria potestas under discussion: see Bankton, I. vi. 1.

27 Fraser, pp. 75 and 76.

28 Newtoun v Ker (1533) Morrison 16218.

29 Idem.

expressed in 1534,[30] 1561,[31] 1741[32] and 1780.[33]

32.11 It would be a matter of considerable importance to the child whether paternal authority in relation to his person ended at minority. If it did, then the later reforming legislation has to some extent extended the duration of the paternal authority. On the other hand, if it were to continue until majority, the scope for judicial intervention would be pro tanto extended.

32.12 Both Stair and Bankton recognised the possibility of such intervention. Stair's grounds included "their parents deal[ing] unnaturally with them, ... by atrocity."[34] Bankton, as already noted,[35] directed his attention to duty rather than to power, but the ground of forfeiture of personal care indicated by him was where the parent "was guilty of maltreatment."[36] These criteria involved culpable if not criminal parental misconduct.

32.13 There were few examples of the exercise of these judicial powers of control, vested originally in the Scottish Privy Council and later in the Court of Session.[37] Fraser noted two examples:[38] in one the children were removed from their parents because of the latters' support of "Quakerism"; in the other the ground was the mother and guardian being "popishly inclined."

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30 Mathesone v Wedderby (1534) Morrison 16218.
31 Kincaid v Johnstone (1561) Morrison 16228.
32 Marischal v Macdowal (1741) Woodhouselee 9.
33 Graham v Graham (1780) 2 Woodhouselee 9.
34 Stair, I. v. 13. 35 Para. 32.9. 36 Bankton, I. vi. 13
37 Fraser, p. 78; Anton, op. cit., pp. 119 and 120.
38 Fraser, p. 78.

32.14 The first reported decision seems to have been Baillie v Agnew[39] in 1775. This was in effect a competition after the mother's death between the children's father and maternal grandfather for control of the children. The allegations against the father were not, as in the two previous cases, religious issues; they were consistent rather with the culpability or criminality approach of Stair and Bankton. The grounds upon which it was alleged that the father had forfeited his parental authority were that he had "contracted unusual habits of drinking, in which he proceeded to high acts of ferocity and maltreatment, and terror to his children."[40] The children were ultimately boarded out under judicial supervision.

32.15 What is important, however, is the judicial comment that the court had "no doubt of their power, ex nobili officio, to interpose in this case."[41] It would appear that the conduct complained of constituted threshold requirements which had to be satisfied before the court could proceed to determine how the children should be dealt with. Even in 1775, therefore, the Court of Session divided its approach to the exercise of its "undoubted jurisdiction to interfere for the benefit of the child"[42] into two parts: the satisfaction of threshold requirements and the consequential exercise of a discretion on how best to deal with the child. The court naturally did not analyse its procedure in this way. But, it is suggested, such

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39 (1775) 5 Brown's Supplement 526. 40 Idem. 41 Idem.

42 Fraser, p. 77. That is a description of the power rather than a statement of the requirements for its exercise. Welfare was not per se a threshold requirement, at least up to 1866 and indeed for some time thereafter.

such a division of approach is clear from the report, brief though it is.

32.16 These threshold requirements impinged upon the welfare of the child in two ways. They were, firstly, negative. The assumption was that the paternal conduct, whether criminal, culpable or merely inconsistent with the community's views on religion[43] would have an effect upon the child of which the community, at least as contemplated by the courts, would disapprove. In this sense the function of the court was at the most protective of the child's interests. The court would intervene to prevent the child's interests from being prejudiced. It would not intervene to achieve a better environment for the child. Welfare thus operated negatively. The threshold requirements, in the second place, related objectively but indirectly to welfare. Welfare itself was not the test for the exercise of the nobile officium. Certain objectively prescribed standards of conduct were the foundation of the requirements. They were not necessarily restricted but some type of parental conduct bearing detrimentally upon the child seems to have been essential.

32.17 The paucity of reported decisions and the nature of the threshold requirements suggest that attempts to deprive a father of his parental authority were rare and the circumstances exceptional. Society was perhaps hesitant even to challenge

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43 See the unreported cases mentioned by Fraser, p. 78 and referred to in para. 32.13.

the way in which the patria potestas was being exercised. For these reasons it is important not to distort the overall nature either of society at large or of the legal system in particular. It would probably be normal for the courts to support the authority of the father and exceptional to suspend it. For example, in Lady Innergellie, Supplicant[44] the mother, who had left her husband because of his cruelty and obtained a judicial award of aliment against him, sought custody of the child because of the child's "tenderness" and the father's neglect of his education. The court declined to award her custody since the father had "the only right to keep and educate him."[45]

32.18 A similar regard for the patria potestas was evident in Charteris v Officers of State.[46] Although the issue in that case concerned the possible forfeiture of a bequest in the event of interference with the child's education, the court commented:-

> " ... for though he might have tutors for the estate which he gave the claimant, yet he could not take from my Lord Wemyss the care and direction of the person of his son, which the laws of God and man had intrusted him with, otherwise than by engaging him voluntarily to renounce it rather than to forfeit so much money to his family."[47]

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44 (1708) 1 Kames 397.

45 Idem.

46 (1749) 5 Brown's Supplement 770.

47 Ibid. at p. 771.

The emphasis of the law, given these indications and the conceptual background of the institutional writers, favoured patria potestas. The child's interests were at this stage of development relevant only as the indirect objective of the threshold requirements. If these requirements had been satisfied in the individual case, something in the nature of an administrative discretion had been created. The exercise of such a discretion was an altogether different matter and one to which the court in the earlier period paid no analytical attention.

(b) The position of the mother: illegitimate children

32.19 Although the courts said nothing about the way in which their powers should be exercised once the patria potestas had been forfeited as a result of paternal misconduct, they gave some indication of how their powers should be exercised in several other contexts in which their powers were required to be exercised without reference to the patria potestas: for example, where the father was dead, when he had delegated his power, where tutors or curators had been or should be appointed, where the child was illegitimate. The processes involved a considerable degree of flexibility and the courts were to some extent less restricted in their approach. The way was at least open for the child's welfare and interests to play a more positive role.

32.20 Since an illegitimate child was filius nullius, there was clearly no scope for the patria potestas. Although the Court of Session in Kidston v Smith[48] indicated that the custody of such a child belonged by law to the mother, other decisions suggested a less categorical position. In one case,[49] the father was held bound to aliment the child whose custody was conceded to the mother.[50] In another case[51] the Court of Session, overruling the Lord Ordinary, decided that the father's alimentary liability continued only until the child reached ten years of age. Again,[52] the award of aliment against the father was to continue until the child became seven and thereafter until the father took the child into his own keeping or the child became ten. There is very little in these reported decisions to indicate why the court reached different conclusions in each of these cases. It must presumably be a reflection of the individual circumstances of each case: in other words, a degree of flexibility. These three cases, however, emphasised the duty to aliment the child. Custody was very much an incidental matter.

32.21 One of these decisions at least, Oliver v Scott,[53] contained the germ of an idea which later became manifest: that the father of an illegitimate child could implement his liability to aliment the child not by paying a regular sum of money but by taking the child into his personal care.[54] Even

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48 (1773) 5 Brown's Supplement 390.
49 Caldwall v Stewart (1773) 5 Brown's Supplement 390.
50 Especially since, the court indicated, the father had denied paternity.
51 Glendinning v Flint (1782) Morrison 445.
52 Oliver v Scott (1778) Morrison 444.
53 (1778) Morrison 444.
54 Para. 32.9. ; Anton, op. cit.,p. 123.

that paternal power was closely linked to the alimentary obligation and was largely incidental to it. But in two early cases more specific attention was paid to the custody of the child. In Burgess v Haliday[55] the child's father required the child's mother and her husband[56] to deliver the child to him after the justices had decerned that he should pay aliment. He intimated that he would maintain and educate the child at his own expense. The mother and her husband refused that offer. The Court of Session reaffirmed the award of aliment and added that the mother could not be obliged to part with her child.

32.22 The father's position in the later case[57] was both stronger and weaker: stronger because the child, although a girl, was over seven years of age; weaker because he had subsequently married another woman. In that case, too, the Court of Session preferred the mother to the father. These various decisions suggest that the courts were not prepared to apply automatically rules of law in relation to the custody of illegitimate children. To some extent each case was to be looked at individually and a decision reached reflecting these circumstances. The courts nevertheless did not state exactly why they were introducing a degree of discretion nor how it should be exercised. The position became clearer in the nineteenth century but the flexible approach can, it is suggested, be detected earlier.

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55 (1758) 1 Woodhouselee 68; also reported as Burgess v Halliday (1758) Morrison 1357.

56 Whom she had married after the birth of the illegitimate child in question.

57 Short v Donald (1765) 1 Woodhouselee 69; also reported (1765) Morrison 442.

(c) The appointment of guardians

32.23 Guardians could take office in a number of different ways.[58] The courts have always taken an interest in these appointments. They were concerned largely to ensure the appointment of a "suitable" person, either by removing one person and substituting another or by making an appropriate appointment in the first place. To a considerable extent these were discretionary processes and potentially at least afforded an opportunity to be given for an examination of the child's needs and interests.

32.24 In the earlier periods the state, acting through the courts, was concerned only with the suitability of appointments. But in Scotland the state acting executively recognised that the needs of children could not always be met by such appointments. They could not, for example, be forced on unwilling appointees. Bankton spoke of public responsibility[59] for indigent infants in these terms:-

> "To preserve, maintain and educate children exposed, and prevent the barbarous murdering them at the birth, his majesty was, graciously, pleased by his royal charter to establish an hospital, called "The Foundling Hospital" for the maintenance and education of such children, or those that are deserted by their parents pursuant to an act of Parliament, with divers valuable privileges."[60]

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58 Montgomery G.A., "Guardian and Ward", chapter XI in An Introduction to Scottish Legal History (Edinburgh, 1958, Stair Society, Vol. 20), p. 126.

59 Bankton, Dig. 3 to I. vi.

60 Ibid., Dig. 4 to I. vi.

Education, too, although a matter of private responsibility, was a matter of public concern through the establishment of schools in every parish.[61] But, these executive functions apart, the state, through the courts, was concerned only with appointments.

32.25 The father's right to appoint a testamentary tutor to his pupil children was merely an example of the patria potestas, effective only posthumously.[62] In that case the court was concerned only with the control of such tutors, not with their appointment. But if the father did not exercise his power of appointment or the appointee were removed from the office, the responsibility would fall upon the court, either by confirming tutors at law or by appointing tutors dative. In neither case was the nomination automatic.

32.26 The tutor was entitled, at least prima facie, to the custody of the pupil's person.[63] The importance of this right justified the careful judicial scrutiny of the candidates. Indeed the rule that the custody of the pupil should not be entrusted to someone who could succeed as heir to the pupil appeared in the Regiam Majestatem.[64] It was emphasised by Bankton.[65] The implied discretion built into this rule is made clear by Willock's description of the procedure relating to the brieve of tutory.[66] It is sufficiently important to justify an expanded reference:-

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61 Ibid., Dig. 16 to I. vi.
62 Anton, op. cit., p. 119.
63 Stair, I. vi. 15; Bankton, I. vii. 1.
64 Regiam Majestatem II. 47; see also Montgomery, op. cit., p. 126.
65 Bankton, I. vii. 28.
66 Willock I.D., The Origins and Development of the Jury in Scotland (Edinburgh, 1966, Stair Society, Vol. 23), pp. 119 and 120.

> "The brieve directed the taking of inquisitions by a sworn inquest ... as to who was the nearest agnate, ... whether he was above twenty-five years old, whether he was provident in his own affairs and capable of caring for the administration of those of another, whether he was himself heir to the child and if so, whether the custody and upbringing of the child might be more suitably left to someone on the mother's side."[67]

The final question has a distinctly modern emphasis. It indicates a choice, based on at least two alternatives, of what is likely to be in the child's interests. This clearly was an exercise of discretion. It was not merely a question of disqualifying the nearest agnate who was also the pupil's heir: that would be the fulfilment of a threshold requirement. It involved deciding, once that had been established, how the child might be brought up most "suitably."

32.27 In the absence of any testamentary tutor or tutor at law, a position approximating to that existing after the disqualification of the nearest agnate, the court has an inherent power to appoint a tutor dative. The power of the Court of Session was derived from the King as "supreme protector of orphans."[68] The tutor dative was "given by the King in virtue of his prerogative."[69] The foundation of the power indicates a

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67 Idem.

68 Bankton, I. vii. 4.

69 Idem.

wide, perhaps unfettered, discretion, but Stair indicated that the mode of its exercise was restricted:-

> " ... In the giving of tutors dative, though it be in the arbitrement of the King to choose whom he thinks fit, yet he will have regard to the interests of the pupil ..."[70]

He went on to indicate, by way of example, situations in which the appointee was not specifically entitled as a matter of law to the office. Since the range of persons whom the court could appoint appeared to be unlimited, it would follow that the range of persons who could apply to be appointed would be equally unlimited. Whether this is so does not presently matter for, in any event, the court seems to have placed upon itself in the exercise of its administrative discretion the duty of having regard to the interests of the child. Stair's view is thus entirely consistent with Willock's description of the procedure for obtaining the brieve of tutory.

32.28 The Court of Session had in reserve what might be termed the residual power to appoint a factor loco tutoris. Such a person, although he has a general power to control and direct the pupil's person and property, has no right to the actual custody of the child's person. This power of appointment was exercised, for example, in Bower, Supplicant[71]. A

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70 Stair, I. vi. 10.

71 (1749) 2 Woodhouselee 385.

minor, resident in the Scots College in Paris to be educated in the Roman Catholic religion, decided to select curators for himself.[72] The Court of Session, on the application of one of his relations, stopped the action and named a factor loco tutoris. In that case the court was probably concerned to protect the religious integrity of the child.

32.29 Guardians, of course, were equally concerned with the child's property.[73] This aspect is less important in the present context but in Martins, Supplicants,[74] the court, on the application of an infant without tutors and of his nearest relations, named a factor loco tutoris to set a tack for seven years "being for the infant's benefit". Whether it was the tack or the appointment which was for the child's benefit is irrelevant. The test of the child's benefit was a recognition of the way in which the power to appoint a factor loco tutoris would be exercised by the court. The precise role of the child's benefit is unclear at this stage of the development. What is clear is that sometimes the interests of the child had a part to play in the judicial appointment of guardians.

(d) Disputes between guardians and parents

32.30 The role of the courts in appointing or confirming the appointment of guardians is to a large extent an administrative function.[75] Settling disputes about guardianship[76] is

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72 See Montgomery, op. cit. p. 127.
73 Bankton, I. vii. 1: see also Stair I. vi. 35 and Bankton I. vii. 47.
74 (1749) 2 Woodhouselee 385.
75 Consider also the appointment and confirmation of executors.
76 E.g. the adequacy of the guardian or of the way he has exercised his powers.

fundamentally more a matter of adjudication. Even so, the courts tended, in the period in question at least, to assume to themselves more discretion in forfeiting the office of guardianship than in holding the father disqualified from exercising his patria potestas. The reason seems clear. Paternal disqualification involved removing a right conferred by the law upon the father.[77] Guardianship disputes generally did not involve rights. They postulated merely an interest conferred upon the guardian by virtue of his office, for which the guardian was dependent in one way or another upon the court. Even the interest of the mother, to the extent of its recognition, although not dependent directly upon the court, did not enjoy the status of a legally protected right.

32.31 Guardianship disputes involved a number of interests: that of the superior, in the case of a feudal relationship; those of the tutor, curator, factor, even the mother; perhaps even that of the father himself. The child's interest was in the early period scarcely recognised. The mother of a child under seven would normally be allowed to have care of the child.[78] Whether this was for the benefit of the mother or of the child was not made clear. What is clear, however, is that this preference was not a matter of law; it rested in the discretion of the court. As the court indicated in Foreman v Oliphant[79]:-

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77 The position is now different.

78 Hume, Lectures, Vol. 1., p. 252; he talked in addition of the mother being "duly" qualified as well as not being disqualified.

79 (1527) Morrison 16216: see also Durie v Dowhill (1517) Morrison 16216 and King and Tullibardin v Wedderburne (1516) Morrison 16216.

> "The cure and keiping of ane air, beand minor, and of all uther minoris, pertenis to the mother efter the deceis of thair father, quhill thair age of sevin zeiris compleit; and the mother in this cais aucht and sould be preferrit to the said minor's guidschir, and to all the rest of his friendis and kinnismen."[80]

The last phrase indicates that the mother's interest rested in the discretion of the court which was thus forced to decide in the circumstances of the individual case. Hume noted, consistently with this approach, that the mother's position was not "a point of absolute privilege" on her part.[81] The individual nature of each decision is further supported by the need for judicial authority to take a child over seven years of age from his mother to hand him to his tutor,[82] even where the latter had been appointed by the father on his death bed.[83]

32.32 The mother's position was much the same in relation to any other claimant, including the feudal superior.[84] Thus a superior, entitled to wardship as a feudal incident, was to be preferred to any other person in relation to a child over seven.[85] As it was alternatively stated, the custody of such a child belonged to the "superior or his donatar, not to the tutor."[86] In the absence of a feudal superior, the pupil's tutor was, in principle, preferred to everyone else.[87]

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80 (1527) Morrison 16216. 81 Hume, Lectures, Vol. 1, p. 252.
82 Giffane v Caldwallis (1579) 1 Kames 116.
83 Idem.
84 On the feudal implication, see Montgomery, op. cit., p. 125.
85 Lundie v Innermeith (1542) Morrison 16220; Abbot of Aberbrothok v Forbes (1532) Morrison 16220.
86 Achans v Livingston (1542) Morrison 16220.
87 Davidsone v Studeman (1553) Morrison 16223.

This was particularly true of the child's testamentary tutor,[88] since that person had been especially chosen by the father, even where the mother was able and willing to aliment the child from her own resources[89] or where the tutor was himself a minor.[90] Strong indeed was the posthumous respect for the father's wishes.[91] There was, of course, no reason why the mother herself could not be appointed by the father.[92] These comments apply also to tutors other than those appointed by the father's will.[93]

32.33 In any case, however, the tutor or the mother with custody could be held to have forfeited his or her interest. The Court of Session retained its inherent capacity to evaluate the adequacy of the exercise by the guardian or the mother of his or her powers of control and direction of the child. Hume regarded abuse of power,[94] neglect of duty,[95] lack of integrity[96] or the absence of a sound and intelligent discretion[97] as the grounds for tutorial disqualification. They reflected an administrative incapacity. On the other hand, the grounds for maternal disqualification were more personal. He identified maternal prostitution,[98] adultery,[99] giving birth to an illegitimate child,[1] remarriage[2] and even foreign residence[3] as grounds for

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88 A v B (1553) Morrison 16224 (10 June).
89 Langshaw v Muir (1629) Morrison 16252.
90 Hamilton v Lady Ernock (1584) Morrison 16234.
91 See Forbes v Bishop of Caithness (1613) Morrison 16241; Johnston v Clark (1785) Morrison 16374.
92 Wod v Monypenie (1557) Morrison 16226; Sandilandis v Tenentis of N (1569) Morrison 16231.
93 Hume, Lectures, Vol. 1, p. 251; Noble v Noble (1627) Morrison 16248; Campbell v Chalmers (1634) Morrison 16263; McIlvain v McQuhirter (1736) Morrison 16340; Gordon v Corsan (1632) Morrison 16259.
94 Hume, Lectures, Vol. 1, p. 251. 95 Idem.
96 Hume, op. cit., p. 253. 97 Idem. 98 Hume, op. cit. p.252.
99 Idem. 1 Hume, op. cit., p. 253. 2 Idem.
3 Idem.

such disqualification. This could be so even where she had been appointed testamentary tutor.[4] There seems, however, to have been only one reported case in the early period of maternal adultery as the ground of disqualification.[5] The mother's remarriage after the death of the child's father seems to have been the principal ground in practice of qualification.[6]

32.34 Similarly, where the Court of Session controlled the exercise by the tutor of his powers of direction of the child's affairs and way of life, the grounds in the reported decisions were narrower than those enunciated by Hume. The main ground of disqualification was the one already mentioned, namely where the tutor was his pupil's heir.[7] In Dischington v Hamiltoun[8] the court indicated that the office of tutor could be lost if the tutor did "dilapidat and waist the said pupil's gudis and geir." But the decision in that case seemed to rely upon the intention of the tutor-testamentar to bring a process of bastardy in relation to his pupil.[9] There seems no reason to doubt, however, that the Court of Session could remove from office an inadequate tutor as competently as it could appoint him or confirm his appointment in the first place.

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4 Fullerton v Boyne (1675) Morrison 16291.

5 Wod v Monypenie (1557) Morrison 16226.

6 Sandilandis v Tenentis of N (1569) Morrison 16231; Langshaw v Muir (1629) Morrison 16252; Valances v Forrester (1630) Morrison 16255; Gordon v Corsan (1632) Morrison 16259; Fullerton v Boyne (1675) Morrison 16291.

7 Dischington v Hamiltoun (1558) Morrison 16227; Edgar v Inglis (1606) Morrison 16237; Chalmers v Gadgirth (1611) Morrison 16239; Dury v Dury (1666) Morrison 16277.

8 (1558) Morrison 16227. See also Clepan v Weymis (1551) Morrison 16227; Spalding v Fleshour (1561) Morrison 16227; Crawfurd v Hunter (1548) Morrison 16227.

9 Dishington v Hamilton (1558) Morrison 16227; a sequel to the earlier reported decision bearing the same but differently spelled names.

32.35 Only two early cases seem to have canvassed the interests of the child, although in each case the interests of the child were discounted. In Dury v Dury[10] the tutor at law craved delivery of the pupil from her mother. The mother's argument was twofold. The tutor, being the child's heir, was for that reason disqualified. That argument was accepted by the court. The mother, however, suggested that, since the child was only nine and as she, the mother, was unmarried, she was the "fittest" person to educate the child. The Court did not accede to this argument, for the Lords of Session decerned "the child to be delivered to ... one of the clerks to be educated with him."[11] In doing so, they may have applied the test of the child's interests. But if they did, it was the unarticulated reason for their decision.

32.36 What is interesting about that case, however, is that the former argument concerned disqualification, a threshold requirement. The latter argument was directed more towards discretion: what should be done after the tutor had forfeited office. Even at this early stage, a certain duality of approach was manifesting itself.

32.37 The second case did not indicate such an approach. A quorum of the testamentary tutors of the children in Scot v Scot[12] decided to send the eldest children, aged six and five,

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10 (1666) Morrison 16277.

11 Idem.

12 (1759) Morrison 16361.

to school in Edinburgh and so apart from their mother. She declined to comply, arguing that they were too young and, in effect, that it would not be good for them to be separated from her. Maternal care, in her view, was preferable; it was "dictated by nature".[13] Her arguments failed. The court commented:-

> "It was anciently, indeed, our law, that the mother should have the custody of pupils; but that will not now take place universally. The rule admits of many exceptions. But the question here is not so much, who shall have the custody of the children? as, who shall have the direction of the place of their education? of which the petitioners are more proper judges than the mother."[14]

The court thus avoided the question which probably would have involved a discussion of the child's interests; namely, who should have custody. That issue would require the circumstances to be considered from the child's point of view, at least to some extent. The question actually determined by the court, who decides where the children are to be educated, was different. It was answered in terms only of the relevant decision-makers. The children's interests were not germane to that issue, although they would be relevant when the persons to whom the decision had been confided came to make their decision. But the court deliberately ignored that question.

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13 Ibid. at p. 16362.

14 Ibid. at pp. 16362 and 16363.

32.38 These two cases in particular indicate that, although some litigants were aware of the interests of the child, there was no evidence to suggest that the courts were prepared at that stage to analyse the problem from the child's point of view. The judicial discretion of application existed at the stage of satisfying the threshold requirements; in other words, at the stage of disqualification of the current office-holder. The subsequent discretion at the stage of appointment equally took no account of the children's interests as such. On the other hand, the recognition of discretionary powers and the existence of interests as distinct from rights laid the foundation for future developments.

Section 3 - Developments in England before the 19th century

(a) General

32.39 Although the law of Scotland relating to children was influenced during the early period of its development by feudal, canon and Roman law, the general pattern has become reasonably clear. The acceptance of a modified version of the Roman law principle of patria potestas placed the father in a position of legal strength during his lifetime and also thereafter in the law of guardianship. The simplicity of this pattern was affected only be certain feudal intrusions into the law of guardianship. In England, on the other hand, the paternal power eventually evolved in consequence of the inadequacies of the feudal common law. The common law itself paid no direct regard to the position of the child. Concepts of seisin and property, indeed a concept of the child almost

as an item of property,[15] were the foundation of guardianship. Custody of the child's person, as distinct from questions of guardianship, played a very minor role until the effective intervention of equity in the eighteenth century.

32.40 Scots law, founded upon the relatively clear and widely applicable doctrine of patria potestas, developed by means of judicial attempts to limit that doctrine, partly in response to a concern for the welfare of the child. The common law of England, on the other hand, grew out of proprietary concepts, became in essence guardianship of the heir's interest in the property inherited and expanded only gradually to include the child's person. That became at first a matter of largely parental concern and only latterly, through the intervention of equity, did the law begin to take account of the child's interest. By the end of the eighteenth century, although the foundations of the two systems and their methods of development were quite distinct, the child's interests had begun to play a similar part in the law of both countries.

32.41 In England the law showed little interest in the custody of children until the stranglehold of feudal wardship was removed in 1660 by the abolition of both military and similar tenures and of the Court of Wards and Liveries.[16] Even the jurisdiction of the Chancellor had been largely

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15 E.g. in Lecone v Sheires (1686) 1 Vernon 442 the father granted the guardianship of his child in security for a debt.

16 Tenures Abolition Act 1660 (12 Car. 2, c.24).

ineffective in the face of that court. In the opinion of Pollock and Maitland, the common law of guardianship was "disjointed and incomplete."[17] The law, they indicated, "had been thinking almost exclusively in terms of infant heirs, and had left other infants to shift for themselves ... The law had not even been careful to give the father a right to the custody of his children ..."[18] It is particularly significant that section 8 of the Tenures Abolition Act 1660, which conferred wide powers on the father, did not refer to them in terms of wardship or guardianship. That section inter alia enabled a father "to dispose of the custody and tuition of such child or children [those under twenty one]" with the effect that "such disposition ... shall be good and effective against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise." In Parnell[19] it was observed by Lord Penzance that this provision authorised the father "to dispose of the custody of the child as he thinks fit."[20] The year 1660 thus saw not only the end of the feudal concepts of wardship but also the emerging importance of custody.

32.42 Bracton had written in terms of the patria potestas.[21] His references however were at best anamalous[22] in the context of the common law of England. Blackstone also talked of the power of parents over their children.[23] But by his time, when

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17 Pollock & Maitland, Vol. 2, p. 443. 18 Ibid., p. 444.
19 In the goods of Thomas Parnell (1872) L.R. 2 P. & D. 379.
20 Ibid. at p. 381 per Lord Penzance.
21 Bracton on the Laws and Customs of England (ed. Woodbine G.E., Boston, 1968), pp. 34 and 35.
22 The doctrine was alien to the law of England during the middle ages.
23 Blackstone, I. 452 and 453.

guardianship by nature and nurture had replaced the feudal wardships,[24] this had begun to be more intelligible in the English context. According to Blackstone this power was derived[25] from the parental duty to maintain, protect and educate their children.[26] This is reminiscent of the conception of duty identified by some of the Scottish institutional writers[27] but they employed it as a constraint upon the exercise of the patria potestas. Blackstone, on the other hand, seems to have used the duty as the foundation of the parental power. This would be sensible in light of the early English common law.

(b) The common law of guardianship until 1660.

(i) Introduction

32.43 In Anglo-Saxon times something akin to the patria potestas of Roman law seems to have been recognised in England.[28] But, unlike Scotland, these ideas did not survive the development of the autochthonous common law. Thus, by the middle ages, the common law of England relating to children was conceived almost entirely in terms of guardianship or wardship. Indeed a child without an interest in property was scarcely recognised by the law. But as time went on, guardianship of the person became more important. There were

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24 Blackstone spent more time in his Commentaries on Parent and Child (Chapter xvi) than on Guardian and Ward (Chapter xvii).
25 Blackstone, I. 452.
26 Blackstone, I. 448 to 452.
27 Para. 32.9.
28 Holdsworth, Vol. 2, p. 97; Pollock & Maitland, Vol. 2, p. 437.

ultimately four types of guardian at common law:[29] guardian in chivalry and guardian in socage, both intrinsically feudal; guardian by nature and guardian by nurture, each of which involved elements of parental authority. It is important to identify the relevance and significance of the interests of the child in each instance.

32.44 Each of these types of guardianship was conceived for certain purposes in a specific context. It would thus be possible for one child to have several guardians, one for each relevant purpose. Holdsworth noted that, where the father was dead, the guardian in question would depend for his appointment upon the nature of the property inherited by the child:[30] for example, whether it was held in return for military service, in gavelkind, socage or burgage. The nature and functions of each guardian differed. Thus the sphere of interest of each guardian would be to some extent affected by the existence of other guardians.

(ii) Guardians in chivalry and in socage

32.45 The principal characteristic of the common law was its application of rigid rules. There was no scope for discretion. Guardianship in chivalry arose out of the feudal practice of bestowing land in consideration of military service.[31] Thus, when land descended to an unmarried male heir

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29 See generally Morgan v Dillon (1724) 9 Modern 135 at p. 141 per West L.C. This was an Irish case but English law applied.

30 Holdsworth, Vol. 3, p. 511.

31 Macpherson, p. 2.

under twenty one, the lord became entitled to custody of the heir's person and of the land until he reached full age.[32] This right, however, was either supported by or lent support to the lord's duty to maintain the child.[33] Wardship was thus a chattel in the hands of the lord; it was transmissible and saleable; custody moreover could be delegated to a third person.[34] But later the concept of custody of the person was separated from the notion of wardship as a chattel or, at least, as a proprietorial interest.[35]

32.46 Guardianship in socage was conceptually similar. It has been succinctly described by Macpherson:-

> "When land held in socage descends from any ancestor, lineal or collateral, to any heir, male or female, under 14, the next of blood to whom the inheritance cannot descend (relatives by affinity only, e.g. a stepmother, being in all cases excluded) becomes guardian in socage and is entitled to the custody of the person and land until the heir reaches that age."[36]

The legal disqualification of successors of the heir himself reflects the Scottish rules relating to legal tutors.[37] But the comparison ends there, for the common law courts in England had no power to appoint guardians.[38] Testamentary guardians also were largely unrecognised by the common law.[39] This, of course, emphasises the rigidity of the common law and the relative flexibility of the early Scottish rules.

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32 Macpherson, p. 2; Pollock & Maitland, Vol. 1, p. 319.
33 Macpherson, p. 3, merely acknowledged the duty, without indicating its source.
34 Macpherson, p. 10.
35 Lecone v Sheires (1686) 1 Vernon 442.
36 Macpherson, p. 20: see also Pollock & Maitland, Vol. 1, p. 321
37 Para. 32.26.
38 See Macpherson, p. 72.
39 Macpherson, p. 68; Co. Litt. 87b. Power to appoint (in limited circumstances) was conferred by 4 & 5 P. & M., c. 8 before the more general power was enacted by 12 Car. 2, c. 24.

32.47 There were differences between guardianship in chivalry and guardianship in socage. They terminated at different ages.[40] The office of guardian in socage was not so freely transmissible as that of guardian in chivalry.[41] The latter distinction indicates a difference of approach which is particularly significant. Although guardians in chivalry and in socage were liable to protect, maintain and educate their ward,[42] the guardian in chivalry seems to have been concerned largely if not entirely with his own interest in the office.[43] On the other hand, the law of guardianship in socage "was settled at any early period with some regard for the welfare of the ward himself."[44] This does not mean that the way in which the guardian discharged his official duties was similarly required to reflect the child's interest. But Macpherson went on to indicate that this may have been so. In his words, guardianship in socage was "admitted to be a personal trust wholly for the infant's benefit ..."[45]

32.48 This would explain to some extent the later development of the law. The trust aspect of guardianship in socage provided an inchoate opportunity for the law to embrace the interests of the child after guardianship in chivalry had been finally abolished.[46] The system of guardianship in chivalry had, of course, been extended, not restricted as it might have been expected, in the later middle ages.[47] But

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40 Chivalry at 21; socage at 14.
41 Macpherson, pp. 25 to 27.
42 Macpherson, p. 28; Litt. s. 123; Co. Litt. 89.
43 Macpherson, p. 27.
44 Ibid., p. 19.
45 Ibid., p. 26. The importance of the notion of the trust is developed later.
46 Holdsworth, Vol. 5, p. 315; Vol. 6, p. 648.
47 Macpherson, pp. 16 to 18.

this came about by statute, particularly the creation of the Court of Wards and Liveries. It has been observed that the statutory provisions tended to benefit the lords and not the wards.[48] This is clearly what would be expected, given the nature of guardianship in chivalry. It is therefore not surprising that the more child-biased approach of guardianship in socage had little opportunity to influence the development of the law until the military tenures and the Court of Wards and Liveries were abolished in 1660. Indeed this is probably the same aspect of the law criticised by Holdsworth for being "defective and inadequate."[49] In his view the law could not decide who was the real beneficiary of the trust created by the office of guardian:-

> "... the older opinion that guardianship was a valuable right which existed for the benefit of the guardian, and the newer opinion that guardianship involved responsibilities to the infant. The perdurance of the feudal right of wardship gave an unnaturally long life to the older opinion."[50]

(iii) Guardians by nature and by nurture

32.49 Whether their powers were to be exercised for the benefit of the guardian or of the ward, guardians in chivalry

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48 Ibid., p. 16.
49 Holdsworth, Vol. 3, p. 512.
50 Idem:, see also Vol. 3, p. 516 and Vol. 4, p. 477.

and in socage had in principle a clear interest in the person of their ward. But in some cases this power would not be available, largely as a consequence of the relationship between these guardians and guardians by nature and by nurture. Although these latter guardians were technically guardians, their powers were more parental in nature. Their recognition and application were probably the foundation of the modern law of parental rights, modified, of course, by consideration of the child's welfare and interests.

32.50 The existence of parental guardians in this sense limited the extent of the powers exercisable by guardians in chivalry and in socage. For example, where the child's father was alive when the land descended to the child, the father was the guardian by nature of the child and "the lord had only custody of the land."[51] It also seemed possible for the father to have custody of his eldest son under fourteen, not, apparently, as guardian by nature but as guardian in socage.[52] The presence of the father would therefore restrict the lord's interest to the child's inheritance. This was an unusual way, at least for those used to the modern law, of looking at the matter. The tendency now would be to look at the paternal position first rather than regard the interest of the guardian as the foremost consideration.

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51 Macpherson, p. 11; Co. Litt. 84a: see also Holdsworth, Vol. 3, p. 511.

52 Macpherson, p. 25; Co. Litt. 88b.

32.51 These rules of guardianship by nature only applied to children being the heirs apparent of their fathers.[53] This restriction seems once again to have been prompted by a concern for land and the succession to land, although in this case the interest of the ancestor in disposing of his heir in marriage was the ultimate objective.[54] Any other children fell under the only other type of guardianship known to the common law: guardianship by nurture. This had the widest application; it was also the least precise.[55] It has been observed:-

> "Parents have an undoubted control over all their children, by virtue of their guardianship for cause of nurture."[56]

This concept was founded rather upon a parental duty to care for their children rather than any desire to secure the child's inheritance. It was restricted unambiguously to "government of the person."[57] In certain circumstances it was also available to the child's mother.[58] In any event guardianship by nurture was clearly an important historical antecedent in the development of the concept of custody as distinct from that of guardianship, a distinction which achieved statutory notoriety only in 1660.

32.52 The development of the law goes beyond the common law approach but the position ultimately reached is worthy

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53 Macpherson, p. 53
54 Ibid., p. 58.
55 Ibid., p. 62.
56 Ibid., pp. 59 and 60: founding upon Co. Litt. 88b; Harg. n. 13; Blackstone, I. 461.
57 Macpherson, p. 60.
58 Ibid., p. 65.

of note at this stage. Equity introduced a new dimension but it did not destroy the common law foundation. In 1732 King L.C. felt confident enough to conclude:-

> "The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture, but by nature; it cannot be conceived that, because another thinks fit to give a legacy, though never so great, to my daughter, therefore I am by that means to be deprived of a right which naturally belongs to me, that of being their guardian." [59]

Such a search for new concepts through existing doctrine is so characteristically English.

(iv) Forfeiture of the office of guardian

32.53 Scots law, relying to a large extent upon Roman ideas, clearly understood tutory and curatory as offices conferred by various methods upon ascertainable persons in prescribed circumstances. Patria potestas was altogether different. In England a guardian, too, was the holder of an office. Thus a parent, to the extent that he was a guardian, was also a mere office-holder. Perhaps English law never really gave up that idea; perhaps parental authority was simply the recognition of an office similar to that of a guardian. In either case, the position of the

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59 Ex parte Hopkins (1732) 3 Peere Williams 152 at p. 153. per King L.C.

parent in law, particularly in England, still seems to have been influenced by that idea. The law is now concerned less with the child's property, more with his person. But the whole approach to control of the person is coloured by its origins in guardianship as an office.

32.54 One particularly significant aspect of this approach is forfeiture of the office of guardian. Once an officer had been appointed, his function was to administer the estate or person of his charge. What he did was largely a matter for him. The principal sanction against him was removal from office. This was probably also true of a parent acting in Scotland under the modified patria potestas or in England under the expanded guardianship by nurture. The issue in Morgan v Dillon[60] was the power to remove a testamentary guardian but in the course of argument it appeared that all guardians, whatever their type, were removable. In a sense, therefore, the possibility of removal was intrinsic to the office.

32.55 Although the guardian's liability to forfeiture of office does not seem to have been questioned, the grounds for disqualification were not analysed in detail before the nineteenth century. Perhaps this was because the power of forfeiture was rarely used. This jurisdiction, being equitable, was not very effective in the earlier period. Moreover, its exercise would involve some form of discretion, an approach not sympathetic to the common law. Indeed neither

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60 (1724) 9 Modern 135.

Holdsworth nor Pollock and Maitland said anything on the topic. Macpherson referred somewhat obliquely to the custom of the manor whereby:-

> "If the guardian ill-treats the infant, or acts inconsistently with the trust or knowingly neglects his duty, he forfeits the wardship; and it was usual in former times, for the lord to remove him in such cases."[61]

The authority quoted by Macpherson[62] scarcely justified that proposition. On the other hand the analysis of the Chancellor in Morgan v Dillon,[63] which was partly historical in character, tended to substantiate the views of Macpherson.

32.56 The precise issue in that case was the removability of a testamentary guardian. West L.C. decided that, as guardianships were intrinsically the same and differences were not created by the method of appointment or nomination of the guardian, there was no reason why testamentary guardians were not subject to equitable control.[64] Almost fifty years earlier Lord Nottingham L.C. had decided that equitable intervention related only to common law guardianships; he therefore concluded: "... but here being a Guardian by Act of Parliament, I cannot remove him or her..."[65] The wider view[66] is perhaps preferable, for Holdsworth suggested, without distinguishing between types of guardian, that "As yet

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61 Macpherson, p. 46.
62 Coles v Wallis (1591) 1 Leonard 328, Croke Elizabeth 224.
63 (1724) 9 Modern 135.
64 Ibid. at pp. 139 to 141.
65 Foster v Denny (1677) 2 Chancery Cases 237 at p. 238 per Lord Nottingham L.C.
66 I.e. of West L.C.

the chief contribution which the court made to the law on this topic was the strict control which it exercised over the guardians' dealings both with the property and the person of the child."[67]

32.57 Whatever the extent of the power of forfeiture, the grounds were clearly enunciated by West L.C. in the Irish case.[68] They applied without discrimination to every type of guardian. The formulation of the grounds was "any misbehaviour or ill-usage of the person of the ward."[69] The Lord Chancellor went even wider when he suggested, perhaps generically rather than prescriptively, that "... whenever he [the guardian] misused that interest [of the ward], this Court could remove the person out of his custody."[70] He added, rather significantly, that when the interest enforceable by the wardship was "lucrative" to the guardian rather than "for the benefit" of the child,[71] the court could not intervene.

32.58 This analysis suggests that the equitable intervention of the Chancellor was designed, at least partly, to protect the interest of the child. This was probably limited to guardianships which acknowledged the child as the beneficiary of the trust created by the wardship. Once military tenures had been abolished in 1660, such equitable intervention would extend to all guardianships. The analysis also indicates

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67 Holdsworth, Vol. 6, pp. 649 and 650.
68 Morgan v Dillon (1724) 9 Modern 135 at p. 141.
69 Idem.
70 Idem.
71 This reflects the distinctive purposes of guardianship in chivalry and in socage.

that the establishment of the grounds of forfeiture was only the first step in the exercise. West L.C. unequivocally said that, once the ground had been established, "this court could remove the person out of his custody."[72] In other words the procedure involved the satisfaction of threshold requirements followed by the exercise of a discretion. The early cases gave no indication of how the power should be exercised; they merely stated in what circumstances the power was available. Finally, reference was made to custody not to the office of guardian. This is evidence of the move away from the conception of guardianship and towards that of custody. But by 1724, more than sixty years after the abolition of military tenures, this development should not have been unexpected.

32.59 Forfeiture applied without any semantic difficulty to guardianship, for a guardian was the holder of an office. It also applied to a person in whom custody was vested; whether a parent, qua parent or qua guardian by nature and nurture, or whether a guardian. This is so whether or not a parent could be regarded as an office-holder. The notion of an office involved first some kind of trust and consequently a person benefiting from the exercise of the official or judicial functions.

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72 See the quotation in para. 32.57: emphasis added.

32.60 The idea of a guardian as a trustee for the benefit of the child seems to have underpinned some of the relevant authorities. In Frederick v Frederick[73] and Duke of Beaufort v Berty[74] Lord Macclesfield L.C. clearly embraced the notion of guardianship as a trust. That was probably also true of West L.C. in Morgan v Dillon.[75] The notion was used much earlier. Pollock and Maitland noted that "a statute was required to convert the profitable rights of the guardian in socage into a trust to be exercised for the infant's benefit."[76] Here the interest of the child was in effect the object of the exercise of the discretion conferred upon the office-holder. So, even at this early stage, a distinction was emerging between the protection of the child as a ground of forfeiture and the interest of the child as the limiting factor restraining the way in which the subsequent decision on forfeiture would be made.

32.61 The idea of a trust in that sense was essentially a private matter between the guardian and the ward. Abuse of the guardian's fiduciary powers was in substance the ground of forfeiture of office. The whole process of forfeiture, particularly as the second stage involved the question whether the guardian should, as distinct from could, be removed, was not automatic. A decision on the merits of the individual case had at some stage to be taken. If

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73 (1721) 1 Peere Williams 711 at p. 721.
74 (1721) 1 Peere Williams 703.
75 (1724) 9 Modern 135.
76 Pollock and Maitland, Vol. 2, p. 444.

forfeiture was to be meaningful, that decision would require to be made by some person or body independent of the private trust created by the law. The courts of common law never exercised such powers. The matter was always reserved to the Lord Chancellor. West L.C. expressed the development very simply in 1724:-

> "At common law, before the statute[76].. by which the Court of Wards and Liveries was erected, the Lord Chancellor was the sole judge of wardships; but with this difference, that where they were lucrative to the Crown, there the Lord Treasurer acted, who had a concurrent jurisdiction with the Chancellor; but where wardships were not lucrative to the Crown, but only for the benefit of the ward, then the Chancellor alone had the disposition and management of the ward; therefore as the law now stands, the onera feudorum being extinct, and the Court of Wards abolished, and all the old tenures being turned into free and Common Socage, all wardships which are beneficial for the wards must return to this court, as to the original fountain."[77]

Thus the benefit of the ward lay first in the ward's relationship with the guardian, the "private trust"; and secondly in the supervisory jurisdiction of the Chancellor over the guardian, the "public trust."

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76 32 Hen. 8, c. 46.

77 Morgan v Dillon (1724) 9 Modern 135 at 139 per West L.C.

32.62 Although so much is clear, the origins of the Chancellor's powers are more of a mystery. According to Holdsworth, the generally accepted view is that the Chancellor's powers were based "not on any inherent jurisdiction, but upon a special delegation by the Crown of its prerogative right, as parens patriae, of looking after their [infant's] interests."[78] But that did not explain the derivation of the Crown's right. Macpherson's opinion on that question was very wide indeed: "... the State must of necessity place somewhere a superintending power over those who cannot take care of themselves."[79] Pollock and Maitland saw the prerogative developing from lands held in chief of the Crown.[80] Holdsworth, however, seems to have combined both views. Early in the development of jurisdiction over children, the King was regarded as the natural protector of those without kin.[81] The prerogative jurisdiction later evolved through direct knight service.[82] Whatever its origin, the existence of the prerogative jurisdiction could not be questioned.

32.63 The logic of the need for a general superintending power is understandable. Guardians succeeded to their office by common law entitlement. They could not be appointed by the King's justices in the common law courts. The father had at best a very narrow power of appointment of testamentary guardians. In effect, therefore, in the absence of common

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78 Holdsworth, vol. 6, p. 648.
79 Macpherson, p. 101.
80 Pollock & Maitland, vol. 1, pp. 321 and 322.
81 Holdsworth, vol. 2, p. 99. This apparently had a statutory foundation.
82 Holdsworth, vol. 10, p. 356.

law guardians, there was a gap which would remain unfilled unless the supreme executive power felt constrained to act. The King could do nothing personally.[83] So he delegated his function to the Chancellor. He too could do little personally and hence grew up the practice of ad hoc appointments of individual guardians.

32.64 The need for reasoning such as this is strengthened by comparison with the Scottish system. The institutions of tutors nominate and tutors dative were borrowed from Roman law. The latter type of guardian, in particular, could easily lead to the recognition of the powers of the Scottish Privy Council.[84] There was in Scotland, therefore, no gap which required to be filled by the acknowledgment of institutionally appointed guardians. The whole ethos of the equitable jurisdiction in England may well be founded upon a "public trust" idea: the acceptance of public responsibility for the well-being of children.[85] Medieval jurisprudence would not have seen it quite like that. But the notion of public responsibility, albeit limited in nature, scope and application, appears to have been one of the foundations upon which the later structure of the law, both common law and equitable, was erected.

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83 Except where he was in a direct legal relationship with the landowner by way of a tenancy by knight service.

84 The origins of the jurisdiction of the Scottish Privy Council are no clearer than those of their English counterparts.

85 Another example of "state" responsibility is the jurisdiction of the Mayor and Aldermen of the City of London in their capacity of the Court of Orphans: see Macpherson, p. 48 and Holdsworth, vol. 3, p. 511. This jurisdiction was probably derived from the prerogative jurisdiction.

(c) The influence of equity during the 18th century

(i) Introduction

32.65 After 1660 the way was clear for equitable principles to have a dramatic impact upon the legal position of children.[86] By 1732, as it has already been noted, attention had moved away from guardianship and towards custody. The idea of parental authority began to take the place of interests wedded to the land. The father, either in his own right or as guardian, was the holder of something in the nature of an office and liable to forfeiture of his position as guardian or custodian at the instance of the superintending Court of Chancery. The eighteenth century and early nineteenth century, before the era of statutory reforms, saw these developments consolidated. The equitable jurisdiction was more frequently invoked[87] and opportunities thereby given for the law to be clarified by statement and analysis. The common law foundation was not, naturally, ignored. Indeed the writ of habeas corpus came to play a role in enforcing rights which had in a sense been created by equity. It did so in rather an unexpected fashion. Until the intervention of Parliament in the nineteenth century, therefore, the interests of the child were required to be analysed in terms of legal and equitable principles. What happened before 1660 was as influential as what transpired after that date.

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86 Holdsworth, vol. 5, p. 315; vol. 6, p. 648.

87 Although some proprietorial interest may have been a jurisdictional requirement, even if the objective of the proceedings was the custody of the child: see Holdsworth, vol. 5, p. 315.

32.66 The principal characteristic of the medieval common law was its application of rigid rules. Arguably this is the antithesis of the nature of the current approach. There were opportunities for the common law to adopt a more flexible approach but it was obviously contrary to the medieval ethos to do so. Entitlement to office, the extent of the fiduciary powers and duties of the guardian, forfeiture of office: each was closely regulated. The fiduciary nature of guardianship, especially where the object of the trust was the benefit of the child, could have justified an imaginative use of the powers. The courts however never seem to have decided what the guardian or parent should have done: a prospective and creative function. They were content to decide on the guardian's fitness for office: a retrospective and negative approach. In other words, they were concerned with the existence of functions, not with the mode of their exercise; with threshold requirements, not with the exercise of a discretion. Equity was prepared eventually to adopt a creative as well as an adjudicative role.

32.67 There is, naturally, very little evidence of the medieval common law reluctance to engage in creative discussion of the benefits for the child of alternative courses of action. The doctrine of the preservation of the status quo was in effect entrenched in the philosophy of the medieval judiciary. This probably was occasioned by the unlikelihood of competitive claims for the care and control of the child. If there were such claims, the courts naturally adopted the most sensible course open to them: do nothing. The origins of guardianship, it will be recalled,were inextricably tied

to property. The inclination of the medieval common law to preserve the status quo probably stemmed from the procedure of the demurrer of the parol.[88] It too arose from the concept of seisin. The procedure was designed to give effect to the principle that "During infancy the possessory status quo is to be maintained."[89] Any action concerning the heir's inheritance was effectively suspended until he reached full age. Thus, in the words of Pollock and Maitland, "the status quo which the dead ancestor left behind him is stereotyped, whether it be to the advantage or to the detriment of the infant heir."[90] It is this disregard for the interests of the child which characterised the medieval approach and distinguished that view of the doctrine of the status quo from the view which later developed.

32.68 But even where there was the possibility of a choice to be determined by the courts, they did not accept the challenge. For example, where the mother and father were both dead, in the event of the infant being heir apparent to two ancestors, "priority of possession of the infant's possession might decide the preference."[91] A second example involved a dispute between the putative father and the mother of an illegitimate child. Neither parent had a common law right of guardianship. The medieval lawyers were therefore obliged to seek a different rule to apply. Apparently, "the

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88 See generally Holdsworth, vol. 3, pp. 513 to 516; Pollock & Maitland, vol. 2, p. 443.

89 Pollock & Maitland, vol. 2, p. 443.

90 Idem.

91 Macpherson, p. 54.

comparative affluence of the parents should be regarded."[92] On the face of it, this seems an approach more sympathetic to the child but in a modern context it is probably no more than a very primitive rule of thumb. The lawyers were probably not reacting in any way to the interests of the child. They were more likely seeking a way out of their dilemma of choice.

32.69 The common law clearly hesitated to impose a creative function upon itself. Equity did not do so immediately. Indeed in the later nineteenth and early twentieth centuries equity alone might not have been sufficient to impose a creative function on the courts. But courts of equity and Parliament acting together may have achieved that objective. One decision of the Court of Chancery indicates the hesitant approach to change. The competing claimants in Ord v Blackett[93] seeking control of the child were the executrix of the mother of the child[94] and the child's putative father.[95] Neither claimant thus had a particularly strong common law claim.[96] The guardian was regarded as a fit person to care for the child. But the court did not require the child to be taken from the putative father. An entirely negative or at best neutral attitude to the interests of the child seems to have been adopted. The comment was made that "removing this child from school into

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92 Ibid., p. 67. 93 (1724) 9 Modern 116.
94 She had succeeded in recovering for the child the lands bequeathed to her by her mother.
95 He had removed the child from school and sent her to live in the country.
96 The executrix had been appointed guardian by the will.

the country, into the [putative father's] house could neither be useful or instructive to her."[97] Despite this comment, the child was not moved. To remain where she was may not have been actually harmful to her but it did not appear to be of any benefit to her. Indeed the reason why the court reached that conclusion was "since he [the putative father] owned her to be his child."[98] This would seem to be an early example of the "blood-tie" rule.[99] This was the attitude evinced by the Court of Chancery in 1724. The evolution of a constructive rather than an obstructive approach was clearly not a rapid process.

(ii) Habeas Corpus

32.70 Until late in the nineteenth century the rules relating to children were distinctively common law or equitable. Nevertheless they seemed to influence each other to some extent. The common law originated as, and indeed remained the repository of, a set of rigid rules. Much of the learning on guardianship has become of historical interest only. But the evolution of something in the nature of paternal power created a considerable impact which to some extent influences the law even now. Habeas corpus proceedings, a common law remedy, became one of the principal methods for enforcing the evolving paternal power.[1] To some extent the eighteenth and nineteenth centuries in England represented a struggle between the common

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97 Ord v Blackett (1724) 9 Modern 116 at p. 117.
98 Idem. 99 Paras. 44.30-44.35.
1 The form of action in this context was trespass quare filium et haeredem suum rapuit.

law concept enforced by habeas corpus and the more discretionary approach of equity.[2]

32.71 Although habeas corpus became a method of enforcing paternal rights, its origins indicate a different, but consistent, purpose. It ensured the preservation of the legal status quo,[3] so as to prevent parents and others seeking to give effect to their apparent rights by interfering with the actual custody of children without recourse to a court of law. The eventual recognition in English law of a concept of parental power never extended to acknowledge the absolute quality of such power.[4] A parent had at most a prima facie claim to the care and control of his or her child. It was open to the Court of King's Bench in habeas corpus proceedings to refuse to deliver the child to his parent.[5] This left the parent in an uncertain legal condition. He had not been deprived of custody. Custody had not been conferred on the third party then in charge of the child. The parent's claim had simply not been enforced. Although the unenforceability of a parental right might lead to doctrinal ambiguities and to that extent it is a compromise, it indicates the absence of an absolute approach, even on the part of the common law courts. This, it is suggested, is not unexpected in light of the way the concept of parental power has developed in England.

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2 Scotland, it will be recalled, did not experience that phase of development. A concept of patria potestas was built into Scots law; so there was no need for it to evolve. There was no struggle between common law and equity. But in Scotland as in England the nineteenth century saw a strengthening of the paternal power and consequently of the parental rights approach.

3 See Macpherson, p. 152; R v Ward (1762) 1 Blackstone W. 386.

4 Although some judges have come close to treating parental power as an inflexible and unalterable legal right.

5 Macpherson, p. 160.

32.72 Since the writ of habeas corpus was available to enforce general legal rights of this nature, subject only to the limited judicial power of refusal, it could extend beyond enforcement of the parental power. It would be available to the mother of an illegitimate child,[6] although at one stage she had no rights as such a mother. But, of course, no person was in any better position. The writ could also be used by a guardian by virtue of his legal status vis-à-vis the child.[7] In all these cases the Court of King's Bench retained the power to decline to enforce what amounted to the claimant's prima facie right.

32.73 Refusal to enforce rights is not forfeiture but in practice they are not very different. The reasons for a refusal by the Court of King's Bench were very limited. Assuming that the child was not old enough to be able to formulate a choice to which the court would have regard, the court declined to act "when the enforcement of [the father's right] would be attended with danger to the child; and it has declined to deliver the child to him, when there was an apprehension of cruelty, or of contamination, by some exhibition of gross profligacy."[8] The satisfaction of these requirements[9] was a matter for the individual case and it clearly involved the application of an interpretational

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6 R v Soper (1793) 5 Term Reports 278; R v Moseley (1798) 5 East 224n.

7 R v Johnson (1723) 8 Modern 214.

8 Macpherson, pp. 157 and 158.

9 Which clearly involve exceptional and extreme parental misconduct.

discretion. It was thus very much a matter for the individual judge to exercise his judicial art in a specific set of circumstances. The Court of King's Bench was very reluctant to use these residual powers and it may have been this reluctance which created the impression of the invincible and almost sacred quality of parental rights.

(iii) Equitable intervention

32.74 The Court of Chancery always had available to it not only the power of appointment of guardians but also their control and superintendence:[10] the sanction being forfeiture of office. This applied also to parents, probably as an extension of their position as guardians. The position reached at the end of the period presently under review may best be described in the words of Lord Eldon L.C.:-

> "It is certain that the court will interfere against the acts of a guardian, if acting in a manner inconsistent with his duty; and it is equally clear that the court will control a parent if acting in a manner in which he should not."[11]

The Lord Chancellor made this comment in response to an argument that the benefit of the children was ground for controlling the legal right of the father.[12] Clearly, therefore, the benefit of the child was not the basis of intervention.

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10 Macpherson, p. 115.

11 Lyons v Blenkin (1821) Jacob 245 at p. 253 per Lord Eldon L.C.

12 Ibid. at p. 250.

But the grounds enunciated by Lord Eldon L.C. were equally general and imprecise. The Court of Chancery appears to have conferred upon itself a very wide interpretational discretion in determining the grounds for intervention. Much depended, as in the case of the Court of King's Bench, upon the attitudes of the individual judge. The general trend, of course, was for the Chancery judges to feel more inclined to intervene than their common law counterparts.

32.75 The exercise of this equitable jurisdiction over guardians, as distinct from parents, was important in two respects. The Court of Chancery was prepared to take a more flexible view of its functions in that context than in relation to parents. The generality of the ground for intervention[13] is indicative of this aspect. Thus, although the child's welfare was not itself a ground for intervention, the consequences for the child of the guardian's decisions were relevant. This is what has been called negative welfare: that is, an aspect of the child which is likely to be detrimentally affected by the guardian's conduct. As Macpherson expressed it:-

> "... [where there is] the least suspicion of the infant's being likely to suffer by the conduct of the guardians, the court will interpose."[14]

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13 I.e. acting inconsistently with the duty of a guardian.

14 Macpherson, p. 119.

32.76 The second aspect of the guardianship jurisdiction for comment is a synthesis of the early child-biased approach to wardship[15] and the late emphasis placed by the common law upon the position of the parent. Thus, while recognising that the jurisdiction was exercisable for the benefit of the child,[16] the Chancery judges at the same time were prepared to accord some weight to the views of the parents.[17] The guardian, therefore, far from being simply a trustee answerable to the court, was obliged to pay attention to the directions of the parents: less of a trustee for the child, more of an agent for the parent. This evolved in two ways: a general duty cast on the guardian to promote filial affection towards the parent;[18] and an obligation to attach weight to the paternal wishes on education, particularly religious upbringing,[19] even where this could be inconsistent with public policy.[20]

32.77 The interesting feature of this development is not the acknowledgement of the benefit of the child as one of the objects of the guardianship jurisdiction, nor the recognition of the parent's interest, but the nature of the duty cast on the guardian. The guardian, and ultimately the court as his superintendent, was given an administrative discretion to exercise. His duty was to give effect not to his own views nor to those of the parent. He simply was required to pay attention to the parent's wishes in particular. This was

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15 Treating guardianship except in the context of military tenures, as a private trust for the benefit of the child.

16 To some extent by looking at the wishes of the child in question: see R v Smith (1734) 2 Strange 982, where even the common law might consider the child's wishes.

17 Macpherson, p. 122.

18 Ibid., p. 121.

19 Ibid., pp. 122 and 123.

20 Particularly public policy which was anti-Catholic: see Macpherson, pp. 123 to 125.

a much more sophisticated and difficult task for the guardian to perform. There was no suggestion of it before the late eighteenth century. It was however a formula which later became very popular with Parliament. At this stage of development, therefore, the Court of Chancery was beginning to create decision-making techniques peculiarly appropriate to the nature of the function which required the discretions to be exercised for the benefit of the child. Equity was becoming concerned as much with the exercise of the discretionary element in the process as with the nature of the threshold requirements.

32.78 The Court of Chancery never seemed to intervene so readily between parent and child as between guardian and child. No doubt this was a reflection of the privileged position which parents as distinct from guardians were beginning to occupy. It reinforces, too, the role of parental wishes in the deliberations of a guardian. The judicial debate about intervention between parent and child thus centred largely upon the grounds for intervention rather than upon the methods and purposes of intervention, as in the case of guardianship.

32.79 Lord Eldon L.C., it will be recalled, described the ground for intervention in very wide terms.[21] It was in practice rather narrower than his formulation. According to Macpherson at least, removal of a parent was permissible in fundamentally two situations: failure to provide adequate maintenance and

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21 I.e. acting in a manner in which he should not.

failure to provide proper education.[22] This reflected the view of parental power as a concession to parents merely to enable them to implement their duties. In this sense the legal imposition of duties and the powers needed to give them effect were logically dependent aspects of the same concept. It is thus not surprising that the grounds for removing the power were simply failures to comply with the correlative duties.

32.80 Macpherson, however, identified one further ground for intervention which did not readily fit into this pattern. In his view, where:-

> "... his character is such that they will be in danger of personal ill-treatment or of moral contamination if they reside with him, the court has not hesitated to take the children from him, and to place them in safe custody ..."[23]

The test here was not so much what the father had done or failed to do but rather what he was. What he was, naturally, is a reflection of what he had done. But in this context the court was given a much more flexible test to apply. In addition, presumably, to examining what had happended in the past, the judges had to determine not the actual but the likely consequences for the future of the father's past behaviour. There was an element of speculation and of

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22 Macpherson, p. 142. Although Macpherson treated paternal desertion of his children in a different context, that ground was probably related to these two failures.

23 Macpherson, p. 143: see also p. 146 where he indicated that restraining a particular act of the father could be sufficient. The policy underlying these comments was "the moral consideration of seeing that he is safely and virtuously brought up."

prognostication. This is not a new approach now but its acknowledgement in the earlier period introduced a new dimension into the decision-making process at that time: a dimension which Parliament was later to endorse and expand. The importance of this particular ground for equitable intervention lies therefore in its almost inadvertent inclusion of the future integrity of the child as part of the reason for judicial protection of the child. This almost necessarily involves an element of both interpretational and administrative discretion.

Section 4 - Conclusions

32.81 Scots law, by borrowing from Roman law a modified version of the doctrine of patria potestas and most of the features of the institutions of tutory and curatory, established a clear distinction between notions of guardianship, parental power and custody. The unified jurisdiction of the Court of Session obviated the need for equitable principles to develop alongside the normal rules of law. The confusions which beset the development of English law were thus avoided. By the nineteenth century the concept of welfare was playing a more significant part in the law, but negatively rather than positively. The court was concerned more to protect the child from the excesses of his parents rather than to devise a solution particularly suited to his needs. In other words, welfare was more important as the consequence of threshold requirements than as the objective of the discretionary process. On the other hand, despite the difficulties encountered by the English system in getting rid of the feudal restraints upon the development of the law, by the

nineteenth century the Court of Chancery had probably advanced beyond the stage which Scots law had then reached in relation to the role of welfare. But later legislation, which was largely uniform throughout Great Britain, ensured that the crucial principles of each system were the same. Whether they were applied in the same way is another question.

32.82 The pattern of development in England was quite different. Inchoate notions of parental power came almost to nothing in the face of the feudal preoccupation with property and the protection of infant successors. Such protection was the main concern of guardianship and, until the abolition of the military tenures and the Court of Wards and Liveries in 1660, the other guardianships had little scope to play an effective part. But the more child-biased rules of guardianship in socage, by nature and by nurture, although for a long time largely ineffective, were the means whereby the law could outreach its feudal origins. By the seventeenth and early eighteenth centuries the welfare or benefit of the child was protected by the private trust concept of guardianship and the fiduciary duties cast upon the guardian.

32.83 The law then took an important change of direction. The existence of inchoate notions of parental power, the broadening of guardianship by nature and by nurture into something like an office of parenthood, the conversion of duties for the benefit of children into powers likewise exercisable for their benefit had together evolved by Blackstone's time into something approximating to the Scottish version of the patria potestas. This was probably purely coincidental. There is no suggestion that Scots law influenced English law.

32.84 Chancery had always exercised a superintending power over guardians, even though they were in other respects regulated also by the common law. It must have been quite natural for that court to have assumed a similar supervisory function in relation to parents. The parental power had, after all, probably arisen from the office of guardian, particularly guardianship by nature and by nurture. But equity did not apparently control parental authority as rigorously as it supervised guardians. It has always been, for instance, considerably more difficult to look after a child's person than his property. The moral position of a parent has no doubt been much stronger than that of a guardian, particularly by the time of the seventeenth and eighteenth centuries. The nuclear family was perhaps taking the place of the wider unity of kinship.

32.85 Equity probably reflected these social changes. It certainly would not have created them. The growing influence of parental authority is intelligible against this background. In England the common law courts came to respect and enforce this idea of parental power, subject to very few limitations. Equity expanded its supervisory role, not only to protect children but also, to some extent, to play a positive role in promoting their welfare. But in doing so the Court of Chancery felt bound to pay some attention to the wishes of the parents as well as to those of a child of sufficient age. This created a new approach: the exercise of an administrative discretion. This is probably the essence of the later statutory system. The Court of Chancery in England developed this technique before the Court of Session in Scotland did so.

This was the main point of distinction between the two systems by the first half of the nineteenth century. Thereafter Scotland probably reacted increasingly to the developments formulated by the English courts after the fusion of law and equity and to those positively enacted by the common legislation.

CHAPTER 33

THE POSITION PRIOR TO THE STATUTORY REFORMS: SCOTLAND

Section 1 - Introduction

33.1 The nineteenth century was a period of transition. It saw, on the one hand, the consolidation of the post - medieval approach to the regulation of parental rights and the interest of the child and, on the other hand, the existence of a certain flexibility of approach which could have led to a greater recognition of the interests of the child. Parliament however intervened. The Custody of Infants Acts 1839[1] and 1873[2] did no more than extend the context in which the Court of Chancery could exercise its discretion in favour of the mother and, through her but only through her, in favour consequently of the child. These Acts did not apply to Scotland. Scots law at that stage probably afforded sufficient[3] protection to the position of the mother to avoid the need for legislation. But the later Acts applied to both systems of law. The 1886 Act[4] strengthened considerably the position of the mother and directed a degree of attention to the interest of the child. The 1891[5] Act simply protected rather than advanced the interest of the child. Finally the 1925 Act[6] introduced the principle of the paramountcy of the welfare of the child. Later

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1 2 & 3 Vict., c. 54. 2 36 Vict., c. 12.
3 I.e. sufficient in the context of Victorian social values.
4 Guardianship of Infants Act 1886 (49 & 50 Vict., c. 27).
5 Custody of Children Act 1891 (54 & 55 Vict., c.3).
6 Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c. 45).

legislation has tended to be technical rather than fundamental. Parliament thus to some extent anticipated the way in which the law was being gradually developed by the judiciary.

33.2 There is no precise date on which, it could be said, a new approach commenced and the old ideas were discarded. This is partly a reflection of the discretionary and flexible nature of the legislation. Even so, despite the application in England of the 1839 and 1873 Acts, the most important date in the evolution of the modern approach is 1886. The purpose of this and the next chapters is to identify the role of welfare before the commencement of the 1886 Act.

33.3 Victorian society was probably as much concerned with the protection of property as with the preservation of the physical and moral integrity of the person of the child. Guardianship still occupied a prominent place in the legal regime concerning children. But even within the framework of guardianship greater emphasis was beginning to be placed on the person of the child. This seems to have brought about a certain marginal blurring of the concepts of guardianship and custody, the increasing conciseness of which had begun to emerge from the medieval confusion, particularly in England. It is thus impossible to separate parental power from guardianship. They interreact partly in terms of specific rules of entitlement, partly in terms of administration of the property or the person of the child.

Section 2 - The general approach to the interests of the child

(a) The influence of the patria potestas

33.4 By 1886 the position of a parent in Scotland had probably strengthened. This occurred largely at the expense of the tutor, who originally had been entitled to the custody of the pupil's person. In practice this right was substantially eroded by the claim of the mother to the care of her child of seven years or less. The position had probably changed in the interim to such an extent that the tutor's prima facie right to custody had become a power of control and superintendence of the child's person available only exceptionally in actual custody.[7] This emphasises, it is suggested, the official rather than the personal nature of the tutor's relationship with his pupil.

33.5 There was a corresponding change of emphasis in the nature of some of the parental duties. The patria potestas included a power inherent in the father to administer any property belonging to his child. Although the patria potestas was personal to the father, the administrative power could be delegated inter vivos or mortis causa.[8] In exercising this power the father was obliged to secure the child's interest in the property. To that extent he was acting as an unofficial tutor rei.[9] But by 1865 at the latest it was clear that the position of

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7 Craig v Greig and Macdonald (1863) 1 Macpherson 1172 at pp. 1179 and 1180 per Lord Inglis L.J.-C; Whitson v Speid (1825) 4 Shaw 42 at p. 43 per Lord Glenlee; Fisher v Fletcher (1827) 6 Shaw 270.

8 Craig v Greig and Macdonald (1863) 1 Macpherson 1172 at p. 1170 per Lord Inglis L.J.-C.

9 A and J Robertson, Petitioners (1865) 3 Macpherson 1077.

a father acting in this way as an administrator-in-law was not official but personal. He was not the holder of an office. His authority derived from the patria potestas. In A and J Robertson, Petitioners[10] a bankrupt father, whose son had inherited a fortune from an English relative, petitioned the court along with his son asking to be removed from office as administrator-in-law and for a curator bonis to be appointed. Although a curator bonis was appointed, the court declined to remove the father from office as administrator, partly because there was no office and partly because his rights could be interfered with only to the extent of the funds in question. Lord Inglis L.J.-C. commented in these words on the function of the father as administrator-in-law:-

> "It is a position inseparable from the relation of parent and child, and recognised by the municipal law of the country, and all therefore the court can do is to supersede him in the exercise of his powers derived from that relation, but not to deprive him of any office."[11]

33.6 These changes of emphasis are of some importance. The shift from a position of legal entitlement, even if subject to judicial superintendence, to one merely of direction and control is juristically fundamental in the context of the person of the child. It implies a clear quantitative and qualitative reduction in the capacity and hence status of the tutor.

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10 (1865) 3 Macpherson 1077.

11 Ibid. at p. 1079 per Lord Inglis L.J.-C. See also McNab v McNab (1871) 10 Macpherson 248 at p. 252 per Lord Deas who indicated that the appointment of a curator bonis did "not destroy the father's power, but only provide[d] a manager of the particular fund."

Similarly, the recognition of the parent as more than an office-holder increases the capacity of the parent and the authority of the patria potestas. These trends may also be discernible in English law in the movement away from guardianship to a concept of parental power.

33.7 When Lord Meadowbank indicated that the policy of the law of Scotland had been "to maintain the relationship of parent and child,"[12] he made no suggestion that it applied only to the father. Indeed the case before him was a competition between the mother of a girl of three and the child's tutor-at-law. In that situation the mother would normally be given the care and control of the child.[13] Any other conclusion could be brought about only in consequence of the establishment of one of the grounds for disqualification.[14] Even although the mother had something like an enforceable claim to custody of a child under eight years of age, she did not enjoy the benefit of patria potestas. That was reserved exclusively to the father.

33.8 There were, however, at least two aspects of the patria potestas.[15] Although some of the institutional writers were ambiguous in some of their references, they indicated the foundation of these two distinctive aspects: one being a very general power of control, direction and superintendence of the child; the other, the correlative of the parental duties, being

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12 Campbell v Campbell (1833) 11 Shaw 544 at p. 545 per Lord Meadowbank.

13 Craig v Greig and Macdonald (1863) 1 Macpherson 1172 at p. 1180 per Lord Inglis L.J.-C.

14 Para. 32.33.

15 I.e. discounting for the present the power of administration distinguished from the patria potestas by Lord Inglis L.J.-C. in Craig v Greig and Macdonald (1863) 1 Macpherson 1172 at p. 1179.

the custody of the child. The distinction had never been fully elaborated. It may have been to some extent a matter of language but, even so, its importance could not be ignored. The Court of Session came close to postulating a distinction of this type in 1863.[16] They did so by discussing comparatively the positions of the father, mother and tutor. Although the rules referred to by the court are familiar, the language of their expression seems particularly helpful. After mentioning the concept of patria potestas from the father's point of view, the court continued:-

> "The mother never possesses any authority of the same kind with the patria potestas. During the years of nurture, the non-separation of mother and child is a matter of necessity, arising from the plainest dictates of nature. After the years of nurture, the right of the mother to the custody of a child in pupillarity stands on a totally different ground. During the life of the father, the child is, by his overruling dominion, kept within the family, and so consigned to the custody of the mother. Even after the father's death a child above the years of nurture, but in pupillarity, is still the subject of legal custody. But the mother has no title to that custody. It belongs to the tutor, whether tutor-nominate or tutor of law, to provide for the residence, custody and education of the child; and he will not, for

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16 Craig v Greig and Macdonald (1863) 1 Macpherson 1172.

> slight reasons, be allowed to withdraw the child from the residence of its mother. But all the widowed mother's rights to the custody of the child after the years of nurture, flow entirely from the tutor. In the lower ranks, among whom children generally have no legal guardians, the mother commonly assumes the custody of such children without any legal title .... When the child attains puberty, all legal authority of the mother over the child is at an end, unless she has been nominated by her husband or chosen by her child, as one of his curators."[17]

This extract indicates the distinctions between legal theory and actual practice, between the static quality of guardianship and the dynamism of custody and between the original nature of guardianship and the derivative aspects of custody. Custody was viewed also on the one hand as a legal entitlement and on the hand as the physical status quo.

33.9 The patria potestas was the only wholly original and independent right. In it was incorporated the widest duty to care for the child and his property. The rights to custody and to administer the property were the means of implementing that duty. It was also a fragmented concept. The father could delegate his powers during his lifetime, although in relation to the child's person in particular the responsibility remained with him.[18] It is in this sense that the father could never be deprived

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17 Ibid. at p. 1180 per Lord Inglis L.J.-C., Lords Benholme and Mackenzie.

18 I.e. his duties could not be delegated.

of his position as father. He could however be temporarily suspended from the exercise of some of his powers. His status was thus not official but personal.

33.10 The mother's position seems to have been partly original and partly derivative. During the first seven years of the child's life her interest in the child was original.[19] To that extent it reduced quantitatively the status of the father. Apart from the "necessity" of her position, she probably also acted as the delegate of the father. This could alter the juridical quality of their respective interests if it were a matter of agreement.[20] But if the mother were to be treated as the legal rather than the consensual delegate of the father, her interest would remain original and not derivative. But once the child had reached eight years of age, the mother's position was wholly derivative; as the consensual delegate either of the father or of the tutor. Where the father was dead and there was no tutor, the mother lacked "any legal title."

33.11 The tutor's rights, finally, were wholly derivative.[21] Although he was technically entitled to custody,[22] the tutor's interest was restricted in effect to its negative aspect: strictly, the duty to provide for the child's "residence, custody and education." The use by the court of the word "custody" in two clearly distinct senses[23] indicates not only the semantic

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19 As a matter of "necessity" and "nature": see the quotation in para. 33.8.

20 In that event the mother's authority would depend entirely upon that of the father.

21 Even when the tutor was appointed other than by the father. Any tutor is at best a parent-substitute; parental and tutorial powers cannot be exercised simultaneously.

22 But see para. 32.26.

23 I.e. legal and actual.

difficulties of that word but also the "power" and "duty" aspects of these concepts. The restricted status of the tutor seems to have been acknowledged late in the development of the law and was in effect a growing recognition of the increasing status of the mother of the child.

33.12 This analysis is reinforced by the attitude of the Inner House of the Court of Session in Pagan v Pagan.[24] The father worked overseas while the mother and children resided in Scotland. He was apparently dissatisfied with his wife's care of the children and through his mandatary petitioned the court for confirmation of his right to custody plus an order delivering them to his mother. His case was based upon the father's broad right of guardianship which included power to regulate custody as distinct from a right to custody. The court supported his argument. According to the Lord President,[25] "the right of the father to regulate the place of the residence and education of his children cannot be withdrawn by any discretion exercised by this court"[26]... The issue became therefore a "pure question of law."[27] The court recognised the two principal exceptions to that doctrine: where the father was shown to be personally disqualified; and where the child, being not more than seven years of age, was with the mother. In this particular case, however, three of the four children were under eight but that did not deter the court

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24 (1883) 10 Rettie 1072.

25 Lord Inglis.

26 (1883) 10 Rettie 1072 at p. 1073 per Lord Inglis L.P.

27 Ibid. at p. 1074 per Lord Deas.

from granting the father's petition. That point apart, the case confirms the distinction between the power of superintendence and the right to custody. In either situation the decision of the father would have been supported by the court.

33.13 The importance of patria potestas as the foundation of the father's status had an impact upon the nature of the jurisdiction of the Court of Session. In 1828 Lord Cringletie commented:-

> "The guardianship of all unprotected persons ... was formerly vested in the Crown. The King, as pater patriae, was clothed with authority to do this; and, as a matter of course, where persons, within the years of pupillarity, have neither testamentary tutors appointed to them, nor a tutor at law served to the office, his Majesty, through his Exchequer, still bestows a gift of tutory on someone to protect the pupil."[28]

An appointment was thus made to superintend the upbringing of the pupil, not to take charge of the person of the pupil. This contrasts with the English position where the child is a ward of court and under direct judicial supervision.[29] The court itself decides who has care and control, custody, access and so on. The Scottish system places the tutor in an intermediate position. Indeed in Kennedy v Steele[30] Lord Gillies specifically commented

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28 Boyce v Grahame (1828) 6 Shaw 425 at p. 433 per Lord Cringletie.

29 Para. 41.9.

30 (1841) 4 Dunlop 12.

that, unlike the Court of Chancery, the Court of Session had no power "to take the child under our own control as our ward."[31] The power of the Scottish courts was thus merely general superintendence: they ensured that steps were taken to make available someone to look after the child; they did not directly ensure that the child was protected. This was no doubt a technical distinction but one of practical importance.

33.14 The fundamentally significant role of the patria potestas appears in another less obvious manner. When the father was dead, the tutor, if there was one, had title to the custody of the pupil, subject only to the rights of the mother when the child was under eight years of age. The father, of course, was entitled to nominate tutors to his pupil children after his death. But that right was personal to him; it could not be delegated to a third party. Implying such a delectus personae from the Roman law maxim "tutor incertus dari non potest", Lord Neaves indicated in Walker v Stronach[32] that a father's testamentary trustees who were also nominated as tutors to his pupil children could alone act as such tutors. Any later trustees assumed by the existing trustees did not thereby take office as tutors.

33.15 The extent of respect for parental authority included giving effect to wishes expressed by the father in his will. For

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31 Ibid. at pp. 14 and 15 per Lord Gillies.

32 (1874) 2 Rettie 120 at p. 122.

example, in Allan v Allan's Trustees[33] the trustees who were also tutors gave partial effect to the recommendation in the father's settlement that his sons should be removed from the control or influence of their mother. The court has generally tended not to destroy the relationship between a child and each parent by giving rights of access[34] unless there were strong reasons for not doing so. In this case the mother was given limited rights of access but subject to judicial control.

(b) The interests of the child

33.16 Although the general approach in the nineteenth century in Scotland was to respect the patria potestas when the father was alive and to give a general function of superintendence to the child's tutors when the father was dead, subject in each case only to the interest of the mother in caring for her child under eight, the interests of the child as such were not entirely ignored. This appears first of all from the justification given for maternal care during the first seven years of life. Lord Mackenzie[35] gave two reasons for the natural guardianship of the mother of children up to seven years of age: first, as he said, "for the sake of the children, the mother having stronger affection for them than anyone else can have,"[36] and secondly, "for the sake of the mother herself, that she may satisfy her

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33 (1869) 41 Scottish Jurist 617.

34 E.g. Logan v Cathcart (1827) 5 Shaw 341; Fisher v Fletcher (1827) 6 Shaw 270.

35 Dallas v Dundas (1845) 8 Dunlop 318.

36 Ibid., at p. 320 per Lord Mackenzie.

anxiety and generate those filial affections in the children which absence is apt to prevent."[37] These reasons certainly have a Victorian flavour but they may be found to be echoed even in the second half of the twentieth century.[38]

33.17 The interest of the child had been recognised however mainly by forfeiture of office or, in the absence of office, by the temporary suspension of the exercise of powers. In either case the relationship between parent or tutor and child was broken and to that extent protection afforded to the child. It is another question whether and how further steps were taken for the care of the child. The status quo created by breaking the parent or tutor relationship might have been sufficient in some cases but not in all circumstances. Unless sympathetic relatives or friends or private or public institutions were available, there was probably no solution. But even if alternative sources of care were available, the court would need to be convinced in the exercise of its discretion to use them.

33.18 Disqualification was a matter of establishing threshold requirements.[39] There were plenty of examples of this. The court would normally after disqualification rely upon the status quo, particularly when the matter could be resolved in terms of legal rights. In the absence of legal rights, of course, it would be much easier for the court to exercise its

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37 Idem.

38 Para.41.70.

39 Paras. 33.29 to 33.40 and 33.55 to 33.74.

discretion; for example, both parents being dead, a competition might arise between paternal and maternal groups of relatives. The distinction between the establishment of threshold requirements and the consequent discretionary process had not been recognised in terms by the courts but its existence was impliedly acknowledged.In Kennedy v Steele,[40] for example, Lord Boyle L.P. discussed the grounds for disqualifying a mother from control of her child but regarded it as a separate question where the child ought to be.

33.19 In practice it is difficult to isolate these two aspects[41] of the whole process. The effect of disqualification is merely to take away from the person disqualified the power to decide upon the child's place of residence, scheme of education and so on. It does not necessarily change the actual care and control of the child. There is a difference between removing a child from an undesirable environment and placing the child in a better environment. The courts in nineteenth century Scotland did not make decisions of the second type; they simply determined who was the most appropriate person to make these decisions. If that is so, it is understandable why the courts were concerned almost entirely with disqualification. If one person was disqualified, the person with the legal right in that person's absence would be preferred. But if there was no such person with a legal right, or if that person was

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40 (1841) 4 Dunlop 12.

41 I.e. threshold requirements and the exercise of a discretion.

unwilling to accept the responsibility, there would be a legal vacuum which the courts could fill or not as they might decide. In Kennedy v Steele[42] the child was in the care of third parties. The mother attempted to enforce her interest not by seeking custody herself but by asking the court to order the third parties to give up the child and hand him over to other named persons. The mother's petition was refused because of her disqualifying conduct. The child remained where he was, with the agreement of the child's closest paternal relations. The mother was thus deprived of her decision-making power but the legal vacuum was left unfilled.

33.20 Whether a parent or tutor has disqualified himself from making decisions does not necessarily require reference to the interest of the child, although clearly such a decision has an impact, indeed a deliberate impact, upon the child. The court would normally be aware of the condition likely to be created by disqualification. This does not mean that the parent would be disqualified simply because to do so would be better for the child. The Court of Session, however, came very close to adopting that approach in Denny v Macnish.[43] The father of the children in question was dead and the mother retained custody of them. She married a second time. Problems arose in relation to the second marriage and she made unfounded allegations against her husband. According to the Lord Justice-Clerk the

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42 (1841) 4 Dunlop 12.

43 (1863) 1 Macpherson 268.

facts surrounding these allegations demonstrated "only too plainly that the home of [the mother and her husband] is not a fitting or safe home for children."[44] The mother was thus disqualified and the children removed.

33.21 The petition had been presented by the factor loco tutoris administering the estate of the pupils in conjunction with the nearest relations of the pupils on their father's side. The petitioners had not sought custody for themselves but merely to ensure proper provision for the residence, maintenance and education of the pupil children. Nevertheless Lord Inglis L.J.-C. said:-

> "The proper question for the consideration of the court in the special circumstances of this case is, whether it be more for the benefit of the pupils that they should be left in the custody of their mother, or removed therefrom."[45]

He did not indicate whether this question was directed to possible disqualification of the mother or whether it concerned the broader issue of what would be best for the child. On the face of it, the broader issue seems to have been within the contemplation of the court but the actual form of the court's ultimate decision suggests otherwise. The children were ordered to be delivered to the factor loco tutoris who was then

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44 Ibid., at p. 272 per Lord Inglis L.J.-C.

45 Idem.

directed to submit a scheme for the residence, maintenance and education of the pupils. The court did not therefore decide what was best for the children. They simply took steps to ensure that they would be properly cared for. The judicial role was general superintendence, not care and control. Even so, in this narrower context," the benefit of the pupils" played a part in the deliberations of the court, but a part which cannot be described with precision.

33.22 In the earlier case of Buchan v Cardross[46] the interests of the child also seem to have been relevant in the disqualification process. The children's grandfather petitioned for the removal of the children from the custody of their mother and for an award of custody in his own favour. The issue reported by Dunlop concerned enforcement of an interdict against removing the children from the jurisdiction[47] but in the course of his judgment Lord Fullerton commented:-

> "The custody of the children may, indeed, be a right, but it is a right to be exercised, not for behoof of the possessor if it, but for behoof of the children themselves."[48]

In that sense, custody was regarded not a right but rather as a fiduciary duty. That judicial comment was a reflection of earlier statements,[49] but the Lord of Session applied a similar test for the exercise of the judicial power of superintendence

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46 (1842) 4 Dunlop 1268.
47 Almost always a matter of concern to the courts: see McCallum v McDonald (1853) 15 Dunlop 535 and Thomas Speirs, Petitioner (1854) 17 Dunlop 289.
48 (1842) 4 Dunlop 1268 at p. 1274 per Lord Fullerton.
49 Paras. 32.9, 32.28 and 32.29.

of the person entitled to custody:-

> "Wherever it is essential to the protection of interests that the power should be immediately exercised, it is competent to the Lord Ordinary to do so. Indeed I think the necessity for this is much stronger when the custody of children, and not a patrimonial right, is concerned. The true interest is the interest of these minors."[50]

These issues were determined therefore in terms of powers and functions, the inadequate exercise and fulfilment of these powers and functions rather than in terms of legal rights and entitlements. But legal rights and entitlements were not irrelevant. They were important not as rights but as material considerations in the exercise and fulfilment of these powers and functions. In adopting such an approach, the courts introduced an element of discretion: interpretational discretion at the stage of establishing threshold requirements; administrative discretion at the final stage of the process.

33.23 The resort to a discretionary approach where the issue was largely unaffected by legal rights is best illustrated by McLay v Thornton.[51] The parents of the children in question received parochial relief. The mother's health deteriorated soon after the father's death. She was removed and placed by

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50 (1842) 4 Dunlop 1268 at p. 1274 per Lord Fullerton.

51 (1868) 41 Scottish Jurist 68.

Roman Catholic priests in one of their homes. At the same time the children were placed in a Roman Catholic orphanage. The children's paternal grandfather and the parochial board disapproved and unsuccessfully asked for the children to be handed over. The managers of the orphanage argued that they had been nominated guardians, while the mother had allegedly expressed a wish that the children should be brought up as Roman Catholics. The paternal grandfather petitioned for delivery. The Court of Session took the view that the orphanage managers had no legal claim whatever to the custody of the children. Although the grandfather might have needed parochial assistance, "his relation to them as nearest male agnate, and his excellent character, clearly pointed him out, alike on grounds of law and of expediency, as the most suitable person to be their guardian."[52]

33.24 No question of threshold requirements arose in that case. Disqualification was unnecessary. The court was concerned only with who was best qualified to look after the children. The grandfather had a legal claim but a relatively weak one. The principal reason for his qualification was "expediency." The criterion was "suitability". These are terms altogether different from those relevant to the disqualification process. The superintendence of the Court of Session in the absence of legal rights was clearly protective but it was also intended to bring about the best possible solution from the children's point

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52 Ibid., at p. 69.

of view. No judicial reference was made to the interests or benefit of the children as the standard of expediency but that was the clear implication of the judicial reasoning. A jurisprudence of interests was thus emerging in the absence of legal rights. The ultimate step in the process would be to eliminate legal rights and render the law a total jurisprudence of interests.

Section 3 - Guardianship

(a) The father as administrator

33.25 A father, it will be recalled, in exercise of his patria potestas is the administrator of any property belonging to his pupil children. He acts in this capacity by virtue of his relationship with his child.[53] There is no need for formal appointment. But his exercise of these powers of administration may be temporarily suspended and a factor loco tutoris appointed to act during such period of suspension. The immediate question is what part the child's interests play in this process.

33.26 There are two stages in the process: the suspension from the exercise of the power and the appointment of a substitute. The courts have usually treated the issues as one matter. Where all the parties involved in the decision, the father, the child's next of kin, the child's other interested

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53 He does not hold an office: A and J Robertson, Petitioners (1865) 3 Macpherson 1077 at p. 1078 per Lord Inglis L.J.-C.

relatives and so on, have agreed to the proposals, it is unlikely that the court would decline to grant the petition seeking the appointment.[54] But a conflict of interest could arise between the father and the child and such a conflict would be the basis of the petition, instigated perhaps by an interested relative of the child[55] or by his official guardian.[56]

33.27 If a conflict of interest were regarded as the fundamental reason for suspending the paternal power, which it probably is,[57] that impliedly recognises that the child has an interest legally distinct from that of his father. Judicial intervention is also a recognition of such a distinction. The courts have hesitated to indicate generally what were the threshold requirements for the exercise of the power of suspension. Each case was considered in the light of its own circumstances. This suggests an element of discretion in the determination and application of any such threshold requirements. The judicial approach was thus negative. It has, for example, been pointed out that the bankruptcy[58] or poverty[59] of the father was not enough to take away his powers. In Wardrop v Gossling[60] the court seemed to be looking for maladministration or at least a risk of maladministration as the ground for intervention, while in McNab v McNab[61] the court found evidence of a "gross violation of the duty of a parent as the guardian of his son"[62] and for that reason intervened. It is thus impossible to be

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54 Napier, Petitioner (1851) 14 Dunlop 10; Mann, Petitioner (1851) 14 Dunlop 12. See also Speirs, Petitioner (1854) 17 Dunlop 289.
55 As in Napier, Petitioner (1851) 14 Dunlop 10.
56 As in Speirs, Petitioner (1854) 17 Dunlop 289.
57 See McNab v McNab (1871) 10 Macpherson 248; Mann, Petitioner (1851) 14 Dunlop 12.
58 A and J Robertson, Petitioners (1865) 3 Macpherson 1077.
59 Wardrop v Gossling (1869) 7 Macpherson 532.
60 (1869) 7 Macpherson 532. 61 (1871) 10 Macpherson 248.
62 Ibid., at p. 253 per Lord Inglis L.P.

specific in relation to the relevant threshold requirements. What is clear, however, is the judicial implication that the child has an interest, independent of his father, recognised and enforced by judicial process.

33.28 There is even less authority on how the power of suspension should be exercised after the grounds for intervention had been established. The impression is that the appointment of a substitute for the father was almost automatic once it had been decided that he should be superseded in the exercise of his powers. If that is so, the interests of the child were probably relevant not only to the threshold requirements but also as the test for the exercise of the power of appointment. In Lady Bethune, Petitioner[63] it appears that the interests of the whole family played a part in the appointment process. The test propounded in Fergusson v Dormer[64] and Macdonald v Next of Kin[65] was "necessity." These two cases were concerned with the selection of a curator, a different process, but the test of "necessity" is not necessarily inconsistent with the test of the interests of the child. It is merely a stronger version of the same approach, particularly if the qualification of necessity is itself the interest of the child. These conclusions are, however, tentative at best, for the courts have not commented directly on this aspect of the appointment process. In principle, at least, the conclusions have some merit. Stair,[66] it will be

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63 (1851) 14 Dunlop 10.
64 (1870) 8 Macpherson 426.
65 (1864) 2 Macpherson 1194.
66 Stair, 1. vi. 10.

recalled, indicated that in appointing tutors-dative, consideration should be given to the interests of the pupil. There is nothing so intrinsically distinctive between a tutor-dative, a curator bonis or a factor loco tutoris as to indicate a different or inconsistent approach.

(b) Forfeiture and disqualification

33.29 Forfeiture in this context affected principally the mother of the child. Cases concerning the patria potestas were quite different. So, too, were those concerning guardians although guardianship is an office for which a person may in strict terms disqualify himself, while a father's exercise of certain powers comprised in the patria potestas may be merely suspended. Thus both a mother and a guardian had rights which were liable to forfeiture. The mother's right was a personal relationship with the child until the age of eight. It would be expected therefore that the grounds of forfeiture would relate to that personal relationship. A guardian, on the other hand, exercised powers of supervision only. His relationship with the child was fiduciary rather than personal. This also would be expected to be reflected in the grounds of forfeiture.

33.30 The grounds of maternal disqualification related principally to the adequacy and acceptability of the parent. The effect on the child was beginning to become relevant only towards the end of the period under review. It was rather an issue of principle than of an examination of each case either from the parent's point of view or from the child's position. One of the two principal grounds of forfeiture may be generically described as sexual immorality. In three cases,[67] for example, the mother had given birth to an illegitimate child after the death of her husband. In another case[68] the illicit relationship between the mother and her paramour continued after the husband obtained decree of divorce for adultery. In each case the mother was deprived of her personal relationship with the child, or at least, the court would not enforce her right.[69]

33.31 In Walker v Walker[70] a further reason existed to deprive the mother of her personal relationship with the child: namely, that her place of residence was not calculated to provide proper means of education for the child. The principal objection to the mother, however, seems to have been based upon the impropriety inherent in her character[71] which automatically rendered her unfit to have care and control of the child. None of the judges indicated why illicit sexual activity necessarily rendered a mother parentally unfit. It seems to have been

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67 Walker v Walker (1824) 2 Shaw 788; Paul, Petitioner (1838) 16 Shaw 822; Gulland v Henderson (1878) 5 Rettie 768.
68 Kennedy v Steele (1841) 4 Dunlop 12.
69 As in Kennedy v Steele (1841) 4 Dunlop 12.
70 (1824) 2 Shaw 788.
71 The approach adopted by Lord Deas in Gulland v Henderson (1878) 5 Rettie 768 at p. 769.

assumed or, at best, treated as a matter of judicial knowledge.[72]

33.32 Even more questionable, at least currently,[73] would be the second of the two principal grounds of forfeiture: the marriage of the mother after the death of the child's father. There was nothing unlawful about this event. Nevertheless it attracted the criticism of creating parental unfitness. In Fisher v Fletcher[74] the mother's second marriage seems to have been the only reason why the child was removed from her custody, despite an argument that at her age[75] it was more advantageous for the child to be with her mother. On the other hand in Logan v Cathcart[76] and McCallum v McDonald[77] there were other circumstances, apart from the mother's remarriage, which supported the court's decision to break the personal relationship between the mother and her child. In the former case the child's delicate health and in the latter case the stepfather's unconvincing circumstances[78] were taken into account. In any event the position of the child was not part of the judicial reasoning.

33.33 Although the report of McCallum v McDonald[79] contains no judicial opinions, the reporter's note states that one of the arguments relied on was that the stepfather's situation "gave no ground for confidence." The issue of confidence was not analysed by the court but presumably it meant confidence in the stepfather

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72 See further in chapter 45.
73 It is, of course, unfair to apply 1977 moral standards to early Victorian society.
74 (1827) 6 Shaw 270.
75 The child was nine.
76 (1827) 5 Shaw 341.
77 (1853) 15 Dunlop 535.
78 The allegations were, he had no means, was unknown to the parties involved and intended to go to Australia.
79 (1853) 15 Dunlop 535.

from the child's point of view. If so, this is an indication, admittedly implicit only, of some regard for the child. There are however two decisions which contained an explicit rather than a mere implicit recognition of the child's interest. In Denny v Macnish[80] the mother of the child had contracted a second marriage but it was the home created by that marriage which induced the court to remove the children from their mother. That environment, they concluded, was "not a fitting or safe home for children."[81] The court thus looked at the effect on the children of residence with their mother and stepfather; an example of negative welfare as a ground of forfeiture or disqualification.

33.34 Muir v Milligan[82] is a second example of the negative approach to welfare. One of the reasons allegedly justifying forfeiture was the mother's immoral conduct with her subsequent second husband. The other reason was that she was teaching her child bad habits, by encouraging him to drink "ardent spirits," to smoke tobacco and to rise early in the morning:[83] strange allegations indeed in relation to a child aged two. The matter was remitted to the sheriff to inquire and report and in his report he concluded that it would be "prejudicial"[84] to the child to remain in the mother's custody. This view was accepted. Thus the court looked not to the parental misconduct itself but to the

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80 (1863) 1 Macpherson 268.

81 Ibid., at p. 272 per Lord Inglis L.J.-C.

82 (1868) 6 Macpherson 1125.

83 Ibid., at p. 1126.

84 Idem.

effect of such misconduct on the child. Such a distinction is important. It indicates that the courts were beginning to be more discriminating in their approach, with the bias inclined more towards the child. The nature and consequences of parental misconduct were becoming more important than the fact of parental misconduct.

33.35 The doctrine of disqualification applies also to holders of the office of guardian. There is, of course, no necessary direct personal relationship between the guardian and his charge. The law has recognised tentatively that the guardian's duties are to some extent fiduciary. Thus their fulfilment will be more likely to be prompted by a consideration of the child's interest. The grounds for forfeiture of office may therefore be expected to be a conflict of interest or a breach of the fiduciary duty. In Gibson v Dunnet[85], for example, where the competitors[86] were otherwise equally eligible, the nearest agnate of the child was held to be disqualified because he had an interest in the death of the child. Although the issues in Buchan v Cardross[87] were only partly related to guardianship the Inner House seem to have conceived clearly the nature of the guardianship function as fiduciary[88] and as a consequence to have regarded the grounds of forfeiture as correlative to the nature of the function. On that basis the court would be more inclined

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85 (1824) 3 Shaw 249.
86 Who were maternal and paternal relatives. The child was an orphan. Paternal or maternal claims and rights were thus irrelevant.
87 (1842) 4 Dunlop 1268.
88 Ibid. at p. 1273 per Lord Cuninghame and at p. 1274 per Lord Fullerton.

to intervene on grounds of prejudice to or neglect of the child's interest: a much less precise threshold requirement than the one applying to the mother, and, for that reason, one more susceptible to individual application. The grounds of forfeiture of the office of guardian were thus more closely related to the position and interests of the child than those affecting the personal parental capacity of the mother.

33.36 There is probably one further example of this approach when the court was prepared to look at each case individually and to some extent from the point of view of the child. Indeed in Whitson v Speid[89] the court was in effect forced to approach the issue in this way, for it was conceded that neither party had a realistic claim for custody. The trustees of the father of an illegitimate child sought custody of the child from the mother. The trustees had no legal right to claim custody.[90] The court considered that it was very doubtful if the mother had such a claim, particularly when she had more or less disqualified herself by remarrying.[91] For these reasons the court asked the question - what was best for the child. The status quo was in effect left intact because that was best from the child's point of view. Such circumstances, free from legal entitlement, were rare but their existence afforded an opportunity to the courts to exercise their discretionary skills in the direction of the child's welfare.

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89 (1825) 4 Shaw 44.
90 Ibid., at p. 45 per Lord Glenlee.
91 Ibid., at p. 45 per Lord Glenlee.

33.37 Once it had been decided, almost entirely as a matter of law,[92] that the mother or the guardian had forfeited her or his interest in the child, the court would probably proceed to appoint a substitute. They might however, depending upon the way in which the matter had arisen, do nothing. In Kennedy v Steele,[93] for example, the court merely declined to enforce the mother's potential right to resume charge of the child after custody had been delegated to third parties. The consequence of such a procedure was not unlike the state of legal uncertainty which arose in England when habeas corpus was refused.[94]

33.38 The circumstances in which a competition might arise for control of the child are theoretically infinite. Disputes between non-parental relatives were not uncommon.[95] But most cases during the period under review involved the mother and the guardian. The general tendency in all of these cases was to prefer a legal solution to the exercise of a discretion. Indeed in determining a petition for custody by a mother against her deceased husband's trustees who had also been appointed tutors, Lord Boyle L.P. said:-

> " ... as no personal ground of objection or disqualification is stated against the petitioner, we must decide upon her application in this petition according to what are the rules of law, and the due exercising of the superintending control of this court."[96]

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92 I.e. any discretion was likely to be interpretational.
93 (1841) 4 Dunlop 12.
94 Paras. 32.70 to 32.73.
95 E.g. Gibson v Dunnet (1824) 3 Shaw 249.
96 Dallas v Dundas (1845) 8 Dunlop 318 at p. 319 per Lord Boyle L.P.

The Lord President's subsequent references to the welfare of the children[97] did not detract from that proposition. They seem to have been directed more to justify the interference of the court rather than to indicate what part welfare should play in that process. Once a mother or a guardian had disqualified herself or himself, therefore, a substitute would be appointed almost automatically without regard to the needs of the child or to the question whether the child would be better residing with his mother, despite her misconduct, rather than living in a new regime.

33.39 In disputes between the child's mother and his guardian it was of no consequence what was the source of the guardian's authority. The guardian might be the child's tutor-at-law,[98] testamentary tutor acting also as the father's trustees[99] or a factor loco tutoris acting with[1] or without[2] the concurrence of the child's nearest relatives. If the mother was found to have disqualified herself, the tutor would be directed to fix a suitable place of residence for the child and to provide a scheme for his maintenance and education.[3]

33.40 The child's interests or welfare played no major part in the decision whether the mother had disqualified herself. Some of the later cases,[4] it will be recalled, suggested that welfare could perhaps be beginning to play a negative part in

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97 Ibid., at p. 320.
98 Walker v Walker (1824) 2 Shaw 788; Fisher v Fletcher (1827) 6 Shaw 270.
99 Dallas v Dundas (1845) 8 Dunlop 318.
1 Denny v Macnish (1863) 1 Macpherson 268; Gulland v Henderson (1878) 5 Rettie 768.
2 Muir v Milligan (1868) 6 Macpherson 1125.
3 See e.g. Walker v Walker (1824) 2 Shaw 788; Fisher v Fletcher (1827) 6 Shaw 270; Gulland v Henderson (1878) 5 Rettie 768.
4 E.g. Muir v Milligan (1868) 6 Macpherson 1125.

the disqualification process. None of the cases clearly distinguished between the threshold disqualification stage and the discretionary appointment stage. It would therefore be invalid to imply too much from the judgments. But in Muir v Milligan[5], it has already been argued, welfare was perhaps operating negatively in the threshold context. It was also beginning to play a small part in the discretionary process. In Dallas v Dundas[6] Lord Boyle L.P. did not apply the legal rules rigidly. The elder child for whose custody the mother was found not to be disqualified was in fact left with the tutors, because only two months remained before he would reach seven. It would have been prejudicial[7] to remove him from his tutors at that stage. The younger child however was ordered to be handed over to his mother until he reached seven. Finally in Denny v Macnish[8] the court concluded that the proper question was whether the children should be left in the custody of their mother or removed therefrom, the test being their greater benefit.[9] To some extent this merely treated the threshold and discretionary questions as one. It indicates nevertheless a choice between two alternatives, the criterion of selection being the welfare of the children. At whatever stage of the process this question is asked, an element of discretion is built into the process. Despite these exceptions the general trend during the period in question was to deal with the whole issue as one of forfeiture

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5 (1868) 6 Macpherson 1125.
6 (1845) 8 Dunlop 318.
7 Ibid., at p. 320.
8 (1863) 1 Macpherson 268.
9 Ibid., at p. 272.

or disqualification and to reach a decision based fundamentally on the establishment of threshold requirements without any significant evaluation of the interests of the child. The existence of these exceptions is important in the later development of the law.

Section 4 - The patria potestas

(a) The general approach

33.41 The rules relating to guardianship were to some extent a reflection, although indirect, of the patria potestas.[10] The paternal power was also a factor in the relatively weak position of the mother. She had in the guardianship process at best an interest, founded principally upon nature and nurture. If the child was illegitimate, if the father had died or if he had disqualified himself from exercising his patria potestas, the mother's position was pro tanto strengthened. It is noticeable that most reported cases up until about the middle of the nineteenth century were concerned with guardianship and the patria potestas in that context. Until then direct judicial control of the exercise of the patria potestas was rare. But by 1886, when Parliament intervened to improve the position of the mother, the courts had intervened sufficiently often to enable a pattern to emerge. The pattern of judicial control of the exercise of the patria potestas developed on remarkably similar lines to that of the judicial control of guardians.

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10 E.g. the father's position as administrator, his power to nominate and appoint tutors and curators, his power to delegate his responsibilities to third parties: each is dependent upon the patria potestas.

33.42 The "classical exposition"[11] of the law concerning the exercise of the patria potestas, particularly in relation to minors, was to be found in the judgment of Lord Inglis L.J.-C. in Harvey v Harvey.[12] Stair, it will be recalled, regarded the patria potestas rather as "an act of dominion in the parents."[13] But in 1860 Lord Inglis L.J.-C. felt obliged to comment:-

> "That the power of a father, at this age, is conferred not as a right of dominion, or even as a privilege for the father's own benefit or pleasure, but merely, or at least mainly, for the benefit, guidance and comfort of the child."[14]

This would apply a fortiori, it is suggested, to a child who was a pupil as it did to one who was a minor. Such a proposition was not inconsistent with the clear difference between the nature and extent of the patria potestas in relation to pupils and minors.[15] Concern here is only with the purpose for which the power should be exercised. There is no reason why that purpose should not have been the same for pupils and minors.

33.43 The court in Harvey v Harvey[16] made reference to no authority other than a brief mention of Stair.[17] Indeed, apart from some mid-eighteenth century Scottish cases, the only judicial authorities quoted by counsel for the parties were a few English and Scottish decisions of the mid-nineteenth century.[18]

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11 Smith T.B. Short Commentary on the Law of Scotland (Edinburgh, 1962), p. 372.
12 (1860) 22 Dunlop 1198.
13 Stair, I.V. 3.
14 Harvey v Harvey (1860) 22 Dunlop 1198 at p. 1209 per Lord Inglis L.J.-C.
15 Ibid., at p. 1208.
16 (1860) 22 Dunlop 1198.
17 Ibid., at p. 1208.
18 Ibid., at pp. 1205 and 1207.

The principal Scottish judicial authority, Baillie v Agnew,[19] was not mentioned by the court. The movement from Stair's concept of parental dominion to the recognition of the benefit of the child as the objective of the patria potestas was thus unexplained.

33.44 Perhaps by the middle of the nineteenth century social mores and attitudes had permeated through society so imperceptibly as to have a tacit effect upon the judiciary. Even so, the only juristic explanation of any value is that such a growth of awareness of children as persons rather than as property owners of attenuated status involved the application to the patria potestas of the concept of forfeiture or disqualification already familiar in the context of guardianship. Whatever the reason, the middle of the nineteenth century saw the resurrection in the context of the paternal power of some of the ideas tentatively acknowledged a hundred years before. This series of decisions[20] thus set the foundation for the judicial development of Scots law in the twentieth century.

33.45 If the Lord Justice-Clerk's comments Harvey v Harvey[21] were correct, that would emphasise the juristic nature of the father's position as the holder of a group of powers conferred upon him to enable him to discharge his legal duties towards his children.[22] The patria potestas, in other words, was not a right legally enforceable against the children or indeed anyone else.[23] The word "potestas" is consistent with this approach.

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19 (1775) 5 Brown's Supplement 526.

20 Of which Harvey v Harvey (1860) 22 Dunlop 1198 is probably the most important conceptually.

21 (1860) 22 Dunlop 1198.

22 For the earlier approaches to this, see para. 32.9.

23 The judges, of course, often talked of the father's "right" to custody, which was certainly one aspect of the patria potestas. Even that "right" was not absolute: see e.g. Ketchen v Ketchen (1870) 8 Macpherson 952 at p. 954.

It means, of course, that the doctrine of patria potestas in classical Scots law was fundamentally different from its Roman law counterpart, a point often mentioned but never explained judicially.[24]

33.46 The important element in Lord Inglis' analysis is not that the father merely exercised a power but that the power was to be exercised for the benefit of the child. Lord Ivory had preferred, two years earlier,[25] to express the nature of the patria potestas slightly differently. Commenting on the maternal claim to access a father was in his view "bound to exercise it [his power] according to a sound discretion."[26] He was dealing with the position of the mother vis-à-vis the father but he clearly comprehended the nature of the father's position as involving the exercise of a discretionary power. That involved, indeed required, the making of a decision appropriate to the circumstances. But Lord Inglis[27] was prepared to treat the benefit of the child as the objective of the power as a general guide to its exercise.

33.47 The child's interests thus may be seen to have constituted a restraint, in the nature of a general statement of policy, upon the exercise of the power. If the power were not being exercised in that way, the father would be liable to be deprived of it. In that event, the grounds of deprivation

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24 E.g. Nicolson v Nicolson (1869) 7 Macpherson 1118 at p. 1124 per Lord Ardmillan.
25 McIver v McIver (1859) 21 Dunlop 1103.
26 Ibid., at p. 1107 per Lord Ivory.
27 Harvey v Harvey (1860) 22 Dunlop 1198.

would, it may be expected, reflect a failure to exercise the power consistently with that policy. Indeed the third of the four propositions enunciated Lord Inglis was:-

> "That, therefore, the father's authority and right of control may at this age of the child be easily lost, either by an apparent intention to abandon it, and leave the child to his own guidance, or by circumstances or conduct showing the father's inability or unwillingness to discharge rightly the parental duty towards his child." [28]

In effect parental disregard for the policy built into the exercise of the patria potestas was the threshold requirement for the decision to suspend the parent's exercise of that power.

33.48 Just as the patria potestas was itself something in the nature of a discretionary power, so the judicial power of control was itself discretionary. The Court of Session has never recognised a wardship jurisdiction.[29] Its function has been to decide who should exercise the parental authority. That decision is discretionary. The court has in fact frequently asserted the flexible nature of its jurisdiction. For example, Lord Deas in Nicolson v Nicolson[30] emphasised that "the law confers a full and large discretion on the court in cases of this kind."[31] The discretionary nature of the jurisdiction also evoked comment from

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28 Ibid., at p. 1209 per Lord Inglis L.J.-C.
29 Kennedy v Steele (1841) 4 Dunlop 12 at pp. 14 and 15 per Lord Gillies.
30 (1869) 7 Macpherson 1118.
31 Ibid., at p. 1122 per Lord Deas.

Lord Moncrieff in AB, Petitioner.[32] Although the substantive decision in Shirer v Dixon[33] concerned an issue of expenses, Lord Inglis L.P. indicated unequivocally that on its merits "This proceeding is an appeal to the discretion of the court."[34] On the other hand, in a later case, Lord Deas felt constrained to comment that the court did not "have any choice in this matter."[35] Although the absence of a choice is the antithesis of a discretion, there was no fundamental inconsistency between the apparently divergent approaches of Lord Deas in particular. His comments were directed to different stages of the process: the satisfaction of the threshold requirements and the subsequent decision on the merits of the issue.

33.49 Such a division of function was not explicitly acknowledged by the courts but a careful analysis indicates its presence. Lord Ardmillan in Nicolson v Nicolson[36] described the process of judicial involvement in these words:-

> "The legal right to the custody of a lawful child is in the father; and a court of law will enforce that right by the appropriate compulsitors. But that right is not absolute. It is not beyond the control of the law. It is within the power and the duty of a court of justice, and more particularly of this Court, which is a court both of law and equity, to mitigate, in the exercise of a cautious discretion, the

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32 (1847) 10 Dunlop 229. 33 (1885) 12 Rettie 1013.
34 Ibid., at p. 1015 per Lord Inglis L.P.
35 Bloe v Bloe (1882) 9 Rettie 894 at p. 895 per Lord Deas.
36 (1869) 7 Macpherson 1118.

> severity of the general rule by interposing in exceptional cases. The exceptions must be few, and must rest on clear grounds; and these grounds must be found in considerations of danger to life, health or morals of the child." [37]

This suggests the existence of an overall discretion. But the judge appears to have distinguished between the "power" to interpose and the "grounds" for interposing. There is, of course, an element of discretion in the interpretation and application of the grounds in relation to an individual set of circumstances. But these grounds of interposition were in effect the threshold requirements for the exercise of the power of interposition and comprised the criteria of disqualification or forfeiture.

33.50 This was probably made clear by Lord Ardmillan's following comment:-

> "In the case of a young baby of seven months old, the health and life of the child may be considered in some degree bound up with the mother, and the natural rights and feelings of the mother of the babe cannot, in my opinion, be altogether ignored by the Court exercising judicial discretion." [38]

This was directed to the question whether the father should be

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37 Ibid., at p. 1124 per Lord Ardmillan.

38 Idem.

permitted to retain custody of the child. This could arise only after the grounds of forfeiture or disqualification had been established. It may be, for example, that, although grounds existed to disqualify him, the father should retain custody because the alternative sources of care were even less satisfactory. This seems implicit in Lord Ardmillan's approach.

33.51 The decision whether the father should be relieved of custody or not was recognised to be discretionary but Lord Ardmillan in common with the other judges of the time said very little about how that discretion should be exercised. The interests of the child were clearly not the sole consideration, for the learned judge specifically referred to the position of the mother. In any event the method of the exercise of the power was left largely unregulated. The reason probably was that the grounds for its exercise were relatively restricted so that the establishment of the ground would lead almost inevitably to forfeiture. There would be no need for the court to become involved in a complicated analysis of what the child's interests would require. Thus, when the courts talked of discretion in this context, they were probably referring to the interpretational and applicational difficulties in establishing the grounds of intervention.

33.52 Although Lord Moncrieff L.J.-C. declined in Ketchen v Ketchen[39] to indicate how far he agreed with these views of

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39 (1870) 8 Macpherson 952.

Lord Ardmillan,[40] the general approach of the Lord Justice-Clerk was not inconsistent with that of Lord Ardmillan. Lord Moncrieff's judgment in that case comprised only three paragraphs. The first dealt with the general legal position, particularly of the divorced adulterous father seeking custody of his child. He had no doubt about the "power of the Court to regulate custody in such a case, and to leave it with the mother, if circumstances render that desirable."[41] There was in that statement a clear distinction between the grounds for the exercise of the power and its subsequent exercise. The criterion for the exercise of the power was simply desirability.

33.53 The next two paragraphs of his judgment dealt with these two aspects in turn. He concluded firstly that the father was unfit to receive the custody of the child. "The next question", he said, "is as to the mother's right to retain the custody."[42] He answered this question by exercising the administrative discretion of taking elements or factors into consideration. His conclusion was that the child's mother was "the only proper person to take charge of her, unless she is a person altogether unfit."[43] Parental unfitness was thus a disqualification not only for retaining custody but also for being granted custody. In the event of unfitness on the part of each parent, the issue would, in the absence of the intervention of a third party, presumably be which parent was least unfit.

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40 Ibid., at p. 953. 41 Idem.

42 Idem.

43 Ibid., at p. 954 per Lord Moncrieff L.J.-C.

whether the father should forfeit his right to custody and in so doing the court would take into account the mother's arguments.

33.56 During the period in question the mother's arguments proved remarkably unsuccessful. In McFarlane v McFarlane[48] Lord Jeffrey pointed out:-

> "We are not entitled to take children from a father merely because they would be better taken care of by other relatives willing to keep them."[49]

Similarly the arguments of the mother in Nicolson v Nicolson[50] that she should have custody during the period of nurture and that the child's interests required a young child to be with her mother received scant attention from the court despite the acknowledgment by Lord Ardmillan of the relevance in the exercise of the judicial discretion of the "natural rights and feelings of the mother."[51] These were not isolated examples.[52]

33.57 The reason for these conclusions is the disqualification approach adopted by the court:[53] their insistence, in other words, upon the establishment of grounds of intervention before the exercise of a judicial discretion. That approach was never better expressed than in the precise words of Lord Cowan. After referring to the "legal right of the husband to have the custody of his children", he said:-

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48 (1847) 9 Dunlop 904. 49 Ibid., at p. 905 per Lord Jeffre
50 (1869) 7 Macpherson 1118.
51 Ibid., at p. 1124 per Lord Ardmillan.
52 See also Lilley v Lilley (1877) 4 Rettie 397 and Bloe v Bloe (1882) 9 Rettie 894.
53 In the context of custody see Nicolson v Nicolson (1869) 7 Macpherson 1118 and Ketchen v Ketchen (1870) 8 Macpherson 952, A v B (1870) 42 Scottish Jurist 224, Lilley v Lilley (1877) 4 Rettie 397, Bloe v Bloe (1882) 9 Rettie 894.

33.54 This scheme paid no direct attention to the child's interests, only indirect attention as the object of the parental unfitness; at best, therefore, negative welfare. The courts were in this way hesitant to examine the issue of what would be in the best interests of the child in question. This hesitation forced them into deciding custody and similar questions[44] on as automatic a basis as possible by applying generalities[45] rather than by examining specialities.

(b) Disqualification

33.55 Most of the mid-nineteenth century reported cases concerning the custodial aspects of the patria potestas were claims by a father against the mother for enforcement of his prima facie right.[46] Rarely did a mother seek positively to deprive the father of his custody. But even when she did take judicial action, as in Cameron, Petitioner[47], it was merely to obtain an order of the court regularising the actual care of the child already under her control. In the light of these matters, the position of the mother was negative rather than positive, operating as a defence to a claim for enforcement of the paternal right rather than as an assertion of a recognised interest. At best, therefore, the mother's position would be relevant only at the second stage of the process; that is, when the court in exercise of its discretion would be contemplating

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44 E.g. access: see McIver v McIver (1859) 21 Dunlop 1103.

45 E.g. that the mother was the only proper person to take charge of a child of four or five: Ketchen v Ketchen (1870) 8 Macpherson 952 at p.954 per Lord Moncrieff L.J.-C. Also where, neither the father nor the mother being personally disqualified, "the right of the father must prevail": Lilley v Lilley (1877) 4 Rettie 397 at p. 398 per Lord Inglis L.P.

46 E.g. McFarlane v McFarlane (1847) 9 Dunlop 904, Harvey v Harvey (1860) 22 Dunlop 1198, Nicolson v Nicolson (1869) 7 Macpherson 1118, Ketchen v Ketchen (1870) 8 Macpherson 952, A v B (1870) 42 Scottish Jurist 224, Lilley v Lilley (1877) 4 Rettie 397, Bloe v Bloe (1882) 9 Rettie 894, Beattie v Beattie (1883) 11 Rettie 85.

47 (1847) 9 Dunlop 1401.

"If he has been guilty of improper conduct he may lose that right."[54]

33.58 The same approach applied to granting rights of access.[55] It affected each parent alike. There is no doubt that the court had power to control the patria potestas in relation to access.[56] But it was controlled in such a way as to give effect to the mother's "right, unless there is something in her conduct or circumstances which deprive her of it, to have reasonable access to her own children."[57] A mother against whom allegations of adultery had not been proved was granted access[58] but one who had been divorced for adultery was refused an order for access.[59]

33.59 That did not mean that a mother who had been refused an order for access would necessarily be deprived of access, for, as Lord Moncrieff L.J.-C. said in that case, "where a husband has divorced his wife on the ground of adultery, the matter of access to the children ought in general to be left in his hands."[60] He acknowledged that there were exceptions to that proposition. Lord Moncrieff's comment was in effect limited to the case of the blameless husband of an adulterous and subsequently divorced wife. But it probably applied more widely, indeed to any father, for the power to intervene in exceptional circumstances would normally have been sufficient for the court, whether the husband had divorced his wife or not and for whatever reason.

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54 A v B (1870) 42 Scottish Jurist 224 at p. 225 per Lord Cowan.
55 AB, Petitioner (1847) 10 Dunlop 229, McIver v McIver (1859) 21 Dunlop 1103, Mackenzie v Mackenzie (1881) 8 Rettie 574, Bowman v Graham (1883) 10 Rettie 1234.
56 McIver v McIver (1859) 21 Dunlop 1103.
57 Ibid., at p. 1107 per Lord Ivory.
58 Idem. 59 Bowman v Graham (1883) 10 Rettie 1234.
60 Ibid., at p. 1235 per Lord Moncrieff L.J.-C.

33.60 The synthesis of these arguments seems to be that the father, presumably in exercise of the patria potestas, could control the matter of access to his children, even on the part of their mother, unless he had been deprived of that power by judicial intervention. This paternal power of control was however absolute neither in a static[61] nor in a dynamic situation.[62] In a static situation it was subject to the mother's right to reasonable access to her children[63] and in a dynamic situation to the overall control of the courts which applied not only to deprive the father of his power of control but also to take away the mother's right of access.[64] Each parent was thus liable to judicial disqualification in relation to the matter of access.

33.61 This threshold approach has made the grounds of disqualification particularly important. Harvey v Harvey,[65] it will be recalled, emphasised the relative rather than the absolute nature of the patria potestas. Since it was to be exercised for the benefit of the child, failure to do so, or at least failure in respect of the constituent elements of that general duty, would justify judicial intervention. Lord Inglis L.J.-C. identified four grounds of intervention,[66] the first two being subjective and the last two objective. They may be paraphrased as follows:-

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61 I.e. where there was no judicial dispute between the parents.
62 I.e. where there was a judicial dispute between the parents.
63 There would be no problem, for in practice the parents would be living together with equal opportunities of access or, if living apart, would have resolved the matter by agreement.
64 The position, in theory at least, may now be different by virtue of the equality of parental rights created by section 10(1) of the Guardianship Act 1973 (1973 c. 29).
65 (1860) 22 Dunlop 1198.
66 Ibid., at p. 1209.

1. abandonment of the child;
2. leaving the child "to his own guidance";
3. paternal inability to discharge his parental duties;
4. paternal unwillingness to discharge his parental duties.

33.62 Lord Inglis' comments were directed particularly to minor children. There was, however, no reason why these general principles should not apply to children of any age. Each of these four grounds involved considering the effect on the child of certain circumstances and conduct of the father. The actual effect was determinable only in the light of the individual circumstances of each case and the age of the child would be one such important circumstance.[67]

33.63 This clearly reflected the approach of the court, and it could be described as a limited welfare approach. The courts did not normally talk in terms of welfare as such. They did however look at certain aspects of the child's welfare, particularly his health and morals.[68] These aspects of his welfare played a negative part in this threshold process. Thus the welfare approach was limited in two ways: in point of substance and in assessing only the consequences for the child of the paternal circumstances.

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67 McFarlane v McFarlane (1847) 9 Dunlop 904 at p. 905 per Lord Boyle L.P.

68 McFarlane v McFarlane (1847) 9 Dunlop 904 at p. 905 per Lord Jeffrey; Nicolson v Nicolson (1869) 7 Macpherson 1118 at p. 1124 per Lord Ardmillan and at p. 1125 per Lord Kinloch; Bloe v Bloe (1882) 9 Rettie 894 at p. 895 per Lord Inglis L.P.; Beattie v Beattie (1883) 11 Rettie 85 at p. 87 per Lord Inglis L.P.

33.64 None of the other judges analysed the issue under discussion as closely as Lord Inglis in Harvey v Harvey.[69] But there was nothing inconsistent in the approach of the Court of Session as a whole. The other judges tended to be more specific. Their underlying theme was nevertheless quite clear. Phraseology, naturally enough, varied. But the principal reason for intervention was whether the child's health or morals would be affected if the child were left in the father's custody. There was one question only and no discretion except at the stage of interpretation and application. Sometimes the criteria were expressed widely: "Are the children's interests, moral or physical, likely to suffer?"[70] Sometimes narrowly: "... danger to the life, health or morals of the child."[71] Indeed Lord Inglis himself, after become Lord President, expressed himself more succinctly and yet more widely than in Harvey v Harvey[72] when he said that the question was whether the child's "association with him [the father] would be detrimental to the moral or physical welfare of the child..."[73] Any suggestion that the court might interfere with the father's authority simply because the child would be better taken care of by someone else was peremptorily rejected.[74] The test was clearly not welfare in the positive sense. This was the principal reason for the relative weakness of the mother's legal position.

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69 (1860) 22 Dunlop 1198.
70 A v B (1870) 42 Scottish Jurist 224 at p. 225 per Lord Benholme.
71 Nicolson v Nicolson (1869) 7 Macpherson 1118 at p. 1124 per Lord Ardmillan.
72 (1860) 22 Dunlop 1198.
73 Beattie v Beattie (1883) 11 Rettie 85 at p. 87 per Lord Inglis L.P.
74 McFarlane v McFarlane (1847) 9 Dunlop 904 at p. 905 per Lord Jeffrey.

33.65 Physical violence towards the child caused no legal problems. In Cameron, Petitioner,[75] for example, the mother obtained an interim order against the father who had "wantonly and without cause" beaten the child. There were other allegations against the father but, apart from suggestions of educational neglect, they related more to the father's marital relationship than to his parental relationship. There is no reason to think that the mother would not ultimately have been awarded custody of the child, then aged thirteen or fourteen, by the court.

33.66 It was much more difficult to identify the moral disadvantages for a child in living with one parent. Such issues tended to arise in relation to alleged sexual and other matrimonial misconduct. In the absence of specific consequences for the child, the courts hesitated to intervene. The exception was the adulterous father. But mere adultery was not normally enough. In Harvey v Harvey[76] itself the parents had been divorced on account of the father's adultery. But he had committed adultery with his wife's sister. Lord Inglis L.J.-C. placed considerable importance upon this "great family crime"[77] and concluded that the father was "the most unfitting and unsafe person that could well be found for the guardianship and control of a boy and girl of fifteen and fourteen years of age."[78] Other

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75 (1847) 9 Dunlop 1401. 76 (1860) 22 Dunlop 1198.
77 Ibid., at p. 1210 per Lord Inglis L.J.-C.
78 Idem.

factors influenced the court, for the father had "abandoned" his children by failing to provide for them for twelve years. The children, too, had no particular desire to return to their father.

33.67 Similarly in Ketchen v Ketchen[79] paternal adultery would not have been sufficient to deprive the father of custody. Lord Cowan indeed indicated that prima facie:-

> "... the existence of a decree of divorce against him on the ground of adultery, if it does not disentitle a man to have his children taken from the innocent mother and delivered to him, at least requires some explanation from him."[80]

It was not, in other words, "conclusive against a father's claim" but it was "certainly a most important consideration."[81] Lord Cowan was talking about the establishment of threshold requirements but in a way relevant to the exercise of an administrative discretion. The discretion underlying his decision, however, was not administrative but interpretational at the stage of application.

33.68 There were in Ketchen v Ketchen[82] two other factors affecting the decision. The father's adultery was "of an aggravated character."[83] It had in fact been committed "under his own roof with the nurse of this very child "[84] and later in brothels

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79 (1870) 8 Macpherson 952.
80 Ibid., at p. 954 per Lord Cowan.
81 Idem
82 (1870) 8 Macpherson 952.
83 Ibid., at p. 954 per Lord Cowan and at p. 955 per Lord Neaves.
84 Ibid., at p. 954 per Lord Cowan.

in Edinburgh. He had also made several uncomplimentary insinuations against his wife. They were subsequently retracted.[85] He was therefore treated as "most unfit" to have the custody of his four or five year old daughter.

33.69 Despite these decisions, the Court of Session never explained exactly why and how it would affect the child's morals to remain in the custody of an adulterous father, even one who had committed the adultery in aggravated circumstances. It was presumably a matter of judicial knowledge. It might, of course, be a disadvantage to the child to live with an adulterous father: but not necessarily so. The test applied by the courts was not the balance of advantage. If it had been, the possible disadvantages of living in the alternative home would have been relevant matters and perhaps sufficient to tip the balance back in favour of the father. But that approach was not open to the courts.

33.70 Matrimonial misconduct, other than aggravated adultery, carried little weight in applying the threshold requirements. In A v B,[86] for example, allegations of desertion were not sufficient to upset the paternal right to custody. Lord Moncrieff L.J.-C. was not prepared to say that desertion might not be sufficient but he was clearly looking for something more to

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85 Idem.

86 (1870) 42 Scottish Jurist 224.

justify depriving the father of his right.[87] Lord Cowan similarly was seeking some kind of "improper conduct" to which guilt might be attributed.[88] In Nicolson v Nicolson[89] and Lilley v Lilley[90] general allegations against the father of ill-treatment, unkind or cruel treatment were insufficient to justify considering depriving him of his position, even when they were coupled with assertions that the child, because of his very young age, should have his mother's care. The argument based upon alternative care was never accepted for reasons which have already been considered. The ground of ill-treatment and related tests were insufficient presumably because the effect on the child was never identified and the courts were not prepared ex proprio motu to proceed on the judicial knowledge of the existence of some such effect, as they had done in cases of aggravated adultery.[91]

33.71 There may, however, be other reasons why the courts in the custodial context were disinclined to become involved in what they regarded as matrimonial matters. Since these were "so strictly personal, so incapable of support from independent testimony, so entirely within the mysterious sanctities of wedded life, as to be almost beyond the possibility, and quite beyond the ordinary discretion of judicial investigation,"[92] it is at least understandable why the courts declined to become involved.

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87 Ibid., at p. 224. 88 Ibid., at p. 225.
89 (1869) 7 Macpherson 1118.
90 (1877) 4 Rettie 397.
91 C.f. the contemporary attitude: paras. 45.16 to 45.19.
92 Nicolson v Nicolson (1869) 7 Macpherson 1118 at p. 1123 per Lord Ardmillan.

This view is an example of the very narrow conception of welfare, particularly of the child's welfare, understood by the Victorian judiciary.

33.72 The courts hesitated even to use procedural devices to protect the child's interests. In McFarlane v McFarlane[93] a father sought to enforce his right to custody while an action of separation by his wife was pending against him. Of the two children, aged eight and three, he was granted custody of the elder but in relation to the younger the court decided to "make no order hoc statu ... so as to change the custody till the evidence in the process of separation is before us."[94] Lord Jeffrey in agreeing to this proposal was influenced by "the justice of the case."[95] On the other hand in very similar circumstances in Beattie v Beattie[96] the mother, who had raised an action of separation and aliment on the ground of cruelty, responded to the petition by her husband for custody by seeking custody herself or having the petition sisted until the separation action had been decided. Lord Inglis L.P. rejected the request for a sist because, even if the allegations of cruelty had been well founded, they would have been insufficient to deprive the father of his right to custody.[97] This comes close indeed, as Lord Mure implied,[98] to treating the issue of parental forfeiture as one purely of legal relevancy, without need to

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93 (1847) 9 Dunlop 904.
94 Ibid., at p. 905 per Lord Boyle L.P.
95 Ibid., at p. 905 per Lord Jeffrey.
96 (1883) 11 Rettie 85.
97 Ibid., at pp. 86 and 87.
98 Ibid., at p. 87.

examine the facts of the individual case.[99] Lord Mure distinguished McFarlane v McFarlane on the ground that "if the facts there set forth were proved the [the court] might be led to refuse the custody of the child to the father."[1] There was nothing in the judgments in McFarlane v McFarlane[2] to support this view. Even the ages of the relevant children in the two cases were much the same. It seems, therefore, to have been a difference of judicial policy.

33.73 The most extreme example in this context of judicial rigidity is Bloe v Bloe,[3] although it was tempered by a certain procedural flexibility. The mother's response to the father's claim for custody was an averment of her husband's cruelty together with a statement that, since it would be four months until the child was to be weaned, it would be dangerous to separate mother and child. This argument was acknowledged to the extent that the hearing was postponed until after the child had been weaned. But the father's claim that the mother's allegations of cruelty were irrelevant met with judicial approval. In Lord Deas' words:-

> "The petitioner seems to me to admit that he has been more than once to blame in his conduct, but that fact will not lead to the result that his wife who is living apart from her husband can claim the custody of this child without a judicial separation."[4]

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99 (1847) 9 Dunlop 904.
1 Beattie v Beattie (1883) 11 Rettie 85 at p. 87 per Lord Mure.
2 (1847) 9 Dunlop 904.
3 (1882) 9 Rettie 894.
4 Ibid., at p. 895 per Lord Deas.

It would appear, therefore, that matrimonial misconduct per se, whether it amounted to a ground of divorce or not, played no part in satisfying the threshold requirements of the power to deprive a father of his right to custody. Aggravated circumstances of adultery formed an exception to this general principle.

33.74 It is true that matrimonial misconduct may not have any effect on the health or more particularly the morals of the child of the marriage. The Court of Session seems to have erected that proposition into something approaching a binding rule, at least in the middle of the nineteenth century. That, it is suggested, was unduly restrictive, even in the context of contemporary society, especially when the court freely acknowledged the discretionary nature of the process. It is merely a further example of the judicial desire to seek a simple and automatic solution to the problem, thereby avoiding the problems of finding an answer appropriate to the special circumstances of each case.

(c) The Conjugal Rights Act of 1861

33.75 There is, however, a much more specific criticism which could be made of the court's approach in that case. Lord Deas implied that the matrimonial misconduct of the father would be

relevant in a custody dispute when there was in addition a judicial separation. This raises the problem of the relationship between consistorial and custodial proceedings.[5] Since 1861 the court has clearly had jurisdiction to deal with custody issues in consistorial proceedings. In such proceedings it would be difficult for the court not to be influenced by the matrimonial allegations and evidence in determining the custody dispute. It could be argued that evidence would be admissible in terms of the nature of the proceedings but that would be a narrow view of the judicial function in custody disputes. In any event matters have not developed in that way.

33.76 When the Court of Session succeeded in 1830 to the jurisdiction of the Commissary Court in consistorial matters,[6] there seems to have been no doubt that the custody of any children of the marriage to which the action related fell within the jurisdiction of the Commissary Court in those proceedings.[7] This applied to separation and divorce proceedings. Lothian pointed out that in an action of separation this was "a discretionary power to dispose of the children, according as circumstances may require."[8] But, he added significantly, "this is a power not to be exerted, except when called for in extreme cases."[9] This discretionary approach was not altogether consistent with Lothian's account of the case upon which it was founded.[10] He

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5 Conjugal Rights (Scotland) Amendment Act 1861 (24 & 25 Vict., c. 86).

6 Court of Session Act 1830 (11 Geo. 4 & 1 Wm. 4, c. 69), s. 33.

7 Fergusson J., A treatise on the present state of the Consistorial Law in Scotland (Edinburgh, 1829) pp. 188 and 189; Lothian M., The Law, Practice and Styles peculiar to the Consistorial Actions (Edinburgh, 1830) p. 201.

8 Lothian, op. cit., p. 201.

9 Idem.

10 Nisbet v Nisbet (1733) Lord Hermand's Consistorial Decisions 1684-1777 (Edinburgh, 1940, Stair Society vol. 6), pp. 126 and 127. See also Fergusson, op. cit., pp. 188 and 189 and Lothian, op. cit., p. 201.

left the impression that if the mother was successful in an action of separation, she would be entitled, almost automatically, to custody of her children aged twelve if female and seven if male. If so, the matrimonial misconduct of the husband justifying separation also operated to deprive him of his right to custody. This approach has clearly been rejected by the Court of Session in the exercise of their nobile officium.[11]

33.77 If the exercise of the power to deal with children in consistorial actions of separation was unclear, its exercise in relation to divorce actions was no clearer. Fergusson nevertheless considered that the power existed. In his words:-

> "In gross cases, either of divorce for adultery, or of separation for maltreatment, where there are children, the Court also possesses jurisdiction to remove the custody of them from the father, which has been extended to the age of 12 years for daughters; and no precise limit appears to have been hitherto defined in regard to the judicial exercise of this statutory power."[12]

This comment implies that the process was much more discretionary than Lothian suggested. These various ambiguities make it impossible to conclude how the consistorial jurisdiction of the Commissary Court was exercised in relation to custody. The only matter beyond reasonable doubt is that the jurisdiction existed.

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11 Para. 33.92.

12 Fergusson, op. cit., p. 196.

33.78 Although this consistorial jurisdiction was conferred upon the Court of Session in 1830, there are no reports of its exercise in relation to custody of the children of the marriage for thirty years. The doubtful nature of the jurisdiction and the existence of the Court of Session's nobile officium powers probably contributed to that situation. The Court of Session had much earlier inherited the powers of the Scottish Privy Council in relation to children.[13] Since they formed part of the nobile officium, they were exercisable only by the Inner House. The consistorial jurisdiction of the court was exercisable in the Outer House.[14] Fergusson indicated that this was a statutory power[15] but he appears not to have identified the statute in question. The statutory nature of the consistorial jurisdiction over children has been confirmed by Clive,[16] but he was referring specifically to the 1861 Act.[17]

33.79 The Court of Session, although succeeding to this consistorial jurisdiction in 1830, was not fully in control of the proceedings until 1861. The consistorial functions of the Commissary Court were not abolished until 1836[18] and between 1830 and 1836 the Commissary Court heard the proof in consistorial matters.[19] In 1836 the sheriff was authorised to take the proof[20] but it was not until 1861 that this function was conferred upon the Lord Ordinary.[21] For these reasons it is understandable why

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13 Para. 32.3. 14 Court of Session Act 1830, s. 35.
15 Fergusson, op. cit., p. 196.
16 Clive & Wilson, pp. 568 and 569.
17 I.e. Conjugal Rights (Scotland) Amendment Act 1861.
18 Court of Session Act 1836 (6 & 7 Wm. 4, c. 41) s. 1.
19 Court of Session Act 1830, s. 38.
20 Court of Session Act 1836, s. 2.
21 Conjugal Rights (Scotland) Amendment Act 1861, s. 13.

the Court of Session was unable until 1861 to make an important contribution to the development of this aspect of consistorial law.

33.80 Section 9 of the Conjugal Rights (Scotland) Amendment Act 1861 provides that:-

> "In any action for separation a mensa et thoro or for divorce the court may from time to time make such interim orders and may in the final decree make such provision, as to it shall seem just and proper, with respect to the custody maintenance and education of any pupil children of the marriage to which such action relates."

The section has been subsequently modified[22] but in ways not presently relevant. As the Act contained a number of other important provision relating to consistorial matters, it is strange that no reference to this provision was made during its Parliamentary passage. Indeed the comments of the Lord Chancellor, Lord Westbury, in particular in the course of the 1861 debate[23] but also during the 1860 debate,[24] implied that the Act was simply conferring upon Scotland the benefit of the procedures which had been available in England for some time. There was thus no indication whether section 9 of the 1861 Act was

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22 Custody of Children (Scotland) Act 1939 (2 & 3 Geo. 6, c. 4), s. 1 (1); Matrimonial Proceedings (Children) Act 1958 (1958 c. 40), s. 15(1); Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (1966 c. 19), s. 8(1).

23 (1861) 164 Parl. Deb. 3s. (H.C.) cols. 292, 792 and 1420; ibid. (H.L.) cols. 1452, 1783 and 1835: see particularly ibid. (H.L.) col. 1783 (Lord Westbury).

24 (1860) 159 Parl. Deb. 3s. (H.L.) col. 2020; 160 Parl. Deb. 3s. (H.L.) col. 179.

creating a new jurisdiction for the Court of Session, confirming an existing jurisdiction or modifying an existing practice. In effect the section was probably clarifying an existing practice. But this conclusion is by no means certain.

33.81 On the face of it, section 9 of the 1861 Act conferred a very wide discretion upon the court, the only limitation, apart from the context and subject-matter of the power, being the court's notion of what would be "just and proper." In practice these limitations would be likely to prove unreal and operate only to confirm the first impression of an almost unfettered discretion. The only procedural limitation was the existence of a separation or divorce action. Particularly significant was the absence of any real and helpful criteria indicating how the court should exercise its discretion. The Court of Session, however, declined to exercise their power in that manner. In doing so, they may have been guilty of introducing fetters into the exercise of their discretion which had not been authorised by Parliament. If so, they were failing in the duty placed upon them by Parliament.

33.82 Of the three reported cases which considered the Act during the period under review, the first[25] could not be regarded as authoritative on the approach to and the meaning of the

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25 Lang v Lang (1869) 7 Macpherson 445.

legislation. The judicial dicta are, however, helpful, particularly as they were effectively supported by the second case.[26] The third decision of the trilogy of cases is unique.[27] It seems to have been the first occasion on which an appeal was taken from the Court of Session to the House of Lords on a matter concerning the welfare of a child and coming within the purview of the common law of Scotland, even although the problem was to a large extent how section 9 of the 1861 Act had modified the common law of Scotland.

33.83 The petitioner in Lang v Lang[28] had been awarded a decree of separation a mensa et thoro on account of her husband's cruelty.[29] She later asked the Lord Ordinary in the separation action to deal with the custody of the children under section 9 of the 1861 Act. The Inner House on appeal accepted the argument that the Lord Ordinary could deal with custody only simul et semel with the action of separation or divorce,[30] while the Inner House itself could not deal with the matter for they had no original jurisdiction under the Act.[31] The mother subsequently petitioned the Inner House seeking an award of custody under the nobile officium. The grounds put forward in support amounted to the cruelty which formed the basis of the decree of separation.

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26 Stewart v Stewart (1870) 8 Macpherson 821.
27 Symington v Symington (1874) 1 Rettie 871 (Court of Session), (1875) 2 Rettie (H.L.) 41 (House of Lords).
28 (1869) 7 Macpherson 445. 29 Lord Jerviswoode.
30 (1869) 7 Macpherson 445 at p. 446.
31 Ibid., at p. 446 per Lord Patton L.J.-C., Lords Cowan and Neaves. Lord Benholme disagreed, suggesting that the order could be made so long as the action was in dependence.

33.84 The law applied by the Inner House in exercise of the nobile officium in this case was entirely consistent with the approach already identified. The father's right to custody of his pupil children could be interefered with only when it could be established that "the children's health, life or morals"[32] would be endangered by their remaining in the father's custody. The Lord Justice-Clerk referred in terms to the "interest of the children"[33] but he applied that criterion no more widely than his colleagues in the Inner House.

33.85 There was no need for members of the court to refer to the 1861 Act in their judgments on the petition. The Lord Justice-Clerk positively refrained from doing so but he did not express dissent from the dicta of Lords Benholme and Neaves. The latter was satisfied that the Act made no difference to the powers of the court "except to allow the application to be made in the process between the spouses."[34] Lord Benholme was more expansive. He responded negatively to the invitation to follow the approach taken by the English courts under their "substantially identical"[35] statute. In England, it was argued, the courts had looked "rather to the hardship which a wife, separated from her husband through no fault of her own, would suffer in being deprived of her children, than to the interests of the children themselves."[36]

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32 Ibid., at p. 447 per Lord Benholme. The other judges expressed similar views: ibid., at p. 447 per Lord Neaves and at p. 448 per Lord Patton L.J.-C.
33 Ibid., at p. 448. 34 Ibid., at p. 447 per Lord Neaves.
35 Ibid., at p. 447 per Lord Benholme. 36 Idem

The Scottish courts had steadfastly rejected during the period under review the criterion of matrimonial fault for the purpose of depriving a father of his right to custody. They had, of course, justified their intervention by reference to certain, very limited aspects of the child's welfare but their insistence at the same time on the threshold approach afforded to the father's right to custody a position of overriding significance. The English approach, at least as enunciated by Lord Benholme, would have afforded paramountcy to the blameless wife. Thus neither the Scottish nor the English courts were prompted by any substantial child-biased approach.

33.86 Be that as it may, Lord Benholme described the relationship between the court's statutory and nobile officium powers in this way:-

> "... I cannot hold that, under the statute, we have any wider or more extensive powers than we have at common law. On the other hand, I do not think that our statutory powers are more limited than our common law powers. My impression is, that under the statute we can just do incidentally what under our nobile officium we can do on a separate application, and that the same principles must guide us in whichever form we act." [37]

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37 Idem.

That simply means that the Court of Session's inherent power to regulate custody was available in certain consistorial actions. If section 9 was procedural in that sense, it is understandable why the same principles would apply to the exercise of the statutory and nobile officium jurisdictions.

33.87 There are, however, several reasons why the two jurisdictions of the Court of Session might have been thought to be independent. The inherent jurisdiction applied to any dispute concerning the paternal right to custody[38]; it was not restricted to an interparental dispute. Nor was it necessarily restricted to pupil children, whether of a marriage or not. The jurisdiction was available to control the exercise of the patria potestas where that power was not being exercised generally for the benefit of the child. The courts had however restricted intervention to a few grounds, thus dividing their function into the establishment of threshold requirements and the consequent but largely automatic discretionary decision. The 1861 Act power was, on the other hand, available only in the context of two specific actions.[39] It related only to pupil children of the marriage. It was on the face of it a wide discretionary power, which would seem to deal with the whole issue of custody as one decision; not, in other words, divided into two parts, one legal and the other administrative.

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38 Paras. 33.102 to 33.105.

39 Separation a mensa et thoro and divorce.

33.88 Much depends on what is meant by "custody".[40] The earlier Scottish cases talked understandably in terms of the patria potestas and whether that power was being properly exercised in relation to the stated purpose of its exercise. Then the discussion switched to the father's right to custody. There was no stated or apparent reason for this change. Custody may well have been an aspect of the patria potestas but that would not appear to justify the movement from talking in terms of a power to discussing a legal right, especially in the context of depriving the holder of that power or right of his interest. To apply similar criteria in depriving the father of his "position"[41], when the nature of the "position" had changed, would seem to require some explanation. But somehow, and without explanation[42], that change was made.

33.89 Whether Parliament should have intervened in the way it did is of no concern. It did so, it is suggested, in a way and using terminology not wholly consistent with the existing corpus of Scots law. That indicates either ignorance or an intention to introduce a deliberate change of policy. If the latter, it could have been achieved in more appropriate language. The re-enactment for Scotland of provisions drafted in the context of English law is no doubt a simple but suspect technique

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40 The courts have never really attempted a detailed analysis.

41 To use a neutral word.

42 Perhaps under English influence.

of legislation. It is equally no answer for the Scottish courts to apply the existing principles of Scots law in the context of the new legislation without justifying that interpretation of the legislation, particularly when there were so many reasons suggesting a different, but not necessarily correct, interpretation.

33.90 The Court of Session may have been justified in equating the substance of their statutory jurisdiction with that of their nobile officium, even if the language of section 9 of the 1861 Act suggested otherwise. The Court of Session in Lang v Lang[43] may, therefore, be criticized not for coming to a necessarily wrong view of the section but for failing to justify that view. Similar criticism may be levelled at the Court in Steuart v Steuart.[44] In Lang v Lang[45] the decision was given by the Lord Justice-Clerk's court,[46] in Steuart v Steuart[47] by the Lord President's court.[48] There was ultimately complete unanimity on this point within the Inner House.

33.91 Steuart v Steuart[49] was undoubtedly an authoritative decision on section 9 of the 1861 Act, for the conclusion for custody was sought in the separation proceedings. The Lord Ordinary, Lord Gifford, awarded custody of the youngest of the five children of the marriage, a daughter aged four, to her mother, the pursuer, simply because it seemed "right that the

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43 (1869) 7 Macpherson 445. 44 (1870) 8 Macpherson 821.
45 (1869) 7 Macpherson 445.
46 Comprising Lord Patton L.J.-C., Lords Benholme and Neaves.
47 (1870) 8 Macpherson 821.
48 Comprising Lord Inglis L.P., Lords Deas, Ardmillan and Kinloch.
49 (1870) 8 Macpherson 821.

pursuer, who is not to blame for the present separation, should have the custody of this child."[50] Despite the slight difference in phraseology, this does not seem to be in any way inconsistent with the statutory reference to what is "just and proper." The Inner House, however, decided that the mother should not have custody of any of the children. The judges of the Inner House were concerned, naturally, only with the youngest child.

33.92 Lord Inglis L.P. simply delivered a concurring judgment. Lords Deas and Ardmillan made no reference to section 9 of the 1861 Act. They applied the principles of the common law, particularly the need to establish an element of risk to the child's life, health or morals before the court could intervene.[51] The foundation of this approach was the position of the father as the "natural and legal guardian."[52] It followed that success in an action of separation against the child's father would not in itself justify awarding custody to the mother. These judgments thus reinforced the views of the Inner House in Lang v Lang.[53]

33.93 Lord Kinloch reached the same conclusion[54] but he alone felt constrained to justify this approach in the light of section 9 of the 1861 Act. In his opinion:-

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50 Ibid., at p. 827 n. per Lord Gifford.
51 Ibid., at p. 830 per Lord Deas and at p. 831 per Lord Ardmillan.
52 Ibid., at p. 830 per Lord Deas.
53 (1869) 7 Macpherson 445.
54 Steuart v Steuart (1870) 8 Macpherson 821 at p. 833.

> "It is difficult to hold it [section 9] as intending to confer on the court an unlimited discretion to act in this matter according to what they think expedient, or to do more than to empower them to exercise their ordinary jurisdiction in the form of a special branch of a decree of separation, in place of in a separate process. The statute clearly intended the jurisdiction to be exercised with reference to the special state of things disclosed in the process of separation. But I think the court must apply to these circumstances the ordinary principles governing their jurisdiction in these matters."[55]

The judicial reluctance to accept a jurisdiction comprising an open-ended administrative discretion can be readily understood in the context of the mid-Victorian era. To have regarded section 9 as procedural was obviously the least onerous interpretation for the judges. Even so, there is a possible inconsistency in these comments of Lord Kinloch. On the one hand, he implied, the circumstances of the separation were statutorily relevant to the custodial elements of the process. On the other hand, he stated, the common law principles were to apply to the issue of custody, one of which was was the irrelevance of marital cruelty and other types of matrimonial misconduct to paternal forfeiture of his right to custody. It would be difficult in practice to

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55 Idem.

apply both of these propositions simul et semel to the one set of circumstances. That relatively minor difficulty apart, the Court of Session clearly took the view that the 1861 Act was in this respect procedural only and did not change for consistorial purposes the general principles of the common law.[56]

33.94 The House of Lords became involved in 1875. The facts of Symington v Symington[57] were rather similar to those of Ketchen v Ketchen[58] and, although a different division of the Inner House heard each of those two cases, it is not altogether surprising that the Court of Session decided that the father was unfit to have custody of all the children of the marriage. The father in Symington v Symington[59] having thus disqualified himself on account of his own aggravated adultery, the way was open for the Court of Session to award custody to the mother. The court did so because that was the "most beneficial course for these children".[60] The issue was decided by the Court of Session, therefore, strictly in accordance with the principles which had been established during the preceeding one hundred years.[61] This was true even where the matter was heard, as it was, under section 9 of the 1861 Act.[62]

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56 This is a conclusion of more than historical importance. It could affect considerably the relationship between the consistorial jurisdiction of the Court of Session and the Acts of 1886 and 1925. On the basis of the interpretation placed by the Court of Session on section 9, the later legislation would effectively enlarge the approach of the court. If the wider view of section 9 had been preferred, the later legislation would have narrowed the approach of the court.

57 (1874) 1 Rettie 871 (Court of Session), (1875) 2 Rettie (H.L.) 41 (House of Lords).

58 (1870) 8 Macpherson 952: the father in both cases had committed adultery with the child's nurse in the family home.

59 (1874) 1 Rettie 871.

60 Ibid., at p. 873 per Lord Inglis L.P.

61 In effect since Baillie v Agnew (1775) 5 Brown's Supplement 526.

62 Lang v Lang (1869) 7 Macpherson 445; Steuart v Steuart (1870) 8 Macpherson 821.

33.95 The House of Lords substituted their own decision for that of the Court of Session by awarding custody of the three sons to their father and of the two daughters to their mother.[63] In doing so they postulated an approach fundamentally different from that enunciated by the Court of Session. The Lord Chancellor, Lord Cairns, characterised section 9 of the 1861 Act as discretionary.[64] It was therefore impossible to lay down any general rules upon the matter, including the purported English rule that, if a wife obtained a divorce or separation, that carried with it almost automatically the custody of the children. He described the general position as follows:-

> " ... the Act of Parliament has given the Court the widest and most general discretion, and has purposely done so. It appears to me that it must be the duty of the Court in every case to consider the whole of the circumstances of the particular case before it - the circumstances of the misconduct which leads to a separation no doubt, the circumstances of the general character of the mother, and, above all, it should be the duty of the court to look to the interests of the children and carefully to weigh as regards the interests of the children, the comparative advantages or disadvantages of leaving the custody of all or of any of them to the one parent or to the other." [65]

This view identified a discretionary process in the sense that a choice had to be made of a series of alternatives. The question clearly was not simply whether the father had disqualified

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63 Symington v Symington (1875) 2 Rettie (H.L.) 41 at p. 49. An appellate court would probably take a narrower view of its functions now and perhaps send the matter back to the original court to deal with it in accordance with the principles stated by the appellate court.

64 Ibid., at p. 43.

65 Idem., per Lord Cairns L.C.

himself. It was a complicated process in which the interests of the children played an important part. The children's interests were the test against which the decision was to be made, but only in the context of the matrimonial misconduct and of the paternal and maternal situation. Lord Cairns seems to have been directing attention rather to the effect upon the interests of the children of the whole matrimonial and parental circumstances than directly to the interests of the children themselves. Thus, although the interests of the children were widely conceived and occupied an important position, that position was fundamentally negative.

33.96 Lord Cairns' approach was different from preceding formulations. Although it had a twentieth century emphasis about it it did not pose the question what will be best for this child. It asked what impact would paternal or maternal custody have on the children and on that basis which parent should have custody. The children's interests became the most important criterion of the exercise of the discretion. They had not, however, become the objective or purpose of the exercise of the discretion.

33.97 There was nothing in Lord O'Hagan's approach which could be regarded as inconsistent with the Lord Chancellor's view.

Lord O'Hagan also discounted reliance upon technicalities and rules. What was important to him was "the real interests of all the parties whom our decision may affect, and to do for all what may seem best and wisest."[66] A formidable task, but one which in principle embodied a recognition that custodial disputes involved a jurisprudence of interests rather than of rights.

33.98 Neither Lord Cairns nor Lord O'Hagan, however, gave full force and effect to these clearly stated principles. Lord Cairns, for example, paid some attention to the question whether anything had been established to "disentitle" the mother for being considered as a potential custodian of the children.[67] He also talked in terms of the mother being the "natural person" to have custody and care of her daughters.[68] This was a reference to an unarticulated rule or guideline. Similar but less clear comments were made about the position of the sons of the marriage. He was, finally, influenced by the apparent desirability of all the children growing up with "as full knowledge and full intercourse as the case will admit of with both parents."[69] In other words, he evinced a predilection for care, control and contact within the nuclear family. The Lord Chancellor was not, of course, consciously creating rules or even guidelines to this effect. He was however to some extent restricting the exercise of the wide and general discretion which he said had been conferred upon the court by

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66 Ibid., at p. 45 per Lord O'Hagan.
67 Ibid., at p. 44 per Lord Cairns.
68 Ibid., at p. 45 per Lord Cairns.
69 Idem., per Lord Cairns.

Parliament. This is in effect the first instance of a court adopting a presumptive approach, whereby a general discretion is limited by presumptions created or recognised by the court.[70]

33.99 There was similarly an echo of the common law principles in Lord O'Hagan's judgment. He espoused the threshold approach:-

> "The father's right to the guardianship of his child is high and sacred. Our law holds it in much reverence, and it should not be taken from him without gross misconduct on his own part, and danger of injury to the health or morals of the child. His proved adultery may, under certain circumstances, make the withdrawal of it inevitable; but, per se, bad as the offence may be, it may not necessarily involve the infliction of such injury, and there may be considerations of convenience and advantage to the children which if that infliction be not probable, should forbid their withdrawal from the father's care."[71]

The final sentence in that comment indicates that, even if the threshold requirements had been satisfied, the decision on the child's future was discretionary. There is therefore nothing in that part of Lord O'Hagan's judgment to distinguish his general approach from the approach established by the Court of Session.

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70 Paras. 39.72 to 39.76.

71 (1875) 2 Rettie (H.L.) 41 at p. 45 per Lord O'Hagan.

33.100 Lord O'Hagan was influenced, probably in relation to the discretionary part of the process, by the stated desirability of retaining a relationship not only between a father and his sons but also between a father and all his children.[72] Indeed the retention of the nuclear family as a unit might also have helped to promote, or at least not destroy, the "possibility of a reunion" of husband and wife.[73] Lord Selborne[74] too impliedly gave effect to certain unstated but clear principles which were taken for granted as part of judicial knowledge and thus never justified. All three judges came to their decisions largely on the basis of unarticulated underlying assumptions about the welfare of the child. This effectively rejected the implied duty to come to a decision in the light of the individual circumstances of each case. The House of Lords thus applied section 9 of the 1861 Act in a manner consistent with the approach and principles of the Court of Session, despite the clear view of Lord Cairns that Parliament had intended a different approach.[75]

33.101 The view of the House of Lords on which parent should have custody was not, of course, the same as that advocated by the Court of Session.[76] This is always possible in this area of the law, even where the legal approach and principles of each decision-maker are fundamentally the same. It would often be a reflection of the respective powers of original and appellate

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72 Ibid., at p. 46
73 Idem., per Lord O'Hagan.
74 Ibid., at p. 47 per Lord O'Hagan.
75 Ibid., at p. 43.
76 Para. 33.94.

courts. It would have no bearing upon the question of approach. That the House of Lords substituted its decision for that of the Court of Session was indicative of the legal nature of the House of Lords' approach. They effectively treated the whole custodial issue as a matter of law. On that basis it is perfectly understandable that the House of Lords should have given effect to their view of the law directing the Court of Session "to do therein as shall be just and consistent with this judgment."[77] The substance of the House of Lords' approach and the technical means of implementing their judgment demonstrate the legal nature of the custodial process both under the 1861 Act and under the common law, at least in 1875. Thus, the tentative move to treat custodial disputes as a jurisprudence of interests rather than as an enforcement of rights was unsuccessful despite common law and statutory extortations that the process was to some extent discretionary.

(d) Non-parental disputes

33.102 The examples discussed so far have mostly been inter-parental disputes. The emphasis has clearly been laid upon the patria potestas and the paternal right to custody. This has accounted for the relative weakness of the position of the mother. It embraced also, almost a fortiori, the even weaker

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77 Symington v Symington (1875) 2 Rettie (H.L.) 41 at p. 49. For the implementation of this direction, see (1875) 2 Rettie 974.

position of non-parents. Few of the mid-nineteenth century cases concerned non-parental disputes, perhaps because to contest the paternal right was acknowledged to be an almost useless exercise. But what is interesting is that any interest derived from the right of the father was, in the absence of the father, treated in much the same way as if it had been a paternal right. The most obvious example of such an interest was that of the mother. Thus, the mother's position was weak as against the father but stronger as a substitute for the father.

33.103 The overriding importance of the patria potestas as against third parties was beyond doubt.[78] In Leys v Leys the children's father attempted successfully to recover custody of them from their paternal grandfather with whom they had been residing with paternal consent for six years. The father was in debt, without income and homeless. However he had made arrangements for the children to be boarded at a Roman Catholic school. His father, the children's grandfather, was a minister of the United Presbyterian Church. The court paid no attention to these religious differences. The grandfather moreover had no "right" in relation to the children.[79] If he had, it would have been derived from the father, who thus would have been in a legally superior position in any event. The question according to Lord Shand was simply, given the "deeply seated"[80] legal right of

78 (1886) 13 Rettie 1223.

79 Ibid., at p. 1225 per Lord Shand.

80 Ibid., at p. 1225 per Lord Inglis L.P.

the father, whether "if the custody be given to the father, the children would suffer morally or physically."[81] The approach, the negative function of welfare and the limited meaning of welfare were thus the same as in the inter-parental disputes.

33.104 In Johnston v Otto[82] and AB v CD[83] the father was absent from the issue: in the former case because he was dead; in the latter case because he had been committed to an asylum for insanity. In both cases the mother attempted to recover the custody of the children then living with relatives of their father. A number of assertions were made in reply to the mother's claim in Johnston v Otto:[84] one exemplified a positive view of welfare, namely that the child's interests and comfort were not likely to be promoted by the proposed change in custody;[85] another indicated the negative function of welfare, that the child had been neglected by her mother.[86] These arguments occasioned not the slighest judicial hesitation. Lord Hope L.J.-C. did not even wish to hear counsel for the mother[87] and Lord Cockburn indicated categorically that the mother was "entitled to have the custody of her child."[88]

33.105 The Lord Justice-Clerk was more circumspect in AB v CD.[89] The children's uncle had resisted the mother's application on the grounds that she had been separated from her husband before he

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81 Ibid., at p. 1226 per Lord Shand: see also ibid. at p. 1225 per Lord Inglis. L.P.
82 (1849) 11 Dunlop 718.
83 (1850) 12 Dunlop 1297.
84 (1849) 11 Dunlop 718.
85 Ibid., at p. 718.
86 Idem.
87 Ibid., at p. 719.
88 Idem.
89 (1850) 12 Dunlop 1297.

became insane, that the father while sane had withdrawn the children from their mother's custody and that they were likely to be removed to England where the mother normally resided.[90] Nothing, Lord Hope argued, could be implied from these matters to the disadvantage of the mother.[91] She was therefore found "entitled to the care and charge of her children" provided she undertook to remain in Scotland with the children.[92] These two decisions indicate that the position of the mother, as the derivative of the father, was much the same in relation to the right to custody, if not the patria potestas, as the position of the father as the paterfamilias. Welfare, in other words, played only a negative role in establishing the threshold requirements justifying the decision to disqualify the parent for exercising the parental powers.

Section 5 - The jurisdiction of the sheriff

33.106 The legalistic nature of custodial proceedings before the reforming legislation is apparent also from an examination of the jurisdiction of the sheriff. The origins of his common law power to enforce custodial rights were uncertain.[93] Nevertheless the existence of the jurisdiction was generally recognised by the beginning of the nineteenth century.[94] The jurisdiction, it is tentatively suggested, may have arisen as an incident to claims

90 Ibid., at p. 1297.
91 Ibid., at p. 1298.
92 Idem: see the interlocutor.
93 Fraser, for example, offered no explanation.
94 Goadby v Macandys (1815) Faculty Collection 4 New Series 482.

for aliment. The paternal duty to aliment his legitimate children was the major obligation correlative to the right to custody which, as one aspect of the patria potestas, had been the recognised means of giving effect to that obligation. This correlative relationship did not subsist between the putative father and the illegitimate child.[95] The alimentary obligation owed to such a child was recognised to be not a personal liability but something in the nature of a pecuniary debt. The putative father's obligation was to relieve the mother of a part of that debt.

33.107 The father could avoid the burden of that debt by taking the child under his own charge. During the early period, as Anton has remarked, "[it] is not unlikely that the father could then counter a demand for aliment, as he certainly could later, by offering to maintain the child himself."[96] Such an offer would require something in the nature of a custody right to be effective. Questions of aliment were matters for the commissary courts after the Reformation but in the eighteenth century jurisdiction apparently was assumed by justices of the peace and by the sheriffs.[97] This was regularised in 1830 when jurisdiction was conferred upon the sheriff in actions of aliment.[98] It is readily understandable therefore that the enforcement of custody as an incident to alimentary issues should

95 E.g. Corrie v Adair (1860) 22 Dunlop 897 at p. 900 per Lord Inglis L.J.-C.
96 Anton, op. cit., p. 123.
97 Idem., p. 124.
98 Court of Session Act 1830, s. 32. For the problems of the meaning of this section, see Clive & Wilson, pp. 186 to 190.

fall within the jurisdiction of the sheriff. This would clearly be so in relation to the offer by the putative father to care for the child as an alternative to paying his share of the alimentary burden. It would have been a short step from that for the sheriff to exercise jurisdiction in any situation to enforce custody rights.

33.108 If this hypothesis is justified, the nature of the court's approach to the offer of custody as a defence to a claim for aliment may indicate more generally the nature of the sheriff's custodial jurisdiction. The earliest nineteenth century reported decision established or at least confirmed the twin propositions that the putative father's alimentary liability subsisted so long as the mother had custody of the child and that, if called upon to provide for the child, the father was entitled to custody.[99] In the case in question the boy had reached the age of sixteen and the father proposed to teach him a trade.

33.109 Although the reporter in that case indicated that this was a legal entitlement of the putative father,[1] the opinions of the judges were neutral on that point. However in Grant v Yuill[2] the clear view of the Inner House of the Court of Session supported the existence of a legal right but one subject to certain qualifications. Lord Benholme made the principle clear:-

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99 Pott v Pott (1833) 12 Shaw 183: see also McCormack v Dunkeld (1874) 1 Guthrie 39: the father's offer was even stronger against a claim by the mother's relations after her death than against a claim by the mother herself.

1 I.e. from the headnote.

2 (1872) 10 Macpherson 511.

> "The law is, that after the child has attained a certain age the father is entitled to say, I can relieve myself of the expense of maintenance, either by taking the child myself, or by making some other arrangement for its maintenance and education."[3]

It was thus a matter for the father's decision where the child was to live. The child did not necessarily have to be in his personal charge.[4] The qualifications to this principle were enunciated by Lord Cowan:-

> "The offer [to be responsible for the child] must be such as is not open to the charge of being unfair or objectionable on reasonable grounds."[5]

It was presumably for the court to decide whether the father's offer was reasonable in that sense.

33.110 The court gave no real thought during the period in question to the test of reasonableness in this context. The judges seemed to imply a forfeiture approach. For in Grant v Yuill[6] the approach was to decline the father's offer if his character was "scandalous or licentious"[7] or would endanger the child's morals. Only in Smith v Macfarlane[8] was reference made to the advantage or benefit of the child.[9] Even there the reference was at best oblique. At that stage, therefore, the

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3 Ibid., at p. 512 per Lord Benholme.
4 See also Gove v Mitchell (1884) 1 Sh. Ct. Rep. 41 at p. 42 per Sheriff-substitute Guthrie Smith.
5 (1872) 10 Macpherson 511 at p. 513 per Lord Cowan.
6 (1872) 10 Macpherson 511.
7 Ibid., at p. 512 per Lord Benholme.
8 (1886) 2 Sh. Ct. Rep. 452.
9 Ibid., at p. 455 per Sheriff-substitute Orr.

putative father's right to offer custody in implement of his alimentary obligation was in practice almost absolute. The sheriff was not concerned with the balance of advantage for the child. His function was the almost automatic application of a legal rule.

33.111 The question then became whether the sheriff's general common law custodial jurisdiction was exercisable in the same manner. The views expressed by Fraser in 1866 were quite clear. In the light of the Court of Session's pre-eminent custodial or protective jurisdiction, the sheriff had "no power to deal with the matter of permanent custody." It was, however, open to him to regulate "interim custody" in cases of "emergency".[10] The distinction between permanent and interim custody is at best specious, for custody has normally been regarded as inherently an ephemeral matter. More importantly, however, three of the cases[11] founded on by Fraser to support his propositions seem to have dealt more with the enforcement of prima facie custodial rights than with regulation of actual custody, whether permanent or temporary.

33.112 The sheriff's powers were judicially analysed most carefully during the period in question in Sharp v Jack.[12] The father of an illegitimate girl aged four asked the sheriff to

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10 Fraser, p. 81. He had earlier expressed equally clear but different views: see Sharp v Jack (1861) 1 Guthrie 260 at p. 263 per Sheriff-substitute Gordon.

11 Goadby v Macandys (1815) Faculty Collection 4 New Series 482; Speid v Webster (1821) 1 Shaw 221; Harvey (1850) 24 July. These were the principal authorities considered in Sharp v Jack (1861) 1 Guthrie 260.

12 (1861) 1 Guthrie 260.

ordain the girl's mother and her husband[13] to deliver the child so that she could be placed in the custody of some other person. The judgments of both the sheriff-substitute and the sheriff were closely reasoned. There was much common ground between them but the point of difference, on which the decision turned, amounted to the distinctive role of welfare advanced in each of the two opinions.

33.113 Of the two questions considered in the decision only the first was of present concern: "... whether the sheriff is competent to entertain an action to determine the custody of an illegitimate child, so as to deprive the mother of that custody and confer it on another person."[14] It was thus a question not merely of a parent forfeiting his or her right to custody but of the court appointing a parental substitute. Sheriff-substitute Gordon, by discounting the second issue, effectively misconstrued the nature of his common law jurisdiction. Both judges, however, acknowledged a number of fundamental propositions:-

1. the mother of an illegitimate child had a right to custody until the child reached seven or ten in the case of males and females respectively;[15]

2. judicial protection was available to illegitimate and as well as to legitimate children;[16]

3. the sheriff had power to decide the question of custody

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13 Whom the mother had married after the birth of her daughter.
14 Sharp v Jack (1861) 1 Guthrie 260 at p. 261 per Sheriff-substitute Gordon: see also ibid., at p. 268 per Sheriff Barclay.
15 Ibid., at p. 261 per Sheriff-substitute Gordon and at p. 268 per Sheriff Barclay.
16 Ibid., at p. 264 per Sheriff-substitute Gordon and at p. 268 per Sheriff Barclay.

incidentally in an action of aliment.[17]

The sheriff-substitute concluded, after referring to the powers of the Court of Session:-

> "But it does not follow that, where the life or health of a child is in immediate danger by maltreatment, or his morals of corruption by neglect or positive evil communications, the sheriff cannot summarily interfere at the suit of anyone having interest."[18]

He added, alluding to legitimate and illegitimate children, that:-

> "In both class of cases, the question is what is for the best interests of the child, independent of the mere wishes of the parent."[19]

33.114 That final comment proved unacceptable to Sheriff Barclay. But the earlier comment of the sheriff-substitute was consistent with the sheriff's views that he had power to interfere to protect the child if "immediate removal was necessary in order to save the child from serious injury."[20] This was probably the source of the opinion that temporary protection of the child in an emergency was within the sheriff's jurisdiction.

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17 Ibid., at p. 262 per Sheriff-substitute Gordon and at p. 268 per Sheriff Barclay.
18 Ibid., at p. 263 per Sheriff-substitute Gordon.
19 Ibid., at p. 264 per Sheriff-substitute Gordon.
20 Ibid., at p. 268 per Sheriff Barclay.

Sheriff Barclay, however, very clearly distinguished the situation:-

> "... when the application is not founded upon immediate apprehension of danger, but when upon views of supposed advantage to the child it is proposed to withdraw it from its natural guardian, and to place it with parties who have no legal right to its custody. Such an interference with the rights of a parent, it is thought, can be exercised only by a court holding not only an equity jurisdiction, but possessed of a nobile officium such as will justify its interference with common law rights." [21]

33.115 These views encapsulate in effect the distinction between judicial interference on the establishment of well-recognised threshold requirements, more or less as a matter of law, and judicial interference of a discretionary nature, first in the sense that the advantage to or benefit for the child is the threshold requirement and then in the context of making a choice between two or more possible decisions. In other words it is the distinction arising from the application of objective rules with a limited element of interpretational discretion on the one hand and from the exercise of interpretational, administrative and substantive discretions on the other hand.

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21 Idem.

33.116 The common law jurisdiction of the sheriff was thus available in two situations each of which fell into first of these two categories; to give effect to a recognised legal right; and to deprive a parent of a recognised legal right as a temporary remedy in an emergency situation of immediate danger to the child. In each case the process was almost wholly adjudicative and lacked any real discretion. The jurisdiction[22] did not exist when welfare was either a threshold requirement or a criterion in the exercise of a discretion. In that event the Court of Session alone could intervene. The sheriff thus exercised a formal and legal function in relation to custodial matters, either in an action of custody per se or in an action of aliment with custodial implications.

33.117 The Court of Session was imputed by the sheriffs to have wider powers at least in comparison with those of the Sheriff Court. The actual position of the two courts, however, may not have been so different in practice. This analysis of the sheriff's jurisdiction indicates the formal and legalistic nature of that jurisdiction and at the same time by comparison it helps to identify more accurately the role of welfare within the contemplation of the Court of Session. Theoretically welfare was stated to have played a more important part in the exercise of the nobile officium but, as already indicated, its role was

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22 Except possibly in the very narrow sense that the effect upon the child of the parental misconduct was an example of "negative welfare".

at best largely negative. This conclusion is not altogether inapplicable to the exercise of the common law jurisdiction of the sheriff during the period under review. It would also tend to support the doubts about the validity of the distinction between temporary or interim custody and permanent custody. It is however above all an indication, reflected by the judiciary, of the mid-Victorian view of the child's place in society. In practice the approach of the sheriffs was not so fundamentally different from that of the Court of Session during the first three-quarters of the nineteenth century.

CHAPTER 34

THE POSITION PRIOR TO THE STATUTORY REFORMS: ENGLAND

Section 1 - Introduction

34.1 Concepts of parental authority and of parental rights to custody had begun to emerge from the common law of guardianship in England by the beginning of the nineteenth century. In that sense English jurisprudence was moving towards the system of principles, in essence a modified version of the Roman patria potestas, which had long been acknowledged in Scotland. While the simplicity of the Scottish system continued until the intervention of the legislature first in 1861[1] and later in 1886[2], the pattern built up by the English courts during the eighteenth and early nineteenth centuries was clearly being modified by statutory intervention in 1839[3], 1857[4] and 1873[5] and also, probably more significantly, by the introduction of a new dimension into the debate, the judicial control of the child's religious education. It is particularly notable that during the period before 1886 Scots law was unaffected by statute; nor was religion a matter of controversy in litigation affecting children.

34.2 These two factors will be considered in relation to the development of English law before 1886. It might however

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1 Conjugal Rights (Scotland) Amendment Act 1861 (24 & 25 Vict., c. 86).
2 Guardianship of Infants Act 1886 (49 & 50 Vict., c. 27).
3 Custody of Infants Act 1839 (2 & 3 Vict., c. 54).
4 Matrimonial Causes Act 1857 (20 & 21 Vict., c. 85).
5 Custody of Infants Act 1873 (36 & 37 Vict., c. 12).

be asked whether the modern approach in England began in 1839 rather than in 1886. Although the inspiration for reform originated in the 1830s with Talfourd,[6] the approach contained in his legislation[7] was probably too radical for the Victorian judiciary, for they reacted by declining to give full effect, within the limited scope of its application, to the policy of legislation. Thus although the way was open in 1839 to adopt something in the nature of a welfare approach, the judiciary tended to apply existing guidelines. Moreover the 1886 Act for the first time made specific reference to the welfare of the child. The year 1886 is therefore the beginning of the modern era for both England and Scotland.

34.3 What purpose is there in looking at the developments in England before 1886, especially since the 1839 and 1873 Acts, with one minor exception,[8] were repealed and replaced by the 1886 Act? That Act, it is suggested, is difficult to understand, certainly in relation to welfare, unless the immediately preceding position is clear. Indeed, in the comprehensive review of the law undertaken by the House of Lords in 1969 in J v C,[9] reference was made to a number of the pre-1886 judicial authorities. Lord MacDermott was the only Lord of Appeal to

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6 His Bill, culminating in the 1839 Act, did not enjoy an easy Parliamentary passage: see (1837) 39 Parl. Deb. (H.C.) 3s. cols. 1082 to 1091; (1837) 40 Parl. Deb. (H.C.) 3s. cols. 1114 to 1123; (1837) 42 Parl. Deb. (H.C.) 3s. cols. 1050 to 1055; (1837) 43 Parl. Deb. (H.C.) 3s. cols. 143 to 148; (1838) 44 Parl. Deb. (H.L.) 3s. cols. 772 to 791; (1839) 47 Parl. Deb. (H.C.) 3s. cols. 549 to 552; (1839) 48 Parl. Deb. (H.C.) 3s. cols. 159 to 163; (1839) 49 Parl. Deb. (H.L.) 3s. cols. 485 to 494.

7 Fundamentally an open-ended discretion.

8 Custody of Infants Act 1873, s. 2.

9 [1970] A.C. 668.

refer to the 1839 and 1873 Acts[10] but he did so without indicating what effect they had upon the decisions of the courts during that period. In his view these two Acts, together with those of 1886 and 1891 "record an increasing qualification of common law rights and the growing acceptance of the welfare of the infant as a criterion."[11] This may have been the policy of the legislation but it was not the trend of authority in the pre-1886 decisions.

34.4 The relative simplicity of the converging English and Scottish patterns was also affected by the English courts' treatment of religious education. Religion had not been a particularly relevant issue in this context after non-Christians had been statutorily disabled from holding the office of guardian[12] and Papists had not been permitted to give their children any education in their own religion either in England or abroad.[13] The anti-Catholic laws were enforced by the courts in this context[14] but by the time of Lord Eldon greater emphasis was being placed upon parental wishes in the matter of religious education.[15] By that time, of course, most of the anti-Catholic legislation was being repealed. This represents the beginning of what became almost a paternal right to have his child educated according to the father's religious principles. This was probably analogous of the paternal right to custody which had somewhat earlier evolved from the new approach to parental guardianship.

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10 Ibid. at p. 708 per Lord MacDermott.
11 Ibid. at p. 709 per Lord MacDermott.
12 Act of 1698 (9 & 10 William 3, c. 32), s. 1 repealed by an Act of 1813 (53 Geo. 3, c. 160).
13 Macpherson, p. 116.
14 Ibid., p. 123.
15 Idem.

This newly recognised parental right to determine the child's religion, both during and particularly after the father's lifetime, considerably distorted the simple movement towards a welfare approach before and after 1886.

Section 2 - Law and policy in 1839

(a) General

34.5 By the early nineteenth century the Court of Chancery, in theory at least, exercised an expansive jurisdiction over the guardianship of parents and other guardians. The close relationship between parental authority and the office of guardian at that period was reflected in Lord Eldon's acknowledgement as a ground of interference parental conduct inconsistent with his duties as a guardian.[16] If a guardian's duty was, as it indeed was often stated to be, to act for the child's benefit, it would follow that parental failure to act for the child's benefit would constitute a ground for interference. Lord Eldon in terms conceded this point[17] but in practice neither the Court of Chancery nor any other court for that matter was prepared to treat parents as guardians in this sense. Even if this equitable ground of intervention existed, the court rarely used it. Most cases seem, in any event, to have gone before the Court of King's

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16 Lyons v Blenkin (1821) Jacob 245 at p. 253.

17 Ibid. at p. 262.

Bench in the early part of the nineteenth century.[18] That court's function remained simply the enforcement of parental rights. This is readily understandable in the light of Chancery's reluctance to exercise its powers and the gradual substitution of a theory of parental authority qua parent for one of parental authority qua guardian.

34.6 The distinction between the equitable and common law jurisdiction of the English courts lay not so much in the conduct considered necessary to deprive a parent of his authority but in the remedies available once the threshold requirements had been satisfied. The Court of Chancery as guardian of its wards could act more or less as a substitute guardian, perhaps even as a substitute parent.[19] The Court of King's Bench could enforce the parent's legal rights or not, as the case may be;[20] it could do nothing to ameliorate the position of the child, if the parent's rights were not to be enforced, other than by retaining the status quo.[21] The distinction between these jurisdictions appears to have been similar to that pertaining between the Court of Session and the Sheriff Court in Scotland.[22]

34.7 Just as the Court of Chancery had laid claim to wide grounds of interference, so it acknowledged the existence of a wide discretion once the decision to interfere had been

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18 At least from a consideration of the reported decisions which does not of course necessarily present a true statistical pattern.

19 In the sense of exercising parental authority about the child's place of residence, education, etc; not in the sense of personal care.

20 I.e. that court had no discretion.

21 Which might not be best for the child.

22 Para. 33.116.

made. Indeed Lord Eldon L.C. indicated that one of the functions implicit in the exercise of the equitable jurisdiction was "to look diligently to all the circumstances of the case."[23] This was qualified however by reference to the existing practice of the court.[24] Thus both in the threshold context and at the point of the exercise of the discretion the Court of Chancery adopted a narrow practical view of the wide jurisdiction to which it laid claim.

(b) The Court of Chancery

34.8 The dearth of examples in the Court of Chancery and the relatively large number of habeas corpus proceedings in the Court of King's Bench are indicative of the gradual movement from guardianship concepts, with their wider acknowledgment of the child's interests, to the parental rights approach which led ultimately to statutory interference. The creative function of equity had in fact foundered upon the question of enforceability, just as the common law had done before. As Lord Eldon L.C. commented:-

> "The courts of law can enforce the rights of the father, but they are not equal to the office of enforcing the duties of the father. Those duties have been acknowledged in this his Majesty's Court for centuries past."[25]

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23 Wellesley v Beaufort (1827) 2 Russell 1 at p. 23 per Lord Eldon L.C.
24 Idem.
25 Idem.

But that was true only of the propertied classes in the sense that a fund was necessary to create jurisdiction[26] and as the means for giving effect to the wardship of the court. It is not perhaps surprising that equity atrophied in this context in the face of the new society brought about by the Industrial Revolution.

34.9 Of the four Chancery decisions worth analysing[27] only one concerned an inter-parental dispute.[28] It is particularly significant that the decision in Chancery followed upon earlier habeas corpus proceedings[29] which had confirmed the right of the father to custody as against the mother. The decision of the Court of King's Bench[30] in that case emphasised the strength of the parental rights approach. The child, eight months old at the relevant time, had a French father and an English mother. The child remained with the mother after she had separated from her husband who later "by force and stratagem" entered the house and removed the child while being nurtured by the mother. The court paid little attention to the age of the child and the close physical relationship with the mother. The method of removal seemed to occasion no comment. Indeed the possibility of the child's removal to France seemed to cause the court more concern. Lord Ellenborough C.J. summed up the court's attitude succinctly:-

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26 On the question of jurisdiction, see para. 45.65.
27 De Manneville v De Manneville (1804) 10 Vesey Junior 52; Shelley v Westbrooke (1817) Jacob 266 n; Lyons v Blenkin (1820) Jacob 245; Wellesley v Beaufort (1827) 2 Russell 1.
28 De Manneville v De Manneville (1804) 10 Vesey Junior 52.
29 R v De Manneville (1804) 5 East 221.
30 Idem.

> "We draw no inference to the disadvantage of the father. But he is the person by law entitled to the custody of his child. If he abuses that right to the detriment of the child, the court will protect the child. But there is no pretence that the child has been injured for want of nurture or in any other respect. Thus he having a legal right to the custody of his child and not having abused that right is entitled to have it restored to him."[31]

34.10 The generality of the judicial power of intervention[32] contrasted with the narrowness of its application[33] is quite remarkable. That conclusion may equally be attributed to the decision of the Court of Chancery.[34] Further grounds for intervention were put before that court: namely, the alleged unsatisfactory religious and political principles of the father.[35] They were not in fact substantiated. The court was however greatly concerned about its jurisdiction over the father. But, that having been established and despite judicial concern over the means whereby the father had recovered control of his child,[36] the court largely ignored its own direction to do "what is fit to be done with the person of the child"[37] and merely ordered the father not to remove the child from the

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31 Ibid. at p. 223 per Lord Ellenborough C.J.
32 A reflection of the view of parental authority as a species of guardianship.
33 A reflection, on the other hand, of the social mores of the early nineteenth century.
34 De Manneville v De Manneville (1804) 10 Vesey Junior 52.
35 Because he was an alien. But since he was living under English protection, that was sufficient to give the court jurisdiction over his English-born child.
36 (1804) 10 Vesey Junior 52 p. 62 per Lord Eldon L.C.
37 Idem.

jurisdiction.[38] The similarity of approach of the Courts of King's Bench and Chancery in practice was thus manifest. It reflected the very narrow view of the social standing of the child held by the early Victorian judiciary.

34.11 The other three Chancery decisions[39] concerned a dispute between the child's father and a relative other than the child's mother.[40] The approach of the court in those cases was not different from any other case concerning the exercise of paternal authority. It might now be expected, however, that a court would distinguish between an inter-parental dispute and one between a parent and a non-parent. Such a distinction would to some extent be consistent with a welfare approach to the settlements of the dispute. The Court of Chancery did not make such a distinction in the early nineteenth century. That emphasises the paternal rights view of the law at the expense of a welfare orientated attitude. That is entirely understandable in context.

34.12 The three cases were exceptional in the sense that in each the court rejected the father's claim. This was always technically possible. The interesting question however is whether these decisions, each one reached by Lord Eldon L.C., indicated judicial concern for the child or judicial disapproval

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38 Removal of a child from the jurisdiction was possible but only where it would be "necessary" or essential for the health of the child: Campbell v Mackay (1837) 2 Mylne and Craig 31. It later became an issue, one among a number, related to the general question of welfare: In re Callaghan: Elliott v Lambert (1884) 28Ch. D. 186.

39 Shelley v Westbrooke (1817) Jacob 266 n.; Lyons v Blenkin (1820) Jacob 245; Wellesley v Beaufort (1827) 2 Russell 1.

40 At least technically: the two later cases concerned to some extent a dispute between the father and the deceased mother.

of the father. The first of the trilogy in point of time and the clearest decision on the merits was Shelley v Westbrooke.[41] The child's mother was dead and the child was living with the mother's father. The claim of the child's father was rejected because he was an atheist, immoral and an adulterer. If the grounds of intervention remaind broadly the benefit of the child,[42] then according to the court for a child to reside with such a father was clearly a disadvantage for, or at least of no benefit to, the child. But the argument turned on the parental inadequacies of the father at large and not on the effect on that child of close contact with the father. The latter was, in theory, what the court indicated as its function but clearly that is not what the court did in that case.

34.13 In Lyons v Blenkin[43] Lord Eldon L.C., as expected, indicated that the Court of Chancery would intervene when the parent was "capriciously interfering in what [was] clearly for their [the children's] benefit."[44] The children's father was a dissenting minister lacking the funds to educate them in the manner in which, it was stated, they ought to be educated. Their deceased mother had provided for them well in the financial sense and their aunt, who was their guardian in that respect, was caring for them and superintending their education with the consent of their father. His claim to have them returned to him was rejected because:-

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41 (1817) Jacob 266 n.
42 Which most of the judgments of Lord Eldon L.C. suggested.
43 (1820) Jacob 245.
44 Ibid. at p. 262 per Lord Eldon L.C.

> "... the testatrix [their mother], by the benefits she has given these children out of her property, has purchased the power of educating them in the way and under the control and guardianship which she has pointed out and the parent has consented to; and I cannot help thinking that unless this gentleman can bring before the Court some complaint on the ground of improper conduct, he must be taken to have given his consent to the course of education which has been pursued."[45]

It was therefore not so much a dispute between the father and the children's aunt as between the father and the mother, acting through her nominee supported by funds adequate for the purpose. The father, by allowing that situation to develop and continue for a considerable period, had effectively displaced the presumption[46], normally supporting the paternal right, in favour of the status quo. The father was not parentally unfit. The children's interests were not consulted. The mother's nominee was preferred simply because of the financial and educational status quo. Whatever the basis of the decision, it certainly was not argued in terms of the benefit of the child.

34.14 The circumstances in Wellesley v Beaufort[47] were similar in several respects. The marriage had broken down. The mother died. Before her death she had asked her sister to resist any attempt by the father to remove the children who,

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45 Ibid. at pp.263 and 264 per Lord Eldon L.C.
46 I.e. a legal right subject to qualification in certain circumstances.
47 (1827) 2 Russell 1.

after her death, remained in the care of their aunts. There was however one vital point of distinction: the father had committed adultery[48] and used profane and obscene language in front of the children. Much of the discussion concerned questions of jurisdiction and, once that issue had been determined, the court had no hesitation in holding the father unfit for custody. The way was open, therefore, for the court to decide where the children should reside. This clearly emphasises the two stages of the process. The threshold requirements were related entirely to the parental fitness of the father: a parent-orientated approach. The report did not indicate upon what criteria the discretion was proposed to be exercised, although the instructions to the Master suggest that the interests of the children, particularly their "fortunes', were to play a part in the decision.[49] Thus welfare played no direct part, at most a negative role, in establishing the threshold requirements. If the benefit of the child was relevant in the discretionary decision, it was restricted to the peculiarly material and financial aspects of the child's welfare.

(c) The Court of King's Bench

34.15 The strength of the paternal right to custody has already been noticed in R v De Manneville.[50] That right applied

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48 Adultery probably had little consequence, for paternal commission of adultery had been stated not to be a ground of deprivation unless the child was to be brought into contact with the paramour: Ball v Ball (1827) 2 Simons 35. This, of course, would be an example of negative welfare.

49 (1827) 2 Russell 1 at p. 44.

50 (1804) 5 East 221.

only to legitimate children. The Court of King's Bench became involved only if an attempt were made to enforce that right.[51] Even although the father's right was not absolute, it was more certain than the position of the mother of an illegitimate child. The uncertainty probably arose from the medieval concept of the illegitimate child as filius nullius. It is likely that nobody except the mother would be interested in the child in any event and the court seemed suspicious on occasions of the mother's motives in seeking to recover her child. Lord Mansfield C.J. commented:-

> "It often happens that the mother insists upon the custody of the child, not so much out of regard to the child itself, as with a view to make the father pay a sum of money towards its maintenance and education."[52]

He concluded however by conceding to the mother something in the nature of a legal entitlement enforceable unless "the child would incur any danger from being left with the mother."[53]

34.16 Lord Ellenborough C.J. evinced a similar hesitancy in R v Hopkins.[54] In his view no legal rights were involved and matters of guardianship were not for his court. He modified his attitude however by looking at habeas corpus not as a means of enforcing a maternal right but as a way of preserving the

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51 R v Greenhill (1836) 4 Adolphus & Ellis 624.
52 Ex parte Ann Knee (1804) 1 Bosanquet & Puller (N.R.) 148 p. 149 per Mansfield C.J.
53 Idem.
54 (1806) 7 East 579.

status quo[55] until the issue could be resolved. This is almost an invocation of the concept of parental authority as a type of guardianship, not as a matter of legal right. The limited nature of this view of the jurisdiction was expressed clearly in these words:-

> "Without touching therefore the question of guardianship, we think that this is a proper occasion for the Court, by means of this remedial writ, to restore the child to the same quiet custody in which it was before the transactions happened which are the subject of complaint; leaving it to the proper forum the decision of any question touching the right of custody and guardianship of this child, in which we do not meddle."[56]

That argument had the merit of treating legitimate and illegitimate children alike. There was no need to investigate closely the status of the mother of an illegitimate child. The nature of the removal or taking of the child was therefore more important than the person from whom the child had been removed. In any rationalisation however the interests of the child were irrelevant.

34.17 Whatever its nature this right was not absolute; more accurately the writ purporting to enforce the right would not

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55 Which would justify looking at the way in which the status quo came about, e.g. by force or stratagem. Cf. R v De Manneville (1804) 5 East 221.

56 R v Hopkins (1806) 7 East 579 at p. 580 per Lord Ellenborough C.J.

be available in certain circumstances. Thus the parent, either qua parent or as the dispossessed custodian, was liable to be disqualified. Although all the reported decisions indicated a disqualification approach, the judges appeared to differ on the purposes of the disqualification. Lord Denman C.J., for example, suggested that "when a father has the custody of his children, he is not to be deprived of it except under particular circumstances."[57] This postulates an approach which was largely parent-biased.[58] Earlier Lord Ellenborough C.J., having established the father's legal entitlement to custody of his child, argued that if he abused that right "to the detriment of the child, the Court will protect the child."[59] This attitude was much more sympathetic to the child than that of Lord Denman C.J.

34.18 Such a difference of approach points to different grounds of interference. Lord Ellenborough C.J. linked parental conduct, the abuse of parental rights, with the effect of that on the child, the need for detriment to the child.[60] Danger to the child formed a part of Lord Mansfield C.J.'s formulation in Ex parte Ann Knee.[61] But in R v Dobbyn[62] the court paid considerable attention to the profligate and cruel conduct of the father. By 1836, just before Talfourd's legislation was enacted, the grounds for interference had clarified as a synthesis of parental conduct and the effect of such conduct

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57 R v Greenhill (1836) 4 Adolphus & Ellis 624 at p. 639 per Lord Denman C.J.
58 He qualified it later in his judgment.
59 R v De Manneville (1804) 5 East 221 at p. 223 per Lord Ellenborough C.J.
60 Idem.
61 (1804) 1 Bosanquet & Puller (N.R.) 148.
62 (1818) 4 Adolphus & Ellis 644 n.

on the child. It was most carefully expressed by Lord Denman C.J. in R v Greenhill[63]:-

> "The court, it is true, has intimated that the right of the father would not be acted upon where the enforcement of it would be attended with danger to the child; as where there was an apprehension of cruelty, or by contamination of some gross profligacy."[64]

The welfare of the child thus played a part in the establishment of the threshold requirements to be satisfied before the court was entitled to refuse habeas corpus: in effect, negative welfare. Once this point had been satisfied, the way was open to decline to enforce the parent's right or interest. The Court of King's Bench had no power to decide what should happen to the child once it had been decided not to enforce that right or interest.

34.19 It would seem therefore that by 1839 the threshold requirements necessary for the intervention of the Court of Chancery and the Court of King's Bench were fundamentally similar. The emphasis was laid upon parental rights, interests and conduct; the welfare of the child occupied at best a negative position. The second part of the process, however, was quite different in the case of each court. The function of the common law court was clearly restricted. Its role was

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63 (1836) 4 Adolphus & Ellis 624.

64 Ibid. at p. 640 per Lord Denman C.J.

protective of the status quo unless that was wholly unjustified. The equitable jurisdiction was in theory very wide but rather narrow in practice, simply because the Court of Chancery hesitated to exercise its undoubted discretionary powers. The issue was resolved more or less at the threshold stage. In both contexts the position of the mother was very weak, except perhaps as a nominee or delegate of the father. She had little independent status vis-à-vis her children. Such was the background to Talfourd's legislation.

Section 3 - The policy of the legislation

(a) The intention of the legislators

34.20 Although the rules constituting the grounds of intervention had become reasonably clear, the courts, either legal or equitable, hesitated to exercise their powers. The reasons, no doubt, were to be found deep in the minds of the judiciary. Occasionally, however, the policies underlying the judicial decisions became apparent. In R v Greenhill[65] Lord Denman C.J. argued that the matter required to be decided on general grounds, "because any doubts left on the minds of the public as to the right to claim the custody of children might lead to dreadful disputes, and even endanger the lives of persons at the most helpless age."[66] The Chief Justice seems to have regarded the preservation of the family unit as vital,

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65 (1836) 4 Adolphus & Ellis 624.

66 Ibid. at p. 640 per Lord Denman C.J.

encompassing the interests of the parents and of the children, while at the same time the integrity of the family remained within the control of the father. It was probably paternal control of the family rather than retention of the family unit which caused general disquiet. Indeed Lord Denman C.J., speaking in the House of Lords on Talfourd's bill and referring to his court's decision in R v Greenhill,[67] indicated that he "felt ashamed of the odious law."[68]

34.21 Talfourd's reforms did not enjoy an easy passage through Parliament,[69] not, it would appear, because there was a great deal of opposition in principle, but rather because of lack of agreement about how the policy could best be achieved. Although Lords Lyndhurst and Brougham were divided on the rules of law which the Bill purported to amend,[70] Talfourd himself had no doubt about the "hideous injustice" of the common law remedy of habeas corpus.[71] His main objection to the Court of Chancery's admitted power to control the father's authority was that "while proofs of gross profligacy or even unhappily religious opinions have been thought sufficient to take the children from their father, no regard has been made to the mother's claim even to be permitted to see them [the children]."[72] Talfourd was thus inspired to improve the position of the mother, without however interfering with the father's "paramount right" to custody which had been "too long recognised" to be

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67 (1836) 4 Adolphus & Ellis 624.
68 (1839) 49 Parl. Deb. (H.L.) 3s. col. 493 (Lord Denman).
69 Para. 34.2.
70 (1838) 44 Parl. Deb. (H.L.) col. 773 (Lord Lyndhurst) and col. 783 (Lord Brougham).
71 (1837) 39 Parl. Deb. (H.C.) col. 1085 (Mr. Sergeant Talfourd).
72 Ibid. col. 1086.

changed.[73] He showed no direct concern for the interests of the children, although it was clearly implicit in his reasoning that the improved position of the mother would benefit indirectly the child. His very limited objective became even clearer in comparison with his view of the law of Scotland. That system needed no amendment for it "gave to the Court of Session the power of giving the custody of infants to their mother."[74]

34.22 The objections to Talfourd's proposals fell into three categories. The new system would embitter marital relations;[75] it would facilitate the separation of spouses.[76] Such matrimonial consequences, it was suggested, would be highly prejudicial to the children of the marriage.[77] Strangely, indeed, both Talfourd and his supporters discounted the consequences for the children of their proposals.[78] The second category of objection, largely a corollary of the first, argued that the reforms did not go far enough, particularly as they failed to improve, or indeed recognise, the position of the children.[79] One opponent of the bill argued the point very clearly:-

> "The greatest evil of all was the condition in which poor children were placed who were innocent parties. The primary object of a bill of this sort ought to be the

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73 Idem. It is interesting that this appears to have been the first time that the word "paramount" has been used in this context: perhaps not in the sense that it is probably used today.

74 (1839) 48 Parl. Deb. (H.C.) 3s. col. 161 (Mr. Sergeant Talfourd).

75 (1837) 40 Parl. Deb. (H.C.) 3s. col. 1123 (Mr. Tancred).

76 Ibid. col. 1114 (Sir E. Sugden); (1837) 43 Parl. Deb. (H.C.) 3s. col. 144 (Sir E. Sugden).

77 Idem.

78 (1837) 43 Parl. Deb. (H.C.) 3s. col. 147 (Mr. Leader).

79 (1838) 44 Parl. Deb. (H.L.) 3s. cols. 782 to 786 (Lord Brougham (1839) 49 Parl. Deb. (H.L.) 3s. cols. 493 and 494 (Lord Cottenham); (1839) 48 Parl. Deb. (H.C.) 3s. cols. 161 and 162 (Mr. Langdale).

> care of the children whom the parents were separated from. Now the present bill did not make a proper provision of this nature."[80]

It is indeed strange, but understandable in context, that the interests of children were at best purely incidental in a bill entitled "Custody of Infants."

34.23 The third type of objection is most significant for present purposes. The Act, just as the bill preceding it, conferred upon a judge in equity a general discretion to award to the mother access to her infant and, where the infant was not older than seven, to order that the infant should be delivered to and remain in the custody of the mother, until that age was reached.[81] It was Talfourd's deliberate policy to confer a discretionary power upon the court to mitigate the law which enforced the right of one parent to withhold access from the other.[82] This policy was considered objectionable as "the law was bound to deal with general cases;"[83] further the issue raised was not justiciable.[84] It would be impossible, it was also suggested, for the judge to come to a decision on such a matter.[85]

(b) The new judicial function

34.24 The fundamental nature of the judicial function in

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80 (1839) 48 Parl. Deb. (H.C.) 3s. col. 161 (Mr. Langdale).
81 Custody of Infants Act 1839, s. 1.
82 (1837) 39 Parl. Deb. (H.C.) 3s. col. 1086.
83 (1837) 40 Parl. Deb. (H.C.) col. 1114 (Sir E. Sugden).
84 Idem.
85 (1837) 42 Parl. Deb.(H.C.) 3s. col.1051 (Sir E. Sugden).

relation to children was raised by these arguments. The exercise of such a discretion involves asking the judge to create legal rights rather than adjudicate upon them, a task which he would normally do by declaring their enforceability or by depriving the holder of their exercise. This new function was implicitly conceded by Lord Cottenham when he advocated judicial control of the abuse of paternal authority, but the power should in his view be sparingly exercised.[86] On the other hand, it could have been argued, the Court of Chancery already had power to control parents and guardians, certainly in exercise of its wardship jurisdiction. This function however could have been distinguished, for there the court was acting as guardian, in substitution for the parent or guardian, and as such the court was not only enabled but actually required to act for the benefit of the child. Even that argument is slightly misleading. For in that situation the court is not creating rights; it is merely exercising powers.

34.25 The stated objection to Talfourd's policy was more fundamental. Guardianship or the wardship jurisdiction was not involved. The court did not stand in loco parentis. It was not acting as an official and paternalistic parent in exercise of a public function. It would in effect be creating a set of rights and duties between individual persons created as a function of public law and enforced as a matter of

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86 (1838) 44 Parl. Deb. (H.L.) 3s. col. 789 (Lord Cottenham).

private law. The novelty of Talfourd's policy was therefore the judicial creation in consequence of the exercise of a publicly inspired discretion of a private legal regime between two parents. The objections voiced in Parliament did not describe the function in that way but it was fundamentally that aspect of Talfourd's policy which prompted the suggestion that the issue created by such a discretion would be neither legal nor justiciable.[87]

34.26 The formal structure of the Custody of Infants Act 1839 was entirely consistent with Talfourd's policy. Section 1 enabled a judge in equity "if he should see fit" to make an access or custody order in the circumstances prescribed. The threshold requirements for the making of an order are not important for present purposes: the infant simply was required to be in the sole custody or control of the father. That requirement merely reinforced that the purpose of the Act was to improve the position of the mother. The judge was also enabled to attach to the access order any temporal or other regulations "as he shall deem convenient and just." The section thus contained almost nothing[88] to indicate how or in what circumstances the discretion should be exercised.

34.27 The other important feature of the Act was the prohibition on making an access or custody order in favour of

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87 The importance of these objections, particularly since they were rejected by Parliament, is their implicit recognition that the formulation of Talfourd's Act created a fundamentally new judicial function and consequential legal regime, at least in the context of children.

88 Because the words of limitation were so general as to confer a clear discretion at the point of interpretation.

an adulterous mother.[89] The adultery had to be judicially established.[90] That restriction operated in a sense as an important threshold requirement, for clearly the court had no power to make an order when the commission of adultery had been established. That requirement was clear beyond doubt. It was probably more restrictive than the earlier rules of common law or equity which tended to regard the commission of adultery as irrelevant unless it was proved to have had effect on the child. The exercise of the wide judicial discretion confirmed by section 1 was thus restricted by the positive rule enacted in section 4. This was an entirely novel statutory formulation in 1839. It is however one which has since been used frequently.

(c) The judicial approach to the new function

34.28 The policy and the statutory formulation of that policy clearly invited the court to exercise a wide discretion. It could have been invoked in favour of the mother, the children or even the father.[91] In the light of its structure, it could not, on the other hand, have been restrained in any substantial sense.[92] The courts however failed overall to respond to this statutory invitation, tended to restrict the exercise of the discretion by reference to existing rules and in so doing probably distorted the nature of the function which Parliament had intended to create.

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89 Custody of Infants Act 1839, s. 4.
90 Either by judgment in an action for criminal conversation by the husband or by sentence of an Ecclesiastical Court.
91 Parliament, or at least Mr. Sergeant Talfourd, had intended that it should be exercised only in favour of the mother.
92 Except where the mother had committed adultery, in which case the power was not available.

34.29 The 1839 Act was not, of course, the only reforming Act prior to 1886. The Matrimonial Causes Act 1857 conferred upon the temporal courts a matrimonial and custodial jurisdiction[93] and in 1873 the restructuring of the judicial system involved priority being given to the rules of equity,[94] including in this context the statutory powers of the Court of Chancery.[95] To that extent the law was the same whether the matter was dealt with in the Chancery or Queen's Bench Division. Finally, Talfourd's Act was repealed in 1873 but replaced by the Custody of Infants Act 1873 which did no more than extend the application of the 1839 Act.[96] It preserved the discretionary approach. The failure of the judiciary fully to adopt that approach was thus the opportunity for Parliament in 1886 to give more positive guidelines to the exercise of the discretion.

24.30 The first reported cases in which mention was made of the 1839 Act were Ex parte Bartlett[97] and In re Fynn.[98] Each was a decision of Knight Bruce V.-C. The Act did not specifically apply to the circumstances of In re Fynn[99] but the Vice-Chancellor indicated that the general approach had been modified in favour of the mother. In his view:-

> "What I have said may however[1] where there is a mother (and especially as to infants under seven years of age) be subject to qualification with reference to her rights (if I may use the

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93 Matrimonial Causes Act 1857, s. 35.
94 Judicature Act 1873 (36 & 37 Vict., c. 66), s. 25(10).
95 In re Ethel Brown (1884) 13 Q.B.D. 614 at p. 617 per Lindley L.J.
96 To include custody and access orders in relation to children under sixteen. It also regulated custodial agreements: see paras. 34.78 to 34.85.
97 (1846) 2 Collyer 661.
98 (1848) 2 De Gex & Smale 457. 99 Idem.
1 In effect, that the paternal right could be suspended only if that were essential to the safety or welfare of the child.

> expression) created by the statute called Mr. Sergeant Talfourd's Act or declared or enforced by it."[2]

He added significantly that the Act could be important even when it did not apply, for, if the children were suddenly to fall under their father's charge, it would apply and the relevant legal approach would be different.

34.31 Such a different approach had been demonstrated by him in the earlier case of Ex parte Bartlett.[3] The parents of a girl of two had separated as a result of one act of violence by the father against his blameless wife. Knight Bruce V.-C. commented that it was not a condition of interference[4] that the mother had obtained or was entitled to obtain a divorce a mensa et thoro. He concluded, without further analysis, that the "wife ought to have the present custody"[5] of the child in question. The use of the word "ought" is significant, for nothing could have been more indicative of the exercise of an open-ended discretion; nor could his approach have been more consistent with the policy of the Act.[6]

34.32 Lord Cottenham L.C. added a further dimension to the implementation of the Act in Warde v Warde.[7] His views expanded the policy of the legislation beyond the protection and advancement of the position of the mother. The Act in his

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2 (1848) 2 De Gex & Smale 457, at p. 475.
3 (1846) 2 Collyer 661.
4 I.e. not a threshold requirement: ibid. at pp. 663 and 664.
5 Idem.
6 At least as stated by Talfourd.
7 (1849) 2 Phillips 786.

opinion enabled the court first of all to interfere with the paternal power "when the maternal feelings are tortured for the purpose of obtaining anything like an unjust advantage over the mother."[8] The remedy was the grant to the court of "absolute authority over children under seven."[9] So much of the Lord Chancellor's views was consistent with the policy expounded by Talfourd. The important qualification added by Lord Cottenham was to some extent a reflection of the views which he stated in the House of Lords during the debates on Talfourd's bill. He evinced, it will be recalled,[10] a feeling for the interests of the children. Thus in Warde v Warde[11] he argued that by nature children were entitled to care from both parents. But if that was not possible, the situation if the 1839 Act or indeed the law generally were invoked, the function of the court would be "to adopt that course which seems best for the interests of the children, without regard, so far as it interferes with that object, to the pain which may be inflicted on the ones who are the authors of the difficulty."[12] He read the Act, therefore, as a measure for securing and promoting the interests of the children, over and above those of the mother, to the extent of any inconsistency between the two. Although the discretion in the Act was sufficiently wide to allow that interpretation, that bias had not been intended by those responsible for the

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8 Ibid. at p. 788 per Lord Cottenham L.C.

9 Idem.

10 See para. 34.22.

11 (1849) 2 Phillips 786.

12 Ibid. at p. 789 per Lord Cottenham L.C.

legislation. That emphasises, of course, how difficult it is to build policy into the legislation without at the same time stifling the initiative of those administering the Act. The 1839 Act was the first major attempt in this context to create such a structure. It is probably true however that draftsmen are now able to handle legislation of this type more easily than in 1839.

34.33 The bias in favour of the children did not survive for long after Lord Cottenham L.C.'s analysis of the legislation. The decision of the court in Re Halliday's Estate: Ex parte Woodward[13] was clear. A child of four was ordered to be delivered to the mother after she had been deserted by her husband who, after being released from prison as a consequence of such desertion, had subsequently surreptitously obtained possession of the child from her. That decision was probably a fortiori the determination of Knight Bruce V.-C. in Ex parte Bartlett.[14] But Turner L.J. interpreted the 1839 Act more narrowly than Knight Bruce V.-C. or Lord Cottenham L.C. In his view the purpose of the Act was to control the father's exclusive right to custody but in so doing the court should consider the father's marital duty to his wife[15] and the interests of the children. These considerations were not however merely elements in the exercise of a statutory discretion. According to Turner L.J. the court would not interfere with the father's

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13 (1852) 17 Jurist 56.

14 (1846) 2 Collyer 661.

15 Later held to include the duty of both husband and wife to their children: In re Elderton (1883) 25 Ch. D. 220.

exclusive right to custody, unless that right was inconsistent with these considerations. In other words, the considerations were being treated as threshold requirements rather than as factors in the discretionary process. The father's right had been reinstated almost to its earlier status of paramountcy. Lord Cottenham L.C.'s approach had impliedly been rejected. The protection or promotion of the interests of the mother or of the children was no longer the objective of the discretionary process. These interests were relevant only at the threshold stage.[16]

34.34 Turner L.J.'s approach was followed by Jessel M.R. in In re Taylor, an infant[17] and Pearson J. in In re Elderton (infants)[18]. These cases were decided under the 1873 Act but the structure of that Act was the same as that of the 1839 Act. It is particularly significant that Jessel M.R. recognised the discretionary nature of the legislation but declined to give effect to it. Having described the pre-1839 position as one of the right of the father to custody,[19] the Master of the Rolls continued:-

> "But the Act took away that right of the father in the most express terms, for the Act was confined to the cases where the child was in the sole custody of the father, and it gave to the Court of Chancery the jurisdiction which is now transferred to the High

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16 This was also true if the matter was raised in the Court of King's Bench in which case, of course, neither the 1839 Act nor the 1873 Act applied: R v Maria Clarke: In re Alicia Race (1857) 7 Ellis & Blackburn 186; In re Andrews (1873) L.R. 8 Q.B. 153; In re Goldsworthy (1876) 2 Q.B.D. 75. Given the ultimate approach of the Court of Chancery, the fusion of law and equity probably made little practical difference to the whole matter.

17 (1876) 4 Ch. D. 157.

18 (1883) 25 Ch. D. 220.

19 Subject only to disqualification if the father was unfit or his care would be injurious to the child.

> Court of Justice, that is to say, in terms of an absolute discretionary power as to the custody of the infant on the application of the mother, when the child was under seven years of age, and this power was by a recent Act, passed in 1873, extended to cases when the child was under sixteen years of age. Therefore the law was altered by Talfourd's Act to this extent that that which was formerly the absolute right of the father became, and is now, subject to the discretionary power of the judge."[20]

The discretion naturally had to be exercised "not capriciously but for substantial reasons."[21] So far Jessel M.R.'s reasoning was entirely consistent with the Act. However he went on to indicate that "it had become necessary to consider what should be the guiding rules as regards this discretion: ..."[22] After referring to the protection of the mother as an object of the Act, Jessel M.R. considered the Act in the context of depriving the father of his right to custody. "Where the wife was innocent," he said, "the court was to exercise a wider discretion, and consider other reasons besides;"[23] by which he meant presumably reasons other than extreme cases of misconduct. Clearly these remarks were directed towards the threshold stage of the proceedings, the grounds of deprivation. The discretion related therefore to that stage in the decision. The Master of

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20 (1876) 4 Ch. D. 157 at p. 159 per Jessel M.R.
21 Ibid. at p. 160 per Jessel M.R.
22 Idem.
23 Idem.

the Rolls purported to follow the observations of Turner L.J. Thus in deciding whether the father was to be deprived of his right to custody, "there was to be kept in mind, first of all, the paternal right; secondly, the marital duty; and, thirdly, the interest of the children."[24] That order was not stated to be of any significance but in practice it probably amounted to the priorities to be afforded to each consideration.

34.35 That approach was clearly not a return to the pre-1839 position but its precise nature is difficult to determine. One of the problems is the status of these guidelines contrived by Turner L.J. Were they merely indications of relevant circumstances; were they finite categories; were they binding rules? If the Act properly conferred a discretion, it is difficult to see how they could have fallen into any of these descriptions, at least without altering the fundamentally discretionary nature of the function. On the other hand, the approach described by Jessel M.R. was not so rigid as that which prevailed before 1839. He hesitated to acknowledge the wide discretion envisaged by the legislation but to have treated paternal misconduct as the sole threshold requirement would have denied the Act any effect. The consequence of Jessel M.R.'s compromise solution was thus to expand the threshold requirements to include a consideration of the position of the mother and of the children. To some extent this amounted to blurring the distinction between the threshold and the discretionary stages of the process. The logical difficulty was the introduction of the administrative function into the establishment of the threshold requirements. There

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24 (1876) 4 Ch. D. 157 at p. 160 per Jessel M.R.

is no legal reason why this should not have been done. But it clearly destroyed the clarity of the earlier approach, while at the same time it did not embrace the simplicity of the wholly discretionary approach.

34.36 A further criticism which could be made of Jessel M.R.'s compromise solution is a corollary of the first logical difficulty. This is a point which will recur again in this analysis. If the purpose of the process was to identify in what circumstances a father could be deprived of his paternal right, it seems strange that the parental right should itself have played a part in that process. It would at the same time have been both the objective of the process and a factor in that process. This criticism would disappear if the objective of the process were amended; for example, to decide what was best for the child. In that event, the paternal right could be a factor, along with the interests of the mother. But in that case the interests of the child could not properly be included as a factor, for the same reasons that the paternal right could not reasonably be a factor if the purpose were to disqualify the father for exercising that right. There is no necessity that the law should be logical but it is important at this stage to bear in mind the distortion brought about by treating the same issue both as the objective of a decision making process and as a factor in that process.

34.37 Despite these criticisms of Jessel M.R.'s approach, the strength of his analysis lay in one important consequence of introducing an element of administration into the judicial process: namely, to look at the circumstances of each case rather than dispose of the issue by applying a legal rule.

One of the best examples of this was the decision of Pearson J. in In re Elderton (Infants).[25] He purported to follow Jessel M.R.'s formulation:-

> "... I ought to give effect to the paternal right, unless there has been so grave a breach of the marital duty that it would not be proper to give effect to it or unless the interests of the infants require the court to interfere with it."[26]

In other words, that postulated a deprivation approach on grounds comprising an element of administrative discretion. Pearson J. considered each of the three relevant matters in turn in the light of the circumstances of the case. In relation to the paternal right, Pearson J. commented that the father would probably not have been selected by the court as guardian if the selection had been made "indiscriminately from all the world."[27] On the other hand, there would be nothing "detrimental either to [the] moral or physical welfare [of the children]" in being with their father.[28] The evidence on the second matter, the marital duty, was neutral.[29] So the decision turned on the third matter, the interests of the children. Pearson J.'s conclusion was clear:-

> "The elder child is not quite nine years old, the younger is seven; and I have medical evidence that both the children are weakly, of

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25 (1883) 25 Ch. D. 220.
26 Ibid. at p. 222 per Pearson J.
27 Ibid. at p. 223. That is a clear rejection that the issue was entirely discretionary exercisable only in the best interests of the child.
28 Idem.
29 (1883) 25 Ch. D. 220 at p. 230.

> nervous temperaments, delicate, requiring excessive care, and that they are not fit to be sent to school. Under such circumstances I think it would be an act of cruelty to remove them from the care of their mother."[30]

34.38 This type of argument would probably not have been successful before the legislation of 1839 and 1873. The decision turned on the interests of the children alone, an approach not contemplated even by Talfourd. But without the discretion conferred by Talfourd's Act, even although its exercise was circumscribed by judicially created "guiding rules", such a decision probably would not have been possible. But even this limited development towards fuller recognition of the interests of the child was somewhat impeded by the judicial attention paid to the father's right to determine the religious upbringing of his child. That impediment effectively destroyed the benefits of Talfourd's reforms.

Section 4 - The influence of religion

(a) Introduction

34.39 The Custody of Infants Acts 1839 and 1873 applied in a relatively narrow context. Although that context had no specific relevance to welfare, the applicability of the legislation was likely to indicate in an individual set of circumstances a discretionary rather than the traditional approach. Indeed, as Knight Bruce V.-C. had indicated,[31] the enactment of the legislation could have influenced the court

30 Idem. per Pearson J.
31 In re Fynn (1848) 2 De Gex & Smale 457 at p. 475.

even when it did not specifically apply. The procedures in the two Acts did no more than confer upon a mother the power to seek an order of custody or access. The 1839 Act specifically required that the child should be in the sole custody or control of the father or of his nominee;[32] the 1873 Act implied such a situation. Litigation at the instance of the father or between the father or mother and a third party were not contemplated by the legislation. The traditional approach therefore remained applicable in a number of important contexts.

34.40 The legal position independent of the legislation was similar to that prevailing at the beginning of the nineteenth century. Issues of custody had become more clearly distinguishable from those of guardianship and, if any trend was discernible, greater attention was being paid to parental rights, particularly, of course, the right of the father. This follows, it is suggested, from the growing judicial acceptance of a doctrine of custodial rights inherent in the father and from a more vigorous attitude to deprivation of parental rights.

(b) The position of the guardian

34.41 The appointment of guardians, as always, caused few problems for the Court of Chancery, simply because the court could act only in the event of the father's failure to do so.[33] Although there were possibilities of religious conflict in Austin v Austin;[34] Romilly M.R. indicated that the welfare of

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32 Custody of Infants Act 1839, s. 1.
33 E.g. where he was dead or incapable of doing so.
34 (1865) 34 Beavan 257.

the child was the "first and primary object,"[35] to which all other considerations, for example, the wishes and desires of the father generally or in relation to religion, were subordinated. In that case the applicants for appointment as guardian were the child's mother and paternal uncle. Romilly M.R. argued that in these circumstances the welfare of the child would require the appointment of the mother. "[The] welfare of the child," he postulated, "is so intimately connected with its being under the care of the mother that no extent of kindness on the part of any other person can supply that place. It is the notorious observation of mankind that the loss of a mother is irreparable to her children and particularly so if young."[36] A similar policy was adopted by Turner L.J. in In re Kaye[37] but in that case both parents were dead. The Lord Justice considered carefully the apparent wishes of the father and the stated preferences of the mother. They were consistent with each other and also with the judge's view of what would be best for the children in any event. The decision was thus simple and clear.

34.42 If the father had appointed a guardian, the position of the mother would according to the traditional approach have been more difficult to sustain. That situation arose in Talbot v Earl of Shrewsbury.[38] The 1839 Act may have applied in that case, for section 1 referred to the child being in the sole

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35 Ibid. at p. 263 per Romilly M.R.
36 Ibid. at p. 263 per Romilly M.R.
37 (1866) L.R. 1 Ch. App. 387.
38 (1840) 4 Mylne & Craig 673.

custody or control of any guardian after the death of the father. But no reference was made to that provision. Lord Cottenham L.C., who had always appeared more than usually sympathetic to the interests of the child, decided nevertheless that in all the circumstances the mother should have custody. There was moreover nothing to deprive her of that status. Nor did her duties as custodian supersede the authority of the guardian. The court in effect was simply directing the guardian how to exercise his powers.

(c) Paternal rights and custody

34.43 The real problems arose however when the court was faced with interfering with paternal rights, in the context either of custody or of guardianship. One way of doing that was to seek the appointment of a guardian in place of the father: the use, in other words, of older remedies in newer contexts. That happened in In re Fynn.[39] The children's grandmother sought appointment as guardian in the place of their father and thereafter to restrain him from interfering with them or seeking possession of them by habeas corpus. She failed, Knight Bruce V.-C. specifically discounted that the purpose of the proceedings was to take the course "likely to be most beneficial to the infants."[40] The reason was simply that the father was alive and seeking his parental rights. In that event, the test of the

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39 (1848) 2 De Gex & Smale 457.

40 Ibid. at pp. 474 per Knight Bruce V.-C.

benefit of the child would not be relevant until the father had been deprived of his rights.

34.44 In consequence Knight Bruce V.-C. enunciated the deprivation approach in these words, which have become in a sense the locus classicus[41] of the unreformed law:-

> "Before this jurisdiction can be called into action between them it must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended - should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong."[42]

Nothing could more clearly indicate the two elements in the equitable jurisdiction of the Court of Chancery: the satisfaction of threshold requirements in which welfare played almost a negative role; followed by the exercise of the discretionary powers inherent in equity. None of these requirements enunciated by Knight Bruce V.-C. had been satisfied in In re Fynn.[43] The father had apparently been somewhat of a rogue: there were

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41 It was quoted in J v C [1970) A.C. 668 at p. 693 per Lord Guest, at p. 703 per Lord MacDermott and at p. 718 per Lord Upjohn.

42 In re Fynn (1848) 2 De Gex & Smale 457 at pp. 474 and 475 per Knight Bruce V.-C.

43 (1848) 2 De Gex & Smale 457.

allegations of physical cruelty to his wife; he used abusive language; he took certain of the children to Paris and there neglected them; he was imprisoned. These characteristics made him unfit to care for the children[44] but did not render it essential that his right should be removed.

34.45 This test was, if anything, more stringent than any earlier standard. True, it looked only at the effect on the child of the parental circumstances and to that extent it was a child-biased approach. But the earlier cases indicated that parental disqualification arose not only from the proved effect on the child of the parent's behaviour but also from general parental unfitness without proof of any actual detriment to the child. Knight Bruce V.-C. went on to indicate the possible enlightening effect of Talfourd's Act, even where it did not in terms apply. These expectations however proved to be unfounded. The same deprivation approach based on stringent threshold requirements treating welfare negatively was repeated in 1854[45] and 1859[46] until it was strongly supported by the Court of Appeal in the two Agar-Ellis decisions[47] shortly before the 1886 legislation. It made no difference whether the competition for custody was between the father and the mother or the father and someone else. If he was alive to assert his interest or had clearly expressed his intentions, it had become difficult indeed to supersede his rights.

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44 At least according to the Vice-Chancellor's private view: ibid. at p. 474.

45 Hope v Hope (1854) 4 De Gex, Macnaghten & Gordon 328 at p. 349 per Lord Cranworth L.C.

46 In re Curtis (1859) 28 L.J. Ch. 458.

47 In re Agar-Ellis, Agar-Ellis v Lascelles (1878) L.R. 10 Ch. D. 49; In re Agar-Ellis, Agar-Ellis v Lascelles (1883) 24 Ch. D. 317.

(d) The Agar-Ellis decisions

34.46 It is worth pausing for a moment to consider the Agar-Ellis decisions. They indicate to some extent why the law took what appears to have been an increasingly rigid stance after the relatively liberal period of Lord Eldon and despite the attempts of Talfourd and others to change the approach. The reason could have been the growing social recognition during the Victorian era of a paterfamilias concept flowing from the movement from guardianship towards a notion of patria potestas as the foundation of parental rights rather than duties. Indeed in the earlier Agar-Ellis decision Malins V.-C. argued:-

> "The father is the head of the family, he must have control of his family, he must say how and by whom they are to be educated, and where they are to be educated ..."[48]

The foundation of these views was simply "common sense" and "propriety." This may well have been so but such notions have always been peculiarly subjective.[49]

34.47 The Agar-Ellis litigation concerned essentially a conflict of religion between the father and mother of the children in question. The father, a protestant, had made a promise to his wife, a Roman Catholic, on their marriage that any children would be brought up as Roman Catholics. When the

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48 In re Agar-Ellis, Agar-Ellis v Lascelles (1878) L.R. 10 Ch. D. 49 at p. 56 per Malins V.-C.

49 Thus open to "interpretational discretion."

first child was born, he failed to honour this promise. The children's mother, however, unknown to their father, had continued to indoctrinate them with Roman Catholic views and ultimately they refused to go with their father to a protestant place of worship. He made them wards of court and took out a summons seeking directions as to their education. The mother responded by presenting a petition under the Custody of Infants Act 1873 with a view to their being brought up as Catholics. Malins V.-C. dismissed the petition, ordered the children to be brought up in the Church of England and restrained the mother from taking them to Roman Catholic places of worship.

34.48 The 1873 Act enabled the mother to bring the petition but the Act was never conceived as a means of settling religious disputes. Surprisingly, however, it received no mention in the judgments of the judges. James L.J., speaking for the whole Court of Appeal,[50] discounted any notion that the father's ante-nuptial promise was legally binding and reinforced the judicial attitude to paternal rights enunciated by Knight Bruce V.-C. in In re Fynn.[51] Perhaps James L.J. used even more emotive language:-

> "The right of the father to the custody and control of his children is one of the most sacred of rights."[52]

Custody, in his view, was simply the vehicle for giving effect to paternal duties, of which one clearly was the "education of

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50 James, Baggallay and Thesiger L.JJ.

51 (1848) 2 De Gex & Smale 457.

52 In re Agar-Ellis, Agar-Ellis v Lascelles (1878) 10 Ch. D. 49 at pp. 71 and 72 per James L.J.

his children." Education included bringing up the child in accordance with the father's wishes on religion. The circle was complete. The father had control of his children's religious education unless he was disqualified in the same way as he would be liable to forfeit his right to custody. The stated grounds of disqualification were similar to those which had become familiar over the years, although it was natural in the context that they were slanted towards religious unfitness rather than general parental unfitness.[53]

34.49 The issue in that case was religion with custodial implications. The second decision[54] concerned custody with religious implications. The issue in that case was a narrow one but the Court of Appeal volunteered expansive judgments. After the earlier decision, the children had been removed by their father from the care of their mother and sent to live with certain third parties[55] with limited maternal access. When one of the daughters attained sixteen, she sought to follow the religion of her choice and live with her mother. Her father agreed only to her attending Roman Catholic services on Sundays. The lady she was living with was going on holiday. A petition was presented seeking permission to spend a period of time with her mother. The father's opposition was upheld by Pearson J. and by the Court of Appeal.

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53 "... moral misconduct, or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards his children:" In re Agar-Ellis, Agar-Ellis v Lascelles (1878) L.R. 10 Ch. D. 49 at p. 72 per James L.J.

54 In re Agar-Ellis, Agar-Ellis v Lascelles (1883) 24 Ch. D. 317.

55 Including a clergyman.

34.50 Brett M.R. spent most of his judgment considering the issue of consent in relation to habeas corpus proceedings.[56] The most important aspect of his judgment for present purposes, however, was the distinction drawn between the legal rights of non-paternal guardians and the "sacred" rights inherent in the father.[57] This reflects closely the approach adopted by Malins V.-C. in the earlier Agar-Ellis case.[58] The same theme was developed in more detail by Cotton and Bowen L.JJ.

34.51 No member of the Court of Appeal was prepared to examine the question "as to what we think is for the benefit of this ward."[59] This would appear to restrict considerably the nature and particularly the extent of the wardship jurisdiction. These comments applied only to the father's natural guardianship. The reasons are especially important. The Court of Appeal did not ignore the welfare or benefit of the child. Indeed, on the contrary, they used it to justify their approach. The first argument, however, was the inadequacy of the judicial machinery to cope with the problems of the individual child. The court could "correct abuses" or "redress the parental caprice" but it could not assume responsibility for a particular child.[60] To that extent the approach of the English courts was moving towards the position adopted by the Court of Session much earlier.[61]

34.52 More important is the second reason in support of the

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56 Relevant only because the daughter had attained the age of sixteen.
57 (1883) 24 Ch. D. 317 at pp. 327 to 329 per Brett M.R.
58 Para. 34.46.
59 (1883) 24 Ch. D. 317 at p. 334 per Cotton L.J.
60 Ibid. at p. 337 per Bowen L.J.
61 In the sense that the judicial function had become supervisory rather than directly paternalistic.

sanctity of paternal rights. Cotton L.J. proposed a very broad argument:-

> "But this Court holds this principle - that when by birth a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child." [62]

Such a comment clearly represented an attempt to solve the issue by reference to a general guideline rather than by detailed investigation of each individual case. In this sense it was more a statement of policy than a rule of law. It may have been justified but no justification, legal or otherwise, was advanced by the court. Its strength was a matter of judicial knowledge. The paternal right thus had expanded beyond legality into a doctrine of sanctity; judicial grounds of interference had correspondingly contracted. These are issues, one would have thought, more appropriate for Parliament than for the judiciary.

34.53 Bowen L.J. took up a similar theme but justified it more in terms of the natural guardianship of the father. Interference with the paternal right would be justified only when the father as the natural guardian had become an "unnatural guardian".[63] He, too, identified a role for welfare:-

> "Then we must regard the benefit of the infant; but then it must be remembered that if the words 'benefit of the infant' are used in any but the accurate sense it would be a fallacious test to apply to the way the court exercises its jurisdiction over the infant by way of interference with the father. It must not be the benefit of the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can." [64]

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62 (1883) 24 Ch. D. 317 at p. 334 per Cotton L.J.

63 Ibid. at pp. 336 and 337.

64 Ibid. at pp. 337 and 338 per Bowen L.J.

What did Bowen L.J. mean? One point is clear. It was not for the court to decide what would be best for the child. The court would be required to approach the task as if it were in the position of that particular father and then to decide, having regard to that aspect, what to do. His earlier comment on the other hand is ambiguous. Was it fallacious to introduce the benefit of the child either as part of the way in which the jurisdiction was to be exercised or at the stage of interference or perhaps even at both stages? The Lord Justice's comment clearly acknowledged the existence of two stages[65] in the process but failed to distinguish clearly the discrete role of welfare. He probably meant that the benefit of the child could not be a ground of interference. Nor could it be the sole criteria in the exercise of the discretionary jurisdiction.

34.54 The importance of the Agar-Ellis decisions lies partly in the negative role attributed to welfare and partly in the greater significance afforded overall to the rights of the father. Such doctrinal emphasis made it much more difficult to induce a court to interfere with paternal rights and at the same time to give them much more weight in the discretionary context. The fundamental approach does not seem therefore to have changed since the early part of the nineteenth century but the relative significance and weight of paternal rights waxed while the benefit of the child waned. This occurred in the

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65 I.e. the threshold and discretionary stages.

face of earlier contrary judicial development of the law[66] and despite the attempts by Parliament to introduce limited reform of the system.

(e) The father's wishes on religion

34.55 There was no obvious reason why the Court of Appeal reacted in the way they did in the two Agar-Ellis decisions. It may simply have been the automatic infusion of changing social attitudes into members of the judiciary. There were symptoms of a similar automatic infusion in the Court of Session about the same period.[67] The opportunity for this to have happened seems to have coincided to some extent with the growing judicial enthusiasm, in England but not in Scotland, to give effect to a father's wishes on the religious education of his children. This may not have been the cause of the acceptance of the doctrine of the sanctity of paternal rights. But it cannot be ignored.

34.56 The cases on this question which were decided between 1857 and 1884 show no wholly consistent approach. But the overall trend seems clear, despite these inconsistencies. A view which to a large extent subordinated religious education to the general welfare of the child gave way to a policy dedicated to give effect to paternal wishes on the child's religious education, particularly when the father was dead. Religious education has always been only a part of education as a whole and the duty to educate similarly only one among a

66 Especially during the Chancellorship of Lord Eldon.

67 Para. 33.74.

a number of duties. Just as the duty of care, as the foundation of the guardianship concept, gave way to the right to custody, as the means of implementing that duty, and finally to the doctrine of the sanctity of paternal rights; so, over the period in question, the duty to educate, including religious education, was overshadowed by the paternal right to decide on the child's religious education.

34.57 The subject matter of the law did not change but the switch from duty to right introduced a new attitude with considerable legal consequences. In particular the duty approach was relatively simple and complete. The rights approach, on the other hand, was much more liable to fragmentation. Thus instead of considering the paternal position as embracing each individual aspect of care, control, maintenance, education and so on, it became possible to divide these aspects, so that, for example, the mother as guardian might have control of residence and temporal education, while matters of spiritual welfare would be reserved to the decision of the deceased father.[68] There is nothing necessarily objectionable in this but it also involved by implication a fragmentation of welfare. Thus the question became more complicated and perhaps even to some extent distorted. The best interests of the child might point one way in one context and another way in a second context. If a court intended as a matter of policy to give effect to the wishes of the deceased father on matters of religious education, this might be in direct conflict with the need of the child for maternal

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68 Not, of course, literally, but by giving effect after his death to his wishes stated or implied during his life.

care during the first few years of life. So the issue turned not on a welfare test but on which aspect of welfare should predominate.

34.58 In each of the reported cases to be analysed the father was dead. If he had not expressed any wishes on the child's religious education, the court assumed that he wanted his child educated according to his own religious beliefs:[69] an assumption which may have been true in some, perhaps most, cases, but clearly not universally so. One of the reasons why the question of religion became so complicated for the courts was their reluctance, after Parliament had in the early nineteenth century largely abandoned any attempt to proscribe or regulate religious practices in a discriminatory fashion,[70] to become involved in a discussion on the merits of one persuasion as against another, either generally or in relation to a particular child. They were seeking a simple and automatic device to solve such a religious conflict. Settling the issue in accordance with the stated or implied wishes of the father was clearly such a device but difficulties arose in relation to matters of custody and welfare.

34.59 The only positive rule espoused by the courts was broadly that a child should be given a religious education.[71] This raised the question whether a certain philosophy constituted a religion. In In re Newbery,[72] for example, the children were

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69 E.g. In re Clarke (1882) 21 Ch. D. 817; see also In re Newbery (1866) L.R. 1 Ch. App. 263.
70 Para. 34.4.
71 Again a reflection of mid-Victorian social attitudes.
72 (1866) L.R. 1 Ch. App. 263.

taken after their father's death by their mother to meetings of the sect of Plymouth Brethren. Knight Bruce L.J. was unable to concede that that amounted to any religion at all.[73] Turner L.J. based his view more on an aspect of the children's welfare:-

> "Nothing could be more prejudicial to children than to place them in a community where there are no persons of authority to teach them what is their duty or what they should believe."[74]

Having thus discounted the Plymouth Brethren the court considered that the only form of religion appropriate for the children was their father's, which happened to be the Church of England. There was no evidence as to what religion would have been the choice of the father for his children.

34.60 That issue apart, the authorities fall into three broad categories: those exhibiting an emphasis on welfare: those endeavouring to achieve more of a balance; and those favouring the wishes of the father. The third category seemed ultimately to attract greater judicial authority. But now to deal with these categories in turn: Turner L.J. in Stourton v Stourton[75] suggested that, in the absence of testamentary guardians, the "first and paramount"[76] duty of the court was to consult the well-being of the children. If the father's wishes were consistent with a decision on that basis, there would be

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73 Ibid. at p. 266.
74 Ibid. at p. 267 per Turner L.J.
75 (1857) 8 De Gex, Macnaghten & Gordon 760.
76 Ibid. at p. 771 per Turner L.J.

no problem. But "if the wishes of the father cannot be carried into effect without sacrificing what the Court, acting without bias, judges to be for the well-being of the children, those wishes cannot be attended to."[77] Clearly in Turner L.J.'s view the well-being of the child would supersede the wishes of the father. Knight Bruce L.J. was not so positive. Attention should certainly in his opinion be paid to the child's spiritual and temporal welfare but only to the extent of not giving effect to the father's wishes if so giving effect would impair the child's welfare in either sense.[78] That view indicated more of a balance between welfare and paternal wishes with the emphasis probably slightly in favour of the latter.

34.61 There was probably stronger evidence of a balanced approach, the second category, in the judgment of Kay J. in In re Clarke.[79] The father in that case seemed generally unconcerned about the religious education of his children. He was quite prepared during his lifetime to let them be educated as Roman Catholics. No guardian was appointed on his death. The children's mother subsequently sought to be appointed as guardian and to be given directions on education. Naturally she wished the children to continue to be brought up as Catholics. The paternal relations however preferred them to be educated as protestants.

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77 Idem. per Turner L.J.

78 Ibid. at p. 768.

79 (1882) 21 Ch. D. 817.

34.62 Kay J. took the view that in the circumstances the father had abandoned his right to have them brought up as protestants.[80] The matter could not therefore be solved in terms of legal right. The court was forced to look at the circumstances of the case. But Kay J. saw the purpose of that exercise very clearly:-

> "And there is the third thing to which the Court is always bound to have great regard, especially where there is any great doubt or difficulty in deciding what the wishes of the father, if he had lived, might have been, viz. what is for the benefit of the child under the circumstances of the case." [81]

It is significant that his reference to the benefit of the child included the child's interests as a whole. He specifically avoided asking what would be best for the child in the religious context. It is clear that he was not attracted by the possibility of fragmenting welfare into a number of aspects. If the son were to be brought up as a protestant, it would not only divide the family, it would also fragment his welfare and distort the overall decision on his best interests.[82] Kay J. declined to accept the responsibility for such consequences which he described as "anything but for the benefit of the infant."[83] He adopted therefore a balanced approach not only in relation to

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80 Ibid. at p. 824.
81 Idem. per Kay J.
82 Ibid. at p. 828.
83 Idem. per Kay J.

the wishes, stated or implied, of the father for his child's religious education but also in relation to the overall question of the child's benefit.

34.63 The other authorities conformed much more rigidly to the pattern which met with the approval of the Court of Appeal in the Agar-Ellis decisions.[84] The circumstances of Andrews v Salt[85] were certainly more complicated than those in In re Clarke.[86] The position of the father and his relations was stronger as he had given a direction in his will on the religious education of his children and had appointed a guardian who would be sympathetic with that direction. It is thus surprising that the court decided in favour of maternal care and a religious upbringing inconsistent with the father's clear wishes. At first instance Malins V.-C. adopted an approach very similar to the balance advocated later by Kay J. in In re Clarke[87] with the ultimate purpose of promoting the well-being of the child.

34.64 The Court of Appeal reached a conclusion consistent with that of the Vice-Chancellor but it was justified altogether differently by Mellish L.J. For him the benefit of the child was relevant only at the threshold stage of the proceedings. There was no real discretion for the court. The satisfaction or otherwise of the threshold requirements provided a solution to the problem on a strict adjudicative basis without recourse

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84 Paras. 34.46 to 34.54.

85 (1873) L.R. 8 Ch. App. 622.

86 (1882) 21 Ch. D. 817.

87 Idem.

to the exercise of a discretion. Mellish L.J. stated his approach to religious education in the form which had become accepted in relation to rights of custody:-

> "The law unquestionably does give great weight to the right of a father to have his children educated in his own religion both during his lifetime and after his death; and if a father has done nothing to forfeit or abandon his right to have his children educated in his own religion, we think that the court cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy and contented and possibly be better provided for by its mother's relations." [88]

Despite the implication in the first phrase of that quotation that the paternal right was given "great weight" only and hence did not operate strictly as a "right," the remainder of Mellish L.J.'s comment makes it clear that effect would be given to the paternal right as a "right" unless it had been forfeited or abandoned. It had become therefore a matter of adjudication only; no element of discretion. The welfare of the child could, of course, be an element in the satisfaction of the threshold requirements, as in the case of paternal disqualification of his custodial right. But in either case welfare played at best a completely negative role.

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88 Andrews v Salt (1873) L.R. 8 Ch. App. 622 at p. 638 per Mellish L.J.

34.65 It is no mere coincidence that something in the nature of a doctrine of the sanctity of the paternal right to determine religious education was most clearly supported by James and Mellish L.JJ. in the later case of Hawksworth v Hawksworth.[89] They had already given an indication of their views. The circumstances of that case were in no sense abnormal. After the death of a Roman Catholic father, his daughter was brought up by her mother as a protestant for eight years. He had left no directions on her religious education. The father's estate was the subject of judicial proceedings and the court inter alia ordered that the child should be brought up as a Catholic. Wickens V.-C. did not want to make such an order but felt compelled by the law to do so.[90] There was no alternative but to give effect to the father's stated wishes. But in his view the consequence was severe:-

> "For to direct that this ward shall be brought up in the Roman Catholic faith will be to create a barrier between a widowed mother and her only child; to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable result of weakening it on all others; to introduce a disturbing element into a union which ought to be as close, as warm and as absolute as any known to man; and lastly, to inflict severe pain on both mother and child."[91]

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89 (1871) L.R. 6 Ch. App. 539

90 Ibid. at p. 540.

91 Idem. per Wickens V.-C.

However justified these consequences, they were presumably the judge's own value judgments, derived from his own knowledge and lacking any proven scientific basis. This is not to suggest that they are wrong, merely to indicate the nature of their authority.

34.66 James and Mellish L.JJ. confirmed Wickens V.-C.'s view of the law. The former Lord Justice went so far as to suggest that whoever was responsible for the child after the father's death 'should have sacred regard to the religion of the father in dealing with the child ..."[92] He rejected any suggestion that the court was faced with a choice, especially as to the benefit or otherwise for the child of the various courses that may have been available if such an approach had not been rejected. Mellish L.J. took a similarly legalistic view. Each judge also recognised the possibility of non-enforcement of the rule so created, but the grounds were stated very narrowly. According to James L.J. the power was available only in "very special circumstances"[93] and for Mellish L.J. where "the interest of the child interferes so as to make it a duty of the court to make some exceptions."[94] The grounds were less precise than any stipulated in relation to forfeiture of the custodial right but the manner of their statement suggest that they would be very restricted in practice. Seven years later in In re Agar-Ellis, Agar-Ellis v Lascelles[95] James L.J. was

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92 Ibid. at p. 542 per James L.J.

93 Idem.

94 Ibid. at p. 544 per Mellish L.J.

95 (1878) L.R. 10 Ch. D. 49.

afforded an opportunity to confirm these rules. He expressed the position of the father in much the same way but he articulated more specifically the grounds on which the power of interference would be available. In doing so, he gave no indication that they would be any less restricted in practice than appeared from his earlier comments.[96]

(f) Conclusion

34.67 Although it is unclear why religious education became a matter of significance in the middle of the nineteenth century, its influence cannot be denied. The movement from a balanced approach to religion, incorporating a consideration of welfare, to a position dominated by the wishes of the father was consistent with the trend towards the doctrine of the sanctity of paternal rights in custodial matters. It is impossible to say whether one caused or even contributed to the other. There was probably an unarticulated interaction between the two developments.

34.68 Each development was important: partly because it was inconsistent with the overall earlier pattern of the development of the law towards a greater recognition of the interest of the child; and partly because it was similarly inconsistent with some of the stated policies of Parliament.

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96 In 1871 the same issue came before the Privy Council on appeal from one of the Provincial High Courts in India. The opinion of the Privy Council was given by James L.J. and he confirmed that the law in England was as stated: Skinner v Orde (1871) L.R. 4 P.C. 60.

reluctance, now almost notorious, of the courts to give sympatheti effect to the policy indicated by the legislature. Section 2 of the Custody of Infants Act was the only provision still in effect after 1886. It was however repealed in 1973[99] and replaced by a similar but certainly not identical enactment,[1] which was also enacted for Scotland.[2] Consensual arrangements were thus unregulated by statute in Scotland until 1973.

(b) The Court of Chancery

34.71 The main principle espoused by the Court of Chancery over the years was that as a matter of public welfare[3] and public policy[4] a father, upon whom the principal parental duties were imposed, should not be able to elide his responsibility merely by voluntarily giving up his right to custody and control. Such an attitude emphasises, of course, the original conception of parental guardianship as a responsibility[5] out of which evolved custody merely as the means for giving effect to that responsibility. Some of the earlier authorities had apparently regarded parental agreements relating to children as ineffective because of the contractual incapacity of the mother as a wife.[6] Bu by Lord Eldon's time the public policy approach had become clear. In his view paternal custody and control were justified "not for his [the father's] gratification but on account of his duties"[7] and it was thus unacceptable to enforce an arrangement against a

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99 Guardianship Act 1973 (1973 c. 29), s. 9(1) and Sched. 3.
1 Ibid., s. 1(2).
2 Ibid., s. 10(2).
3 St. John v St. John (1805) 11 Vesey 530 at p. 531.
4 Vansittart v Vansittart (1858) 2 De Gex & Jones 249 at p. 256; Hamilton v Hector (1872) L.R. 13 Equity 511 at p. 520.
5 It was also reflected in the period in question: see Bazeley v Forder (1868) L.R. 3 Q.B. 559.
6 See St. John v St. John (1805) 11 Vesey 530 at pp. 529 and 530 per Lord Eldon L.C.
7 Ibid. at p. 531 per Lord Eldon L.C.

It represented in other words a distortion of the overall pattern. It thus becomes more intelligible why in 1886 Parliament felt obliged to eradicate the distortion so created. But before the validity of that proposition can be tested, there are two other areas to be examined: the effectiveness of consensual arrangements about custody and religion; and the judicial approach to the custodial power in the Matrimonial Causes Act 1857.

Section 5 - Consensual arrangements

(a) Introduction

34.69 The number of disputes concerning children settled by the courts in the nineteenth century was no doubt small, partly because of the relatively restricted nature of the law and partly because of financial constraints in seeking judicial assistance. It is likely therefore that most problems concerning children then, as now, were solved by some arrangement or understanding of the parties. Although few arrangements would take the form of written agreements, it is not perhaps surprising that, when the trouble was taken to engage professional services and reduce the agreement to writing, the parties would be equally capable of bringing the matter before a court.[97]

34.70 The development of the law during the period under review falls simply into three parts; the strict view of the Court of Chancery; the intervention of Parliament[98]; and the

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97 There is a relatively small number of reported decisions on this question.

98 Custody of Infants Act 1873, s. 2.

father who had changed his mind so that the court would "place them [the children] against his [the father's] will in the hands of his wife."[8]

34.72 Similar reasoning was adopted by Lord Chelmsford L.C. in Vansittart v Vansittart.[9] There the custody, care, education and maintenance of the children were regulated in a formal separation agreement. The wife sought to enforce the agreement against the husband but the court unequivocally considered the agreement pro tanto ineffective and unenforceable. It was a matter of interpreting the agreement or understanding the arrangement in each case[10] but if the father had succeeded in his attempt "to fetter and abandon his parental power,"[11] the court would regard that as "repugnant entirely to his parental duty."[12]

34.73 There was no suggestion in these cases that the court should consider the welfare of the children. No doubt in their view their notion of "public welfare" either included or perhaps overrode any idea of the welfare of the individual children. The reason may be not that the Court of Chancery felt incapable of considering individual welfare but rather that that issue did not arise in these cases. In Swift[13] v Swift Romilly M.R. felt quite free to consider the welfare of the children. One of the children in that case had been criminally assaulted by the father and in consequence the sole care and management of the children was conferred upon the

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8 Idem. per Lord Eldon L.C.
9 (1858) 2 De Gex & Jones 249.
10 E.g. Hunt v Hunt (1884) 28 Ch. D. 606.
11 Vansittart v Vansittart (1858) 2 De Gex & Jones 249 at p. 259 per Turner L.J.
12 Idem. per Turner L.J.
13 (1865) 34 Beavan 266.

mother under a formally executed agreement. An attempt was later made by the father to recover control of his daughter and the mother sought an injunction to prevent him. She succeeded.

34.74 The general rule and the supporting policy as contemplated in the earlier cases were not questioned by Romilly M.R., for in his view equity would interfere to prevent injurious paternal control, perhaps even by removing the child from the father.[14] Certainly his decision was "an exception to the general rule."[15] To justify his decision, however, Romilly M.R. changed the policy underlying the general rule: from public welfare to individual welfare. The words of the Master of the Rolls are particularly significant:-

> "... a particular case may occur in which it is not for the benefit of the child that this [paternal] superintendence should exist ... This policy of the law is derived from what is most for the benefit of the child. In this case it is inverted, and the policy of the law in this particular case is to take the child away from the father and put her under the care of others."[16]

He concluded:-

> "The advantage and benefit of the child is the foundation of both the rule and the exception."[17]

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14 Ibid. at p. 270.

15 Idem. per Romilly M.R.

16 Idem. per Romilly M.R.

17 Idem. per Romilly M.R.

34.75 This is probably the first occasion in this context on which an English judge talked so openly in terms of policy. Policy naturally is always a rather difficult issue, especially in the hand of the judiciary. The Court of Chancery had always acknowledged a power of intervention over guardianship and parental matters. Consistently over the years the justification for intervention was stated to be the protection of children from paternal abuses rather than promoting their interests: in other words, the policy of individual welfare as an aspect of public welfare.

34.76 The problem for Romilly M.R. was a possible conflict of policies: on the one hand, giving effect to the bona fide and sincere consensual arrangements agreed to by willing parents; on the other hand, the judicial duty to protect children from paternal excesses. In the event Romilly M.R. saw no conflict. The policy of protecting children was given effect. For him the existence of an agreement, arrangement, undertaking, understanding or whatever was inconsequential. He did not express it in this way, but in his view the agreement was probably no more than an expression of the parents' views at a certain moment of time. The father was simply exercising his parental authority by consulting and giving effect to his wife's wishes, which he was, of course, under no duty to do. The Court of Chancery, he would have argued, has supreme authority over the father in any event. The issue would be whether he had abused his position to the detriment of the child. It would normally be to the advantage of the child to be under paternal authority but it could equally be to the child's advantage not to be under paternal authority. There is thus no inconsistency

between the earlier cases and Swift v Swift.[18] It was a question of policy. The content of the policy was the benefit of the child. Both ideas are inherently flexible: that is, policy and benefit. It is thus no surprise that the content of a policy should provide the basis not only for a rule but also for an exception to that rule. The nature of the policy almost requires that this should be so.

34.77 In Swift v Swift[19] Romilly M.R. scarcely paused to consider the agreement. It was in the circumstances of that case irrelevant. The logic of the welfare policy suggests that such an agreement might not always be so inconsequential. The Master of the Rolls was faced with a situation of that type in Hamilton v Hector.[20] He contemplated circumstances in which the test of the benefit of the child and the terms of the arrangement pointed to the same conclusion. In that event there was no reason why the agreement should not be "enforced."[21] The favoured parent would thus have two remedies: "enforcement" of the "unofficial" agreement; enforcement of the order made by the Court of Chancery. In that sense the consensual arrangement of the parties could be of some, but clearly not overriding, significance in the deliberations of the court.

(c) The amending legislation

34.78 Just before the enactment of the Custody of Infants Act 1873 the law was quite clear. The general rule was that

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18 (1865) 34 Beavan 266.

19 Idem.

20 (1872) L.R. 13 Equity 511.

21 Ibid. at p. 520 per Romilly M.R.

parental agreements relating to children would not be enforced as being contrary to public policy. Paternal authority however was still liable to judicial control, whether or not there was such an agreement, in the normal way. The policy was to protect the welfare of the individual child and the "agreement" could play a part in securing compliance with the decision of the court, if the two were consistent.

34.79 The 1873 Act met with no opposition in Parliament.[22] During the debate the existing law on custodial agreements was described in terms similar to but simpler than those used in the foregoing paragraph.[23] The purpose of section 2 of the 1873 Act was stated as follows:-

> "[It] would put an end to this cruel injustice and the Court would enforce the agreement unless it should deem it contrary to the real interests of the children to do so."[24]

That is not however what section 2 said. That Parliamentary comment did not describe who was suffering that "cruel injustice" but the phraseology of the comment suggests that it was the father. Mr. Fowler's language indicated, in other words, that previously the courts would not enforce the agreement, to the presumed disadvantage of the father, whereas under the new legislation they would enforce the agreement, thereby securing the father's position.

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22 (1873) 214 Parl. Deb. (H.C.) 3s. cols. 884 and 885; (1873) 215 Parl. Deb. (H.L.) 3s. cols. 4 to 6.

23 (1873) 214 Parl. Deb. (H.C.) 3s. cols. 884 and 885 (Mr. Fowler).

24 Ibid. col. 885 (Mr. Fowler).

34.80 There were however three elements in section 2. Separation agreements were not to be invalid merely because they also provided for custody and control of the children. That provision was, for present purposes, formal only. The second element provided that such agreements were not enforceable by the court. The third element was the condition attached to that restriction: such agreement would be unenforceable if the court was of the opinion that it would not be for the benefit of the child to give effect to it. The benefit test was thus a threshold requirement. But it was expressed negatively. A court could not enforce an agreement if it thought it would not benefit the child. That does not mean that it would enforce the agreement if it thought that it would benefit the child. That might be the view of the court but the court would be under no statutory obligation to reach such a decision: to do so would be at best a matter for the court's discretion.

34.81 Mr. Fowler expressed the approach in a more positive fashion: the agreement would be enforced unless the child's interests indicated otherwise. The criticism of that formulation is that he expressed as a duty, admittedly a qualified duty, what appears on the face of section 2 to be a discretion. Section 2 clearly proscribed the making of an enforcement order in certain circumstances. If these circumstances were not found

to subsist, the section did not apply. The court would then be governed by the existing rules or be free to exercise its own discretion. If Mr. Fowler's interpretation had been correct, section 2 would have considerably changed the emphasis of the law. On the other hand, a strict interpretation would indicate, it is suggested, rather an enactment of the existing rules than either a fundamental change of principle or a shift of emphasis.

34.82 Such a strict interpretation is not authoritative. Nor however is it necessarily inconsistent with the opinions expressed in In re Besant[25]. There were two aspects to that case. One was the applicability and meaning of section 2 of the 1873 Act. Jessel M.R. at first instance came to a decision largely on that basis. There was also a religious conflict between the father and mother of the child. James L.J. in the Court of Appeal placed much more weight upon the "duty of the court to take care that a fatherless ward is brought up in the religion of the father."[26] It would no doubt have been open to the court to adopt that approach in terms of the strict interpretation postulated in the foregoing paragraph. If so, James L.J. would have argued that it would not have been for the child's benefit to be brought up in terms of the agreement, for then the child would not have had the advantage of being educated in the father's religion. In that event, section 2 would not apply and

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25 (1879) 11 Ch. D. 508.

26 Ibid. at p. 519 per James L.J.

the court would simply reach a decision on the basis of the existing rules. That in effect is what James L.J. decided but he did not in the first place discount section 2 before applying the existing rules on the religious upbringing of children.

34.83 Jessel M.R. on the other hand contended with section 2 of the 1873 Act. His approach may readily be split up into a number of propositions which can be considered separately:-

1. "... I am not to enforce [the agreement] unless I shall be of of opinion that it will be for the benefit of the infant to enforce it."[27]

The direction not to enforce the agreement cannot be faulted but the contents of the condition were framed positively while in the Act they were negative. Thus although Jessel M.R. noted that the clause was "negative",[28] he failed to give effect to the second of these two negative aspects.

2. "If I merely doubt whether it would be for the benefit of the infant, I am not to enforce it ..."[29]

The Act did not unfortunately provide for judicial doubts. The court was clearly directed to ask the question: will it be for the benefit of the infant to give effect to the agreement or not? If so, the prohibition did not apply. If not, it did apply. However Jessel M.R. gave effect to the spirit, if not the letter, of that interpretation, for he added:-

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27 Ibid. at p. 511 per Jessel M.R.

28 Idem.

29 Idem.

3. "... and in that case [doubt] the father's rights remain the same as they were before the Act was passed ..."[30]

That would be entirely consistent with the strict interpretation suggested earlier.

4. The Master of the Rolls concluded:- "Therefore the point I have to decide is, whether or not this is really for the benefit of the child."[31]

This, of course, was the real question to which reference has been made in relation to point 2 earlier in this paragraph.

34.84 The only remaining problem of Jessel M.R.'s comments is what the word "this" referred to in the last quotation. Was it the father's legal right to custody or the enforcement of the agreement? Probably the latter. But in any event he went on to consider in some detail all the evidence relating to the welfare of the child,[32] including the quality of the mother's care, the companionship of the other members of the family, the mother's extreme religious views and so on. The mother's claim to custody under the agreement was finally rejected by Jessel M.R. because of her religion. The Court of Appeal came to the same decision but without circumventing section 2 of the 1873 Act.

34.85 Jessel M.R.'s comments on section 2 of the Act were, it is suggested, largely consistent with its strict interpretation. The decision reached by him and later confirmed by the Court of

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30 Idem.

31 Idem.

32 Ibid. at pp. 512 to 514.

Appeal was certainly not open to doubt in terms of the generally recognised approach to the benefit or welfare of the child. But the decision indicates that, despite the statutory standing of the benefit of the infant, the courts remained consistently faithful to the doctrine of paternal rights which they had created in relation to custody and also in relation to the religion of the child. Jessel M.R. alone in In re Besant[33] felt any need, imposed upon largely by statute, to take a general and open approach to welfare on an individual basis. Even he ultimately conceded priority of importance to the matter of religion.

(d) Arrangements about religion

34.86 Although Jessel M.R. in In re Besant[34] attempted to relate section 2 of the Custody of Infants Act 1973 to wider questions of custodial and paternal rights, the Court of Appeal decided that case largely in terms of the father's right to determine his child's religious education. Religious education can be a matter for parental negotiation. The final question for analysis is thus the legal validity of an attempt by the parents to come to an arrangement about the religious upbringing of their child. The courts decided, it will be recalled, that the father's paternal authority did not extend to giving it up or transferring it voluntarily, simply because that would have involved escaping from the liabilities of parenthood. Does the

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33 (1879) 11 Ch. D. 508.

34 Idem.

same reasoning apply to the religious upbringing of the child? The silent assumption underlying the court's approach to custodial arrangements was probably that the matter should ultimately be regulated by law rather than consensually between the parents in consequence of the recognition of the interest of the child. The same broad approach would apply to the religious aspects of the child's upbringing.

34.87 The principle is perhaps even clearer in relation to religion than in relation to custody. In the first Agar-Ellis decision,[35] it will be recalled,[36] the protestant father had ante-nuptially promised that any child would be educated as Roman Catholics. The Court of Appeal entirely discounted that promise:-

> "...it is on principle and authority settled so as to be beyond question or argument, that the ante-nuptial promise is, in point of law, absolutely void ... As between the husband and wife, therefore, the question is to be determined as if there never had been any such promise ..."[37]

It was, in other words, a question of law not a matter of arrangement between the parents. James L.J. in that case gave no reason why that policy was appropriate. But in the earlier case of Andrews v Salt[38] Mellish L.J. argued in support of the same conclusion that:-

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35 In re Agar-Ellis, Agar-Ellis v Lascelles (1878) L.R. 10 Ch. D. 49.
36 Para. 34.47.
37 (1878) L.R. 10 Ch. D. 49 at p. 71 per James L.J.
38 (1873) L.R. 8 Ch. App. 622.

> "A father cannot bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own."[39]

The interest of the child was thus the justification for ultimate judicial control of the father. Mellish L.J.'s use of the word "conclusively" indicates that, contrary to that impression left by James L.J. in the first Agar-Ellis decision, the arrangements of the parents might well play some part in the final judicial decision. Indeed in Andrews v Salt[40] at first instance Malins V.-C. commented to that effect.[41]

34.88 Taking the parental arrangements into account in that way was simply giving effect to the overall obligation, where the child's interest was relevant, to consider all the circumstances of the case before reaching a conclusion on the child's interest and only thereafter determining what part that conclusion played in the whole process. James L.J. would probably not have sympathised with such a view. He was concerned to solve these issues in an entirely legalistic fashion. Although he conceded that a father's right could be forfeited, the interest of the child played no part in the grounds of forfeiture or the consequential and almost automatic decision to remove the father's authority.

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39 Ibid. at p. 636 per Mellish L.J.

40 (1873) L.R. 8 Ch. App. 622.

41 Ibid. at p. 628 per Malins V.-C.

34.89 James L.J.'s very rigid attitude was probably not shared by Mellish L.J. or Malins V.-C. and in In re Clarke[42] Kay J. pursued a more flexible course. In Kay J.'s opinion the benefit of the child had a clear function in determining the child's religious education. It is not surprising that the parental arrangements should not in his view be ignored. In that case the father was held to have abandoned his right to have the child brought up in his religion and Kay J. paid some attention to the agreement prior to the marriage that any children should be educated in his wife's religion. There is thus some evidence that the courts were prepared to look at these parental arrangements as part of the overall family pattern as a basis for reaching a decision on the child's interest, provided, of course, that the child's interest was recognised to have some function in the total process.

(e) Conclusion

34.90 These comments are important for themselves in the narrower context of consensual arrangements about religion and custody. They also support a proposition of wider significance. Judicial powers of interference in custodial and religious matters had long been acknowledged. The consequence of the exercise of these powers was to take away from the father his authority to make a decision or a series of decisions for the child and to substitute in its place the decision of the court

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42 (1882) 21 Ch. D. 817.

or some other nominated person. This suggests that the judicial function was to some extent administrative and, more importantly, that the father's status comprised a series of powers rather than rights in the strict sense. If the issue were to be judicially contested, a decision reached by a father by way of the abuse of his powers would not be enforced by the court. It is thus difficult to use the word "right" in this context except in the most formal sense. The dynamic analysis has become more important than the static analysis.

34.91 By the middle of the nineteenth century the concept of parental authority had clearly emerged from the complexities of guardianship. The judges had begun to talk, perhaps misleadingly, of parental "rights." That may unwittingly have coloured their attitudes and contributed to an increasingly rigid approach in a number of areas, despite the enactment of potentially liberalising legislation. In earlier periods guardianship, parental or otherwise, had clear connotations of a "trust" and an "office", with the correlative emphasis on "benefit", "discretion" and "administration." But even by 1886 the pattern was not entirely clear or consistent. Flexibility coupled with an open, discretionary approach was recognised in certain limited contexts. The overwhelming trend however probably favoured a legalistic approach culminating in the recognition of the doctrine of the sanctity of paternal rights.

Such was the background to the legislation of the late nineteenth century which introduced the contemporary approach to welfare.

Section 6 - Matrimonial causes

(a) Introduction

34.92 When the matrimonial jurisdiction of the Ecclesiastical Courts[43] in England was conferred in 1857 upon the newly constituted Divorce Court,[44] there was very little evidence of how children were dealt with in the Ecclesiastical Courts.[45] In a sense therefore the new court was given an opportunity to create a new jurisprudence, especially as Parliament had apparently conferred upon the court a wide discretion in relation to children's matters.

34.93 The position was slightly different in Scotland in 1861 when Parliament similarly intervened,[46] for there was some indication, however weak, of the approach of the consistorial courts.[47] In the United States of America, on the other hand, the situation was dramatically different. There never had been ecclesiastical courts in that country[48] and systems of public divorce law had become not uncommon by the beginning of the nineteenth century.[49] Bishop moreover indicated that by the middle of the century the courts were being given a discretion in relation to children in a divorce action.[50] Few rules guided the exercise of that discretion but he was able to comment that

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43 Abolished by the Matrimonial Causes Act 1857, s. 2.
44 More properly the Court for Divorce and Matrimonial Causes: Matrimonial Causes Act 1857, s. 6.
45 See generally Holdsworth, vol. 1, pp. 621 to 624; vol. 12, pp. 685 and 686; vol. 15, pp. 201 to 208.
46 Conjugal Rights (Scotland) Amendment Act 1861 (24 & 25 Vict., c. 86).
47 Paras. 33.76 and 33.77.
48 Friedman L.M., A History of American Law (New York, 1973), p. 179.
49 Ibid. p. 182.
50 Bishop J.P., Commentaries on the Law of Marriage and Divorce (Boston, 1852), para. 634.

"the leading principle is to consult the good of the children, rather than the gratification of the parents."[51]

34.94 Parliament clearly gave to the English Divorce Court an opportunity to do likewise. Section 35 of the Matrimonial Causes Act 1857 was couched in very wide language. The court was authorised in the appropriate context to make provision "with respect to the custody, maintenance and education" of the relevant children "as it may deem just and proper." Between 1857 and 1886 the law developed somewhat haphazardly at the hands of the judges. It is difficult to identify any coherent trends. The only common denominator was probably that the judges tended to look at each case in the light of its own circumstances. Certainly this was part of an overall discretionary approach. But in their freedom the judges pursued often inconsistent policies. How far they conceived the correct approach under the Act and then applied it or whether they come to a decision on the merits and conceived an approach to support that decision, it is impossible to tell. In any event traces of common law and equity are as easy to identify in the cases between 1857 and 1886 under the 1857 Act as references to existing law were welcomed by the Court of Session between 1861 and 1886 under the 1861 Act.[52]

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51 Ibid., para. 636.

52 Paras. 33.82 to 33.93.

34.95 The phraseology of section 35 indicated the generality of the jurisdiction created by it. The orders could be either interim or final. They could be made from time to time but the restriction in section 35 that they could be made only before making the final decree was effectively removed two years later when it was enacted that orders could be made after the final decree.[53] The only jurisdictional restriction in the 1857 Act related to the children actually subject to the jurisdiction. The Act was, of course, a divorce measure and custody issues were in a sense incidental. This had two consequences. First, the custodial issue was never raised except in conjunction with allegations supporting the principal matrimonial issues. It was only to be expected that the existence of these allegations and the supporting evidence would colour the judicial attitude to the custodial matters. Secondly, the jurisdiction was limited by section 35 to the "children the marriage of whose parents is the subject" of the principal suit. This received a clear interpretation in 1886[54] and the judiciary continued to give it a wide but justifiable interpretation, supported by their notions of the policy of the legislation.

34.96 The courts during the period in question did almost nothing to restrict the generality of their statutory jurisdiction. Access was competently awarded without custody being judicially regulated.[55] If no order was necessary, none was made.[56] It was

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53 Matrimonial Causes Act 1859 (22 & 23 Vict., c. 61), s. 4.
54 Langworthy v Langworthy (1886) 11 P.D. 85.
55 Thompson v Thompson and Sturmfells (1861) 2 Swabey & Tristram 402; Codrington v Codrington and Anderson (1864) 3 Swabey & Tristram 494.
56 Seymour v Seymour (1895) 1 Swabey & Tristram 332.

regarded as competent to award custody of certain children to one parent and custody of the other children to the other parent.[57] Custody was awarded to a person other than a parent.[58] Persons other than parents were permitted to intervene in the proceedings.[59] The only restriction imposed by the courts upon themselves was the age limit of sixteen.[60] This statutory jurisdiction was therefore interpreted very broadly by the courts: an approach entirely consistent with the legislation. The actual method of its exercise was, however, scarcely so liberal.

(b) The approach to section 35

34.97 Two principal factors seem to have influenced the exercise of the custodial jurisdiction in section 35: the rules of common law and equity governing the paternal authority; and the matrimonial nature of the principal jurisdiction with its clear notions of matrimonial fault. It is not immediately obvious why legal and equitable rules should have been relevant, particularly in view of the phraseology of section 35. It would, on the other hand, have been very difficult, but not impossible, for the courts to have ignored in practice the issues of fault discussed in the divorce context. Indeed of sixteen of the reported cases nine involved adultery and seven cruelty. In seven of these cases the husband was the petitioner and in nine

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57 Curtis v Curtis (1858) 1 Swabey & Tristram 75; Spratt v Spratt (1858) 1 Swabey & Tristram 215.

58 Curtis v Curtis (1858) 1 Swabey & Tristram 75; Boynton v Boynton (1858) 1 Swabey & Tristram 324; Chetwynd v Chetwynd (1865) L.R. 1 P. & D. 39; D'Alton v D'Alton (1878) 4 P.D. 87.

59 Chetwynd v Chetwynd (1865) L.R. 1 P. & D. 39; March v March and Palumbo (1867) L.R. 1 P. & D. 437; Godrich v Godrich (1873) L.R. 3 P. & D. 134.

60 Mallinson v Mallinson (1866) L.R. 1 P. & D. 221.

the wife was seeking the matrimonial remedy. Matrimonial fault involved either husband or wife[61] and it would have been simpler for the courts, exercising a purely adjudicative function, to have determined custody issues on the basis of matrimonial fault. There is indeed some evidence of this.

34.98 It had always been a problem in England and Scotland how to relate matrimonial fault to the custodial context. One of the consequences of the threshold approach adopted by courts of common law and equity had been the introduction of concepts approximating to paternal or, in some cases, parental fault. On reflection, therefore, it is easier to understand why the common law and equity were inadvertently drawn into custodial disputes. The element common to both legal and equitable rules relating to children and the solution of matrimonial disputes was a species of fault. This is not to say that all disputes about children brought before the Court of King's Bench, the Court of Chancery and the Divorce Court were solved in terms of fault. Clearly they were not. But fault in several ways was a factor of considerable influence in a number of cases. It became particularly important as the courts began to acknowledge the doctrine of the sanctity of paternal rights.

34.99 There was no reason for the courts to deny the discretionary nature of their jurisdiction. It allowed them to

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61 Occasionally both.

adopt a number of different approaches to the issues before them. Indeed in one of the first reported decisions on section 35, the Judge Ordinary indicated how different was the law administered in the other courts, emphasising that an application to the Divorce Court was fundamentally a request for the exercise of its discretion.[62] This view was summed up very concisely in Marsh v Marsh.[63] There the Judge Ordinary relied upon the words "just and proper" in section 35:-

> "[They] are to be construed with reference to the circumstances affecting the suit, and not merely with reference to the rules by which courts of equity and common law have been governed in questions respecting the custody of infants; in short, that it was the intention of the legislature to give a discretionary power to the court exceeding that which had previously been exercised by courts of law and equity."[64]

That seems quite unexceptionable. But the use of the word "merely" suggests that legal and equitable rules may have been to some extent relevant, although not important. It would however be pedantic to criticise the overall view expressed in that comment.

34.100 The indication of a different approach came only three or four years later. The Judge Ordinary in Cartlidge v Cartlidge[65] directed himself to keep certain principles in mind.

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62 Spratt v Spratt (1858) 1 Swabey & Tristram 215.

63 (1858) 1 Swabey & Tristram 312.

64 Ibid. at p. 316.

65 (1862) 2 Swabey & Tristram 567.

He enumerated two. The first was the father's common law right to custody. The second was the court's discretionary power under section 35. It is suggested in passing how strange it is to refer to a discretionary power as a principle. Principles indicate how a power should be exercised. That it is a discretionary power is a matter of law which must be established before principles can be devised as to its exercise. However, he continued:-

> "... but I think I ought to exercise that power with reference to the prima facie legal right of the father, and the petitioner must establish a case beyond the mere natural desire of a mother to have the custody of her infant child."[66]

The individual circumstances of the case were given due consideration. It was finally decided that, there being no necessary reason in the interests either of the mother or of the child to do otherwise, effect should be given to the father's legal right. So far, then, from exercising a discretion, the Judge Ordinary determined the issue largely in terms of legal right. The right was admittedly liable to forfeiture but the ground of forfeiture included a high standard, that of necessity. Cartlidge v Cartlidge[67] thus postulated a return to the rules of common law and equity.

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66 Ibid. at p. 568.

67 (1862) 2 Swabey & Tristram 567.

34.101 The other extreme is when a court exercises its discretion in the way most consistent with the best interests of the child. There were two instances of this approach. Each was rather special. It was moreover probably no coincidence that in each case the child was ordered to be placed in the custody of a third party. Despite his conclusion, the starting point of Lord Penzance's argument in Chetwynd v Chetwynd[68] was the father's legal right to custody. That right was liable to forfeiture and in this case it was forfeited because "the common home has been broken up by the conduct of the father."[69] In that event the "injured mother" would succeed to custody, but only if she herself "has been free from blame."[70] In this case the mother had also behaved in a "blameworthy" fashion. Thus she too lost any interest she might otherwise have had. Lord Penzance was in this way forced[71] to the conclusion that custody should be awarded to an aunt and uncle of the children.

34.102 A welfare approach was a matter more of choice than compulsion for Hannen P. in D'Alton v D'Alton.[72] The only difference between the parents related to the religious upbringing of the children. The only purpose in seeking custody was to be able to assert one religion rather than another. Hannen P., at first instance, said that the question was "... what is most for the benefit of their offspring, whose interests are of paramount importance upon this application?"[73]

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68 (1865) L.R. 1 P. & D. 39.

69 Ibid. at p. 41 per Lord Penzance.

70 Idem.

71 I.e. not a proper exercise of a discretion.

72 (1878) 4 P.D. 87.

73 Ibid. at p. 88 per Hannen P.

That, it is suggested, was an extremely helpful way of expressing the issue. The benefit of the children was almost the purpose or objective of the exercise. The children's interests simply attracted the greatest weight in reaching a decision intended to achieve that objective.

34.103 On the other hand Sir R.J. Phillimore on appeal argued that the first duty of the court was "to consider what is for the benefit of the children."[74] He clearly meant that that was the purpose or objective of the exercise. However he added: "That should be the paramount consideration with the court."[75] The same matter, it is suggested, cannot at the same time be both the purpose of the exercise and a consideration, paramount or otherwise, in the exercise of it. Sir R.J. Phillimore was obviously trying to be sympathetic to the children but, it is suggested, the formulation of Hannen P. is to be preferred.

34.104 The court proceeded to apply these ideas and concluded that in the circumstances neither the father nor the mother should have custody which was in the event awarded to the teacher who ran the boarding school attended by the children. Despite the similarity of conclusion, it would appear that in D'Alton v D'Alton[76] the court was more inclined as a matter of policy to exercise their discretion in favour of the children, while in Chetwynd v Chetwynd[77] the court did so because no other

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74 Ibid. at p. 91 per Sir R.J. Phillimore.

75 Idem. per Sir R.J. Phillimore.

76 (1878) 4 P.D. 87.

77 (1865) L.R. 1 P. & D. 39.

alternative was available. The latter case was not therefore the exercise of a real discretion; the former case probably was.

(c) The criteria used in the exercise of the discretion

34.105 Although the courts claimed from time to time to be exercising a discretion, often they preferred to follow established rules. If they stated in terms that they were applying rules, that would probably have been an invalid exercise of a discretionary power. But if they proceeded in terms rather of a policy created and conceived in exercise of their discretion founded upon the nature of the legislation, it would have been more difficult to sustain such a claim of invalidity. A number of criteria were mentioned in passing by the judges: for example, reasonableness,[78] convenience,[79] benefit,[80] even attachment.[81] None of them meant very much. There were however two or three particularly significant judicial attitudes underlying some of the authorities. In Cartlidge v Cartlidge,[82] as already noticed, considerable attention was paid to the legal right of the father to custody. For present purposes the nature and grounds of forfeiture, recognised as complementary to that right, were more significant. Forfeiture applied to the "natural right" of the mother[83] as it did to the legal right of the father.[84]

34.106 The grounds of forfeiture showed a close relationship with the grounds of divorce. Living a notoriously dissolute

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78 Spratt v Spratt (1858) 1 Swabey & Tristram 215.
79 Codrington v Codrington and Anderson (1864) 3 Swabey & Tristram 494.
80 Langworthy v Langworthy (1886) 11 P.D. 85.
81 (1858) 1 Swabey & Tristram 324.
82 (1862) 2 Swabey & Tristram 567.
83 Seddon v Seddon and Doyle (1862) 2 Swabey & Tristram 640: see also Milford v Milford (1869) L.R. 1 P. & D. 715 at p. 717 per Lord Penzance.
84 March v March and Palumbo (1867) L.R. 1 P. & D. 437.

life could lead to disqualification.[85] A mother found guilty of adultery would forfeit any right to custody and access.[86] Any parent responsible for the breakup of the family home would similarly be rejected for custody.[87] These decisions clearly suggest that matrimonial fault, no doubt largely presumed from the decision in the principal issue between the parties, was the basis for forfeiture. Parental qualities were either irrelevant or assumed to be lacking in the case of matrimonial fault.[88] Indeed in an early case children were withdrawn from their father even although they had not been cruelly or improperly treated by him, a point to which specific attention had been drawn. That is an issue different from equating matrimonial and parental fault but it indicates that to some extent the courts were concerned more with the parents than with the children.

34.107 Even where the interests of the children were recognised, at least to some extent, the function played by welfare was negative. In Spratt v Spratt,[89] for example, the child's interest was considered only to the extent that "there is no fear of its being contaminated by the alleged conduct of the mother."[90] In modern terminology, the court would give effect to the wishes of the appropriate parent unless that would be contrary to the best interests of the child. But perhaps the best expression of the overall attitude of the courts was to be

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85 Idem.
86 Bent v Bent and Footman (1861) 2 Swabey & Tristram 392; Seddon v Seddon and Doyle (1862) 2 Swabey & Tristram 640.
87 Chetwynd v Chetwynd (1865) L.R. 1 P. & D. 39: Milford v Milford (1869) L.R. 1 P. & D. 715.
88 Marsh v Marsh (1858) 1 Swabey & Tristram 312.
89 (1858) 1 Swabey & Tristram 215.
90 Ibid. at p. 216.

found in Codrington v Codrington and Anderson.[91] It emphasised the predominance afforded to the interests of the parents and the negative aspect of the interests of the children:-

> "The obvious intention of the legislature was to gratify the natural affection of both parties for the children. The convenience of both parties must be considered, and when the court sees reason to believe that access to the children would be productive of injury to them, or where the court thinks that the application is not bona fide, it ought to refuse it."[92]

34.108 Despite the acknowledgement of discretionary powers, the tendency on the whole was to pay some attention to the legal rights of the father and the natural rights of the mother, while each remained liable to forfeiture, as in the other courts. The grounds of intervention were perhaps even more restrictive than those recognised by equity. Notions of matrimonial fault became enmeshed in the determination of the custodial disputes. In a sense, perhaps, custody was the reward for the innocent party and if neither party was innocent, the reward went elsewhere. The whole approach of the courts was thus dominated by reference to the parents, their behaviour and their interests. The part played by welfare became minimal.

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91 (1864) 3 Swabey & Tristram 494.

92 Ibid. at p. 503.

CHAPTER 35

THE CONTEMPORARY LEGISLATION - I

Section 1 - Introduction

35.1 The context in which decisions are now made affecting the welfare of a child is entirely statutory. This is as true for matters of guardianship and custody as it is for questions of adoption and the executive interference with parental rights.[1] The matrimonial context in England[2] is similar to the scheme created in 1857, while in Scotland the foundation of custodial regulation in consistorial cases has remained the same since 1861.[3] The only contextual problem for matrimonial and consistorial cases has been the applicability of the paramountcy of welfare principle.[4] The statutory formulation of that principle was probably wide enough to apply to matrimonial and consistorial cases, although its application to such cases may not have been intended. In any event the practice now is to apply the principle comprehensively to custodial and similar issues, while its significance may to some extent reflect the context of its application.

35.2 That issue apart, the Guardianship of Infants Act 1886[5] was the first statutory intervention in Scotland in

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1 I.e. under the official care legislation.
2 Matrimonial Causes Act 1973 (1973 c. 18).
3 It has however been extended.
4 Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c. 45), s. 1; Guardianship of Minors Act 1971 (1971 c. 3), s. 1.
5 49 & 50 Vict., c. 27.

custodial matters. The Custody of Infants Acts of 1839[6] and 1837[7] which applied only in England were largely superseded by the 1886 Act.[8] Although that Act and the Guardianship of Infants Act 1925 were consolidated in 1971 for England,[9] they together with the Custody of Children Act 1891,[10] the Guardianship Act 1973[11] and Part II of the Children Act 1975[12] remain the statutory foundation of the present English law. Similarly in Scotland the unconsolidated Acts of 1886 and 1925, together with those of 1891, 1973 and 1975 remain effective with the specific enactment for Scotland of the Illegitimate Children (Scotland) Act 1930[13] and the Custody of Children (Scotland) Act 1939.[14]

35.3 The complexity of this statutory pattern makes difficult any joint reference to the individual English and Scottish provisions. Many of the English authorities have, naturally, been formulated in terms of the unconsolidated common legislation. The simplest solution is perhaps to refer to the same provisions in the 1886 or 1925 Acts and in the 1971 Act in relation to each jurisdiction. This suffers from the disadvantage of referring to one provision which may not now technically apply. But it will have the merit of allowing the appropriate enactments to be identified. For that reason the double reference system will be used, but for

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6 2 & 3 Vict., c. 54. 7 36 & 37 Vict., c. 12.
8 S. 2 of the 1873 Act alone survived the 1886 Act but it was repealed in 1973: see para. 34.70.
9 Guardianship of Minors Act 1971. 10 54 & 55 Vict., c. 3.
11 1973 c. 29. 12 1975 c. 72. 13 20 & 21 Geo. 5, c. 33.
14 2 & 3 Geo. 6, c. 4.

these Acts only. All the Acts referred to in the previous paragraph have distinctive dates. These Acts will generally be referred to in terms of their years, unless to do so would cause confusion.

35.4 What is remarkable about the progression of the legislation from 1886 until 1975 is how little the substantive law has changed. The law has developed by modifications to its structure and procedures. This is a further indication of how heavily the system relies upon policy for its inspiration rather than upon specific rules of law. Policy can, of course, be important in a number of different ways: for interpreting the individual word or phrase in an Act; for disclosing the overall scheme of the legislation; for indicating how powers should be used or discretions exercised. The courts are permitted to conceive policy only from the terms of the legislation itself. Commentators are not similarly inhibited. There is therefore no harm, indeed there is considerable merit, in attempting to elucidate Parliamentary policy from the Parliamentary discussions themselves. To do so may only rarely provide clear evidence of what Parliament intended. But these discussions often indicate negatively what was not intended and that may assist in identifying what

was proposed.

Section 2 - The Guardianship of Infants Act 1886

(a) Policy

(i) Background

35.5 That comment is probably especially true of the 1886 Act. The law in force at the commencement of that Act tended to emphasise very heavily the rights of the father, generally and in relation to religion. Parliament deliberately refrained from touching upon the father's right to educate his children in the religion of his choice[15] but, by interfering with the structure of the system relating to custody, the father's position vis-à-vis religion was impliedly affected. This possible inadvertent consequence of the Act was only briefly mentioned.[16] That apart, there is very little in the 1886 Act which indicated a drastic change in the law. That Act is couched largely in terms of powers with minimal guidance as to how they should be exercised. But the guidance provided by the Act comprised its novelty of approach.

35.6 The earlier nineteenth century legislation[17] had conferred upon the courts discretions largely unrestricted in point of substance. The courts had, however, applied these Acts with the limitations created by the judiciary. To some

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15 E.g. (1884) 286 Parl. Deb. (H.C.) 3s. col. 822 (Mr. Walter), col. 835 (Mr. Leamy); (1884) 291 Parl. Deb. (H.L.) 3s. col. 1552 (Lord Fitzgerald).

16 (1884) 286 Parl. Deb. (H.C.) 3s. col. 829 (Mr. Gibson); (1885) 297 Parl.Deb. (H.L.) 3s. col. 1091 (Lord Fitzgerald).

17 I.e. the custody legislation of 1839 and 1873 and the matrimonial and consistorial legislation of 1857 and 1861.

extent the 1886 Act was a reaction against the judicial creation of such limitations. The Act was in a sense a collection of individual and largely unrelated provisions. But their structure was in some respect new.

35.7 Of the thirteen sections in the Act, only sections 2 to 7 are of present substantive relevance. Sections 2, 3, 4 and 6 are concerned with guardianship in both its private[18] and public[19] contexts. The policy of the legislation clearly was to give to the mother a greater legal interest in the guardianship of her children. Her position under the Act was not, however, the equivalent of the father. There was no equality of rights. The supervisory function of the court to appoint[20] and remove[21] a guardian was preserved and pro tanto extended. Sections 5 and 7 were directed more towards custody: the former section gave to the mother a right to apply for custody or access; section 7 enabled the court in a matrimonial context to make a declaration of parental custodial unfitness.

35.8 Only one substantive right was created by these provisions; namely, the surviving mother's right to guardianship either alone or along with any guardian appointed by the father.[22] Otherwise she was merely given an opportunity to expand her interest in and control over her children.[23] Whether

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18 I.e. as between the father and mother and other interested individuals.

19 I.e. when the state, acting through the courts, becomes involved.

20 1886 Act, s. 2 (second sentence): see also 1925 Act, s. 4(1) (second sentence) and 1971 Act, s. 3(1).

21 1886 Act, s. 6: see also 1971 Act, s. 6.

22 1886 Act, s. 2 (first sentence).

23 E.g. by appointing a guardian under s. 3(1), by provisionally nominating a guardian under s. 3(2) or by applying for custody or access under s. 5.

she succeeded or not depended largely upon the court. The court similarly was also given merely powers.[24] They were naturally supervisory in character. Thus the mother, as the father, had no absolute status at any stage. But certain of these powers were restricted in their exercise. Only the powers of the court conferred by sections 2 and 3(3) were unrestricted discretions. Sections 3(2) and 7, on the other hand, referred to parental unfitness; section 6 twice referred to the "welfare of the infant;" and section 5 directed the court to have regard "to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father." Earlier legislation was conspicuously devoid of such provisions. It is a different question altogether what these provisions mean.

(ii) The move towards parental equality

35.9 The 1886 Act, it is clear, conferred no rights upon children. Although the mother benefited by the creation of only one strict right, her interest in her children was certainly recognised by the conferment of certain powers. Yet this Act was hailed as a"mother's charter." As it was originally drafted, it might have been; as it emerged finally from Parliament, it could scarcely justify that description.

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24 E.g. the power of appointment in s. 2 (second sentence), the power of confirmation of a provisional nomination in s. 3(2), the power to settle inter-guardian disputes in s. 3(3), the power to regulate custody and access in s. 5 and the power to remove a guardian in s. 6.

Are there, nevertheless, any indications of what Parliament was attempting to achieve in passing the 1886 Act?

35.10 When the bill was first introduced in 1884, it was, like the 1839 and 1873 Acts, a private member's measure.[25] The spokesman for the Government,[26] however, gave the Government's general assent to the measure.[27] The bill nevertheless met with considerable opposition in the House of Commons. It contained a provision conferring equality of rights upon father and mother. This "duality of control" was seriously questioned.[28] The bill was read a second time[29] but it encountered even more opposition in the House of Lords.[30] Later that year it was withdrawn. In 1885 it was reintroduced in the Lords without the equality of rights provision and was subsequently enacted in that form. The static relationship between father and mother therefore remained the same, despite the intervention of the 1925 Act,[31] until 1973 when an "equality of parental rights" provision was enacted for England and Scotland.[32]

35.11 Late Victorian society was clearly not ready to equalise the status of father and mother. It is interesting however that equality was stated to be desirable not for its own sake or even in the interests of the parents. It was thought appropriate because of its implication for the

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25 Promoted by Mr. Bryce: (1884) 286 Parl. Deb. (H.C.) 3s. col. 811.
26 Lord Advocate Balfour.
27 (1884) 286 Parl. Deb. (H.C.) 3s. col. 835 (Mr. Balfour).
28 Ibid., col. 820 (Mr. Ince), col. 824 (Mr. Gregory), col. 826 (Mr. Collins).
29 Ibid., col. 842.
30 (1884) 291 Parl. Deb. (H.L.) 3s. cols. 1550 to 1554, especially at the instance of the former Lord Chancellor, Lord Cairns.
31 1925 Act, s. 1; 1971 Act, s. 1. 32 1973 Act, ss. 1(1) and 10(1).

children. The clause which eventually was not enacted proposed to confer joint guardianship upon both parents during their marriage.[33] According to the bill's promotor, it was necessary to give to the courts a discretion to regard "the interests of the children in the first place and in the next the interest of the parents on an equal footing."[34] It is by no means clear that enacting parental equality would necessarily afford priority to the interests of the children but it certainly would, as Mr Bryce claimed, "get rid of the legal presumption in favour of the father."[35]

35.12 The force of Mr Bryce's argument lay in its acknowledgment that joint parental guardianship would be important only in the event of a dispute between the parents. In other words, joint guardianship, like any guardianship, was a static concept which would become important only when a dynamic dimension was introduced, for example, when a dispute occurred. Failure to appreciate that point led the opponents of the bill into certain misconceptions. Joint guardianship, it was alleged, would effectively set up two equal and co-ordinate authorities in the household;[36] it would cause disputes;[37] it would cause domestic discord and disturbance.[38] The reply, of course, was enunciated that the bill would not, indeed could not, cause disputes.[39] They were brought about by

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33 (1884) 286 Parl. Deb. (H.C.) 3s. col. 815 (Mr. Bryce).
34 Idem. The same view was expressed by Mr. Davey: Ibid., col. 831.
35 Ibid., col. 816.
36 Ibid., col. 824 (Mr. Fowler). 37 Ibid., col. 820 (Mr. Ince).
38 Ibid., col. 827 (Mr. Gibson).
39 Ibid., col. 825 (Mr. McLaren), col. 830 (Mr. Davey).

simple disagreement, irrespective of where static guardianship lay. The bill, in their view, would attempt to solve not cause such disputes.

35.13 The principle of equality was rejected for other reasons. It was simply wrong;[40] it was against scripture and reason.[41] More specifically, man and woman could not be made equal for "nature and reason point out that the man ought to be supreme and that he should be the master of his own household."[42] The Government spokesman in the House of Commons adopted a less dogmatic approach, something more in the nature of a discrete compromise. Joint guardianship was not necessary, in his view, while the parents were alive and living together. A remedy would however be necessary when the parties were living apart.[43] That comment postulates the unwarranted assumption that parental disputes could arise only when the parents were living apart. In any event, joint guardianship clearly was opposed for a number of reasons and, when it was dropped from the bill, much of the determined opposition ended.

(iii) The mother's application for custody

35.14 Parliament, it would seem, was opposed to varying the rights of parents but not to the way judicial control over

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40 Ibid., col. 827 (Mr. Collins).
41 Ibid., col. 823 (Mr. Fowler).
42 Ibid., col. 824 (Mr. Fowler).
43 Ibid., col. 837 (Mr. Balfour).

these rights could be exercised. The legislature, in other words, was not to be seen to take away or limit the paternal authority as a matter of principle. But it would be quite acceptable for a court to do so in the individual case. Thus, when the 1884 bill was in committee, Mr Bryce, the bill's promotor, suggested a new clause giving to the court power on a mother's application to make discretionary orders on matters of custody, having regard to the welfare of the children and the conduct and wishes of the parents.[44] This was the origin of what became section 5 of the Act. In this way the principal provision of the Act was introduced when opposition to its main principle, joint guardianship, became increasingly hostile. The new clause was introduced by Mr Bryce on the suggestion of the Solicitor-General,[45] whose legal eminence no doubt contributed more than a little to its acceptance. One of the main contributions to the development of the law, therefore, came about less as a consequence of mature Parliamentary deliberation, more as a matter of political compromise.

35.15 The other notable feature of the debates on the 1884 bill was their treatment of the law of Scotland. In his opening remarks during the second reading debate Mr Bryce clearly and concisely described the position in English law.[46]

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44 (1884) 291 Parl. Deb. (H.C.) 3s. col. 1017 (Mr. Bryce).

45 Sir Farrer Herschell.

46 (1884) 286 Parl. Deb. (H.C.) 3s. cols. 812 and 813 (Mr. Bryce).

He acknowledged the discretionary nature of the 1839, 1873 and 1857 Acts and conceded that the mother was still largely excluded in consequence of the court's preference for a father who had not grossly misconducted himself.[47] There was no suggestion of course that the courts had simply misapplied these Acts. He added however, in relation to Scotland, that the law there was "even harsher";[48] there was no 1873 Act; the courts had a "narrower discretion;"[49] the father's rights were regarded with "warmer favour".[50] It is not suggested that in 1884 the law of Scotland was any better from the child's point of view. The discretion was much the same as in England. But neither system encouraged its exercise. The father's rights could scarcely have been stronger than in England. Admittedly there was no 1873 Act. But in practice that made no difference. It is thus difficult to understand the conclusion that Scots law was "harsher."

35.16 The Government spokesman,[51] especially as he was also the Lord Advocate, might have been expected to have commented on this aspect but he did not do so. He merely hinted that the standard of misconduct justifying forfeiture might have been higher in Scotland than in England.[52] This probably was in response to the alleged criticism that Scotland required parental rather than matrimonial misconduct as the basis for

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47 Idem. 48 Ibid., col. 814 (Mr. Bryce).
49 Ibid., col. 815 (Mr. Bryce). 50 Idem.
51 Mr. J.B. Balfour.
52 (1884) 286 Parl. Deb. (H.C.) 3s. col. 838 (Mr. Balfour).

disqualification.[53] But, it is suggested, that is not so much a criticism of the Scottish approach as an indication of its logical strength. Be that as it may, that issue may certainly have been in 1884 a point of comparison with the law in England. That in itself may, of course, have been the reason for the use of the adjective "harsh."

35.17 Although the Lord Advocate did not take the opportunity to describe the law of Scotland, he did concede that the Scottish discretion had in fact become "a hard and fast rule."[54] He seemed to be referring in particular to the consistorial legislation and even in that context he attributed the legal rather than a discretionary approach to "a survival of the patria potestas of the Roman law."[55] That apart, his constructive solution to the problem was:-

> "The primary and governing consideration ought to be the welfare of the child, and where consideration for either parent comes in, it ought to be subordinate and collateral to that."[56]

That approach was not taken up by anyone else in the Commons debate on the 1884 bill. There were however indications in the Lords and the Commons during the debates on the reintroduced bill to that effect.[57] Perhaps therefore

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53 Ibid., col. 833 (Sir R.A. Cross). The same issue was debated more generally by Sir R.A. Cross and Mr. Balfour during the second reading of the 1886 bill: (1886) 304 Parl. Deb. (H.C.) 3s. col. 1876.

54 (1884) 286 Parl. Deb. (H.C.) 3s. col. 839 (Mr. Balfour).

55 Idem.

56 Idem.

57 (1885) 297 Parl. Deb. (H.L.) 3s. col. 296 (Lord Beauchamp), cols. 299 and 300 (Lord Selbourne); (1886) 304 Parl. Deb. (H.C.) 3s. col. 1868 (Mr. Crawford).

there was more sympathy in 1886 for an approach linked to the interests of the child than appeared to the promotors of the first bill. After all, Mr Bryce introduced joint guardianship as a means of securing predominance for the interests of the child.[58] That may have been a misconception. Perhaps, if something in the nature of the paramountcy of welfare principle had been suggested rather than joint guardianship, the bill would not have met with the substantial opposition which it encountered. It is equally speculative to consider whether the introduction of the paramountcy of welfare principle in 1886 would have made any difference to the way in which the law was administered either before or after 1925 when it was introduced.

35.18 The subsequent discussions in Parliament on the several aspects of the bills added very little to an understanding of the role of welfare in the new context. Joint guardianship had been removed. Welfare was at best a factor in the court's determination of the mother's application for custody or access. The meaning and significance of that approach were not the subject of comment. Lord Salisbury was keen not to destroy the position of the father nor was he on the other hand "an absolute believer in the divinity of a Court."[59] Lord Bradbourne was content only because he was

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58 Para. 35.11.

59 (1885) 297 Parl. Deb. (H.L.) 3s. col. 622 (Lord Salisbury).

satisfied that the court would not "strike at the supremacy of the father."[60] These ideas were shared by a number of other Parliamentarians. They reflect satisfaction with the status quo. Perhaps, therefore, if the bill had attempted to achieve much more, it would have failed in the face of such conservative opposition. The tentative conclusion reached a few paragraphs ago suggested that the Act made very little change to the structure of the law and almost none to the substance of the law. The Parliamentary deliberations are consistent with that comment. The indication is that Parliament intended to change as little as possible.

(b) The role of welfare

(i) Unregulated discretions

35.19 The nature and purpose of the various powers conferred by the 1886 Act differ. The power given to the mother, for example, to appoint[61] or nominate[62] a guardian is unrestricted by the Act. In practice however control is exercised judicially by the court, acting either under the Act itself[63] or in exercise of its general supervisory powers over guardians.[64] Thus, although the mother may be given extended powers of appointment, her choice of guardian is subject to the normal scheme of control.

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60 Ibid., col. 627 (Lord Bradbourne).
61 1886 Act, s. 3(1): see now 1925 Act, s. 5(2) and (3) and 1971 Act, s. 4(2) and (3).
62 1886 Act, s. 3(2): this was superseded by the 1925 Act, s. 5(4) and the 1971 Act, s. 4(4).
63 E.g. 1886 Act, s. 6: see also 1971 Act, s. 6.
64 Para. 32.74.

35.20 This argument would not apply to the exercise of powers by the court. Unless the Act directs how they are to be exercised, it is a matter for the court to do as it sees fit. A court however is unlikely to disregard how similar powers have been exercised in the past and it is to be expected that a court will follow the general principles established for the exercise of the power. The restricted exercise of the discretion in the matrimonial and consistorial legislation in England and Scotland is an indication of such a view.

35.21 There are two instances of unrestricted judicial discretions in the 1886 Act: the power of appointment in section 2;[65] and the power to settle disputes between joint guardians.[66] It would have been possible for Parliament to have enacted a general principle applying to all or most discretions in the legislation.[67] That would have changed the nature of the problem. Parliament at that stage did not do so. It had long been established that the practice of the court in appointing guardians was to look to the benefit of the child.[68] The court would be likely to follow a similar line when exercising a statutory rather than a legal or equitable power of appointment. There is therefore no reason to think that the benefit of the child

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65 See now 1925 Act, s. 4(1) and 1971 Act, s. 3(1).
66 1886 Act, s. 3(3): see now 1925 Act, s. 6 and 1971 Act, s.7.
67 As it did when the paramountcy of welfare principle was enacted in 1925.
68 Para. 32.77.

would not be the test for exercising the power in section 2 of the Act.

35.22 Similar arguments would apply when the court was directly faced with solving disputes between joint guardians under section 3(3). In the English wardship jurisdiction the Court of Chancery had always been prepared to direct guardians and indeed parents in the fulfilment of their responsibilities. In Scotland the Court of Session never failed to offer guidance or direction when it was sought. Thus, although joint guardianship would have created a new opportunity for judicial involvement, it raised issues with which the courts were quite familiar.

35.23 The novelty of joint guardianship under the 1886 Act[69] was the possibility of the mother being one of the guardians. That would not have made much difference, for the legal position of a mother vis-à-vis the father had not been fundamentally changed by the 1886 Act. In the absence of the father, the courts had normally been quite prepared to acknowledge the natural position of a mother in relation to her child.[70] In settling disputes under section 3(3), therefore, the courts would probably have approached the problem as they had done in the past when the claim of the

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69 At least in England.

70 Paras. 32.51 and 32.68.

father or his favoured status was not in issue. The interests of the child could play a more positive role. These were no doubt some of the reasons which prompted the legislature to leave these two discretions unregulated.

(ii) Negative welfare

35.24 References to the interests, benefit or welfare of the children were absent from sections 3(2)[71] and 7[72] of the Act. The criteria there specified related to the fitness or otherwise of the father. It would be difficult to reach a conclusion on the fitness of a father without looking at the consequences for the child of the father's circumstances. Welfare would perhaps play a silent and negative role.

35.25 Section 3(2) authorised a mother provisionally to nominate a guardian to act with the child's father after her death and the court was authorised to confirm the appointment of the person so nominated as sole guardian "if it be shown to the satisfaction of the court that the father is for any reason unfitted to be the sole guardian of his children." Paternal unfitness could thus deprive a father of his guardianship. The Act did not say what would amount to "unfitness"[73] but the courts had had considerable experience of this type of problem. Welfare had often played a negative part in determining that issue[74] and there was no reason on the

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71 Now superseded by s. 5 of the 1925 Act and s. 4 of the 1971 Act
72 Now superseded for England by s. 42(3) and (4) of the Matrimonial Causes Act 1973.
73 There had been some discussion on this point in the Parliamentary debates but it was not helpful: see generally (1885) 297 Parl. Deb. (H.L.) 3s. cols. 1084 to 1092 and more particularly cols. 1087 and 1088 (Lord Salisbury).
74 Para. 32.75.

face of the Act to assume otherwise in this context.

35.26 The direct beneficiary of the exercise of the statutory power would be the mother, in the sense that she would be controlling her child's future posthumously through her nominee. But the obligations would fall upon that nominee. That person's accession to sole guardianship would therefore under section 3(2) depend to some extent upon the father's parental unfitness which in turn would reflect the consequences for the child of his continued association with the child. Although these provisions were repealed in 1925[75] and replaced by a scheme[76] which equated the positions of mother and father, unfitness remained as the statutory ground of disqualification.[77] The role of welfare thus remained the same in this general context.

35.27 Parental unfitness was also the ground for disqualification in section 7 of the 1886 Act. Although the 1886 Act was directed primarily to questions of guardianship and incidentally to custodial issues of a general nature, section 7 operated in a matrimonial context. Despite the incongruity of the phraseology of section 7 in relation to Scotland, there was no suggestion that it applied only to England.[78] Section 7 was repealed for England in 1965[79] and the relevant provision is now section 42(3) and (4) of the

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75 1925 Act, s. 5(7). 76 1925 Act, s. 5; 1971 Act, s.4.
77 1925 Act, s. 5(4); 1971 Act, s. 4(4).
78 It has always been taken to apply to Scotland: see Gloag and Henderson, Introduction to the Law of Scotland (7th ed., 1969 Edinburgh), p. 687.
79 Matrimonial Causes Act 1965 (1965 c. 72), s. 45 and Sched. 2.

of the Matrimonial Causes Act 1973. That section of the 1886 Act thus now applies only in Scotland. It is not a provision of great significance.

35.28 Section 7 was a declaratory provision only. It enabled the court to declare "the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children." Any such declaration was one of parental unfitness. The unfitness was not, it is suggested, dependent upon the misconduct giving rise to the decree. The reference to such misconduct simply enabled the "guilty" parent to be identified and so liable to the declaration. The mere fact that a parent had committed adultery or cruelty could not thereby automatically render him or her parentally unfit. If that view is correct, it is more consistent with the comments in the Parliamentary debates of the Lord Advocate than with the views of Sir R.A. Cross.[80] In any event that view it is suggested, is strictly in accordance with the phraseology of section 7.

35.29 There is a further dimension to this apparent controversy. If the view of Sir R.A. Cross were valid,[81] the commission of adultery or cruelty would as a matter of law deprive the guilty parent of custody. There would be no discretion nor any investigation of the circumstances of the case in relation to custody. The existence of a

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80 Para. 35.16.

81 I.e. that a matrimonially guilty parent will automatically forfeit his or her claim to custody.

separation or divorce decree would be the only issue. On the other hand if the matrimonial misconduct simply identified the parent liable to a forfeiture declaration, the decision would divide into two parts: the threshold decision and the decision to make a declaration. The former would require two questions to be answered: which parent is guilty of matrimonial misconduct; and is he or she parentally unfit: two quite unrelated questions. If these questions were answered positively, the issue would become simply whether a declaration as to unfitness should be made.

35.30 In determining that point the consequences of making a declaration would be important. The statutory effect of such a declaration is to take away from that parent his right to custody or guardianship of the children on the death of the innocent parent. That simply ensures that static rules of law will not destroy the decision of a competent court reached dynamically on questions of parental fitness for custody. It by no means follows that because one parent is preferred to another at the time of the decree, that parent will always be more suitable to have custody. On that parent's death, for example, the choice will no longer be between the two parents. It could be between the matrimonially guilty parent and a relation of either parent, a friend or even the local authority. In that event,

it is impossible to say that the guilty parent may not be the best person to have care of the children. The need for flexibility, including a possible review of the situation, was probably the justification for taking away the guilty parent's right by making a declaration under section 7. On the other hand, would the existence of such a right make much difference? The answer is only if the court were to give effect to it without investigating the circumstances. That is unlikely. Section 7 has not been used often. Perhaps therefore Parliament was overcritical in anticipating the court's possibly conservative reaction to the 1886 Act by giving the court yet another device to avoid a legalistic approach to the settlement of custody disputes.

(iii) Positive references to welfare

35.31 Apart from the currently inconsequential reference to welfare in section 3(3) of the 1886 Act,[82] the word "welfare" or its equivalent appears only in sections 5[83] and 6.[84] To examine section 6 first: it contains two powers. The first, named as a discretion,[85] allows the court to remove from office any testamentary or statutory guardian. The second enables the court to appoint a guardian in place of the one so removed. Welfare plays a part in the exercise of each power.

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82 See now 1925 Act, s. 6 and 1971 Act, s. 7. It is no more than the test for the application of the subsection: an important point but not in this context.
83 See now 1971 Act, s. 9(1).
84 See now 1971 Act, s. 6.
85 In the 1886 Act but not in the 1971 Act.

35.32 The court may exercise its power of removal "on being satisfied that it is for the welfare of the infant." If the court is satisfied that the removal of the guardian is for the welfare of the child, then the way is open to remove him. He may not in fact be removed, because, for example, no substitute is available. That however is unlikely. The test of welfare postulated by the Act is the future welfare of the child. But that test is directed only to the question whether the removal of the present guardian is for the welfare of the child. The question is not whether another guardian would be better for the child. The court has no substantive choice. The answer can be only yes or no. It is, in other words, a threshold requirement.

35.33 In deciding whether the threshold requirement has been satisfied, the court will look, no doubt, inter alia to the quality of the present guardian's administration and its effect on the child. In that sense welfare is negative. But the court will also look to the child's future with the present guardian:[86] a rather speculative judgment. Assuming a positive response to that question, then comes the exercise of the discretion. The Act does not say how it should be exercised. But the court will probably consider the chances of another guardian discharging his duties better

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86 Not by comparing his future with any other guardian.

from the child's point of view. At that stage, the court has a substantive choice.

35.34 The second power may be similarly analysed. The threshold question is: does the court deem it to be for the welfare of the child to appoint another guardian in place of the one removed.[87] Welfare is also part of this threshold requirement and it embraces the future welfare of the child. The question relates, of course, to the substitute for the guardian actually removed. Then follows the substantive decision on the merits: should another guardian be appointed.

35.35 Section 6 thus contains two issues which are quite separate: the removal of the present guardian and the appointment of a substitute.[88] Each issue involves the satisfaction of a threshold requirement in which welfare plays a positive and negative role and the subsequent exercise of a discretion in which welfare plays no statutory role. In practice however the two issues are likely to be determined, if not simultaneously, at least with some regard to each other. This may not matter in most cases but if the court reduces its decision to writing, its rationalisation would require to be consistent with the Act. Section 6, it is suggested, takes the form analysed above, involving the satisfaction of a threshold requirement and the exercise of a discretion.

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87 That question is very similar to the issue determined at the stage of the exercise of the court's discretion in relation to the first power in s. 6.

88 The words "and may also" linking the two elements of s. 6 emphasises this distinction.

The unusual feature is the part played by welfare. Although its formulation is positive, it may also play a negative role. In either case it is part of the threshold requirement.

35.36 Section 5 treated welfare quite differently. That section deals with custody. Section 6 was concerned with guardianship. Welfare had always in the past been conceded a more flexible yet positive function in guardianship issues than in custody matters. Section 5 conferred upon the mother a power to apply for custody and upon the court power to grant her application. More importantly in this context, it directed how the application should be determined: "having regard" to the child's welfare and to the parents' conduct and wishes. There was no indication that the order of these words implied any substantive priority.

35.37 The child's welfare and parental conduct and wishes are no more and no less than factors which are required to be taken into consideration by the court in deciding whether the mother should be granted custody or access. The way in which and the extent to which they are to be taken into account is clearly a matter for the court. But the court nevertheless is under a duty[89] to examine the whole circumstances of the case so far as they relate to these three matters. That is a formidable task. Nor is the court under a duty to

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89 Implied from the duty to have regard to these factors.

avoid considering other factors, the contentious factor, if it may properly be a factor at all,[90] being the legal right of the father.

35.38 It is important to bear in mind that the question before the court is: should the mother be awarded custody or access. As in the case of each of the two questions in section 6, there is no real choice. The question in section 5 is not: is it better, presumably for the child, that the father, the mother, the guardian or even someone else should have care of the child. It is for the mother to show that she should have custody, not that she is better than anyone else nor that the father or some other party should not have custody.

35.39 The parents' conduct is relevant, no doubt, to establish or deny their parental fitness. Their wishes are relevant simply as an expression of their personal preferences. And welfare is relevant. But how? Welfare is generically different from parental wishes or conduct. Is welfare relevant simply as the consequence for the child of granting and alternatively refusing the mother's application? Is it simply a way of requiring the court to look at the whole issue from the child's point of view as well as from all the other aspects, for otherwise the child's interest would be unarticulated? The Act gives no answer to these questions.

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90 If it is a legal right, it will determine the issue. If it is something, however important, simply to be taken into account, it is not a legal right.

The approach is discernible only from the judicial handling of the concept.[91]

35.40 There are however two final points to note in reading section 5 of the Act on a semantic level. It is, in the first place, odd to equate welfare and parental conduct and wishes. Conduct is how parents have behaved. Wishes are what the parents would like to happen. Each is capable, albeit with some difficulty, of being established objectively. Welfare is quite different. Whatever it means, it involves more than the establishment of facts. It implies a judgment based upon established facts. The facts may be ascertainable. But some intellectual processes must be involved before a judgment based on these facts can be reached. A decision on welfare involves, therefore, after the facts have been established, rationalisation, judgment, speculation. Each is subjective. These three are all part of the process of exercising an administrative discretion. But section 5 sets no purpose or objective to be achieved by this process. Welfare is simply part of it: perhaps a special part, but nevertheless only a part.

35.41 The direction in section 5 to have regard to these three factors involves firstly ascertaining the facts related to welfare, conduct and wishes. They form part of the final decision only. They do not require, as welfare does, a

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91 See chapter 42.

decision per se before going on to form part of the process in reaching the final decision. Conduct and wishes may relate to parental fitness but that is not a statutory factor in the decision-making process. The generic difference between welfare and the other factors is therefore that a decision must be reached on welfare before it can form part of the wider question whether the mother's application should be granted.

35.42 The second point is that if welfare had been the purpose or objective of the process, it would have been more intelligible on a semantic level. It then would not have been part of the process; it would have stood outside or apart from the process; it would have been its goal. Is it possible to interpret section 5 in this way? Clearly no. The phraseology, if not the logic, of section 5 is clear. The welfare of the child is not set apart from the process of determining the mother's application. It is part of it, along with parental conduct and wishes. Parliament has thus directed in a clear and unambiguous fashion that as a matter of policy the courts must look at the welfare of the child. Equally significantly the welfare of the child is not the policy underlying section 5 of the Act.

35.43 This position must be contrasted with the earlier

legislation. Discretions had been created by the 1839, 1857, 1861 and 1873 Acts. Much greater attention could have been paid to the interests of the child. But the courts reacted against that. Section 2 of the 1873 Act introduced the benefit of the child as a threshold requirement in the context of enforcing parental agreements.[92] Section 6 of the 1886 Act also treated welfare as a threshold requirement. Section 5 of the 1886 Act however is unique, for it introduced for the first time in legislation the concept of welfare as part of the discretionary and administrative stage of the whole process. This was done in a very vague and nebulous fashion which has since caused enormous problems. But section 5 deserves to be recognised as the first step in a direction followed frequently thereafter.

Section 3 - The Custody of Children Act 1891

(a) Policy

(i) Introduction

35.44 The status of a mother was only marginally improved by the Guardianship of Infants Act 1886. Children fared no better. Their interests were upgraded only to the extent of mandatory consideration in maternal applications under section 5. The welfare of the child remained where it always had been, almost entirely within the discretion of the court. The courts had been notoriously reluctant to promote

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92 Para. 34.80.

or even protect the interests of the child in the face of paternal opposition. Indeed in Parliament in 1890 Lord Herschell summed up the state of the law in two concise propositions. Hitherto, he explained, there had been "too great a regard for what is called the sanctity of parental authority."[93] It followed almost automatically therefore that "there has been too little regard paid to the interests and welfare of children."[94]

35.45 It has already been suggested[95] that there might have been more support for a child-biased approach to guardianship and custody than the promotors of the 1886 Act realised. Indeed moves were afoot two or three years later to afford greater legal protection for children. One of the methods used was the machinery of the criminal law. The Custody of Children Act 1891 was the first piece of civil legislation intended specifically to protect children. Moreover, the Act was designed to protect children from their parents, mother or father, and any person strictly in loco parentis.[96] Of all the legislation dealing with guardianship and custody, the 1891 Act has probably remained the most tightly drafted. That is not to say that it was not discretionary in character. It simply means that the discretions were more carefully regulated than in most other Acts.

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93 (1890) 345 Parl. Deb. (H.L.) 3s. col. 19 (Lord Herschell).
94 Idem.
95 Para. 35.17.
96 1891 Act, s. 5.

35.46 The 1891 Act seems on the whole to have been well received in Parliament. Most of the debate took place in the Lords, where there was little direct opposition, rather relatively minor criticism. Arguably, there was little opposition because the Act introduced no fundamental changes.[97] Indeed to some extent it could be described as merely putting certain aspects of the law into slightly more rigorous form without really changing them. Perhaps the most important obstacle to be overcome was "the almost superstitious dread which seems to actuate the minds of some persons of any interference with the rights, privileges and responsibilities of parents."[98] When it became clear that such interference was not new, the issue became more how it should be done rather than the need for it to be done.

35.47 Most of the 1891 Act started out as part of the Protection of Children Bill introduced as a private member's measure in the House of Lords by Lord Meath.[99] Other children's legislation was being mooted at the time and after his bill was read a second time in the Lords, Lord Meath withdrew it[1] and agreed to most of it being included in the Custody Bill which had the support of the Government. That bill passed the Lords[2] but met with serious opposition from some Irish members in the Commons. It was withdrawn. But the Government considered it so valuable that Ireland might be excluded from it.[3] In the circumstances it was eventually

97 (1890) 349 Parl. Deb. (H.L.) 3s. col. 1511 (Lord Herschell).
98 (1891) 350 Parl. Deb. (H.L.) 3s. col. 433 (Lord Aberdeen).
99 (1890) 345 Parl. Deb. (H.L.) 3s. cols. 13 to 25.
1 Ibid., col. 1733.
2 (1890) 347 Parl. Deb. (H.L.) 3s. col. 32.
3 (1890) 348 Parl. Deb. (H.L.) 3s. cols. 922 and 923.

put before Parliament again and this time successfully.

35.48 The clauses which were eventually enacted remained much the same throughout, whether they were in the Protection of Children Bill or the Custody of Children Bill. Statements of policy are thus largely interchangeable. No specific reference will be made to which of the two bills was under discussion. Most of the principal comments on general policy relate, naturally enough, to Lord Meath's Bill.

(ii) The protection of foster children

35.49 The main purpose of the legislation, according to Lord Meath, was to protect children from the abuse of parental authority by those who had relinquished parental control.[4] There was no intention to control an existing but perhaps unsatisfactory relationship between parent and child. That remained a matter for common law and equity. As Lord Halsbury L.C. put it, the object of the bill was "to interpose a barrier against the demand of an unworthy parent to retake possession of his child."[5] In fact, the policy makers had two particular types of children at risk in mind: those who had been deserted by their parents and were residing in workhouses; and those "waifs and strays" who had been picked up in the streets.[6] The former might be entrusted to foster parents; while the latter might be taken in and cared for by

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4 (1890) 345 Parl. Deb. (H.L.) 3s. col. 14 (Lord Meath).
5 Ibid. col. 23 (Lord Halsbury).
6 (1890) 349 Parl. Deb. (H.L.) 3s. col. 1508 (Lord Thring).

well-disposed members of the public. Any such children could have been recovered by their parents unless the parents were disqualified in terms of the old rules. The point presumably was that mere desertion or abandonment would not in itself be a ground of disqualification. In any case the financial standing of the parties being negligible, the thought of judicial proceedings was preposterous.

35.50 Lord Meath took his argument further. One of his ideas was presumably to avoid recourse to the courts by making the parental rights unenforceable in these circumstances. The child would be protected by putting the onus of recovery on the parent.[7] Thus the foster parent or whoever actually had care of the child could rely on the statutory "right" created by the legislation. Statute thus would intervene to deprive the abusive parent of his right without judicial intervention. The right however could be recovered at the instance of the parent, but only if he was willing and able to prove his parental fitness. This was a very sophisticated argument which certainly goes some way to explaining the tortuous language sections 1 and 3 of the 1891 Act.

35.51 Interestingly, at least in 1891, Lord Meath's thesis was supported by some sort of evidence. This was the first time this had happened in the context of children's

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7 As it was described by Lord Herschell (1891) 350 Parl. Deb. (H.L.) 3s. col. 122.

legislation of this type. He wanted to show that it would be contrary to the interests of abandoned or deserted children to be automatically returned to their parents, however fit these parents might regard themselves. Apparently about one-quarter of children in industrial schools who were restored to their parents reverted to their former habits which had caused them to enter these schools in the first place. On the other hand only one-twentieth of such children who had been boarded out suffered such relapses.[8] These figures certainly supported Lord Meath's thesis. Their origins and validity are unknown. But it was rather an imaginative approach to adopt in securing the approval of the House of Lords to this measure.

35.52 If this Act had followed the traditional structure for either judicial or statutory intervention in parental matters, it would have adopted the dual pattern of threshold requirements followed by a discretion. One of the issues debated in Parliament, although not in these terms, was the desirability of following that structure. As it transpired, the traditional structure was preserved, with some modifications, and one of the ancillary issues for Parliament was the grounds justifying the threshold decision. The technique of the legislation was to adopt an approach presumptively in favour of the children rather than in favour of the parents.

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8 (1891) 350 Parl. Deb. (H.L.) 3s. col. 121 (Lord Meath).

Supporters of the legislation were clearly concerned to protect the position of parents,[9] but in such a way that did not nullify the children's interests. It was not a question of absolutes; rather a matter of relativities. The structure of the legislation, therefore, had to be discretionary but, as his Lordship himself put it, the court "must be satisfied that it will be for the child's interests before the parent can be permitted to resume possession of it."[10] Nothing could have more eloquently indicated the dual approach to the whole issue. The interests of the child were the threshold requirement prior to the exercise of a discretion.

(iii) The role of welfare

35.53 The crux of the matter was the part to be played by welfare. The opponents of the bill preferred to restrict welfare to a negative role. Lord Percy gave the clearest exposition of that view. Parents, he argued, were by nature intended to have control of their children. It followed that "only when it is clearly proved that the child would suffer morally or physically by being left to its parents that he can be taken away from their custody by the State."[11] The benefit for the child was simply not the question. The approach, in other words, was parental disqualification and nothing more.

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9 (1890) 345 Parl. Deb. (H.L.) 3s. col. 19 (Lord Herschell).

10 Ibid., col. 20 (Lord Herschell).

11 Ibid., col. 22 (Lord Percy).

35.54 The Attorney-General later on pointed out, on the other hand, that it was not just a question of disqualification.[12] Lord Thring took up the same theme but developed it further. Parental misconduct was not a sufficient ground of disqualification. It was, in a sense, too flexible. He therefore suggested "deemed misconduct" as a matter of law rather than actual misconduct as determined by each judge.[13] Hence relinquishment was to become the ground of disqualification. It appeared in the Act as abandonment and desertion, supported by a more general ground of unacceptable parental conduct.[14] The general ground was almost a reversal to the earlier position but the crucial words were "abandoned" and "deserted."

35.55 Having thus characterised the grounds of disqualification in terms of law rather than discretion, Lord Thring indicated that the second step was for the parent who had thus relinquished control of his child to prove his parental worthiness before being permitted to resume control. The question to be asked at that stage was dramatically articulated:-

> "[whether] it would be more for the child's benefit that it should go back to the father than that it should remain with the foster parent."[15]

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12 (1891) 351 Parl. Deb. (H.C.) 3s. col. 1510 (Sir R. Webster).
13 (1890) 345 Parl. Deb. (H.L.) 3s. col. 4 (Lord Thring).
14 1891 Act, s. 1.
15 (1890) 345 Parl. Deb. (H.L.) 3s. col. 5 (Lord Thring).

That involved a real choice between supportable alternatives. It was not a question which directed an answer either yes or no. The only test was the benefit of the child, which was thus postulated rather as the objective of the process than as a factor for consideration.[16] The pattern thus conceived by Lord Thring comprised the traditional structure of threshold requirements plus discretion. But under the old approach the important decision was the first and it was treated flexibly by the courts. The second decision was largely formal. The new system reversed that emphasis.[17] The disqualification, though important, was more formal, more adjudicative, less discretionary. The second decision, which was to turn on the benefit for the child, involved a proper discretion. That aspect was clearly regarded as vital. So, although the discussion talked of changing the onus, the Act was intended by its promotors to do more than that. The structure of the decision-making process remained the same but the emphasis was modified to bring about the desired policy.

35.56 The other aspect of welfare of concern to the House of Lords was its content. In other words, what did it mean; what matters did it embrace? Lord Percy put the hypothetical problem of the foster parent leaving a fortune to the child

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16 Cf. the analysis of the 1886 Act.

17 In Lord Herschell's technical terms it reversed the onus of proof.

whose parents were poor.[18] He could not conceive that the benefit test would prevent the court from restoring the child to his natural parent. It was pointed out later on by Lord Halsbury that the interest of a child included not only his pecuniary but also his moral and religious interests.[19] That is probably as far as Lord Halsbury could reasonably have gone in the late nineteenth century. Today, of course, the relevant sciences have developed understanding to an extent that these views of a child's interests would appear very narrow.

35.57 Lord Halsbury impliedly conceded the difficulties in construing words of such flexibility and complexity. But some principle, in his view, was necessary, even one as difficult as this. Otherwise Parliament would be abandoning its duty of providing some basis for these judgments and thereby throwing the whole responsibility on the judges.[20] The judges had, of course, been determining the bases of their own judgments for centuries and Parliament had not seen fit hitherto to intervene in this area. The earlier nineteenth century Acts, with two relatively minor exceptions in the 1886 Act, had given to the judges no guidance or basis for their judgments. Lord Halsbury did not say so, but perhaps he meant that the judges had not selected the appropriate basis for their judgments and it was for that

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18 (1890) 345 Parl. Deb. (H.L.) 3s. col. 22 (Lord Percy).

19 Ibid., col. 24 (Lord Halsbury).

20 Idem.

reason that Parliament had decided to do its duty by providing some basis, albeit a rather vague and uncertain one.

(b) The structure of the Act

(i) General

35.58 The six sections of the 1891 Act, of which four contain operational functions,[21] form an integrated and unitary set of provisions, unlike the 1886 Act which was composed of an unrelated series of enactments. Sections 1 and 3 are fundamental. They give effect to the purpose of the legislation as conceived by its promotors. Sections 2 and 4 are incidental. The former deals with the repayment of maintenance costs incurred by the foster parent if the child is returned to his parent, while the latter enforces the parent's right to determine the child's religious education if the parent's right to custody is not being enforced. Section 4 is particularly interesting since it impliedly recognises that, for the purposes of the Act, the grounds of parental disqualification for custody are wider than, or at least different from, the grounds of parental disqualification for determining the child's religion.[22] This comment is based on the assumption that the equitable approach to forfeiture of the parental rights, either custodial or quoad religious education, was the same in each case.

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21 1891 Act, ss. 1 to 4. S. 5 contains definitions and s. 6 the short title.

22 This follows because the Act contains new grounds for disqualifications for custody but is silent on when a court will not enforce the parental right to determine religious education. The effect of the latter is to import the rules of common law and equity.

35.59 Sections 1 and 3 make little sense in the context of the policy of the legislation unless they are read together. Each section contains a threshold requirement followed by a function. In section 1 the function is a positive discretion. In section 3 it is a negative restriction. But the complexity of the provisions is that section 3 probably operates as a general restriction upon the exercise of the discretion contained in section 1.[23] It might have been expected that the threshold requirements in each section would have been the same, so that the circumstances for the exercise of the discretion and of the restriction on the discretion were precisely identical. But they are not identical and this causes a certain logical but not practical incongruity.

35.60 To consider now each section separately and thereafter to examine their relationship: the common ground is that sections 1 and 3 both operate in the context of enforcement. They amount in effect to a judicial discretion, circumscribed by statute, not to enforce the legal rights of the parents. The Act is thus meaningless unless viewed against the prevailing legal and equitable background. The background in Scotland was technically different from its English counterpart but substantially it was much the same. So

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23 Discussed in more detail in paras. 35.65 to 35.71.

these general comments apply equally to each jurisdiction.

(ii) Section 1

35.61 Section 1 confers upon the court a power to decline to enforce the right of the parent to custody of his child. It is stated to be "in its discretion," although the significance of those words is unclear. They probably make no difference to the nature of the power, particularly taking section 3 into account, and were probably intended to emphasise the nature of the power. The threshold requirements for the exercise of the power, apart from the technical institution of judicial proceedings, are three in number: parental abandonment, parental desertion and finally where the parent "has otherwise so conducted himself that the court should refuse to enforce his right to the custody of the child." These grounds apply to either parent,[24] mother as well as father: so a mother is potentially liable to the same disadvantages as the father, without having the benefit of the same advantages. Abandonment and desertion are in the context novel ideas.[25] They were intended, of course, to create statutory relinquishment,[26] thereby affording objective grounds for parental disqualification, without the necessity of judicial intervention. The third threshold requirement, "other parental misconduct"[27] is quite different. It is open and confers upon the court some form

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24 1891 Act, s. 5.
25 The were familiar in criminal neglect legislation.
26 Relinquishment was the word used in Parliament to describe the general idea involved: para. 35.54.
27 That expression is intended as a general paraphrase of the ground.

of interpretational and applicational discretion. Some return to existing legal and equitable principles might be expected. This would involve a much more parent-biased approach.

35.62 The welfare or interests of the child cannot be excluded from a consideration of the first two grounds, abandonment and desertion. They are in effect written into the Act. The child appears as the object of the verb in each case. This has two consequences. It is inevitable, on a semantic and practical level, that parental conduct will be considered. Does it per se amount to abandonment or desertion? The second effect is that, in answering that question, the child cannot be ignored, either in terms of the language used or in terms of the Act itself. The child's position however is relevant only negatively,[28] for the underlying question is: has this child been abandoned or deserted. In the case of the third ground, on the other hand, the question is: has the parent qua parent misconducted himself. Any reference to the child is purely incidental. If the answer to any of these questions is positive, the way is then open for the court to refuse to return the child to his parents.

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28 I.e. the court will look only at the effect on the child of the parental conduct.

(iii) Section 3

35.63 Two of the three threshold requirements in section 3 are also abandonment and desertion. The same comments in relation to the child's interests therefore apply. The third requirement is different.[29] There is no necessary reference to the position of the child. He is merely the vehicle for considering the quality of the parental care. The question is merely: was the parent unmindful of his parental duties by allowing him to be brought up by another person or institution. Attention is thus focussed directly on the parent. The decision on the third requirement in section 3 as in section 1 thus rests largely in the discretion of the court.

35.64 The statutory consequence of satisfying one of the three requirements in section 3 is clear. The court shall not order the child to be restored to his parent. If section 3 had contained nothing more, that prohibition would have effectively denied to the court the discretion conferred upon it by section 1, at least in relation to the common threshold requirements of abandonment and desertion. But that prohibition is modified by the words:-

> "unless the parent has satisfied the court that, having regard to the welfare of the

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29 Broadly, allowing the child to be brought up by another person.

child, he is a fit person to have the

custody of the child."

The question contained in this conditional modification is: is the parent fit to have custody of this child, having regard to his welfare. Now, that question would require no reference to anything except the fitness of the parent, including the child only incidentally, but for the mandate to have regard to the welfare of the child. Without that mandate, the issue would be, as in the case of the third threshold requirement in sections 1 and 3, the general fitness of the claimant to be a parent. A court might well regard as important the actual effect for the child of a resumption of parental care. But, in the absence of these eight words,[30] there would be no legal requirement to do so. Finally, the nature of this mandate is clear. The legal duty is simply to have regard to the welfare of the child. Implementation of this duty is in practice an exercise in administrative discretion. Thus, despite this complex provision, the child's interest is at best a matter ultimately for the court's discretion. The provision, naturally, was drafted against a background, contained in the Act, of parental legal rights. The 1891 Act would appear therefore not to have changed the fundamental legal position of the welfare of the child.

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30 I.e. having regard to the welfare of the child.

(iv) The relationship between sections 1 and 3

35.65 The final point in relation to the structure of the 1891 Act is the relationship between sections 1 and 3. Each section is quite intelligible without reference to the other. But if section 1 were to be applied independently of section 3, the result would be rather different than if they were applied together. Indeed the two sections could probably be run together and fewer words used to achieve much the same result. But by doing so the impact of section 3 on the discretion in section 1 would to some extent be lost. The separation of the two sections thus makes it clear beyond doubt that the obligation cast upon the court by section 3 is attracted to the decision whether to make an order restoring the child to his parent.

35.66 This establishes the two fundamental elements in the final decision. Has the parent abandoned or deserted the child: a decision based upon past events and liable to judicial adjudication in the normal way. It lacks any element of substantive discretion. It is a threshold requirement in the strictest sense of that expression.

35.67 Once that requirement has been satisfied, only then may the court consider whether the child should be returned

to his parent. The repetition of the same two threshold requirements in section 3 indicates that the exercise of the function in that section is also conditional upon the fulfilment of these threshold requirements. That function is cast in the form of a negative duty. But that makes no difference. It emphasises that the negative duty, or more accurately the restriction, in section 3 operates only at the post-threshold stage. The restriction thus applies to the exercise by the court of its discretionary power in section 1. The criterion for restoring a child to his parent is the parent's proved fitness to have custody of the child having regard to his welfare. Former parental inadequacy plays no part in determining present parental adequacy.

35.68 There is however one overall ambiguity when the two sections are read together. Section 3 cannot apply before the child has been abandoned or deserted. May it not however apply after the threshold requirements in section 1 have been satisfied but before the court decides whether or not to restore the child to his parent? In any event, section 3 is an impediment to the exercise of the judicial discretion in section 1. Is that the sole impediment or is the court free to take other matters into consideration in deciding whether to return the child? If the former, then section 3 is the

only criterion in the exercise of the section 1 power. If the latter, the court would be free to go beyond section 3. It may be put in tabular form:-

Provision	Alternative 1	Alternative 2
Threshold requirement	Abandonment or desertion in sections 1 and 3	Abandonment or desertion in sections 1 and 3
Intermediate requirement	None	Parental fitness, having regard to the child's welfare in section 3
Restriction on discretion	Parental fitness, having regard to the child's welfare, in section 3.	None

35.69 Either alternative would seem to be a possible interpretation of section 1 and 3. The first alternative would seem to be more in accord with Parliament's apparent policy[31] to force the parent to justify restoration of his child in terms of the parent's own fitness quoad the child. To give the court a final discretion to reach a decision on other unstated principles would be rather inconsistent with such policy. On the other hand, the second alternative is closer to the language used by the legislature. Parental fitness

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31 Para. 35.52.

is simply one condition for the making of an order. If the first alternative had been intended, it would have been easy to use an appropriate formula: for example, the court may make an order for delivery "only where" the parent has satisfied the court on his parental fitness. In that case, parental fitness would be the only condition for the making of an order.

35.70 If the second alternative were to be preferred on grammatical grounds, as seems likely, there would be no technical restriction on the exercise of the court's discretion in section 1. The threshold requirements in section 1 would, of course, have to be satisfied. The effect of section 3 would be therefore an intermediate requirement interposed between the threshold requirements in section 1 and the final discretion also in section 1. This is what was meant by the reference earlier[32] to the possibility of section 3 itself operating as a further threshold requirement to the exercise of the discretion in section 1.

35.71 Although the intention of the 1891 Act seems clear, there may be some doubt whether the language of sections 1 and 3 has been appropriate to bring it about. There have been a number of interpretational difficulties in the 1891 Act[33] and the relationship between sections 1 and 3 is merely

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32 Para. 35.59.

33 The dynamic aspects of the 1891 Act are discussed in paras. 38.56 to 38.66.

one of them. The Act has not been much used in practice, perhaps because of these problems. It may on the other hand have been effective as a deterrent measure, discouraging parents who had relinquished actual care of their children from seeking to recover them. The problems of foster and similar children changed when adoption became available in the second quarter of the twentieth century. There was less scope for the operation of the 1891 Act but it could even now be of some practical importance. In any event some of the phrases used in it have reappeared in later legislation. It is only by way of full and detailed analysis of these expressions and phrases that some sense may be made of their apparent complexity.

Section 4 - The Guardianship of Infants Act 1925

(a) Policy

(i) Introduction

35.72 It is significant that the 1920s saw two major pieces of legislation affecting children.[34] Indeed before the Guardianship of Infants Act 1925 was enacted, attempts had been made by several members to introduce legislation on similar topics.[35] None of them received government support, partly because the interests of children failed to receive sufficient emphasis.[36] In fact the paramountcy of welfare

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34 The 1925 Act and the English adoption legislation.

35 (1925) 181 H.C. Deb. 5 s. col. 532 (Mr. Lampson).

36 Idem.

principle appeared for the first time in the Government bill of 1925. Even before then the interests of the child occupied a place in the arguments of the politicians[37] but a place which could not be described as predominant. They were concerned more with creating equality between men and women.[38] In the views of some such equality would lead to better protection of the interests of the children.[39] To some extent, ultimately, the 1925 Act moved in both directions Perhaps that is why, along with government support, the 1925 bill met with success after very little opposition.[40] The debates unfortunately provide no direct assistance in determining the meaning of the paramountcy of welfare principle.

35.73 As expected, accounts were given of the state of the law prior to the 1925 Act.[41] It is perhaps not entirely surprising that some of these accounts were inconsistent. They related mostly to English law, for almost no reference was made to Scottish law. Some attempts were however made to substantiate the point that in some respects the law of Scotland was superior to the law of England.[42] It is probably impossible to reach any intelligent value judgment on such a broad issue as that. One such attempt[43] however evoked an interesting response. "We have been told," he

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37 (1921) 141 H.C. Deb. 5 s. col. 1406 (Lady Astor) col. 1414. (Mr. W.R. Smith), col. 1431 (Mr. Sugden).

38 Ibid., col. 1400 (Col. Greig), col. 1405 (Lady Astor), col. 1424 (Dr. Murray), col. 1430 (Lt. Com. Williams).

39 Ibid., col. 1406 (Lady Astor), col. 1430 (Lt. Com. Williams).

40 (1925) 61 H.L. Deb. 5s. col. 521 (Lord Cave).

41 (1921) 141 H.C. Deb. 5s. cols. 1393 and 1394 (Col. Greig), col. 1433 (Sir E. Pollock); (1925) 181 H.C. Deb. 5s. col. 539 (Mr. Hurst); (1925) 61 H.L. Deb 5s. col. 521 (Lord Cave).

42 (1921) 141 H.C. Deb. 5s. col. 1399 (Col. Greig), cols. 1411 and 1412 (Mr. Jameson).

43 Ibid., cols. 1411 and 1412 (Mr. Jameson).

said, "that Scotland is considerably ahead of the rest of the U.K. I am doubtful whether that is the case ..."[44]

35.74 The lack of consistency in the views of the existing law was particularly apparent during the second reading debate on the 1921 bill. One of its promotors rehearsed the relevant rules,[45] which by then would have included the authorities on the 1886 and 1891 Acts, and concluded that they indicated an ingrained or presumptive paternal preference.[46] But, the Attorney-General, although indicating agreement with the views of that member, said:-

> "... the point of view from which the court looks at these questions...is always the point of view of the children. They ask always what is the right thing to do in the interests of the child, and the courts have been very careful, indeed, to construe their liberties as widely as possible in order that the interests of the children should be safeguarded. They have passed away from what has been described as the old tradition, under which a father could come in and claim absolute legal rights at the hands of the courts without question."[47]

If the Attorney-General's view was correct, why, it may be asked, was there any need to legislate in the interests of children? Indeed during the second reading of the 1925

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44 Ibid., col. 1430 (Lt. Com. Williams).
45 Ibid., cols. 1393 to 1395 (Col. Greig).
46 Ibid., col. 1393 (Col. Greig).
47 Ibid., col. 1433 (Sir E. Pollock).

bill in the House of Lords the Lord Chancellor indicated that the paramountcy of welfare principle in clause 1 of the bill "...accords with the law as now administered by the Courts."[48] There would be some merit in putting into statutory form the existing approach to custodial issues. But it is clearly important to know whether Parliament was amending or merely codifying the legal rules.

(ii) The main streams of policy

35.75 That apart, there seem to have been two streams of policy underlying the legislation: one favouring the interests of the children;[49] the other advocating the equality of both parents vis-a-vis their children.[50] These policies are by no means inconsistent. Indeed it was argued by some that parental equality was desirable not just for itself but also for the sake of the children. The 1921 bill did not contain the paramountcy of welfare principle and several members in the Commons justified the theme of equality in terms of the needs of the children. It was essential, for example, for the control of children that both parents should have "entire equality of rights and entire equality of responsibility."[51] The 1925 Act, it should be remembered, did not create complete equality of parental rights between mother and father. It merely continued the movement in

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48 (1925) 61 H.L. Deb 5s. col. 522 (Lord Cave).

49 (1925) 181 H.C. Deb. 5s. col. 533, (Mr. Lampson) 182 H.C. Deb. 5s. col. 2333 (Mr. Lampson), col. 2336, (Mr. Duncliffe), 61 H.L. Deb. 5s. col. 664 (Lord Haldane).

50 (1925) 181 H.C. Deb. 5s. cols. 545 and 546 (Mr. Davies).

51 (1921) 141 H.C. Deb. 5s. col. 1430 (Lt. Com. Williams).

that direction which had begun in limited fashion in 1886. So, despite these comments, there was considerable support before 1925 for greater emphasis on the position of children, either obliquely through parental equality or directly. The 1925 bill was clearly directed to that policy and members of both Houses were firm that any proposals inconsistent with the paramountcy of welfare principle should not be accepted.[52] Indeed one member indicated that in his view the bill had two objects in this context: not merely the importance of the welfare of the child but also the termination of the presumption in favour of the father.[53]

35.76 There was similarly a strong consensus in Parliament about the means of achieving the policy of the paramountcy of welfare. In arguing against the creation of rigid rules, Sir Henry Slesser said that "the whole object of this legislation is elasticity in dealing with particular cases."[54] It was pointed out earlier, on the other hand, that some guidelines would be necessary, otherwise the courts would adopt "some doctrine of convenience."[55] It was eventually agreed that the paramountcy of welfare principle would be sufficient and the matter left to judicial discretion.[56] That amounted, of course, to an implied acknowledgement that the principle was itself inherently discretionary in character. There

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52 (1925) 182 H.C. Deb. 5s. col. 2333 (Mr. Lampson), col. 2337 (Mr. Cuncliffe).
53 Ibid., col. 2336 (Mr. Cuncliffe).
54 Ibid., col. 2330 (Sir Henry Slesser).
55 (1921) 141 H.C. Deb. 5s. col. 1415 (Lt. Col. Hurst).
56 (1925) 181 H.C. Deb. 5s. col. 537 (Mr. Hurst).

can thus be no question that the main purpose of the Act was to ensure greater emphasis for the interests of the children and that this was to be achieved through the exercise of a judicial discretion. So much was clear. But there was no indication of what precisely the paramountcy of welfare principle meant, how it should be approached or how the discretion giving effect to it should be exercised.

(b) The legislation

(i) Introduction

35.77 The 1925 Act contains eleven sections and one Schedule.[57] Neither sections 7 to 11 nor the Schedule relates to this analysis. Sections 4, 5 and 6 replace and extend certain guardianship provisions in the 1886 Act and their nature and structure have been considered in relation to the earlier Act.[58] Sections 2[59] and 3[60] extend further the rights of the mother in relation to judicial proceedings. By elimination, therefore, only section 1 of the Act is directly relevant to the question of welfare. It contains, of course the paramountcy of welfare principle.

35.78 Section 1 of the 1925 Act applies to Scotland. After the 1886 and 1925 Acts were consolidated for England in 1971, the paramountcy principle has also been contained in section 1

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57 It has been incorporated for England in the Guardianship of Minors Act 1971.

58 Paras. 35.19 to 35.21.

59 Now repealed: 1973 Act, s. 10(8). The equivalent section of the 1971 Act was repealed by the 1973 Act, s. 9 and Sched. 3.

60 Amended: 1973 Act, s. 11 and para. 1 of Part I of Sched. 4. The equivalent section of the 1971 Act, s. 9, was amended by the 1973 Act, s. 2 and para. 1 of Part I of Sched. 2.

of the 1971 Act. It has since been amended for both jurisdiction in 1973.[61] The principle relates to questions of custody or upbringing of the child and to matters relating to his property or income. It is, of course, most important and complex in relation to custody. Thus in that context the section now reads:-

> "Where in any proceedings before any court ... the custody or upbringing of a [child] is in question, the court, in deciding that question, shall regard the welfare of the [child] 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 custody, upbringing... is superior to that of the mother, or the claim of the mother is superior to that of the father."

The obligation to discount the father's common law right was repealed in 1973,[62] as a consequence presumably of the simultaneous creation of the equality of parental rights between father and mother.[63] This would not have the effect of resurrecting the common law rights of the father. It merely reaffirmed obliquely the equal status inter se of parents in custodial matters.[64]

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61 1973 Act, s. 10(8) for Scotland; s. 9 and Sched. 3 for England.
62 Idem.
63 1973 Act, ss. 1(1) and 10(1).
64 The 1925 Act equalised their status only in the dynamic context (i.e. in case of dispute), while the 1973 Act did so generally.

35.79 Section 1 contains three elements:-

(a) the generality of its application:[65] this is purely a question of interpretation, in which policy is likely to play an important if unstated part;

(b) the duty to have regard to welfare as the first and paramount consideration: a complex problem of interpretation and application; and

(c) the duty to disregard the superiority of either the paternal or maternal claim: the use of the word "claim" rather than "right" suggests that this is a reference to "natural" rather than legal superiority.

35.80 This pattern is consistent with the policy of the Act's supporters: greater emphasis on welfare and greater equality of parental rights. The latter was more obviously important in the extended status of the mother in relation to guardianship.[66] But it is also significant in custody issues. The third element in section 1 clearly does not require the court to ignore the position or "claims" of the parents. It merely renders them neutral in relation to each other. The real problem is how the parental claims, although neutral inter se, relate to the paramountcy of welfare principle, for there can be no doubt that section 1 must be read as a whole. Moreover, the second element probably makes little sense if

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65 I.e. the first seven words in the section in each Act.

66 1925 Act, ss. 4 and 5; 1971 Act, ss. 3 and 4.

read in isolation from the third element. It is proposed nevertheless to consider each element separately before attempting to ascertain the overall approach.

(ii) Its application

35.81 On its face, the first phrase in section 1 could scarcely be wider. The proceedings need not be custodial in the sense that only a claim for custody is being made. Custody may be an incidental matter. The reference to "upbringing" would embrace access and any other ancillary dispute. There is no reason why the proceedings could not be, for example, matrimonial or consistorial.

35.82 The reference to court is similarly wide. It includes any court having jurisdiction, legal, equitable or statutory, over custody and related matters. Each court would naturally be restricted in terms of its own jurisdiction. The High Court in England has considerably wider powers than the Magistrates' Court. In Scotland the sheriff enjoys a narrower jurisdiction than the Court of Session. But whatever the court's powers, to the extent that the court may decide custodial and ancillary matters, section 1 applies.

35.83 A number of custodial powers,perhaps most, are unregulated.[67] Even if section 1 did not apply in terms to

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67 Particularly those in the divorce legislation.

the court and the proceedings in question, there would be no reason to prevent the court from exercising such an unregulated discretion in accordance with the principle in section 1. Indeed a court would probably feel morally if not legally bound to do so.

35.84 A more difficult problem is where the proceedings are to some extent subject to other legislation; for example, the Children Act 1948,[68] the Social Work (Scotland) Act 1968,[69] the Children and Young Persons Act 1969,[70] or the adoption legislation. In each of these statutes welfare plays a part not necessarily inconsistent with section 1 but by no means similar to that section. The problem may be complicated by the nature of the proceedings, particularly in England, where questions of the prerogative and wardship may arise. The decision on welfare may not fall within the competence of the court. If the matter were to come to the court by way of the review of a decision of a local authority, the custody or upbringing of the child would not be in issue. In Scotland, on the other hand, the Court of Session probably takes a wider and perhaps to some extent a deeper interest in the child in this context, for the Lords of Session seem more prepared to consider the actual decision rather than merely review the way in which the decision has been reached.

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68 11 & 12 Geo. 6, c. 43.

69 1968 c. 49.

70 1969 c. 54.

Some of these issues have already been considered.[71] There is no general answer. Each context must be considered separately.

(iii) The welfare principle

35.85 Much has already been said about the distinction between primacy and paramountcy.[72] The words "regard" and "consideration" in section 1 suggest that the decision about custody and upbring is an administrative one, while the words "first" and "paramount" indicate that a special position for which no other factors qualify is reserved for welfare. Welfare is thus clearly a factor in the decision-making process. It is not the only factor, a position which would have been relatively easy for Parliament to have achieved if that had been the policy.[73] That was not the intention of Parliament and even on a semantic level, welfare could not, discounting for the moment the words "first and paramount", be treated as the policy of section 1 itself. In other words, section 1 does not impose a duty upon the court to reach the decision which is in the best interests of the child. Welfare does not stand apart from the process.

35.86 But what is the impact of the words "first and paramount"? Individually they mean much the same. The first consideration is simply the matter to which is to be

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71 Passim.

72 In relation to the Children Act 1975 (1975 c. 72), s. 3: paras. 30.65 to 30.70.

73 E.g. by substituting for "first and paramount" the word "only."

accorded the most important place in the process. It is the top of the list of priorities. It is to be given most weight in the balance of competing considerations. "Paramount" conveys the same fundamental idea. "Primary" indeed does likewise. The only difference between these words is their origins. "First" is Anglo-Saxon, "paramount" is Anglo-French and "primary" has Latin roots. There may be slight, almost imperceptible, nuances of meaning. Perhaps, if anything, "paramount" is the strongest of the three adjectives.

35.87 Does the conjunction of "first" and "paramount" add anything? It probably does no more than emphasise how vitally important welfare is in the process, without changing its character as part of the process. Is it on the other hand possible to argue that the words used together set it apart from the process, to be treated either as the exclusive consideration or the fundamental objective of the process? The language of section 1 would not strictly sustain either of these possibilities. Why then did Parliament use the two words together in 1925 but drop "paramount" in 1975[74], even although the 1975 context is clearly different? The answer may have been to make it clear beyond doubt in 1925 that welfare was to be the most important consideration. That is pure conjecture. There is no evidence of such a motive.

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74 1975 Act, s. 3.

Nor would any be expected. The courts must be presumed to be as familiar with the English language as Parliament.

35.88 The courts have had several problems with these words. What is important in practice is not what the words mean but what the courts state or think they mean. There is plenty of evidence, much of it inconsistent, of the court's views. What the courts have not done, perhaps understandably, is to characterise the nature of the paramountcy of welfare principle. To do so would have been helpful. The principle contains, it is suggested, inherent discretions in all senses. It is formulated in the Act not as a legal rule but as an administrative direction. Welfare is relevant as an important part of the process. Section 1 says no more. "Welfare" itself is a word of flexible and variable meaning and thus liable to interpretational discretion. Being part of an administrative process, welfare's precise role will vary according to the circumstances and according to the court's analysis and interpretation of these circumstances. The court will ask a number of questions in this exercise: what is the child's welfare;[75] how does it relate to the other circumstances; then, putting the issues together as one, what decision should be reached on the custody matter? It is an intellectual process characterised by interpretational, administrative and substantive discretions, aided only by

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75 Not on the face of it an enlightening question: but see para. 35.90 where it is suggested that welfare is perhaps better understood as a way of looking at the circumstances rather than itself part of the circumstances.

the principle of paramountcy which is itself susceptible to the same characterisation. Prima facie therefore the statutory guideline is as flexible as the discretion which it is intended to regulate.

(iv) Parental equality

35.89 The third element in section 1 gives effect in the context of custody to the second line of policy conceived by Parliament, namely parental equality. The father had his legal right to custody.[76] The simple enforcement of that right would in theory be inconsistent with the welfare principle, although in practice the recognition of that right as a factor to be considered would not necessarily be inconsistent with the principle. The difficulty would be treating a legal right as a matter for consideration rather than as a right. It is thus readily understandable why Parliament directed the court not to take into consideration any legal right the father might have.[77]

35.90 The final phrase in section 1 went further. It directed the court to disregard whether the father's or mother's claim was superior. Their claims as such could not be disregarded for they would be the substance of the dispute. But that is not what section 1 means. The words "from any other point of view" are important. The reference can only

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76 Nothing in the 1925 Act took that right away as an incident of paternal status: s. 1 merely required it to be disregarded in a disputed custodial context.

77 It indicates too that the paramountcy of welfare principle and the movement towards parental equality would tend, if fully implemented, to break down the dual approach hitherto normal in practice: i.e. the division of the process into threshold and discretionary stages.

be to any point of view other than the welfare of the child. This is important in two respects. Firstly, it treats the welfare of the child as a point of view. The welfare principle thus directs the court to look at custody questions primarily from the child's point of view. That makes much more sense than the strained technical meaning of section 1[78] but it is not exactly what the section says.

35.91 Secondly, and more specifically, what the court is to disregard is whether the mother or father has a superior claim from any point of view other than the welfare of the child. Thus the claim of the parent qua mother or father is irrelevant except to the extent that it has a bearing on the welfare of the child. For example, the parental fitness of the father may be a matter for consideration but only from the child's point of view. On the face of it this seems a small point but if this comment is well-founded it could be of great practical importance.

(v) The section as a whole

35.92 The final point is the relationship of the separate elements in section 1. It leads on directly from the last point. The paramountcy principle makes welfare both relevant and significant. The implication is that other

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78 Paras. 35.85 to 35.87.

considerations, although relevant, are relatively insignificant. The parental claims are equated, moreover, not only for the benefit of the parents but also for the sake of the children. This would be consistent with the stated policy of the Act.

35.93 The old approach had suggested three matters of relevance for the court's consideration: the father's legal right, the circumstances of the claimants, which would include their past behaviour, and lastly the interests of the child. There is no need for present purposes to consider whether these matters related to the threshold or discretionary stages of the process. The new approach discounted the father's legal right,[79] emphasised the children's interests and directed the court to disregard the parent's claims of superiority except from the child's point of view. The old "rules" were thus swept away.

35.94 The importance of the third element in section 1 is that it clearly acknowledges that matters other than the welfare of the child are relevant. But if they are relevant, they are to be considered only from the child's point of view. The reason why section 1 referred only to the possible claims of superiority of the father or mother[80] was probably that in 1925 the positions of the mother and father were the only interests

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79 This was also probably subject to the exception relating to the child's point of view. But, since the repeal of the phrase, the matter is no longer important.

80 Apart from the father's common law right.

afforded any privileged status. Guardianship had, it should be recalled, grown apart from custody. Moreover in guardianship matters the child's interests had always played a more important role. There was therefore no practical reason to refer to any other matters in section 1 for the purpose of restricting the ambit of their relevance.

35.95 Thus, when section 1 is put together again, it may be seen to have achieved three purposes:-

(a) it destroyed the father's legal right in the dynamic context of contested custody;

(b) it limited the relevance of parental claims of superiority to their consideration from the child's point of view only; and

(c) it put the welfare of the child in a privileged position.

The relative positions of parent and child have, if this analysis and synthesis are correct, been completely reversed. Instead of a parent-biased approach, there is a child-biased approach. Instead of a presumption in favour of the parents or more particularly the father, there is a presumption in favour of the child. This is what the 1891 Act in its narrower context had tried but failed to achieve. It remains to be seen whether section 1 has been given this effect by the courts.

35.96 Finally the negative and positive aspects of these technical devices require comment. A direction to disregard an otherwise relevant matter amounts to a rule of law: the matter becomes irrelevant; it cannot form part of the decision-making process; there is no discretion. In this case that direction was modified by reference to the welfare of the child. That introduces an element of interpretational and possibly administrative discretion into a matter of law. On the other hand, a direction to take welfare into consideration or to regard it as the first and paramount consideration is an administrative direction, not a rule of law, although enforceable ultimately by the appropriate legal machinery. There is thus an element of discretion in each element in section 1 of the 1925 Act. Every earlier piece of legislation was also, in relation to welfare, discretionary to a greater or less extent. The new approach in section 1 is no exception.

CHAPTER 36

THE CONTEMPORARY LEGISLATION - II

Section 1 - Introduction

36.1 The trilogy of Acts from 1886 to 1925 still contains the essential principles relating to the welfare of the child in the custodial and guardianship contexts in England and Scotland. The use of unregulated judicial discretions in the 1839 and 1873 Acts, after proving to be singularly unsuccessful in achieving their promotor's hopes, gave way in 1886 to a statutory mandate making welfare relevant. A more sophisticated approach was introduced in 1891 in a much more limited context but it probably overcomplicated the issue. In 1925, to some extent as an unarticulated admission of failure, the child's interests were pushed to the forefront. But again the devices used were complex, perhaps deliberately so to avoid the implications of the policy, with the result that the courts have never been given a clear set of principles which could not by semantic juggling be distorted into something less than contemplated by Parliament. That is an oversimplication but it indicates the broad trends of the legislation.[1]

Section 2 - Changes before 1958

36.2 A number of changes have been made by Parliament since 1925. Most are technical. Few are important.[2] None

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1 It does not take account of the wide discretions conferred by the matrimonial and consistorial provisions in the 1857 and 1861 Acts.

2 I.e. in relation to welfare.

destroys the core of the 1886 to 1925 series of Acts. The changes made before the 1970s fall into three broad categories: the extension of the courts whose jurisdiction is governed by the Acts; the application of the legislation to the father of a legitimate child and ultimately to illegitimate children generally; and one or two miscellaneous points. The feature of these changes is that almost none of them affected the substantive rights of the parties. This is quite consistent with the mainstream of the legislation.

36.3 So far as Scotland is concerned, there has never been any problem about which courts are subject to the legislation. Since 1886 any reference to the court has included both the Court of Session and the sheriff court.[3] This is not to say that the powers or jurisdiction of the courts are the same. In England, on the other hand, the 1886 Act applied only to the High Court and the county court.[4] A limited jurisdiction was conferred upon courts of summary jurisdiction in 1925[5] and this was extended in 1951.[6] The consolidation of 1971 did not change the position in England.[7] What is important, however, is that, whatever may be the powers and jurisdiction of the several courts, the paramountcy of welfare principle applies to any custodial dispute brought before the Court of Session or the sheriff court in Scotland or the High Court, county court or magistrates' court in England.[8]

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3 Guardianship of Infants Act 1886 (49 & 50 Vict., c. 3), s. 9.
4 Idem.
5 Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c. 45), s.7(1).
6 Guardianship and Maintenance of Infants Act 1951 (14 & 15 Geo. 6, c. 56), s. 1.
7 Guardianship of Minors Act 1971 (1971 c. 3), s. 15.
8 I.e. assuming that a wide interpretation is given to the 1925 Act, s. 1 and to the 1971 Act, s.1.

36.4 Section 5 of the 1886 Act, it will be recalled, conferred upon the mother of a child the power to apply for an order giving her custody of or access to her child. The father retained his rights, both substantive and procedural, under the rules of common law and equity. The same was true mutatis mutandis in Scotland. Statute directed an approach to welfare different from either common law or equity. So a mother's application would be dealt with differently from a father's application. This obvious example of lack of parental equality was rectified in 1928[9] when the statutory position of the mother and the father was made the same in both England[10] and Scotland.[11]

36.5 There had been considerable debate whether the 1886 and 1925 Acts applied to illegitimate children.[12] The static position of an illegitimate child vis-à-vis his parents differed considerably from that of the legitimate child. But in the dynamic situation of a dispute the differences were much less significant. In 1930 Scotland equated the position of legitimate and illegitimate children for the purposes of parental applications for custody.[13] In doing so, the welfare formula in section 5 of the 1886 Act was the model used by Parliament. The 1925 Act had become effective by then. This perhaps left open the question whether the paramountcy of welfare principle applied to illegitimate children. There can be do doubt now that it does so apply. It nevertheless remains

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9 Administration of Justice Act 1928 (18 & 19 Geo. 5, c. 26).
10 Ibid., s. 16; 1971 Act, s. 9(1).
11 Ibid., s. 20(3).
12 Paras. 37.22, 39.22, 39.27 and 39.43.
13. Illegitimate Children (Scotland) Act 1930, s. 2(1).

something of a mystery why in 1930 Parliament did not take some official notice of the 1925 Act when enacting along the lines of the 1886 Act model.

36.6 England did likewise in 1959.[14] But in that case Parliament did not, as it had done for Scotland, enact an entirely independent provision; they simply applied section 5 of the 1886 Act and section 16 of the 1928 Act to illegitimate children. This would automatically apply to illegitimate children whatever relationship then existed between section 5 of the 1886 Act and section 1 of the 1925 Act. The result no doubt was the same in England and in Scotland, despite the need for the Scottish courts to contend also with an independent provision. Legislation by application is often complex and confusing. These provisions may be an example of an exception to that general comment.

36.7 There is another example of the use after 1925 of a welfare model different from the paramountcy of welfare principle. Section 3(3) of the 1886 Act conferred upon the court an open-ended power to settle disputes between joint guardians on questions affecting the child's welfare. The substance of that provision was re-enacted in 1925.[15] But this was amended in 1932 in relation to guardians of whom one was the mother or father to include power to award to the mother or father custody or access.[16]

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14 Legitimacy Act 1959 (7 & 8 Eliz. 2, c. 73), s. 3(1); 1971 Act, s. 14(1).

15 1925 Act, s. 6.

16 Children and Young Persons Act 1932 (22 & 23 Geo. 5, c. 46), s. 79(1); 1971 Act, s. 11; Children and Young Persons (Scotland) Act 1932 (22 & 23 Geo. 5, c. 47), s. 73(1).

In exercising that power the court is directed to have regard to the welfare of the child. Thus in the case of non-parental guardians the judicial discretion is unlimited, perhaps on the assumption that in the absence of parents the court would apply a welfare test according to the usual principles relevant in guardianship. The mandatory reference to welfare where one guardian is a parent was intended no doubt to offset to some extent the priority which the court would otherwise afford to the parent.[17] Even so, it is an open question whether the paramountcy of welfare principle would apply to the judicial power in section 6 of the 1925 as amended by the 1932 Act provisions. In terms of section 1 of the 1925 Act it would so apply. But does it nevertheless apply to a lex posterior? Probably but by no means certainly.

36.8 The two miscellaneous statutory changes apply to Scotland. Neither is directly important in relation to welfare. They are mentioned largely for the sake of completeness. The father of an illegitimate child was able to discharge his liability to aliment the child by offering to assume custody of the child. This is certainly understandable when custody was largely a matter of right. But as it became more a matter of administrative decision in the light of the circumstances of each case, a great deal of the possible justification for the rule became eroded. It was abolished in 1930.[18]

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17 Cf. Guardianship Act 1973 (1973 c.12), ss. 1(3) and 10(3).
18 Illegitimate Children (Scotland) Act 1930, s. 2(2).

36.9 One of the points of criticism of the 1886 and 1925 Acts is their rather perfunctory application to Scotland. Little regard was apparently had to the nature, concepts, structure and even terminology of Scots law. Pupillarity and minority are by no means the equivalent of infancy, nor tutory and curatory the equivalent of guardianship. So the Acts were applied to Scotland in a way far from satisfactory.[19] Probably the most significant specialty of Scots law is the division of incapacity into pupillarity and minority. Since "infant" was deemed to be "pupil" for the application of the 1886 Act to Scotland,[20] that Act and the 1925 Act[21] applied only to that class of children so identifiable according to the law of Scotland. The 1891 Act did not have to deal with that particular problem, for there Parliament used the neutral word "child." In practice that did not matter, for the application of the 1891 Act was dependent entirely upon the jurisdiction of the High Court in England and the Court of Session in Scotland.

36.10 Since "infant" in England included any person under twenty-one years of age, there was a considerable gap between the ranges of children in England and Scotland to whom the 1886 and 1925 Acts applied. This in itself was no problem. It simply reflected different policies built into the common law of Scotland and England. However, in 1939 Parliament decided to change the policy of the law of Scotland and extended the

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19 E.g. 1886 Act, ss. 8, 12 and 13; 1925 Act, s. 10.

20 1886 Act, s. 8.

21 1925 Act, s. 11(2).

common law and statuory powers of the courts in Scotland to include minor children under the age of sixteen.[22] The reason seems to have been that a child who had just attained minority was not sufficiently mature to decide with which parent he or she should reside.[23] The future of such a child would be more secure and settled if that issue were liable to be determined by the court.[24] It was gratuitiously and to some extent inaccurately added[25] that such an amendment would bring the law of Scotland into line with the law of England.

36.11 The age of majority has since been reduced to eighteen for England[26] and Scotland[27] and it is somewhat ironic that at the same time English law indicated preference for the word "minor" in place of "infant".[28] Thus in England the status of minority now terminates at age eighteen, the powers of the courts under the Guardianship of Minors Act 1971 cease at that age[29] but their powers under the matrimonial legislation cease at age sixteen.[30] The equitable powers of the English High Court probably also continue until the child reaches eighteen.[31] The nobile officium of the Court of Session similarly

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22 Custody of Children (Scotland) Act 1939, s. 1(1).

23 (1939) 342 H.C. Deb. 5s. col. 1557 (Mr. Erskine Hill).

24 Idem.

25 Ibid.,(Mr. Mathers).

26 Family Law Reform Act 1969 (1969c. 46), s. 1(1).

27 Age of Majority (Scotland) Act 1969 (1969c. 39), s. 1(1).

28 Ibid., s. 12.

29 The use of the word "minor" in the 1971 Act as interpreted by the Family Law Reform Act 1969, s. 1(2)(a).

30 Matrimonial Causes Act 1973 (1973c. 18), s. 41(5); except in certain circumstances: idem.

31 In any event they apply the statutory paramountcy of welfare principle.

ceases when the child reaches eighteen. But all the statutory powers of the courts in Scotland are available only until the child reaches sixteen.[32] These are important matters in practice[33] and the welfare of the child will be seriously affected by the availability of judicial powers of intervention. They obviously add nothing to the concept of welfare. But they are an important part of the background to it.

Section 3 - Questions of Principle since 1958

(a) Parental equality

36.12 The reforming legislation since 1925 had dealt principally with adoption and official[34] involvement in the care and protection of children. The changes made in relation to custody and guardianship are by no means inconsistent with that movement and are to some extent a consequence of it.[35] Most deal with matters of principle. The most important are the equality of status between mother and father[36] and the need to safeguard children in the matrimonial and consistorial

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32 Custody of Children (Scotland) Act 1939, s. 1(1).

33 E.g. Guardianship Act 1973 in relation to Scotland. Part II uses the words "pupil", "minor" and "child" very carefully. The distinctions would appear to be questions of age only without reference to functions or status. They certainly add to the complexity of the Act.

34 I.e. other than judicial.

35 In the sense that in the custodial context public care as opposed to private or at least publically controlled private care has become an increasingly available option.

36 Guardianship Act 1973, ss. 1 and 10.

contexts.[37] The latter reform was achieved by the creation of new structures and procedures, some of which have been used as the model for further reform.[38] Although not first in point of time, it is appropriate to deal with parental equality now and with the other reforms later. The other reforms to be considered later fall into a clear, coherent and important pattern.

36.13 Equality of parental rights had been advocated as early as 1886[39] but the suggestion met with no acceptance. The Guardianship Act 1973 was the result of government initiative. There was no official inquiry into the matter nor apparently anything more than an informal request[40] for reform of the law.[41] Sections 1(1) and 10(1) of the 1973 Act create what the side-note calls "equality of parental rights for England and Scotland respectively. Each subsection

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37 Matrimonial Proceedings (Children) Act 1958 (6 & 7 Eliz. 2, c. 40) which is still effective in Scotland but superseded in England by Part II of the Matrimonial Proceedings Act 1973.

38 E.g. committing a child to the care of a local authority or putting a child under their supervision.

39 Paras. 35.9 to 35.13.

40 By the Conservative Party.

41 Clive E.M., "The Guardianship Act 1973" S.L.T. (News) 225.

contains four elements: its application; the conferment upon the mother of the same rights and authority as the father enjoys; the deemed equality of such rights and authority; and the independent exercisability of such rights and authority. The phraseology of the subsections is the same with two exceptions. The application of the English provision repeats precisely the subject matter of section 1 of the 1925 or 1971 Act.[42] The Scottish application does not do so and is thus not in any way restricted: it refers simply to a "pupil or minor". The second difference is that the Scottish provision gives an example of the right thereby conferred upon the mother: the office of tutor or curator. The Scottish provision is therefore potentially wider in application.

36.14 The repetition in the English provision of some of the introductory words in the enactment creating the paramountcy of welfare principle indicates some sort of relationship between the two. Section 1 of the 1971 Act is a dynamic rather than a static provision. The creation of equality of parental rights is however more a matter of status than of assistance in the solution of disputes. Section 1(1) of the 1973 Act does not

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42 I.e. "custody or upbringing" and the later reference to property and income.

refer to the settlement of disputes. No doubt the intention is therefore to make that subsection relevant in any situation: where the parents are in dispute, where they are transacting the domestic regime from day to day, or merely as the background to the relationship between father, mother and child. This would also seem to be the meaning and effect of the Scottish provision.[43] Indeed, that provision more precisely achieves that effect. The Scottish provision certainly applies in both a static and a dynamic context; the English provision probably does likewise.

36.15 There are nevertheless two specifically dynamic aspects of these provisions. Sections 1(3) and 10(3) give to the parents power to apply for a direction from the court if there is a disagreement about any question affecting the child's welfare. Such a direction however cannot deal with custody or access.[44] Custodial disputes presumably fall to be determined in the normal way, while other parental disagreements are dealt with under this Act. These subsections give to the court a power to settle the matters in difference "as it may think proper." The Act does not indicate how this power is to be exercised. But there is no reason to suppose that it will not be governed by the paramountcy of welfare principle.[45]

36.16 If that is so, custodial disputes and formal disagreements under this Act are determinable according to that

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43 Clive, op. cit.

44 1973 Act, ss. 1(4) and 10(4).

45 Clive, op. cit. at p. 226.

principle. But the application of that principle raises a further matter. Section 1 of the 1925 Act directed the court in a dynamic situation to disregard claims of paternal or maternal superiority and the father's common law right to custody except from the point of view of the welfare of the child.[46] Reference to the father's common law right was repealed in 1973[47] presumably because it would become anomalous to refer to it when parental rights were being made equal. The welfare of the child remains the first and paramount consideration in a dynamic context but it will now have to contend with equal parental rights rather than with sole paternal rights at least from the child's point of view. This is unlikely to make much difference, for the claims of the mother and father remain relevant under the 1925 Act in the same way. Equality of rights in a dynamic context means little more than the recognition of individual claims to custody or for a direction.

36.17 Equality of parental rights on the other hand means much more as a matter of status.[48] There will be two persons instead of one entitled to make decisions for the child in the custodial, guardianship and tutorial contexts. Naturally that may have an important effect on the position of the child; there may well be an element of competition between the parents. But that is indicative of one fundamental problem. Welfare is a matter for subjective judgment, whether the person making the

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46 Para. 35.90.

47 1973 Act, s. 9 and Sched. 3; s. 19(8).

48 Clive, op. cit. at pp. 226 and 227.

decision is mother, father, guardian or court. The court is naturally involved only when disagreement arises. In that situation the criterion of judgment becomes explicitly the welfare of the child.[49] That criterion is presumably implicit in the day-to-day domestic context.[50] It becomes a matter of law only when a parent's decision is challenged. Then sections 1(1) and 10(1) of the 1973 Act will have little or no impact upon the role of welfare as the basis for settlement of disputes.

36.18 The other dynamic provision in sections 1 and 10 of the 1973 Act relevant to the welfare of the child is subsection (2) dealing with the validity of parental agreements about children. Section 1(2) replaced section 2 of the Custody of Infants Act 1873[51] for England. Although much of the phraseology is slightly different, the substance of the enactment remains the same.[52] It has been suggested that the 1873 Act did no more than put the existing common law of England into statutory form.[53] It seems unnecessary therefore not only to have enacted the provision in 1873 but to have re-enacted it completely in 1973. A minor amendment[54] would have been sufficient.

36.19 The 1873 Act did not apply to Scotland but section 10(2) of the 1973 Act has given to Scotland a precise equivalent of section 1(2). The common law of Scotland was much the same as the common law of England: that as a matter of policy a

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49 I.e. the paramountcy of welfare principle.
50 In the sense that parents are presumed to do what is best for their children.
51 Repealed: 1973 Act, s. 9 and Sched. 3.
52 I.e. the last twenty or so words of the provision.
53 Paras. 34.71 to 34.81.
54 Making it effective also as against the mother.

father could not voluntarily give up his authority over the child, as that would involve avoiding his duties to the child. Any attempt to do so would ultimately be a matter for the court applying normal principles. The wording of the Scottish provision has been strongly criticised[55] but not in the context of welfare. Whether the provision should be part of the law of Scotland is not presently relevant.[56] Neither the English nor the Scottish provision adds anything either original or different to the position of welfare.

(b) Safeguards for children in the divorce legislation

36.20 The principle other than parental equality introduced since 1958 is the need to safeguard children in the matrimonial and consistorial contexts. The courts in England and Scotland have had statutory powers to deal with custodial matters in matrimonial and consistorial contexts since 1857[57] and 1861.[58] So far as the earlier periods are concerned, the courts tended not to exercise a wide discretion but preferred to apply, so far as possible in a different context, the rules of common law and equity.[59] There is no reason to assume that section 1 of the 1925 Act would not apply. Even so, the Report of the Morton Commission in 1956 concluded that as respects both England and Scotland the most suitable arrangements were not always being made for the future of the children.[60] The principal reason

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55 Clive, op. cit. at p. 228.

56 The whole Act has not been welcomed in some quarters: e.g. "The Guardianship Act, 1973: A view of the sections applicable to Scotland" (1973) 18 Journal of the Law Society of Scotland 396.

57 Matrimonial Causes Act 1857 (20 & 21 Vict., c. 85).

58 Conjugal Rights (Scotland) Amendment Act 1861 (24 & 25 Vict., c. 86).

59 Paras.33.81 and 34.97 to 34.104.

60 Morton Report, para. 366.

identified was that nobody was "specifically charged to look after the child's interests."[61] In consequence of the Commission's recommendations the court was barred from completing the formalities of a divorce and similar decrees until satisfied that the arrangements proposed for the care and upbringing of the children were the best in the circumstances.[62] That system was reviewed in 1968[63] and found to be to some extent unsatisfactory in England[64] but largely satisfactory in Scotland.[65] It has not however been substantially changed although there have been some relatively minor amendments in England.

36.21 The relevant provisions of the 1958 Act were the same for England and Scotland.[66] The court was disabled from making absolute the appropriate decrees in England or granting them in Scotland "unless and until the court is satisfied [in relation to the relevant children][67] -

(a) that arrangements have been made for the care and upbringing of the child and that these arrangements are satisfactory or are the best which can be devised in the circumstances; or

(b) that it is impracticable for the party or parties appearing before the court to make any such arrangements."[68]

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61 Ibid., para. 367.
62 Matrimonial Proceedings (Children) Act 1958.
63 Law Commission, Published Working Paper No. 15, incorporating a report of an enquiry into the working of section 33 of the Matrimonial Causes Act 1965 by Mr. John Hall (hereinafter called the "Hall Report").
64 Hall Report, pp. 13, 17, 25, 26, 29 and 32. 65 Ibid. p. 37.
66 Matrimonial Proceedings (Children) Act 1958, s. 2(1) and (2) for England and s. 8(1) and (2) for Scotland.
67 A class which has been expanded by statute over the years. Welfare is relevant only as an aid to interpretation.
68 1958 Act, ss. 2(1)(a) and 8(1)(a).

There is no dobut that the duty of protecting the interests of the child is placed firmly upon the court. In Scotland the court is supported by its statutory power to appoint an investigating officer.[69] In England such a support is a matter of practice only.[70] The judicial duty is however characterised by considerable flexibility. "Arrangements" must clearly be made "for the care and upbringing of the child." In other words, the parents must be able to answer the question: what are you going to do about the children?

36.22 One of the changes made after 1958 in England was to substitute for "care and upbringing" the word "welfare".[71] The latter word is clearly wider than the former expression. Its inherent flexibility is not however restricted by the interpretation given to "welfare" so that it includes "the custody and education of the child and financial provision for him."[72] It is difficult to see what differences, if any, the statutory definition of "welfare" makes to the phrase used in the Act. It is likely that the same issues will in practice be considered. The statutory meaning of welfare probably makes explicit that education and maintenance are part of care and upbringing which was, it is suggested, implicit in the 1958 Act. The significance of the use of the word "welfare" in this context emphasises that it can have a content component, in the sense that by using the word reference is being made to a number of facets of the child's

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69 1958 Act, s. 11.

70 Hall Report, p. 37.

71 Matrimonial Causes Act 1973, s. 41(1)(b)(i).

72 Ibid., s. 41(6).

circumstances. That is to be contrasted with "welfare" when it indicates a perspective component: in other words, a direction to consider a matter or indeed the whole circumstances from a certain point of view.[73]

36.23 Not only do arrangements for the child's welfare have to be made, they must also be "satisfactory" or "the best which can be devised in the circumstances."[74] The one is not the test of the other but "satisfactory" means roughly "as good as circumstances permit". Since "satisfactory" is unsupported, it can only mean acceptable in a subjective fashion to the court. The second standard is more objective by reference to "the circumstances." But in the case of neither standard can it be said that Parliament has provided any clear and unambiguous approach to the problem. The court in other words is left with considerable interpretational and administrative discretion in relation to paragraph (a) and its equivalent in the 1973 Act.

36.24 The general judicial duty in section 8(1) of the 1958 Act and section 41(1) of the 1973 Act is subject to two exceptions, one permanent and the other temporary. The duty is elided where it is impracticable for the parties before the court to make the arrangements required of them.[75] This will give the court a wide discretion in practice but the guiding principle no doubt is that the power creates an exception to the general statutory rule and should be applied accordingly.[76]

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73 E.g. that is one view of the paramountcy of welfare principle and s. 1 of the 1925 and 1971 Acts.
74 1958 Act, ss. 2(1)(a) and 8(1)(a); 1973 Act, s. 41(1)(b)(i).
75 1958 Act, ss. 2(1)(b) and 8(1)(b); 1973 Act, s. 41(1)(b)(ii).
76 I.e. the onus firmly upon the parties to prove why it is impracticable for them to make any arrangements.

36.25 The temporary exception, on the other hand, is not inconsistent with the general statutory duty to make arrangements for the children. Section 8(2) of the 1958 Act and section 41(1)(c) and (2) of the 1973 Act allow the court to grant or make absolute the decree without fulfilling its duty under the general rule if it is desirable to do so without delay and provided the question of the necessary arrangements will be brought before the court within a specified time. The tests are thus "desirability" and the obtaining of a satisfactory undertaking. Each is replete with discretionary functions.

36.26 The overall character of the statutory machinery in section 8 of the 1958 Act and section 41 of the 1973 Act for giving effect to the principle of protecting the child's interest in matrimonial and consistorial proceedings is clearly one of discretion. It is thus not surprising that in some respects it was found unsatisfactory in England,[77] simply because so many persons were involved in a decentralised discretionary process. Nor is it surprising, despite the comment in the Hall Report,[78] that the Scottish practice was more satisfactory. A much smaller number of judges, advocates, solicitors and investigating officers is involved in Scotland and the proceedings are centralised. A greater uniformity of approach, despite its discretionary nature, is thus understandable.

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77 Para. 36.20, n. 64.
78 Hall Report, p. 37.

Section 4 - Procedures and structures since 1958

(a) Introduction

36.27 One of the reasons which prompted the Morton Commission in 1956 to recommend the creation of the structures and procedures just analysed in principle was their lack of confidence not only in the parents' ability to decide what would be best for their children but also in the parents' ability to provide the best available care for their children.[79] Such inadequate parents are no doubt exceptional but that is the situation to which not only this but every branch of child protection law is directed. Arguments like these justify judicial interference with parental rights and also state responsibility for the care and protection of certain classes of children. Once it is accepted in principle that the courts should accept responsibility for the future welfare of children affected by their parents' matrimonial and consistorial proceedings,[80] it follows almost automatically that the court is acting *in loco parentis*. Since the court's status is in this regard entirely statutory, the wider prerogative powers are unlikely to be available unless further procedures are implemented.[81]

36.28 There have been other practical restraints upon the powers of the courts. They have no power for example, to impose the responsibility for the care and upbringing of a child upon

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79 Morton Report, para. 366.

80 *Ibid.*, para. 372.

81 E.g. making the child a ward of court; taking the matter to the Inner House of the Court of Session in Scotland (i.e. in 1956).

an unwilling third party. But third parties can in the English matrimonial context apply for and be awarded custody of the child in question.[82] The office of guardian is always available on application by anyone interested to the court. But in England this is not normally possible while someone is properly exercising parental rights over the child.[83] In Scotland there is probably no restriction on any interested person applying to have the parental rights of the parent forfeited or the guardian removed from office and for that same interested person to be appointed factor loco tutoris instead of the person so deprived.[84] The difficulty is that that person qua factor loco tutoris, while responsible for the child, would not be entitled to personal care of him.[85] Thus, although it may be possible for a third party to become involved, there are practical difficulties which would impede the well-intentioned outsider. Even so, no court can select whomsoever it considers would be most suitable to care for the child and impose the duty of care, by conferring custody, upon that person.

36.29 But what about the wardship jurisdiction of the High Court in England as parens patriae? Is it not the responsibility of the state, acting both judicially and executively, to care for as well as supervise those children in need? Yes, but in the past only if there were sufficient private resources available to maintain the child.[86] In 1948

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82 Para. 34.96.

83 Halsbury, vol. 21, para. 460; Bromley, pp. 281 and 325; Houghton-Stockdale Report, para. 117.

84 Para. 45.49. See also Fisher D.E., "Adoption and the Courts: an examination of the 1972 Report" 1973 S.L.T. (News) 145 at p. 149 and Fraser, pp. 215 and 466.

85 Para.45.49.; Fraser, p. 221.

86 See the Report of the Committee on the Age of Majority (1967, Commd. 3342), para. 194.

state responsibility for the care of children changed dramatically.[87] It is no longer possible to talk in terms of private rights and responsibilities and public rights and responsibilities. The one is affected by the other. Private custodial and guardianship rights have always been subject to a certain amount of judicial control and interference. Although the state has always accepted certain responsibilities for limited classes of children, it is probably no longer acceptable to treat the private and public regimes separately. They may be legally distinct but in practice they are clearly dependent upon each other. The legislation enacted since 1958 has tended to emphasise their interdependence.

(b) The availability of local authority care resources

36.30 When the Morton Commission was considering in the mid-1950s how best in the matrimonial context to deal with children whose parents were inadequate, the system of local authority care under the Children Act 1948 had been operating for a few years. Children of divorced parents would be unlikely to come within that system.[88] There was therefore no way in which local authorities could be forced, if indeed they were authorised, to receive the children of divorced parents into their care. The answer was to require the local authority to receive them into care if the court so decided.

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87 Children Act 1948 (11 & 12 Geo. 6, c. 43).

88 They would not as such fall within the provisions of section 1(1) of the 1948 Act or section 15(1) of the Social Work (Scotland) Act 1968 (1968 c. 49).

36.31 The Report itself described the proposal very clearly. Discussing the position of parentally unacceptable spouses on the point of divorce:-

> "The only course then open to the court would be to give the care of the child to a third party; although conditions would have to be really bad before that course could be contemplated. In such circumstances the best person to assume the care of the child would clearly be a relative, if he or she is considered suitable and is willing to take the child. But this solution will not always be possible, and then the alternative is that the child should be received into the care of a local authority. We therefore recommend that the court should have power to require a local authority to receive a child into its care." [89]

The initiative would thus rest with the court. This is reasonable since the responsibility lies there too. But once the child is in care, the local authority becomes responsible[90] and the matter is no longer under direct judicial control.[91] This proposal did not provide directly for the welfare of the child. Its importance lies in the creation of powers designed to facilitate the exercise of the functions conferred upon the court in relation to the welfare of the individual child. The

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89 Morton Report, para. 395.

90 Children Act 1948, ss. 12 and 13; Social Work (Scotland) Act 1968, ss. 20 and 21.

91 Except in the possible context of administrative review: paras. 16.27 to 16.29 and 17.60 and 17.61.

court in a sense is given greater powers than the parent. The two however cannot be equated: one is artificial and the other natural The status of an actual parent and of a court in loco parentis reflects these differences. When these proposals were enacted in 1958,[92] the court was enabled to play a more effective role as part of the state[93] as parens patriae, simply because the range of decisions available to it and facilities at its disposal had been extended.

36.32 Local authority care was not the only facility made available to the court in the interests of the children for whom it had responsibility. Local authority supervision was also possible[94] and, on a more technical plane, the jurisdiction of the courts in relation to the nature of the relevant proceedings was extended.[95] The range of children falling within the control of the courts was widened.[96] Control over the removal of children from the jurisdiction was extended to Scotland.[97]

36.33 The 1958 Act applied only to children whose parents were involved in matrimonial or consistorial proceedings.[98] The domestic jurisdiction of magistrates in England was reformed in 1960[99] and the local authority's care and supervision facilities were made available to the magistrates.[1] In 1969 these facilities were available to the High Court in exercise of its wardship

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92 Matrimonial Proceedings (Children) Act 1958, ss. 5 and 10; the English provision is now the Matrimonial Proceedings Act 1973, s. 43.

93 Perhaps a more appropriate word now than the "Crown".

94 Matrimonial Proceedings (Children) Act 1958, ss. 6 and 12: the English provision is now the Matrimonial Causes Act 1973, s. 44. This was recommended by the Morton Report, para. 396.

95 Ibid., ss. 3 and 9: the English provision is now the Matrimonial Causes Act 1973, s. 42(1).

96 Ibid., ss. 1 and 7: the English provision is now the Matrimonia Causes Act 1973, s. 41(5) which gives inter alia a qualified discretion to the court.

97 Ibid., s. 13.

98 That is only a broad descriptive reference: it does not accurately indicate the children affected.

99 Matrimonial Proceedings (Magistrates' Courts) Act 1960 (8 & 9 Eliz. 2, c. 48).

1 Ibid., s. 2(1)(e) and (f).

jurisdiction.[2] Finally in 1973 these powers were given to the court in England acting under the Guardianship of Minors Act 1971.[3] It would appear therefore that any court in England in exercise of any jurisdiction, equitable or statutory, in any context, custodial or matrimonial, can resort to the local authority as a source of care of supervision.

36.34 Since 1958 the Scottish courts have had the same powers in the consistorial context.[4] In 1973 they were made available to the Court of Session and the sheriff court exercising their statutory jurisdiction under the Guardianship of Infants Acts 1886 and 1925 and related Acts.[5] It appears however that they are not available to the Court of Session exercising its nobile officium or to the sheriff court except under the 1886 and 1925 Acts and, of course, the 1958 Act. This may have been an oversight. It is unlikely to be important as most custodial disputes are settled under these Acts. But it would be unfortunate if the local authority could not be required, even in the marginal case, to receive a child into their care.

36.35 The overall pattern since 1958 is clear: the extension of judicial powers and jurisdiction; greater possibility of the use of public care resources when private resources are inadequate or unavailable; increasing responsibility on the court in determining the best course for the child in the

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2 Family Law Reform Act 1969 (1969c. 46), s. 7.
3 Guardianship Act 1973, s. 2(2).
4 Matrimonial Proceedings (Children) Act 1958, ss. 10 and 12: care in Scotland may be committed to an individual as well as to a local authority.
5 Guardianship Act 1973, s. 11(1).

settlement of private disputes; and increasing responsibility on the local authority in giving effect to these decisions. The policy underlying these various enactments is clearly the welfare of the children. But the welfare and interests of the child play no articulated part in any of these provisions.

36.36 Nevertheless, the custody and upbringing of the child are clearly in question. There are proceedings before the court. There can be no doubt therefore that the paramountcy of welfare principle applies. Indeed the provision of these powers is to some extent intended to support the court in giving real effect to that principle by extending the range of alternatives. The court is no longer bound merely to react to the application before it, the issue in which may be extremely narrow: for example, to grant custody to the applicant or not. Section 1 of the 1925 Act has widened the issue to include some relative matters.[6] The 1958 Act, in its limited context, cast a more positive duty on the court to look at the circumstances of the case for the purpose of deciding upon the adequacy of the proposed arrangements. The availability of local authority care and supervision thus enables the court to look beyond the parental applicant, the competing parents or even an interested relative or third party as the sources of care. This enables them to discard the parental forfeiture or disqualification test and allows them at least to consider what would be best for the child. Whether they have done so is, of course, another matter.

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6 Paras. 35.90 to 35.95.

(c) The availability of alternative options

36.37 These provisions made available to the courts certain public child care resources. Private resources had always been an option open to the local authority[7]: not, of course, to the court, except in the very limited sense already mentioned.[8] The policies underlying the statutory movements under discussion are no doubt a reflection of contemporary social and psychological doctrine. Institutional care, for example, may be going out of fashion. So the desirability of private care, either directly or under the guidance of a local authority, in preference to public institutional care may be part of the theme implicit in Part II of the Children Act 1975. It did not however come about in that way.

36.38 Although the Houghton-Stockdale Committee was concerned principally with adoption, alternatives to adoption were part of their terms of reference.[9] Many children are cared for by third parties, especially foster parents and relatives.[10] There is no original legal relationship between them and the child. Unless the parent has disqualified himself from exercising his rights, it would be almost impossible for the third party to refuse a request by the parent for the return of the child.[11] The only security available to the third party is adoption. That is not an automatic device for creating the

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7 Children Act 1948, ss. 12(2) and 13(2); Social Work (Scotland) Act 1968, s. 20(2).

8 Para. 36.29.

9 Houghton-Stockdale Report, para. 1.

10 Ibid., para 116.

11 Despite the paramountcy of welfare principle.

security desired by the third party. Nor, indeed, is it necessarily an appropriate method for securing his interest.[12] The committee thus recommended "guardianship orders"[13] which would be "similar to existing custody orders."[14] It has been suggested elsewhere that the nature of this concept amounts to a "revocable suspension of parental rights" which are thus "temporarily vested in a third party."[15] Parliament gave effect to this recommendation for England,[16] although the word "guardianship" was rejected for "custodianship,"[17] but not for Scotland which benefited by the simple clarification that certain persons in association with the child could apply in the normal way for custody.[18]

36.39 The concept of custodianship was designed in the first place to afford a degree of security to non-parents caring for a child.[19] The statutory effect of a custodianship order is to suspend the right of any other person to the legal custody of the child.[20] The normal position revives on revocation of a custodianship order.[21] The making of a custody order in Scotland similarly excludes the parent during its currency.[22] There is however more to custodianship and custody than merely formalising the status quo. Making such an order is a dynamic judicial act. A foster parent, relative or other third party has, in other words, no entitlement to security under the 1975 Act. He will be given such security only where to do so would be

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12 Houghton-Stockdale Report, chapter 5.
13 Ibid., paras. 120 and 121. 14 Ibid., para. 123.
15 Fisher D.E., "Adoption and the Courts: an Examination of the 1972 Report" 1973 S.L.T. (News) 145 at p. 149.
16 Children Act 1975, s. 33(1). 17 Ibid., ss. 33(2).
18 Ibid., s. 47(1). 19 Houghton-Stockdale Report, para. 116.
20 1975 Act, s. 44(1). 21 Idem.
22 Under common law.

consistent with the welfare of the child.[23] The revocation of an order may be as important for the child as granting an order in the first place. The Act thus prescribes a role for welfare also at that stage.[24]

36.40 Certain requirements[25] must be fulfilled before an application for a custodianship order may be made under section 33(1) of the 1975 Act. They are in the form of personal qualifications required of the applicant and have no direct bearing on the welfare of the child. They seem to have been designed more to protect the interest of the person having legal custody of the child at that time.[26] The interest of the child is protected at this stage by the application to the decision-making process of the paramountcy of welfare principle.[27] That principle probably applies in England in any event but there can be no doubt that, once the qualifications of the applicant stated in section 33(3) have been met, the way is open for the court to make a custodianship order subject only to the paramountcy of welfare principle. The traditional pattern thus emerges: threshold requirements, in this case personal qualifications, followed by a qualified discretion.

36.41 Although actual custody is variable informally by agreement among the parties, any such changes do not affect the enforceable legal relationship between the parties established

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23 That is not precisely accurate: it simply paraphrases the general position. Each context must, and will, be examined separately.

24 1975 Act, s. 36(2) and (3). 25 Ibid., s. 33(3).

26 Who would not, of course, have actual custody of the child, but whose consent may be required. For an explanation of the words "legal custody" and "actual custody" see 1975 Act, ss.86,87and 107(2).

27 1975 Act, s. 33(9) in England; 1925 Act, s. 1 by implication in Scotland.

either statically by law or dynamically by a court.[28] The second critical moment for the child is thus when an attempt is made to change the legal relationship so created. There is naturally power to revoke or vary a custodianship order.[29] There are again threshold requirements to be fulfilled before the power may be exercised[30] and the paramountcy of welfare principle similarly applies to the exercise of the power.[31]

36.42 Revocation of a custodianship order revives the legal regime existing at the time of making the order.[32] Parliament has, however, following the policy which has now become almost uniform, anticipated the possibility of the inadequacy of the existing legal regime.[33] The court is directed before making a revocation order to ascertain who would have legal custody under the existing legal regime. If legal custody would vest in nobody, the child must be committed to the care of a local authority.[34] Otherwise the court comes under a duty to consider "whether it is desirable in the interests of the welfare of the child" for the child to revert to the legal custody of the person so entitled.[35] If not, the child must be committed to the care of a local authority.[36] Supervision by the local authority of the person entitled to legal custody is a further possibility.[37]

36.43 The same broad scheme is intended to apply to Scotland but there is greater reliance in Scotland[38] than in

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28 At common law. It is now supported in England by statute: 1975 Act, s. 85(2).
29 1975 Act, s. 35(1). 30 Ibid., s. 35(2). 31 Ibid., s. 33(9)
32 Ibid., s. 44(1). 33 Ibid., s. 36(1).
34 Ibid., s. 36(2). 35 Ibid., s. 36(3).
36 Ibid., s. 36(3)(a). 37 Ibid., s. 36(3)(b).
38 Houghton-Stockdale Report, chapter 6.

England upon the existing law because custody has been selected as the vehicle for giving effect to these ideas. The structure of the enabling provisions is thus quite different. No person may apply unless he is a relative, step-parent or foster parent of the child.[39] In addition to these personal qualifications, the requirements in section 47(2) must be satisfied before the court can grant custody in favour of anyone other than a parent or guardian. Apart from one provision,[40] they are similar in content to the personal qualifications required of an applicant in England.[41] Once the applicant has met these personal qualifications and satisfied these threshold requirements,[42] the custodial decision will be made in the normal way, by giving effect to the paramountcy of welfare principle.[43] Any such decision may be varied or revoked under this Act[44] but presumably according to the same rules.[45]

36.44 The jurisdiction of the court under the 1975 Act in Scotland is probably wider than in England. The intention of the Act was not to allow anyone to apply for a custodianship order or for custody, but to restrict it to those who had had care of the child for the prescribed periods.[46] In this context paragraphs (a) to (c) in the Scottish provision[47] are similar to paragraphs (a) to (c) in the English provision, with the exception of the phrase describing the actual relationship between applicant and child:[48] in England it is an applicant

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39 1975 Act, s. 47(1).
40 Ibid., s. 47(2)(d).
41 Ibid., s. 33(3).
42 Ibid., s. 47(1).
43 1925 Act, s. 1.
44 1975 Act, s. 48(2).
45 Including committing the care of the child to a local authority or placing it under the supervision of a local authority: Guardianship Act 1973, s. 11(1) as amended by the 1975 Act, s. 48(3).
46 1975 Act, ss. 33(3) and 47(2): see Houghton-Stockdale Report, para. 138.
47 1975 Act, s. 49(2).
48 Ibid., s. 33(3).

"with whom the child has had his home,"[49] while in Scotland the traditional test of "care and possession" has been retained. Paragraph (d) in the Scottish provision has no English counterpart and is intended presumably to reflect the generality of the jurisdiction of the Scottish courts in this respect at common law.

36.45 The effect of these paragraphs is reasonably clear, with one exception,[50] but the statutory formula is complex. Power to apply is conferred by section 47(1) only upon a relative, step-parent or foster parent. The meaning of "relative" is clear by reference[51] to its statutory definition in section 57(1) of the Adoption Act 1958.[52] "Step-parent" is not defined but its meaning should cause no problem. Paragraph (a) of the English provision refers, as does its Scottish equivalent, to relatives and step-parents. Paragraphs (b) and (c) of the English provision were intended to cover foster parents[53] and do so not by name but by prescriptive description. The Scottish section, however, refers to foster parents by name[54] and defines them in wider terms[55] than the persons described in paragraphs (b) and (c)[56] but also includes them by prescriptive description rather by name in those two paragraphs. Paragraph (a) thus applies only to relatives and step-parents; paragraphs (b) and (c) cover foster parents.[57]

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49 Now the test also for an application for adoption: 1975 Act, s. 9.
50 The part played by the paramountcy of welfare principle.
51 1975 Act, ss. 47(5)(c) and 107(1).
52 7 Eliz. 2, c. 5.
53 Houghton-Stockdale Report, para. 122.
54 1975 Act, s. 47(1).
55 Ibid., s. 47(5)(b).
56 Of the English and Scottish provisions.
57 In both jurisdictions.

36.46 Paragraph (d)[58], applying only to Scotland, has effect in circumstances "not falling within paragraph (a), (b) or (c)." In each of these three paragraphs there is a care and possession requirement and in two of them a consent requirement. If any of these requirements, care and possession or consent, is not met, the alternative of paragraph (d) would be available. It is however in the case of foster parents subject to the overriding care and possession qualification contained in the definition of "foster-parent."[59] Paragraph (d) would thus be available to a relative or step-parent at any time but to a foster parent who had had care and possession for twelve months, not necessarily continuously nor immediately preceding the grant of custody. This indicates the nature of the "interest" required of an applicant to support his claim to the court.[60]

36.47 The structure of section 47(2)(d) is important. It disables the court from granting custody to any person other than a parent or guardian unless the person can "show cause" why custody should be awarded to him. The onus is clearly on that person to prove that point and in determining it the court will give effect to the paramountcy of welfare principle.[61] The court is thus obliged to ask such an applicant: why should you be preferred as the child's custodian having regard to the welfare of the child as the first and paramount consideration and disregarding, except from the welfare point of view, the claim of either parent?

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58 1975 Act, s. 47(2). 59 1975 Act, s. 47(b).

60 Much the same as the common law.

61 1925 Act, s. 1 by implication.

36.48 The position created or implied by section 47(2) is complex. A brief summary may be helpful:-

1. a parent or guardian may apply for custody at any time;
2. a relative or step-parent may apply for custody under paragraph (a) if the requirements thereof have been satisfied;
3. a relative or step-parent may apply for custody under paragraph (d) if the requirements of paragraph (a) have not been satisfied;
4. a foster parent may apply for custody under paragraph (b) or (c) if the requirements of the definition of foster parent in section 47(5)(b) and of paragraph (b) or (c) have been satisfied;
5. a foster parent may apply for custody under paragraph (d) if the requirements of the definition of foster parent in section 47(5)(b) have been satisfied and the requirements of paragraph (b) or (c) have not been satisfied.

(d) The function of welfare

36.49 So much is reasonably clear. What is uncertain, yet important, is the function of the paramountcy of welfare principle in the context of section 47 generally and of section 47(2)(d) in particular. Unless one of the paragraphs in subsection (2) is satisfied, the court cannot make a third party custody order. The paragraphs thus represent threshold

requirements in the strict sense. Assuming the requirements are met, the question reverts to the second limb of subsection (1), whether the power to grant custody to the third party should be exercised or not. On the face of it, that question is very similar indeed to the question built into paragraph (d). The former question is the substantive issue; the latter is the threshold problem.

36.50 The two issues are not however the same. If they were, the position would be unusual, to say nothing more, and one of the questions would be superfluous. The threshold question is: why should custody be awarded to the third party applicant? The answer might be: because nobody else is interested. Paragraph (d) in other words seems to be looking for a partial reason, probably merely a prima facie reason, why the court should consider granting custody to a third party. The substantial question, on the other hand, is: should custody be awarded to the third party applicant? That cannot or perhaps should not be a partial decision. Even if it is not contested, which is unlikely but possible,[62] the court would have to reach as impartial a judgment as possible, taking all the circumstances into account, not merely the applicant's arguments.

36.51 The two issues are different and there is no reason why some prima facie justification should not be called for, as a threshold requirement, before proceeding to the substantive

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62 Otherwise consent or agreement would have been given and one of the other paragraphs could have applied.

decision. That decision beyond question is concerned with the custody and upbringing of the child. The matter is properly before a court. Section 1 of the 1925 Act therefore applies in the normal way. That same principle must also by statutory direction form part of the threshold requirement in paragraph (d). The principle is not directed in that paragraph to the question whether an order should be made. In other words, the threshold requirement is: having regard to the welfare of the child as the first and paramount consideration, show cause why an order should be made. The novelty of this provision is that the paramountcy of welfare principle forms part of the satisfaction of a threshold requirement. Normally it is part of the process leading to the substantive decision. This makes sense only when the distinction between the two questions is understood: that is, why and whether a custody order should be made. It indicates also that threshold requirements need not be adjudicative in nature. The paramountcy of welfare principle may fall appropriately into place as part of an administrative duty. This is as true of the function in paragraph (d) of section 47(2) of the 1975 Act as it is of the function in section 1 of the 1925 Act.

36.52 The principal purpose of Part II of the 1975 Act was to widen the jurisdiction of the courts so as to afford some sort of security to foster parents and caring relatives.

As a consequence it extended the range of persons upon whom the rights and duties of parents could be devolved, in this case, willingly. That aspect, although to some extent incidental, forms part of the general trend towards extending the range of decisions open to the courts as options for achieving what is best for the child. The best example is the growing availability to the courts of local authority care and supervision facilities since 1958.[63] Indeed the recommendation of the Houghton-Stockdale Committee[64] to extend these facilities in realtion to custodianship order was implemented in the 1975 Act.[65]

36.53 Custodianship was intended as a desirable alternative to adoption in appropriate circumstances.[66] In the past the courts could not grant custody instead of an adoption order simply because that seemed to them best. The courts, in other words, could not grant anything but the subject of the application. There would be an element of choice only if the courts were faced with joint adoption and custody proceedings.[67] To be successful the policy recommended by the Houghton-Stockdale Committee involved giving the court such an alternative.[68] This would be wholly consistent with the pattern which has been emerging since 1958. The 1975 Act thus gave to the court power to make a custodianship order in England and a custody order in Scotland against the wishes of the applicant in an

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63 Paras. 36.30 to 36.36.
64 Houghton-Stockdale Report, paras. 129 and 138 (recommendation 26).
65 1975 Act, ss. 36(3) and 48(3).
66 Houghton-Stockdale Report, paras. 106 and 120.
67 Para. 25.45 to 25.47.
68 Houghton-Stockdale Report, para. 114.

application for adoption.[69] The different criteria relevant in exercising that power depend on whether there is an existing relationship[70] or not[71] between the applicant and the child. The criteria are the same in both jurisdictions. The Scottish provisions are less complicated and will therefore serve as the model for analysis.

36.54 The only formal requirement for making a custody order instead of the adoption order which is the subject of the application is that the applicant, apart from being qualified to apply for adoption, is also qualified to apply for custody.[72] Otherwise the threshold requirements either relate to the welfare of the child or are largely discretionary. The welfare test applies to applications by relations of the child.[73] An open-ended test of appropriateness is added to the welfare test in that case.[74] If these two tests are satisfied, the application is to be treated as if it were an application for custody. In the case of applications other than by relations, the only test is comparative appropriateness.[75]

36.55 The welfare test is where the court is of the opinion:-

> "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 custody order in his favour."[76]

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69 1975 Act, ss. 37(1) and (2) and 53(1).
70 Ibid., ss. 37(1) and 53(1)(a).
71 Ibid., ss. 37(2) and 53(1)(b).
72 Ibid., ss. 53(1).
73 Ibid., s. 53(1)(a)(i).
74 Ibid., s. 53(1)(a)(ii).
75 Ibid., s. 53(1)(b).
76 Ibid., s. 53(1)(a)(i).

This clearly includes the child's future welfare.[77] The court is thus being asked firstly to speculate on what is likely to happen to the child if he is adopted by the applicant or merely placed in the custody of the applicant and secondly which of these alternatives would be better for the child. There is an unambiguous choice for the court. A positive approach is required. This test forms part of a threshold requirement. So the alternative of custody is simply not available as a matter of law unless that would in the judgment of the court be the better solution for the child. Making that judgment is more an administrative than an adjudicative function, as it involves interpretational and substantive discretions in the intellectual and rational processes forming part of the overall decision-making function. Thus the content of this part of the threshold requirement is largely discretionary but its consequence is a matter of law.

36.56 The test annexed to the welfare test in the case of applications by relations directs the court's attention to the applicant rather than to the child.[78] No comparison is involved. There is no real choice. The test is expressed very loosely: would it be appropriate to make a custody order in favour of the applicant. The amount will normally be positive. Otherwise the alternative of custody in preference to adoption would be irrelevant. Thus, so far as relations are concerned, custody

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77 The use of the words "would" and "promoted."

78 1975 Act, s. 53(1)(a)(ii).

is not available as an alternative to adoption unless to do so would be justifiable from the point of view of the child and the applicant.

36.57 The test created by the Act for applicants other than relations[79] is much less specific and thereby gives a wider discretion to the court. It is broadly whether custody would be "more appropriate" than adoption. This will require a fairly wide ranging investigation by the court in order to ascertain and assess the relative merits and disadvantages of custody and adoption. There is no reason to doubt that this will involve the welfare of the child and the qualifications of the applicant. But neither is written into the procedure as a positive threshold requirement. Each will therefore be relevant only as an ancillary aspect of comparative appropriateness.

36.58 The 1975 Act gives no indication of what may or may not be "appropriate." Custody is involved in Scotland, custodianship in England. The paramountcy of welfare principle applies generally to each of these issues.[80] Is there any reason why it does not apply in this context? If it does apply, which seems likely, the courts will be bound, in deciding whether it would be appropriate to make a custody order in favour of the applicant[81] or whether custody would be more appropriate than adoption,[82] to regard the welfare of the child as the first and paramount consideration. This would be consistent with the

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79 Ibid., s. 53(1)(b).
80 1925 Act, s. 1 by implication in Scotland; 1975 Act, s. 33(9) in England.
81 1975 Act, s. 53(1)(a)(ii).
82 Ibid., s. 53(1)(b).

purpose and structure of the provisions, the phraseology of the Act and the views of the Houghton-Stockdale Committee.[83] The principle, therefore, applies.

36.59 These tests are technically threshold requirements. In this case they precede a duty rather than a discretion. It makes sense to find an element of discretion built into certain aspects of these threshold requirements. It is nevertheless unusual to find the paramountcy of welfare principle as part of a threshold requirement. There is also another example of that in the Act.[84] This approach means in the case of applications by relations that welfare operates twice in the same decision-making process: first, as the sole objective of the first threshold requirement; second, as part of the process of deciding whether the second threshold requirement has been met. In the case of applications other than by relations it is only part of the test of comparative appropriateness.

36.60 The availability of custody as an alternative to adoption is wholly consistent with the policy of the post-1958 legislation to support the welfare approach to custody and related matters by extending the range of alternative sources and methods of care, by breaking down the traditional barriers between private and public regimes of child care, by reducing the impediments created by the judicial nature of the proceedings

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83 Houghton-Stockdale Report, para. 114.

84 1975 Act, s. 36(3).

and finally in effect by making the court a more realistic parens patriae than had ever been possible before. This places a tremendous responsibility upon the courts. The guidance given to them by statute is minimal but important. It usually takes the form of welfare in one way or another. Indeed Parliament has been forced to create new welfare models or adapt existing ones to meet the challenge. Many of them are prima facie similar. On examination they are often different. The problem so created is complex. The only common feature is an element of discretion. But that, given not only the word but also the concept and the policy, is almost inevitable.

CHAPTER 37

WELFARE AND GUARDIANSHIP

Section 1 - Scotland

(a) Introduction

37.1 The significance of custody as a concept in the law of children compared with guardianship has continued to grow with increasing rapidity since 1886 especially in Scotland. There were several reported cases on guardianship issues between 1886 and 1914, fewer after 1918 and very few indeed since 1925. The institution of tutory, and to a lesser extent curatory, has become more of a residual remedy rather than the principal method of protecting fatherless and later parentless children. In England the concept of parental authority had emerged to a large extent from the various types of guardianship. Scots law had no need of such a development, for patria potestas and tutory were equally effective institutions of the law. It might have been expected that the Guardianship of Infants Act 1886[1] would have had a greater impact on English law than on Scots law.[2] This was probably true but the Act coupled with other changes, social and legal, common to both jurisdictions effectively directed Scots Law into the same stream of development as English law.[3]

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1 49 & 50 Vict., c.27.

2 Because it was enacted largely in the English legal and indeed social context.

3 I.e. a reduction in the contribution of guardianship.

37.2 The 1886 Act nevertheless had an impact on the law of Scotland. By section 8 its application was restricted to pupils and their tutors. In 1897 the Court of Session confirmed very clearly that it did not extend to minors,[4] despite the strong contrary views of Lord Kinnear.[5] The nature of the Act made in inapplicable to illegitimate children.[6] There is no doubt that legitimate pupils were directly affected by the Act to the extent that the child's mother became entitled to the office of tutor, either alone or with the tutor appointed by the father.[7] This would certainly strengthen the mother's position which at common law depended more on her natural relationship with the child. The mother's new statutory status was a matter of law.[8] Just like the father or any other person as tutor, the mother became liable to judicial oversight in the administration of her office and ultimately to removal.[9] The extension of the

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4 Chalmers' Trustees v Sinclair (1897) 24 Rettie 1047. The common law therefore applied. That disqualified a married woman from acting as curator. The majority of the Court of Session founded upon Kerbechill v Kerbechill (1586) Morrison 9585. It is interesting that even in 1586 the law was justified because it "was founded and made for the weil and preservation of pupils and their gear."

5 Ibid. at pp. 1053 and 1054 where he argued that the common law did not prevent a married woman from acting as curator. He relied upon McCallum v Macdonald (1853) 15 Dunlop 535.

6 Brand v Shaws (1888) 16 Rettie 315 at p.320 per Lord Inglis L.P.

7 1886 Act, s.2.

8 Campbell v Maquay (1888) 25 Scottish Law Reporter 587 at p.588 per Lord Inglis L.P.

9 At common law : e.g. Willison and others, Petitioners (1890) 18 Rettie 228 at p.230 per Lord Inglis L.P.; Boylan v Hunter 1922 S.L.T. 4 at p.5 per Lord Clyde L.P. Or under statute : e.g. 1886 Act, s.6; Campbell v Maquay (1888) 25 Scottish Law Reporter 587 at p.588 per Lord Inglis L.P.

office of tutor to the mother of the child could naturally either benefit the child or put him at risk: hence the need for judicial protection in the normal way.

37.3 The Act also gave to the mother a limited power to appoint[10] and nominate[11] a tutor to her pupil child after her death. Although the appointment so made by the mother[12] could not be challenged,[13] the Court of Session soon decided that any tutor so appointed was not automatically entitled to custody of the child.[14] The mother nevertheless, by exercising her limited power, was in a position to influence the upbringing of her child.

37.4 The court was given power to appoint a tutor to act jointly with the mother acting as tutor under the Act.[15] The decision was a matter for the discretion of the court but the indications are that considerable attention was paid to the wishes of the mother. In one case this was intended to avoid any possible hostility between the mother and the tutors suggested by the paternal next of kin.[16] In another case, on the other hand, Lord Balfour L.P. said that the duty of the court was "to have regard primarily to the benefit of the pupil," although he did not exclude the wishes of the mother.[17]

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10 1886 Act, s.3(1).

11 Ibid. s.3(2).

12 And confirmed, where necessary, under s.3(2).

13 Fraser, Petitioner(1893) 1 S.L.T. 126; Murray v Maclay 6 Fraser 160.

14 Fenwick v Hannah's Trustees (1893) 20 Rettie 848.

15 1886 Act, s.2.

16 Martin v Stewart (1885) 16 Rettie 185 at p.186 per Lord Inglis L.P.

17 Sim v Robertson (1901) 3 Fraser 1027 at p.1028 per Lord Balfour L.P.

These three aspects of the 1886 Act thus had little direct but potentially considerable indirect consequences for the child, as a result simply of modifying the source of power over the child.

37.5 There is no necessity, legal or otherwise, for a guardian to be appointed. It is a matter of choice on the part of the father, mother, interested third party or the court.[18] The justification for guardianship in the earlier periods was the efficient administration of property, especially where the father was dead or inappropriate as the administrator for one reason or another. No doubt that was part of the reasoning which led some to believe that ownership of a fund was necessary in England for the exercise of the wardship jurisdiction.[19] There is no doubt that it will often be convenient to have a guardian appointed to look after the child's property. Some Scottish cases indicate the technical difficulties if there is no guardian[20] or if there are foreign implications.[21] It would be altogether more exceptional for a guardian to be appointed only to protect the child's personal welfare. A tutor has no absolute right to custody of the child's person,[22] although he has a prima facie right

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18 Often acting together.

19 Para. 45.65.

20 Atherstone's Trustees, Petitioners (1896) 24 Rettie 39; Webb v Cleland's Trustees (1904) 6 Fraser 274.

21 Seddon, Petitioner (1891) 19 Rettie 101; McCrossan's Trustees (1899) 7 S.L.T. 22; Elder, Petitioner (1903) 5 Fraser 307; McFadzean, Petitioner 1917 S.C. 142; Collins, Petitioner 1921 2 S.L.T. 36; Ogilvy v Ogilvy's Trustees 1926 S.N. 166.

22 Fenwick v Hannah's Trustees (1893) 20 Rettie 848.

to control the child's person.[23] It has even been suggested that if he has a claim to the office of tutor, that would assist his claim to custody.[24] That is not a matter of law but of judicial discretion.

37.6 Fiscal and other policies began to make inroads into the capacity to hold large estates as the twentieth century advanced. The need of the propertied classes for the insitution of guardianship tended to diminish for that reason. The trust, on the other hand, became a more important device for protecting and administering property. So the decline of guardianship as a method of property control could not be regarded as wholly unexpected.

37.7 Changes also took place in the use of guardianship as a means of protecting the person of the child, particularly from his parent. In the late nineteenth century unofficial arrangements became popular.[25] Sometimes they ended up dramatically in the courts.[26] To some extent the Custody of Infants Act 1891[27] was intended to remedy some of the most serious abuses and weaknesses of that system. But in the twentieth century the state became more involved in the care and protection of children and provided alternatives for children whose parents would not or could not care for them. It is perhaps unusual to think of adoption in that sense but

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23 McCrossan's Trustees, Petitioners (1899) 7 S.L.T. 22.

24 Alexander v McGarrity (1903) 5 Fraser 654.

25 Mr Quarrier's homes in Scotland; Dr. Barnardo's homes in England.

26 E.g. Morrison v Quarrier(1894) 21 Rettie 430 and 617; Kincaid v Quarrier (1896) 23 Rettie 676; Barnardo v McHugh [1891] A.C. 388; Barnardo v Ford [1892] A.C. 326.

27 54 & 55 Vict; c.3.

inter alia it provided a satisfactory form of care for children unwanted by their parents. The rationalisation of local authority care in 1948 made available a very important source of care, backed up, in the case of delinquent children, by the Children and Young Persons Acts.[28] The Social Work (Scotland) Act 1968[29] was intended to make the care of children uniform, irrespective of the reason why care was needed.[30] The most recent legislation has tended to increase the range of alternative sources of care, including private care by relatives, step-parents and foster parents.[31]

37.8 In response to these statutory changes guardianship of the person of the child has atrophied. The personal welfare of the child is now dealt with in terms either of the public legislation or inter-parental custodial disputes. Non-parental custodial disputes can occur at the margin of the statutory schemes. Such disputes probably cause the most difficulties for the courts, for the issues are often not only competing welfare considerations but also conflicting policies underlying the various public codes. Guardianship has thus become useful only in rather special and limited circumstances, and custody, apart from inter-parental disputes, has become somewhat distorted by the statutory super-structure built on top of it. This complex system has been brought about largely in the name of the welfare of the child.

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28 Children Act 1948 (11 & 12 Geo. 6, c.43).

29 1968 c.49.

30 I.e. delinquency, parental death, absence, incapacity or unfitness.

31 Children Act 1975 (1975 c.72): paras. 45.49 to 45.52.

(b) The nature of guardianship

37.9 A parent is guardian of his or her child by operation of law. In the case of the father, it is a matter of common law;[32] in the case of the mother, it is a matter of statute.[33] The office derives from the law and "the fact of blood relationship."[34] There is no question of choice, suitability or fitness.[35] It is a legal right, comprising also a legal duty.[36] The office may not be given up volunatarily.[37] For these reasons, such a tutor was not regarded as a trustee under the Trusts (Scotland) Act 1921[38] but this was changed by Parliament in 1925.[39] The mother's statutory right to the office of tutor formed the background to several cases in the Court of Session[40] and the sheriff court.[41] The full consequences of the mother's status as tutor were accepted by

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32 Cochrane, Petitioner (1891) 18 Rettie 456 at p.458 per Lord Young; Shearer's Tutor - Petitioner 1924 S.C. 445 at p.449 per Lord Anderson.

33 Campbell v Maquay (1888) 25 Scottish Law Reporter 587 at p.588 per Lord Inglis L.P.; Willison and others, Petitioners (1890) 18 Rettie 228 at p.230 per Lord Inglis L.P.; Speirs, Petitioner 1946 S.L.T. 203 at p.203 per Lord Sorn.

34 Shearer's Tutor - Petitioner 1924 S.C. 445 at p.449 per Lord Anderson.

35 Ibid., at pp. 449 and 450.

36 Cochrane, Petitioner (1891) 18 Rettie 456 per Lord Young.

37 Shearer's Tutor - Petitioner 1924 S.C. 445.

38 11 & 12 Geo. 5, c.58.

39 Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c.45), s.10.

40 Campbell v Maquay (1888) 25 Scottish Law Reporter 587; Willison and others, Petitioners (1890) 18 Rettie 228; Ferrier's Tutrix-at-law, Petitioner 1925 S.C. 571; Speirs, Petitioner 1946 S.L.T. 203.

41 Miller v Miller (1889) 5 Sh. Ct. Rep. 289.

the courts. It was possible for the court to appoint a tutor to act with the mother[42] but on her death that appointment lapsed and any tutor competently appointed by the mother was entitled to act in the normal way.[43]

37.10 These rules are wholly static. It is a different question how the tutor may exercise his or her powers once the office has been created.[44] The welfare of the child may be a matter of some importance. The analysis of the earlier periods indicated a relatively positive role for welfare in the dynamic contexts of guardianship.[45] Generally speaking, as with a parent, so with a guardian, the court will not normally interfere with the day-to-day administration of the person in authority. It was expressed very concisely by Lord McLaren:-

> "Now, it is not disputed that Mr Maclay was lawfully appointed guardian by the mother of the children upon whom their guardianship had devolved by statute. Whatever may have been done in exceptional cases, the general rule is that the Court will not relieve a guardian of the responsibilities which attach to his office by instructing him what to do, but if he fails in his duty, will, upon proper applications and upon a case of misconduct being made out, relieve him from the office."[46]

In other words, paraphrasing the comments of the Lord President,[47] it is not for the court to substitute its judgment

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42 1886 Act, s.2; 1925 Act, s.4(1).

43 Fraser, Petitioner (1893) 1 S.L.T. 126.

44 E.g. Fenwick v Hannah's Trustees (1893) 20 Rettie 848; Murray v Maclay (1903) 6 Fraser 160.

45 Paras. 32.27 to 32.29 and 32.74 to 32.77.

46 Murray v Maclay (1903) 6 Fraser 160 at p.166 per Lord McLaren. See also Balfour Melville, Petitioner (1903) 5 Fraser 347 at p.352 per Lord Kinnear: but cf. Stuart v Moore (1861) 4 Macqueen 1.

47 Ibid., at p.165 per Lord Kinross L.P.

of which is best for the child for the guardian's view of what is best for the child. The remedy is removal of the guardian; the ground is failure to do his duty; the criterion is the welfare of the child. That follows the traditional pattern of threshold requirements followed by the exercise of a discretion.

37.11 One of the problems is when and in what circumstances may an application be properly made. Murray v Maclay[48] concerned a dispute[49] about the children's religious education. Such disputes and those about custody are perhaps the most difficult for the courts. Where property is involved, it is much easier. It is not always necessary, or indeed competent, to deprive the guardian, whether a parent or not, of his office. Certain of his rights or powers may be temporarily suspended or a third party authorised to act in a limited context. There is no doubt, for example, that in certain circumstances a curator ad litem should be appointed to protect the child's patrimonial interests in the litigation.[50] Such a person would merely deal with the child's interests in the matter and the position of either parent or tutor and administrator-at-law would otherwise be unaffected.

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48 (1903) 6 Fraser 160.

49 Between the guardian appointed by the mother and the paternal uncle.

50 Murphy v Smith 1920 1 S.L.T. 25; Lowther v Chien (1935) 52 Sh. Ct. Rep. 197.

37.12 If such litigation concludes by a judicial award of damages to the child, the problem of administering that fund arises. The natural guardianship of a parent could not be superseded by the appointment of a trustee.[51] But the court could "remove any guardian, including a legal guardian, on certain grounds."[52] Although a trustee could not be appointed to administer such a fund, there was no reason why a judicial factor loco tutoris should not be appointed and supersede the guardian quoad that fund.[53] Such a factory terminates when the child attains majority.[54]

37.13 A factor loco tutoris may also be appointed in relation to any estate or interest in property either where there is no legal guardian[55] or where it would for one reason or another be inappropriate for the guardian to administer the property.[56] Much less clear however is the position regarding the protection of the pupil's person. Although a factor is concerned principally with the child's property, he could not claim to have no interest in or responsibility for his person. The reason for the appointment of a factor loco

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51 The guardian cannot transfer his powers as guardian for that would amount to eliminating his duties to the child and the court has no power to appoint a trustee: see Boylan v Hunter 1922 S.L.T. 4 at p.5 per Lord Clyde L.P.

52 Boylan v Hunter 1922 S.L.T. 4 at p.5 per Lord Clyde L.P.

53 Idem.

54 At age eighteen, whatever the order of the court said: McIntosh v Wood 1970 S.L.T. (Notes) 32.

55 Hutcheson, Petitioner 1909 1 S.L.T. 71.

56 Allan, Petitioner (1895) 3 S.L.T. 87; Balfour Melville, Petitioners (1903) 5 Fraser 347.

tutoris in Moncrieff, Petitioner[57] was the child's succession to certain rights in the estate of her Russian maternal grandmother. The child's mother was also dead. The factor was appointed on the application of the child's paternal grandmother. The child's father, a Scot living in Russia, claimed his daughter's share in the estate as her legal guardian but the Russian courts would not give it to him unless the child was in his custody. The child was living with her paternal grandmother in Scotland and the factor considered that it would be against the child's interests to live with her father or in Russia. The Court of Session in these circumstances ordered the factor to detain the person of the child in the meantime. There the matter appeared to rest. The court was as much concerned with the child's person as with her interest in the Russian grandmother's estate. The decision however is somewhat anomalous. For, although the order of the court was directed to the child's personal welfare, the matter arose as a dispute about the administration of property.

37.14 Parental guardianship embraces control of the child's property and person. In practice the parental guardian may be superseded in the exercise of his powers in relation to certain selected aspects of his authority.[58] Non-parental guardianship, on the other hand, is likely to be fragmented in principle as well as in practice, as the tutor at law is

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57 (1891) 18 Rettie 1029.

58 Where a factor loco tutoris is appointed to look after a child's estate, the child's legal guardian, if there is one, must renounce his rights quoad that estate before the factor can be appointed: Speirs, Petitioner 1946 S.L.T. 203 et p. 204 per Lord Sorn.

normally barred from actual custody of the child. There is probably no reason to stop any relative of the child, or even any third party, applying to the court in a custodial context,[59] whether there is a guardian[60] or not.[61] If there is neither parent nor guardian, the issues are relatively straightforward. The presence of a guardian, although perhaps simplifying the administration of any property of the child, makes questions of personal welfare more complex.

(c) Techniques of removal and appointment

37.15 There are two aspects of the problem: appointing a guardian of the person; and superintending the administration of the office. The incapax in the leading case of Dick v Douglas[62] was a senile old lady. Her property was already under the care of a curator bonis and it was the petitioners' intention merely to have "a tutor appointed to their mother's person."[63] The position would not be precisely the same if the incapax was a child. In that case, if there was a legal guardian exercising responsibility for the child's person, that guardian would no doubt require first to be removed. But if there was merely a factor loco tutoris caring for the child's property, the position would be much the same as in Dick v Douglas.[64] The dilemma for the court was clear. The nearest male agnate was entitled to be served tutor-at-law, thereby coming under an obligation to ensure that the incapax was being properly cared for. Such a tutor would have precedence

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59 Paras. 45.48 to 45.50. See also Children Act 1975, s.47.

60 Murray v Maclay (1903) 6 Fraser 160.

61 E.g. Reilly v Quarrier (1895) 22 Rettie 879.

62 1924 S.C. 787.

63 Ibid. at p. 792 per Lord Clyde L.P.

64 1924 S.C. 787.

over any guardian appointed by the court.[65] The tutor-at-law would however be barred from having actual custody of the person of the incapax.[66] That would not necessarily apply to a tutor appointed by the court.[67] Lord Clyde L.P. saw no reason "for holding it incompetent to appoint a tutor-dative to the ward's person, while allowing the management of his estate by a curator bonis to continue."[68] The court so appointed the eldest son of the incapax,[69] provided that, where there was a legal guardian, such guardian would require to be removed before a tutor-dative could be appointed.

37.16 The technique of judicial tutorial appointments to a child's person is, at best, anomalous, especially since Parliament has confirmed the right of relatives and other third parties to apply direct to the court for custody.[70] Dick v Douglas[71] and the decision in Shaw v Richardson[72] of Sheriff Mercer who adopted a similar approach in a child custody context emphasise strongly the nature of the problem that, where there is an existing legal right relating to the child,[73] that right must somehow be discounted before a decision can be reached creating a new legal regime for the care of the child's person or property. On that basis there can be no doubt about

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65 Ibid. at p. 793 per Lord Clyde L.P.

66 Idem.

67 Idem.

68 Idem.

69 Which to some extent they did in Shaw v Richardson (1936) 53 Sh.Ct. Rep. 135.

70 Children Act 1975, s.47.

71 1924 S.C. 787.

72 (1936) 53 Sh. Ct. Rep. 135.

73 Whether as a parent, guardian or otherwise.

the dual function of the court.[74] Dick v Douglas[75] was decided before the 1925 Act. It remains to be seen whether that would have made any difference if the issue concerned a child incapax.[76]

(d) The guardian's duties

37.17 Most of the reported guardianship cases were determined before 1925. The 1925 Act has thus had little judicial impact on the modern approach to guardianship. Two principal questions nevertheless remain to be considered. What grounds are appropriate for depriving a tutor of his office or suspending the exercise of some of his powers? What criteria are relevant in appointing a tutor? To consider first the criteria of disqualification: Lord McLaren, it will be recalled, indicated that the remedy for inadequate tutorial administration was removal of the tutor. The justification for removal was broadly failure in the duties of guardian and "misconduct".[77] This means quite clearly that the tutor must have proved himself in the past to have been tutorially inadequate as a consequence of decisions taken or acts done by him. It does not mean that the tutor may be removed simply because someone else might discharge the duties of the office better. But what is the duty owed by the tutor to the child?

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74 I.e. the satisfaction of threshold requirements followed by the exercise of a discretion.

75 1924 S.C. 787.

76 Shaw v Richardson (1936) 53 Sh. Ct. Rep. 135 was decided in terms of the 1925 Act. But it is unlikely that anything in that Act would have made much difference to Sheriff Mercer's conclusion, although it influenced his reasoning.

77 Murray v Maclay (1903) 6 Fraser 160 at p.166 per Lord McLaren.

Earlier cases indicated that it was to look after the child's property and person for the benefit of the child.[78] The tutor's precise duty has never been carefully articulated but the clear implication is that it is to act in the child's best interests.

37.18 The duty has been variously described. In Ross v Ross[79] the House of Lords had occasion to comment generally on the financial responsibilities of a guardian.[80] In suggesting a test for deciding how much of a minor's property should be used to pay for his education and maintenance, Lord Herschell said that all the circumstances had to be taken into account, "the leading consideration, - in fact, as regards the amount, one might say, the governing consideration - being the interest of the heir."[81] The uses to which a pupil's property may properly be put are thus determinable only in relation to each set of circumstances.

37.19 One particular problem which faced the Court of Session for a number of years was the power to sell the whole or part of the pupil's heritable estate. The attitude of the common law was that the tutor's duty was to preserve the estate, not sell it.[82] The Court of Session however

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78 Paras. 32.26 to 32.29.

79 (1896) 23 Rettie (H.L.) 67.

80 Ibid. at pp.75 and 76 per Lord Halsbury L.C.

81 Ibid., at p.79 per Lord Herschell. Cf. Hamilton's Tutors, Petitioners 1924 S.L.T. 229 where the court in very exceptional circumstances authorised the tutors to make payments not for the benefit of the pupil but for the benefit of the pupil's cousin.

82 See Linton v Inland Revenue 1928 S.C. 209 at p.213 per Lord Clyde L.P. and cf. his comments on the statutory position at p.214.

felt free in the exercise of its nobile officium to authorise such a sale when appropriate. The tests were, to say the least, uncertain. Lord Robertson L.P. simply looked for "some chance of advantage".[83] A more stringent view was taken in Gilligan's Factor v Fraser,[84] namely "high expediency" or "urgent necessity." It was later suggested that "future advantage" would not be enough; the sale would normally have to be necessary in the interests of the child.[85] By 1925 the test of "necessity" seems generally to have been accepted,[86] amounting in effect to the approach in most of the earlier cases.[87]

37.20 About the same time two independent but related matters came before the Court of Session and tended to distract attention from the central issue. A father as tutor and administrator-in-law was held not to be a trustee under the Trusts (Scotland) Act 1921 and so did not have available the statutory power of a trustee to sell heritage.[88] A mother, as statutory guardian under the Guardianship of Infants Act 1886, required no judicial authority to complete title in name of

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83 Logan, Petitioner (1897) 25 Rettie 51 at p.51 per Lord Robertson L.P.

84 (1898) 25 Rettie 876.

85 McFadzean, Petitioner 1917 S.C. 142.

86 Shearer's Tutor, Petitioner 1924 S.C. 445; Ferrier's Tutrix-at-law, Petitioner 1925 S.C. 571 at p.573 per Lord Alness L.J. - C.

87 E.g. Colt v Colt (1801) Morrison, Appendix voce Tutor, No.1; Vere v Dale (1804) Morrison 16389; Lord Clinton, Petitioner (1875) 3 Rettie 62; Campbell, Petitioner (1880) 7 Rettie 1032.

88 Shearer's Tutor, Petitioner 1924 S.C. 445 overruling Forbes, Petitioner 1922 S.L.T. 294.

her pupil child; that was simply "an ordinary act of administration."[89] Thus in 1925 any guardian required judicial authority to sell heritage. However a legal guardian could make up title in the pupil's name at any time; a factor loco tutoris continued to require judicial authority to make up title in the pupil's name.[90]

37.21 The position of parental legal guardians was however changed by section 10 of the Guardianship of Infants Act 1925. Such a guardian was deemed to be a trustee for the purposes of the Trusts (Scotland) Act 1921 which thus gave them the benefit of the statutory power of sale in section 4(1)(a) of that Act. Heritage could thereafter be sold by a parental guardian provided the sale was not at variance with the purposes of the trust.[91] By trust in this context is presumably meant the duty to secure the benefit of the child. Judicial authority is available under the Act to sell the property when to do so would be at variance with the purposes of the trust.[92] The need for judicial authority has certainly been reduced but the question could still arise in certain circumstances.[93]

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89 Ferrier's Tutrix-at-law, Petitioner 1924 S.L.T. 118.

90 Kirkland, Petitioner (1848) 10 Dunlop 1232.

91 Dempster, Petitioner 1926 S.N. 15; Cunningham's Tutrix, Petitioner 1949 S.L.T. (Notes) 11.

92 Trusts (Scotland) Act 1921, s.5: the test is expediency.

93 E.g. where the sale is by a factor loco tutoris, the application would be to the nobile officium of the Court of Session; where the sale by a legal guardian deemed trustee is at variance with the purpose of the trust, the application would be under section 5 of the 1921 Act. The judicial and statutory criteria are different.

37.22 So much for the duty of the guardian in relation to the child's property and the overriding powers of the court:[94] the duty owed by the guardian to the child's person is less clear.[95] Except in the case of parental guardians, it would be unusual for a guardian to have personal responsibility for the care of the child.[96] His function is rather one of superintendence: to ensure that the child is properly maintained, educated and brought up. Dispute about the person of the child tends to arise in the custodial context. But that is not necessarily so.[97] To some extent it is a reversion to the question who can competently apply to the court for a custody order. In Hunter v McGregor,[98] for example, the child's factor loco tutoris raised an action for custody in Perth Sheriff Court. The defender, who was the child's paternal uncle, argued that the pursuer had no title to sue. Sheriff Jameson rejected this contention strongly:-

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94 A guardianship properly created cannot be consensually terminated: Balfour Melville, Petitioner (1903) 5 Fraser 347 at p.352 per Lord Kinnear.

95 Who are now entitled to exercise the patria potestas jointly: Guardianship Act 1973 (1973 c.29), s.10(1).

96 By barring the nearest agnate from actual custody.

97 McCrossan's Trustees, Petitioners (1899) 7 S.L.T. 22, Murray v Maclay (1903) 6 Fraser 160 and Low, Petitioner 1920 S.C. 351 were custodial disputes between a relative and a guardian, depending to some extent upon the guardian's power in relation to the person of the child.

98 (1897) 13 Sh. Ct. Rep. 215.

> "A factor loco tutoris has, in my opinion, both title and interest to pursue such an action as the present and to obtain delivery of the person of the ward for the purpose of placing the ward in suitable keeping."[99]

Such a guardian has an implied duty therefore to ensure the provision of suitable care for the child. If this is true of a factor loco tutoris in the sheriff court, it is true a priori of any guardian in the Court of Session.[1]

(e) Criteria for disqualification

(i) Parental guardians

37.23 Most of the reported cases dealing with disqualification from office or suspension of powers concern parental guardians and the property of the child. Parental guardians are in a sense different, because their guardianship is created by the existence of a relationship rather than by appointment. For that reason, it has been noted, they hold no office.[2] There is no doubt however that the exercise of some or all of their powers may be suspended.[3] The question whether a parental guardian must renounce his or her rights before another guardian may be appointed is

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99 Ibid., at p.216 per Sheriff Jameson.

1 Denny v Macnish (1863) 1 Macpherson 268: paras.32.28 and 32.40

2 A. & J. Robertson, Petitioners (1865) 3 Macpherson 1077 at p.1079 per Lord Inglis L.J. - C. (curatorial power); Shearer's Tutor, Petitioner 1924 S.C. 445 at p.447 per Lord Alness L.J. - C. (tutorial power).

3 Idem.

largely a technical formality,[4] but a formality which could be important. More important in the current context is that the basis of parental guardianship is a relationship. To some extent it makes the position of parental guardian more secure from the guardian's point of view[5] but also carrying greater inherent risks for the child.[6]

37.24 So far as property is concerned, the courts tend to take a fairly simple and formal view of their function. Clearly they prefer to avoid any suggestion of judicial control over the detail of the guardian's administration.[7] If either he or his regime is unacceptable, his powers will be suspended or he will be removed from office.[8] In Balfour Melville, Petitioner Lord Kinnear was speaking of a recall of a judicial factory but his comments could apply equally to appointing a factor:-

> "A farmer ought either to have the uncontrolled management of his son's estate, or else, if it is admitted that he is not in a position to claim the uncontrolled administration, it is better for the interests of the son that the administration both of capital and income should remain in the hands of the officer of the Court. " [9]

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4 Willison and others, Petitioners (1890) 18 Rettie 228 at p.230 per Lord Inglis L.P.; Speirs, Petitioner 1946 S.L.T. 203 at p.204 per Lord Sorn: cf. Moncrieff, Petitioner (1891) 18 Rettie 1029; Boylan v Hunter 1922 S.L.T. 4.

5 Because he is supported by legal right and natural relationship.

6 As he is subject to the discretionary administration of the parental guardian's powers.

7 Murray v Maclay (1903) 6 Fraser 160; Balfour Melville, Petitioner (1903) 5 Fraser 347.

8 (1903) 5 Fraser 347.

9 Ibid., at p.352 per Lord Kinnear..

The criteria for judicial intervention would therefore be general rather than specific and would apply equally to the mother or father as guardian. The broad test applied by the courts is a conflict of interest between the parental guardian and the child. If the court finds such a conflict, a factor loco tutoris is appointed to administer the property in question.[10] In the case of litigation a curator ad litem is appointed to protect the child's interest.[11] Parental bankruptcy or financial embarrassment does not necessarily justify judicial intervention,[12] although such circumstances may convince the court of the general undesirability of leaving the child's property in the control of such a person. But that is altogether different from a simple conflict of interest. Indeed in two cases, each concerning the mother as guardian, the court went further. They considered in one case the fitness of the guardian to administer the fund[13] and in the other case the general undesirability of the guardian acting in that capacity.[14] The remarriage of a mother was not in itself treated as a ground of disqualification.[15]

37.25 There is no suggestion that the court in these cases was deliberately discriminating against mothers or guardians, for similar comments were made in relation to a father in Cochrane, Petitioner.[16] Indeed the words of

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10 Allan, Petitioner (1895) 3 S.L.T. 87; Speirs, Petitioner 1946 S.L.T. 203.

11 Murphy v Smith 1920 1 S.L.T. 25; Lowther v Chien (1935) 52 Sh. Ct. Rep. 197.

12 See Balfour Melville, Petitioner (1903) 5 Fraser 347.

13 Boylan v Hunter 1922 S.L.T. 4.

14 Willison and others, Petitioners (1890) 18 Rettie 228.

15 Campbell v Maquay (1888) 25 Scottish Law Reporter 587.

16 (1891) 18 Rettie 456.

Lord Young in that case suggest that the approach of the court may fall into the traditional pattern of the satisfaction of threshold requirements followed by the exercise of a discretion. He said:-

> "I do not mean to say anything to the effect that the court may not protect a pupil child in a question in which his or her father has an adverse interest. The court in the exercise of its nobile officium may appoint an officer to protect the pupil against the father, and to see that the interest of the former is duly attended to, if there is any reasonable ground to fear that it might be in danger if the father was left in charge of it." [17]

This can be analysed in terms of three questions:-

1. has the father an interest in the property adverse to the child;

2. is the child's interest "in danger" if left in the charge of the father;

3. should a factor be appointed to look after the child's interest?

The first is clearly a threshold issue; the third a matter of discretion. The second is probably a threshold issue as well. Unless there were such a danger, Lord Young at least would not appoint a factor. Some of the other reported cases suggest that a factor would be appointed only if a conflict of interest were established;[18] others talk in terms of tutorial fitness.[19]

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17 Ibid. at p.458 per Lord Young.

18 Allan, Petitioner (1895) 3 S.L.T. 87; Murphy v Smith 1920 1 S.L.T. 25; Lowther v Chien (1935) 52 Sh. Ct. Rep. 197; Speirs, Petitioner 1946 S.L.T. 203.

19 Willison and others, Petitioners (1890) 18 Rettie 228; Boylan v Hunter 1922 S.L.T. 4.

37.26 The position is not entirely clear. Probably either a conflict of interest or tutorial inadequacy would justify an appointment. Lord Young's approach is probably more logical but the trend of the authorities does not support his view. In practice it would not matter very much. The expressions "conflict of interest" and "tutorial inadequacy" are imprecise and leave a great deal to the interpretational and administrative discretion of the court. They give at best a vague indication of the circumstances in which the exercise of tutorial powers may be suspended. The discretionary stage of the decision is not apparently regulated in any way. But again in practice the exercise of the substantive discretion is likely to be influenced if not determined by the satisfaction of the threshold requirements. The whole approach therefore is essentially flexible.

(ii) Non-parental guardians

37.27 What about non-parental guardians? It is unlikely, although possible, that there may be a conflict of interest in the property between the tutor and the pupil.[20] That has not been the ground for removing the guardian from office. One of two testamentary trustees who were also tutors was removed from office in Whittle v Carruthers[21] after he had

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20 Because non-parental guardians are frequently not related at all to the child.

21 (1896) 23 Rettie 775.

become bankrupt. His estates were sequestrated. According to the court these circumstances rendered him a "very unsuitable person" to take part in managing the estate of the pupil. In Edgar v Fisher's Trustees[22] the child's aunt was the sole tutor quoad the trust estate of which the aunt and the child were the beneficiaries. The aunt removed the child from the jurisdiction and failed to comply with an order of the court directing her to restore the child to her father. The father asked the court to remove her from office as testamentary tutor and to appoint a factor loco tutoris to look after the child's share of the estate. The Court of Session appointed a factor loco tutoris but did not remove the aunt from her office of testamentary tutor.[23] These cases indicate quite clearly that in the case of non-parental guardians the grounds for judicial intervention relate exclusively to the fitness or otherwise of the guardian. The interests of the child play no direct role in the process.

37.28 Although Edgar v Fisher's Trustees[24] was decided in 1893, no mention was made of section 6 of the Guardianship of Infants Act 1886.[25] That section gives the court power to

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22 (1893) 21 Rettie 325.

23 The effect therefore was to suspend the exercise by the aunt of her tutorial powers quoad the child's share of the trust estate during the currency of the factory.

24 (1893) 21 Rettie 325.

25 Guardianship of Minors Act 1971 (1971 c.3), s.6 in England.

remove any guardian and appoint another. It applies to any testamentary guardian or any guardian appointed or acting by virtue of that Act. The criteria for removal is the court being satisfied that to do so is for the welfare of the welfare of the child. It is not certain whether section 6 did apply to the aunt acting as guardian in Edgar v Fisher's Trustees.[26] The indications were that the trust deed under which she acted was a mortis causa disposition, in which case section 6 would have applied. If so, it is strange that the section was not mentioned. There is no doubt however that the section did apply to the guardian in Campbell v Maquay.[27] There the widow of a domiciled Scotsman was acting as tutor to her pupil children under section 2 of the 1886 Act. The fact that she had married again did not disqualify her from office.[28] Lord Inglis L.P. mentioned in passing that she was technically liable to removal under section 6 and he added:-

> "... the ground for that is a consideration of what is best for the child's welfare."[29]

That is not what section 6 said. It does nevertheless indicate that the statutory ground for removal is the welfare of the child. There is unfortunately no reported exercise

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26 (1893) 21 Rettie 325.

27 (1888) 25 Scottish Law Reporter 587.

28 Her status was statutory; the earlier law did not apply.

29 Campbell v Maquay (1888) 25 Scottish Law Reporter 587 at p.588 per Lord Inglis L.P.

of that statutory power in Scotland. Section 6 clearly does not apply to every guardian.[30] Some guardians thus fall under the common law rules for disqualification and some under the statute. To that extent the position is rather anomalous and the welfare and interests of the child do not play a uniform part.

(f) Conclusion

37.29 The extension of guardianship rights to the mother of a child, the increase in statutory alternatives to private care,[31] the extended availability of custodial remedies[32] and the changing social significance of the property and personal welfare interests of the child have contributed to a reduction in guardianship as a method of protecting a child's interests. Judicial involvement in the twentieth century is much less than in earlier periods, partly for these reasons and partly because guardianship either during the lives of both mother and father or where either has died is very much the affair of the family. This has been achieved by amending the legal rules between 1886 and 1973. All aspects of care for children, both public and private,[33] have thus been strengthened:

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30 It does not apply to a father acting as tutor and administrator-in-law under the common law.

31 E.g. local authority care and supervision and boarding out.

32 To relatives, step-parents and foster parents.

33 It is more usual to think of the post-war developments as extending the influence of the state. But that is only part of the story.

parental care by extended and later joint guardianship; care by relatives and interested third parties as a consequence of the extended availability of custodial remedies; care by public bodies as a result of a greater range of sources of public care. The means of bringing this about are diverse. Some are a matter of law and therefore automatic.[34] Others are dynamic,[35] requiring reference to the relevant administrative or judicial machinery.

37.30 The modern law of guardianship embraces both the static and dynamic aspects of the system. Welfare plays a part in each. Where guardianship is created by virtue of a relationship, it is a matter of law. In that sense the law has decided that that person is best able to care for the child's property and person. Welfare is the underlying justification for that general policy. But when guardianship is created by appointment, it involves a process of selection, either by an individual or by a court, which although regulated by the law, is not per se a matter of law. Welfare in that sense plays a part in the selection process. Although the law may direct what part welfare should play, the concept of welfare and the nature of the process of which it is a part require a relatively flexible and discretionary approach at each stage of the process.[36]

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34 E.g. joint guardianship.

35 E.g. custody disputes and local authority care.

36 Whether at the stage of interpretation, application, administration or final decision.

37.31 When the court is making an appointment, either in the absence of anyone else[37] or to act jointly with another guardian,[38] the court is influenced by the interests of the child. This is also true when the continuation or termination of a guardianship is the issue.[39] In the case of a positive attempt to remove a guardian or suspend the exercise of his powers, the criteria created by the courts are either a conflict of interest between guardian and ward or the inadequacy of the guardian. The former criterion directly raises the interest of the child; the latter criterion is negative from the child's point of view. In that context statute has directed that in some circumstances the criterion is the welfare of the child.[40] These criteria of disqualification have evolved naturally from the failure or incapacity of the guardian to fulfil his obligation to the child, amounting broadly to do what is for the child's benefit.

37.32 These various decisions cannot be made, unless the appropriate judicial procedures and requirements are carried through and satisfied. This is a technical matter of jurisdiction, title and interest to petition the court, judicial powers, enforceability and similar issues. However impressed a court may be with the necessity or desirability

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37 Hutcheon, Petitioner 1909 1 S.L.T. 71.

38 Sim v Robertson (1901) 3 Fraser 1027.

39 Balfour Melville, Petitioner (1903) 5 Fraser 347; Macalister v Crawford's Trustees 1909 1 S.L.T. 232.

40 1886 Act, s.6.

of a certain appointment, nothing can be done unless these issues have been resolved. Statute has assisted considerably but the courts have been prepared to use whatever means are competent to achieve the desired result.[41] The generality of the Court of Session's nobile officium has probably been of considerable assistance in promoting the welfare concept, particularly before the impact of the reforming legislation in the second half of the twentieth century.

37.33 Despite all of these factors, the use of guardianship has declined in the face of custodial and statutory remedies. It remains nevertheless an important institution of the law. It is now not so much itself a means of protecting children or their property. Its use is to enable others to take advantage of the other remedies now available. The questions therefore are not so much who is or should be the child's guardian, whether the guardian is fulfilling his functions or whether he should be removed; rather they are what the guardian can do for the child. Guardianship is no longer a major issue. The child now occupies a position of prominence. Welfare is now particularly important in the context of custodial disputes. Sometimes the dispute is between the guardian and a parent, relative or some other interested party.[42] But the guardian's guardianship is

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41 E.g. Dick v Douglas 1924 S.C. 787.

42 E.g. Moncrieff, Petitioner (1891) 18 Rettie 1029; Reilly v Quarrier (1895) 22 Rettie 879; Kincaid v Quarrier (1896) 23 Rettie 676; Chalmer's Trustees v Sinclair (1897) 24 Rettie 1047; McCrossan's Trustees, Petitioners (1899) 7 S.L.T. 22; Murray v Maclay (1903) 6 Fraser 160.

entirely incidental. The child's welfare is the matter of importance.

Section 2 - England

(a) Introduction

37.34 Although the statutory reforms beginning in 1886 were largely uniform for England and Scotland, they were imposed upon different legal regimes. In England the question of religion had attracted increasing significance during the nineteenth century and complemented the movement towards the doctrine of the sanctity of paternal rights.[43] This did not happen in Scotland. Indeed many of the reported cases which have helped to fashion the modern law of guardianship in England have been brought in a context of religious conflict.

37.35 Scotland had benefited earlier from the separate institutions of patria potestas and tutory. From them evolved a fairly clear distinction between protection and care of the child's property and person. In England, on the other hand, the concept of guardianship had been and even towards the end of the nineteenth century remained the cornerstone of the law. Custodial conflicts were still in a sense incidental to guardianship and notions of custody were probably not fully established until the twentieth century. Thus custody emerged out of guardianship. This was not necessary in Scotland where it is unlikely to have developed, in any event, in the way in which it evolved in England. The difficulty in Scotland was the legal disability of the tutor-at-law to

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43 Paras. 34.39 to 34.68.

have charge of the child's person in normal circumstances. In England there was no doctrinal barrier against the guardian having charge of the child's person.[44] It is understandable therefore how guardianship and custody issues were for a long time closely related in England.[45]

37.36 There is another reason why guardianship was so long in England the favourite device for involvement in these cases. Anyone could seek to be appointed guardian in England.[46] but that was not so in relation to custody.[47] In Scotland, on the other hand, there were more technical difficulties in the way of a person seeking guardianship than of someone craving custody. At least in each jurisdiction there was a way open, however devious, to any interested third party to bring the matter before the court.

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44 In re McGrath (infants) [1893] 1 Ch. 143 at p.146 per Lindley L.J.

45 Even in Barnardo v McHugh [1891] A.C. 388 the distinction between guardianship and custody seemed rather hazy. That was a case concerning an illegitimate child. The distinction would be less important in that context.

46 Certainly where there was nobody with a legal right to custody, for example, no parent or guardian: In re Nevin (an infant) [1891] 2 Ch. 299 at p.310 per Lindley L.J. The interest of a third party without a legal right to custody was "limited to informing the court ..... of misconduct on the part of the legal guardian towards her wards:" In re McGrath (infants) [1893] 1 Ch. 143 at p.147 per Lindley L.J. Thus if there was already a person with a legal right to custody the applicant for guardianship would have to seek the removal of that person from custody as a precedent to appointment.

47 Except by instituting wardship proceedings: see Re H (an infant) [1959] 3 All E.R. 746 at p.748 per Roxburgh J: cf. Children Act 1975, s.33(1) and (3).

37.37 Finally, the function of the Court of Session was to ensure that there was a person competent and suitable to make decisions for the child.[48] The wardship jurisdiction in England was more positive: it could involve actually making decisions for the child in question. The widening of the jurisdictional base of wardship[49] and its continuing supervisory nature enabled it to extend its range of influence. The English courts therefore probably had a greater opportunity to evolve a doctrine of welfare than their Scottish counterparts. This happened to some extent because a sufficient number of disputes arose in the guardian context. In that context in England, but not to the same extent in Scotland, the rights and interests of parents were unimportant. Control of religious education remained available even in the guardianship context as a device for retaining parental influence over the care of the child. In England the welfare doctrine thus emerged largely in the guardianship context in partial conflict with parental control of the religious education of the child. In Scotland it reached maturity in the custodial context in conflict with the general rights of parents as part of the patria potestas.

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48 This is probably true only as a broad generalisation: only very rarely did the court become directly involved in decisions for the child.

49 At least the recognition that protection for the child's person as well as ownership of property afforded jurisdiction over the child: e.g. In re McGrath (infants) [1893] 1 Ch. 143 at p.147 per Lindley L.J. : In re D (an Infant) [1943] Ch. 305 at pp. 306 and 307 per Bennett J.

(b) The powers of a guardian

37.38 In 1899 Lord Lindley M.R. described the Guardianship of Infants Act 1886 as having "revolutionised" the rights of mothers as guardians.[50] Hitherto the position of a mother had been "most unfortuante, cruel and unjust."[51] It was not until 1940 that the mother of an illegitimate child was held to have a right to appoint a guardian to her child.[52] Although a child who was married remained in the natural guardianship of his mother during his infancy, he was not in her care and custody.[53]

37.39 The 1886 Act undoubtedly improved the position of a mother as guardian of her children. The courts however did not extend the mother's influence beyond the strict limits of the 1886 Act. The crucial issue in In re McGrath (Infants)[54] was the religious education of the children. After the death of the father, a Roman Catholic, a benevolent female member of the Church of England gave the mother financial assistance. This lady was appointed guardian by the children's mother under the 1886 Act. Just before her death the mother declared herself to be a protestant. Thereafter none of the children, under the guardian's auspices, attended a Roman Catholic school. In 1891 a catholic aunt of the father of the children, acting as next friend, took out a summons asking that the appointed guardian be removed and that she and another named catholic be appointed joint guardians.

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50 In re X, X v Y [1899] 1 Ch. 526 at p.529 per Lindley M.R.

51 Ibid. at p. 530 per Lindley M.R.

52 Re A dec'd., S v A (1940) 164 L.T. 230. That was decided under s.5(2) of the 1925 Act which contained almost the same principle as s.3(1) of the 1886 Act.

53 Quinn v Quinn [1920] P.65 at p.67 per Sir Henry Duke P.

54 [1893] 1 Ch. 143.

37.40 The Court of Appeal[55] in that case confirmed the right of the legal guardian to custody of the children and the right to support and educate them,[56] subject always to the overriding powers of the court in its wardship jurisdiction.[57] In a slightly earlier case[58] Stirling J. had decided that in substantially similar circumstances the 1886 Act had made no difference to the father's right to decide in his lifetime the appropriate religious education for his children or to the guardian's duty after his death to ensure that the children were educated in the father's religion.[59] This applied therefore as much to the mother as guardian under the 1886 Act as to any other non-parental guardian. This view was confirmed by the Court of Appeal in In re McGrath (infants).[60] As Lindley L.J. pointed out: "The consequence is that, notwithstanding that Act, a widow may still find herself compelled to bring up her child in a religion which she abhors."[61] This rule remained subject to the qualification that the father's rights could be disregarded if he had acted in such a way as to forfeit them.[62]

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55 Lindley, Bowen and A.L. Smith L.JJ.

56 [1893] 1 Ch. 143 at p.146 per Lindley L.J.

57 In re W, W v M [1907] 2 Ch. 557.

58 In re Scanlan, Infants (1888) L.R. 40 Ch.D. 200.

59 See also F v F [1902] 1 Ch. 688 at p.689 per Farwell J.

60 [1893] 1 Ch. 143 at p.148 per Lindley L.J.

61 Idem.

62 In re Scanlan, Infants (1888) L.R. 40 Ch.D. 200 at p.214 per Stirling J.; In re McGrath (infants) [1893] 1 Ch. 143 at pp. 148 and 149 per Lindley L.J.

The mother was thus treated by the courts as any other guardian and was not afforded any privileges because of her relationship with the child.[63]

(c) The powers of the court

(i) Appointment of guardians

37.41 The functions of the court in guardianship matters are numerous. They include appointment[64] and removal[65] of guardians, as well as supervision of the guardian's administration in relation to religion,[66] litigation[67] and removal from the jurisdiction.[68] Control of religious education was frequently the motive underlying applications for removal and appointment of guardians. Welfare plays a part in all of these functions. But the part played by welfare reflects the context of the dispute. However an inchoate pattern has emerged from the reported decision of the courts. Much depends on whether a threshold or discretional approach has been adopted by them.

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63 Even if she had been awarded custody of the child by order of the court, she could not exercise any power properly falling within the scope of the guardian's function: Re T (otherwise H) (an infant) [1963] Ch. 238. The creation of equal parental guardianship by the Guardianship Act 1973 (1973 c.29) has probably destroyed the basis for many of these arguments.

64 In re Nevin (an infant)[1891] 2 Ch. 299; In re McGrath (infants) [1893] 1 Ch. 143; In re X,X v Y [1899] 1 Ch. 526; Re H (an infant)[1959] 3 All E.R. 746.

65 F v F [1902] 1 Ch. 688.

66 In re W,W v M [1907] 2 Ch. 557.

67 Re Taylor's Application [1972] 2 Q.B. 369.

68 In re Callaghan, Elliott v Lambert (1884) 28 Ch. D. 186.

37.42 The most unrestricted reference to a welfare test is where there is no parent or guardian. In that situation the cynics would observe, there is no interest other than that of the child; the child's interest is by elimination the only relevant one. But the cynics would be wrong. The father can exercise an influence posthumously by means of the religious education rule. In In re Nevin (an infant)[69] neither the father nor the mother had appointed a testamentary guardian. After the father's death but before her own, the mother agreed that the child should live with a certain Miss Martin. The father's family were protestants, the mother's family catholics. But religion does not seem to have been of great concern to either parent. After the child had been forcibly removed by members of the mother's family, but subsequently returned to Miss Martin,[70] she attempted to legalise her relationship with the child by seeking appointment as guardian.

37.43 Each of the four judges involved[71] described diffferently the judicial function. The most guarded view was given by Chitty J.:-

> "In these circumstances the Court, in the exercise of its ordinary jurisdiction, has a discretion in the selection of the person to be appointed guardian. In the exercise of this discretionary authority, the Court, according to its ordinary practice, gives a preference to the nearest blood relations, and does

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69 [1891] 2 Ch. 299.

70 After habeas corpus proceedings had been instituted.

71 Chitty J. at first instance; Lindley, Bowen and Kay L.JJ.

> not appoint strangers when fit persons are to be found among the relations. But although the claims of relations are duly considered, they have no actual legal or equitable right to the guardianship. In the choice of guardians, where there are none, the Court endeavours to give due weight to all the circumstances of the case, the guiding principle being the welfare of the child in the widest sense of the term." [72]

He added that normally a child would be brought up in the father's religion.[73] The precise role for his "guiding principle" is uncertain. The implications are that the father's religion will give way where it is in conflict with the child's welfare and that unfit relations will not be considered. Does that mean that fit relations are ceteris paribus to be preferred? Perhaps, but that is not what Chitty J. decided. There was no suggestion that either the relations or the stranger were unfit. The stranger's religion happened to be the same as the father's. As the stranger had the confidence of both the father and the mother, the relations had very little to support this claim. So it was decided.

37.44 The Court of Appeal did not refer to preference accorded to blood relations. Lindley L.J. simply said that the "paramount consideration is the child's welfare."[74] Bowen L.J. required all the circumstances to be considered "from the point of view of the child's welfare"[75] and Kay L.J. merely indicated that the court would do "what a wise father would do" except where a positive rule indicated otherwise.[76]

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72 [1891] 2 Ch. 299 at p.303 per Chitty J.

73 Ibid. at p.305.

74 Ibid. at pp. 310 and 311 per Lindley L.J.

75 Ibid. at p. 313 per Bowen L.J.

76 Ibid. at p. 315 per Kay L.J.

There is probably no fundamental inconsistency between Chitty J. and the Court of Appeal, despite the different methods of expressing the function. They all seem to contemplate a fairly positive role for welfare in the absence of any legal rights. All the circumstances require consideration and in reaching a decision the child's welfare plays the most important, if not a vital, role.

37.45 None of the other contexts indicates such a positive role for welfare. The reason is simply the existence of someone having a legal relationship with the child. In In re McGrath (infants)[77], it will be recalled,[78] an attempt was made to remove the existing guardian and replace her with others more consistent with the applicants' views of the religion in which the child should be educated.[79] Lindley L.J. explained his approach very clearly:-

> "The duty of the court is, in our judgment, to leave the child alone, unless the court is satisfied that it is for the welfare of the child that some other course should be taken."[80]

That means in effect that the court should not, almost cannot, interfere unless the child's welfare so requires.[81]

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77 [1893] 1 Ch. 143. 78 Para. 37.39.

79 Although such a course was authorised by s.6 of the 1886 Act, no reference was made in the Court of Appeal either to the statutory power or the statutory reference to welfare as the threshold requirement for its exercise. North J. at first instance referred to s.6 but merely repeated the statutory phraseology without attempting to analyse it: [1892] 2 Ch. 496 at p.511.

80 [1893] 1 Ch. 143 at p.148 per Lindley L.J.

81 Which is what s.6 of the 1886 Act directed the court to do.

Welfare is thus made a threshold requirement. The Lord Justice went on to add that the "dominant matter for the consideration of the court is the welfare of the child."[82] He described the substance of welfare in wide terms.[83] But the approximation of a threshold requirement whose substance is welfare and a duty to regard welfare as the dominant factor is strange unless the former clearly is a threshold requirement and the latter part only of the exercise of a discretion. If so, Lindley L.J.'s comment means:-

(a) unless it is for the child's welfare, the court cannot remove a guardian; and

(b) if it is for the child's welfare to remove his guardian, the court, in deciding whether or not to remove him, must regard welfare as the dominant consideration among all other relevant considerations.[84]

If not, it is suggested, his comment is meaningless.

37.46 Two cases[85] were concerned with the analogous situation where applications were made to appoint a guardian to act jointly with an existing guardian.[86] In each case the existing guardian was a parent. The applications clearly cast doubts upon the adequacy of the parental guardian. Lindley M.R., as he became, was also a member of the Court of Appeal in the

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82 [1893] 1 Ch. 143 at p.148 per Lindley L.J.

83 Including financial, physical, moral and religious welfare as well as "ties of affection."

84 This element almost anticipates s.1 of the 1925 Act.

85 In re X,X v Y [1899] 1 Ch. 526; Re H (an Infant)[1959] 3 All E.R. 746.

86 1886 Act, s.2; 1925 Act, s.4(1); Guardianship of Minors Act 1971 (1971 c.3), s.3(1).

earlier of these two cases. His comments in In re X,X v Y[87] are liable to precisely the same analysis as his comments in In re McGrath (infants).[88] As he said in the later case:-

> "There can be no conceivable ground for our interfering except the benefit of the child. That is the ground upon which the court always acts in considering these questions of guardianship - whether they arise as to fathers or testamentary guardian or anybody else. The benefit of the infant and that alone is what we have to look at ."[89]

The benefit of the child as the ground of intervention is clear. His last sentence is more difficult. Is he referring to the ground of intervention? If so, there is no problem. Or is he referring to the exercise of the discretion whether to intervene by appointing a joint guardian? If so, he has gone further than his comments in In re McGrath (infants).[90] In that case welfare was the dominant consideration; in the latter case it was stated to be sole consideration. If it is the sole consideration, it is arguably senseless and meaningless to use the same matter both as the threshold requirement and as the determinant of the substantive issue.

37.47 Both Rigby and Vaughan Williams L.JJ. referred in In re X,X v Y[91] to the welfare test in a rather general way. They were clearly thinking of it as the principle to be used in exercising the discretion conferred upon the court by the

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87 [1891] 1 Ch. 526.

88 [1893] 1 Ch. 143.

89 [1899] 1 Ch. 526 at p. 531 per Lindley M.R.

90 [1893] 1 Ch. 143.

91 [1899] 1 Ch. 526 at pp. 534 and 536 per Rigby and Vaughan Williams L.JJ. respectively.

Act. Their judgments add little to the argument. Rigby L.J. however commented that it was not normally desirable for a child to have two guardians because their policies for the child might be inconsistent.[92] That argument had been raised in Parliament against the creation of joint parental guardianship.[93] It is odd that Rigby L.J. should have repeated that point, for Parliament had clearly declared that the appointment of two guardians or the creation of a joint guardianship was a practicable and possibly desirable solution.[94] They also provided a method of settling any inter-guardian disputes of that nature which might arise.[95]

37.48 In re X,X v Y[96] was decided under section 2 of the 1886 Act which, it will be recalled,[97] conferred a wide and apparently unrestricted discretion upon the court. The benefit requirement described by Lord Lindley M.R. was thus the creation of the court. Although Re H (an infant)[98] was decided under section 4(2) of the 1925 Act, the principle is the same. In that case the mother of the child died and the child's eldest sister applied to be appointed guardian along with her father. They were not on good terms. Roxburgh J.

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92 Ibid., at p.535 per Rigby L.J.

93 Para. 35.12.

94 Simply by enacting the second sentence of s.2 of the 1886 Act.

95 1886 Act, s.3(3); 1925 Act, s.6; 1971 Act, s.7.

96 [1889] 1 Ch. 526.

97 Para. 35.21.

98 [1959] 3 All E.R. 746.

considered section 4(2) rather closely. He concluded generally that "if it is not desirable to appoint a joint guardian, it cannot be right to appoint a guardian for some collateral purpose, if that collateral purpose can lawfully be obtained by other means."[99] That raised the question of the meaning of the words "if it thinks fit" in section 4(2). Roxburgh J. answered:-

> "They must mean 'if the court thinks that such a course will be for the benefit of the infant."[1]

That is exactly the test applied by Lord Lindley M.R., although there is no indication that his judgment was drawn to the attention of Roxburgh J.

37.49 The 1925 Act had intervened between these two decisions. The test applied in these decisions was certainly not the paramountcy of welfare principle as enacted in section 1 of the 1925 Act. It is perhaps doubtful if section 1 would apply to the appointment of a joint guardian.[2] If not, it might have had an unarticulated influence on Roxburgh J. but naturally there is no evidence of that. Whatever the reason there seems no doubt that on two reported occasions the courts have built into this discretionary power the test of the child's benefit as a threshold requirement necessary for the exercise of the power.

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99 Ibid. at p.747 per Roxburgh J.

1 Idem.

2 The custody of the child is not in question. The upbringing of the child is in question in only the most indirect way.

(ii) Removal of guardians

37.50 Although in In re McGrath (infants)[3] the applicants sought removal of the existing guardian and the appointment of a substitute, there is no requirement that such procedure should be followed to enable the court to control the guardian or his activities. In F v F[4] the object was to control the child's religious education by having the guardian removed and in In re W,W v M[5] to do the same by supervising the guardian's administration through the wardship jurisdiction. What is important about these two cases is that for the first time the court was forced to consider the question of religion immediately in the context of the child's welfare. In the earlier cases there had been no fundamental conflict between religion and welfare.[6]

37.51 The child's guardian in F v F[7] was her paternal aunt. At the commencement of the guardianship there was no problem. The child's father had been a protestant; the child was being educated as a protestant: the guardian was also a protestant. Four years later the guardian for genuine reasons of conscience became a Roman Catholic and an application

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3 [1893] 1 Ch. 143.

4 [1902] 1 Ch. 688.

5 [1907] 2 Ch. 557.

6 The religion in which the child was being brought up was the same as the father's in In re Scanlan, Infants (1888) L.R. 40 Ch. D. 200 and In re Nevin (an infant)[1891] 2 Ch. 299. In In re McGrath (infants) [1893] 1 Ch.143 The parents had before their deaths indicated confidence in the religious education provided for their child.

7 [1902] 1 Ch. 688.

was made for her removal as guardian. Farwell J. emphasised that the guardian had discharged her duties "in an exemplary manner."[8] The only ground for removal was the change of religion. That in itself was not a ground for intervention. To succeed, therefore, it would have to be established that it would be for the benefit of the child that her association with her guardian should be terminated. The crucial question was the importance of religion in the overall welfare of the child.

37.52 Farwell J.'s argument contained three elements. He referred first of all to the father's right to have his child brought up in his religion and the correlative duty imposed upon the guardian "to see that the ward is brought up in that religion."[9] The second question was welfare. In his words:-

> "The Court in considering the question of guardianship has regard before all things to the infant's welfare; it has regard of course to the rights of the father and the mother, but the essential requirements of the infant are paramount."[10]

The father's legal rights, including presumably his right to determine the child's religion, have changed in response to the welfare concept. They are no longer relevant and enforceable as legal rights, although that is what they are stated to be; they simply form part of the process in reaching

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8 Ibid. at p. 689 per Farwell J.

9 Idem.

10 Ibid. at pp. 689 and 690 per Farwell J.

a decision on the child's guardianship. Moreover their part in that process is less important than the "essential requirements of the infant" which are presumably the equivalent of the "infant's welfare." These comments relate probably to the discretionary part of the process, for Farwell J. added that the ground of intervention was not only the unfitness of the guardian but also the requirements of the child's interest.[11] He was thus following the scheme of intervention described in In re X,X v Y.[12]

37.53 The third element in Farwell J.'s approach is original. He applied these guidelines to religion as part of the child's welfare. To some extent religion hitherto had been separate and apart from welfare. The courts had treated it as an independent legal right of the father to be enforced except in circumstances amounting to paternal forfeiture. By a rather sophisticated process of reasoning Farwell J. reduced its status to an incident of welfare while at the same time he appeared to comply with the existing doctrines. In effect his argument was a reversion to the earlier view that parental rights were merely the device for implementing legal duties. His argument may be broken down into five paraphrased propositions and a conclusion:-

1. a guardian must act so far as possible in loco parentis;[13]
2. "one of the first and most sacred duties of the parents" is to create religious beliefs, by formal education and by daily contact; [14]

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11 Ibid. at p. 690 per Farwell J.

12 [1899] 1 Ch. 526.

13 [1902] 1 Ch. 688 at p. 690.

14 Idem.

3. a child has a right to expect his guardian to fulfil this duty for him; [15]

4. a change of religion by the guardian deprives the child of his right to expect his guardian to fulfil this duty; [16]

5. moreover, seeing the guardian worshipping according to a different religion may disturb the child's confidence in the guardian; [17]

6. "such a change of religion as is calculated in the opinion of the Court seriously to prejudice the ward in the manner that I have already pointed out imposes on the Court the duty of interfering." [18]

37.54 The weak link in that argument, it is suggested, is the fourth proposition. The preceding proposition related generally to religious beliefs. The fourth proposition contemplated specific religious beliefs, for it assumes that the child was entitled to be educated in a specific religion, probably but not necessarily the one in which he was then being brought up; in other words, the religious status quo. To change it made it inconsistent with the father's religion. But that is not what Farwell J. said. The importance of his argument is that it was based not on inconsistency with the father's religion but on what the child was entitled to expect of his guardian in the light of the guardian's duties to the child. By omitting reference in this argument to the father's religion, Farwell J. broke loose from the earlier law and, by arguing in terms of the guardian's duty and the child's welfare, he reduced the status of religion from a paternal right to an incident of welfare.

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15 Idem.

16 [1902] 1 Ch. 688 at p. 691.

17 Idem.

18 Idem.

(iii) Supervision of guardians

37.55 The circumstances in In re W,W v M[19] were less dramatic. The conclusion of the Court of Appeal was consistent with that of Farwell J. but the reasoning in the later case was much looser and less precise than the sophisticated arguments of Farwell J. There was no need in In re W,W v M[20] to seek removal of the guardian. The child was a ward of court and the guardian subject to any direction which the court chose to make. The child's father was Jewish and in 1904 the court had directed that the child in question should be brought up as a Jew. Three or four years later the child aged about thirteen indicated that he no longer wished to be brought up as a Jew. Kekewich J. was satisfied that his request was reasonable in the circumstances and genuine. The direction was thus amended to allow him to be brought up as a Christian.

37.56 Despite the relative looseness of his judgment, the main theme of Kekewich J.'s judgment was to do what would be for the benefit of the child, even if it might not have met with the approval of the father.[21] Cozens-Hardy M.R. in the Court of Appeal saw no reason to change this aspect of Kekewich J.'s decision. The Master of the Rolls however tended to rely on older authority and justified welfare negatively rather than positively. In other words he looked

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19 [1907] 2 Ch. 557.

20 Idem.

21 [1907] 2 Ch. 557 at p.560.

at the issue from the point of view of paternal forfeiture as well as from the child's point of view.[22] That is the approach which Farwell J. had attempted to discard.[23] It is nevertheless likely that Farwell J.'s view would be preferred by most members of the English High Court today. A similar issue would now probably arise in a custody rather than a guardianship context.

(iv) The next friend of a child

37.57 The last instance for analysis of the judicial control of guardianship powers is the child's next friend in litigation affecting him. The next friend is an officer of court whose duty is "to take all measures for the benefit of the infant in the litigation in which he appears as next friend.[24] In most cases that should cause few major problems. In England, as in Scotland, it is normally the right or responsibility of the father to act as next friend in looking after his child's interest. In Scotland the parent is liable to have his function suspended if there is any conflict of interest between him and the child.[25]

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22 Ibid. at p. 568.

23 See also Stevenson v Florant [1927] A.C. 211 when the Privy Council on appeal from the Supreme Court of Canada applying the law of Quebec decided that the child's welfare was the test for removal of the "tuteur". They supported the local court's conclusion that ".... la qualite de tuteur de l'appelant ne lui confere pas sur la personne de ... des droits qu'il puisse opposer a l'autorite paternelle de l'intimee, qui est la mere. C'est donc a la mere et non au tuteur qu'appartient le droit de garde et d'education de ...": ibid. at pp. 215 and 216.

24 Rhodes v Swithenbank (1889) 22 Q.B.D. 577 at p. 579 per Bowen L.J.

25 Para. 37.25.

In England, according to Halsbury, the next friend may lose his office "if he is an improper person to act as such or does not conduct the action in a proper manner."[26] The former ground probably involves a conflict of interest,[27] rather like the Scottish position. The latter ground goes further.[28] It relies to some extent[29] on obiter dictum of Jessel M.R. in In re Birchall Wilson v Birchall.[30] That view was approved in Re Taylor's Application[31] and may now be taken as authoritative.

37.58 In Re Taylor's application[32] all but five of two hundred and sixty parents whose children had been born defective by reason of their mothers having taken thalidomide agreed to a settlement of their actions for damages. The settlement was conditional upon the agreement of all parents. Taylor favoured acceptance and applied to the court as special next friend for an order removing the five parents from the office of next friend to their children and appointing the Official Solicitor in their place. He failed. The test applied by Lord Denning M.R. was:-

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26 Halsbury, vol. 21, p.317.

27 Ibid., p. 317, n. (a).

28 It is dynamic. The other ground is static.

29 Halsbury, vol. 21, p.318, n. (b).

30 (1880) 16 Ch.D. 41 at p.42 per Jessel M.R. where he said: "If the Court saw that a guardian or next friend was acting improperly and against the infants' interests in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him and substitute another person..."

31 [1972] 2 Q.B. 369.

32 Idem.

> "If he [the next friend] is to be removed, it should only be done if the proposed settlement is so clearly beneficial for his child that he is acting improperly in refusing it... The burden is clearly upon those who seek to remove a parent to show that he is not acting properly in the interest of his child as next friend."[33]

Taylor was unable to discharge that onus and the father's "vested right" prevailed.[34]

37.59 There are thus in England two grounds of intervention: conflict of interest and a refusal to do what is clearly for the benefit of the child. In Scotland only the former ground applies. The conflict of interest ground requires simply an investigation of the issue and the relationship between it and the parent and child. The second English ground requires the court to consider the merits of the issue and to come to a decision based solely on the benefit of the child. That is a more stringent test and one which places a considerable responsibility on the court. Welfare plays a positive role, although the purpose of the decision is not to do what is best for the child but only to remove the next friend from office vis-a-vis the litigation in question.

(d) Conclusion

37.60 There are relatively few reported decisions on the role of welfare in guardianship. They are important, although the emphasis in practice has now moved from guardianship to custody. It seems reasonably clear that the concept of welfare evolved in something like its modern form from

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33 [1972] 2 Q.B. 369 at p.380 per Lord Denning M.R.

34 Ibid. at p. 382 per Edmund Davies L.J.

guardianship. This is simply because guardianship issues tended to arise in the absence of parents and the direct influence of parental rights.[35] The exception was the legal right of the father to determine the religious education of his child. When that began to erode in consequence of Farwell J.'s approval in F v F[36] the way became clearer for welfare to occupy an almost dominant position in guardianship disputes. That facilitated its acceptance into the custody context.

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35 A situation affording greater opportunity to adopt a welfare approach.

36 [1902] 1 Ch. 688.

CHAPTER 38

STATUTORY THRESHOLD REQUIREMENTS

Section 1 - Introduction

38.1 A considerable number of statutes contain threshold requirements bearing upon the welfare of the child. Most arise in the contexts of adoption[1] and official child care legislation.[2] The legislation dealing with guardianship and custody contains very few such requirements. The threshold approach in guardianship and custody matters evolved through common law and equitable principles. The series of Acts in the nineteenth and twentieth centuries[3] merely extended the application of recognised judicial powers and indicated broadly how they should be exercised. The courts to some extent tended to retain the threshold approach of the earlier period even in the context of the legislative superstructure of the 1886, 1891 and 1925 Acts.

38.2 There are nevertheless a few examples of the threshold approach in the guardianship and custody legislation. One is the statutory power of the court to remove an existing guardian and appoint a replacement.[4] The threshold requirement is the

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1 E.g. the grounds for dispensing with parental agreement: Children Act 1975 (1975 c. 72), s. 12(2).

2 E.g. the grounds for receiving a child into the care of a local authority, for making a care order or for deciding whether a child is in need of compulsory measures of care: Children Act 1948 (11 & 12 Geo. 6, c. 43), s. 1(1); Social Work (Scotland) Act 1968 (1968 c. 49), s. 15(1); Children and Young Persons Act 1969 (1969 c. 54), s. 1(2); Social Work (Scotland) Act 1969, s. 32(2).

3 I.e. principally those of 1886, 1891 and 1925; but it includes those of 1839 and 1873 for England, those of 1930 and 1939 for Scotland, and more recently those of 1973 and 1975 for both England and Scotland.

4 Guardianship of Infants Act 1886 (49 & 50 Vict., s. 27), s. 6; Guardianship of Minors Act 1971 (1971 c. 3), s. 6.

welfare of the child. This power seems to have been largely ignored. That is of little consequence, for the courts have applied the same welfare test independently of the Act.[5] A glance at the adoption and official child care legislation indicates that welfare itself is not normally a threshold requirement. If it is, the decision is usually given to an administrative rather than a judiciary body. Theshold requirements are more specific and protect the welfare of the child negatively, as a consequence of proscribed parental behaviour. It is not surprising that there is a close affinity between the criminal and civil criteria in these contexts; for example, abandonment, desertion, neglect, ill-treatment, failure to maintain or failure to fulfil the duties of a parent.

38.3 The same is true of the three instances of a threshold approach in the custody context. The first is more of a restriction than a requirement. Section 4 of the Custody of Infants Act 1839[6] disabled the court from awarding custody or access to a mother who had committed adultery. Section 7 of the Guardianship of Infants Act 1886 gave to the court in a matrimonial and consistorial context power to make a declaration of parental unfitness for custody in consequence of the matrimonial misconduct of the parent. Finally, sections 1 and 3 of the Custody of Children Act 1891[7] restricted in favour of the child the exercise of the judicial power to regulate custody where the parent had abandoned or deserted his child or allowed him to be brought up by another person in circumstances of

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5 Para. 37.45.

6 2 & 3 Vict., c. 54.

7 54 & 55 Vict., c. 3.

neglect. The 1839 Act has been repealed[8] and the consequences of adultery by a parent have become a matter for judicial determination[9], as they always have been in Scotland.[10] Section 7 of the 1886 Act has not been used much. The 1891 Act has rather ironically had a more significant impact on the law of Scotland than on the law of England.

38.4 Each of these three sets of provisions have had or have a direct effect on the welfare of the child. The effect has been achieved negatively in the sense that the child was merely the unspecified object of the parental misconduct but objectively because the legislation contained fairly specific criteria of parental unfitness. The 1839 Act effectively stated that it was not for the child's benefit to have a relationship with an adulterous mother. A spouse who had been found guilty of a matrimonial offence is for the purposes of the 1886 Act not regarded as suitable to exercise parental functions. According to the 1891 Act a parent guilty of abandonment or desertion of his child is not prima facie suitable to resume responsibilities as a parent.

38.5 The structure of the three provisions differs in an interesting fashion. The 1839 Act provision absolutely barred[11] an adulterous mother from access or custody. Section 7 of the 1886 Act simply enabled the court in the prescribed circumstances to make a declaration of parental unfitness for

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8 Custody of Infants Act 1873 (36 & 37 Vict., c. 12).

9 Matrimonial Causes Act 1857 (20 & 21 Vict., c. 85), s. 35 and its statutory successors.

10 Paras. 33.66 to 33.70.

11 1839 Act, s. 4 provided that "no order shall be made by virtue of this Act whereby any mother against whom adultery shall be established by judgment in an action for criminal conversation or by sentence of an ecclesiastical court shall have the custody of or access to any infant..."

custody, thus amounting to the simple form of a threshold requirement. The 1891 Act more precisely qualified the exercise of the judicial power. But it did so in a much more complicated way which, it has been suggested,[12] amounted to an overall threshold approach.

Section 2 - The Acts of 1839 and 1886

38.6 It must be borne in mind that the 1839 Act was enacted while the ecclesiastical court was still exercising matrimonial jurisdiction. After 1857 the scope for the operation of section 4 of the 1839 Act would diminish for the question of the custody of the children of adulterous parents would tend to be decided by the Divorce Court under section 35 of the 1857 Act.[13] It is interesting that the only reported case in section 4 was a decision of the Divorce Court, which took the view that its discretionary powers under the 1857 Act were restricted by the rule in section 4 of the 1839 Act.

38.7 In that case, Clout v Clout and Hollebone,[14] a wife whose marriage had been dissolved on the ground of her adultery applied for access to the children of the marriage. These circumstances were covered precisely by section 4 of the 1839 Act and the Judge Ordinary concluded on the strength of that position that he "ought not to order that she have access to her children."[15] It would seem however not only that an order

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12 Para. 35.59.

13 Matrimonial Causes Act 1857.

14 (1861) 2 Swabey & Tristram 391.

15 Ibid., at p. 392.

ought not to have been made under the Act but also that it could not competently have been made.[16] That comment assumes that the 1839 Act applied to the jurisdiction created by the 1857 Act. The position of an adulterous spouse in relation to custody or access is now dealt with in exercise of the judicial discretion in the Matrimonial Causes Act 1973.[17]

38.8 Section 7 of the 1886 Act is directly related to matrimonial and consistorial proceedings.[18] The conduct of the "guilty" parent[19] in the divorce or separation action is the foundation for declaring that person unfit for custody.[20] The declaration becomes effective only on the death of the other parent. In one of the earliest cases under this section, Skinner v Skinner,[21] the husband was guilty of adultery and cruelty of an aggravated character. Although the application was unopposed, Sir James Hannen P. had no difficulty in making the order:-

> "The operation of this order of course does not arise until after the petitioner's death. There are many cases - I have one before me now - in which a husband though guilty has been allowed to have the custody of the children of that marriage, and I can easily conceive that very serious questions may arise under this section. But in this case, as there is no opposition, I make the order prayed."[22]

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16 Because the provision is a mandatory prohibition, not a discretion.

17 1973 c. 18, s. 42.

18 It is the only provision of that Act so related in specific term

19 I.e. "guilty" in the matrimonial but not necessarily the parental sense.

20 An application for such a declaration in England must be made and determined in open court and a judge in chambers has no jurisdiction: Cliff v Cliff [1948] 2 All E.R. 760.

21 (1888) 13 P.D. 90.

22 Ibid., at pp. 90 and 91 per Sir James Hannen P.

38.9 In 1888, when that case was decided, little imagination would have been required to conclude that a parent guilty of adultery and aggravated cruelty would be regarded as unfit to have custody of any children of the marriage. The approach of common law and equity would have directed a similar conclusion. There is also a close statutory relationship between adultery and any other type of matrimonial misconduct on the one hand and parental unfitness on the other hand.

38.10 On the basis of the grammatical structure of section 7 parental unfitness must be directly related to the behaviour giving rise to the decree. The statutory words are "by reason of whose misconduct such decree is made." Questions of causation and relation are often rather transitory and there may well be scope for giving effect to a changing code of moral values. In 1949[23] one of the objections to an order under section 7 was that the question raised by section 7 was too narrow and should be extended to cover the interests of the children in a wider sense.[24] This objection was rejected by Hodson J. in that case, rightly, it is submitted, on the basis of the phraseology of the Act. He explained the issue in these words:-

> "It [the application] is opposed first on the ground that it should not be made without hearing other evidence which may be put forward by the husband in relation to these children.

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23 S v S [1949] P. 269.

24 The 1925 Act had been enacted by then and there is no reason to suppose that s. 1 would not have applied.

> That objection is not well founded. The other evidence which he may put forward may well have a bearing on the future of these children but it would not, in my judgment, be relevant to the question which I have been asked to decide."[25]

In that case the misconduct justifying the divorce was cruelty. It amounted to the husband forcing his wife to submit to sexual practices of a gross and debased character. In 1888 nobody probably would have questioned that such conduct disqualified a father from custody; by 1949 the attitudes of society had changed sufficiently to call that presumption in question.[26]

38.11 One of the other grounds of objection in S v S[27] was that section 7 of the 1886 Act was really obsolete. There is little doubt that section 7 is, nowadays at least, an odd provision, but it was nurtured during a period of strict Victorian morality. In that context it is intelligible. The law however has moved considerably beyond rigid approaches in the direction of discretions directed towards promoting the child's best interests. If that is current policy, its incompatibility with the philosophy underlying section 7 of the 1886 Act can be readily understood. An argument founded upon similar policy considerations was rejected by Hodson J. in S v S.[28] Again, it is submitted, the view of the learned judge was

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25 [1949] P. 269 at p. 270 per Hodson J.

26 Hodson J. went on to make a declaration under s. 7 in that case.

27 [1949] P. 269.

28 Ibid., at p. 271.

correct. He was under an obligation to apply the statute as Parliament enacted it. Normally there is little scope for imaginative interpretation. If section 7 is obsolete or irrelevant, it is really a matter for the legislature. But they have continued to re-enact it in successive Matrimonial Causes Acts in England.

38.12 Section 7 remains in force in Scotland as originally enacted. The only apparent reported case of an application for a declaration in Scotland is Fairley v Fairley[29] in 1904. The father had become addicted to alcohol; he was unable to keep a job; he could not support his family. Eventually he left the country, never to return to Edinburgh. He had however sent small sums of money to help to keep the child, by then living with the paternal grandfather. These sums of money had stopped two years before the divorce action. Lord Low refused to make a declaration under section 7. He gave no opinion. The section would in Scotland at least appear to be in desuetude.

Section 3 - The 1891 Act

(a) General

38.13 The 1891 Act has featured in a considerable number of Scottish cases but in relatively few English cases. It has not often been effective in the Scottish cases in which it has been considered, either because it was held not to apply or

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29 (1904) 12 S.L.T. 140.

because the common law dictated the same solution. Indeed one of the issues was whether and to what extent the Act changed the law. This was particularly crucial for the sheriff court in Scotland with its relatively narrow common law jurisdiction.[30] The problem was intensified when the jurisdiction of the sheriff court was modified in 1907 and 1913.[31] Thus much of the debate in Scotland turned on the very technical question of the sheriff's jurisdiction.

38.14 England did not have these problems, for the jurisdiction of all the courts except the High Court is statutory. On the whole little has been said about the 1891 Act in England. Even in the House of Lords' review of the law in 1969 the Act was treated largely as a matter of history.[32] There was no suggestion that it exerted even a silent influence. Lord MacDermott simply recorded it along with the other reforming Acts of the nineteenth century as indicating "an increasing qualification of common law rights and the growing acceptance of the welfare of the infant as a criterion."[33] That is true. But, it is suggested, there is more to the legislation than that. It was not merely a precursor of the paramountcy of welfare principle in section 1 of the 1925 Act.[34] The 1891 Act, just as the other Acts, has a part to play in creating an integrated concept of welfare. Each element, including section 1 of the 1925 Act, plays a separate but related role as part of an immensely complex pattern.

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30 Which disabled it from exercising any discretionary jurisdiction.

31 Para. 38.26.

32 J v C [1970] A.C. 668 at p. 694 per Lord Guest and at p. 709 per Lord MacDermott.

33 Ibid., at p. 709 per Lord MacDermott.

34 1971 Act, s. 1 in England.

38.15 Bevan, too, has suggested that in consequence of the decision by the House of Lords in J v C:-[35]

> "... the common law and equity and the rules of the 1891 Act are superseded by s. 1 of the Guardianship of Minors Act 1971..."[36]

That, it is suggested, is to some extent misleading. Welfare plays a number of different roles in the 1891 Act,[37] as indeed it does in the 1886 and 1925 Acts. It is not however suggested that these roles are inconsistent. Section 1 of the 1925 Act is broad in concept as well as in application. The 1891 Act is narrower in both respects. That Act is designed to ensure that certain decisions cannot be made unless they can be justified in terms of the child's welfare in its negative and positive aspects. The 1925 Act principle is altogether different. It inhibits nothing. It requires that in making a decision the child's welfare shall be afforded a place of priority. That is the essence of the distinction between the threshold and discretionary stage of the whole process. Section 1 of the 1925 Act has not therefore superseded the 1891 Act, for they achieve different objectives. The precise relationship between these provisions is naturally a matter of importance and has been the subject of considerable judicial comment.

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35 [1970] A.C. 668.

36 Bevan, p. 289.

37 On a semantic level at least.

(b) Problems of application and jurisdiction

(i) Application

38.16 There can be no doubt that the Act applies in disputes coming before the High Court in England or the Court of Session in Scotland.[38] Unfortunately it gives no indication whether it applies to illegitimate children. The Act was clearly designed to require inadequate parents to justify the recovery of their children from the third parties who had been caring for them. There would be no reason to suppose that illegitimate children would not fall into that category. The Scottish courts soon after its enactment unhesitatingly applied the Act to illegitimate children[39] and had no hesitation in doing so frequently thereafter.[40]

38.17 For much the same policy reason it seems clear that the Act would apply only between a parent who had given up care of his child and the person or body who had undertaken care of that child. There is no doubt now that it does not apply to a dispute between parents.[41] In the words of Lord Clyde L.P.:-

> "The Act is primarily designed to remove a doubt as to the Court's powers to refuse an application by such a parent when the child is being adequately looked after by

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38 1891 Act, s. 1.

39 Mackenzie v Keillor (1892) 19 Rettie 963.

40 McLean v Campbell (1894) 11 Sh. Ct. Rep. 131; Campbell v Croall (1895) 22 Rettie 869; Mitchell v Wright (1905) 7 Fraser 568; Raeburn v Dunleavy (1934) 50 Sh. Ct. Rep. 107; Duguid v McBrinn 1953 S.L.T. (Sh. Ct.) 74, 1954 S.C. 105.

41 Campbell v Campbell 1956 S.C. 285. See also Murray v Forsyth 1917 S.C. 721 at p. 726 per Lord Johnston and cf. Kitson v Kitson 1945 S.C. 434 at p. 442 per Lord Cooper L.J.-C.

> a third party or an institution, and the "parent" is for certain reasons unfit to undertake his care. It necessarily follows that, when the issue is one between a father and a mother as to which of them is to be found entitled to the custody of their child, the Act of 1891 has no application, and cannot be invoked, for it does not profess to deal with such an issue at all. [42]

The word "parent" is defined in the Act to include any person liabl to maintain the child or entitled to his custody.[43] As Lord Sorn pointed out, the Act does not operate unless there is a person "wit an existing and undisputed right of custody" which may simply not b enforced. Possession not legal custody is thus regulated by the Ac

38.18 This places the putative father of an illegitimate child is an anomalous position. There is no reason why the Act does not apply to the child but it will not affect the father unless he qualifies as a parent by being liable to maintain the child or entitled to his custody in consequence of an order of a court. In McCormack (otherwise Jackson) v McCormack[45] the mother of an illegitimate child asked the court to order the putative father to deliver the child to her.[46] The father alleged that the mother had "deserted" the child and so would require to prove her fitness to resume care of the child under the 1891 Act. Lord Walker[47] did not dispute that approach.

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42 Campbell v Campbell 1956 S.C. 285 at p.290 per Lord Clyde L.P.

43 1891 Act, s. 5.

44 Campbell v Campbell 1956 S.C. 285 at p.295 per Lord Sorn.

45 1963 S.L.T. (Notes) 3.

46 Precisely the same claim was made in Duguid v McBrinn 1953 S.L.T (Sh. Ct.) 74, 1954 S.C. 105 and the case was remitted to the Court of Session which reached its decision largely on the basis of the Illegitimate Children (Scotland) Act 1930 (20 & 21 Geo. 5 c. 33) without substantial reference to the 1891 Act on the point now in question.

47 The application was first made to the sheriff court. The sheriff-substitute remitted the case to the Court of Session. The Inner House adjusted the record and remitted to Lord Walker in the Outer House to proceed.

But he decided that the Act did not apply in the circumstances of that case as the allegation of desertion was unfounded.[48] It followed therefore that:-

> "... the defender must show clear grounds in order to justify his retention of the child."[49]

If the Act had applied, the onus would have been on the mother to justify her recovery of the child.[50] That case must therefore be treated as a dispute between a parent, the mother, and a third party, the putative father. That is a dispute to which the 1891 Act applies in principle.

38.19 The Act probably does not, on the other hand, apply to a dispute between the putative father and someone else, for in that case neither would have a legal right without which, as Lord Sorn said, the Act cannot operate. In A v N[51] an illegitimate child was cared for by the child's maternal uncle and his wife after the death of the child's mother. The uncle and his wife thought that they might adopt the child but the putative father sought custody. The question of remitting the case to the Court of Session in terms of the 1891 Act was raised but rejected. Sheriff McNeill's reason was that none of the criteria in sections 1 and 3 of the Act was in issue.[52] There was no need therefore to decide whether the Act applied in principle to a dispute between the putative father and a third

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48 1963 S.L.T. (Notes) 3 at p. 4. 49 Idem. per Lord Walker.
50 These comments are consistent with the onus of proof contentions during the debates in the House of Lords: para. 35.50.
51 1973 S.L.T. (Sh. Ct.) 34.
52 Ibid., at p. 36.

party. It is suggested nevertheless that it no more applies to such a dispute than to any dispute between persons without any legal relationship with the child. In any event Sheriff McNeill decided the issue in terms of the Illegitimate Children (Scotland) Act 1930 without reference to the 1891 Act.

38.20 The relationship between a parent and a third party with actual custody of the child had never proved particularly difficult for the Courts in the past. They applied the disqualification formula as part of the threshold approach followed by the exercise of a discretion. The right to custody thus remained vested in the parent and he could be deprived of it only if the appropriate ground had been established. A parent, in other words, could always delegate his functions but he could also at any time withdraw the mandate and demand the return of his child. Consensual or informal "adoptions" were not legally binding.[53] The purpose of the 1891 Act was to restrict that right of automatic recovery where the position was not so much a genuine delegation of authority but rather wanton abandonment or neglect. For the third party to rely upon section 3 of the 1891 Act as a defence to an action to recover the child was a serious matter, for it would amount almost to accusing the parent of having committed a criminal offence.[54] Parliament no doubt deliberately used the words "abandonment" and "desertion" but their use also in a criminal

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53 Humphreys v Polak [1902] 2 K.B. 385; Kerrigan v Hall (1901) 4 Fraser 10.

54 Children and Young Persons Act 1933 (23 & 24 Geo. 5, c. 12), s. 1; Children and Young Persons (Scotland) Act 1937 (1 Edw. 8 & 1 Geo. 6, c. 37), s. 12; There are of course differences between the civil and criminal criteria but there is some common ground. These statutory offences had been created before 1891.

context[55] may have encouraged the courts to give them a narrow meaning.[56] That benefited the parent rather than the child, somewhat contrary to the apparent intention of Parliament.

38.21 The other major aspect of the Act was the statutory discretion conferred upon the court. The threshold requirements in sections 1 and 3(a) and (b) apart,[57] the power to restore the child to the parent was not available unless the court was satisfied that the parent, having regard to the welfare of the child, was fit to have custody of him. This requirement is discretionary in nature. It was these discretionary aspects of the Act which caused jurisdictional difficulties for the sheriffs in Scotland.

(ii) Jurisdiction

38.22 The sheriff's custodial jurisdiction was in a "somewhat confused" state[58] by the end of the nineteenth century. He had a common law jurisdiction to enforce the legal right of whoever was entitled as a matter of law to the custody of the child and to make interim orders in case of emergency.[59] He also had a statutory jurisdiction to regulate custody and access on the mother's application[60] but subject always to the possibility of removal of the cause to the Court of Session.[61] His jurisdiction did not include the power to override any legal title.[62]

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55 At least of "abandonment". 56 Paras. 38.42 to 38.47.
57 These requirements contained certain discretionary aspects at the points of interpretation and application.
58 Murray v Forsyth 1917 S.C. 721 at p. 724 per Lord Skerrington.
59 Para. 33.116. 60 1886 Act, ss. 5 and 9. 61 Ibid., s. 10.
62 That was reserved to the nobile officium of the Court of Session: see generally Murray v Forsyth 1917 S.C. 721 at p. 724 per Lord Skerrington and at pp. 725 to 727 per Lord Johnston.

38.23 The 1891 Act made no specific reference to the sheriff court. Apart from relying on that omission, a number of decisions also used the discretionary nature of the 1891 Act as the basis for the sheriff's lack of jurisdiction under that Act.[63] As Sheriff Johnston put it in 1904, he had power to deal with custody only where there was no special defence, for example:-

> "... determination of status, or requiring the exercise of a discretion which might result in the Court interfering, not in support of, but in limitation or restriction of the parental right."[64]

The 1891 Act required the court to do what was beyond the power of the sheriff at common law.[65] The sheriff court therefore had no jurisdiction under the 1891 Act.[66] This conclusion proved controversial. To one sheriff-substitute it may have been "an oversight of the draftsman"[67] but two years earlier it had been for him "practically a denial of justice".[68]

38.24 An attempt was made soon after the Act had been enacted to avoid these jurisdictional problems. In Mackenzie v Keillor[69] the

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63 McLean v Campbell (1894) 11 Sh. Ct. Rep. 131; Hogarth v Reid (1900) 17 Sh. Ct. Rep. 3; Marshall v Smith (1904) 21 Sh. Ct. Rep 60; Cairns v Cairns (1905) 21 Sh. Ct. Rep. 207 and 22 Sh. Ct. Rep. 51.

64 Marshall v Smith (1904) 21 Sh. Ct. Rep. 60 at p.62 per Sheriff Johnston.

65 Hogarth v Reid (1900) 17 Sh. Ct. Rep. 3 at p.5 per Sheriff Lees.

66 Hogg v Scarth (1896) 13 Sh. Ct. Rep. 29; Kelly v Goudie (1896) 13 Sh. Ct. Rep. 321; Campbell v Barony Parish Council (1896) 13 Sh. Ct. Rep. 242; Gillan v Barony Parish Council (1898)1 Fraser 183; Hogarth v Reid (1900) 17 Sh. Ct. Rep. 3; Marshall v Smith (1904) 21 Sh. Ct. Rep. 60.

67 Campbell v Barony Parish Council (1896) 13 Sh. Ct. Rep. 242 at p. 243 per Sheriff-substitute Guthrie.

68 McLean v Campbell (1894) 11 Sh. Ct. Rep. 131 at p. 131 per Sheriff-substitute Guthrie.

69 (1892) 19 Rettie 963.

sheriff court had directed the third parties having care of an illegitimate child to restore the child to her mother. This was an interim decision until a permanent arrangement could be made by the court. The decision was taken on appeal to the Court of Session. The 1891 Act was put in issue. The mother admitted that she had allowed the child to be brought up at another's expense. The Lord Justice-Clerk[70] and Lord Young saw no reason why the Act should not apply simply because the matter had originated in the sheriff court, where by implication it was not available.[71] The onus was therefore on the mother to satisfy the court that she was a fit person to resume custody.[72] She failed. For that reason the Lord Justice-Clerk and Lord Young recalled the sheriff-substitute's judgment and dismissed the petition. Lord Rutherford Clark and Trayner reached the same decision by applying not the 1891 Act but the common law.[73]

38.25 Sheriff Berry in McLean v Campbell[74] used the same argument to support the jurisdiction of the sheriff court in circumstances to which the Act would apply. He contended in addition that the Act had not removed the sheriff's common law jurisdiction completely.[75] In his view the sheriff court could go ahead and deal with the application so far as it could in terms of the common law or 1886 Act jurisdiction, even if the 1891 Act applied. But the sheriff court would not give effect to that Act. The parties could appeal to the Court of Session where the decision would be reviewed in the light of the 1891 Act. This device proved unacceptable to the Court of Session in Gillan v Barony Parish Council.[76] The court should not, according to Lord Trayner, "continue to adopt applications which incompetent

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70 Sir J.H.A. Macdonald.
71 (1892) 19 Rettie 963 at pp. 965 and 966 respectively.
72 Ibid., at p. 966 per Sir J.H.A. Macdonald L.J.-C.
73 Ibid., at p. 966.
74 (1894) 11 Sh. Ct. Rep. 131.
75 Ibid., at p. 133.
76 (1898) 1 Fraser 183.

ab initio."[77] Lord Young agreed and suggested that application should be made direct to the Court of Session. So the matter rested.

38.26 In 1907[78] and again in 1913[79] Parliament legislated on the jurisdiction of the sheriff court. The possible ambiguities of the 1907 Act[80] are of no practical concern in this context, for the 1913 Act made it clear that "actions for regulating the custody of children"[81] were within the competence of the sheriff. The problem was whether this simply confirmed the existing jurisdiction of the sheriff or enlarged it into something approaching the nobile officium of the Court of Session. The words in the Act were "custody" which went beyond "delivery" and"regulate" which went beyond "enforce". The parallels are not exact but prima facie the new phraseology may arguably have given the sheriff considerably greater powers than before. But as late as 1956 Lord Clyde L.P. commented[82] that the legislation had not "the effect of enlarging the jurisdiction conferred on the sheriff court beyond that given" by the Acts of 1886,[83] 1925[84] and 1928.[85] In other words, it could deal with custodial questions between the mother and the father provided that the defender resided in the sheriffdom.[86] That excluded the powers in the 1891 Act.

38.27 Three of the earliest cases decided under the 1913 Act were rather inconsistent. Sheriff Mackenzie in Miller v

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77 Ibid. at p. 186 per Lord Trayner
78 Sheriff Courts (Scotland) Act 1907 (7 Edw. 7, c. 51), s. 5(2).
79 Sheriff Courts (Scotland) Act 1913 (2 & 3 Geo. 5, c.28), s. 3 and 1st Sched. substituting an amended s. 5(2) of the 1907 Act.
80 Whether custody was an independent or ancillary action; see Yuill v Taigs (1911) 27 Sh. Ct. Rep. 195.
81 I.e. independently of any other action.
82 Campbell v Campbell 1956 S.C. 285 at p. 289 per Lord Clyde L.P.
83 1886 Act, ss. 5, 9 and 10.
84 1925 Act, s. 10.
85 Administration of Justice Act 1928 (18 & 19 Geo. 5, c. 2), s. 16.
86 On the residence requirement see Kitson v Kitson 1945 S.C. 434 at p. 442 per Lord Cooper L.J.-C.

Miller[87] decided that the 1913 Act gave jurisdiction to the sheriff court "to entertain a substantive action for the custody of children."[88] By that he meant that the legislature had delegated "a very important part of the nobile officium of the Court of Session to the Sheriff."[89] The 1891 Act however was not available in the sheriff court.[90] In MacLean v MacLean[91] on the other hand the view was that the 1913 Act did not extend the jurisdiction of the sheriff. The 1891 Act however was dealt with specifically in Thomson v Vine.[92] The child's mother sought delivery of her son from the child's paternal aunt. The defender relied upon the 1891 Act. Sheriff-substitute Lyell talked in terms of the 1913 Act having conferred "a new power" on sheriffs to "regulate" custody.[93] That, in his view, necessarily involved questions of abandonment, desertion, parental misconduct, welfare and so on. The fact that these were matters for the Court of Session under the 1891 Act did not make them irrelevant for the sheriff.[94] However the defender in that case sought to be reimbursed in the money spent in alimenting the child.[95] That could not be done independently of the 1891 Act. Thus, he concluded, although the action was competent in the sheriff court, the counter claim for a money payment under the 1891 Act could not be made in that court.

38.28 The issue was apparently resolved by the Court of Session in 1917.[96] An action by a father against a third party

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87 (1915) 33 Sh. Ct. Rep. 99.
88 Ibid., at p. 103 per Sheriff Mackenzie.
89 Ibid., at p. 104 per Sheriff Mackenzie. 90 Ibid., at p. 105.
91 (1916) 33 Sh. Ct. Rep. 316.
92 (1917) 34 Sh. Ct. Rep. 30.
93 Ibid., at p. 30 per Sheriff-substiture Lyell.
94 Ibid., at p. 31. 95 1891 Act, s.2.
96 Murray v Forsyth 1917 S.C. 721.

for the recovery of his child was held competent in the sheriff court although considerations relevant to the 1891 Act were raised. Lord Johnston talked of "this new extension" of the jurisdiction of the sheriff into areas involving the nobile officium.[97] But this was qualified by Lord Johnston, after referring to the statutory power to remit any case to the Court of Session,[98] in these words:-

> "... when it is disclosed by the defences that a case of interference with the patria potestas is involved, it becomes the duty of the Sheriff to transmit the cause to the Court of Session."[99]

Whether the sheriff has a new substantive jurisdiction or not is a technical irrelevance if he is under a duty to remit the case to the Court of Session when the parental right is liable to be forfeited. This was clearly a compromise decision, designed on the one hand to give effect to the words enacted by Parliament and on the other hand to preserve the Court of Session's monopolistic nobile officium to interfere with the patria potestas. This line has been followed consistently since 1917 either as part of the decision[1] or by way of judicial comment when the issue did not directly arise.[2] The availability of the 1891 Act thus depends upon the court in which the action is brought. More significantly the welfare approach and the welfare criteria also depend upon the court in which the action

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97 Ibid., at p. 727 per Lord Johnston.

98 Which always requires reasons in support: Brown v Brown 1948 S.C. 5.

99 Murray v Forsyth 1917 S.C. 721 at p. 727 per Lord Johnston.

1 Shannon v Gowans (1921) 37 Sh. Ct. Rep. 235; Dawkins v Muir (1922) 39 Sh. Ct. Rep. 45; Smith v Glasgow Corporation (1933) 50 Sh. Ct. Rep. 103; Raeburn v Dunleavy (1934) 50 Sh. Ct. Rep. 107; Duguid v McBrinn 1953 S.L.T. (Sh. Ct.) 74.

2 Anderson v Anderson (1922) 39 Sh. Ct. Rep. 158; Easton v Easton (1924) 40 Sh. Ct. Rep. 186; Richardson v Burns 1963 S.L.T. (Sh. Ct.) 26.

is brought. The Court of Session is bound to give effect to all the legislation. The sheriff is restricted to the welfare principles in the 1886 and 1925 Acts. It could in appropriate circumstances be a matter of some significance.

(c) Neglectful parents

38.29 There are four threshold requirements in sections 1 and 3 of the 1891 Act: abandonment and desertion are common to each section; section 1 includes what may be described as unacceptable parental conduct; section 3 deals with neglectful parents. To deal with the last category first: section 3(b) applies where a parent has:-

> "allowed his child to be brought up by another person at that person's expense ... for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties."

38.30 This paragraph also applied to children brought up by the guardians of a poor law union in England but not specifically to those brought up by a parochial board in Scotland. This has been treated now as a reference in England at least to the Supplementary Benefits Commission or the local authority.[3] Section 2 refers also to the parochial boards in Scotland. This must now be a reference to children boarded out by a local authority under the Children Act 1948 and now the Social Work (Scotland)

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3 See Clarke Hall & Morrison, p. 1214.

Act 1968. These children[4] will be mentioned briefly later.

38.31 That apart, there are two elements in the paragraph: first, allowing the child to be brought up by a third party at his expense, a simple issue of fact; and second, in such a way that the parent is unmindful of his duties, a question of judgment reserved for the court. The second element has been used by the courts to justify a rather strict interpretation of the paragraph. Of eight reported instances[5] of defences based on paragraph (b), only two were effective.[6] Most of the cases involved disputes between a parent and a relative of the child: two defenders were aunts,[7] two grandparents,[8] two cousins,[9] one a "friend"[10] and one an orphan's association.[11]

38.32 One of the justifications put forward by the courts for a strict view of paragraph (b), apart from the normally silent argument that the Act is designed to deprive parents of their rights, is that it is eiusdem generis with paragraph (a).[12] That means abandonment or desertion. Allowing a child to be brough up by someone else involves voluntary delegation by the parent of his rights. That per se is neither abandonment nor desertion. The second and crucial element is that the delegation must not amount in effect to an elision of his parental responsibilities. If so, it comes close to a concept of neglect and it may be as much a matter of the parent's intention as of his actions.

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4 Paras. 38.38 to 38.41.

5 Six were Scottish, one English and one Irish.

6 Soutar v Carrie (1894) 21 Rettie 1050; Mitchell v Wright (1905) 7 Fraser 568.

7 Shannon v Gowans (1921) 37 Sh. Ct. Rep. 235; Re Thain: Thain v Taylor [1926] Ch. 676.

8 Soutar v Carrie (1894) 21 Rettie 1050; Gibson v Hagen 1960 S.L.T. (Notes) 24.

9 Mitchell v Wright (1905) 7 Fraser 568; Begbie v Nichol 1949 S.C. 158.

10 Kerrigan v Hall (1901) 4 Fraser 10.

11 In re O'Hara [1900] 2 I.R. 233.

12 Ibid., at p. 244 per FitzGibbon L.J.

38.33 This matter has never been fully examined by the courts. In Mitchell v Wright,[13] for example, Lord Dunedin L.P. postulated a common sense test: in his view the question was who "practically sees to the bringing up of the child."[14] A period of five months was not sufficient in another case to amount to "being brought up" by the third party.[15] These points were clearly directed to the first element in the paragraph: the fact of delegation.

38.34 The Court of Session came closer to the intention of the parties in Gibson v Hagen[16] but they did not quite reach that point. While she was living with her parents, an unmarried mother gave birth to her child. They all lived together for a period thereafter, and, apparently to avoid "social disgrace", it was agreed that the child should be passed off as that of the grandparents. Indeed she took only a small part in caring for her child. After her marriage with the putative father, the mother ceased to live with her parents but they continued to look after the child. During this period there was some contact between the mother and her child. Later the mother and her husband sought to recover the child from the child's grandparents. They succeeded. The 1891 Act was held not to apply. The reason probably[17] was that, in the context of paragraph (b), the mother had never given up responsibility for the child, despite or perhaps in consequence of the rather specious motive for the act of delegation in the first place.[18]

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13 (1905) 7 Fraser 568.
14 Ibid., at p. 575 per Lord Dunedin L.P.
15 Shannon v Gowans (1921) 37 Sh. Ct. Rep. 235.
16 1960 S.L.T. (Notes) 24.
17 It was not fully articulated.
18 I.e. to avoid social disgrace.

38.35 It is difficult to rationalise the decisions, for the court have on the whole declined to analyse the legislation in much detail. The general impression however is that, once a delegation has taken place, paragraph (b) will not apply unless there is proof of neglect on the part of the parent. Thus, if there is any evidence of a relationship, however tenuous, between parent and child, the court will not hold that the parent has been "unmindful of his parental duties".[19]

38.36 In seeking such a relationship, the court will not be looking for maintenance of the child in the financial sense. The concept of delegation built into paragraph (b) includes the child being brought up at the third party's expense. Section 2 of the Act acknowledges that technically this responsibility is part of the parent's duties, although it is not a "duty" for the purpose of paragraph (b) of section 3. The court is given by section 2 a relatively wide discretion to order the parent, where he is successful under section to pay to the third party the whole or a part of the costs incurred in bringing up the child. This power is not available except in relation to an order under section 3.[20]

38.37 So much is clear. But the payment under section 2 was conceived by Lord McLaren "as compensation to the person deprived of the custody of the child."[21] If so, it would appear

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19 See particularly In re O'Hara [1900] 2 I.R. 233 at p. 244 Fitz-Gibbon L.J. where he said: "...the surrender of a child to an adopted parent, as an act of prudence or of necessity, under the pressure of present inability to maintain it, being an act done in the interests of the child, cannot be regarded as abandonment or desertion, or even as unmindfulness of parental duty within the meaning of the Act.": and Kerrigan v Hall (1901) 4 Fraser 10 at p.14 per Lord Balfour L.P. where he said, "I cannot say, upon the information before us, that there is any reason to suppose that the petitioner has been mindful of her parental duties. Having no home of her own, she had to place the child in the hands of someone else and she accordingly boarded it with a respectable person, viz., the respondent. In doing so, the petitioner appears to have done the best thing she could have done in the circumstances."

20 Kerrigan v Hall (1901) 4 Fraser 10; McVeigh v Bonnar (1947) 64 Sh. Ct. Rep. 102; Begbie v Nichol 1949 S.C. 158.

21 Soutar v Carrie (1894) 21 Rettie 1050 at p.1051 per Lord McLaren.

to be rather anomalous for the alimentary obligation of the parent to be disregarded in deciding whether the parent is unmindful of his parental duties. But that appears to be the effect of the Act. The factor common to most if not all of the reported decisions seems to be that, if the initial delegation can be justified by the parent, probably in the interests of the child, he is not unmindful or neglectful for the purposes of paragraph (b). In other words, if the parent's delegation is the best decision for the child when it is made, the 1891 Act does not apply. It is the function of the court to decide whether the parent's decision is the best for the child: as much a matter of speculation for the court as for the parent.

38.38 Section 2 of the 1891 Act also applied to children being brought up by the guardians of a poor law union in England or a parochial board in Scotland. Section 3 did not in terms apply to the latter.[22] The earlier Scottish cases treated parish councils as any other third party actually responsible for bringing up the child.[23] Their power to do so was not queried.[24] But in 1933 a mother sought to recover her children from Glasgow Corporation which had taken possession of them and boarded them out apparently as public assistance authority[25] under the Local Government (Scotland) Act 1929.[26] The details were not disclosed but the corporation was probably providing medical assistance, at least in the first place, under a scheme made

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22 Para. 38.30. S. 3 in conjunction with the definition of "person" in s. 5 would apply to a child being brought up by a school or institution. By institution the Act probably meant a residential home rather than an official body such as a parochial board, parish council or local authority.

23 Campbell v Barony Parish Council (1896) 13 Sh. Ct. Rep. 242; Gillan v Barony Parish Council (1898) 1 Fraser 183.

24 Smith v Glasgow Corporation (1933) 50 Sh. Ct. Rep. 103.

25 Ibid., at p. 103 per Sheriff-substitute Robertson.

26 19 & 20 Geo. 5, c. 25.

in terms of section 14(4) of that Act. In any event no legal process was involved and Sheriff-substitute Robertson decided that the corporation had no legal right to the custody or upbringing of these children. The 1891 Act did not apply. The action was simply to give effect to the mother's right to custody. Decree of delivery was granted.[27] Sheriff Mercer took a different view. He could not agree that the corporation had acted "otherwise than lawfully."[28] The corporation's defences raised issues under the 1891 Act. The case was required to be remitted to the Court of Session.

38.39 The sheriff court did not analyse the legal status of the corporation under the Act of 1929. It would probably have had power to provide medical and other assistance for the children.[29] It is unlikely that it had any legal right or title to custody of the child. That would remain with the mother and the local authority was probably authorisied to do no more than supplement or control certain aspects of the mother's administration. Thus to some extent both judges in the sheriff court were correct: the corporation was acting lawfully[30] but it could not deprive the mother of custody against her will. To that extent a parochial board, parish council or local authority was in no different a position from any other third party.

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27 (1933) 50 Sh. Ct. Rep. 103 at p. 104.

28 Ibid., at p. 106.

29 1929 Act, s. 14(4).

30 Perhaps more accurately it was not acting unlawfully.

38.40 That view is probably confirmed by the apparently strange drafting of the Act. Sections 2 and 3 of the 1891 Act refer to the English guardians of a poor law union. Section 2 alone refers to the parochial boards in Scotland. Does this mean that section 3 does not apply to such bodies and their successors in Scotland? If so, it is consistent with Lord Jamieson's comment in Begbie v Nichol[31] that section 2 was designed primarily to enable poor law authorities to recover their expenses. It would also be consistent with the lack of any custodial status in the corporation, for in that event the action for delivery should be directed not against the statutory body but against the actual person with whom the child had been boarded out. That person would fall within section 3 of the 1891 Act but, since that person would probably be funded by the public body, it would be appropriate to confer the power to recover expenses on that body.

38.41 That makes sense. But it means that those boarding out children under local authority auspices are at risk under the 1891 Act. It also means that the decisions in some of the earlier cases, by avoiding these points, were perhaps questionable. In practice however these difficulties have probably been overtaken by the later legislation, now the Social Work (Scotland) Act 1968. The effect of receiving or taking a child into care is now closely regulated by the Act and the status

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31 1949 S.C. 158 at p. 171 per Lord Jamieson.

of a parent in relation to such a child is also dealt with in the legislation.[32] Thus, so far as the local authority is concerned, the 1891 Act either does not apply or has been overtaken in practice by the later legislation. The 1891 Act possibly remains effective against the person caring for the child unless such a person is protected vicariously by the statutory safeguards for the local authority.

(d) Abandonment and desertion

38.42 Abandonment and desertion appear as alternative threshold requirements in sections 1 and 3 of the 1891 Act. According to Lord Dunedin L.P. they mean the same in either context.[33] As with neglect of duty, so with these two grounds, the courts have failed on most occasions to consider their nature and meaning in much detail. On no occasion has either of these grounds been effective and the court has usually been content to conclude that the statutory requirements have not been met.[34] Indeed once the arguments contending for the application of the Act were declared to be "almost unstatable."[35]

38.43 The more positive comments by some of the judges also fail to produce a coherent or more helpful picture. The importance of In re O'Hara,[36] it will be recalled,[37] was in the recognition of the close connection between the grounds in paragraphs (a) and (b) of section 3. It is not surprising

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32 Chapter 17. See particularly Woods v Minister of Pensions 1952 S.L.T. (Sh. Ct.) 6, 1952 S.C. 529.
33 Mitchell v Wright (1905) 7 Fraser 568 at p. 574.
34 Begbie v Nichol 1949 S.C. 158; Gibson v Hagen 1960 S.L.T. (Notes) 24; McCormack (otherwise Jackson) v McCormack 1963 S.L.T. (Notes) 3.
35 Begbie v Nichol 1949 S.C. 158 at p. 170 per Lord Jamieson.
36 [1900] 2 I.R. 233.
37 Para. 38.35.

therefore that Holmes L.J. in that case described abandonment and desertion in terms of "duty" and "blame". Both words, for him, implied "a disregard of parental duty, and carry with them the idea of moral blame."[38] In Mitchell v Wright[39] Lord Dunedin L.P. moved the central point of the requirement from the parent to the relationship between the parent and the child. So, instead of asking either has the parent failed in his duty or is he to blame, the question was "has the parent left the child to its fate?"[40] This question suggests a balance between the two competing interests rather than a parent-biased approach.

38.44 The difference between the views of Holmes L.J. and Lord Dunedin L.P. is to some extent reflected in McLean v Hardie[41]. The event which could have amounted to abandonment occurred when the mother of the child, then aged five months, met the father in the street, put the child in his arms, took the shawl in which the child had been wrapped and left. The child was apparently in a delicate state of health and the father had no means of taking care of such a young child. In fact he placed the child with his sister and her husband, left on a sea voyage and lost his life at sea. The mother sought to recover the child.

38.45 Lord Clyde L.P., supported by Lords Blackburn and Ashmore, rejected the contention that these events amounted to

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38 [1900] 2 I.R. 233 at p. 252 per Holmes L.J.
39 (1905) 7 Fraser 568.
40 Ibid., at p. 574 per Lord Dunedin L.P.
41 1927 S.C. 344.

abandonment or desertion for totally technical reasons. "The child's father was the person who was naturally and primarily entitled to the custody of the child, and bound to make provision for its maintenance and upkeep."[42] No doubt that would be true in a static situation. The Lord President added: "He had unwarrantably thrown that obligation on the mother's shoulders by deserting her and both the children."[43] Surely, it is suggested, handing the child to her father while in a state of desertion could not amount to a proper discharge of the mother's parental duties. Certainly he was under a duty to maintain and protect the child but he had demonstrably failed to do just that to the mother's knowledge. The 1891 Act does not deal with a static situation and it is strange for the court to apply static principles in a dynamic context. Had not the mother "left the child to her fate"[44] in the sense either of not knowing what would become of her or of having grounds to suspect that she would be unlikely to be properly cared for?

38.46 Lord Sands disagreed with the majority. In his view a legal rule or maxim did not solve the problem. "It is the action of the parent, nor the fate of the child, that is in question. What has the parent done?"[45] He answered this by considering the effect on the child of what the mother had done: that is, negative welfare. He concluded: "I should have been prepared to say she had abandoned or deserted that child, and in

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42 Ibid., at p. 348 per Lord Clyde L.P.
43 Idem.
44 I.e. the question posed by Lord Dunedin L.P: para.38.43.
45 1927 S.C. 344 at p. 348 per Lord Sands.

exercise of the discretion which this consideration opens up to us I should not have been prepared to disturb the status quo."[46] That conclusion was reached only after a consideration of the facts of the individual case, not by applying a legal rule. Lord Sands' comments also emphasise the threshold nature of the requirement followed by the exercise of a discretion. These views are not authoritative, however justifiable they may be, and placing a child in the care of his father as his natural and legal guardian and custodian does not per se amount to abandonment or desertion of the child. The main defect of that approach is that it fails to recognise that the fundamental issue is not the father's legal right but the desirability of the exercise of that right by the father.

38.47 The general lack of success in seeking the application of these grounds, the fairly stringent tests laid down by Parliament and the even narrower interpretation of these tests enunicated by the courts have led to an approach which is heavily parent-biased and which has done little and is unlikely to do much to protect the child from his parents except in the most extreme cases. Other more effective methods are now available to interfere with the rights of inadequate and neglectful parents.[47] Social attitudes to these issues have probably changed since 1891. The Act of 1891 cannot begin to be effective unless these threshold requirements have been satisfied. These various factors suggest that the Act has not been able to achieve what its advocates had hoped in 1891.

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46 Ibid., at p. 349 per Lord Sands.

47 I.e. official child care legislation.

(e) The function of welfare

38.48 Since the 1891 Act was held to apply in very few cases, there was little scope for the courts to analyse and identify the role of welfare at the discretionary stage of the process. The Acts of 1886 and 1925 would not normally apply, for they were considered to be concerned only with inter-parental disputes.[48] As the Act of 1891 was stated to apply only to disputes between a parent and a third party,[49] cases of that type were free from statutory regulation when the threshold requirements of the 1891 Act had not been satisfied, and they were thus governed by the common law. It probably made little difference that the Acts of 1886 and 1925 were irrelevant, for the Court of Session was moving slowly towards a welfare approach under the nobile officium jurisdiction.[50] This does not mean that the discretionary approach in the 1891 Act would be the same as that which was evolving under the common law or had become the subject of statutory direction in the 1925 Act in particular. If this is true, the 1891 Act could not be treated as superseded by the later legislation.[51] This could be so even if the 1886 and 1925 Acts were to relate to disputes between a parent and a third party. In that event the courts would have to satisfy the 1891 Act as well as the other statutes. The Acts may to some extent overlap but there is no inconsistency between them.

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48 E.g. McLean v Hardie 1927 S.C. 344 at p. 348 per Lord Clyde L.P. A different view probably now prevails.

49 E.g. Campbell v Campbell 1956 S.C. 285.

50 Chapter 39.

51 As Bevan, p. 289 suggested.

38.49 Section 1 of the 1891 Act contains a simple discretion to decline to issue the writ or make the order sought by a parent satisfying the threshold requirements of that section. Section 3 prevents the court from making an order for delivery of the child to the parent unless the parent proves that he is a fit person to have custody. In reaching that decision the court is directed to have regard to the welfare of the child. Even if that is proved to the satisfaction of the court, the way remains open for the court to decline to make an order. There is thus a discretion in section 3 as well as in section 1. The only restriction in the 1891 Act on the exercise of these discretions is the direction to have regard to the welfare of the child in the final phrase in section 3. If the 1886 and 1925 Acts were to apply, the significance of welfare would not be reduced. Section 5 of the 1886 Act makes welfare relevant along with parental conduct and wishes. Section 1 of the 1925 Act also makes welfare relevant and gives it a certain priority. Each of these two sections thus goes further than to make welfare relevant but welfare remains a factor common to all three provisions. The acts are in this regard not inconsistent. Each may be given effect.

38.50 If the 1891 Act does not for one reason or another apply, then the matter will fall to be determined under common law.[52] In Campbell v Croall[53] the third party respondent relied

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52 I.e. assuming that s. 1 of the 1925 Act does not apply.

53 (1895) 22 Rettie 869.

upon the 1891 Act and the common law. The Court of Session did not reveal whether the requirements of the Act had been satisfied or not. It made no difference, for the court refused the petition. The reason was that it was better for the children to remain with the respondent than to be restored to their mother. The test applied by the court was the best interests of the children. "The leading consideration," said Lord Young, "is, what is best for the children."[54] In doing so the court adopted a balancing approach, by looking at the legal right of the mother, her circumstances and those of the children, but guided by what may almost be described as the objective of the exercise, namely to do what would be best for the children.[55] The approach adopted by the Court of Session in that case under the nobile officium was very close indeed to the approach directed by the 1925 Act.

38.51 Kerrigan v Hall[56] was quite different. The respondent relied upon the 1891 Act. Lord Adam's analysis of the Act clearly divided it into threshold requirements followed by a discretion.[57] But none of the requirements had been satisfied.[58] The 1891 Act was irrelevant. The 1886 Act did not apply, for the dispute was not between the child's parents. The 1925 Act had not been enacted. The Court of Session gave effect only to the common law, not as an alternative as in Campbell v Croall.[59] But in Kerrigan v Hall[60] the common law was not an anticipated

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54 Ibid., at p. 871 per Lord Young.
55 Ibid., at pp. 871 and 872 per Lords Young and Trayner.
56 (1901) 4 Fraser 10.
57 Ibid., at p. 15.
58 Ibid., at pp. 14 and 15 per Lord Balfour L.P. and Lord Adam respectively.
59 (1895) 22 Rettie 869.
60 (1901) 4 Fraser 10.

reflection of the 1925 Act. The court asked not so much what is best for the child but rather whether there was any reason why the mother should not be given custody. That is the reverse of the approach required if the Act had been held to apply. It was this common law approach, one based on parental rights, disqualification and only then the welfare of the child, which the 1891 Act sought to modify. It failed inter alia because it re-enacted the disqualification approach in the form of threshold requirements.

38.52 When the 1891 Act does apply, the onus is on the parent to prove his fitness rather than on the third party to prove the parent's lack of fitness.[61] At the discretionary stage of the process, under the Act as under common law, the court must examine the whole circumstances of the case.[62] Normally the court requires to be satisfied on the threshold requirements before engaging in that exercise.[63] In Macallister v Macallister however the Court of Session seemed either to consider the two stages simultaneously or to ignore the threshold requirements and proceed at once to the discretionary stage. The justification for so doing was said to be the common law as enunciated by Lord Inglis L.P. in Sutherland v Taylor.[64]

38.53 The Lord President in that case indicated that the interests of the child had always been considered as of

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61 Mackenzie v Keillor (1892) 19 Rettie 963 at p. 966 per Sir J.H.A. Macdonald L.J.-C.
62 Hogarth v Reid (1900) 17 Sh. Ct. Rep. 3 at p. 4 per Sheriff Lees.
63 1962 S.C. 406.
64 (1887) 15 Rettie 224.

paramount importance.[65] That remark was passed however in a context related to the legal title of the mother of an illegitimate child and her right as "natural custodier" of a child of a very young age.[66] The structure of the Lord President's judgment was an examination of the mother's conduct[67] followed by a consideration of whether it would be in the child's interest to be returned to the mother.[68] The significant feature was not so much the division into threshold and discretionary stages but the relevance of welfare at each stage. The Lord President's comment relied upon by Lord Guthrie in the later case[69] applied more to this threshold stage than to the discretionary stage.

38.54 Lord Guthrie was concerned to ensure that the general discretion of the court had not been removed or narrowed by the 1891 Act. In his view nothing in the 1891 Act in any way modified the principle enunciated by Lord Inglis L.P. in Sutherland v Taylor.[70] His reason was that section 1 of the 1891 Act recognised that "the decision as to the future charge of a child is a matter within the discretion of the court."[71] He also rejected an argument that section 3 had limited the discretion of the court by requiring the court to enforce the parent's title unless the threshold requirements had been satisfied.[72] It is clear therefore that the general view of the Court of Session is that the 1891 Act no more restricts the exercise of the discretions of the court than the common law.

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65 Ibid., at p. 227 per Lord Inglis L.P.
66 Idem. 67 Ibid., at p. 227. 68 Ibid. at p. 228.
69 Macallister v Macallister 1962 S.C. 406 at p. 411 per Lord Guthrie.
70 (1887) 15 Rettie 224.
71 Macallister v Macallister 1962 S.C. 406 at p. 411 per Lord Guthrie.
72 Idem.

The attitude of Lord Guthrie to the threshold requirements of the 1891 Act nevertheless remain something of a mystery. It appears that he regarded the mother as unmindful of her parental duties[73] but he never came to a specific conclusion related to abandonment, desertion or neglect. Otherwise his judgment is impeccable.

38.55 Welfare plays a negative and silent role in the threshold requirements of the 1891 Act and a positive part at the discretionary stages of the procedures in that Act. That is fundamentally no different from the common law. Nor is there any reason why, other difficulties apart,[74] the discretions in the 1891 Act should not also fall within the paramountcy of welfare principle in the 1925 Act. There is no reason why welfare cannot at the same time be both relevant and paramount. The significant feature of welfare in the 1891 Act is not its relevance but its relationship with parental fitness. The court is barred from restoring a child to the parent where the threshold requirements have been met unless parental fitness has been proved.[75] Welfare is part of that positive requirement. It thus plays three separate and distinctive roles.[76] No other Act emphasises welfare in that way in a single context. It was not that feature of the Act which reduced its impact. That was brought about the narrow threshold requirements and the strict interpretation given to them by the courts.

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73 This is the implication of Lord Guthrie's conclusion that the mother was concerned more with the assertion of her rights as mother than with the welfare of the child: 1962 S.C. 406 at p. 413.

74 E.g. the application of the 1925 Act to non-parental disputes.

75 1891 Act, s. 3.

76 Negatively as the effect on the child of the threshold requirements: as part of the discretionary decision-making process; finally and positively as part of the overall requirement of parental fitness before restoration of the child to the parent.

Section 4 - The 1891 Act in operation

38.56 The foregoing analysis has been rather semantic. It has given little indication of the circumstances in which the 1891 Act was discussed. It is also to some extent unreal to separate threshold requirements from the discretionary stage of the proceedings. In practice one would have an impact upon the other. There have been only three considered analyses of the Act: one Irish[77], one Scottish[78] and one English[79]. It is worthwhile for several reasons to look briefly at these cases in the light of their individual circumstances. They present a picture of the Act in operation as well as affording an overall impression of the structure of the legislation.

38.57 The issue in these cases was fundamentally the same: whether the parent, who had handed over care and control of the child to third parties for reasons consistent with the welfare of the child, could recover the child when it seemed appropriate to do so. In In re O'Hara[80] the child's father had died. The mother, being in poor circumstances, obtained a domestic position and placed the child in an orphanage. The child was subsequently "adopted" by the mother's employer. The mother remarried and decided to recover the care and control of her daughter. Kenny J. refused the mother's application but the Court of Appeal reversed his decision and ordered the return

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77 In re O'Hara [1900] 2 I.R. 233.
78 Mitchell v Wright (1905) 7 Fraser 568.
79 Re Thain: Thain v Taylor [1926] Ch. 676.
80 [1900] 2 I.R. 233.

of the child to his mother. The judgment turned upon the view that section 3 of the 1891 Act did not apply as the mother had neither deserted nor abandoned her child. The attitude of the Court of Appeal is encapsulated in the words of FitzGibbon L.J.:-

> "... the surrender of a child to an adopted parent, as an act of providence or of necessity, under the pressure of present inability to maintain it, being an act done in the interests of the child, cannot be regarded as abandonment or desertion, or even as unmindfulness of parental duty within the meaning of the Act."[81]

Thus voluntary delegation in the child's interest does not put the parent at risk.

38.58 In the Scottish case[82] the mother of an illegitimate child, before her marriage to someone other than the child's father, placed the child with a certain married couple. The mother was personally unable to look after the child. About seven years later Miss Wright, the petitioner's cousin who had helped to make the earlier arrangements for the child, took the child into her control for a holiday but declined to return her either to the petitioner or the couple who had earlier cared for the child. The mother sought the return of her child. She had subsequently married a man of humble but respectable circumstances and a home was available. One of the questions

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81 Ibid., at p. 244 per FitzGibbon L.J. This view was repeated, presumably with approval, by Slesser L.J. in In re J.M. Carroll [1931] 1 K.B. 317 at pp. 362 and 363.

82 Mitchell v Wright (1905) 7 Fraser 568.

before the Court of Session was identical to the issue in In re O'Hara:[83] had the mother "abandoned or deserted" the child so as to activate section 1 or section 3 of the 1891 Act? This question was answered very succinctly by Lord Dunedin L.P. He applied the test whether the parent had left the child to its fate[84] and concluded:-

> "... although the petitioner did little for her child, she never really abandoned or deserted it, because she knew and approved of the steps which the respondent took for its maintenance."[85]

38.59 No reference was made in that case to In re O'Hara.[86] The similarity of argument and opinion of the two courts is thus quite remarkable. There were however further circumstances in the Scottish case which found no counterpart in the Irish case. These circumstances effectively induced a different decision. Abandonment or desertion by the parent is the threshold requirement for the exercise of the discretion in section 1 of the 1891 Act. Abandonment and desertion are also the criteria in paragraph (a) of section 3. The words "abandonment" and "desertion" attract the same meanings in section 3 as in section 1.[87] The circumstances in Mitchell v Wright[88] did not amount to abandonment or desertion in paragraph (a) of section 3 but they did fall within paragraph (b) of section 3. So the prohibition in section 3 became effective.

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83 [1900] 2 I.R. 233. 84 Para. 38.45.
85 (1905) 7 Fraser 568 at p. 574 per Lord Dunedin L.P.
86 [1900] 2 I.R. 233.
87 (1905) 7 Fraser 568 at p. 574 per Lord Dunedin L.P.
88 (1905) 7 Fraser 568.

38.60 The threshold question in the Scottish case thus was whether the child had been brought up "by another person at that person's expense ... for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties." The court eschewed a narrow interpretation of these words, took a common sense view and decided that they applied to "the person who practically sees to the bringing up of the child."[89] There was no need of continuous residence with the person bringing up the child. The judicial consensus was that "the mother practically washed her hands of the child, and left her entirely in the care of Miss Wright."[90]

38.61 Once the threshold requirement was satisfied, attention was directed to discharging the onus of proof of parental fitness. The petitioner argued that, as there was no "moral slur" upon her character, she must by virture of that qualification be a fit person to have custody.[91] The court however founded upon the statutory directive "having regard to the welfare of the child." The question of fitness thus became "one of circumstances and degree."[92] In applying this test Lord Dunedin L.P. regarded welfare very largely from the point of view of the child rather than the mother.[93] The advantages which the child would enjoy with the mother were less than those the child then enjoyed in the care of Miss Wright. The conclusion

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89 Ibid., at p. 575 per Lord Dunedin L.P.
90 Idem.
91 (1905) 7 Fraser 568 at p. 575.
92 Idem.
93 This is an important distinction.

was that it was "for the welfare of the child"[94] to remain with the respondent and the petition was refused.

38.62 The significance of this welfare test, particularly in its statutory context, is that in a clearly positive sense it promotes the best interests of the child. The court weighed the advantages and disadvantages of the alternatives open to it, balanced them against the welfare of the child and came to a decision on the basis of what would probably be best for the child. In this sense the court went beyond the statutory duty to have regard to the welfare of the child.[95] It probably also went beyond the paramountcy of welfare principle later enacted in the 1925 Act.[96] In other words welfare was made the objective of the decision, not a factor in the process.

38.63 These two cases were decided before the enactment of the paramountcy of welfare principle in 1925. Although the decision in the English case came after the enactment of the 1925 Act, the English Court of Appeal in effect interpreted section 3 of the 1891 Act in the way already described. The facts in Re Thain, Thain v Taylor[97] scarcely need rehearsing but a young girl had from earliest infancy lived with her maternal aunt and her husband. The mother of the child died. The father allowed the child to remain with her aunt but the paternal relationship continued so far as practicable. On

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94 (1905) 7 Fraser 568 at p. 575 per Lord Dunedin L.P.: the word "for" is important.

95 1891 Act, s.3.

96 1925 Act, s.1. There would be nothing inconsistent as between the Acts of 1891 and 1925 in doing so. If the 1925 Act had been enacted, the approach in Mitchell v Wright (1905) 7 Fraser 568 would have satisfied both requirements.

97 [1926] Ch. 676.

remarriage the father wished to have his daughter in his own care and control. Lord Hanworth M.R. unequivocally rejected section 3 of the 1891 Act:-

> "That section does not touch the facts of this case. The father intended to leave the arrangement made with Mr and Mrs Jones [the aunt and her husband] without a limit as to time, but his conduct did not amount to allowing the child to be brought up at those persons' expense for such a length of time, and under such circumstances as to satisfy the court that he was unmindful of his parental duties." [98]

He went on to refer to the paramountcy of welfare principle enacted in the 1925 Act.[99] There was no suggestion that the Act did not apply to third party disputes. Section 1 of that Act was stated to be declaratory of the existing law.[1] Presumably therefore the same decision would have been made before 1925.

38.64 The interesting question however is whether the court would have reached the same decision if section 3 of the 1891 Act had been satisfied. Would the court have taken the same approach as in Mitchell v Wright.[2] Probably not, because the English Court of Appeal, despite the benefit of the 1925 Act, appeared to adopt an approach biased in favour of the parent, admittedly a "blameless" parent. Thus the Acts of 1891

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98 Ibid., at p. 688 per Lord Hanworth M.R. Presumably because the decision to delegate care of the child was the best for the child when it was made and during the father's viduity.
99 1925 Act, s. 1.
1 [1926] Ch. 676 at p. 689 per Lord Hanworth M.R.
2 (1905) 7 Fraser 568.

and 1925 probably made no difference to the actual decision in Re Thain, Thain v Taylor.[3] No court would have refused the father's request for the return of his daughter. That case therefore sheds little light on the discretions in the Act of 1891.

38.65 These three cases take an entirely consistent and acceptable view of the threshold requirements in sections 1 and 3 of the 1891 Act. The Court of Session alone in Mitchell v Wright[4] had occasion to consider the discretionary provisions in section 3 and indicated, it is suggested, a justifiable approach but nevertheless one which went beyond the legislation in favour of the child. The Court of Appeal in Thain[5] felt bound to take notice of section 1 of the 1925 Act but, in view of the controversy surrounding that part of their decision,[6] it may be that their approach to welfare, while justifiable no doubt in the circumstances of that case, had created problems for the future.

38.66 The importance of the 1891 Act as interpreted by the courts may be summed up in two propositions. A relatively clear and simple understanding emerges of the way in which Parliament has directly and objectively protected the welfare of the child by creating threshold requirements containing concepts such as abandonment and desertion. Greater difficulty however is apparent in the judicial approach to the more generalised concept of welfare and the part it plays in the statutory schemes, particularly those parts which are discretionary in character.

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3 [1926] Ch. 676.

4 (1905) 7 Fraser 568.

5 [1926] Ch. 676.

6 Paras. 42.18 to 42.22.