CHAPTER 39

THE CONTEMPORARY APPROACH TO WELFARE: THE NOBILE OFFICIUM IN SCOTLAND

Section 1 - Introduction

39.1 The pattern of the contemporary custodial legislation indicates that until recently[1] the Custody of Children Act 1891[2] was the only legislation which specifically treated the welfare of the child in one form or another as a threshold requirement. The effect of section 5 of the Guardianship of Infants Act 1886,[3] so far as it applied, was simply to make relevant inter alia the welfare of the child, while section 1 of the Guardianship of Infants Act 1925[4] directed that the welfare of the child should additionally be afforded a certain priority. The flexibility of that approach enabled the courts to take an individual but potentially diverse and sometimes inconsistent view of the role of welfare. That may have been one of the reasons underlying the recent trend to reduce the scope for judicial inconsistency by reverting in certain contexts to a threshold approach.[5] Unfortunately that trend is so recent that it is impossible at this stage to analyse the judicial reaction to it. These statutory provisions were built on to a common law and equitable system which in the context of custody and parental rights amounting or

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1 I.e. until the Guardianship Act 1973 (1973 c. 29) and the Children Act 1975 (1975 c. 72),
2 54 & 55 Vict., c. 3.
3 49 & 50 Vict., c. 27.
4 15 & 16 Geo. 5, c. 45.
5 Children Act 1975, ss. 36(3), 37(1) and 53(1).

approximating to patria potestas had itself exhibited a narrow threshold approach. The pattern is thus a complex amalgamation of potentially divergent approaches. The attitudes of the courts reflect this statutory complexity.

39.2 This is true for England and Scotland. Each jurisdiction developed from its own distinctive origins and the structure of the judicial system has done nothing in either case to simplify the law. The nobile officium of the Court of Session was until recently exercisable only in the Inner House.[6] The consistorial jurisdiction of the Outer House is entirely statutory.[7] The former has clearly had an effect on the latter and the contemporary legislation has either directly or indirectly influenced the court's consistorial jurisdiction.[8] To this must be added the common law and statutory jurisdictions of the sheriff. In England the magistrate's court,[9] the county court[10] and the High Court[11] all exercise statutory jurisdictions which have in practice been influenced indirectly by the general prerogative wardship jurisdiction of the High Court derived from Chancery. Welfare plays no more of a uniform role in these various jurisdictions than it does in the areas of adoption and official child care.

39.3 It is difficult if not impossible to generalise about the role of the welfare of the child. The overall impression however is this: where parents are not involved, there is greater

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6 Rules of the Court of Session, r.189(a)(xx) as amended by Act of Sederunt dated 30 January 1970; Syme v Cunningham 1973 S.L.T. (Notes) 40.

7 Conjugal Rights (Scotland) Amendment Act 1861 (24 & 25 Vict., c. 86).

8 Paras. 40.16 to 40.28.

9 Matrimonial Proceedings (Magistrates' Court) Act (8 & 9 Eliz., 2, c. 48), s. 2(1)(d)(e) and (f); 1886 Act, s. 9 as read with 1925 Act, s. 7(1) and the Guardianship and Maintenance of Infants Act 1951 (14 & 15 Geo. 6, c. 56), s. 1.

10 1886 Act, s. 9.

11 1886 Act, s 9; Matrimonial Causes Act 1973 (1973 c. 18), s.42.

scope for the welfare of the child to play a wider, more positive and almost exclusive role; where the dispute is between a parent and a third party, the tendency is to adopt a threshold approach by seeking grounds for parental disqualification, at least as the point of commencement; and where it is an inter-parental dispute, the courts seem concerned to achieve a balance between the interests of the parent and of the child, although sometimes an approach similar to the threshold approach is adopted or a decision is reached by reference to a rule of practice (more properly a principle of child care) evolved (or accepted) by the court.[12] Such a pattern may be expected to emerge as a matter of common sense. But the authorities lend support sometimes directly, sometimes indirectly. This pattern has evolved against the foregoing common law and statutory background. The earlier views on the applicability of the legislation to parental or non-parental disputes, to legitimate or illegitimate children and to consistorial and matrimonial cases have influenced the development of the law by the courts. This has added to the complexity of the law. Parliament has done nothing to simplify matters. Indeed they have rather piled Ossa on Pelion by adding to rather than reducing the statutory superstructure.

Section 2 - Non-parental disputes

(a) The earlier cases

39.4 These problems are immediately apparent even in the

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12 These issues are analysed in detail in this chapter.

case of children whose parents have died without appointing a guardian. In that event, there being no person with a right or title to the custody of the child, the way would in theory be open to settle the dispute by reference only to the interests of the child. This is not so. In Smith v Smith's Trustees,[13] where the orphan's relatives sought to have him removed from the care of the person with whom he was boarding and placed with his parental grandmother, Lord Inglis L.P. indicated that it was "entirely a question for the discretion of the court whether the existing arrangment should be suspended, and another arrangement made for the custody and for the education of the child."[14] No threshold requirements were created by the court for the exercise of that discretion. The Lord President however considered that the court should look at the feelings and opinions of the parents before their deaths. The father had in fact been responsible for making the existing arrangement before his death.[15] No reason was put forward to change that arrangement and the court refused to alter the existing position. The court was guided therefore in the exercise of its discretion by the attitudes of the father and the status quo. The onus was on the petitioners to show why the status quo should be changed, presumably in the interests of the child. They failed.

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13 (1890) 18 Rettie 241.
14 Ibid., at p. 243 per Lord Inglis L.P.
15 Idem.

39.5 A similar approach was adopted by the Court of Session in Hannigan v Muir.[16] In that case the orphan was aged thirteen. Her personal wishes were clear and strong reasons would have been needed to overrule them. Although the orphans in Morrison v Quarrier[17] were twins aged twelve, less significance was attached to their wishes. There was a possible conflict of religion. Their father, although a Roman Catholic, had apparently been prepared to have his children brought up in a different religion. The petition was brought to require them to be brought up as catholics.[18] The Court of Session refused the petition. Lord Robertson L.P. took the view that "the inference naturally arising from the father's own religion is entirely displaced by the way in which he arranged for the instruction of his children..."[19] But, although Lord Adam conceded that the wishes of a father might be the predominant consideration, he insisted that he should be allowed to say:-

> "... I do not know that by the law of Scotland the same paramount weight is to be given to them as seems to be attached to them by the law of England, almost to the exclusion of the consideration of the interests of the children."[20]

There was no problem in that case, for the wishes of the father and the interests of the children were wholly consistent: that

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16 (1892) 19 Rettie 909.

17 (1894) 21 Rettie 889 and 1071.

18 (1894) 21 Rettie 1071 at p. 1073 per Lord Robertson L.P.

19 Ibid., at p. 1074 per Lord Robertson L.P.

20 Ibid., at p. 1075 per Lord Adam: supported idem. per Lord McLaren.

the children should remain in Quarrier's home and continue to be brought up as protestants.

39.6 Religion was also the issue in O'Donnell v O'Donnell.[21] Although Lord Strathclyde L.P. apparently was prepared to accept the views of Lords Adam and McLaren[22] in Morrison v Quarrier,[23] he in practice accepted as the law of Scotland the legacy bequeathed by the law of England in the late nineteenth century.[24] The views expressed in O'Donnell v O'Donnell[25] are however rather inconsistent unless a threshold approach is introduced into the decision-making process. The case was a competition for custody between the protestant stepmother of the children and their Roman Catholic maternal grandmother. The children would be as well cared for by the one as by the other. The father before his death was content for the stepmother to look after the children. But she indicated that she would educate them as protestants, while the family had been described as a "Roman Catholic family."[26]

39.7 Lord Strathclyde L.P. applied[27] the views of Mellish L.J. in Andrews v Salt,[28] that the children will be brought up in the father's religion unless he has forfeited that right. That implies a threshold approach, followed where appropriate by the exercise of a discretion. But the Lord President added:-

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21 1919 S.C. 14. 22 Ibid., at p. 17 per Lord Strathclyde L.P.
23 (1894) 21 Rettie 1071 at p. 1075.
24 O'Donnell v O'Donnell 1919 S.C. 14 at p. 17 per Lord Strathclyde.
25 1919 S.C. 14. 26 Ibid., at pp. 18 and 19 per Lord Mackenzie.
27 Ibid., at p. 17 per Lord Strathclyde L.P.
28 (1873) L.R. 8 Ch. App. 622 at p. 638.

> "... the interest and welfare of the children is the paramount consideration in questions of this kind. If in the present case I were to have regard to that principle alone and to nothing else, then I should certainly refuse the prayer of this petition..."[29]

The court granted the petition. He did not therefore give effect to that principle alone. To it was added the threshold approach to the rights of the father in religious matters enunciated by Mellish L.J. Since there was nothing to suggest that the father had forfeited or abandoned his right, the children were required to be brought up in the father's religion. That meant that custody was awarded to the maternal grandmother. If the view of Lords Adam and McLaren had been followed, the court would have also considered whether to do so would be consistent with the children's welfare. The court did not look at that question, because the children would be well cared for in the custody of either competitor. So, not only did the court adopt a threshold approach, it also took a rather narrow view of welfare. Religion and parental rights were separate from and independent of welfare rather than a part of it; or, if not a part of it, at least a part of the overall process along with religion and parental rights. The common law of Scotland had adopted an open but

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29 1919 S.C. 14 at p. 17 per Lord Strathclyde L.P.

balanced attitude to the religious aspects of non-parental custodial disputes. It reverted however to a much narrower threshold approach under the influence of the English doctrine of the sanctity of the parental right to determine the child's religion.

(b) The present position

39.8 Cases concerning orphans rarely come before the courts now. Children would either have guardians or, more likely, come under the care of the local authority under the official child care legislation. Any dispute will be governed by that legislation or, if the matter were to come before the court, in exercise of the nobile officium of the Court of Session.[30] The essence of the cases under discussion is the absence of any person with legal right or title to the custody of the child. The most recent case which probably falls into this context is G v H.[31] The child's mother in that case divorced her husband for adultery. Custody was awarded to the mother. The father therefore had no right or title to custody.[32] The mother remarried and she and her daughter lived with the second husband. The mother died but the child continued to live with her stepfather or, when he was away, with her maternal grandparents. The child's father, who had been deprived of his right to custody,[33] sought delivery of

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30 Cheetham v Glasgow Corporation 1972 S.L.T. (Notes) 50.
31 1976 S.L.T. (Sh. Ct.) 51.
32 He would retain any powers, other than custody, exercisable as father of the child.
33 Which presumably did not revive on the death of the mother. If it did, this action was in a sense an attempt to enforce it.

the child from the stepmother. Sheriff Ireland, after considering the procedural difficulties involved, decided that he could award custody to the step-father, "if it is proved that this will best promote the welfare of the child."[34] In reaching a positive decision on that question, the sheriff looked at two matters: whether it was in the child's interests to remain with the stepfather and the nature of the relationship between the father and his daughter. He concluded that it was in the child's interests to remain where she was and that there had been no contact between them throughout her life. Putting these two facts together, custody should be awarded to the stepfather. Sheriff Ireland thus approached the question according to the spirit of the common law of Scotland.

39.9 Leaving aside the English approach to religion adopted by Lord Strathclyde L.P.,[35] the other cases clearly did not embrace a threshold approach as such. In each case the fundamental issue was what was best for the child. Moreover the court also postulated a guiding principle which seemed appropriate for no reason other than that it was part of the circumstances of each case. This principle was built into the decision-making process as a presumption or at least as a point of commencement. In Smith v Smith's Trustees[36] it was the status quo; in Flannigan v Muir[37] it was the child's wishes; in Morrison v Quarrier[38] it was the child's

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34 1976 S.L.T. (Sh. Ct.) 51 at p. 54 per Sheriff Ireland.
35 O'Donnell v O'Donnell 1919 S.C. 14.
36 (1890) 18 Rettie 241.
37 (1892) 19 Rettie 909.
38 (1894) 21 Rettie 889 and 1071.

wishes and the father's attitude to religion. In each of these cases this presumption was rebuttable if inconsistent with the child's interests. That introduced an approach something in the nature of a threshold. The law has not created it, as in the case of a formal threshold requirement. It is the creature of the judicial imagination. The court has apparently looked at the circumstances of the case, identified a principle of child care which seemed appropriate in the circumstances and tested it against the interests of the child in question. Even Sheriff Ireland's approach in G v H[39] can probably be analysed in this way. He did not in terms identify a guiding principle but the implication is that it was the status quo.

39.10 The creation of such a guiding principle conceived rather as a matter of policy in the interests of the child is a self-imposed restriction on the court. For ease of reference it may be called the presumptive approach. It is not a binding threshold requirement to be established in relation to the child in question. It is part of the discretionary process as a factor to be taken into account and rejected where undesirable in the whole circumstances affecting the child in question. The court has evolved the principle as an introduction to the debate on the specific interests of the child in question in the circumstances of the case. It is, if anything, the threshold to discussion, not

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39 1976 S.L.T. (Sh. Ct.) 51.

a threshold requirement necessary to make a decision. The former is general; the latter is specific. The presumptive approach is a further dimension of welfare which has emerged largely in the area of non-parental disputes and has subsequently moved into other areas partly in response to the increasingly welfare-orientated approach to the settlement of custodial disputes.

Section 3 - Disputes between parents and third parties

(a) Introduction

39.11 The important feature of disputes between parents and third parties is the common law right of the parent. The 1891 Act had been designed to deal with this situation. It was for the most part ineffective as a consequence of the somewhat narrow threshold requirements built into the legislation. Several decisions in which the 1891 Act was considered were finally determined under the common law either in addition or as an alternative to the 1891 Act. The court expressed the view from time to time that the Act made no or little difference, for it simply put the common law in statutory form.[40] If these points are at all arguable, it would be reasonable to expect the common law to adopt the same fundamental approach. The authorities indicate that it does.

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40 Walter v Culbertson 1921 S.C. 490 at p. 500 per Lord Skerrington; Duguid v McBrinn 1954 S.C. 105 at p. 107 per Lord Patrick.

39.12 It appears to make no difference what is the social or physical relationship between the parent and the third party. Whether the child is legitimate or illegitimate is also of little consequence. Of the eleven reported cases in this category to be analysed, in four instances the third party was a relative of the child,[41] in two he was the putative father,[42] in two what may be called a private "adopter" and[43] in three the person running a residential home.[44]

39.13 Naturally it was entirely a matter of the circumstances of the individual case whether the parental right was enforced against the third party. It is however significant that where the parental right was enforced, the court did no more than decide whether the parent had disqualified himself. Welfare played on the whole a negative part in that decision.[45] On the other hand, where the court decided that the parent had forfeited his right and went on to determine whether the child should remain with the third party or be returned to the parent, welfare played a much more positive role.[46] The approach of the common law was thus fundamentally the same as that of the 1891 Act. The major difference was that the common law grounds of disqualification were less rigid than those in the Act. For that reason the common law was more adaptable to individual circumstances: hence reliance more often on the common law than on the Act.

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41 Leys v Leys (1886) 13 Rettie 1223; Fisher v Edgar (1894) 21 Rettie 1076; Walter v Culbertson 1921 S.C. 490; Begbie v Nichol 1949 S.C. 158.

42 Macpherson v Leishman (1887) 14 Rettie 780; Duguid v McBrinn 1954 S.C. 105.

43 Sutherland v Taylor (1887) 15 Rettie 224; Mackenzie v Keillor (1892) 19 Rettie 963.

44 Markey v Colston (1888) 15 Rettie 921; Campbell v Croall (1895) 22 Rettie 869; Kerrigan v Hall (1901) 4 Fraser 10.

45 Para. 33.63.

46 Paras. 33.51 to 33.54.

(b) The threshold approach

(i) The traditional attitude

39.14 The foundation of the threshold approach is the legal right of the parent: the father during his lifetime; the mother if she survives his death; and the mother in the case of her illegitimate child. The equality of parental rights created by the 1973 Act does nothing to destroy this foundation.[47] There is nothing to stop the parent delegating the care and control of his child while retaining the right of custody, and many of the cases have supported the power of the parent, as an incident of the right of custody, to bring such an arrangement to an end at any time, unless that would be detrimental to the welfare of the child.[48] Lord Inglis L.P. explained the approach very clearly in 1886 before the possible application of any legislation:-

> "The children here in question are in pupillarity, and the father's claim is founded on the patria potestas, and the only answer which can be made to his application for their custody is that it would tend to their moral or physical injury if they were given over to him."[49]

More recently Lord Patrick described the position of the father of a legitimate child and the mother of an illegitimate child as "absolute in normal circumstances, although it might yield to

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47 It simply gives the mother a co-extensive legal right along with the father, but not in relation to illegitimate children: Guardianship Act 1973, ss. 1(1) and (7) and 10(1) and (6).

48 Leys v Leys (1886) 13 Rettie 1223; Macpherson v Leishman (1887) 14 Rettie 780; Kerrigan v Hall (1901) 4 Fraser 10; Begbie v Nichol 1949 S.C. 158.

49 Leys v Leys (1886) 13 Rettie 1223 at p. 1225 per Lord Inglis L.P.

considerations affecting the welfare of the children."[50]

39.15 The common law grounds of disqualification are potentially wider than those in the 1891 Act. They depend, given this flexibility, upon the allegations made in each case. Poverty, for example, would not by itself be enough. It would need to bring about actual physical suffering or hardship.[51] Similarly in Macpherson v Leishman[52] Lord Shand was looking for serious suffering in health from want of attention and nourishment and danger to life.[53] In Sutherland v Taylor[54] Lord Inglis L.P. talked of the child's life being imperilled and his health seriously endangered.[55] The child was not returned to the mother in that case for the child had been in very poor health, the mother had shown no interest in her child, had no visible means of support and lived in unsuitable accommodation. In another case a child received into a residential home in a starved and emaciated state and whose parents were drunkards and lived in poor, miserable and wretched conditions was not returned to his parents.[56] Nor was a child returned to his mother who had more or less abandoned him for six years and was living a life of immorality.[57] These are fairly extreme circumstances. Unless it could be shown that the child had suffered under parental control, the court would not intervene. Welfare was relevant as the consequence of the parental abuse. Welfare was not itself the ground for disqualification.

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50 Duguid v McBrinn 1954 S.C. 105 at p. 108 per Lord Patrick.
51 Leys v Leys (1886) 13 Rettie 1223 at p. 1225 per Lord Inglis L.P.
52 (1887) 14 Rettie 780.
53 Ibid., at p. 782 per Lord Shand. 54 (1887) 15 Rettie 224.
55 Ibid., at p. 229 per Lord Inglis L.P.
56 Markey v Colston (1888) 15 Rettie 921.
57 Mackenzie v Keillor (1892) 19 Rettie 963.

(ii) The modified attitude

39.16 There are however indications of a much less rigorous threshold approach. The circumstances are rather special. In Fisher v Edgar[58] the child had been living with her aunt since the age of two when her mother died. When she reached twelve, her father decided to take her back. No reference was made to the 1891 Act which arguably might have applied. The child was not returned to her father largely because the child did not want to go back to him. The judge stressed the importance of the position of the father less as a matter of legal right and more as a principle of child care. There was thus an indication of a presumptive rather than a threshold approach. Lord McLaren stated that the father's powers could be restrained "on good and sufficient grounds, among which the reasonable wishes of the child are a material element."[59] Lord Robertson L.P. expressed the same idea in a way more directly related to welfare. The father's rights did not allow him "to override the choice of his minor daughter where the choice is quite sustained by the general well-being of the child."[60] The wishes of a minor were thus regarded as important but only if they were consistent with the welfare of the child. If so, they would displace the right and wishes of the father. The difficulty in this case is whether they would do so at the threshold or discretionary stage. The opinions are unclear

58 (1894) 21 Rettie 1076.

59 Ibid., at p. 1079 per Lord McLaren.

60 Ibid., at p. 1078 per Lord Robertson L.P.

on this point. But in the absence of evidence of abandonment, desertion, neglect, abuse or similar parental failing, the court was either treating the child's wishes and welfare as the threshold requirement or adopting a relatively discretionary approach to the whole issue. In either event it probably represents a break from previous practice.

39.17 A movement away from the threshold approach may also be identified in Campbell v Croall[61] and particularly in Walter v Culbertson.[62] Part of the difficulty in Campbell v Croall[63] is the brevity of the opinions. The case for refusing to return the children to their mother was not strong, particularly having regard to the other cases. The children had been in poor condition on entering into the home and their condition had improved. So also had the circumstances of the mother. The court seemed to decide the question according to the balance of advantage for the children.[64] Lord Young made reference to the mother's legal right[65] but that seemed to play almost no part in the decision. Nor was there any indication that the mother had disqualified herself.[66] Indeed the reverse, if anything, seems more justified. Taken prima facie, therefore, the case was simply founded upon a welfare test. In 1895 that was quite exceptional, probably in that context unique.

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61 (1895) 22 Rettie 869. 62 1921 S.C. 490.
63 (1895) 22 Rettie 869.
64 Ibid., at pp. 871 and 872 per Sir J.H.A. Macdonald L.J.-C. and Lord Young.
65 Ibid., at p. 871.
66 Cf., the comment in Walter v Culbertson 1921 S.C. 490 at p. 503 per Lord Skerrington that "the real ground on which the application [in Campbell v Croall] was refused was her inability to show any reasonable prospect of being able to maintain the children if they were handed over to her." This seems a strange comment since the mother had both accommodation and a job.

39.18 Walter v Culbertson[67] to some extent consolidated the development which began in Fisher v Edgar.[68] A mother had placed her illegitimate child with the father's mother soon after his birth. Four years later she went to Australia from where she contributed to her child's maintenance. When he was ten, she returned to take the child back to Australia with her. The court declined to grant the request but did so a month or so later when the mother produced a deposit-receipt for £500 as proof of her capacity to care for the child and set up a business as she had proposed on her return to Australia.

39.19 Lord Skerrington, who would have granted the petition in the first place,[69] applied the traditional threshold approach:-

> "Unless a parent has so conducted himself as to show that he is not to be trusted, the Court has no duty, and no right, to oust him from his position as head of the family and to arrogate to itself the right and duty of deciding in what way and in what country he ought to live and maintain his family."[70]

However he modified the traditional approach in two ways. First, the parent's right was not enforceable for its own sake but "because the law considers that it is for the interest of the child that it should be under the control of its natural guardian."[71] Parental control has thus become a principle of child

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67 1921 S.C. 490. 68 (1894) 21 Rettie 1076.
69 1921 S.C. 490 at pp. 502 and 504.
70 Ibid., at p. 501 per Lord Skerrington.
71 Ibid., at p. 499 per Lord Skerrington.

care as well as a rule of law: an example, in other words, of the presumptive approach. This is an updated version of Lord Eldon's principles of equity propounded but largely eschewed in the early nineteenth century.[72] It would follow that if it was not for the interest of the child to be under paternal control, he should not be under paternal control. Lord Skerrington more or less recognised that sequitur in the next part of his opinion which he justified by reference to the benefit of the child as "the paramount consideration."[73] The second modification of the traditional threshold approach was thus to include the benefit or interest of the child as a positive threshold requirement precedent to the power to decline to give effect to the parental right.

39.20 Lord Clyde L.P. probably did not go so far as Lord Skerrington. There is no doubt that the Lord President espoused the threshold approach.[74] He did not treat welfare positively as a threshold requirement. Nor was the position of the mother treated simply as a legal right. The Lord President came close to suggesting that a mother's care was presumptively beneficial to a child. But that presumption would be relevant at the discretionary stage rather than the threshold stage. As he said: "The value of maternal ministrations can easily outweigh many other considerations."[75]

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72 Para.32.74 73 1921 S.C. 490 at p. 499 per Lord Skerrington.
74 Ibid., at 495 per Lord Clyde L.P.
75 Ibid., at p. 498 per Lord Clyde L.P.

(iii) The influence of the legislation

39.21 These three cases indicate an approach more sympathetic to the interests of the child, particularly compared with the older attitude in seeking parental misconduct causing physical or material suffering or injury to the child. No reference was made in any of these cases to the 1886 Act. It had been held not to apply to illegitimate children[76] and that would be sufficient to exclude the mother from its application in practically all cases involving a third party. The 1886 Act in other words applied principally to inter-parental disputes about legitimate children. The 1925 Act naturally featured in none of the cases. What effect did it have on later disputes between parents and third parties?

39.22 There can be no doubt that the 1925 Act now applies to parent-third party disputes[77] but there has been almost no judicial analysis of it in this Scottish context. It has nevertheless been the subject of passing comment. The Illegitimate Children (Scotland) Act 1930[78] applied the formula in section 5 of the 1886 Act to applications by the mother or father of an illegitimate child for custody.[79] This would be consistent with the view that the 1925 Act did not so apply. So the exact relationship between the common law so far discussed and the 1925

76 Brand v Shaws (1888) 15 Rettie 449.

77 J v C [1970] A.C. 668; Cheetham v Glasgow Corporation 1972 S.L.T. (Notes) 50.

78 20 & 21 Geo. 5, c. 33.

79 1930 Act, s. 2(1).

Act remains for Scotland a matter of speculation.

39.23 Of the two post-1925 cases, one featured a dispute between the father of a legitimate child and some distant relatives of his deceased wife[80] and the other was between the mother and father of an illegitimate child.[81] In Begbie v Nichol,[82] the former of these two decisions, the third parties alleged that the father had abandoned or neglected his children in terms of the 1891 Act. This was not substantiated. The final decision thus depended on the common law. Decree was granted in favour of the father. No inquiry had taken place. The decision turned on the relevance of the defenders' pleas. Apart from those relating to the 1891 Act, the plea of the defenders which proved unacceptable to the court was in effect that "The interests of the said child being of paramount importance and removal from the custody of the defenders being likely to cause injury to her health, the crave should be refused."[83]

39.24 That plea encapsulates in technical form the positive role of welfare in the threshold approach. The plea was rejected because it contained no reference to the conduct or character of the father as responsible for the danger to the child's health.[84] In other words, the court applied the negative role of welfare in the threshold approach. If that correctly interprets the opinions expressed in the case, it means that in 1949 the Court of Session

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80 Begbie v Nichol 1949 S.C. 158.
81 Duguid v McBrinn 1954 S.C. 105.
82 1949 S.C. 158.
83 Ibid., at p. 160: the second plea for the defenders.
84 Ibid., at p. 163 per Lord Thomson L.J.-C.

reverted to the traditional threshold approach as enunciated in Leys v Leys,[85] Macpherson v Leishman[86] and Sutherland v Taylor[87] and bypassed the modified threshold approach in Fisher v Edgar[88] and Walter v Culbertson.[89]

39.25 Lord Thomson L.J.-C. argued that the father had in the circumstances "a prima facie case for the delivery of his child."[90] Consequently the third parties were required to "show clear grounds in order to justify their refusal of his request."[91] In his view the vital ground for their refusal was that "the child has become so attached to the defenders that the change of environment may be prejudicial to her general health and an averment is made that it may have possible fatal results to her mental balance."[92] That may well have been so, he concluded, but he was unable to regard that "as a relevant defence to an action at the instance of a father against whom nothing is personally averred."[93] Parental conduct in relation to the child was thus the ground for judicial interference with the patria potestas: not the welfare of the child.

39.26 This was fully supported by Lords Mackay[94] and Jamieson.[95] They were not content, as the Lord Justice-Clerk apparently was, to rely on the father's legal right as the foundation of the threshold approach. The father's legal position was aided in

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85 (1886) 13 Rettie 1223. 86 (1887) 14 Rettie 780.
87 (1887) 15 Rettie 224. 88 (1894) 21 Rettie 1076.
89 1921 S.C. 490.
90 Begbie v Nichol 1949 S.C. 158 at p. 163 per Lord Thomson L.J.-C.
91 Idem. 92 Idem.
93 1949 S.C. 158 at p. 164 per Lord Thomson L.J.-C.
94 Ibid., at pp. 166 and 167.
95 Ibid., at p. 171.

their view[96] by his natural claims founded on the child's interest. Lord Mackay's opinion was clear beyond question. In his "long experience", he said, "the restoration of natural conditions between a natural father and child of seven years of age is nearly always the best course for ultimate stability of mental balance ... I prefer the natural solution to produce the naturally anticipated result, to the solution of leaving the child with parents who are not her natural parents at all."[97] This is also a further example of the presumptive approach whereby a principle of child care created by the court is given the status not of a legal rule but of a guiding principle. In this case it was used to support the legal position. In earlier cases it had been used as the point of commencement for a discussion of the welfare of the child as part of the discretionary process rather than at the threshold stage.[98]

39.27 The only substantial statutory references in the fairly long judgments in Begbie v Nichol[99] were to the 1891 Act. The 1925 Act was mentioned once and immediately discarded.[1] But Duguid v McBrinn[2] was concerned with an illegitimate child to whom the 1930 Act[3] clearly applied. There was no formal suggestion that the 1925 Act was relevant to such a dispute. It would appear nevertheless that the welfare approach in that Act had some influence, largely unacknowledged, on the court. The judicial

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96 Ibid., at pp. 166, 168 and 169 per Lord Mackay and at p. 171 per Lord Jamieson.
97 Ibid., at pp. 168 and 169 per Lord Mackay.
98 Fisher v Edgar (1894) 21 Rettie 1076; Walter v Culbertson 1921 S.C. 490.
99 1949 S.C. 158.
1 Ibid., at p. 170 per Lord Mackay.
2 1954 S.C. 105.
3 Illegitimate Children (Scotland) Act 1930, s. 2(1).

opinions unfortunately are not conspicuous for their clarity or accuracy in determining the role of welfare.

39.28 One of the problems in Duguid v McBrinn[4] was identifying the common law. This naturally was a prerequisite to deciding what effect the 1930 Act had on it. Lord Patrick, for example, referred to the common law right of the mother to custody of her illegitimate child. After mentioning two nineteenth century cases[5], he added:-

> "Nevertheless, even in those days, the welfare of the child was the paramount consideration, and the Court would refuse to give effect to the legal right of the mother if the interests of the child so demanded."[6]

The authority quoted for that proposition was Sutherland v Taylor[7]. Admittedly a difficult case, it cannot, if the foregoing comments are well founded, be taken to support the view that the interests of the child were a threshold requirement for depriving a parent of custody[8]. The welfare of the child may well, on the other hand, have been a consideration, perhaps even the paramount consideration, in deciding whether to deprive a parent of custody at the discretionary stage. That is probably what Lord Inglis L.P. meant[9] in Sutherland v Taylor[10] but that would be inconsistent with Lord Patrick's interpretation of that case. However, Lord Patrick

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4 1954 S.C. 105.
5 Macpherson v Leishman (1887) 14 Rettie 780 and Brand v Shaws (1888) 15 Rettie 449.
6 Duguid v McBrinn 1954 S.C. 105.
7 (1887) 15 Rettie 224.
8 If it were justified, it would have made even less sense for Parliament to have intervened as it did.
9 Discussed in relation to Sutherland v Taylor (1887) 15 Rettie 224 at para. 39.15.
10 (1887) 15 Rettie 224.

commented later that according to the common law the father's right, with which he equated the mother's right vis-a-vis her illegitimate child, might accurately be described as "absolute in normal circumstances." He added the qualification, of course, that "it might yield to considerations affecting the welfare of the children."[11] That would be so, but it is quite different from suggesting that it might yield to the welfare of the children. The inconsistency of Lord Patrick's remarks simply points to the difference between the negative and positive aspects of welfare.

39.29 Lord Mackay also appears to have taken the view that the common law paid more attention to the welfare of the child than was perhaps jusitified.[12] He seems in particular to have been misled by the use of the word "paramount" in some of the early judicial dicta. However all the judges, including Lord Thomson L.J.-C., were unanimous, apart from the common law problems, that "the result of modern legislation, both in the case of the legitimate and the illegitimate child, is to make its welfare the paramount consideration."[13] If the common law had been as Lord Patrick had contended, it would have been difficult to have made that comment, for no changes would have been made by the legislation.

39.30 Duguid v McBrinn[14] was concerned not with the 1886 or 1925 Act but with the 1930 Act. The Lord Justice-Clerk's reference to "paramount" was, it is suggested, inaccurate in

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11 Duguid v McBrinn 1954 S.C. 105 at p. 108.

12 Ibid., at pp. 109 and 110.

13 Ibid., at p. 111 per Lord Thomson L.J.-C.

14 1954 S.C. 105.

relation to the 1930 Act. The Act did not use that word. But what effect did the 1930 Act have on the common law? On the face of it, the 1930 Act, as section 5 of the 1886 Act, directed the court to have regard to the welfare of the child, the conduct of the parents and their wishes.[15] Although the 1886 Act was not strictly relevant, Lord Patrick equated the position of the illegitimate child with that of the legitimate child under the legislation as he had done under the common law. He concluded:-

> "... in a contest between the father and the mother of an illegitimate child for the custody of the child, the paramount consideration is the welfare of the child. Consideration must also be given, as the Act of 1930 directs, to the conduct of the parents, either generally or towards the children or towards one another, and to the wishes of the parents. Only if these considerations fail to dictate that the custody of the child should be given to one parent rather than the other will the claim of the mother be preferred."[16]

39.31 The crucial aspect of these words is their negation of the threshold approach, either traditional or modified. The decision was conceived as the result of an administrative process wherein certain matters were taken into account, afforded due

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15 1930 Act, s. 2(1).

16 1954 S.C. 105 at p. 109 per Lord Patrick.

weight and a decision reached. If that was ineffective to produce a result, only then would the maternal claim be relevant. That would determine the issue. The law dictated the result therefore only as a last resort and in a way, given the circumstances of its application, which would neither prejudice the child nor be of any particular benefit to him. The maternal claim was neutral and therefore acceptable. This contrasts strongly with either the traditional or the modified threshold approach In that situation the maternal claim was the point of commencement, either as a rule of law or a principle of child care.

39.32 The process described by Lord Patrick is essentially discretionary. It is open-ended, for the only direction is to have regard to certain considerations. How they are to be taken into account, how they are to be weighed and balanced and the part each plays in the overall process are matters for the court. The synthesis of these various factors and the reasoning leading to the decision are questions of administrative, intellectual and substantive discretion. The meanings of the relevant ideas, especially welfare, are liable to interpretational and applicational discretion. The only part of his process not discretionary is the residual reference to the legal right of the mother. That element is not contained in the statute but Lord Patrick no doubt would have hoped that there would never be any need to resort to the residual legal right.

39.33 The strength of Lord Patrick's analysis is, it is suggested, that it precisely gives effect, with one exception, to what the statute says. The exception is affording to welfare a priority[17] not given to it by the Act of 1930. That Act did not make welfare the paramount consideration. Lord Patrick did not say why or whence the idea evolved. It could not have been either the 1886 Act or the 1891 Act. It might have been derived from the common law, for Lord Patrick took the view that welfare was the paramount consideration.[18] Another possibility may have been the silent influence of the 1925 Act. If that Act were now to be applied to an inter-parental dispute concerning an illegitimate child, Lord Patrick would have anticipated in 1953 what the law probably is in 1977.

39.34 Lord Thomson L.J.-C.[19] and Lord Mackay[20] reached a similar conclusion. They lacked the elegance and precision of Lord Patrick's statement of the approach. Lord Mackay relied somewhat upon what may be called the quasi-relevance of the 1925 Act as justification for the paramountcy principle.[21] He had also gone further than either of his two fellow judges in asserting that the 1930 Act had given the father of an illegitimate child not only a right to apply for custody but also a right to custody.[22] If this was his view, it was disapproved obiter in A v B[23] by Lord Clyde L.P.[24] and Lord Sorn.[25] In the Lord President's view the 1930

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17 By the use of the word "paramount."

18 It is not clear what he meant by that or in what context welfare was paramount.

19 1954 S.C. 105 at p. 112 per Lord Thomson L.J.-C. But the use of the word "claims" in the penultimate line of the report of his judgment seems inaccurate. Perhaps he meant that only if the merits of the parents as parents (or lack of merit) were evenly balanced, the claim of the mother as mother would become significant.

20 Ibid. at p. 111 per Lord Mackay. 21 Idem. 22 Idem.

23 1955 S.C. 378. 24 Ibid. at p. 387 per Lord Clyde L.P.

25 Ibid. at pp. 390 per Lord Sorn.

Act gave the court power to confer on the father a right to custody "if the welfare of the child so requires."[26] But that was not the test contained in the 1930 Act. The Lord President in fact reverted to welfare as a threshold requirement, which it is not either in terms of the Act or of the Act as interpreted in Duguid v McBrinn.[27] These few cases demonstrate, if nothing else, at least the inconsistency of approach to welfare under the legislation as interpreted by the courts and under the common law.

(c) The role of the judicial discretion

39.35 At this stage it is premature to attempt an overall synthesis even in relation to parent and third party disputes. Duguid v McBrinn[28] firmly established for the first time a discretionary approach in settling certain custodial disputes. The earlier threshold approach has been pro tanto discarded. But that decision is presumably authoritative only in relation to a dispute between the mother and father of an illegitimate child to whom the 1930 Act applies. Otherwise the threshold approach in Begbie v Nichol[29] holds good, unless that has been overtaken by the generality of the House of Lords' decision in J v C.[30] That is probably so, but the matter cannot be regarded as authoritatively settled in Scotland.

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26 Ibid. at pp. 386 and 387 per Lord Clyde L.P.
27 1954 S.C. 105.
28 Idem.
29 1949 S.C. 158.
30 [1970] A.C. 668.

39.36 It must however be recalled that the threshold stage was only the first of two steps in the process. If the threshold requirements had been satisfied, the court would proceed to decide the substantive issue. The supersession of the threshold-discretionary approach by an overall discretionary approach in Duguid v McBrinn[31] was achieved partly under the influence of the legislation and partly under the influence of the discretionary element built into the common law as the second stage of the process. This was the problem in Sutherland v Taylor[32] which apparently caused Lord Patrick inter alios to refer to the paramountcy of welfare.[33] The foregoing analysis of the legislation and of Duguid v McBrinn[34] has to some extent anticipated and overtaken an analysis of the discretionary stage of the common law process. This must now be put right, so that the whole development may be put into perspective.

39.37 None of the cases specifically divides the judicial function into two such parts. Where the threshold requirements were not met, there would be no need to do so. If they had been satisfied, the conduct required to justify parental disqualification was so stringent that proof of such conduct would almost ipso facto determine the question whether the parental right should be enforced. It is significant that the welfare or interests of the child played little or no part in the opinions of the judges

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31 1954 S.C. 105.

32 (1887) 15 Rettie 224.

33 Duguid v McBrinn 1954 S.C. 105 at p. 107 per Lord Patrick.

34 1954 S.C. 105.

except where it was decided eventually not to enforce the parental right. An exception in Macpherson v Leishman.[35] Lord Shand made reference to the "paramount consideration" being "the benefit of the child."[36] But he did so more to justify the policy of judicial intervention to safeguard the child than to indicate a criterion in the exercise of a discretion.

39.38 Some reference has already been made[37] to the remarks of Lord Inglis L.P. in Sutherland v Taylor.[38] In his opinion considerations other than the "mere legal title to the custody" were relevant.[39] Of them the interests of the child were paramount.[40] In the last paragraph of his judgment,[41] when in a sense he put the whole argument together, he came to two separate conclusions; first, as permanent contact with the parent would imperil the child's life or endanger his health, "these are good and sufficient reasons which overcome the legal title of the petitioner." The second was that "the interests of the child are sufficient to warrant us in declining to give effect to the present petition." Thus, once the parent's legal rights had been forfeited, the way was clear not to restore the child to the parent, the criterion being the interests of the child. Lord Shand in Markey v Colston[42] and Lord Young in Mackenzie v Keillor[43] pursued similar approaches.

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35 (1887) 14 Rettie 780. 36 Ibid. at p. 783 per Lord Shand.
37 Paras. 39.15 and 39.28. 38 (1887) 15 Rettie 224.
39 Ibid. at p. 227 per Lord Inglis L.P.
40 Idem. 41 Ibid. at pp. 228 and 289.
42 (1888) 15 Rettie 921 at pp. 926 and 927 per Lord Shand.
43 (1892) 19 Rettie 963 at p. 966 per Lord Young.

39.39 There are also instances in some of these earlier cases of the presumptive approach. This is to some extent an exercise of judicial discretion by creating a principle or guideline, conceived in the interests of the child, unless there is some reason why effect should not be given to it, again in the interests of the child. This has already been seen in Fisher v Edgar,[44] Walter v Culbertson[45] and more recently Begbie v Nichol.[46] These are not isolated cases of the presumptive approach. It has sometimes proved a convenient technique to use to avoid an unduly difficult decision on the facts alone. Lord Clyde L.P. followed the same principle in McLean v Hardie[47] which he had enunciated in Walter v Culbertson.[48] The principle acted upon by the court is always subject to qualification, as, for example, in Kerrigan v Hall[49] where Lord Balfour L.P. announced that "there can be no doubt that unless some strong reason to the contrary is shown ... the natural place for a young child is with its mother."[50] In the earlier case of Campbell v Croall[51] Lord Trayner had argued that the proper place for the children was with their mother.[52] But the children in that case thought differently. They were aged ten and eleven and the court paid considerable attention to their wishes. To some extent the court in that case was forced to decide between two general principles which were there in conflict: that children are better with their mother; and consideration should be given to the children's personal wishes.

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44 (1894) 21 Rettie 1076. 45 1921 S.C. 490.

46 1949 S.C. 158.

47 1927 S.C. 344 at p. 348 per Lord Clyde L.P.

48 1921 S.C. 490. 49 (1901) 4 Fraser 10.

50 Ibid. at p. 14 per Lord Balfour L.P.

51 (1895) 22 Rettie 869. 52 Ibid. at p. 872 per Lord Trayner.

39.40 These decisions suggest that to some extent the courts have been prepared to exercise their undoubted but judicially unpopular discretionary powers by creating general principles or guidelines not in substitution for or competition with the legal rights of parents as the basis for the threshold approach but rather to give some direction and meaning to the concept of the welfare of the child and to make it easier to apply in the individual case. These principles are threshold concepts just as legal rights had become. In the event of a conflict between such principles, difficulties naturally will arise.[53] One of the most recent cases, which arose in a rather strange way, is a good example.

39.41 Klein and another, Petitioners[54] was a competition for custody between the child's adoptive parents on the one hand and her natural parent and step-parent on the other hand. After the child's mother had divorced her father, the child was adopted by the father's parents. She lived with her grandparents as their adopted child for about eight years. The girl was apparently removed by her mother and step-father from the care of her paternal grandparents who thereafter petitioned to have their adopted daughter (natural grand-daughter) returned to them. They failed. The picture thus presented was a confusing one for Lord Johnston. The adoptive parents would have a legal right to custody of the child.[55] The mother could lay claim on the basis of the "maternal ministrations" so favoured by Lord Clyde L.P.[56]

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53 As in Campbell v Croall (1895) 22 Rettie 869.

54 1969 S.L.T. (Notes) 53.

55 Adoption Act 1958 (7 Eliz. 2, c. 5), s. 13(1): repealed by Children Act 1975 (1975 c. 72), s. 108 and Part I of Sched. 4. The matter has since 1 January 1976 been regulated by the 1975 Act, s. 8, para. 3(1) and (2) of Sched. 1 and para. 1(1) and (7) of Sched. 2.

56 Walter v Culbertson 1921 S.C. 490 at p. 498; McLean v Hardie 1927 S.C. 344 at p. 341.

The child had been with her adoptive parents for eight years or so. The evidence indicated that the child would be equally well cared for by either set of "parents". The child, however, who was aged thirteen at the date of the process, would not willingly return to the petitioners.

39.42 Lord Johnston directed himself without quoting any authority that "the paramount consideration is the welfare of Edith [the child]."[57] After neutralising the physical well-being of the child Lord Johnston indicated the nature of her personal wishes. To return the child to her adoptive parents would, as he said, "almost certainly harm the child."[58] These two considerations pointed to the need for the child in her interests to remain with her mother. Lord Johnston said nothing about legal right but the implications were that the child would be returned to her adoptive parents unless there was some reason in the child's interests why this should not happen. In effect, he gave two such reasons. Lord Johnston's judgment may thus be broken down into four elements:-

1. the implied traditional threshold approach based on the legal right of the adoptive parents;
2. the modified threshold approach creating judicially the presumptive desirability of giving effect to the child's wishes unless that would be inconsistent with the child's interests;

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57 1969 S.L.T. (Notes) 53 at p. 53 per Lord Johnston.
58 Idem.

3. the harm potentially flowing to the child on return to the adoptive parents, that is, the negative aspect of welfare; and
4. the synthesis of those three elements affording paramount place to the welfare of the child.

The significant feature of that analysis is that it draws upon most of the indicators which have been seen to be relevant, either separately or together, in the settlement of custodial disputes between a parent and a third party. This case is such a dispute only by the merest technicality. Even so, the only element arguably inappropriate on the basis of the authorities so far analysed would be the paramountcy of welfare. It would be difficult but not impossible to justify a paramountcy approach in terms of the common law. If the 1925 Act were to apply, that would solve the problem. The principal missing link in the analysis so far is simply the paramountcy principle. An examination of inter-parental disputes will help to find that link.

Section 4 - Inter-parental disputes

(a) Introduction

39.43 There never has been any doubt that section 5 of the 1886 Act and section 1 of the 1925 Act extended to inter-parental

disputes concerning legitimate children.[59] The illegitimate child was later specifically covered by the Illegitimate Children (Scotland) Act 1930. These enactments are dynamic and had been conceived on the basis of the legal right of the father and of the mother in relation to the legitimate and illegitimate child respectively. Indeed the second element of section 1 of the 1925 Act was effective specifically to reduce the significance of any parental claim or right which the parent might put forward in argument. The legal right contemplated by section 1 was unequivocally the common law right of the father. The absence of any reference to the mother indicated that the Act did not apply originally to an illegitimate child. On the other hand, the claim contemplated by section 1 included the claim of either father or mother. Such a claim is probably a reference to the principle advocated by the father or mother in support of his or her position along the lines of the presumptive approach already identified. If so, it was quite proper for it to be applied to both father and mother.

39.44 The only change since 1925 of any possible relevance is the repeal of the reference in the second element of section 1 of the 1925 Act to the father's legal right.[60] This was a consequence of the creation of the equality of parental rights.[61] It is unlikely to make much difference to the practical

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59 In the case of the 1886 Act, at the instance of the mother.

60 1973 Act, s. 10(8).

61 Ibid. s. 10(1).

administration of the law. The change would not, as it has already been suggested[62], have the effect of reviving the legal rights of the parents, now including the mother of a legitimate child, and restoring them to the position which they held before 1925. That comment assumes that the legal right of the father had before 1973 become if not totally irrelevant at least largely redundant.

39.45 It would be unwise to conclude that the patria potestas had become irrelevant in settling custodial disputes before or indeed after 1973. This was certainly true of disputes between parents and third parties, where the threshold approach was effective in terms of both the common law and 1891 Act. The only exceptions were the modified threshold approach and the 1930 Act relating to illegitimate children. The interpretation of that Act indicated a residual relevance of the rights of the parent. The text of section 2(1) of that Act was fundamentally the same as the formula in section 5 of the 1886 Act. Prima facie therefore the rights of the parents would continue to be residually relevant also in that context[63]. The crucial matter however is the impact of section 1 of the 1925 Act.

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62 Para. 36.16.

63 Duguid v Brinn 1954 S.C. 105 at pp. 108 and 109 per Lord Patrick.

39.46 The general impression is that the 1925 Act has had a considerable impact if not on the law itself at least on the way the law has since been administered: this despite a number of judicial protestations that the Act had not changed the law.[64] Indeed these protestations were no doubt technically correct. The law, conceived as a body of rules and standards, was not changed. It remained statically the same. But the 1925 Act was a dynamic statute in the custodial context: effective only in any "proceeding" concerning the custody or upbringing of a child. If that is so, it emphasises the vitally administrative nature of the substantive part of judicial proceedings relating to custody and associated issues.

39.47 The traditional threshold approach remained the norm between 1886 and 1925. Only rarely did the courts resort to their discretionary powers. After 1925 the threshold approach gave way to a large extent to a judicial attempt to balance the various interests affected.[65] This did not mean that parental rights as such necessarily disappeared. They did not. Moreover they reappeared in another form. As in relation to parent-third party disputes so in relation to inter-parental disputes, judicial presumptions in the form of child care principles were created and applied at the threshold. These presumptions along with residual legal rights played a part in the overall attempt to secure such

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64 E.g. M v M 1926 S.C. 778 at p. 786 per Lord Anderson.

65 Cf. the formal parts which are clearly adjudicative: e.g. issues of jurisdiction and competency.

a balance. The pattern which has thus emerged over the last fifty years is relatively clear but nevertheless complex.

39.48 The 1886 and 1925 Acts applied to inter-parental disputes coming before the Inner House of the Court of Session in exercise of its nobile officium[66] and the sheriff court in exercise of its statutory jurisdiction under the 1886 Act. The consistorial jurisdiction of the Court of Session under the Conjugal Rights (Scotland) Amendment Act 1861 was exercisable by the Outer House. The Acts of 1886 and 1925, especially the later Act, have had an effect upon the exercise of that jurisdiction. That raises different issues because of the relationship between questions of custody and the grounds of divorce or separation in the principal part of the action. That question has also been regulated by the Matrimonial Proceedings (Children) Act 1958.[67] The sheriff's statutory jurisdiction has probably been complicated by his original common law jurisdiction. Those matters however, although relevant to inter-parental disputes and the administration of the current legislation, will be treated where possible separately. A certain overlap will be inevitable.

(b) The threshold approach before 1925.

(i) The common law

66 Which have come before the Outer House since 1970: para. 39.2.
67 6 & 7 Eliz. 2, c. 40.

39.49 Section 5 of the 1886 Act was technically available only to the mother of her legitimate child.[68] Petitions by the father fell under the common law until 1928.[69] In these cases the Court of Session adopted the threshold approach. Indeed in Stevenson v Stevenson[70] Lord Robertson L.P. supported the threshold approach with a presumptive approach.[71] Allegations of cruelty were made against the father but so far as they related to the mother they were taken to be irrelevant and so far as they related to the children there was no indication that the children would suffer by living with their father. Lord Robertson L.P. expressed the joint threshold - presumptive approach thus:-

> "What we are in search of is some definite reason for believing that it would be injurious to the interest of the children that they should remain in their father's house, which is their proper home ..."[72]

The court could find no sufficient allegations of such injury. The main allegations were of cruelty to the wife. They even regarded as irrelevant to the question of custody. However on appeal the House of Lords[73] appeared to take the view that as in England the matrimonial offence of cruelty would be relevant to questions of custody.[74] But the ultimate decision of the House of Lords turned more on questions of jurisdiction and procedure. The

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68 That had been its intention. The father had no need of such a power of application.

69 Administration of Justice Act 1928 (18 & 19 Geo. 5, c. 26), s. 16.

70 (1894) 21 Rettie 430.

71 He looked for a ground to forfeit the legal right and the father's house was also the proper house.

72 (1894) 21 Rettie 430 at p. 432 per Lord Robertson L.P.

73 (1894) 21 Rettie (H.L.) 96.

74 Thus disapproving the earlier Scottish authorities of Lang v Lang (1869) 7 Macpherson 445 and Stuart v Stuart (1870) 8 Macpherson 821.

1886 Act probably did not apply in Stevenson v Stevenson[75] as the application was brought by the father but the Act was mentioned in passing. Holding cruelty relevant would certainly be consistent with section 5.

39.50 There was no such complication in the four other petitions by the father of the child. In Rintoul v Rintoul[76] Lord Adam was seeking some evidence of paternal misconduct. The mother in Marchetti v Marchetti[77] was allegedly in danger of killing her child. Neglect and ill-treatment were the basis of the allegations in Brydon v Brydon.[78] While in AC v BC,[79] where a parental conviction for pilfering was not sufficient to displace the patria potestas, Sir J.H.A. Macdonald L.J.-C. commented:-

> "... it is a well-established principle that, unless there are reasons of a substantial character to the contrary, where a child is weaned and no longer requires the immediate attention of its mother, the father is entitled to its custody."[80]

There can be little doubt that these decisions followed the traditional threshold approach.[81]

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75 (1894) 21 Rettie 430, 21 Rettie (H.L.) 96.
76 (1898) 1 Fraser 22.
77 (1901) 3 Fraser 888.
78 (1907) 15 S.L.T. 236.
79 (1902) 5 Fraser 108.
80 Ibid. at p. 111 per Sir J.H.A. Macdonald L.J.-C.
81 See also the obiter dictum of Lord Young in Aitken v Gourlay and McNab (1903) 5 Fraser 585 at p. 588.

(ii) Section 5 of the 1886 Act

39.51 The 1886 Act has been the subject of application and comment in a number of cases. Some propounded the common law; other indicated a new dimension. The first reported instance of an application by a mother under section 5 is Sleigh v Sleigh.[82] Lord McLaren commenced his opinion by suggesting that the court had under the Act "an unqualified discretion."[83] It is difficult to see how the discretion could at all be regarded as unqualified, even according to Lord McLaren, for he added that the "guiding consideration" was the "interest of the children."[84] How a guiding or indeed any consideration could be a qualification on the exercise of a discretion is not easy to understand. Perhaps Lord McLaren was thinking more generally of the policy justifying the power of the court to intervene. However, he went on to conclude that the statute had not displaced the common law for the common law had always treated the interest of the children as the ruling consideration. Notwithstanding these arguments, he suggested, the "position of the father as head of the family" had not been altered.[85] The final words of his first paragraph are the essence of the threshold approach:-

> "... the father is the guardian, and cannot be displaced from that position except on sufficient legal grounds."[86]

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82 (1893) 30 Scottish Law Reporter 272.

83 Ibid., at p. 275 per Lord McLaren.

84 Idem.

85 Idem.

86 Idem.

An example would, in his view, be a father of dissipated habits or one who had forfeited the respect of his friends. If so, it was open to place them with their mother. The criterion in the exercise of that discretion was "the interest of the children." Lords Robertson L.P., Adam and Kinnear adopted a similar threshold approach without the same extravagant reasoning.

39.52 Lord McLaren was misled perhaps by a wider view of the common law than was justified. Lord Herschell L.C. in Stevenson v Stevenson[87] was equally misled by an excessively narrow view of the common law of Scotland. His comments are in any event obiter, because the Act did not apply to an applicant who was as in that case the father of the children. The impression left by the Lord Chancellor was that before 1886 the father's right was absolute and under the Act it was only a prima facie right. As he explained the effect of the Act:-

> "... the rights of the husband, the father, are no longer to be absolute, but if he has misconducted himself he should not be entitled to the custody as an absolute right, but the Court should consider the mother as well as the father, and consider above all, the interests of the children."[88]

This would appear to have three elements:-

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87 (1894) 21 Rettie (H.L.) 96.
88 Ibid. at p. 99 per Lord Herschell L.C.

1. static - the father's possibly absolute right;
2. threshold - misconduct removing title to custody;
3. discretion - substantive decision, by considering as priority the interests of the children and thereafter equally the mother and father.

The second element does not appear in section 5 nor does that section afford priority to the interests of the child unless that is built in by the order of the words. Lord Herschell L.C.'s description is thus a very loose interpretation of section 5.

39.53 Did the Inner House of the Court of Session in Mackellar v Mackellar[89] and Campbell v Campbell[90] fare any better? Strictly speaking, the Act applied to the former[91] but not to the latter case.[92] Lord McLaren gave the leading opinion in Mackellar v Mackellar.[93] His description of the common law was much more precise than in Sleigh v Sleigh[94] and so far as the 1886 Act was concerned:-

> "[It] has made this alteration on the law, that the Court is directed to consider the conduct and wishes of the parents and the welfare of the children, the direction being given in such terms as to indicate that in considering the question no preference is given to one spouse over the other."[95]

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89 (1898) 25 Rettie 883. 90 1920 S.C. 31.
91 Where the mother applied for custody.
92 Where the father applied for custody.
93 (1898) 25 Rettie 883.
94 (1893) 30 Scottish Law Reporter 272.
95 (1898) 25 Rettie 883 at p. 884 per Lord McLaren.

Lord McLaren in applying this statutory direction, considered the question of paternal misconduct first. Whether he did so for purely practical reasons or because he thought the law required him to is not stated. He appears however to have adopted something in the nature of the threshold approach. For he concluded that the father was not "guilty of such misconduct as would make him unfit to have the guardianship of the children."[96] Nevertheless according to Lord McLaren the father was probably responsible for the separation of his wife and himself.[97] There was thus no parental misconduct;[98] the children's welfare was neutral as between the parents;[99] the father in these circumstances could not be displaced from his position as guardian. Lord McLaren appeared to adopt a threshold approach but he was prepared to reintroduce the legal right of the father to solve the problem when all other considerations were equal.

39.54 Lord Adam reiterated the words of the Act and in applying them appeared to give priority to the welfare of the children.[1] But in dealing with parental conduct as part of the overall approach, he clearly considered it from the disqualification or forfeiture point of view.[2] Moreover, in his view, it was desirable for all the children to be brought up as one family.[3] That indicted the father. So, apart from that minor example of the presumptive approach, the only point of difference between

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96 Ibid. at p. 885 per Lord McLaren.
97 Why he made that observation is not clear. It seemed to form no part of his reasoning.
98 On the part either of the father or of the mother.
99 I.e. "... no considerations affecting the welfare of the children to lead to either parent being refused their custody." (1898) 25 Rettie 883 at p. 885 per Lord McLaren.
1 (1898) 25 Rettie 883 at p. 886.
2 Idem.
3 Idem.

Lords McLaren and Adam was whether the disqualifying effect of the paternal conduct was relevant at the outset as an overall threshold requirement or during the consideration of the father's conduct as one of the several factors to be taken into account. In either event it would be difficult to deny custody to a blameless father. There are two reasons: his right had not been forfeited and it might also be relevant as a last resort, all other considerations being equal. The court in Mackellar v Mackellar[4] was thus influenced by the 1886 Act to the extent of recognising a modified threshold approach either by restoring the effectiveness of the legal right at the final stage of the process or by considering the disqualifying nature of parental conduct as part of the discussion of all relevant matters. In either case welfare played at most only a negative role.

39.55 If the comments in Campbell v Campbell[5] are to be regarded as authoritative,[6] then the approach of Lord Adam should probably be combined with that of Lord McLaren to produce the proper overall attitude to the role of welfare under the 1886 Act. The circumstances in Campbell v Campbell[7] were, jurisdictional difficulties apart, very similar to those in Mackellar v Mackellar[8]: namely, two entirely capable and fit parents, each able to provide a good home and neither guilty of any form of parental or other misconduct. Each desired custody. The wishes of each parent are

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4 (1898) 25 Rettie 883.

5 1920 S.C. 31.

6 Although the Act technically did not apply.

7 1920 S.C. 31.

8 (1898) 25 Rettie 883.

a matter for consideration under section 5 of the 1886 Act. Nevertheless Lord Strathclyde L.P. was prompted to say that the mother's wish to retain custody was "manifestly not a sufficient answer to her husband's demand."[9] Technically accurate, no doubt. Although the court was obliged to take the mother's wishes into account, they appear to have been discarded as unimportant very rapidly.

39.56 The main point of difference between these two cases was the age of the children. In the earlier case they were ten, nine and four; in the later case the child was two. The argument, essentially a principle of child care put forward as a presumptive approach, to the effect that a young child is better in her mother's custody found no sympathy.[10] Nothing therefore could displace the father "as the legal custodian of the child."[11] A great deal thus turned on the legal right of the father. Lord Strathclyde L.P. had indicated that the child's welfare was the paramount consideration.[12] Nevertheless, he purported to give effect to the 1886 Act.[13] The same result would clearly have been reached if that Act had never been passed.

39.57 The Lord President's analysis of the 1886 Act relied heavily upon Stevenson v Stevenson,[14] Sleigh v Sleigh[15] and Mackellar v Mackellar.[16] Two points in his opinion are important: the absence

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9 1920 S.C. 31 at p. 36 per Lord Strathclyde L.P.
10 Ibid. at p. 39 per Lord Skerrington.
11 Ibid. at p. 36 per Lord Strathclyde L.P.
12 Idem.
13 The 1886 Act does not anywhere contain the word "paramount".
14 (1894) 21 Rettie (H.L.) 96.
15 (1893) 30 Scottish Law Reporter 272.
16 (1898) 25 Rettie 883.

of any reason to displace the father; and the duty to keep "fully in view all the considerations set out in the statute."[17] The former suggests a threshold approach, the latter a discretionary approach. However, he summed up his approach in a way which probably solves the potential inconsistency between Lords McLaren and Adam in Mackellar v Mackellar.[18] As he said:-

> "... there being no conduct alleged on the part of either party such as to disqualify either parent from having the custody of the child, and no considerations affecting the welfare of the child to lead to either party being refused the custody, I think that the father, who is by law the guardian of the child during the joint lives of the spouses, cannot be displaced from his position as the guardian."[19]

On that basis the court needs to ask several questions:-

1. how have the parents conducted themselves;

2. does such conduct amount to parental disqualification in the case of either or both parents;

3. what considerations affect the child's welfare;

4. is either parent liable to be refused custody because that would have a detrimental affect on the child;

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17 1920 S.C. 31 at p. 37 per Lord Strathclyde L.P.

18 (1898) 25 Rettie 883.

19 Campbell v Campbell 1920 S.C. 31 at p. 37 per Lord Strathclyde L.P.

5. if the answer to either 2 or 4 is positive, that parent is unlikely to be successful and the "blameless" parent will succeed almost as a matter of course;
6. if the answers to 2 and 4 are negative, the father will succeed.

If this correctly identifies what Lord Strathclyde L.P. envisaged, the effect would be to reduce discretion to a minimum, by devising legal rules to cover almost every circumstance. Where there remains an element of discretion, it would operate negatively, so as to deprive a parent of his interest rather than select the the course most suitable for the child.

39.58 This may or may not have been what Parliament intended; it may or may not be what section 5 means. The Act said nothing about the parent's legal right. It called prima facie for the exercise of a discretion on the mother's application, the only qualification being to consider the welfare of the child and the parents' conduct and wishes.[20] It is understandable, but not necessarily justifiable, for the courts to revert to the parental legal right when the prescribed criteria are entirely neutral.[21] That might be the appropriate context for a presumptive approach which, it would appear, purports to decide according to the child's welfare. Although there is nothing in the Act to

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20 1886 Act, s. 5.

21 It is the easiest solution to a potentially difficult problem.

justify a return to the parental legal right, either as a residual solution or as the basis for the analysis of parental conduct, the reason may be found in this short and simple proposition of Lord Skerrington:-

> "... [section 5] assumes that the father remains the sole guardian but indicates certain circumstances in which his powers over the person of his child may be lost or restricted."[22]

The key word is "assumes." Thus the fathers' legal right is the unarticulated foundation of section 5 and the criteria in section 5 are the circumstances of disqualification. That suggests a reversion to the traditional threshold approach. But not quite, for the disqualification criteria now relate to parental conduct as part of the process of consideration and the parental legal right may also be relevant residually as a last resort. Two new dimensions have been added to the threshold approach but its fundamental character appears not to have changed.[23]

(c) The position of discretions before 1925

39.59 It remains to be seen whether the 1925 Act has had any effect upon that approach to inter-parental disputes. If not, the reversion to the parental legal right to settle the issue in certain circumstances would become distinctly difficult in the

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22 Campbell v Campbell 1920 S.C. 31 at p. 40 per Lord Skerrington.

23 Cf. Duguid v McBrinn 1954 S.C. 105 at pp. 108 and 109 per Lord Patrick who commented obiter that "... all that was left of the so-called paramount right of a father to the custody of his legitimate children in a contest between the parents was that, if neither the conduct of the parents nor the welfare of the children dictated that the claim of the father or the claim of the mother should prevail, the court would award the custody to the father." This would appear however to ignore the parental legal right as the foundation of the disqualification approach to parental conduct.

light of the equality of parental rights created by the 1973 Act.[24] Since the issue is a dispute between the parents, reliance upon the static relationship of equality between the parents would achieve nothing. For that reason alone that interpretation[25] of the 1886 Act may now have been overtaken by subsequent statutory changes and the courts as a consequence forced into a discretionary situation.

39.60 This is naturally a novel attitude in relation to the 1973 Act but there have been examples in which a reference to legal rights would not have solved the dispute. In such cases the courts have indeed been persuaded to exercise more freely their discretionary powers. That might be done by creating a principle in the form of a presumptive approach. The effectiveness of such a principle would depend on the circumstances of the case but that is merely a reflection of the general discretionary nature of the approach.[26]

39.61 This may be considered in the context of access. It was probably no accident that in Mackellar v Mackellar[27] and Campbell v Campbell[28] it was suggested that generous access should perhaps be awarded to the non-custodial parent. This was justified by the desirability in the children's interests of contact with both parents, particularly blameless parents.

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24 Guardianship Act 1973, s. 10(1).
25 I.e. the residual parental legal right.
26 E.g. Reid v Reid (1901) 3 Fraser 330 at p. 332 per Lord Balfour L.P.; AC v BC (1902) 5 Fraser 108 at p. 111 per Sir J.H.A. Macdonald L.J.-C.
27 (1898) 25 Rettie 833 at p. 885 per Lord McLaren.
28 1920 S.C. 31 at p. 39 per Lord Mackenzie.

Earlier it had been decided as a matter of law that a parent who had been guilty of a conjugal transgression would not be awarded access.[29] As in CD v AB[30] in 1908 this was justified not as a rule of law but rather as a presumption in the interests of the child. This change may have been brought about by the 1886 Act.

39.62 In Mackenzie v Mackenzie[31] the mother petitioned for access.[32] The father argued that his custody should not be interfered with unless by his conduct he had shown himself to be inadequate. This was rejected by Lord Young. In his view the Act directed the court "to deal with such an application according to its discretion, having regard primarily to the welfare of the infant, but also to the wishes of both parents so far as they are reasonable."[33] Each parent in that case was of irreproachable character. The court made no reference to legal rights and came to a decision, admittedly not a difficult one in the circumstances of the case, guided largely by the interests of the child. This seems much more sympathetic to the phraseology of the 1886 Act than the somewhat complex interpretations in Mackellar v Mackellar[34] and Campbell v Campbell[35]. There were therefore few instances between 1886 and 1925 of a discretionary approach even when the circumstances were favourable.

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29 Bowman v Graham (1883) 10 Rettie 1234.
30 1908 S.C. 737.
31 (1887) 25 Scottish Law Reporter 183.
32 1886 Act, s.5.
33 (1887) 25 Scottish Law Reporter 183 at p. 187 per Lord Young.
34 (1898) 25 Rettie 883.
35 1920 S.C. 31.

(d) The impact of the 1925 Act

(i) Introduction

39.63 The Court of Session has on eight occasions considered section 1 of the 1925 Act in greater or less detail.[36] In seven of these cases the Court of Session was asked to exercise its nobile officium.[37] The other case was an appeal from the Outer House in exercise of its consistorial jurisdiction. Strictly speaking that falls to be considered in the next chapter. But there is probably no substantial difference now in practice between the way in which the Court of Session exercises its nobile officium and its consistorial jurisdiction. Any differences presumably reflect the different circumstances of each case; for example, the responsibility for the marital separation or breakdown in the one instance and the commission of a matrimonial offence in the other. Moreover the implementation of the Divorce (Scotland) Act 1976[38] is likely to reduce the importance of such differences. For these reasons the case decided by the Inner House on appeal from the Outer House will be considered in detail in this chapter.

39.64 Section 1 of the 1925 Act falls into two substantive parts: the direction to regard the welfare of the child as the first and paramount consideration and the duty to discount parental claims and until 1973[39] the paternal right except from

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36 Sometimes without actually referring to it.
37 Hume v Hume 1926 S.C. 1008.
38 1976 c. 39: see para. 40.12.
39 1973 Act, s. 10(8).

the point of view of the welfare of the child.[40] The Scottish judges have on the whole tended to eschew detailed textual analysis of the section. The approach has been to consider the section broadly and generally. No judge has allowed himself to comment on the meaning of the words "first and paramount."[41] This is partly the consequence of the overall interpretation favoured by the Court of Session.[42] As early as 1926 it was decided that parental legal rights were relevant but subordinate considerations in the overall process.[43] Welfare was simply, as the Act said, the most important consideration. The Court of Session could not however avoid being drawn into a discussion from time to time of the relationship between welfare and the other considerations. So the problem of "first and paramount" has been in Scotland treated functionally rather than semantically.

39.65 Otherwise two important ideas influenced the thinking of the Court of Session. Each may be traced to section 1 of the 1925 Act. The first is positive. The Court of Session acknowledged that they were exercising a discretionary jurisdiction. This required, as the common law had long recognised in appropriate but limited contexts, an examination of the whole circumstances of the case. The issue could not be solved automatically by applying a simple rule of law. From this evolved the process of determination by balancing all the relevant considerations. The

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40 Para. 35.90.

41 Their meaning has however become apparent in the overall context of s. 1.

42 I.e. the decision-making process has been treated as one, not divided into threshold and discretionary stages as hitherto.

43 Hume v Hume 1926 S.C. 1008.

1925 Act confirmed in a sense that priority was to be afforded to the welfare of the child in that process.[44] The idea that welfare was relevant was immediately rejected. Parental claims were for consideration. This meant in effect that the court was required to assess the relevance and importance of child care principles as part of the presumptive approach.[45] The paternal right was also relevant. That naturally revived the possibility of the threshold approach in terms of paternal disqualification.

39.66 But the second matter of importance recognised or introduced by the 1925 Act effectively reduced the impact of these claims and rights. They were stated to be relevant not per se but only from the point of view of the welfare of the child. They thus became subsumed under the concept of welfare: the origins of the subsumptive approach to welfare. This is a negative provision but nevertheless vital to the contemporary approach. The Court of Session never espoused the doctrine that custody proceedings were designed solely to promote the welfare of the child as the object or purpose of the exercise willy-nilly.[46] But they came as close to that as the legislation permitted.

(ii) Textual commentaries

39.67 That pattern seems clear and consistent. Is it accurate? How did the Court of Session reach that position?

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44 In that very restricted sense the 1925 Act had not changed the law.

45 Which had begun to evolve largely in response to the 1886 Act.

46 An approach put forward earlier as a possible interpretation of the provision: para. 35.87.

To consider first the judicial analyses of the text of section 1: only in M v M[47] and Hume v Hume[48] was much attention paid to the text. Lord Anderson in M v M[49] categorised the two parts of section 1 as positive and negative.[50] The positive duty on the court was "to take a long view as to the child's welfare, and not merely to determine what is best for the child for the time being."[51] The fact that he included in welfare not only physical aspects but also moral and educational considerations indicates that section 1 required of the court a much more detailed and purposeful investigation than had hitherto been normal. Lord Hunter similarly suggested that the court was required to "take a broad view of the situation, and look to what is ultimately best in the interests of the child."[52] This met with the approval of Lord Jamieson in Brown v Brown.[53] These views support the contention that the court is faced with a substantive choice: is it better for the child to be with the father or with the mother? The threshold approach denied such a choice: if the parent was disqualified, the other claimant would almost automatically be preferred.

39.68 These dicta related to the first part of section 1. They came close to postulating that welfare was the only consideration, which would render it effectively the purpose of the exercise, rather than the first and paramount consideration.

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47 1926 S.C. 778. 48 1926 S.C. 1008. 49 1926 S.C. 778.
50 Ibid. at p. 786. 51 Idem. per Lord Anderson.
52 Idem. per Lord Hunter.
53 1948 S.C. 5 at p. 15 per Lord Jamieson.

Similar comments have been made from time to time. Lord Aitchison L.J.-C., for example, stated:-

> "The only question in this case is, what is best in the interests of the child? By statute we are to regard the welfare of the child as the first and paramount consideration."[54]

However in that case he failed to comply entirely with his own direction.[55] On the other hand Lord Moncrieff in the Outer House in Hume v Hume[56] not only treated welfare as first and paramount but gave effect to that idea. His decision depended on a "comparative estimation ... of the two family groups"[57] and his general impression "of where the better prospects of their welfare will be found."[58] This is probably what Parliament intended and what section 1 precisely meant. But its application in Hume v Hume[59] effectively gave custody, but not in fact care,[60] of the children to their adulterous, intemperate and thrice convicted father. This proved too unpalatable for the Inner House the majority[61] of whom recalled Lord Moncrieff's interlocutor and awarded custody to the mother.[62] The difference between the Inner and Outer Houses was however not so much their interpretation of section 1[63] but its application, for in a rather cynical judgment Lord Clyde L.P. hinted that Lord Moncrieff had

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54 Christison v Christison 1936 S.C. 381 at p. 384 per Lord Aitchison L.J.-C.

55 He paid some attention to the fact that the father effectively broke up the home: ibid. at p. 385.

56 1926 S.C. 1008. 57 Ibid. at p. 1010 per Lord Moncrieff.

58 Ibid. at p. 1012 per Lord Moncrieff. 59 Idem.

60 The children would be looked after by their paternal grandparents.

61 Lord Blackburn declined to reject the Lord Ordinary's decision on the merits: 1926 S.C. 1008 at p. 1018.

62 1926 S.C. 1008 at p. 1019.

63 That was stated to be the ground.

not read the 1925 Act and accused him of having acted like a "board of welfare."[64] It is perhaps unfortunate that such an extreme case as Hume v Hume[65] was decided so soon after the Act became effective. It caused the Court of Session to take a less positive view of section 1 than it otherwise might have done.

39.69 The technical reason for Lord Moncrieff's reversal by the Inner House was his alleged assumption that section 1 had abolished the existing parental rights and preferences.[66] That probably was not his view,[67] for there is really no doubt that he regarded them as "subordinate" and "of secondary importance."[68] If that is so, then both Houses of the Court of Session accepted that parental rights and claims of preference had not been abolished. That is fundamental to the application of section 1.

39.70 These arguments were concerned with the second or negative part of section 1, to which most of the textual comments of the judges were directed. It is not possible to treat either part of section 1 independently of the other part. If so, an entirely distorted pattern would emerge. No judge did that. However, it is probably true that Lords Anderson,[69] Hunter,[70] Moncrieff[71] and Aitchison L.J.-C.[72] attached more or at least equal weight in their arguments to the first part of the section 1 while the other judges preferred the second part.

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64 1926 S.C. 1008 at p. 1013 per Lord Clyde L.P.
65 1926 S.C. 1008.
66 Ibid. at p. 1013 per Lord Clyde L.P.
67 He had actually used the words "the court is no longer to have regard to the old presumptions." But in context he probably meant that they were no longer important.
68 1926 S.C. 1008 at p. 1010 per Lord Moncrieff.
69 M v M 1926 S.C. 778 at p. 786. 70 Ibid. at pp. 784 and 785.
71 Hume v Hume 1926 S.C. 1008 at p. 1010.
72 Christison v Christison 1936 S.C. 381 at p. 384.

39.71 Lord Hunter perhaps typifies the even-handed interpretation. After referring to welfare as the first and paramount consideration, he said:-

> "That, of course, does not mean that there may not have to be inquiry into the conduct of one of the spouses towards the child and even towards the other spouse, because, ... that provision [the second part of section 1] does not appear to me to exclude inquiry into the conduct of the one spouse towards the other if and in so far as that may have ... a direct bearing upon what were really the best interests of the child."[73]

Lord Anderson took a more extreme view when he suggested that the provision made the patria potestas wholly irrelevant.[74] That would not seem to be justified either in terms of the Act or in consequence of the preponderance of authority. A third view was proclaimed by Lord Sands in Hume v Hume.[75] This is not however inconsistent with the authoritative view. Lord Sands explained that legal rights or claims had not been made redundant. In his view the provision placed spouses "in a position of complete equality when no special interest of the child is involved."[76] Thus parental preferences inter se were abolished but parental rights and claims per se were relevant but subordinate to the welfare of the child. The general trend is that, although the common law was

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73 M v M 1926 S.C. 778 at pp. 784 and 785 per Lord Hunter.

74 Ibid. at p. 786 per Lord Anderson.

75 1926 S.C. 1008.

76 Ibid. at p. 1016 per Lord Sands.

not abrogated by statute, it was relevant only from the point of view of the child. Parental rights and presumptive claims were thus subsumed within the concept of welfare.

(iii) The positive approach

39.72 Although it has been mentioned, indeed emphasised, from time to time that custodial issues are questions of discretion,[77] restrictions upon the exercise of that discretion have always been acknowledged. Again, in a few instances welfare came close to being the purpose of the exercise,[78] in the sense that no other considerations would be relevant. But the courts were never prepared to endorse that approach. In Hume v Hume[79] Lord Moncrieff seemed prepared to afford negligible weight to considerations other than welfare. Even he was disinclined to ignore them.[80] The textual interpretations of section 1 indicate three principles:-

1. all the circumstances of the dispute need to be investigated;
2. the relevant considerations require to be balanced, one against the other;
3. in making a decision priority must be given to welfare and other considerations are relevant only to the extent that they directly bear upon welfare.

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77 In Brown v Brown 1948 S.C. 5 Lord Mackay used the word or its derivatives four times on p. 11 and once at the top of p. 12.
78 E.g. Lords Hunter and Anderson in M v M 1926 S.C. 778.
79 1926 S.C. 1008.
80 Para. 39.69.

These principles are supported in practice by applying where appropriate whatever child care concepts seem presumptively relevant to the circumstances of each case. All these matters are fundamentaly discretionary in nature, whether the discretion is interpretational, applicational, administrative or substantive. Thus the restrictions upon the judicial discretion are themselves discretionary. In this sense these aspects of the process are positive.

39.73 These principles permeate most of the cases under section 1 and they are frequently inter-related. The most difficult principle to isolate as such is the attempt to seek a balance. The judges do not normally speak in these terms. It is more often than not implicit in their judgments. For example, welfare, it has been stated, is not the sole consideration prescribed by statute:[81] nor is any individual circumstance conclusive.[82] Lord Mackay has perhaps encapsulated the nature of the approach in these words:-

> "... the present case is entirely one for the discretion of any Court before which it lies, dealing with it predominantly on the question of how the welfare of the child in question lies, and also taking due account of how the relevant legal rights and capacities and suitability of the parents reflects on that welfare."[83]

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81 Hume v Hume 1926 S.C. 1008 at p. 1017 per Lord Sands. This was also implied in McLean v McLean 1947 S.C. 79 at p. 88 per Lord Mackay.

82 M v M 1926 S.C. 778 at p. 783 per Lord Alness L.J.-C.

83 Brown v Brown 1948 S.C. 5 at p. 11 per Lord Mackay. This also contains a description of the subsumptive approach.

Or as Lord Thomson L.J.-C. expressed it more recently:-

> "The paramount consideration is the welfare of the child and that must be looked at from all angles." [84]

These are simply random dicta but the balance approach may be found in most of the judgments in most of the cases dealing with the 1925 Act.

39.74 Much clearer is the judicial reliance upon presumptive principles of child care conceived and applied by the court. It has been made plain that such an approach cannot be conclusive; the principles are always liable to be disregarded in the individual circumstances of each case.[85] The principles are both enunciated and discarded in terms of the child's welfare. Lord Mackay, for example, justified the overriding natural claim of the parent in terms of the welfare of the children as a family "in the most primary and far-reaching sense."[86] Intimate knowledge of the father, he suggested, was of primary importance for their own welfare.[87] Emphasis was laid specifically upon the father's natural position, rather than his legal rights over the children.[88] Similarly in Hume v Hume[89] Lord Sands placed considerable weight upon the innocence of the maritally blameless spouse.[90] He conceived that some sort of penalty[91] was appropriate for the

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84 McClements v McClements 1958 S.C. 286 at p. 289 per Lord Thomson L.J.-C.
85 E.g. M v M 1926 S.C. 778 at p. 783.
86 McLean v McLean 1947 S.C. 79 at p. 89 per Lord Mackay.
87 Idem.
88 Idem. where Lord Mackay said: "... not be it noted his rights over the child..."
89 1926 S.C. 1008.
90 Ibid. at pp. 1016 and 1017.
91 Deprivation of custody.

wrongful spouse. He reconciled that approach with the paramountcy of welfare principle in these words:-

> "There is a legal presumption in favour of the claim of the innocent spouse. That presumption may be redargued. But the onus is on the spouse challenging that claim. When each parent can offer a home in every way suitable to the child, the presumption in favour of the spouse faithful to marital duty is not to be redargued by a nice judicial balancing of considerations which in the nature of things must be more or less speculative." [92]

39.75 The application of the presumptive approach is of considerable practical significance. It is justified in terms of the welfare of the child and the task of the apparently guilty spouse is thereby made much more difficult.[93] On the other hand the court's task is pro tanto easier. Lord Sands was obviously hesitant to engage in a "nice judicial balancing of considerations" as part of the overall function contemplated by section 1 and to some extent the presumptive approach was treated as an abrogation of the wide-ranging discretionary approach prescribed by the 1925 Act. Since it had an earlier but limited history,[94] the presumptive approach was not conceived simply in response to the 1925 Act. Nevertheless it may be seen as a substitute for the threshold approach founded upon parental legal rights the significance of which has already been reduced by the second part of section 1.

39.76 The relevant presumption, if any, is naturally a matter of the circumstances of the individual case. In that sense the court's function is discretionary. There is no guarantee that the principles

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92 1926 S.C. 1008 at p. 1017 per Lord Sands.

93 As it was under the 1891 Act.

94 Paras. 33.54 and 33.74.

of child care forming the presumption are consistent either generally or in the circumstances of the specific case.[95] The court may thus be faced with a choice between competing principles. They are simply created by the court, as they see fit. It is particularly significant that reliance is placed entirely upon the judges' own knowledge and experience of child care.[96] These principles are not a matter of evidence.[97] No definite set of principles can be drawn up but those favoured by the Court of Session in the present context include the natural position of the father,[98] the desirability of maternal care,[99] particularly when the child is young, the significance of the age of the child,[1] the need to keep siblings together[2] and to maintain the unity of the family,[3] the desirability of some form of religious upbringing,[4] the need for a relationship with parents[5] and the significance of matrimonial fault and

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95 Hence the power to exclude them.

96 E.g. the repeated references by Lord Mackay to his "long experience" in Begbie v Nichol 1949 S.C. 158 at p. 168.

97 Although evidence may be given about the relevance or application of these principles in individual cases.

98 McLean v McLean 1947 S.C. 78 at p. 89 per Lord Mackay; Douglas v Douglas 1950 S.C. 453 at p. 456 per Lord Patrick.

99 Hume v Hume 1926 S.C. 1008 at p. 1016 per Lord Sands; Christison v Christison 1936 S.C. 381 at p.385 per Lord Aitchison L.J.-C.

1 M v M 1926 778 at pp. 783 and 784 per Lords Alness L.J.-C. and Ormidale respectively; Christison v Christison 1936 S.C. 381 at p. 385 per Lords Aitchison L.J.-C. and Anderson; McLean v McLean 1947 S.C. 79 at p. 84 per Lord Cooper L.J.-C.; Brown v Brown 1948 S.C. 5 at p. 14 per Lord Mackay.

2 Christison v Christison 1936 S.C. 381 at p. 385 per Lord Anderson Douglas v Douglas 1950 S.C. 453 at p.457 per Lords Keith and Thomson L.J.-C.

3 Hume v Hume 1926 S.C. 1008 at p. 1012 per Lord Moncrieff; McLean v McLean 1947 S.C. 79 at p. 87 per Lord Mackay.

4 Mackay v Mackay 1957 S.L.T. (Notes) 17 at p. 17 per Lord Clyde L.P.; McClements v McClements 1958 S.C. 286 at p. 289 per Lord Thomson L.J.-C.

5 M v M 1926 S.C. 778 at p. 786 per Lord Hunter.

innocence.[6] Most of these are understandable but scarcely within the professional competence of a legally trained judge. Most too are positive and sensitive to the welfare of the child. The exception however is matrimonial fault or innocence. That creates a negative effect in relation to the welfare of the child and reappears in this context as the spectre of the traditional threshold approach.

(iv) The negative approach

39.77 The liability of any of these presumptions to rebuttal gives them a potentially negative quality, but not necessarily negative from the child's point of view. When a presumption is created and applied, it operates at the threshold of the process or at least at the threshold of the substantive part of the process after the circumstances have been investigated. There is thus a similarity between a legal right as the threshold and a presumption as the threshold. In either case the onus is clearly on the person seeking to displace the right or the presumption and the reason will normally be its negative detrimental effect on the welfare of the child.

39.78 The scope for the traditional threshold approach to disqualify a parent from exercising his legal right has been much reduced by the creation of the subsumptive approach directed

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6 Ibid. at p. 784 per Lord Ormidale; Hume v Hume 1926 S.C. 1008 at p. 1016 per Lord Sands; Christison v Christison 1936 S.C.381 at p. 385 per Lord Aitchison L.J.-C. and at p. 386 per Lord Anderson; Douglas v Douglas 1950 S.C. 453 at p. 456 per Lord Patrick.

by the second part of section 1. However, according to Lord Sands at least, the traditional threshold approach may be relevant.[7] It depended to some extent upon whether the first part of section 1 should be regarded as declaratory of the common law. He gave a hypothetical example. If the parent's circumstances were such that it would be "injurious to the child to enforce the parent's right," the court could under common law decide whether to enforce that right.[8] That was certainly true and it represents the threshold stage of the common law approach. Lord Sands concluded that, "if the question arises in this way, the welfare of the child is the first and paramount consideration."[9] The paramountcy of welfare principle thus would apply at the discretionary stage of the common law process. What has happened however is that the 1925 Act according to most of the authorities has replaced the common law division into threshold and discretionary stages by one discretionary process on which the former threshold criteria form only a part. The basis for Lord Sands' residual applications of the common law has thus disappeared.

39.79 The creation of a presumption on the other hand has introduced a new threshold concept. The similarity between the traditional threshold approach and this new threshold concept is thrown into dramatic relief because the new concept has been formulated most clearly in the opinion of Lord Sands in the same

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7 Hume v Hume 1926 S.C. 1008 at p. 1015.

8 Idem. per Lord Sands.

9 Idem. per Lord Sands.

case. He was discussing the relevance of welfare in relation to a parent's preferable claim to custody:-

> "... that question is raised only when the circumstances are such that some definite detriment to the child in being left in the custody of the party who has the prima facie preferable claim, or some definite advantage to the child in being awarded to the guilty party, can be pointed out. When that can be done, then the welfare of the child is the first and paramount consideration." [10]

This threshold concept is generally the same as its common law counterpart but the significant difference between the two lies in the grounds for displacing the presumption. Welfare is now treated positively as well as negatively. The common law was never prepared to concede that a positive welfare advantage to the child would displace the parental right. Such a circumstance may now justify rebutting any presumption created prima facie by the court. That is the consequence of the paramountcy of welfare principle.

39.80 To express it slightly differently: since the common law process was divided into two separate stages, threshold and discretionary, it was not possible to exercise a discretion until the threshold requirements had been met. Welfare played a negative,

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10 Ibid. at p. 1017 per Lord Sands.

passive role in the threshold requirements. These requirements were so strict that their satisfaction led almost inevitably to the exercise of the discretion against the disqualified contender. It was thus of no real significance whether welfare was paramount or not. Any common law judicial dicta referring to welfare being paramount were either statements of policy or mere surplusage. The new threshold concept applies to principles of child care. They are merely part of the overall discretionary process created by section 1. In no sense are they requirements. They operate at the threshold of the balancing process, as part of that process and as part of the general debate on welfare. They cannot be other than subject to the paramountcy of welfare principle: hence a possible welfare advantage to the child may rebut the presumption.

39.81 Lord Sands, it is suggested, made this new threshold approach clear beyond doubt. It is also implicit in a number of other judgments. In M v M[11] the mother in effect deserted the father and took the child with her. Lord Alness L.J.-C. then asked:-

> "The question arises at the very outset of the case, why should the husband, in these circumstances, be deprived of the custody of his child?"[12]

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11 1926 S.C. 778.

12 Ibid. at p. 783 per Lord Alness L.J.-C.

It is clear that he was dealing with this point in consequence of the paramountcy of welfare principle and as part of the overall balancing process; not as a threshold requirement but as the opening proposition in the debate on welfare. A similar attitude was adopted by Lord Cooper L.J.-C. in relation to the maternal claim to a child of a very tender age[13] and by Lord Thomson L.J.-C. in Douglas v Douglas[14] where he said:-

> "Another consideration is that the position of a father as the head of a family with the resulting obligations and duties is not, in my view, infringed by the Guardianship of Infants Act except in cases where to affirm it would adversely affect the welfare of the child."[15]

This emphasis that the presumption, and as a corollary its rebuttal, is part of the overall process. His stated ground of rebuttal was however limited to the negative aspect of welfare. But that is not inconsistent with Lord Sands' interpretation.[16]

39.82 The second negative aspect of the contemporary function of welfare is the subsumptive approach in the second part of section 1. This approach was first recognised in the textual analysis by Lord Hunter in M v M.[17] It means that non-welfare considerations, principally preferential parental claims, are

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13 McLean v McLean 1947 S.C. 79 at p. 84 per Lord Cooper L.J.-C.

14 1950 S.C. 453.

15 Ibid. at p. 458 per Lord Thomson L.J.-C.

16 Although it does not go as far as Lord Sands whose view, it is suggested, was correct.

17 1926 S.C. 778.

relevant only to the extent that they are subsumed under welfare or, as Lord Clyde L.P. said, that they shall be considered "from one standpoint only, namely, the welfare of the children."[18] This interpretation was founded upon the view that "any rights or preferences which the law acknowledges on the part of either spouse to the custody of the children" had not been abolished.[19] In fact they were controlled but not abolished by section 1. This had two consequences for the Lord President:-

1. if welfare was neutral as between the two parents, the rights or preferences of one parent could be given effect: this is much the same as the interpretation placed upon section 5 of the 1886 Act, securing the residual function of parental rights;
2. a preferable right or claim should not be given effect if it would be adverse to the welfare of the children: this is much the same as the common law threshold approach.

Lord Clyde L.P. clearly did not say that a preferable right or claim should not be given effect simply because that would be better for the child. In short, his interpretation added nothing to the common law or the 1886 Act as interpreted in Mackellar v Mackellar[20] and Campbell v Campbell.[21] The second part of section 1 thus was interpreted largely to preserve the mere relevance of parental rights and preferences rather than to emphasise their restriced relevance.

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18 Hume v Hume 1926 S.C. 1008 at p. 1013 per Lord Clyde L.P.
19 Idem.
20 (1898) 25 Rettie 883.
21 1920 S.C. 31.

39.83 Lord Clyde L.P. construed the second part of section 1 in the way he did to narrow the allegedly wide "board of welfare" interpretation placed upon the first part of section 1 by Lord Moncrieff in the Outer House.[22] The full significance of section 1 as a whole becomes apparent, as Lord Hunter had indicated,[23] only when the two parts are interpreted together. This total approach may be found in the opinion of Lords Cooper L.J.-C. and Mackay in McLean v McLean[24] and of Lord Mackay again in Brown v Brown.[25] As Lord Cooper L.J.-C. indicated:-

> "... we are not concerned with the relative superiority or inferiority of the rival claims of the two spouses to custody except from one point of view, namely the welfare of the children, which is the primary and paramount consideration by reference to which our judgment must be guided."[26]

39.84 Prima facie the presumptive and subsumptive approaches have much in common. But they are fundamentally different. The former contains a principle which will be ineffective by reference, either positively or negatively, to the child's welfare. The latter simply directs that non-welfare considerations are to be considered only from the welfare point of view. The complexity is that a presumption is also a matter for consideration. It thus may either be disregarded by reference to the child's welfare or

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22 Para. 39.68.
23 M v M 1926 S.C. 778 at pp. 784 and 785.
24 1947 S.C. 79.
25 1948 S.C. 5.
26 McLean v McLean 1947 S.C. 79 at p. 85 per Lord Cooper L.J.-C.

it may be relevant subsumptively only from the point of view of the welfare of the child.

39.85 These points may be illustrated briefly in terms of Mackay v Mackay[27] and McClements and McClements.[28] In each case the father was free from marital blame and the mother maritally culpable. In each case too the father was a professed atheist and the mother of some religious beliefs. The welfare of the child was neutral as between each set of parents. Marital innocence in each case would have raised a presumption in favour of the father. The Court of Session decided that some religious upbringing was desirable.[29] Lord Clyde L.P. would have been prepared for that reason alone to deprive an atheist of custody "however fitted he might be in other respects to have the child with him."[30] If that had been the position, the matter would have been resolved by giving predominance as a matter of principle to a religious upbringing as against being brought up by the guilty spouse. That is the approach adopted by the Court of Session in McClements v McClements,[31] for, there being no welfare considerations to suggest otherwise, custody was awarded to the adulterous mother more or less on a balance of principle.

39.86 There was on the other hand in Mackay v Mackay[32] one further consideration not present in McClements v McClements[33]

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27 1957 S.L.T. (Notes) 17. 28 1958 S.C. 286.
29 Mackay v Mackay 1957 S.L.T. (Notes) 17 at p. 17 per Lord Clyde L.P.; McClements v McClements 1958 S.C. 286 at p. 289 per Lord Thomson L.J.-C.
30 Mackay v Mackay 1957 S.L.T. (Notes) 17 at p. 17 per Lord Clyde L.P.
31 1958 S.C. 286.
32 1957 S.L.T. (Notes) 17.
33 1958 S.C. 286.

which caused custody to be awarded to the father. The child's paternal grandmother, who lived in family with the father and the child, gave the child religious education and would continue to provide a religious upbringing. The father apparently approved. He was awarded custody. The provision of a religious upbringing during rather than in consequence of the father's custody was approached differently by Lord Clyde L.P. and Lord Carmont. For neither was it, as in McClements v McClements,[34] a matter of conflicting principle. Lord Clyde L.P. treated it as a matter of balance in the circumstances of the case, applied the criterion of welfare and decided that "the welfare of the child will be better secured by leaving her where she is [with the father]..."[35] The brief report discloses no further reason other than, by implication, the retention of the status quo. Lord Carmont on the other hand concluded that there was nothing to justify "depriving the father of custody."[36] The Lord President thus would appear to have applied the subsumptive approach, by looking at all the considerations from the point of view of the child's welfare and affording welfare overall priority. Lord Carmont, on the other hand, applied the threshold approach to the prima facie claim of the father but whether he did so under the older approach in terms of a legal right or by reference to the presumptive approach is not clear, but probably the latter.[37] These cases

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34 Idem.
35 1957 S.L.T. (Notes) 17 at p. 17 per Lord Clyde L.P.
36 Ibid. at p. 17 per Lord Carmont.
37 Because of his reference to welfare as the paramount consideration.

indicate the diversity of approaches in custodial matters, sometimes leading to the same conclusion but not necessarily so. Each presumably purports to administer the same legislation. It emphasises, if nothing else, the discretionary and flexible nature of the process.

(v) Conclusions

39.87 The 1886 Act had been restricted by the courts in terms of the existing common law.[38] There is little justification for such a conclusion on the 1925 Act, even although it did not abolish the existing rights and preferences. Before 1925 the courts were with few exceptions still treating welfare negatively as part of the traditional threshold approach. It had been modified marginally but not fundamentally. Despite comments that the 1925 Act had not changed the law, which may be true in a very narrow, formal sense, it added new dimensions to its administration. In an area where the process is predominantly administrative rather than adjudicative, that is initially important.

39.88 The main impact of the 1925 Act was to destroy the traditional division into threshold and discretionary stages and substitute one overall discretionary process. The negative aspect of that overall approach was the retention of parental

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38 Paras. 39.51 to 39.58.

rights[39] and preferences but qualified to the effect of their relevance only from the welfare point of view: that is, the subsumptive approach. The second development, the continuation of one which had origins prior to 1925, was partly negative and partly positive. The acknowledgment and application of presumptive principles of child care in the general interests of children created a more positive attitude to solving child care and formal custodial issues. It was a movement away from a strictly legal solution. The effectiveness of the approach would depend on the quality of the presumptive principles: not a legal or judicial matter at all. These presumptions were rebuttable, a safeguard to protect the interests of the individual child if the general principles were proved to be inappropriate in his case. As in the traditional threshold approach, welfare played a negative role in disapplying these principles in the individual case but perhaps, as Lord Sands had indicated,[40] positive welfare might justify a decision to rebut the presumption.

39.89 The third dimension was wholly positive: the paramountcy of welfare principle. Most importantly this was the justification for implementing some of the other changes. But per se it created the overall discretionary approach and in conjunction with the second part of section 1 of the 1925 Act it increased the significance of welfare by reducing the importance

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39 Now repealed: 1973 Act, s. 10(8) but not thereby revived to the fullest extent. Indeed to do so in relation to inter-parental disputes would be meaningless, unless the traditional threshold approach were also to be revived or some other dynamic criteria created.

40 A phrase often repeated in custody disputes but too wide and uncertain to be meaningful.

of parental rights and claims. From this pattern emerged the contemporary balancing approach which requires an investigation of the whole circumstances, selecting those which are presumptively significant, discarding those presumptions which are not in accordance with the child's welfare, discarding any other considerations except from the welfare point of view and finally coming to a decision after administratively balancing all the remaining considerations against the welfare of the child. This is a very flexible process, the principal but not the sole objective of which is "to do what is best for the child." That often quoted phrase is an oversimplification. The whole process, although unitary, comprises positive and negative aspects, elements of threshold, presumptive, subsumptive and purpose approaches but not of specifically enforceable legal rights. It is a complex pattern, which has caused difficulties and problems, both legal and practical, for the courts administering it. Question of right and title, disqualification and forfeiture have become secondary. Question of welfare have, as the Act directed, become paramount. The law has become not so much a jurisprudence of rights as a jurisprudence of interests.

CHAPTER 40

THE CONTEMPORARY APPROACH TO WELFARE: THE STATUTORY JURISDICTIONS IN SCOTLAND

Section 1 - Introduction

(a) The Court of Session

40.1 The preeminent court in Scotland in custodial matters is the Court of Session. Applications are made to it for the exercise of the nobile officium which was within the competence of the Inner House until 1970 when that jurisdiction was conferred upon the Outer House.[1] That does not mean that the law administered has changed. It remains the common law of Scotland as modified by the Acts discussed in the last two chapters. The Outer House exercises original jurisdiction under the Conjugal Rights (Scotland) Amendment Act 1861[2] as modified by the Matrimonial Proceedings (Children) Act 1958.[3] It will be recalled that the Court of Session applied the common law in its consistorial jurisdiction despite the apparently discretionary jurisdiction conferred by the 1861 Act.[4] It may be that there were differences between the nobile officium and the consistorial law after 1886[5] but since Hume v Hume[6] there can be little doubt that the two regimes have been much the same. Many more custodial issues come under the consistorial jurisdiction

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1 Para. 39.2.
2 24 & 25 Vict., c. 86, s. 9.
3 6 & 7 Eliz., 2, c. 40: paras. 36.20 to 36.26.
4 Paras. 33.82 to 33.101.
5 Not directly because of the Guardianship of Infants Act 1886 (49 & 50 Vict., c. 27), for it did not apply to consistorial causes, but indirectly under the influence of changing policies.
6 1926 S.C. 1008.

of the Court of Session[7] than under the nobile officium, although the law has evolved largely in terms of the nobile officium as modified by the legislation.

40.2 One of the earlier problems, some of which may still be marginally relevant, was the relationship between the Outer House[8] and the Inner House, now the relationship between the two jurisdictions of the Outer House. Similar but more complex jurisdictional problems also arose in England.[9] The problem in Scotland was not defining the boundaries of the two jurisdictions but their potential overlap. This could occur because the view was taken that "it is competent for any parent in the position of the petitioner to come at any time and ask the Court[10] to interfere with a view to regulating the custody of his child. This Court is always open to applications of that kind, notwithstanding any proceedings that have taken place in the Outer House."[11] In that particular case the mother had been awarded custody in separation proceedings. Soon after, the father petitioned the Inner House

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7 Particularly since 1958 when it was provided that no decree of divorce or separation could be made until satisfactory arrangements had been made for the children: 1958 Act, s. 8(1).

8 See Syme v Cunningham 1973 S.L.T. (Notes) 40.

9 Para. 41.6.

10 I.e. the Inner House of the Court of Session in 1889.

11 Beedie v Beedie (1889) 16 Rettie 648 at p. 651 per Lord Inglis L.P.

which held the petition competent but declined to award him custody. The foundation of the court's decision was that "the recent Act[12] puts us in a wholly different position from that of the Lord Ordinary."[13] That may have been so of the 1886 Act but it could not be said of the 1925 Act.[14] The foundation having thus been eroded, the possibility of jurisdictional overlap is now remote.

40.3 That apart, later decisions have attempted to put the relationship between the two Houses on a more rational basis. In 1893 the Court of Session explained that, although the competency of an application to the nobile officium could not be denied, it should be used "only in circumstances in which no other course will give [the parties] the remedy which they desire."[15] Thus, when consistorial proceedings were properly before the Lord Ordinary, it would be inappropriate for any custodial issue to be dealt with under the nobile officium. Any such petition would be sisted pending the determination of the consistorial proceedings.[16] The Inner

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12 1886 Act, s. 5.

13 Beedie v Beedie (1889) 16 Rettie 648 at p. 652 per Lord Inglis L.P.

14 The Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c. 45) applies to the consistorial jurisdiction of the Lord Ordinary and it has the same effect in all the jurisdictions to which it applies.

15 McCallum v McCallum (1893) 20 Rettie 293.

16 Paterson v Paterson (1889) 2 Fraser 81; B v B 1907 S.C. 1186.

House has however pronounced an interim order pending the Lord Ordinary's decision[17] and a "final"[18] order after decree of divorce had been granted without dealing with questions of custody.[19] If a particular remedy would be beyond the jurisdiction of the Lord Ordinary, this deficiency could be remedied by the exercise of the nobile officium.[20]

40.4 The problems were greater before 1958. The Lord Ordinary's jurisdiction under section 9 of the 1861 Act was available only when a decree of divorce or separation was granted.[21] Unless power was reserved in the decree to either party to apply in the process to re-open the question of custody or access, the Lord Ordinary was unable to deal further with the matter.[22] Such power is now automatically reserved in all decrees.[23] The solution now therefore is to lodge a minute of variation in the subsisting consitorial process.[24]

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17 Reid v Reid (1901) 3 Fraser 330.

18 No custodial order can ever be "final" in the absolute sense of the word.

19 Christison v Christison 1936 S.C. 381.

20 Guthrie v Guthrie (1906) 8 Fraser 545.

21 It was not available in an action for adherence or for declarator of legitimacy: Heriot-Hill v Heriot-Hill (1906) 14 S.L.T. 182; Curran v Curran 1957 S.L.T. (Notes) 47. Nor was it available when decree was refused: McArthur v McArthur 1955 S.C. 414.

22 Sanderson v Sanderson 1921 S.C. 686; Smith v Smith 1930 S.L.T. 590; Bain v Douglas 1936 S.L.T. 418.

23 Rules of Court, rr. 156, 163 and 164.

24 Generally, see Clive & Wilson, p. 591.

40.5 The Lord Ordinary's jurisdiction[25] has also been extended to cover a wider range of consistorial causes and to include cases in which a consistorial remedy is refused.[26] A wider range of children also falls within the Lord Ordinary's jurisdiction.[27] These changes[28] have considerably reduced the contexts in which application to the nobile officium might have been appropriate. It would be very exceptional indeed now for the Lord Ordinary to lack jurisdiction and so to justify the exercise of the nobile officium.

(b) The Sheriff Court

40.6 Only exceptionally do non-consistorial cases come before the Court of Session. Most are dealt with by the sheriff. There had been considerable difficulties about the nature and extent of the sheriff's custodial jurisdiction.[29] Whatever the limitations of his common law powers, there is no doubt that he had statutory jurisdiction under section 5 of the 1886 Act which was extended in 1928 to cover paternal applications[30] and, in effect, in 1930 to deal with illegitimate children.[31] His power under the Sheriff Court Acts of 1907[32] and 1913[33] to "regulate" custody supplemented his other capacities.[34] The only real

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25 To include nullity and adherence: 1958 Act, ss. 9(2) and 14(1).
26 1958 Act. s.9. 27 Ibid., s. 7.
28 Generally, see Clive & Wilson, pp. 568, 569, 578 to 580.
29 Paras. 38.22 to 38.28.
30 Administration of Justice Act 1928 (18 & 19 Geo. 5, c. 26), s.16.
31 Illegitimate Children (Scotland) Act 1930 (20 & 21 Geo. 5, c. 33).
32 7 Edw. 7, c. 51.
33 2 & 3 Geo. 5, c. 28.
34 Para. 38.26.

limitation was the inapplicability of the 1891 Act.[35] However, section 1 of the 1925 Act applied to the shrieval jurisdiction as much as it did to the consistorial, nobile officium and statutory jurisdictions of the Court of Session. In practice therefore with marginal exceptions the sheriff's custodial powers were more or less equivalent to those of the Court of Session. Certain jurisdictional questions apart, the legal context of the custodial decision-making process was much the same in both courts.

Section 2 - The consistorial jurisdiction

(a) General

40.7 The consistorial custodial jurisdiction of the Court of Session developed quite differently from the nobile officium. The way in which the original jurisdiction was exercised is largely unknown.[36] But once the Court of Session had succeeded entirely to the jurisdiction in 1861, the pattern became clearer. Despite the apparent discretionary nature of the power in the 1861 Act,[37] the Court of Session tended to apply the normal approach of the common law.[38] The modern approach emerged about ten to fifteen years later.[39]

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35 After 1925 this probably made little difference in practice.
36 Paras. 33.75 to 33.77.
37 Conjugal Rights (Scotland) Amendment Act 1861, s. 9.
38 Paras. 33.82 to 33.93.
39 Symington v Symington (1875) 2 Rettie (H.L.) 41.

40.8 The Divorce Court in England exercised a similar custodial jurisdiction over children the marriage of whose parents was in process of being dissolved.[40] The English jurisdiction was exercised rather differently. The new dimension was introduced into the law of Scotland by the House of Lords in Symington v Symington:[41] the tentative beginnings of the presumptive approach.[42] In a sense that was a compromise between the rigidity and legal nature of the common law threshold approach on the one hand and the prima facie unrestricted flexibility of the 1861 Act on the other hand. Although Stevenson v Stevenson[43] was not a consistorial cause, the House of Lords in that case, which was decided under the 1886 Act, also indicated that there was scope for an inchoate presumptive approach.[44] The way was therefore open for the court to abandon the traditional threshold approach and to substitute a consideration of all the circumstances of the case, including, perhaps even as a priority, the interests of the child.[45]

40.9 On no occasion between 1875 and 1925 has the Court of Session engaged in a detailed analysis of the law or of the legislation. It has done so only once since then.[46] This is so, despite the fact that the consistorial jurisdiction has become increasingly more important in practice during this century and that children have been of vital concern since 1958.[47] Reference

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40 Matrimonial Causes Act 1857 (20 & 21 Vict., c. 85), s. 37: para. 34.92 to 34.108.
41 (1875) 2 Rettie (H.L.) 41. 42 Paras.33.98 and 39.10.
43 (1894) 21 Rettie (H.L.) 96.
44 Ibid., at p. 99.
45 Idem.
46 Hume v Hume 1926 S.C. 1008.
47 Matrimonial Proceedings (Children) Act 1958, s. 8.

had been made occasionally in a desultory fashion to the Acts of 1886 and 1891,[48] although their relevance to consistorial matters is difficult to see. But the judicial approach before 1925 was quite consistent with the Act of 1925, which clearly did apply to these disputes, supported by the interpretation of that Act in Hume v Hume[49] which is the authority for present practice. Even now, neither the Act nor that authority is much mentioned. This is not to say that the Act did not clarify certain issues or introduce some marginal modifications.

40.10 The absence of a detailed judicial analysis of the law makes it difficult to be sure what approach was taken. Certain attitudes however are implicit in the judgments. This is not a denial of any legal restraints or indeed of any role for the law. But the overall judicial approach to the consistorial jurisdiction is wholly consistent with the way in which the 1925 Act has been interpreted and applied. That forms the framework into which the decisions of the Outer House may be appropriately fitted.

40.11 One of the issues which had exercised the minds of the judiciary, particularly in England, was the significance of marital misconduct.[50] Perhaps it may have originated in the bar in the Custody of Infants Act 1839 to awarding custody or access to an adulterous mother.[51] In Scotland the courts under

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48 Martin v Martin (1895) 3 S.L.T. 150; Minto v Minto 1914, 2 S.L.T. 381.

49 1926 S.C. 1008.

50 Paras. 34.97 to 34.104.

51 Custody of Infants Act 1839 (2 & 3 Vict., c. 54), s. 4.

the common law had taken the view that marital misconduct did not have any bearing upon the issue. They were concerned only with the effect of the parent's conduct upon the child. The parent's immorality could be relevant in that sense but never decisive. It would have been much easier if custody had been the reward for marital innocence and the penalty for marital fault. In Stevenson v Stevenson[52] the House of Lords indicated that paternal cruelty to the mother was as relevant as paternal cruelty to the children. This opened wider the scope of investigation, the range of considerations and the basis for argument. An adulterous mother has in consequence not necessarily been refused custody and there are both early[53] and recent[54] examples of such an award.

40.12 It is only exceptionally that custody is contested. Satisfactory arrangements for the child have nevertheless been a mandatory matter for decision since 1958 in any case.[55] The most difficult cases are when the father seeks custody from a guilty wife. The new concept of divorce in the Divorce (Scotland) Act 1976[56] is unlikely to make much difference, except perhaps to extend the scope for discussion and to modify the foundation from "guilt" to responsibility for breakdown.[57] Relatively few of these cases are reported but they probably represent a fairly common example of what happens. Of nineteen decisions,[58] the father was the pursuer in sixteen, the mother in three; the

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52 (1894) 21 Rettie (H.L.) 96. 53 Smith v Smith (1894) 2 S.L.T.17
54 Barr v Barr 1950 S.L.T. (Notes) 15. 55 1958 Act, s. 8.
56 1976 c. 39, s. 1.
57 The only change of current relevance is s. 5(6)(b) of that Act which requires provision to be made by act of sederunt to inform a defender of his right to apply for custody under s. 9 of the 1861 Act in the case of a divorce to which the "traditional" grounds do not apply.
58 Basically those considered hereafter.

father was awarded custody in four, the mother in nine; custody was divided in three cases; no decision in two; thirteen were founded on adultery, three on desertion, three on cruelty. It would thus be exceptional for a father to succeed, even when he is the innocent spouse. This pattern is unlikely to have occurred if the courts had followed the traditional common law approach.

(b) The traditional threshold approach

40.13 The process was divided into threshold and discretionary stages in only three cases.[59] Two, strangely, were judgments of Lord Sands who made such a valuable contribution to the modern law in Hume v Hume.[60] In each of these three cases the husband was the pursuer and he succeeded in obtaining custody in one case only. McCurdie v McCurdie[61] is a perfect example of the threshold approach. The children had been neglected by their father. Consequently, as Lord Sands said, "the only considerations to be taken into account are the feelings of the mother and the interests of the children."[62] The only point against the mother was her adultery. There was attachment between her and the children. When she was out working, a neighbour or their grandmother would look after the children: "not an unusual concomitant of industrial life."[63] In the event the "less unsatisfactory course"[64] was to leave them with their mother.

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59 Minto v Minto 1914 2 S.L.T. 381; McCurdie v McCurdie 1918 2 S.L.T. 250; Allan v Allan 1919 2 S.L.T. 88.
60 1926 S.C. 1008. 61 1918 2 S.L.T. 250.
62 Ibid., at p. 250 per Lord Sands.
63 Idem.
64 Idem.

40.14 The circumstances in Allan v Allan[65] were probably more favourable to the father than in McCurdie v McCurdie.[66] The wife had committed adultery. But the father was to blame for the general lack of success in family life. Normally, as Lord Sands indicated, the father was entitled to custody when the wife was divorced.[67] Whether that was a rule or presumption is not clear. In either case it was displaced by the blame adhering to the father. The child therefore remained with the mother.

40.15 In Minto v Minto,[68] on the other hand, the father succeeded. Neither parent was unfit. The father had shown lack of "interest in and of affection"[69] for his children but that was not enough to displace his prima facie right to their custody. Lord Ormidale went on to refer to the interests of the children as the paramount consideration but the context of that observation was negative. It was the basis of the threshold approach: "can it be said that their interests would suffer if they were handed over to their father?"[70] In none of these three cases did the court consider what was best for the child. Once the father had forfeited his right in McCurdie v McCurdie[71] and Allan v Allan,[72] there was little option but to give custody to the mother. Any disadvantages which she may have exhibited were far outweighed by the benefits of the child being with her.

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65 1919 2 S.L.T. 88. 66 1918 2 S.L.T. 250.
67 1919 2 S.L.T. 88 at p. 88. 68 1914 2 S.L.T. 381.
69 Ibid., at p. 382 per Lord Ormidale.
70 Idem., per Lord Ormidale.
71 1918 2 S.L.T. 250.
72 1919 2 S.L.T. 88.

(c) The contemporary approach

(i) The foundations

40.16 The principal element in the modern approach is a judicial attempt to look at all the circumstances of the problem, relate them to each other and ultimately reach a decision on that basis. This is certainly true of the more recent cases; it was also true of the earliest decisions. It is equally true that welfare played a part in every decision but the function of welfare has changed since the earlier years of this century. This overall balancing technique clearly evolved under the influence of the House of Lords in Symington v Symington.[73] It would be almost impossible to argue that 1925 was as clear a point of departure for the consistorial jurisdiction as it was for the nobile officium. Equally its influence would be difficult to deny. Although no dramatic change may be identified, three broad trends may be seen to have evolved:-

1. an increasingly open-ended approach to welfare;
2. continuing reliance upon the presumptive approach; and
3. a greater recognition of the subsumptive approach.

The 1925 Act underlies and emphasises each of these trends.

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73 (1875) 2 Rettie (H.L.) 41.

40.17 As early as 1895, however, no doubt under the influence of Stevenson v Stevenson,[74] some of these concepts were becoming apparent. Lord Kincairney commented:-

> "[the] interest of the children rather than the right of the father is now the overruling consideration in such cases, - although I do not doubt that the right of the father will still be recognised and respected."[75]

In awarding custody to the mother in that case he gave effect to that overall approach and in doing so took into account, but was not bound by, certain presumptive and threshold considerations. For example, the ages of the children indicated presumptively the mother. Her innocence and the respectability of her relations did likewise. While the father's idle, intemperate and thriftless habits operated against him at the threshold. The delicate health of one of the children similarly was a threshold consideration antipathetic to him. Lord Kincairney's approach may be analysed in this way but synthesised as a balance of the relevant consideration ruled ultimately by the children's interest.

40.18 Most of the earlier cases, while eschewing the traditional threshold approach, failed to anticipate so clearly the maturity of the approach common in the second half of the

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74 (1894) 21 Rettie (H.L.) 96.

75 Martin v Martin 1895 3 S.L.T. 150 at p. 150 per Lord Kincairney.

twentieth century. Lord Stormonth Darling, for instance, appeared in Gibson v Gibson[76] to restrict himself to the possible detriment to the child's health in being separated from her mother. In Stewart v Stewart[77] Lord Ormidale had great difficulty in deciding "which of the alternatives should, having in view the interest of the child, be adopted."[78] Despite the innocence of the father and the blame attaching to the mother, she was "in the meantime at any rate"[79] preferred as regards the youngest child. The father was given custody of the three eldest children. This was no doubt something of a compromise solution. In each of three cases there was independent evidence in relation to the children:[80] again, a matter more prevalent later than earlier. These reports enabled the court to come to a decision based largely on welfare considerations. Even these decisions are entirely consistent with the present approach, although they may not go quite so far as some of the later cases.

40.19 Despite this flexibility of approach, there is no doubt that the responsibility for deciding the custodial issue, including what is best for the child, remains with the court.[81] It cannot be delegated to investigating reporters, dependent or independent witnesses or even the child. Much depends on the circumstances of the case but on at least two occasions the court took a very positive view of welfare. This does not mean

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76 (1894) 2 S.L.T. 71. 77 1914 2 S.L.T. 310.
78 Ibid., at p. 312 per Lord Ormidale.
79 Idem., per Lord Ormidale.
80 In the former case a commissioned medical report; in the latter case a report of the Shelter officials.
81 Gover v Gover 1969 S.L.T. (Notes) 78.

that non-welfare considerations were ignored. In McCarroll v McCarroll[82] the Lord Ordinary was seeking the decision which would best advance the welfare of the children and Lord Keith's attitude in Christie v Christie[83] was similarly that separation from her mother would not best serve the child's welfare. That is not the same as Lord Stormonth Darling's concern in Gibson v Gibson[84] for any detriment to the child in separation from her mother. The latter is a negative threshold consideration, the former more an overriding welfare objective.

(ii) The subsumptive approach

40.20 McCarroll v McCarroll[85] and Christie v Christie[86] were probably exceptional. Most judicial comments simply reiterated the paramount significance of welfare in the decision-making process. As Lord Sorn stated, "the paramount consideration is the welfare of the child;"[87] in Lord Wheatley's more emphatic words, "the paramount consideration must be the welfare of the child."[88] Some judicial expressions seemed to go beyond the paramountcy principle. As Lord Wheatley, for example, had said, before becoming Lord Justice-Clerk, "the real consideration however in the case is the welfare of the children and what would be best for them."[89] Sometimes the question is which alternative is in the best interests of the child.[90] Do these comments mean that the child's welfare or interests are the

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82 1937 S.N. 62. 83 1945 S.L.T. 300. 84 (1894)2 S.L.T. 71.
85 1937 S.N. 62. 86 1945 S.L.T. 300.
87 Spicer v Spicer 1946 S.L.T. (Notes) 24 at p. 24 per Lord Sorn.
88 Wincentzen v Wincentzen 1974 S.L.T. (Notes) 26 at p. 26 per Lord Wheatley L.J.-C.
89 Zamorski v Zamorska 1960 S.L.T. (Notes) 26 at p. 26 per Lord Wheatley.
90 Huddart v Huddart 1961 S.C. 393 at pp. 395 and 396 per Lord Walker; Runciman v Runciman 1965 S.L.T. (Notes) 6 at pp. 6 and 7 per Lord Johnston.

exclusive consideration? That would amount to making welfare the objective of the exercise. But no such interpretation or approach was intended. These formulations need to be read in light of the prescribed subsumptive approach that non-welfare considerations are to be given effect only from the point of view of the child's welfare.

40.21 The direction in the second part of section 1 of the 1925 Act applies strictly only to the claims of either parent. It has however implicitly at least, been extended to most, if not all, considerations relevant to the decision. The paramountcy of welfare principle as a matter of policy as distinct from a statutory directive would be sufficient to justify such an approach where the Act might not arguably apply. The subsumptive approach cannot be divorced from the paramountcy of welfare principle in any event. Nowhere is this clearer than in Lord Sorn's judgment in Spicer v Spicer.[91] After referring to welfare as the paramount consideration, he said:-

> "If the evidence indicates that looked at from this point of view the interests of the child would be secure with one spouse and in danger with the other, then I think that must be decisive without regard to the question which spouse is guilty or innocent."[92]

That is an extreme proposition. Lord Sorn is implying that when

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91 1946 S.L.T. (Notes) 24.

92 Ibid., at p. 24 per Lord Sorn.

the evidence as a whole looked at from the child's point of view indicates one solution, matrimonial guilt or innocence is irrelevant from any point of view. Normally such guilt or innocence would be relevant only from the child's point of view. But for Lord Sorn the tenor of the whole evidence is a fortiori merely one aspect of it.

40.22 The normal view, that is limiting the relevance of each consideration to its relationship with the welfare of the child, has been applied in a number of cases. The religious upbringing of the child and the implied wishes of the father in that regard became insignificant when considered in the overall context of the child's welfare.[93] The traditional reluctance to allow a child to emigrate[94] or even to leave the jurisdiction to live in England,[95] in either case against the father's wishes, evaporated when considered from the welfare point of view. Similarly the children's own wishes, at best obliquely related to the claim of either parent, were significant provided only that inter alia they would not involve risk of positive danger to welfare.[96] If, on the other hand, the status quo and probably any other consideration indicating a tentative conclusion could not be faulted from the welfare point of view, there would be no reason to deny that consideration effect.[97] That consideration may not be decisive but it will be relevant. Only when the subsumptive approach is added to the paramountcy

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93 Zamorski v Zamorska 1960 S.L.T. (Notes) 26.

94 Huddart v Huddart 1961 S.C. 393.

95 Runciman v Runciman 1965 S.L.T. (Notes) 6.

96 Gover v Gover 1969 S.L.T. (Notes) 78; Johnson v Johnson 1972 S.L.T. (Notes) 15.

97 Hannah v Hannah 1971 S.L.T. (Notes) 42.

of welfare principle will a decisive context be reached. The subsumptive approach thus forms part of the approach to the consistorial jurisdiction. It merely adds a further dimension or a different aspect. It is no more a substitute for an overall discretionary approach than any other single criterion.

(iii) The presumptive approach

40.23 It is not altogether surprising, despite a somewhat inauspicious start,[98] that the Court of Session was persuaded to introduce general child care principles into the exercise of the wide discretionary powers of its consistorial jurisdiction. These principles or presumptions are relevant subject to the subsumptive approach to welfare. Lord Sorn in Spicer v Spicer[99] and Lord Fraser in Stevenson v Stevenson[1] made it abundantly clear that these presumptions would only be effective where the considerations bearing directly on the welfare of the child were equally balanced. Otherwise the subsumptive approach or perhaps even the threshold approach would reduce their significance in the individual case.

40.24 The principles which may be presumptively applied in this way may be as varied and diverse as the arguments of the parties or the predilections of the judges. They may range from the age of the child,[2] the wishes of the child,[3] the status of the father as head of the family[4] and the peculiarly important

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98 I.e. the decisions of the Court of Session on the 1861 Act before 1875.

99 1946 S.L.T. (Notes) 24.

1 1967 S.L.T. (Notes) 7.

2 Martin v Martin (1895) 3 S.L.T. 150.

3 Gover v Gover 1969 S.L.T. (Notes) 78; Johnson v Johnson 1972 S.L.T. (Notes) 15.

4 Martin v Martin (1895) 3 S.L.T. 150; Stevenson v Stevenson 1967 S.L.T. (Notes) 7.

maternal qualities of the mother[5] to the need for stability[6] and the preservation of the status quo.[7] But perhaps the principle of greatest practical significance in this context is a reflection of the nature of the principal proceedings: the innocence or culpability of the spouses[8] not merely in relation to the matrimonial relationship but more particularly in the general family context. It is the latter aspect which is likely to attract more attention under the Divorce (Scotland) Act 1976. Lord Keith described the approach very succinctly in Christie v Christie[9]:-

> "There is no doubt that, if considerations are equally balanced, the fact that the pursuer is the innocent party would be conclusive in entitling him to obtain custody of the child."[10]

This theme was specifically endorsed by Lord Sorn in Spicer v Spicer.[11] In Zamorski v Zamorska[12] and Stevenson v Stevenson[13] responsibility for bringing the marriage to an end, although not conclusive, played an important part in the overall decision-making process.

40.25 These principles may operate in two ways. Where other considerations are equally balanced, they may be decisive.[14] Otherwise they may take whatever place the court thinks fit in

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5 Johnston v Johnston 1947 S.L.T. (Notes) 26.
6 Wincentzen v Wincentzen 1974 S.L.T. (Notes) 26.
7 Johnston v Johnston 1947 S.L.T. (Notes) 26; Barr v Barr 1950 S.L.T. (Notes) 15; Runciman v Runciman 1965 S.L.T. (Notes) 6; Hannah v Hannah 1971 S.L.T. (Notes) 42.
8 Stewart v Stewart 1914 2 S.L.T. 310; Christie v Christie 1945 S.L.T. 300; Spicer v Spicer 1946 S.L.T. (Notes) 24; Zamorski v Zamorska 1960 S.L.T. (Notes) 26; Stevenson v Stevenson 1967 S.L.T. (Notes) 7.
9 1945 S.L.T. 300. 10 Ibid., at p. 300 per Lord Keith.
11 1946 S.L.T. (Notes) 24 at p. 24. 12 1960 S.L.T. (Notes) 26.
13 1967 S.L.T. (Notes) 7.
14 E.g. Christie v Christie 1945 S.L.T. 300; Spicer v Spicer 1946 S.L.T. (Notes) 24.

the overall rationalisation process.[15] In that event the court will be required to relate the principle to the other considerations. This may involve a procedure or way or thinking similar to the threshold approach.[16] It involves a principle[17] or rule[18] of general application but liable to be disapplied in the circumstances of the individual case. Thus in the present context the court establishes a general principle but for reasons relevant only to the circumstances of the individual case may later discard it or render it less important. There were some examples of this modified threshold approach in the settlement of parental disputes under the nobile officium.[19] There, as here, it may lead to conflict and controversy.[20]

40.26 Such a case is Hannah v Hannah.[21] Lord Walker, having granted decree of divorce to the mother on the ground of adultery, found most custodial considerations equally balanced between the parties. He awarded custody to the mother because that would be "more in accordance with nature than is the somewhat artificial position that exists at present."[22] The child, a girl aged seven, was at that stage living with her father. Lord Walker obviously considered that it was more natural for a girl of seven to live with her mother. He failed to state, what he clearly implied, that this principle justified awarding custody to the mother in the best interests of the child. His failure to make that clear enabled the Inner House to question

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15 E.g. Martin v Martin(1895)3 S.L.T. 150; Zamorski v Zamorska 1960 S.L.T. (Notes) 26.

16 Gibson v Gibson(1894)2 S.L.T. 71; Martin v Martin(1895)3 S.L.T. 150. It is not without significance that these are relatively early cases.

17 In this context. 18 In the common law context. 19 Para. 39.47

20 It would normally but not necessarily arise when a proposal would possibly be detrimental to the child's welfare: Gibson v Gibson(1894)2 S.L.T. 71; Martin v Martin(1895)3 S.L.T. 150; Zamorski v Zamorska 1960 S.L.T. (Notes) 26; Wincentzen v Wincentzen 1974 S.L.T. (Notes) 26.

21 1971 S.L.T. (Notes) 42. 22 Ibid., at p. 42 per Lord Walker.

the legality of his approach and ultimately to reverse his decision by awarding custody to the father.

40.27 The principal argument concerned the second part of section 1 of the 1925 Act. Allegedly Lord Walker had regarded the mother's claim as superior to that of the father.[23] Undoubtedly he had done so but as the conclusion not as the foundation of his analysis of the issue. This argument was in terms of nature, not of welfare. The subsumptive approach required him to look at the mother's natural claim in terms of welfare. That is probably what he intended. But he did not specifically say so. Thus Lord Clyde L.P. argued:-

> "What exactly the Lord Ordinary meant by nature, or what precisely nature has got to do with it, I must confess I find difficulty in appreciating as a proper test in matters of this kind. It is not nature but the welfare of the child which is the material matter."[24]

After quoting the second part of section 1 of the 1925 Act, the Lord President concluded:-

> "... the Lord Ordinary has not only not adopted the proper test for this question of custody but has adopted a test which appears to me at least to be in the teeth of the latter provisions of s. 1 of the Act of 1925."[25]

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23 Ibid., at p. 43.

24 Ibid., at p. 43 per Lord Clyde L.P.

25 Idem.

40.28 Lord Clyde L.P. then went on to consider the merits of the case. The homes and financial standing of each parent were equally acceptable from the child's point of view. The child had been living with the father for six or so years in a satisfactory manner. The Lord President preferred the father but in doing so, it is suggested, he fell into precisely the same trap as Lord Walker. The Lord President certainly had clearly set out the statutory welfare context of the decision-making process. But in his analysis of the circumstances of the case in question he failed to articulate his decision in terms of the child's welfare. Custody was simply awarded to the father "with whom or in whose family the child has been living for practically all its life hitherto."[26] He thus gave effect, all other considerations being equal, to the presumption in favour of the status quo. No doubt that was in his view in the best interests of the child. But he articulated his decision in welfare terms no more and no less than Lord Walker. In the event the Inner House merely substituted the principle of the status quo for Lord Walker's principle of the natural claim of the mother as the device for solving the issue when the individual aspects of welfare had failed to indicate a solution. This demonstrates the potential difficulties of the discretionary approach supported by the presumptive approach but ignoring the practical implications of the subsumptive approach.

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26 Idem.

(c) Incidental matters

(i) General

40.29 One of the principal features of the post-war legislation has been the extension of the powers of the courts in exercise of all their jurisdictions so that they were not bound simply to grant or refuse the application before them.[27] In other words the range of alternatives was considerably extended. This approach however was not unprecedented. The 1861 Act, it will be recalled, was drafted in wide language. It enabled the court inter alia to make such provision "as to it shall seem just and proper" with respect to custody, maintenance and education.[28] Access per se was not mentioned but that aspect was in practice regulated as an incident of custody.[29] Nor was any reference made to third parties but their involvement in the process was taken to be competent.[30] On occasions, too, but rather exceptionally custody was divided in the sense that, there being more than one child, custody of one or more was given to one parent and custody of the other or others to the other parent. None of these facilities was specifically mentioned in section 9 of the 1861 Act and their validity is no doubt a reflection of the wide expressions in the Act. Some of them were confirmed in 1958.[31]

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27 Paras. 36.37 to 36.48. e.g. Runciman v Runciman 1965 S.L.T. (Notes) 6.
28 1861 Act, s. 9.
29 Huddart v Huddart 1960 S.C. 300; S v S 1967 S.C. (H.L.) 46.
30 Pow v Pow 1931 S.L.T. 485.
31 1958 Act, s. 14(2).

40.30 Each of these issues raises particular questions, with solutions potentially different from parental custodial disputes. Is access in the nature of a right inhering in the non-custodial parent? Is it subject to the forfeiture approach? Are third parties to be treated as such, even in the consistorial context? How does the concept of divided custody relate to the principle of family unity? Some of these are worth considering.

(ii) Third Parties

40.31 To consider first third party involvement: the paternal grandparents intervened in Pow v Pow[32] by lodging a minute in the consistorial process seeking not an award of custody but a decision refusing custody to the children's mother. The point was not argued but presumably, if the court were to accede to their request, custody would remain with the father and the grandparents' interest would be as his delegate. The competency of the grandparents' involvement was not questioned and Lord Fleming approached the issue as if the 1925 Act applied. The issue thus was not so much who should have custody but rather which set of claimants should care for and bring up the child.[33] That was largely the effect of the 1925 Act in relation to parental disputes. The common law required more of a threshold than a balancing approach. So the consistorial context of Pow v Pow[34] impliedly caused further erosion of the

32 1931 S.L.T. 485.
33 I.e. the welfare approach in practice.
34 1931 S.L.T. 485.

common law[35] and indicated the eventual assimilation of all matters under the 1925 Act.

40.32 Pow v Pow[36] was only the first step in this process. Nevertheless it exhibits most of the features of the overall discretionary approach appropriate in inter-parental disputes. Lord Fleming in effect attempted to balance the relevant considerations and to afford in that process priority to the children's interest. Legal right and title were not the only considerations. Three presumptive principles were discussed: the maternal claim as such; the marital innocence of the mother; and the children's own wishes. The two older children had lived most of their lives with their paternal grandparents and the youngest with her mother. The children wished to continue these arrangements. So the consequences of upsetting the status quo became relevant. Expert evidence indicated that removal from their grandparents would prejudice their health. On balance therefore it was decided to preserve the status quo in the interests of the children.

40.33 The issue in Nicol v Nicol[37] was similarly a competition between the mother and paternal relatives of the child. There was however one vital difference between it and Pow v Pow[38], making the later case an even stronger authority on

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35 As in Nicol v Nicol 1953 S.L.T. (Notes) 67 and, more obliquely, in Cochrane v Keys 1968 S.L.T. (Notes) 64.
36 1931 S.L.T. 485.
37 1953 S.L.T. (Notes) 67.
38 1931 S.L.T. 485.

the approach to welfare. Custody had been granted to the father in the divorce proceedings. He died. The mother sought to recover the children from the paternal relatives. They refused and she lodged a minute in the divorce process seeking an award of custody. That implies that her common law right to custody on the death of the children's father did not accrue to her once custody had been conferred upon him in consequence of his legal right. If that had not been so, the mother's remedy would have been to ask, probably the sheriff, for an order of delivery to enforce her legal right.[39] But she asked for an award of custody. Lord Strachan however did not dissent from the appropriateness of that procedure and proceeded to adopt an overall discretionary approach rather than the traditional threshold approach of the common law.

40.34 Counsel for the mother in fact relied inter alia upon the threshold approach. Lord Strachan rejected that contention.[40] It was also suggested for the mother that the 1925 Act did not apply. That question was avoided by the Lord Ordinary when he argued:-

> "Assuming that section 1 of the Guardianship of Infant Act, 1925, does not apply, it seems to me none the less that the principles of the common law require me to take into consideration the welfare of the children as well as the title of the mother as sole surviving parent."[41]

Reliance was placed upon the common law as expounded by Lord Inglis L.P. in Sutherland v Taylor.[42] The Lord President's dictum applied in the context of the traditional threshold approach which had been

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39 See Clive & Wilson, p. 591.

40 It was "too absolute": Nicol v Nicol 1953 S.L.T. (Notes) 67 at p. 67 per Lord Strachan.

41 Nicol v Nicol 1953 S.L.T. (Notes) 67 at p.67 per Lord Strachan.

42 (1887) 15 Rettie 224. That case has frequently been quoted as authority for excessively wider propositions: para. 39.28.

rejected by Lord Strachan who thus substituted the natural claims of a mother for her legal rights at the threshold but as part of the overall discretionary approach. The mother's claim in this way became a presumptive principle of child care rather than a matter of law. The justification for this was the welfare of the children.[43] That presumption is always liable to rebuttal. So the appropriate attitude was in Lord Strachan's words:-

> "...from the point of view of the welfare of the children themselves it is, in my opinion, desirable that they should be in their mother's custody unless it is proved clearly that she is an unsuitable person." [44]

There was no evidence that she was unsuitable.[45] Effect was therefore given to her presumptive claim. Although Lord Strachan referred to the title of the mother, no doubt under the influence of Lord Inglis L.P. in Sutherland v Taylor,[46] he proceeded rather on the basis of the welfare-inspired presumption in favour of the mother. This is entirely consistent with the way in which inter-parental disputes have been settled either under the nobile officium or in exercise of the consistorial jurisdiction, in either case subject to the influence of the 1925 Act.[47]

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43 "... great weight must be given to the fact that by nature the mother is normally the person who is best suited to bestow affection and care upon the young children:" Nicol v Nicol 1953 S.L.T. (Notes) 67 at p. 67 per Lord Strachan.

44 1953 S.L.T. (Notes) 67 at pp. 67 and 68 per Lord Strachan.

45 Her marital guilt was unimportant.

46 (1887) 15 Rettie 224.

47 Lord Robertson evinced a similar attitude in Cochrane v Keys 1968 S.L.T. (Notes) 64 but he was able to point to s. 14(2) of the 1958 Act to support third party involvement. The anomaly in that case was that the grandmother did not lodge a minute in the divorce process; she presented an independent petition.

(iii) Fragmentation of custody

40.35 Custody may be fragmented in a number of different ways. It may be given to one parent for a tract of time, to the other parent for a different period; custody may be given to one parent for an undivided period, subject to the lesser right of access conferred upon the other parent; the common law right of the parent or of one parent may be left intact but not enforced, thus leaving actual custody with the other person; custody may be awarded to one person, care and control to the other. The Scottish courts in particular have given very little thought to these matters. Parliament in 1975 attempted to rationalise some of these concepts,[48] especially for England.[49] It is in many respects a question of status,[50] with which this analysis is not especially concerned, but welfare has a part to play in practice in the fragmentation of custody.

40.36 Gibson v Gibson[51] was a strange case. The father's conclusion for custody was dismissed. The child was living with her mother. Each of the legal and actual status quo was thus preserved. Later however Lord Stormonth Darling gave the father custody for a week at Easter and for three weeks in autumn. The father had in a sense never lost custody; it had not been taken away from him nor given to anyone else. He was

48 Children Act 1975 (1975 c. 72), s. 107(2): the reference to actual custody meaning care and possession presumably picks up for Scotland the interpretations placed upon them in the adoption context: para. 24.23.

49 Ibid., ss. 86 and 87: see also s. 85.

50 Which has been modified by the statutory position of local authorities having the case of children: chapters 16 and 17.

51 (1894) 2 S.L.T. 71.

presumably in that case merely free to exercise certain elements of it at two periods in the year. The static position was clearly overtaken by the dynamic effect of the court's decision. In modern terminology[52] the father retained legal custody, the mother actual custody with limited access by the father.

40.37 Access had been a matter for judicial regulation earlier than 1886,[53] when the Act of that year first made specific reference to it in the Scottish context. The matter also fell within the consistorial jurisdiction of the Court of Session.[54] Only fairly recently has the concept been judicially analysed. The general principle has been stated by Lord Blades:-

> "... in matters of access, as in matters of custody, the paramount consideration was the interest of the child. At the same time a father, unless anything could be said against his moral character, was entitled, so long as it did not interfere with the paramount consideration, to some access to his child."[55]

He reiterated the same idea later in his opinion in terms of a presumptive principle rather than a legal right.[56] Lord Blades' comments evoke the spirit of the threshold approach. A blameless father has a right to access which may be denied to him if it is inconsistent with the child's welfare. A reprehensible father,

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52 I.e. under the Children Act 1975, s. 107(2).
53 Paras.33.58, 33.59, 39.61 and 39.62.
54 Stuart-Brown v Stuart-Brown 1911 2 S.L.T. 35.
55 Murray v Murray 1947 S.N. 102 at p. 102 per Lord Blades.
56 "... she ought not to be allowed to grow up without contact with her father, unless something could be said against the father ...:" idem. per Lord Blades.

on the other hand, has no such right at all. This approach would appear to have been implemented in later cases.[57] Welfare played no part. In each case the mother's apparent right was forfeited because she had virtually abandoned or deserted the child or the children. If these words are too strong, then it could be said that the lack of contact between her and the children indicated the absence of any real relationship between them. The frequently enunciated principle that a child should, as far as possible, grow up knowing both parents was apparently ignored.

(iv) Fragmentation of the family

40.38 It is similarly often stated that the unity of the family should be preserved and the children kept together whenever possible. In two fairly early cases however the court distributed custody between the parents: in one case for no apparent reason[58] and in the other by disrupting the status quo.[59] More recently the court has become rather circumspect. In Barr v Barr[60] the division of the family proposed by the Lord Ordinary simply preserved the status quo, while in Johnson v Johnson[61] it reflected the wishes of the children, although changing the status quo, It is a matter of circumstances. The present practice would appear to require exceptionally good reasons to

57 McAllister v McAllister 1947 S.L.T. (Notes) 9; Urquhart v Urquhart 1961 S.L.T. (Notes) 56; Gray v Gray 1961 S.L.T. (Notes) 83.
58 Smith v Smith (1894) 2 S.L.T. 173.
59 Stewart v Stewart 1914 2 S.L.T. 310.
60 1950 S.L.T. (Notes) 15.
61 1972 S.L.T. (Notes) 15.

break up the unity of the family.

Section 3 - The shrieval jurisdiction

(a) Third party disputes

40.39 Apart from the inapplicability of the Custody of Children Act 1891,[62] the substantive law administered by the sheriff court is prima facie the same as that administered by the Court of Session, including in particular the 1925 Act. The sheriff's custodial jurisdiction did not develop smoothly as a result of the uncertainties about his common law jurisdiction and the statutory modifications of his common law powers.[63] The position had clarified by 1917[64] and the enactment of the 1925 Act reinforced the relatively wide view then taken of the shrieval jurisdiction. These evolutionary difficulties nevertheless affected the way in which the substantive law was administered and it has been only in the last thirty or forty years that the sheriffs have fully acknowledged the contemporary approach.

40.40 This development may be illustrated in the first instance by the trilogy of cases concerning parentless children. In that situation, there being no rights or preferential claims, the way was clear to pursue a welfare approach. The attitude of the court in the earliest of these cases was rather guarded.[65] Before the father's death, the child in question had

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62 36 & 37 Vict., c. 12: para. 38.28.
63 Paras. 38.22 to 38.26.
64 Murray v Forsyth 1917 S.C. 721.
65 Stewart v Brodie (1887) 3 Sh. Ct. Rep. 405.

been living in family with him, his second wife and three other children. The year after the father's death, the child's maternal aunt "surreptiously and without consent" removed the child from school and from her stepmother. She sought to recover the child. The sheriff-substitute took a narrow view of his jurisdiction and decided to restore the child to the position she had been in immediately prior to the unlawful taking. Questions of welfare were irrelevant. Sheriff Gloag on the other hand thought that the interest of the child was chiefly to be considered and that the paramount question was which was best for the child.[66] Thus the legality of the aunt's conduct in removing the child, though not condoned, was not the main point.[67] His decision turned less on the circumstances of the case and more on two presumptive maxims. There was no reason in the child's interests to disturb the status quo.[68] The aunt's being the child's nearest cognate counted strongly in her favour.[69] It would be unjustified to describe the sheriff's approach as an overall discretion.

40.41 In Walker v Croll,[70] decided in 1919 when the jurisdictional issues had largely been settled, Sheriff-substitute Orr took a much more positive line. This was a dispute between the maternal and paternal grandparents. The three children were at that time distributed between each set of grandparents. Nothing

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66 Ibid., at p. 408 per Sheriff Gloag.
67 Ibid., at p. 409 per Sheriff Gloag.
68 Ibid., at p. 410.
69 Idem.
70 (1919) 36 Sh. Ct. Rep. 31.

could be said against them. It was considered undesirable to have the family split up as it then was and, largely for material considerations, the maternal grandparents were preferred, simply because "the interests of the children will be best promoted by their being put under the care of the pursuer."[71] This amounts to the exercise of an overall discretion guided only by one presumptive principle.

40.42 Law v Elrick,[72] a more complicated case, was decided in similar fashion. The threshold or presumptive principle considered by Sheriff Blades to be appropriate was that the mother's expressed wish ought to receive effect unless there was some strong reason to the contrary.[73] There were sufficient reasons to displace the mother's wishes: her vacillatory nature, the pursuer's earlier indifference to the child[74] and, most importantly, the possibility of irreparable injury if she were removed from a satisfactory environment in which she was happy and comfortable.[75] This amounts almost to substituting the preservation of the status quo for giving effect to the mother's wishes as the threshold principle, provided it is not inconsistent with the child's interests. This attitude has become of increasing importance in recent years. It is of the essence of the contemporary approach.[76]

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71 Ibid., at p. 37 per Sheriff-substitute Orr.
72 (1939) 55 Sh. Ct. Rep. 253.
73 Ibid., at p. 257 following Brand v Shaws (1888) 16 Rettie 315.
74 Ibid., at p. 256 per Sheriff-substitute MacKinnon.
75 Ibid., at p. 257 per Sheriff Blades.
76 See also G v H 1976 S.L.T. (Sh. Ct.) 51.

(b) Parent and third party disputes

40.43 A custodial dispute between a parent and a non-parent, in theory at least, would be the most likely to have exhibited the traditional threshold approach founded upon the right of the father to custody. This is largely true of the sheriff's jurisdiction until 1925 at the earliest. It is very much a reflection of the narrow common law jurisdiction of the sheriff. Sheriff-substitute Guthrie expressed the view very strongly in Corlin v Quarrier[77]:-

> "... the rights of a parent,[78] even though a helpless one, or a deceased parent, are, according to the authority referred to, inalienable and far-reaching, and must be protected so far as the child's interests permit."[79]

There would be little scope there for judicial interference with the parental right. In Sutherland v Sutherland[80] it was emphasised that only improper character or conduct would disqualify a parent, although prejudice to the child as mentioned in Shafe v MacRae[81] would have introduced the negative aspects of welfare. The position remained fundamentally the same in 1922.[82] The same rule applied even if the child had technically attained minority, when the patria potestas was seen not to terminate but only to erode slowly.[83]

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77 (1889) 6 Sh. Ct. Rep. 90.
78 Including, as in this case, the mother of an illegitimate child.
79 (1889) 6 Sh. Ct. Rep. 90 at p. 92 per Sheriff-substitute Guthrie.
80 (1891) 8 Sh. Ct. Rep. 23. 81 (1903) 19 Sh. Ct. Rep. 266.
82 Miller v Miller (1915) 33 Sh. Ct. Rep. 99; McGhie v Reid (1922) 39 Sh. Ct. Rep. 217.
83 Savage v Jardine (1891) 9 Sh. Ct. Rep. 139.

40.44 This restrictive attitude was clearly a reflection of the originally narrow jurisdiction of the sheriff. The power to enforce the paternal legal right was available, for example, to a delegate of the father.[84] Much then would depend on whether the action was for custody or for delivery and on whether any statutory powers were available to the court. Indeed in Samson v Samson[85] the extreme view was stated:-

> "By the common law of Scotland the father is the sole guardian of his children, and has a paramount right to their custody unless and until that right has been interfered with by the Court. This paramount right is not affected by the Guardianship of Infants Acts [sic] 1886, or by any other statute, except that the Court may modify or deprive him of it in certain circumstances ... In the present case, therefore, the exclusive right of the father to the custody of his children at the moment is indisputable, whatever may be the result of the action."[86]

That effectively is a description of the traditional common law threshold approach to which the 1886 Act had made very little difference. The rest of the sheriff-substitute's reasoning was directed towards questions of procedure and jurisdiction. But it is unlikely that he would have held the action competent if the

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84 Samson v Samson 1922 S.L.T. (Sh. Ct.) 34.
85 1922 S.L.T. (Sh. Ct.) 34.
86 Ibid., at p. 35 per Sheriff-substitute Malcolm.

law administered by the sheriff had been more welfare orientated. The substantive law thus remained much influenced in practice before 1925 by the earlier jurisdictional restrictions upon the sheriff.

40.45 The position changed dramatically as a result of the 1925 Act. Of the two important decisions, Irwin v Bowie[87] concerned the custody of one of the legitimate children of a widower, the child then living with a friend of her mother. The father's application for custody was dismissed by Sheriff-substitute Menzies in a very careful and lucid judgment. The father was inspired to apply by his religious convictions. Since there was no suggestion that the father was personally unfit for custody and the allegation against him of abandonment was not established, there were no criteria which would justify the application of the threshold approach. The decision thus turned entirely upon the welfare of the child and the relationship between welfare and religion. It is, therefore, particularly significant in the general welfare context.

40.46 The sheriff-substitute first applied the common law,[88] then decided that the 1925 Act was relevant[89] and finally implemented section 1 of that Act.[90] The court gave effect to the common law as expounded in Leys v Leys[91] and as construed by the sheriff-substitute:-

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87 (1931) 47 Sh. Ct. Rep. 293.
88 Ibid., at pp. 297 to 299.
89 Ibid., at p. 300.
90 Ibid., at pp. 301 to 303.
91 (1886) 13 Rettie 1223.

> "The pursuer's [father's] right to dictate the religious upbringing of his children was held to depend upon his right to have or control their custody, and that was held to depend upon the physical well-being of the children being maintained without injury to it." [92]

The application of these criteria postulated a decision that the child would possibly be injured by removal from the third party. In terms of the common law therefore the father would not succeed.

40.47 More importantly his interpretation of the 1925 Act led to the same conclusion. The Act was held to apply to disputes between a parent and a third party as well as to those between parents.[93] Sheriff-substitute Menzies' analysis emphasised the general discretionary approach directed towards the welfare of the child and thereby incorporating the subsumptive approach set out in the second part of section 1.[94] He distilled his attitude in these words:-

> "... where there is a preponderating advantage to the child's well-being that it should remain in the custody of someone other than the father, that consideration excluded that father's rights or desires. But where the advantages to the child's well-being are about evenly balanced between custody other than the father's and his custody, the father's natural right and his desire are to be allowed to weigh down the balance in favour of his custody."[95]

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92 Irwin v Bowie (1931) 47 Sh. Ct. Rep. 293 at p. 299 per Sheriff-substitute Menzies.

93 Following Re Thain: Thain v Taylor [1926] Ch. 676 rather than In re J.M. Carroll [1931] 1 K.B. 317.

94 (1931) 47 Sh. Ct. Rep. 293 at p. 300.

95 Ibid., at p. 301 per Sheriff-substitute Menzies.

This analysis is based not on legal right but upon the "natural right" of the parent. It is a question of presumptive principle not of law. That consideration will tip the balance, as it were, in favour of the parent only when the other considerations are equally balanced from the child's point of view. But where there is a clear advantage to the child in one rather than another decision, the parental priority is excluded. This may be divided into a number of aspects:-

1. an examination of all the circumstances indicating the relationship or balance between each of these considerations;[96]

2. these considerations to be taken into account only from the child's point of view;[97]

3. the parental presumption to apply residually only where the other considerations are equally balanced from the child's point of view;[98]

4. the decision will otherwise be directed by the advantage to the child of one course as against another.[99]

This represents a contextual framework similar to the one implied by the Court of Session in relation to parental disputes in Hume v Hume,[1] although rather interestingly none of the Scottish decisions on the 1925 Act was mentioned by the sheriff-substitute. It would appear therefore that there was no reason

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96 The overall discretionary process elucidating the balancing between the considerations.
97 The subsumptive approach. 98 The presumptive approach.
99 The welfare approach. For that reason the welfare of the child took precedence over the parental wishes in relation to religion.
1 1926 S.C. 1008.

why the same scheme should not be appropriate for both inter-parental disputes and those between a parent and a third party.[2] This makes sense if the foundation of the parent's interest is, as the sheriff-substitute suggested, in the form of a presumptive principle rather than a legal right.

40.48 These comments are confirmed by Paterson v McNicoll.[3] That was a dispute between the parents of an illegitimate child: it would be in the nature of a parent-third party issue on the basis of the parental legal right but an inter-parental question on the basis of the presumptive approach. The Illegitimate Children (Scotland) Act 1930[4] applied to that case. The absence of the words "first and paramount" in that Act[5] made no real difference to the interpretation placed by the court on the role of welfare. Section 2(1) of the 1930 Act was drafted in language almost identical from the welfare point of view to that used in section 5 of the 1886 Act. Sheriff-substitute Valentine in Paterson v McNicoll[6] placed a more positive construction upon section 2(1) of the 1930 Act than the courts had been prepared to do for section 5 of the 1886 Act.[7] This may have been the influence of the 1925 Act which was regarded as having no application to illegitimate children.

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2 For the shrieval approach to inter-parental disputes, see paras. 40.50 to 40.55.
3 1934 S.L.T. (Sh. Ct.) 2.
4 20 & 21 Geo. 5, c. 33.
5 S. 2(1).
6 1934 S.L.T. (Sh. Ct.) 2.
7 Paras. 39.51 to 39.58.

40.49 In Paterson v McNicoll[8] the mother of an illegitimate child sought to recover her daughter from the child's father with whom the child had been living at the mother's request for three or four years. The mother contended that decree should be granted de plano in her favour in the absence of any argument that she was an unfit custodian of the child.[9] That in effect was the common law threshold approach. This was rejected. The sheriff-substitute's views of the current position[10] may be broken down into five propositions, although this is not the order in which they were stated:-

1. when there is a dispute, the whole circumstances must be considered;
2. "[t]he mother has been deprived by the 1930 Act of her paramount claim to the custody;"[11]
3. there is no rule of law in favour of either parent;
4. the court must do more than consider whether the mother is unfit to have custody;
5. "[t]he custody must now be given to the father if the Court, having regard to welfare of the child, together with the conduct and wishes of the parent, thinks that it is best that the father should have custody."[12]

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8 1934 S.L.T. (Sh. Ct.) 2.
9 Ibid., at p. 4.
10 Idem.
11 Idem.
12 Idem.

The last proposition is questionable. There is no reason why it should not apply to the mother as it is stated to apply to the father. If so, it would be consistent with the earlier propositions and moreover with the provisions of the Act. Subject to that comment, the construction placed upon section 2(1) of the 1930 Act in that case[13] was much the same as the construction placed upon section 1 of the 1925 Act in Irwin v Bowie.[14] If so, whether the dispute is between a parent and a third party or between the parents of an illegitimate child is a mere incidental circumstance, one of the factors to be taken into account but not the determinant foundation of the approach to the dispute.

(c) Inter-parental disputes

40.50 The pattern of development relating to the settlement of inter-parental disputes is much less clear. Even before 1925 the position was distinctly erratic. There was no doubt that section 5 of the 1886 Act enabled a mother to apply to the sheriff for custody under that Act. In one of the first cases[15] under the Act Sheriff-substitute Spens, no doubt keen to exercise the new jurisdiction, took perhaps an unduly wide view of the legislation. Section 5 contemplated a petition by the mother but a petition by the father was treated as falling under

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13 See also AB v CD 1962 S.L.T. (Sh. Ct.) 16 where Sheriff-substitute Hook appeared to adopt a similar but unarticulated approach. His judgment was more concerned with other issues.

14 (1931) 47 Sh. Ct. Rep. 243.

15 A v B (1888) 6 Sh. Ct. Rep. 6.

the Act on the rather doubtful reasoning that it applied equally where the mother was the respondent.[16] In any event, having thus supported his jurisdiction, Sheriff-substitute Spens took the view that:-

> "... the chief matter to be considered, regard to the spirit of the 5th section of the Act referred to, is the welfare of the children."[17]

That may have gone somewhat beyond the literal meaning of that provision but the circumstances of the case suggested that the father could have been deprived of custody even under the common law, for there was not only no clear advantage in handing the children over to the father but the likelihood of specific disadvantages from their point of view. That decision therefore, despite its apparent welfare approach, is an unusually weak authority.

40.51 That would not be true of McGrogan v McGrogan.[18] The mother presented a petition under section 5 and that was conjoined with the father's action for delivery. Although allegations had been made against the father, they had not been proved. Thus both parents were regarded as parentally fit. However the circumstances[19] were such that the child's welfare pointed to maternal custody. So it was decided, largely on the

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16 The House of Lords in the later case of Stevenson v Stevenson (1894) 21 Rettie (H.L.) 96 in effect approved of that argument.

17 (1888) 6 Sh. Ct. Rep. 6 at p. per Sheriff-substitute Spens.

18 (1894) 2 S.L.T. 142.

19 The father would have almost no contact with the child whom he proposed to leave in the care of his aged mother.

authority of Stevenson v Stevenson.[20] Sheriff-substitute Henderson Begg thus construed section 5 as enabling him to award custody in accordance with the welfare of the child.

40.52 Where the 1886 Act was not or could not be pleaded, the approach was altogether different. Although much of the discussion in Ross v Ross[21] concerned the problems of jurisdiction, Sheriff MacKintosh pointed out that, although the paternal right to custody was less absolute than at common law, "even under the statute of 1886 it is still a strong prima facie right."[22] Custody was incidental to the main issue of judicial separation in Robb v Robb[23] and in that context also the attitude of Sheriff-substitute Wark was to look for some reason to justify depriving the father of custody.[24] Even more dramatic was Hatrick v Hatrick[25] where the father sought custody of his one year old son from the mother. Sheriff-substitute Fyfe dismissed the action because "the proper person to have the care of an infant [was] obviously the mother,"[26] unless that presumptive principle was displaced. On appeal Sheriff MacKenzie granted an order to the father by substituting the paternal right for the presumption in favour of the mother.[27]

40.53 The custodial issue in A v B[28] was, like Robb v Robb,[29] incidental to the question of separation. Sheriff-substitute Fyfe had no difficulty. For him welfare was the paramount

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20 (1894) 21 Rettie (H.L.) 96. 21 (1917) 34 Sh. Ct. Rep. 52.
22 Ibid., at p. 61 per Sheriff MacKintosh.
23 (1917) 34 Sh. Ct. Rep. 136. 24 Ibid., at p. 140.
25 (1918) 34 Sh. Ct. Rep. 299.
26 Ibid., at p. 299 per Sheriff-substitute Fyfe.
27 Applying Rintoul v Rintoul (1898) 1 Fraser 22. The court also applied the threshold approach in Paden v Paden 1922 S.L.T. (Sh. Ct.) 4.
28 (1924) 41 Sh. Ct. Rep. 157. 29 (1917) 34 Sh. Ct. Rep. 136.

consideration, the child was two and a half years old and the proper place for a child of that age was with his mother.[30] It is not surprising that, given his attitude in Hatrick v Hatrick,[31] Sheriff MacKenzie hesitated long before reaching the same conclusion. He did what he failed to do in the earlier case, namely examine rather carefully the pre-1886 law and the decisions on the 1886 Act. In the event he did not disturb the sheriff-substitute's interlocutor but he added[32] two further reasons in support[33] which tended to emphasise the threshold nature of his approach compared with the presumptive and more welfare-biased attitude of Sheriff-substitute Fyfe. The general position before 1925 seems therefore to have favoured the threshold approach, despite the initial movement towards welfare, whether under the 1886 Act or not.

40.54 The judicial function after 1925 was to seek a balance among all the considerations, the principal factor being welfare. It has been variously described. In one case the decision was reached "for the sake of the future welfare of the child."[34] In another welfare was the "first consideration, and in a broader sense than under the old common law."[35] It has also been regarded as the "decisive factor."[36] Although normally an attempt has been made to achieve an overall balanced approach, with appropriate statutory weighting, Sheriff-substitute Louttit

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30 (1924) 41 Sh. Ct. Rep. 157 at p. 160.
31 (1918) 34 Sh. Ct. Rep. 299. 32 (1924) 41 Sh. Ct. Rep. 157.
33 Cruelty by the father to the mother; paternal responsibility for the separation of the spouses.
34 Greig v Greig (1947) 63 Sh. Ct. Rep. 171 at p. 174 per Sheriff-substitute Louttit Laing.
35 Brown v Brown (1947) 64 Sh. Ct. Rep. 86 at p. 87 per Sheriff-substitute Dickson.
36 Holmes v Holmes (1954) 70 Sh. Ct. Rep. 341 at p. 341 per Sheriff-substitute Young.

Laing in Greig v Greig[37] eschewed that approach because it was speculative. He proceeded on the basis of the preferential claim of the innocent spouse. Each of the relevant decisions evinced a presumption of one kind or another, including the residual factor of preserving the status quo or, to put it cynically, to do nothing. It would be difficult to avoid any element of speculation in relation to an issue so flexible and subjective as the welfare of the child. The spirit of the overall approach has been best captured in the words of Sheriff-substitute Walker:-

> "The duty which the Court must discharge in these cases is not easy, bearing in mind the necessity for considering the child's welfare, not as one would consider the welfare of an orphan, whose parents are dead, but with due regard to the social and emotional influences, and the legal rights and duties which should operate in both directions between the child and each of his two living parents."[38]

There is little doubt now that this is the contemporary approach, achieved by statutory intervention in the face of a judiciary reluctant to discard the common law.

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37 (1947) 63 Sh. Ct. Rep. 171.

38 Loughran v Loughran 1949 S.L.T. (Sh. Ct.) 77 at p. 78 per Sheriff-substitute Walker.

40.55 It is a complicated task, requiring great attention to detail yet a capacity to see it in the correct perspective, including the relevant legal framework. The court here has, as in other contexts, seen fit to limit the discretion which forms a large part of this process by reference to presumptive principles. They have to some extent taken the place of legal rules. The principles resorted to by the sheriffs are no different from those used elsewhere: the preference shown to the innocent spouse;[39] the specialities of the mother's position,[40] especially in relation to a very young child;[41] finally preservation of the status quo.[42] Statements made soon after 1925 that the Act of that year was largely declaratory may have been justified then but the pattern which has since evolved suggests that if such a comment were true it was probably based on a misunderstanding of the existing law or a failure to appreciate the force of section 1 of the 1925 Act.

(d) Questions of access

40.56 It has never been seriously doubted that the Court of Session could deal with access in exercise either of the nobile officium or of its statutory consistorial jurisdiction. Access was specifically mentioned in section 5 of the 1886 Act. That applied to the sheriff court as well as to the Court of

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39 Greig v Greig (1947) 63 Sh. Ct. Rep. 71; Loughran v Loughran 1949 S.L.T. (Sh. Ct.) 77; S v S 1960 unreported - see 1962 S.L.T. (News) 62.

40 Loughran v Loughran 1949 S.L.T. (Sh. Ct.) 77; Holmes v Holmes (1954) 70 Sh. Ct. Rep. 341.

41 Brown v Brown (1947) 64 Sh. Ct. Rep. 86; Holmes v Holmes (1954) 70 Sh. Ct. Rep. 341.

42 Holmes v Holmes (1954) 70 Sh. Ct. Rep. 341; Cameron v Cameron (1955) 72 Sh. Ct. Rep. 232; S v S 1960 unreported - see 1962 S.L.T. (News) 62.

Session. There can be no doubt about the sheriff's powers in relation to access, therefore, in applications to which the Acts of 1886, 1925 and 1928 apply. In practice that covers most of the custodial actions likely to come before the sheriff. The Sheriff Courts (Scotland) Acts 1907 and 1913 do not refer to access as such but that has not been allowed to limit the sheriff's otherwise sufficiently wide jurisdiction.[43]

40.57 It appears to be open to the sheriff, as it is to the Court of Session,[44] to fragment custody temporally between the parents and the welfare of the child is undoubtedly a factor in such a decision.[45] The role of welfare generally seems to have changed over the years. In 1908 Sheriff Maconochie adopted the traditional threshold approach founded upon the prima facie right of the mother to see her child. Exercise of the right would be disallowed if contact between the child and the parent would cause detriment to the health and morals of the child.[46] But by 1950 the basis had changed from a prima facie right to a mere presumptive claim, liable to be defeated in the normal way.[47] That development is consistent with the general movement from a legal rights basis to presumptive principles. There is nothing about access to distinguish it from the general pattern of development relating to children.

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43 Murphy v Murphy (1952) 69 Sh. Ct. Rep. 25. 44 Para. 40.35.
45 McGrogan v McGrogan (1894) 2 S.L.T. 142.
46 Macdonald v Macdonald (1908) 24 Sh. Ct. Rep. 271.
47 AB v AB (1950) 66 Sh. Ct. Rep. 225.

Section 4 - Custody and aliment[48]

(a) Introduction: legitimate children

40.58 The relationship between custody and aliment is close both conceptually and in practice. Indeed for some commentators custody was merely the paternal power enabling the father to implement his alimentary obligation.[49] The law placed the emphasis firmly on the alimentary obligation in that context. Similarly the reason why custody was regarded as inalienable was that otherwise the alimentary obligation would be put at risk. Such an approach lends support to the protective view of the law. The position changed as the parental power and custody came to be acknowledged as rights per se rather than as the method of giving effect to legal obligations. The imposition[50] or recognition[51] of criminal responsibility in the parent or whoever was caring for the child for failure to maintain the child was no doubt brought about partly by that modification in the relationship between custody and aliment.

40.59 That relationship has developed differently as between legitimate and illegitimate children. These differences have probably now either disappeared or lapsed into insignificance in practice, largely in consequence of the Illegitimate Children (Scotland) Act 1930. This analysis is not concerned with aliment

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48 Alimentary actions are not exclusive to the sheriff court but much of the law dealing with the relationship between custody and aliment, particularly in relation to illegitimate children, has developed in that court. It is therefore convenient to deal with this issue following upon an examination of the sheriff's custodial jurisdiction.

49 Para. 32.9.

50 By statute: the predecessors of the Children and Young Persons Act 1933(23 & 24 Geo. 5, c.12), s.1 and the Children and Young Persons (Scotland) Act 1937(1 Edw. 8 & 1 Geo.6, c.37), s.12.

51 By the common law, particularly in Scotland.

as such, other than to note that it is an issue of vital concern to the child, whether the marital relationship between the parents is stable, unstable or has been dissolved or whether the parental relationship is viable or not. The present purpose is simply to identify the role of welfare in this relationship.

40.60 The order of liability to aliment a legitimate pupil child is clear: first, the father; then the mother; then the paternal grandfather and ascendants on that side; finally the maternal grandparents.[52] In the normal situation where the child is living in family with his parents there will be no problem. Before 1973 the right and the duty inhered in the same person, namely the father.[53] Since 1973 they have resided in both mother and father. The day-to-day exercise of these rights and the implementation of these duties is a matter for the parental administration of the domestic régime. In the event of any disagreement or dispute, the matter will be settled ultimately by the courts in exercise of their custodial and alimentary jurisdictions. The father, for example, may wish to discharge his alimentary obligation by having the child in his custody. It may also be possible for him to do so by delegating care of the child to someone else, provided this does not amount to abandonment, desertion, neglect or failure to honour his

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52 Mackenzie's Tutrix v Mackenzie 1928 S.L.T. 649 at p. 650 per Lord Mackay.

53 Guardianship Act 1973 (1973 c. 29), ss. 1 and 10.

alimentary obligations. But whether he may do so is precisely the issue in every custodial dispute.

40.61 It is much more exceptional for the alimentary obligation to fall on someone other than a parent. Nevertheless the general principle is the same. The person properly under the obligation is entitled to discharge the obligation in the way least burdensome to himself, which includes receiving the child in his own house.[54] He may pay a sum of money in name of aliment to the mother, for example, when she is indigent and the father dead. He may alternatively offer to take the child into his care. If the offer is accepted, the child comes under the control of the person so discharging the obligation and if the offer is not accepted, the child remains with the mother who thereby loses the financial contribution from the other person. It is thus the offer and not the actual care which discharges the obligation. Acceptance and implementation of the offer do not have the effect of conferring custody on that other person.[55] But if being awarded custody by the appropriate court is the only way of securing control of the child,[56] inability to do that will render the offer ineffective to discharge the alimentary obligation.[57]

40.62 This rule is however subject to the qualification

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54 Fincham v Muirhead (1706) Morrison 5927, 16322; McKissock v McKissock (1817) Hume 6; Jameson v Jameson (1845) 8 Dunlop 86; Wallace v Goldie (1848) 10 Dunlop 1510; Dall v Dall (1887) 3 Sh. Ct. Rep. 265; Bell v Bell (1890) 17 Rettie 549; Mackenzie's Tutrix v Mackenzie 1928 S.L.T. 649.

55 In Couper v Riddell (1872) 9 Scottish Law Reporter 150 the Court of Session clearly distinguished between aliment and custody. The context of those remarks was an illegitimate child but they apply with equal force in this context.

56 E.g. in the absence of agreement between the parties or where the child is under the control of a third party.

57 Foxwell v Robertson (1900) 7 S.L.T. 353.

that the child will not be harmed by residing with the person attempting to discharge his alimentary obligation in this way. Lord Adam expressed it simply in Bell v Bell[58] where the children's mother sued their grandfather for aliment:-

> "It would, I think, be a good answer to the defender's offer if the pursuer could shew that there were sufficient reasons why the child should not enter his grandfather's house, and I should think that these reasons would not be confined to such circumstances as injury to the child's health or morals, as would be the case when the relationship was that of parent and child."[59]

This approximates to the traditional threshold approach. The law has created a prima facie right in the obligant but this right may not be given effect if to do so would be contrary to the child's interests. Lord Adam did not express it so widely as that but he probably intended something along these lines when he pointed out that the right might be displaced in circumstances beyond injury to health or morals. Thus, although the right of the obligant was not a right to custody, the common law recognised that the welfare of the child would be a disqualifying factor similar to the role played by welfare in the common law of custody.

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58 (1890) 17 Rettie 549.

59 Ibid., at p. 551 per Lord Adam.

(b) Illegitimate children

(i) The common law

40.63 The position of the illegitimate child was different.[60] While the obligation to aliment a legitimate child arose ex jure naturale, the duty to support an illegitimate child was a joint obligation cast on both parents.[61] Since the mother would normally have custody of the child, her claim was a claim of relief against the father for one-half of the expenditure.[62] It was thus in the nature of a debt. Nevertheless the father of the illegitimate child was in much the same position as any non-parent liable to aliment a legitimate child, for he too was given the privilege of discharging his alimentary obligation by an offer to maintain the child in his own house.[63] This was available to the father in relation only to a child who had attained the age of seven if male or ten if female.[64] While the child had not attained either of these age groups, he remained in the custody of the mother who could in addition demand aliment from the father.[65] The interest of the child was the basis of these rules. It was open to the father to make this offer at any time after the child had reached the appropriate age, either as a defence to the action, during the currency of any decree or even just before the decree[66] was to be enforced against

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60 It has since been changed by statute: paras. 40.68 to 40.74.

61 Malcolm v McGregor (1892) 9 Sh. Ct. Rep. 43.

62 Cairney v Ross (1897) 13 Sh. Ct. Rep. 203; Cameron v Ross (1898) 14 Sh. Ct. Rep. 210.

63 Kay v McLaurin (1826) 4 Shaw 706; Corrie v Adair (1860) 22 Dunlop 897; Reid v Robertson (1868) 6 Scottish Law Reporter 77; Grant v Yuill (1872) 10 Macpherson 511; Couper v Riddell (1872) 9 Scottish Law Reporter 10; Westland v Pirie (1887) 14 Rettie 763; Moncrieff v Langlands (1900) 2 Fraser 1111; Macdonald v Denoon 1929 S.L.T. 161.

64 E.g. Moncrieff v Langlands (1900) 2 Fraser 1111 at p. 1113 per Lord Trayner; Macdonald v Denoon 1929 S.L.T. 161 at p. 164 per Lord Ormidale.

65 Macdonald v Denoon 1929 S.L.T. 161 at p. 164 per Lord Ormidale.

66 Wilson v Lindsey (1893) 1 S.L.T. 272; Miller v Melville (1898) 6 S.L.T. 62 and 274; cf. Oliver v Bayne (1894) 2 S.L.T. 106.

him by imprisonment.[67] The offer was also available to the father as a defence to a claim at the instance of a poor law authority.[68]

40.64 If the offer proved satisfactory to the court and acceptable to the mother, it no more conferred custody on the father than it did in relation to a legitimate child. Indeed in Couper v Riddell[69] the court emphasised that the issue was alimentary rather than custodial. It was clearly implied that the circumstances of an offer sufficient to meet a claim for aliment would not necessarily be sufficient to warrant awarding custody to the father.[70] Even so, welfare played a similar part in each context under common law.

40.65 What is important is that the father did not have an absolute legal right to take the child into his care when the child attained the relevant age. Otherwise the potential role of the court would have been very restricted, for it was only the mother who could refuse the father's offer, keep the child in her custody but forgo the alimentary allowance.[71] In the case of any other person, if the father's offer was genuine and satisfactory, the child had to be handed over to the father. Nor in any case was there an obligation on the father to keep the child in his personal care. There was no reason why he could not delegate his function in some acceptable manner.[72]

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67 Macdonald v Denoon 1929 S.L.T. 161.
68 Buie v Steven (1863) 2 Macpherson 208.
69 (1872) 9 Scottish Law Reporter 510.
70 Ibid., at p. 511 per Lord Cowan.
71 Muldoon v Greig (1895) 12 Sh. Ct. Rep. 172; A v B (1895) 3 S.L.T. 4.
72 Moncrieff v Langlands (1900) 2 Fraser 1111 at p. 1113 per Sir J.H.A. Macdonald L.J.-C.; Brown v Ferguson 1911 2 S.L.T. 345 at p. 346 per Lord Dundas.

40.66 Three of the restrictions upon the father's right to offer custody did not relate to welfare. The offer was required to be genuine,[73] potentially effective[74] and continuous.[75] Protection of the child however was the most important restriction. There was no uniformity of approach. In Brown v Halbert,[76] for example, Lord Trayner, supported in similar terms by Lord Moncrieff, indicated that "the most forcible exception" to the rule occurred when it was certain that "such a change of circumstances would be detrimental to the child's health."[77] Welfare was thus relevant negatively as the likely consequence of the assumption of care by the father. This theme was repeated in the Court of Session in the judgment of Lord Ormidale in Macdonald v Denoon[78] and in the sheriff court in Byers v Donaldson[79] and Burt v Nicol.[80] It is not surprising therefore that the blameless father's offer would be approved by the court.[81]

40.67 On the other hand Lord Trayner seemed to regard this negative approach as part of a more positive attitude. He said:-

> "The first question in this case is, what is the best course to follow in the interests of this child... "[82]

This is similar to the general contemporary approach. It was repeated in a number of decisions in the sheriff court. "Advantage"[83]

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73 An offer might not be regarded as genuine where the father had continually denied his proved paternity: Drummond v Morton (1892) 8 Sh. Ct. Rep. 256; Balfour v Fairweather (1906) 22 Sh. Ct. Rep. 231. Cf. Lyons v Young (1900) 17 Sh. Ct. Rep. 59; Kelly v Webster (1902) 19 Sh. Ct. Rep. 143.

74 A v B (1893) 9 Sh. Ct. Rep. 239.

75 Burgess v Milton (1902) 18 Sh. Ct. Rep. 353.

76 (1896) 23 Rettie 733.

77 Ibid., at p. 736 per Lord Trayner

78 1929 S.L.T. 161 at p. 164 per Lord Ormidale.

79 (1903) 19 Sh. Ct. Rep. 242.

80 (1918) 34 Sh. Ct. Rep. 196.

81 Murrie v McCallum (1911) 27 Sh. Ct. Rep. 160.

82 Brown v Halbert (1896) 23 Rettie 733 at p. 736 per Lord Trayner.

83 Black v Glendinning (1900) 16 Sh. Ct. Rep. 348.

or "necessity"[84] was the test. What would be "better" for the child[85] or in his interests?[86] These questions clearly indicated the possibility of a more open-ended attitude to the welfare of the child. The trend of authority however, particularly in the Court of Session, seemed to point towards the earlier threshold approach.

(ii) The 1930 Act

40.68 The 1930 Act has changed the position of the child and the relationship between the parents. Section 2 made two changes. It enabled, or perhaps confirmed, the right of the father of an illegitimate child to apply for custody.[87] That power was specifically made available[88] in an action for aliment for the illegitimate child. In determining such a custodial issue the Act set out the same criteria as applied to legitimate children in the 1886 Act[89] as modified by the 1928 Act.[90] The second change abolished the common right of the father to offer to assume custody as a defence to a claim for aliment.[91] It is only when these two provisions are taken together that the full implications of the Act can be realised. When that is done, the overall change brought about by the 1930 Act becomes less dramatic than may have originally appeared. Thus in consequence of a marginal technical amendment,[92] the role of welfare was

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84 Burgess v Milton (1902) 18 Sh. Ct. Rep. 353.
85 Kelly v Webster (1902) 19 Sh. Ct. Rep. 143.
86 Balfour v Fairweather (1906) 22 Sh. Ct. Rep. 231.
87 1930 Act, s. 2(1). 88 Idem. 89 S. 5.
90 Which extended s. 5 to applications by the father.
91 1930 Act, 2(2).
92 By substituting a claim for custody for a defence to a claim for aliment.

potentially extended but only in the sense of confirming the contemporary welfare approach rather than the traditional threshold approach.

40.69 The distinctive nature of alimentary and custodial proceedings had been well recognised by the courts. Although the decision of the court in the alimentary process was inherently variable[93] and the father could offer to assume custody at any stage of the procedure up until enforcement, his offer operated only as a defence. It could not be converted into a positive claim for custody.[94] The removal of that right by section 2(2) of the 1930 Act would per se have taken away only that defence available to the father. The mother in that situation could insist ceteris paribus on retaining care and control and custody of the child and at the same time on being awarded an appropriate sum in name of aliment. On the other hand, if subsections (1) and (2) of section 2 were read together, the father's offer to assume custody as a defence, which if successful gave him no right to custody, might be regarded as having been superseded by the creation of his right to apply for custody in the alimentary process, which if successful would give him a right to custody. The ultimate question is the role of welfare in each context.

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93 Alimentary decrees are always granted in hoc statu: Millar v Melville (1898) 1 Fraser 367 at p. 371 per Lord Young.

94 McQueen v Coyne 1926 S.L.T. (Sh. Ct.) 110.

40.70 Some of the initial decisions on the 1930 Act did little to clarify these points, partly because of the diversion whether the Act was retrospective or not. In Presly v Duguid[95] the father's offer to assume custody of the child was made in 1927 when the child attained the age of seven. The offer was declined. He ceased paying aliment. In 1932 the mother sued for aliment for the child from the date of cessation of payment until the child would reach the age of sixteen. Decree was refused by Sheriff-substitute Dallas. On appeal Sheriff Morton adhered. In their view the Act was not retrospective. It did not apply. According to the common law the refusal to accept the father's bona fide offer discharged his alimentary obligation. If the Act had been in operation when the father made his offer, then according to Sheriff Morton "the subsection would have prevented his offer from having any effect upon the question of the defender's liability for aliment."[96] On the other hand in similar if not identical circumstances in Kerr v Henderson[97] Sheriff-substitute Brown applied theAct, rejected the offer as irrelevant, found the father liable and ordered a proof on the details of the aliment to be paid. The difference between these two cases is that a different event was selected as the basis for applying section 2(2) of the 1930 Act: in the former case, the date of the offer;[98] in the latter case, the date of the action.[99]

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95 1933 S.L.T. (Sh. Ct.) 35.
96 Ibid., at p. 37 per Sheriff Morton.
97 1933 S.L.T. (Sh. Ct.) 54.
98 Presly v Duguid 1933 S.L.T. (Sh. Ct.) 35 at p. 36 per Sheriff Morton.
99 Kerr v Henderson 1933 S.L.T. (Sh. Ct.) 54 at p. 55 per Sheriff-substitute Brown.

40.71 These cases were concerned only with the operation of section 2(2). Two other cases, which happened to be earlier in point of time, dealt with section 2 as a whole. In Ward v Ainslie[1] the father made his offer before the commencement of the Act. The initial writ in the mother's action was also lodged before the commencement of the Act but the record was closed after the date of commencement of the Act. Sheriff-substitute Mitchell held that the Act applied because it was adjective or procedural rather than substantive.[2] He said of section 2(1) that it extended the application "of what I may term the doctrine of the welfare of the child to certain disputes between the parents, and makes the interest of the child the paramount consideration in such cases."[3] The former observation is clearly correct. The Act said nothing about welfare being paramount.

40.72 The learned judge went on to deal with subsection (2). Having decided that it could apply, thus eliding the father's offer as a defence, he indicated that that would not necessarily prevent the father succeeding. In his words:-

> "The determining factor must be the welfare of the child. But the father can only succeed on that issue if he presents a proper case to the Court."[4]

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1 1931 S.L.T. (Sh. Ct.) 33.
2 Ibid., at p. 34.
3 Ibid., at p. 34 per Sheriff-substitute Mitchell.
4 Idem.

The father in Ward v Ainslie[5] failed to present such a case because no allegations had been made against the parental fitness of the mother. She could not therefore be deprived of custody. The implication in the Sheriff-substitute's judgment however was that it would be competent in the alimentary process to put in question issues of custody which would have to be determined as custodial matters in the normal way but in the context of the alimentary action. That is precisely what section 2(1) inter alia provided.

40.73 The final step in the argument is Hepburn v Williamson.[6] There was no suggestion that the Act did not apply. The father was willing to assume custody when the child reached seven. But section 2(2) effectively deprived him of that defence.[7] His defence to the claim for aliment, as Sheriff-substitute Dallas said, was "based" on section 2(1), for:-

> "He [the father] craves the Court for an order that he should have the custody of the child, having regard to the welfare of said child. The question before the Court resolves itself into this: is it in the best interests of this boy, now nine years of age, that he should be given into the custody of his father."[8]

Sheriff-substitute Dallas and Sheriff Morton both applied the contemporary welfare approach in answering that question in the

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5 1931 S.L.T. (Sh. Ct.) 33.
6 (1932) 50 Sh. Ct. Rep. 37.
7 Ibid., at p. 43 per Sheriff Morton.
8 Ibid., at p. 38 per Sheriff-substitute Dallas.

negative. The father was accordingly ordered to pay aliment for the child. If the decision had been the reverse on the merits, the father would have been awarded custody subject to the correlative alimentary obligation.

40.74 The practical effect of section 2 of the 1930 Act in the context of welfare makes sense only against the common law background to subsection (2). What was initially a purely alimentary action, with custody, care and welfare relevant only incidentally, could become a fundamentally custodial issue. It depends not on the nature or nomenclature of the action but upon the allegations made and the issues thereby raised. There was an absence of uniformity in the role played by welfare in the common law. Although there were indications of the contemporary welfare approach, the traditional threshold approach tended to predominate. The contemporary approach is now required under the 1930 Act. No reference was made in the 1930 Act to the 1925 Act. Yet the interpretation of the later Act has probably been influenced by the earlier Act. In any event, the 1930 Act has permitted the nature of the dispute to be changed at the instance of the father and at the same time has directed the contemporary approach in place of the traditional approach as the norm. Welfare will thus play not only a protective negative role but also a promotive, positive role. The differences between the common law and the 1930 Act in relation to welfare are a matter more of degree than of fundamental distinction.

CHAPTER 41

THE CONTEMPORARY APPROACH IN ENGLAND: THE EQUITABLE AND MATRIMONIAL JURISDICTIONS

Section 1 - Introduction

(a) Comparative aspects

41.1 Although in many respects the substantive law in England is now similar to the law in Scotland, the ways in which this relative uniformity has been achieved have been quite different. The evolution of the law up until 1886 at least was clearly independent in each of the two jurisdictions. Scots law benefited in particular from the fundamental distinction between guardianship or tutory and custody as an incident of the patria potestas. A concept of custody emerged only slowly in England out of the very complex rules relating to guardianship. Indeed it was not until very recently that the English courts were required to examine in some detail the concept of custody.[1] That occurred in a strange context.[2] The Scottish courts have generally speaking also refrained from analysing custody. Perhaps there was no need to do so, as custody was an incident of the more fundamental and well-recognised doctrine of the patria potestas.

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1 The context of these analyses was static rather than dynamic: e.g. Hewer v Bryant [1970] 1 Q.B. 357 and Todd v Davison [1972] A.C. 392: see also Children Act 1975 (1975 c. 72), ss. 85 to 87.

2 Custody within the meaning of s. 22 of the Limitation Act 1939 (2 & 3 Geo. 6, c. 21) as amended by the Law Reform (Limitation of Actions etc.) Act 1954 (2 & 3 Eliz. 2, c. 36).

41.2 The impact of the largely uniform legislation since 1886, in conjunction with the initially distinct but subsequently similar approach under the earlier matrimonial and consistorial legislation, has forced the two systems to adopt a similar overall approach. The contemporary approach emerged in England before it became established in Scotland. The impetus in England, rather ironically, came from the House of Lords' decision in the Scottish case of Symington v Symington.[3] That was a consistorial cause. While the Scottish courts hesitated initially to follow the directive to pursue a discretionary approach,[4] the Divorce Court in England felt free, indeed obliged, to do so.[5]

41.3 The evolution of the contemporary approach in the matrimonial context in England also influenced the development of the custodial jurisdiction generally. By 1925 in England but not in Scotland the current attitudes had become fairly well established. The Act of 1925[6] probably had a greater impact upon Scots law than upon English law. It was probably more accurate in the English context to suggest that the Act was declaratory rather than innovative. If this were so, it would account for the closer scrutiny of section 1 of the 1925 Act in the Scottish courts. In England, on the other hand, with certain exceptions, the courts have assumed that the 1925 Act directs what may be described as the "pure welfare approach." The enthusiasm of the

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3 1875 2 Rettie (H.L.) 41.

4 Paras. 33.82 to 33.93.

5 Handley v Handley [1891] p. 124; Witt v Witt [1891] p. 163; B v B [1924] p. 176.

6 Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45).

English judiciary for this approach may have prompted them to go somewhat beyond the limits set by the 1925 Act. The Court of Session, on the other hand, has taken a fairly conservative view of section 1. This may nevertheless be more consistent with the precise language of the section. Whether the English interpretation has gone beyond the literal meaning of section 1 or not, it has caused particularly difficult problems[7] which have arisen less frequently in the Scottish courts.

41.4 One of the other points of distinction between the two systems is the relative paucity of detailed analyses of the merits of custodial disputes in the English law reports. Most of the English reports deal with what are probably strictly legal issues: questions of jurisdiction and procedure, interpretation of the legislation prescribing the power of the lesser courts and the children affected by the legislation. Only infrequently does the analysis concern the statutory framework of the decision-making process. On the other hand, the current law yearbook and to a lesser extent the reports in the solicitor's journal and the justice of the peace are replete with actual circumstances and decisions. But they tend to omit the reasoning of the court. Such reasoning is fundamental to an understanding of the decision and the process leading to that decision.

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7 E.g. competing presumptions of child care.

41.5 The Scottish system benefits greatly, both in this context and in relation to adoption, from the reports of decisions in the sheriff court. They disclose the reasoning leading to the decision. This is invaluable in analysing the process and in identifying the part played by welfare in that process. The reports of the decisions of the Court of Session often concentrate on the law rather than on the merits of the case. Pleading in terms of competency and relevancy helps to isolate the peculiarly legal aspects of the issue which sometimes appear to become lost in the English reports where questions of fact and evidence are debated interstially with the law. But the law, more often than not, is now taken for granted and, so long as a few catchwords are used,[8] it would be difficult for an appellate court to overrule the magistrate, county court judge or whoever was exercising original jurisdiction.

41.6 The other main point of distinction between the two systems is the relative uniformity of approach in England despite the large number of jurisdictions,[9] compared with the jurisdictional difficulties once experienced in Scotland between only two courts. The movement towards the contemporary approach in England began with the respect paid by the English Divorce Court to the House of Lords' decision in the Scottish appeal in Symington v Symington.[10] The Scottish system changed more

8 E.g. welfare, paramount, all the circumstances, balance.
9 E.g. custodial, matrimonial, wardship; magistrates' court, county court, High Court; domestic jurisdiction, guardianship jurisdiction.
10 (1875) 2 Rettie (H.L.) 41.

particularly in response to the 1925 Act. The approach which had so evolved remained largely static in Scotland but in England it may be that the movement beyond the 1925 Act was wrought by the resurgence of wardship proceedings in the second half of the twentieth century.

(b) The significance of wardship

41.7 Wardship or the Crown as parens patriae is a species of guardianship.[11] But they are distinct legal concepts.[12] Custodial disputes tended to arise in the guardianship context until custody emerged as a concept almost sui generis. After that happened about the beginning of the nineteenth century, guardianship became the foundation of the dispute only when the father or possibly both parents were dead.[13] Otherwise the common law, equity or the legislation, especially the matrimonial enactment of 1857 and the guardianship provisions of 1886, indicated the context and nature of the decision-making process. The association between guardianship and property restricted the practical scope of wardship. In these circumstances it is not surprising that little use was made of wardship.

41.8 Although wardship was always available, particularly when it became less restricted jurisdictionally,[14] its revival did not occur until after 1948, partly in response no doubt to the

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11 Generally see Bevan, pp. 411 to 423.
12 See Re N (Minors) (1973) 4 Family Law 93.
13 Not necessarily so, for custodial disputes between non-parents could arise: e.g. Re Collins (An Infant) [1950] Ch. 498.
14 When a property qualification was not regarded as essential.

increased powers and status of official authorities as statutory guardians of children. The simplified procedures introduced in 1949[15] made it even more attractive. It became popular as a means of solving disputes between parents and potential adopters, parents and foster parents and even inter-parental disputes.

41.9 The peculiar feature of the jurisdiction was the consequence of its original nature. The court had custody of the child[16] and decided how best to deal with the child's future and welfare. The dispute inter partes was not about custody at all. It was about welfare or what a reasonable parent would decide for his child. In a sense the court was acting as a substituted parent; it was not merely adjudicating upon the way the parent had conducted himself as a parent or deciding which of two competitors would be better suited to make decisions for the child. If this were so, the function of the court would have overreached that contemplated by the 1925 Act. This is not to suggest that such a function or approach was unlawful. It indicates how important it was to ascertain correctly the limits, if any, upon the wardship jurisdiction. The nobile officium of the Court of Session had never pretended to be a wardship jurisdiction. That would account to some extent for the different emphases in the contemporary approaches of the two systems. A comparative analysis of the two systems at least draws attention to these possible differences.

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15 Law Reform (Miscellaneous Provisions) Act 1949 (12, 13 & 14 Geo. 6, c. 100), s. 9.

16 Bevan, p. 422.

41.10 The origins of guardianship, parental or otherwise, and hence of wardship were to be found in the duty to protect, maintain and generally care for the child. Custody in the sense of personal control of the child was only incidental. But during the nineteenth century the pattern changed. Greater emphasis was placed upon custody as a parental right, culminating in the doctrine of the sanctity of parental rights which were prima facie enforceable at any time during the father's life and posthumously effective in consequence of the paternal right to determine the child's religious education. Parental rights have remained the static basis of the system. This has been implicitly recognised in the Guardianship Act 1973[17] and underlies the approach and structure of the adoption and official child care legislation. The courts took the same view. The rights of the father as head of the family were the foundation of the action of damages for enticement.[18] Any interference with the static right of the father to control his child's religious education was disapproved.[19] The ineffectiveness of agreements relating to the care and upbringing of children was originally justified as a failure to discharge the duties cast upon the parent[20] but later as an attempt to interfere with the jurisdiction of the court to determine the welfare and custody of the child.[21] In any dynamic context on the other hand the law, whether common law, equity or statute,

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17 1973 c. 29.
18 Lough v Ward [1954] 2 All E.R. 338. This has now been abolished: Law Reform (Miscellaneous Provisions) Act 1970 (1970 c. 33), s. 5.
19 In re May: Eggar v May [1917] 2 Ch. 126.
20 Humphreys v Polak [1901] 2 K.B. 385.
21 Goodinson v Goodinson [1954] 2 Q.B. 118 at p. 126 per Romer L.J.

always afforded an element of discretion. The way in which the exercise of that discretion has changed either naturally or under statutory pressure is the essence of this analysis.

41.11 Guardianship in its original sense remained largely unaffected in the absence of parental rights, either because the parents were dead, the exercise of their rights had been suspended or because there was no religious conflict. Despite the custodial vicissitudes of the nineteenth century the welfare of the child remained the principal if not the sole concern of the Court of Chancery where for one reason or another parental rights were irrelevant, secondary or unimportant. This was the essence of the wardship jurisdiction over orphans. It laid the foundation of the welfare approach when wardship became useful again in much wider contexts in the second half of the twentieth century.

(c) The care of orphans

41.12 The continuing welfare nature of guardianship may be illustrated by reference to three cases, two decisions of the House of Lords in the middle of the nineteenth century and a decision of the Court of Appeal about one hundred years later. The child's parents in Johnstone v Beattie[22] were dead. The child was resident in England with a grandfather while the child's properly appointed tutors were administering the estate which was

22 (1843) 10 Clark & Finnelly 42.

situated wholly in Scotland. The grandfather's application to the Court of Chancery made the child a ward of court. It was a competition for care of the child between the Scottish tutors and the grandfather resident in England. The House of Lords considered that the Court of Chancery had jurisdiction as parens patria over any child resident in England but could not agree to recognise the status of the Scottish tutors. The child was thus a ward of court, the judicial duty being to decide who "are the proper persons to be entrusted with the care of the infant."[23] The test to be applied in answering that question was simply what would be for the benefit of the infant.[24]

41.13 All the members of the House of Lords conceded that the process was fundamentally discretionary. As Lord Campbell said:-

> "The benefit of the infant, which is the foundation of the jurisdiction, must be the test of its right exercise."[25]

Lords Brougham and Campbell disagreed with the majority[26] on the exercise of the discretion. In their view the discretion might properly be exercised for the child's benefit by declining to continue the wardship. One such instance was the case in question, where properly appointed tutors were already operating.

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23 Ibid. at p. 90 per Lord Lyndhurst L.C.

24 Ibid. at p. 87 per Lord Lyndhurst L.C.

25 Ibid. at p. 122 per Lord Campbell.

26 Lords Lyndhurst L.C., Cottenham and Langdale.

The majority however discounted the relevance of the Scottish tutors in the English context, considered that the child needed protection and confirmed the wardship of the court and the care of the grandfather. It was apparently not his intention to allow the child to return to Scotland but this counted for little or nothing in the deliberations of the House.

41.14 Stuart v Bute[27] was a much more complicated case and engendered a degree of acrimony between the English and Scottish courts[26] for which the House of Lords held the Court of Session largely to blame. By 1861 Lord Campbell had become Lord Chancellor. He reaffirmed the views which he had expressed in the earlier case which, he said, warranted only the proposition that:-

> "... if there be a foreign child in England, with guardians duly appointed in the child's own country, the Court of Chancery may, without any previous inquiry, whether the appointment of other guardians in England is or not necessary, and would or would not be beneficial for the child, make an order for the appointment of English guardians."[29]

The Lord Chancellor obviously found himself in a slightly embarrassing situation. His rationalisation of the earlier decision in these words almost amounted to substituting a rule

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27 (1861) 9 H.L.C. 440.

28 See the Memorandum of Lord Inglis L.J.-C., the Remarks of Sir John Stuart V.-C. and the Remarks of Lord Inglis L.J.-C. (1861) 4 Macqueen 1 at pp. 74 to 77, 78 to 81 and 82 to 85 respectively.

29 (1861) 9 H.L.C. 440 at pp. 464 and 465 and per Lord Campbell L.C.

for a discretion. He did not go quite so far as that, for his use of the word "may" suggests that the court was not obliged to appoint an English guardian. The implication however is that an English guardian could be appointed without examining the relative benefits for the child of the alternative courses.

41.15 There was probably no need for the Lord Chancellor to become involved in such a potentially inconsistent series of propositions. Lord Cranworth articulated the view which has become normal in England when the court is faced with a conflictual situation.[30] Having postulated that the interest of the infant was the one "object" to be kept in view, the existence of foreign guardians was simply a matter to be taken into consideration in deciding the issue before the court.[31] This is certainly more consistent with a discretionary than with an adjudicative approach.

41.16 The circumstances of the ward in Stuart v Bute[32] were clearly different from those in Johnston v Beattie.[33] For in the former case the child had substantial contacts with England in addition to those with Scotland. In the latter case the English association was minimal. There was probably no need therefore in Stuart v Bute[34] for Lords Wensleydale and Chelmsford to assume their fairly extravagant attitudes. Lord Chelmsford clearly disliked the greater freedom afforded by Scots law to a minor child.[35] Lord Wensleydale conceded that it was possible to obtain a "very

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30 Para. 45.70.
31 (1861) 9 H.L.C. 440 at p. 470 per Lord Cranworth.
32 (1861) 9 H.L.C. 440.
33 (1843) 10 Clark & Finnelly 42.
34 (1861) 9 H.L.C. 440.
35 Ibid. at p. 474.

good education at a grammar school in Scotland" and later at one of the Scottish universities.[36] But that was not regarded as entirely suitable for someone who would become a member of the House of Lords and move in the higher ranks of society. Such a future required the child to be educated at "one of the great public schools for the higher classes in England" and thereafter at one of the English universities.[37] It is thus not altogether surprising that the Court of Session was somewhat disappointed when the House of Lords, sitting effectively on appeal from the Court of Chancery and from the Court of Session yet assimilating the two systems, failed to appreciate not only some of the procedures of Scots law but also its different principles.[38] The House of Lords' decision, no doubt correct in terms of English law,[39] turned ultimately on social considerations.

41.17 Leaving aside the Scottish aspects of these decisions, there can be no doubt that they endorsed the welfare approach regarded as normal in the strict guardianship context.[40] The only possible restriction was the growing significance of parental control of the child's religion, inter vivos or posthumously. That failed to survive the 1925 Act. In Re Collins (An Infant)[41] the child, whose parents were dead, resided with his maternal grandparents. His paternal grandparetns, with whom he had also resided at an earlier period, applied for custody in wardship

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36 Idem. 37 Idem.
38 Memorandum of Lord Inglis L.J.-C. (1861) 4 Macqueen 1 at pp. 74 to 77.
39 I.e. the welfare approach.
40 The law of Scotland similarly applied the welfare test in appointing guardians: para. 32.27. The distinction between the two systems was jurisdictional: in England residence, in Scotland domicile.
41 [1950] Ch. 498.

proceedings largely because they would bring him up as a Roman Catholic, the father's religion. Each set of grandparents was acceptable from the child's point of view. Wynn-Parry J. decided that on balance it was in the child's interests to retain the status quo. The Court of Appeal agreed.[42] The question thus became whether that tentative conclusion should be displaced by giving prior effect to the religion of the father. That would not have been a supportable contention before the series of cases giving almost absolute priority to the father's wishes on religion or to his religion, particularly where the child was an orphan.[43]

41.18 The question however was whether section 1 of the 1925 Act applied to a dispute to which neither parent was a party. Slesser L.J. had earlier indicated that as between father and mother section 1 had provided for priority to be given to the welfare of the child at the expense, if necessary or desirable, of the parental views on religion.[44] Had, in other words, the paramountcy of the father's religion been displaced for parentless children by the paramountcy of the child's welfare? Sir Raymond Evershed M.R. concluded that it had been so displaced by section 1 of the 1925 Act which in his view applied to non-parental disputes as well as to inter-parental disputes.[45] The effect of section 1 therefore was to restore the position to what it had been in relation to orphans before the judicial creation in the

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42 Ibid. at p. 503.

43 Because of the overall welfare approach where the child had no parent.

44 In re J.M. Carroll (An Infant) [1931] 1 K.B. 317 at p. 355 per Slesser L.J. where he said: "... as between father and mother, the Court may decide on the basis of the welfare of the infant which religious education it shall be given."

45 Re Collins (An Infant) [1950] Ch. 498 at p. 506 per Sir Raymond Evershed M.R.

second half of the nineteenth century of the doctrine of parental rights in relation to religion. The Master of the Rolls did not say that matters of religion were irrelevant. Nor did he suggest that they were to be subsumed under welfare generally. They were thus not paramount nor could they displace what would otherwise be best for the child.

Section 2 - Equitable reform

(a) General

41.19 Parentless children were not the subject of statutory control until 1925, even if that was not judicially recognised until later.[46] The main impact of the 1886 Act was in relation to inter-parental disputes.[47] That was also true initially at least of the 1925 Act. The problems of the application of these Acts to illegitimate children also in the first instance reduced their impact. In the matrimonial context the Divorce Court exercised exclusive custodial jurisdiction. Many of the innovations originated there and no doubt influenced indirectly the other jurisdictions, including the combined powers of the courts of common law and equity. It was in that context that most of the disputes between a parent and a third party, including those concerning illegitimate children, took place between 1875 and 1925.[48] The alleged strength of equity was its adaptability in

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46 This was one of the points for decision or confirmation in J v C [1970] A.C. 668.

47 Paras. 35.8 and 35.14.

48 Where the Custody of Children Act 1891 (54 & 55 Vict., c. 3) did not apply.

the light of changing circumstances. It was not immune from the statutory reforms. The law in England therefore developed very pragmatically in consequence of the close but unofficial nexus between the statutory and non-statutory jurisdictions. Although the principal forum for innovation tended to be the Divorce Court, it is convenient to begin the analysis in the courts of common law and equity.

41.20 The fusion of common law and equity in 1873[49] gave an impetus to the development of the law. Before 1873 the common law procedures[50] emphasised the threshold approach while the nature of the equitable jurisdiction gave greater opportunity to embrace a welfare approach. Even equity was considerably influenced in the late nineteenth century by the doctrine of parental rights and, in particular, the parental right to control religious education.

41.21 Welfare, naturally, played a part in the common law and in equity. As each jurisdiction was founded upon parental rights, the issue was the grounds for suspending the exercise of those rights. This was the disqualification or forfeiture approach. For example, according to Greer L.J., the dissenting judge in In re J.M. Carroll (An Infant)[51], a parent was entitled to custody unless proved guilty of misconduct leading to parental

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49 Supreme Court of Judicature Act 1873 (36 & 37 Vict., c. 66).

50 I.e. particularly habeas corpus.

51 [1931] 1 K.B. 317.

unfitness:[52] negative welfare. The Court of Chancery could however interfere "where it is clearly right for the welfare of the child in some very serious and important respect that the parents' right should be suspended or superseded."[53] This was clearly a more flexible and discretionary concept. Welfare played a more positive role. But it remained a disqualification approach, the ground being the welfare of the child. Equity had thus almost assimilated the threshold and discretionary stages of the process. But not quite, for as Lindley L.J. described the effect of the Supreme Court of Judicature Act 1873:-

> "[It] requires all the Divisions to recognise the cardinal principle on which the Court of Chancery always proceeded, namely, that in dealing with infants the primary consideration is their benefit."[54]

41.22 That reference to welfare would appear to be either a general statement of policy without any specific contextual application or directed towards the discretionary stage of the process. The use of the word "primary" supports the second alternative; it also suggests that other matters are relevant. Greer L.J. on the other hand had given no indication that other matters were relevant. Thus, unless there is some inconsistency

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52 Ibid. at p. 343.

53 Ibid. at p. 343 per Greer L.J.

54 Thomasset v Thomasset [1894] P. 295 at p. 300 per Lindley L.J.

between Lindley and Greer L.JJ., which it is suggested there is not, they were describing different contexts: namely, the discretionary and threshold stages respectively. On this basis the main distinction between common law and equity was that in the former welfare played a negative role as part of the threshold requirement while in the latter it operated positively as the threshold requirement. In addition, welfare would generally be relevant at the discretionary stage in either situation but this aspect was relatively unimportant, for the emphasis lay clearly on the threshold stage. Because of the more positive role of welfare, the equitable approach was clearly more discretionary but even equity was forced to adopt a threshold approach where parental rights were the foundation of the decision.

(b) The equitable approach

41.23 The most penetrating analysis of the law in England unaffected by statute was the Court of Appeal's judgment in Reg v Gyngall.[55] The child in that case, aged fifteen at the time of the litigation, had almost never been in the charge of her mother after her father had died when she was still very young. She was happy and comfortable in the defendant's home[56] and wished to continue to reside there. The child's parents were Roman Catholics[57] but she had recently begun to follow protestant views. The

55 [1893] 2 Q.B. 232.

56 It appeared to be a small residential establishment at Weymouth.

57 Both the father and the mother were Roman Catholics and the mother so continued after the father's death.

mother's applications for habeas corpus were successively refused. So the matter came to the Court of Appeal.

41.24 The approach commended by Lord Esher M.R. went beyond that described by Greer L.J.[58] and came very close indeed to the formula prescribed thirty years later in section 1 of the 1925 Act. There was no allegation of maternal abandonment or neglect. The Custody of Children Act 1891 did not apply. Indeed the approach of the Master of the Rolls was more discretionary than the policy of that Act required, for the rights of the mother were expressly superseded despite the absence of fault or misconduct on her part.[59] There were four steps in the deliberative process leading to that conclusion:-

1. the nature of the parens patriae jurisdiction required the court[60] to exercise that jurisdiction "in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child;"[61]

2. to do so the court was required to look at the whole circumstances of the case, including the position of the parent and of the child, the child's age, religion and happiness;[62]

3. prima facie however the best place for the child would be with his parent;[63]

4. the child's own wishes, generally and in relation to religion, were in this case important.[64]

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58 In re J.M. Carroll (An Infant) [1931] 1 K.B. 317.
59 [1893] 2 Q.B. 232 at p. 246.
60 In this case the Queen's Bench Division to which was directed the application for the writ of habeas corpus. That court was required to apply equitable principles in terms of s. 25 of the Supreme Court of Judicature Act 1873.
61 [1893] 2 Q.B. 232 at p. 241 per Lord Esher M.R.
62 Ibid. at p. 243. 63 Idem. 64 Ibid. at p. 245.

41.25 The crucial stage of that process was the first. It created or recognised the doctrine of the substituted parent, placed the court in loco parentis and hence directed a decision for the welfare of the child. This amounted to a policy directive with the effect almost of overriding other considerations. On the other hand Lord Esher M.R. created or recognised two presumptive principles designed to assist in giving effect to that directive: a parental preference and the importance of the age and wishes of the child. These principles could not be consistently applied in the circumstances of the case and the latter gave way to the former. It cannot be said then that the court adopted an open-ended welfare approach. They applied what was described in the Scottish context as a modified threshold approach[65] by substituting parental preference for parental right but a preference liable to be overcome in the circumstances of the case. Reg v Gyngall[66] therefore did not quite reach the position achieved by the 1925 Act but it went beyond other statements[67] of the law by substituting a parental preference for a parental right as an important part but not the foundation of the process.

41.26 Although religion was the factor motivating the application in Reg v Gyngall,[68] it played a relatively minor role in the decision-making process. This indicates a movement away from the almost overriding significance of the child's religious

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65 Para. 39.16. 66 [1893] 2 Q.B. 232.
67 In R v Walker (1912) 28 T.L.R. 342 a similar overall approach was adopted but in that case the principle applied was the presumption in favour of the status quo.
68 [1893] 2 Q.B. 232.

education. Three years later the question of religion was raised directly in In re Newton (Infants).[69] Earlier cases had indicated that custody and religion were so interdependent that unless a father could be deprived of custody his views or wishes on religion for the child would have to be followed. Although this was the foundation of Lindley L.J.'s approach in In re Newton (Infants),[70] he modified it in practice by severing the nexus between custody and religion.

41.27 The opportunity for making this modification came about, as it frequently does in the absence of statute, in consequence of the peculiar circumstances of the case. A Roman Catholic father had permitted his wife during her lifetime to bring the children up as protestants. After her death the quality of the care provided for the children by their father was wholly unsatisfactory. They were removed from his custody, made wards of court and entrusted to the care of a nominated third party. These decisions were not contested by the father but in the application in question he sought to give effect to his right to control their religious education by asking that they be brought up as Roman Catholics. He failed.

41.28 Since the father had sought neither custody nor care and control, the way was open to deal with religion independently of any custodial issues. The court could have taken the view that

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69 [1896] 1 Ch. 740.

70 [1896] 1 Ch. 740 at p. 747.

the power to control religious education inhered automatically in the person to whom the court awarded care and control. Although that would have in fact achieved the same result, the court chose not to adopt that approach. It was clear to Lindley L.J. as a legal proposition that:-

> "the Court has jurisdiction in a proper case to deprive a father of the custody of his children, and it also has jurisdiction to decline to change the religion in which the children have been brought up."[71]

This was so despite the fact that hitherto a father's wishes on the child's religion had never been disregarded unless he had been deprived of custody. Here he had not been deprived of custody. Kay L.J.'s argument turned more simply on the parental nature of the jurisdiction.[72] The Court of Appeal was thus following the view of wardship proceedings expressed only two or three years earlier in Reg v Gyngall[73] as the doctrine of the substituted parent. That was the substantive justification for treating religion independently of custody. It was recognised that there could be circumstances which would "compel the Court, having regard to the real welfare of the infants and the conduct of the father, to take away from him the sacred right of controlling the education of his children."[74] Welfare considerations

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71 Ibid. at p. 748 per Lindley L.J.: emphasis added.

72 Ibid. at pp. 751 and 752.

73 [1893] 2 Q.B. 232.

74 [1896] 1 Ch. 740 at pp. 747 and 748 per Lindley L.J.

could in the event override religion independently of custody.

41.29 Effect was given to this approach by the House of Lords in the Irish case of Ward v Laverty,[75] although no reference to In re Newton (Infants)[76] seems to have been made. Both parents in the Irish case were dead and the dispute was between the maternal and paternal grandparents. The father however had stated in his will that the children should be brought up as Roman Catholics. So, although it is strictly a case concerning orphan children, it comes very close indeed to the situation in In re Newton (Infants).[77]

41.30 The children in the Irish case had been brought up as Roman Catholics while their parents were living together. The father became a habitual drunkard. His wife left him, took the children and lived with her parents. Thereafter the background to their education was protestant. The application for custody[78] by the paternal relatives was refused. The general approach was described by Lord Cave L.C. in these words:-

> "On the question of the religion in which a young child is to be brought up, the wishes of the father of the child are to be considered, and, if there is no other matter to be taken into account, then, according to the practice of our courts, the wishes of the father prevail.

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75 [1925] A.C. 101. 76 [1896] 1 Ch. 740.
77 Idem.
78 Cf. In re Newton (Infants) [1896] 1 Ch. 740 which was not an application for custody.

> But that rule is subject to this condition, that the wishes of the father only prevail if they are not displaced by considerations relating to the welfare of the children themselves. It is the welfare of the children which, according to rules which are now widely accepted, forms the paramount consideration in these cases."[79]

It may be noted firstly that the Lord Chancellor referred to the "wishes" of the father rather than any right he may have had. This may have been no more than an acknowledgment of his death. Even so, the approach described by Lord Cave L.C. was a threshold or forfeiture approach. Whether the father's position was founded on legal right or paternal preference, his views prevailed unless displaced by welfare considerations. The Lord Chancellor did not, in other words, advocate a subsumptive approach; he did not say that the father's wishes on religion were relevant only to the extent that they had any bearing on the child's welfare.

41.31 Having thus set up the framework for the decision, the Lord Chancellor went on to consider the welfare considerations relevant to the case. He did so in terms of certain presumptive principles related to the circumstances of the case. The oldest child, for example, had acquired strong religious convictions and to subject her to Roman Catholic views at that stage could have

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79 [1925] A.C. 101 at p. 108 per Lord Cave L.C.

been dangerous to her:[80] that is, a presumption in favour of the settled religious status quo. To separate her from her smaller sisters would have been "wrong".[81] The court also evinced something in the nature of a presumption against the guilty spouse.[82] In the event the welfare considerations supported by these presumptive principles indicated that the welfare of the children displaced the wishes of the father on their religious upbringing. The approach of the House of Lords in Ward v Laverty[83] was entirely in sympathy with the policy underlying the 1925 Act.[84] The principal point of difference was that the House of Lords considered the wishes of the father at the threshold rather than as the consideration of last resort. The 1925 Act, on the other hand, made welfare the threshold consideration.

41.32 The children in each of these three cases[85] were legitimate. The dicta of Greer L.J. in In re J.M. Carroll (An Infant),[86] on the other hand, had been formulated in relation to an illegitimate child. Was there any difference, therefore, between legitimate and illegitimate children in relation to welfare? Generally no. The fact that an illegitimate child had a legal relationship with one parent made little difference, for until 1973[87] the same was largely true at any moment of time for a legitimate child. In any event the doctrine of the illegitimate child as filius nullius was gradually being eroded and the position

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80 Ibid. at p. 109 per Lord Cave L.C.
81 Ibid. at p. 111 per Lord Cave L.C.
82 Ibid. at p. 110 per Lord Cave L.C. 83 [1925] A.C. 101.
84 Which did not apply because the decision was made in 1924 and the Act in any event did not extend to Ireland.
85 I.e. Reg v Gyngall [1893] 2 Q.B. 232; In re Newton (Infants) [1896] 1 Ch. 740; Ward v Laverty [1925] A.C. 101.
86 [1931] 1 K.B. 317.
87 When equality of parental rights in relation to a legitimate child was introduced: Guardianship Act 1973, ss. 1 and 10.

was rationalised by the House of Lords in 1891.[88] It appeared to Lord Herschell that "the obligation cast upon the mother of an illegitimate child to maintain it till it attains the age of sixteen years" involved "a right to its custody."[89] The approach to custodial disputes indicated by the House of Lords placed the maternal right at the threshold, rendered it liable to forfeiture in terms of negative welfare and qualified the exercise of the subsequent discretion in terms of the welfare criterion[90] Religion, finally, would not override any decisions otherwise in the interest of the child. The pattern is thus similar mutatis mutandis to the one for legitimate children.

(c) Modern wardship

41.33 The wardship jurisdiction and the doctrine of the substituted parent were the opportunity in English law to move towards a welfare approach to some extent in advance of the 1925 Act. In a sense it is inappropriate to consider wardship cases decided after 1925 without having analysed the ways in which the English Courts interpreted the 1925 Act. Even where the 1925 Act was not specifically mentioned, there can be no doubt that its existence and the mode of its interpretation had an impact upon the decision. None of the cases considered in the foregoing paragraphs concerned a simple inter-parental competition for care

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88 Barnardo v McHugh [1891] A.C. 388.

89 Ibid. at p. 398 per Lord Herschell.

90 Ibid. at pp. 395 and 396 per Lord Halsbury L.C. and at p. 399 per Lord Herschell.

and control. In each there was an issue of some complexity. Most inter-parental disputes were determinable under either the matrimonial legislation of 1857 or the guardianship statutes of 1886 and thereafter of 1925. The relative paucity of decisions under the 1891 Act indicates that, at least latterly, the wardship jurisdiction was more capable of protecting the child than that Act. The widening scope of the 1925 Act, on the other hand, might have been expected to reduce the need for wardship but this has not proved to be so. Apart from disputes between parents and potential adopters and between parents and official foster parents, each of which attracts special statutory considerations, there has been considerable use of the wardship technique, certainly in parent-third party disputes and increasingly in inter-parental disputes.

41.34 Re R(M) (An Infant)[91] concerned an illegitimate child in the care of official foster parents who were also potential applicants for adoption. But these aspects played a less important part than normal. The child was originally made a ward of court on the application of the foster parents, no doubt to regulate their relationship with the mother. They also sought care and control but in the event that was awarded by Plowman J. to the mother. The circumstances in which the child had been handed to the care of the foster parents were in no way a

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91 [1966] 3 All E.R. 58.

reflection on the maternal qualities of the mother. She had not neglected or abandoned the child. Nor was she unfit to care for the child. Hence, for example, the 1891 Act would not have applied to place the onus on the mother to prove that she should have custody or care. Plowman J. relied heavily upon Re Thain: Thain v Taylor[92] in support of the unimpeachable parent. The evidence however indicated that materially and psychologically the child would be better with her foster parents. Plowman J. left no doubt that it was the child's welfare with which he was concerned[93] but, in entrusting the child to the care and control of her mother, he considered less the evidence on welfare and more the presumption that in the long term a child should be brought up by her mother.[94] In a later case considerable weight was attached to the position of a father in a contest with the child's grandparents.[95] In a sense this is a questionable approach for it makes a presumptive principle of child care rather than the welfare of the child the threshold consideration. This would seem contrary to section 1 of the 1925 Act. On the other hand, the wardship jurisdiction, in the sense that the court is the substituted parent, may be beyond and above the 1925 Act, conferring as it were an unfettered discretion provided it is aimed at the interest of the child.

41.35 The Court of Appeal has expressed conflicting views on the desirability and even the legality of the presumptive

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92 [1926] Ch. 676.
93 See also In re O (a minor) (1973) 3 Family Law 135; Re N (Minors) (1975) 5 Family Law 186.
94 [1966] 3 All E.R. 58 at pp. 66 and 67.
95 Re F (a minor) (Wardship: appeal) (1975) 6 Family Law 147.

approach advocated inter alia by Plowman J. in Re R(M) (An Infant).[96] In re M (An Infant) (No. 2)[97] concerned an illegitimate child placed for adoption with maternal consent. The child became a ward of court on the application of the putative father in an attempt by him to secure care and control for his sister and brother-in-law with a view to adoption. Wilberforce J. made an order as requested giving custody, care and control to the father's relations. Further evidence was laid before the Court of Appeal to the effect that removal of a very young child from his normal home involved a risk of psychological trauma. Lord Denning M.R. and Salmon L.J. accepted the possibility of such a risk and for that reason were prepared to allow the appeal. Harman L.J. also allowed the appeal but for an entirely different reason. Although the dispute was technically between the mother and the putative father and since the child was with the applicants for adoption, the contest effectively was between the potential adopters and the father's relations. Harman L.J. took the view that any decision on the wardship issue would effectively determine the adoption application. Such procedure was incorrect. For that reason he allowed the appeal.

41.36 The approach of Lord Denning M.R. and Salmon L.J. was to preserve the status quo, supported by general but not specific evidence that to change it might be against the child's interests.[98]

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96 [1966] 3 All E.R. 58.

97 (1964) 108 Sol. Jo. 1031.

98 See also Re O (a minor) (1973) 3 Family Law 40 and In re EO (a minor) (1973) 3 Family Law 48.

Thus they created a presumptive principle which proved not to be rebuttable in the circumstances of the case. Although Harman L.J. allowed the appeal for a different reason, it is likely that he would not have shared the approach of the majority, for in a later case he unhesitatingly rejected the suggestion of a presumptive approach. In re C (An Infant)[99] was a dispute between the father of an illegitimate child and the father's own relations. Harman L.J. confirmed Plowman J.'s decision to award custody, care and control to the father. In the Lord Justice's view there was no principle that a boy of eight should be with his father. Considerations of age and sex were no more than considerations. The only principle in relation to children's cases was that the court should look at the whole background and consider which was the best home for the child, having regard to his welfare. Harman L.J. thus clearly embraced the balancing approach, unsupported by principles, presumptions or rules of any kind. The only indicator was in the nature of a policy directive.

41.37 So far no consistent pattern has emerged. But clearly the wardship jurisdiction is no ordinary jurisdiction. It is not "an ordinary lis between parties but partakes of an administrative character."[1] It has also been described as "quasi-administrative."[2] The suggestion has been already made that any custodial proceeding, wardship or otherwise, is to some extent administrative.[3] There are

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99 (1970) 114 Sol. Jo. 12.

1 Re K (Infants) [1962] 3 All E.R. 178 at p. 180 per Ungoed-Thomas J.

2 Re K (Infants) [1962] 3 All E.R. 1000 at p. 1008 per Upjohn L.J.

3 Para. 35.88.

obvious discretionary stages[4], whether or not the 1925 Act applies. To the extent that any decision must be based on the circumstances of the case and is a speculative prognosis for the child's future, the process involves balancing circumstances and arguments against a stated or implicit objective. The process is meaningless without some indication of direction. The direction may be that no decision is possible unless it is for the benefit or in the interests of the child: that is, a threshold requirement. It may be that in reaching a decision the welfare of the child is the first and paramount consideration: that is, the threshold consideration or the point of departure. Finally, the welfare of the child may be the only matter in question, the underlying objective, the policy prompting the decision: that is, it is not a consideration at all but the whole purpose of the exercise. The first of these three descriptions indicates a largely adjudicative function; the second an administrative process with the method of approach clearly indicated; the third is an uncontrolled discretion. There are several examples of the first but section 1 of the 1925 Act is not one of them. The second corresponds generally to the way in which the Scottish courts have interpreted and applied section 1, effectively rejecting what was called the "board of welfare" approach. The third may be what the English court conceives as its function in wardship proceedings: the

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4 E.g. applicational, interpretational, substantive discretions.

"substituted parent" approach.

41.38 It is too soon in this analysis to reach a conclusion on this yet but the decision of Plowman J. in Re R (M) (an infant)[5] postulated a very wide discretion aimed at the welfare of the child rather than treating welfare as the threshold consideration. This is probably also true of certain wardship decisions concerning inter-parental disputes. There the scope for a wider discretion, particularly since the creation of equality of parental rights by the 1973 Act, is even greater. This has been brought about to some extent by the introduction of the notorious concept "justice". It is perhaps not without significance that that is a concept to which the Scottish courts have never in this context referred.

41.39 Re O (Infants)[6] was one of those particularly difficult cases where no parental or any other kind of criticism could be levelled against either parent. The complexity however was that the father was a Sudanese Moslem and the mother an English Christian. Each ultimately intended to live in his or her country of origin. Pennycuick J. thought that it might be best to leave the daughter with her mother and let the son go to the Sudan. He decided in the event not to divide the family in this way for that would be the worst solution for everyone. The Court

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5 [1966] 3 All E.R. 58.

6 [1962] 2 All E.R. 10.

of Appeal however considered that Pennycuick J.'s original view was correct and "justice" required that solution. He had in their opinion taken too short a view of the circumstances. The decision turned therefore not on the individual circumstances of the case, for they were effectively neutral, but upon the desirability of competing general principles, postulated but not really justified. The decision in a sense was a compromise intended to give partial satisfaction to each of two unimpeachable parents. If justice was the ultimate criterion, there was no indication who was intended to be the beneficiary. In the event it was the parents rather than the children.

41.40 In relation to Re L (Infants)[7] such a conclusion is more than mere speculation. It can be justified. In that case the mother had committed adultery and then deserted the family. The father was innocent throughout. Plowman J. preferred the mother, despite her matrimonial guilt, because she could provide the necessary love and affection. Lord Denning M.R. did not dissent on that point but emphasised that she was not a good mother as she had in effect broken up the home. He concluded:-

> "It is a simple matter of justice between them that he [father] should have care and control. Whilst the welfare of the children is the first and paramount consideration, the claims of justice cannot be overlooked."[8]

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7 [1962] 3 All E.R. 1.

8 Ibid. at p. 4 per Lord Denning.

By justice, then, he clearly meant inter-parental justice. Section 1 of the 1925 Act said nothing about justice. That does not mean that it could not be relevant. But if it is relevant, it will be relevant only to the extent that it bears upon welfare: that is, the subsumptive approach contained in the second part of section 1. Otherwise, it is suggested, an unrestricted reference to justice coul be inconsistent with the statutory direction in section 1 as a whole.[9]

41.41 It may be that the 1925 Act does not apply to wardship proceedings because they derive from the prerogative of the Crown as parens patriae.[10] Such an argument would be more difficult to support in Scotland than in England.[11] Even in England it has not been put forward in relation to the 1925 Act. The nature of wardship proceedings however was considered in some detail in Official Solicitor v K[12] by the House of Lords, in a context more of policy than of law. Whether they are judicial, administrative or whatever does not matter greatly. It is however important for the court to know and understand its function. Although the jurisdiction is structurally judicial, several of its procedures are administrative,[13] few of its decisions are adjudicative and its substance is governed more by policy than by rules. Indeed Lord Evershed positively eschewed the adjudicative function:-

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9 The references by Lord Denning M.R. to justice were subsequently disapproved as being inconsistent with J v C [1970] A.C. 668: see S v S (1975) 6 Family Law 148 and D v D (1976) 6 Family Law 149. But in Re R, an minor (1974) 4 Family Law 153 the Court of Appeal gave effect to the paramountcy of welfare principle; Scarman L.J. specifically referred to the "statute".

10 The 1925 Act is not stated to apply to the Crown. Presumptively, therefore, it may not apply to the Crown. See Maxwell, p. 129; Cameron J.T., "Differing approaches to prerogative" (1961) 24 M.L.R. 523.

11 Because that presumption is weaker in Scotland and because of the differences in the "prerogative" jurisdictions in each system.

12 [1965] A.C. 201.

13 See generally paras. 32.61 to 32.64.

> "... I cannot think, because this jurisdiction is essentially judicial in its exercise, that since there may arise a conflict between the paramount interest of the infant which the court is concerned to promote on the one hand and the rights on the other hand which according to proper principles of justice generally belong to other persons properly parties to the proceedings, and since, therefore, in the language of Russell L.J., there has to be a "balancing" of these considerations, the process is one which, if no escape can be found, must inevitably be concluded by choosing the course thought likely to be harmful to the infant."[14]

Although the conclusion which he rejected was somewhat extreme, the approach enunciated by Lord Evershed involved the court doing its utmost to promote the interests of the child. Welfare was to some extent therefore not only the paramount and threshold consideration but also the policy underlying and surrounding the whole process. This is understandable in the context of the decision.[15] It also indicates a function of welfare beyond its function in the 1925 Act.

Section 3 - The matrimonial jurisdiction

(a) The earlier authorities

41.42 The application of section 35 of the Matrimonial Causes

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14 [1965] A.C. 201 at p. 217 per Lord Evershed.

15 The confidentiality of reports in wardship proceedings.

Act 1857[16] varied after its enactment from a recognition of its discretionary nature to an acknowledgment of the earlier rules of common law and equity.[17] The narrower view tended to predominate. The same was true of Scotland under the 1861 Act[18] until in 1875 the House of Lords[19] favoured the wider, discretionary approach tempered however by reference to what may be described as an inchoate presumptive approach. This decision of the House of Lords was not presumably binding on the English courts. Nevertheless it was apparently not until 1891[20] that it came to the attention of the English Divorce Court and that the Court of Appeal, noting that the English and Scottish statutes were similarly drafted, decided to adopt a similar approach. a fairly consistent approach evolved between 1891 and 1924 when a judgment of Atkin L.J.[21] anticipated the spirit and policy of the 1925 Act.

41.43 The change came about largely at the instance of Lindley L.J. In Thomasset v Thomasset[22] he criticised the Divorce Court for having "unduly restricted"[23] the wide discretion created by the 1857 and later Acts. The need to exercise the statutory powers "discretionally according to the particular circumstances in each case" was emphasised in the same case by Lopes L.J.[24] Such an approach also underlay the judgment of Jeune J. in Witt v Witt.[25] It would be wrong however to suggest that the courts applied an unrestricted discretion.

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16 20 & 21 Vict., c. 85. 17 Paras. 34.97 to 34.104.
18 Conjugal Rights (Scotland) Amendment Act 1861 (24 & 25 Vict., c. 86).
19 Symington v Symington (1875) 2 Rettie (H.L.) 41.
20 Handley v Handley [1891] P. 124.
21 B v B [1924] P. 176. 22 [1894] P. 295.
23 Ibid. at p. 303 per Lindley L.J.
24 Ibid. at p. 307 per Lopes L.J.
25 [1891] P. 163.

41.44 In Handley v Handley[26] Lindley L.J. explained that the statutory discretion of the Divorce Court overrode both the common law and equity.[27] Nevertheless he expected the judge to have regard to these rules in exercising his discretion.[28] The welfare of the child on the other hand carried more weight for Jeune J.[29] and Cozens-Hardy M.R.[30] The former, while acknowledging that no hard and fast rule should be laid down, said that "in every case the court is bound to do what it conceived to be for the best interests of the children."[31] That approximates almost to a policy approach. But for Cozens-Hardy M.R. the "benefit and interest of the infant is the paramount consideration."[32] That assumes a balancing approach with welfare as the threshold consideration. There were important differences between the judges but the common attitude among them was their rejection of the threshold approach.

41.45 In Handley v Handley,[33] for example, the issue was whether an adulterous mother should be awarded access to her child. The earlier practice of the Divorce Court had been to follow the rule in Talfourd's Act[34] not to award access to an adulteress. The discretion in the 1857 Act required rejection of that rule. There remained however almost a presumption against allowing access to an adulterous mother, for Lindley L.J. commented:-

> "... I do not say that the Court can in no case give to an adulteress access to her children..."[35]

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26 [1891] P. 124. 27 Ibid. at p. 127. 28 Idem.
29 Witt v Witt [1891] P. 163.
30 Mozley-Stark v Mozley-Stark [1910] P. 190.
31 Witt v Witt [1891] P. 163 at p. 165 per Jeune J.
32 Mozley-Stark v Mozley-Stark [1910] P. 190 at p. 194 per Cozens-Hardy M.R. Cf. Clarke v Clarke and Lindsay (1913) 57 Sol.Jo. 644 where Cozens-Hardy M.R. tended to emphasise parental misconduct rather than welfare.
33 [1891] P. 124.
34 Custody of Infants Act 1839 (2 & 3 Vict., c 54).
35 Handley v Handley [1891] P. 124 at p. 128 per Lindley L.J.

A similar issue arose in Mozley-Stark[36] v Mozley-Stark and Cozens-Hardy M.R. even more positively rejected the threshold approach:-

> "... the matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter or even to custody of her daughter ... The Court ought not to lay down a hard and fast rule on this subject."[37]

41.46 The court was nevertheless not prepared to take the discretionary nature of section 35 of the 1857 Act to its logical conclusion. It must be recalled that the 1886 Act could not directly affect the application of the 1857 Act.[38] The 1925 Act alone was capable of such an effect. Judicial reluctance to give effect to the discretion in the 1857 Act was thus visible not so much in their rejection of the traditional threshold approach based on legal rights but in their substitution for that approach of an inchoate presumptive approach. This happened considerably before the same judicial response to the 1925 Act. The foregoing comments of Lindley L.J. and Cozens-Hardy M.R. indicate a policy rather than a rule against giving custody or access rights to an adulterous mother which amounts in practice to recognising a presumption in favour of the matrimonially innocent spouse: an

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36 [1910] P. 190.
37 Ibid. at pp. 193 and 194 per Cozens-Hardy M.R.
38 As Pollock M.R. said in B v B [1924] P. 176 at p. 181: "... the Guardianship of Infants Act is not as binding upon the Divorce Division as it would be on the Chancery Division."

attitude which the courts have found increasingly difficult to justify in a purely parental context.

41.47 The presumption in favour of the innocent spouse was not the only principle embraced by the courts, although by 1924 adultery was relevant less for itself but more as the cause[39] of the family breakdown. That view was related conceptually to the judicial desire to keep the family effective as a unit so far as possible, which evolved as the policy of giving to the non-custodial parent the most extensive access possible.[40] It is certainly understandable in the matrimonial context for the courts to pay considerable attention to these two principles. They exhibit, at least in retrospect, a rather narrow view of a child's welfare. Matrimonial disputes normally concern only the parents. But in the rather exceptional case of Witt v Witt[41] a preference for parental care was postulated in place of care by a stranger. This comment is no doubt the origin of the principle that a third party should be preferred in exceptional circumstances only.[42] It was probably also brought about as a result of a relatively narrow view of welfare. The policy remains, but in modern form.

41.48 So the law generally stood just before 1925. But one of the judgments in what must have been one of the last decisions of the Court of Appeal before the 1925 Act added a new dimension to the law gave it a fresh impetus which not only anticipated the

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39 So far as any cause may be identified.

40 Para. 41.56.

41 [1891] P. 163.

42 See para. 44.37.

spirit of the Act but may even to some extent have gone beyond it. In B v B[43] the trial judge had awarded custody to the father and refused access to the mother because her commission of adultery had been responsible for the disruption of the family. The Court of Appeal awarded limited access to the mother. Pollock M.R. relied heavily upon Symington v Symington[44] and the general desirability of preserving a relationship between children and both parents.[45] To that extent he was following the line which had become well established by 1924. That was also true of Warrington L.J.

41.49 On the other hand, Atkin L.J. indicated a new attitude which encapsulated three propositions. First, he rejected the threshold and presumptive approaches. In his words:-

> "All those matters which lay down any kind of rule, or any kind of presumption, or any kind of prima facie proof, seem to me to be wrong in law."[46]

Then he advocated a balancing approach, for "the Court must have regard to all the circumstances of the case."[47] Those circumstances would include the fragmentation of the family and the matrimonial guilt of the mother. Atkin L.J. said in relation to matrimonial guilt:-

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43 [1924] P. 176.

44 (1875) 2 Rettie (H.L.) 41.

45 B v B [1924] P. 176 at p. 180 per Pollock M.R.

46 Ibid. at p. 189 per Atkin L.J.

47 Ibid. at p. 190 per Atkin L.J.

> "It is impossible to suggest that that is not a consideration which ought to be very seriously regarded in considering the welfare of the child."[48]

The third proposition therefore is that these matters are relevant in considering the welfare of the child. Earlier Atkin L.J. had pointed out that "all these cases have to be approached with single reference to the interests of the child under the particular circumstances of the case."[49] These comments embrace the subsumptive approach, that all matters are relevant but only from the point of view of the welfare of the child.

41.50 The two principal elements in Atkin L.J.'s analysis were the balancing and subsumptive approaches. Each was later to be built into section 1 of the 1925 Act. Atkin L.J. did not use the expressions "paramount", "first" or "most important" in relation to welfare. He conceived welfare rather as an all-embracing idea. To that extent he may have advanced beyond what was later enacted in section 1 of the 1925 Act. His clear reference to the subsumptive approach probably made it unnecessary to ascribe any priority to welfare. He did not regard welfare as the objective or policy of the exercise. It was simply the point of reference for each consideration. Nothing more was necessary.

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48 Idem.

49 Ibid. at p. 189 per Atkin L.J.

(b) The later authorities

(i) W v W

41.50 It has never been suggested that section 1 of the 1925 Act does not apply to matrimohial disputes between husband and wife. This is probably true irrespective of which jurisdiction is invoked,[50] for each Act merely confers the power to make decisions within the relevant context but does not seek to regulate the exercise of that power. The reported cases have tended to deal with such matters as the extent of the powers, the children subject to the legislation, matters of technical jurisdiction or the powers of appellate courts on appeal from trial courts. There has been, particularly in comparison with Scotland, a lack of detailed judicial scrutiny of the legislation.

41.51 The pattern which has emerged is far from clear. One case decided in 1926[51] raised a number of significant issues but there the matter rested until the second half of the twentieth century. Since then a number of different and at times conflicting attitudes have been adopted. This may be consistent with the discretionary nature of the jurisdiction but generally speaking the courts have not considered it in that light. Indeed the problem now seems to be for the courts to move immediately into the substantive merits of the dispute. This is undoubtedly part

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50 E.g. the matrimonial jurisdiction of the High Court or the domestic jurisdiction of the magistrates.

51 W v W [1926] P. 111.

of the exercise but failure to keep the legal context of the decision-making process in view may give the judges the opportunity to resort to their considerable imaginations.

41.52 The first reported[52] case decided under the 1925 Act amply demonstrates these points. It was rather unusual in the matrimonial context. The wife had obtained an order for restitution of conjugal rights. Since that in itself did not necessarily conclude the question of responsibility for the breakdown of the marriage, the incidental custodial issue, authorised by section 6 of the Matrimonial Causes Act 1884,[53] would have to be decided largely independently of matrimonial fault or innocence. The nature of the issue thus gave the court a clear opportunity to approach the question totally unencumbered by the old statutory and judicial restrictions.

41.53 Lord Merrivale P. commenced his judgment with a surprisingly outdated comment that where there was a successful application for a decree of divorce or separation, "it is common knowledge that unless cause is shown to the contrary the custody of the children of the marriage is granted to the complainant party."[54] That common law threshold approach may well have been normal before 1891 when greater attention was beginning to be paid to the discretionary[55] approach but by 1926 it would seem to be contrary to the views of the Court of Appeal. Section 1 of

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52 Idem.

53 47 & 48 Vict., c. 68.

54 W v W [1926] P. 111 at p. 114 per Lord Merrivale P.

55 Handley v Handley [1891] P. 124.

the 1925 Act thus had far greater significance for Lord Merrivale P. than, for example, for Aitkin L.J.

41.54 That apart, there seem to be three aspects to Lord Merrivale P.'s analysis. He referred specifically to section 1 of the 1925 Act. There is no doubt that in his view a solely legal approach would be inconsistent with section 1.[56] The three elements in his constructive analysis were the balancing, subsumptive and presumptive approaches. Clearly welfare had to be taken into consideration. It was also the "governing" consideration. The President however failed to indicate what "governing"[57] meant in practice. That word probably was his paraphrase of "first and paramount." But he did not conceive welfare as the only consideration, for the circumstances of the parties were undeniably relevant but only so far as they affected welfare: that is, the subsumptive approach to welfare. Finally, as Lord Merrivale P. himself said:-

> "Balancing as well as I can the relative advantages which are offered here, it seems to me that the well-being of the child while it is of tender age requires peremptorily that the child should remain in the care in which since its birth it has been ..."[58]

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56 He rejected, for example, the contention that parental contempt of court was relevant to a decision on the future of the child: W v W [1926] P. 111 at p. 116.

57 [1926] P. 111 at p. 114 per Lord Merrivale P.

58 Ibid. at p. 116 per Lord Merrivale P.

He also stressed the importance of both parents being concerned in the child's welfare.[59] There can be no doubt that these two general principles influenced the decision. Lord Merrivale P. thus, in applying section 1 of the 1925 Act, followed the general trend which had evolved prior to 1925 by giving effect to the balancing process, weighted in favour of the child's welfare but supported by his own preferred principles of child care. The President, as Atkin L.J. before him, subsumed all circumstances under welfare, the direction in section 1 of the 1925 Act, but there was no suggestion that in doing so he relied specifically upon that provision. The principal difference between the two judges was Atkin L.J.'s emphatic rejection of the presumptive approach contrasted with its acceptance by Lord Merrivale P. It is indeed the presumptive approach which has become the most controversial aspect of the law in the second half of the twentieth century.

(ii) The threshold approach: access

41.55 Subject to that qualification, Atkin L.J. and Lord Merrivale P. created the foundations of the contemporary law. The possibility of the threshold approach was again raised in Chipperfield v Chipperfield[60] but rejected by Pearce J. If custody were to be decided simply in terms of matrimonial misconduct, then in his view such misconduct would be the paramount

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59 Idem.

60 [1952] 1 All E.R. 1360.

consideration. That was not possible as Parliament had "deliberately stated that the welfare of the infant shall be the paramount consideration."[61] The Court of Appeal however has come close to reinstating the threshold approach in relation to access.

41.56 In S v S[62] in 1962 Willmer L.J. said of access that "In the ordinary way [it] would be no more than the basic right of any parent."[63] It was moreover a right of which the parent could not be deprived unless the parent was "not a fit and proper person to be brought into contact with the children at all."[64] That is the traditional threshold approach.[65] The Court of Appeal in that case gave no indication that the parent's interest was anything less than a right. In the later case of B v B[66] Davies L.J. adopted the same attitude but Edmund Davies L.J., although this cannot be stated with much certainty, appeared to shift the basis of the approach from a right to a general principle.[67] "Speaking generally," he said, "it is the duty of parents, whatever their personal differences may be, to seek to inculcate in the child a proper attitude of respect for the other parent."[68] Davies and Edmund Davies L.JJ. however were prepared to widen the grounds of judicial control. The welfare of the child rather than parental unfitness became the reason justifying deprivation of the right or rebuttal of the presumption.[69] That is consistent rather with the earlier principles of equity than with the common

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61 Ibid. at p. 1361 per Pearce J. 62 [1962] 2 All E.R. 1.
63 Ibid. at p. 3 per Willmer L.J.
64 Ibid. at pp. 3 and 4 per Willmer L.J.
65 See also Hammond v Hammond (1962) 106 Sol. Jo. 610.
66 [1971] 3 All E.R. 682.
67 See also D v D (Infant: access) (1974) 4 Family Law 195.
68 [1971] 3 All E.R. 682 at p. 688 per Edmund Davies L.J.
69 Ibid. at pp. 688 and 689 per Davies and Edmund Davies L.JJ. respectively.

law. It however does not comply with the direction in section 1 of the 1925 Act which, there can be no doubt, applies as much to access as to custody.[70]

(iii) The balancing technique

41.57 Reverting again to the mainstream of custodial disputes: the fundamental approach now is to seek a balance between the various considerations. It is the basis of the discretionary approach. No longer can the process be divided into the satisfaction of threshold requirements followed by the exercise of a discretion. This was certainly recognised in W v W[71] in 1926, endorsed by Denning L.J. in Wakeham v Wakeham[72] and followed by Winn L.J. in P(LM) v P(GE).[73] It is now implicit in most if not all decisions. Simon P. has summed up the approach very concisely:-

> "It is a peculiar type of adjudication. Neither parent has a paramount right, which, on proof of certain facts, entitles him or her to judgment. The decision is, in other words, what is known to the law as a discretionary one. There are almost always a number of conflicting considerations. All that the law says is that the tribunal charged with adjudication shall take as its first and paramount consideration the welfare of the child. That is easy to state: it is often very much less easy to determine."[74]

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70 C v C (1971) 1 Family Law 136; B v B (1971) 1 Family Law 137; M(P) v M(C) (1971) 115 Sol. Jo. 444.
71 [1926] P. 111. 72 [1954] 1 All E.R. 434 at p. 436.
73 [1970] 3 All E.R. 659 at pp. 660 and 661.
74 B(PM) v B(MM) [1969] P. 103 at p. 106 per Simon P.

The unanswered question thus remains what part welfare plays in that discretionary process. What, in other words, does section 1 of the 1925 Act mean?

41.58 The difficulty of the English system is that the courts have never really faced that fundamental question. More often than not their views can only be deduced from the ways in which they have reached their decisions. This is not altogether satisfactory. It is impossible to be certain that the courts have given effect to the approach which they appear to have adopted. One view, perhaps also the most common, is that welfare is a "consideration" forming part of the decision-making process and attracting the greatest weight in the overall balancing technique.[75] This reflects the literal meaning of at least the first element in section 1 of the 1925 Act. It has however been variously described. Lord Merrivale P. called it "the governing consideration;"[76] Denning L.J. emphasised that it was not the only consideration;[77] according to Winn L.J. it was the factor to which "the court should have regard primarily;"[78] for Scarman L.J. it was the"fundamental guide".[79] The most accurate, but in some respects

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75 E.g. Allen v Allen [1948] 2 All E.R. 413; Boyt v Boyt [1948] 2 All E.R. 436; Willoughby v Willoughby [1951] p. 184; D v D (1965) 109 Sol. Jo. 573; Laxton v Laxton [1966] 2 All E.R. 977; Mounter v Mounter (1971) 1 Family Law 138: Jussa v Jussa [1972] 2 All E.R. 600; Good v Good (1973) 3 Family Law 80; Copland v Copland (1973) 3 Family Law 105; Owen v Owen (1973) 4 Family Law 13; Ives v Ives (1973) 4 Family Law 16; Roughley v Roughley (1973) 4 Family Law 91; Bowden v Bowden (1974) 4 Family Law 92; Bevan v Bevan (1973) 4 Family Law 126; Townsend v Townsend (1973) 4 Family Law 127; Geers v Geers (1974) 4 Family Law 155; Thariyan v Thariyan (1974) 5 Family Law 123.

76 W v W [1926] p. 111 at p. 114 per Lord Merrivale, P.

77 Wakeham v Wakeham [1954] 1 All E.R. 434 at p. 436 per Denning L.J.

78 P(LM) v P(GE) [1970] 3 All E.R. 659 at p. 660 per Winn L.J.

79 Greer v Greer (1974) 4 Family Law 187 at p. 188 per Scarman L.J.

the least helpful description is simply to refer to welfare as Simon P. did, as the "first and paramount" consideration.[80] The crucial aspect of this approach, a point repeated but incapable of over-emphasis, is that welfare is an element, albeit the most important element, in the decision. The precise part which it plays depends naturally on the circumstances of the case. It thus becomes for the court a matter for the exercise of its intellectual discretion. The quality of the decision lies in the rational strength of the relationship between the circumstances of the case in general, the special weight to be afforded to welfare in particular and the ultimate decision based thereon.[81] Each of these is a matter of fact rather than of law. But the decision is made in a legal context with profound legal consequences.

41.59 It has already been suggested[82] as a possible interpretation of section 1 of the 1925 Act that welfare is not so much an element in the decision-making process as its all-embracing policy. In that sense welfare would stand outside and apart from the process; it would be the target of the decision not part of it. No court has ever expressed it in this way. But judicial references to doing what is best for the child or making whatever decision is in the child's interests come close to this concept.[83] Such an approach is also discretionary in character.

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80 B(BPM) v B(MM) [1969] P. 103 at p. 106 per Simon P.

81 The spirit of relativity has been described by Scarman J. in these words: "[J]udgments in regard to human relationships as vital as those affecting the welfare of a child must always be relative and what has to be looked at is not what is ideal and perfect but what is best in the circumstances": G v G (1962) 106 Sol. Jo. 858 at p. 858.

82 Para. 35.87.

83 E.g. Bevan v Bevan (1973) 4 Family Law 126; S v S (1975) 6 Family Law 148; D v D (1976) 6 Family Law 149. The last two cases relied upon J v C [1970] A.C. 668 in rejecting the presumption in favour of an unimpeachable parent. Cf. Jeffrey v Jeffrey (1962) 106 Sol. Jo. 686 where Willmer L.J. indicated that the paramount consideration was what was in the best interests of the child: welfare in that case was not a matter of policy but a consideration.

The exercise of the discretion however is restricted not by the "internal" requirement to treat welfare as the most important consideration but by acknowledging welfare "externally" as the object of the exercise.

41.60 Although the evidence in favour of this view is not strong, it warrants some attention. It has occasionally been stated that welfare is the "sole consideration"[84]. This clearly conflicts with the more authoritative view that it is not the sole consideration,[85] at least in terms of section 1 of the 1925 Act. But if welfare were the sole consideration, it could scarcely be a consideration at all. In the absence of any other relevant matter, it would assume not only greater or even overriding significance but a position beyond the decision-making process: something, in other words, in the nature of a policy.

41.61 In Official Solicitor v K,[86] it may be recalled,[87] the welfare doctrine was used to justify a decision on the confidentiality of reports. The doctrine became in that case a matter of policy. Much the same happened in F v F[88] where the doctrine as a matter of policy formed part of the argument whether the principle of res judicata applied to custodial proceedings. It does not necessarily follow that the welfare doctrine, whatever it means, can be used as a matter of policy in settling custody as distinct from evidential and procedural issues. Salmon L.J. in F v F[89] was

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84 E.g. S v S (1968) 112 Sol. Jo. 294 at p. 294 per Danckwerts L.J.; see also Geapin v Geapin (1974) Family Law 188 at p. 188 per Stephenson L.J. where it was stated that the matter had to be considered "entirely from the point of view of the boy's best interests."

85 Wakeham v Wakeham [1954] 1 All E.R. 434 at p. 436 per Denning L.J.

86 [1965] A.C. 201.

87 Para. 41.41.

88 [1968] 2 All E.R. 946.

89 Idem.

referring to the welfare doctrine as a policy consideration in relation to a procedural matter. His comments cannot, therefore, be transposed into substantive custodial questions. Nevertheless, he said:-

> "The paramount duty of the court in custody proceedings is to consider what is in the best interests of the child. Of course, in a sense it is a fight between the father and the mother, but the court does not decide it on the basis of whether the mother ought to win or the father ought to win, but chiefly on the basis of what is best for the child."[90]

Although he used the words "paramount" and "chiefly", Salmon L.J. was talking in terms of a "duty" rather than "considerations." The duty was cast very much in the role of a policy or object of the exercise. This view approximates to a discretionary policy but given the context of these remarks by the Lord Justice and the dearth of any similar analysis, this approach cannot be regarded as authoritative. Moreover it falls outside the literal meaning of section 1 of the 1925 Act.

(iv) Judicial techniques of restriction

41.62 The courts in the past have tended to reject or restrict the discretionary approach. They preferred to apply rules or principles rather than exercise discretions. This has continued despite Parliamentary attempts to induce the courts to do otherwise. Arguably section 1 of the 1925 Act might have been an attempt to restrict the court's wide statutory discretion,[91] at least in this context, by directing that the discretion be exercised in a certain way. It is clear however, given the

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90 Ibid. at p. 950 per Salmon L.J.

91 I.e. if s.35 of the 1857 Act and s. 1 of the 1925 Act are taken at face value.

history of the matter, that section 1 was intended to force the courts to exercise a wide but limited discretion rather than apply rules or principles. The welfare doctrine is itself inherently flexible. So the purported restriction was in effect no restriction at all. The courts nevertheless have continued their attempt to build restrictions in the form of rules, now principles, into the discretion.

41.63 The first attempt arose not judicially but by statutory direction. The second element in section 1 of the 1925 Act created the subsumptive approach. Instead of looking at parental rights and preferences generally, the court was to consider them from the point of view of the welfare of the child. This was restrictive in a formal sense only, for the reference to the welfare of the child retained considerable flexibility in practice. The subsumptive approach, although more eagerly implemented in Scotland, was acknowledged in England in W v W,[92] Chipperfield v Chipperfield[93] and S v S and T.[94]

41.64 The second attempt to restrict the discretion was to treat welfare not only as the most significant consideration but also as the first consideration chronologically. This would have the effect of turning welfare into a presumptive or threshold principle which would be recognised and followed unless there was proved to be good reason for doing otherwise. This would narrow

92 [1926] P. 111.

93 [1952] 1 All E.R. 1360.

94 (1963) 107 Sol. Jo. 475.

the ambit of the court's discretion. The authority in support of this approach is not strong. In re H (Infants)[95] was a dispute, which started in the magistrates' court, between the mother and father of an illegitimate child.[96] It was contended that the mother had a claim superior in law to that of the natural father. In casting considerable doubt upon that contention Lord Denning M.R. said, after referring to the relevant Acts:-

> "... it seems clear that one does not start with either the mother or the natural father as having a superior claim in law. One has first to have regard to the welfare of the children."[97]

The words "start" and "first" suggest a chronological as well as a substantive priority. Lord Denning M.R. then appears, perhaps inadvertently, to have treated welfare as the threshold consideration. It is much less clear that he thereby intended to turn it after into a threshold principle.

41.65 There can be no doubt about the third restriction. The presumptive approach had its origins in the late nineteenth century and has been given effect in a large number of reported cases ever since. It has been made clear on a number of occasions that the principles underlying these presumptions are not rules of law.[98] The principles presumptively applied vary in accordance with judicial imagination and the circumstances of the

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95 (1965) 109 Sol. Jo. 575.

96 It was not strictly a matrimonial dispute at all.

97 (1965) 109 Sol. Jo. 575 at p. 575 per Lord Denning M.R.

98 Willoughby v Willoughby [1951] P. 184 at p. 192 per Singleton L.J.; D v D (1965) 109 Sol. Jo. 573 at p. 573 per Willmer L.J.; H v H and C [1969] 1 All E.R. 262 at p. 263 per Salmon L.J.

case. Perhaps the clearest statement of the approach may be found in the judgment of Lord Denning M.R. in W v W and C:-[99]

> "I feel it is right to be guided by the general principle that a boy of this age, some eight years of age, is, on the whole, other things being equal, better to be with his father." [1]

It rests upon the judicial "feeling" of what is right. But it is also rebuttable, for all things may not be equal. This is emphasised later in the same case when Sachs L.J. remarked that the onus was in effect on the mother to "displace that prima facie view."[2] The approach thus contains a judicially created principle liable to be overriden by the circumstances of the case.[3]

(c) Conclusion: the current system

41.66 Of the five foregoing functions of welfare in the overall balancing approach,[4] two have become almost normal in practice: to treat welfare as the most important consideration; and to restrict the interpretational and intellectual discretions inherent in that process by applying judicial presumptions setting out general principles of child care. It is by no means clear in every case whether a matter is being treated as a consideration among a number of others or as a principle liable to displacement.[5] That can be a matter of importance. In the former case there is no question of either party having to discharge an onus; in the latter case that procedural question could arise and moreover, in

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99 [1968] 3 All E.R. 408. 1 Ibid. at p. 409 per Lord Denning M.R.
2 Ibid. at p. 410 per Sachs L.J.
3 I.e. the presumptive threshold approach.
4 I.e. first and paramount consideration, policy, subsumptive approach, theshold consideration, presumptive approach.
5 In Dyter v Dyter (1973) 4 Family Law 52 the Court of Appeal came close to adopting the modified threshold approach by giving considerable weight but not technical priority to the wishes of an unimpeachable parent. According to Buckley L.J. the power of such a parent to make decisions for the child's upbringing, education, language and religion were "the very stuff of parental responsibility." But in Ellard v Ellard (1974) 5 Family Law 29 Davies L.J. emphasised that the mother's marital guilt was only "a factor to be put into the scales."

an evenly balanced or neutral set of circumstances, it could be decisive. An approach which is in that way decisive is the antithesis of the exercise of a discretion. Even so, many of the decisions have been reached not so much in consequence of a detailed analysis of the circumstances of the case but rather by selecting which of two or more competing principles seemed more appropriate.

41.67 Although the range of principles is theoretically infinite, there appear to be three particularly attractive to the judiciary: the presumption against the parent matrimonially at fault; the preference for maternal care for young children; the preservation of the status quo.[6] The relevance and significance of matrimonial fault has always been a matter of concern to the courts. This is almost inevitable when custody is regarded as incidental to the overriding matrimonial issue. There are several instances of its application[7] but it would seem that this is a principle to which the courts have paid less attention in more recent years. It has nevertheless probably survived the technical elimination of the fault concept in divorce.[8]

41.68 There may be two reasons for the apparent declining importance of this presumption. There is probably a growing

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6 Effect may also be given to the need to keep the family intact as a group and to the wishes of an older child: see respectively Buckley v Buckley (1973) 3 Family Law 106 and Reynolds v Reynolds (1974) 4 Family Law 193; and Stewart v Stewart (1973) 3 Family Law 107.

7 Vigon v Vigon [1929] P. 157; Allen v Allen [1948] 2 All E.R. 413; Boyt v Boyt [1948] 2 All E.R. 436; Willoughby v Willoughby [1951] P. 184; G v G (1962) 106 Sol. Jo. 858; Laxton v Laxton [1966] 2 All E.R. 977; Roughley v Roughley (1973) 4 Family Law 91.

8 Divorce Reform Act 1969 (1969 c. 55); Matrimonial Causes Act 1973, s. 1; Roughley v Roughley (1973) 4 Family Law 91; B v B (1975) 119 Sol. Jo. 610.

acceptance that custody is essentially a parental matter, even when it arises in a matrimonial context. Nevertheless Singleton L.J. expressed his attitude very cautiously in Willoughby v Willoughby[9]:-

> "It may be undesirable and in some cases it is undesirable that the care and control of a child should be given to a mother if she has committed adultery..."[10]

That comment implies a certain prima facie attitude unfavourable to the guilty spouse. The second reason is more important. An increasingly wider interpretation now tends to be given to the expression "welfare." As Evershed L.J. argued in Allen v Allen,[11] it is not simply the child's moral welfare which is at issue. The wider the meaning of "welfare", the less significant matrimonial guilt becomes.

41.69 On the other hand relatively less emphasis seems to be attached to parental as distinct from matrimonial incapacity or unfitness. To do so would be a partial reversion to the common law threshold approach. The courts would not, indeed could not, do that now. The difficulty probably is that questions of parental quality are very subjective. Conclusions are reached no doubt largely on the basis of past events and that would make the behaviour of the parent in the matrimonial context of some

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9 [1951] P. 184.

10 Ibid. at p. 192 per Singleton L.J.

11 [1948] 2 All E.R. 413.

importance. Where the peculiarly parental conduct of the parent has been extreme, for example, assault, neglect or abandonment, the criminal law or the local authority's powers are likely to be invoked. In that sense parental shortcomings per se may be of only marginal significance.[12]

41.70 The judicial preference in favour of the mother of a young child, on the other hand, remains strong and may indeed be becoming even more important.[13] It may nevertheless be denied effect.[14] This is entirely consistent with medieval guardianship by nature and nurture.[15] To some extent maternal preference is merely the revival of an old idea which had been superseded in the interim by the strength of paternal legal rights. The age and perhaps the sex of the child are naturally important in relation to any claim for maternal preference. The foundation of the principle was described in Laxton v Laxton[16] as a tie between the mother

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12 What impressed Salmon L.J. in H v H and C [1969] 1 All E.R. 262 at p. 263 was not the mother's adultery but her abandonment of the child.

13 Vigon v Vigon [1929] P. 157; Allen v Allen [1948] 2 All E.R. 413; Boyt v Boyt [1948] 2 All E.R. 436; Willoughby v Willoughby [1951] P. 184; D v D (1965) 109 Sol. Jo. 573; Laxton v Laxton [1966] 2 All E.R. 977; H v H and C [1969] 1 All E.R. 262; Angrish v Angrish (1973) 3 Family Law 108; Pinch v Pinch (1973) 3 Family Law 171; Ives v Ives (1973) 4 Family Law 16; Baldrian v Baldrian (1974) 4 Family Law 12; P v McK (1973) 4 Family Law 128; Greer v Greer (1974) 4 Family Law 187; Reynolds v Reynolds (1974) 4 Family Law 193; Barham v Salter (1974) 5 Family Law 19; Haleem v Haleem (1975) 5 Family Law 184; G v G (1975) 6 Family Law 43.

14 Owen v Owen (1973) 3 Family Law 13; Stovold v Stovold (1973) 4 Family Law 14; Bowden v Bowden (1974) 4 Family Law 92; Morgan v Morgan and others (1974) 4 Family Law 189; T v T (1974) 4 Family Law 190; Arensman v Pulman (1975) 5 Family Law 183.

15 Paras. 32.49 to 32.52.

16 [1966] 2 All E.R. 977.

and the child. For Davies L.J. that was a "biological fact."[17] In H v H and C[18] Salmon L.J. conceived it as a matter of "common sense and ordinary humanity."[19] What is important is that the principle is taken for granted; it is not the subject of evidence; it is a matter of judicial knowledge.

41.71 Occasionally the judicial preference guided by age and sex has favoured the father. A boy of eight, for example, has been stated to be better with his father.[20] This view has not met with universal approval. It cannot be regarded therefore as being as well-established as the maternal preference.

41.72 There is a further parental preference. It is generally regarded as desirable for a child to be with either parent or both parents in preference to any third party.[21] To some extent this favours the "family" at the expense of any substitute. It may also be regarded as an attempt to equate so far as possible the static and dynamic situations.[22]

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17 Ibid. at p. 979 per Davies L.J.

18 [1969] 1 All E.R. 262.

19 Ibid. at p. 263 per Salmon L.J. See also B v B (1973) 3 Family Law 14.

20 W v W and C [1968] 3 All E.R. 408 at p. 409 per Lord Denning M.R.

21 Jeffrey v Jeffrey (1962) 106 Sol. Jo. 686 at p. 686 per Willmer L.J.; B(BPM) v B(MM) [1969] P. 103 at p. 106 per Simon P.; Jussa v Jussa [1972] 2 All E.R. 600 at p. 603.

22 E.g. by awarding joint custody to the parents. See Clissold v Clissold (1964) 108 Sol. Jo. 220 and Jussa v Jussa [1972] 2 All E.R. 600.

This choice is dependent upon a power to award custody jointly to the parents[23], to fragment custody when desirable[24] and to make an order in favour of third parties[25]. If welfare is the general policy, then clearly the more options the better the court will be able to give effect to that policy. The test for exercising these powers has generally been the interests or welfare of the child rather than the existence of exceptional circumstances[26]. That does much to dilute the parental preference of much of its force. It should be noted in passing however that the statutory powers to award custody, care or control to a non-parent, including local authorities, are available only in exceptional circumstances[27]. In this sense the

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23 This is at best anomalous in view of the equality of parental rights created by the Guardianship Act 1973.

24 A power available under the Guardianship of Infants Act 1971 (1971 c. 3) but not under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (8 & 9 Eliz., 2 c. 48): see Wild v Wild [1969] P. 33. Cf. Bowden v Bowden (1974) 4 Family Law 92 and Baldrian v Baldrian (1974) 4 Family Law 12.

25 Pryor v Pryor [1947] P. 64; B v B and H [1962] 1 All E.R. 29. There has also been statutory power since 1958 to commit the care of a child to a local authority; see now Matrimonial Causes Act 1973 (1973 c. 18), s. 43 and F v F [1959] 3 All E.R. 180.

26 Pryor v Pryor [1947] P. 64; B v B and H [1962] 1 All E.R. 29; Wild v Wild [1969] P. 33; Jussa v Jussa [1972] 2 All E.R. 600.

27 See para. 45.52.

courts have on the whole been more faithful to the welfare doctrine than Parliament. There remains nevertheless a certain residual preference for parental rather than non-parental care.

41.73 The final presumption is preservation of the status quo. This is the least imaginative of the principles. It may be of some effect when there is no clear solution to the problem. This happened in W v W.[28] Frequently however the presumptions may be in conflict,[29] particularly where the mother of a very young child has committed adultery or otherwise lost the benefit of the presumption in favour of the innocent parent. In that event the court must either choose between the conflicting principles or, more likely, reduce their status from principles to mere considerations.[30] Either solution almost inevitably requires an analysis of the circumstances of the case generally and from the point of view of the child's welfare. This would be a reversion to the original balancing approach to avoid which was the purpose of creating presumptions and principles in the first place. It is thus no surprise to find the principles just considered being treated in other contexts as considerations: for example, matrimonial guilt and innocence,[31] maternal preferences,[32] age,[33] religion[34] or the status quo.[35]

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28 [1926] P. 111. See also Cahill v Cahill (1974) 5 Family Law 16.

29 E.g. Vigon v Vigon [1929] P. 157: Allen v Allen [1948] 2 All.E.R. 413; Willoughby v Willoughby [1951] P. 184; Laxton v Laxton [1966] 2 All E.R. 977; H v H and C [1969] 1 All E.R. 262; Roughley v Roughley (1973) 4 Family Law 91; P v McK (1973) 4 Family Law 128; G v G (1975) 6 Family Law 43.

30 E.g. Goodfellow v Goodfellow (1968) 112 Sol. Jo. 332.

31 Wakeham v Wakeham [1954] 1 All E.R. 434; Harben v Harben [1957] 1 All E.R. 379; Cooper v Cooper [1961] 3 All E.R. 539; M v M and G (1962) 106 Sol. Jo. 877.

32 Goodfellow v Goodfellow (1968) 112 Sol. Jo. 332.

33 Clarke v Clarke and Lindsay (1913) 57 Sol. Jo. 644.

34 S v S and T (1963) 107 Sol. Jo. 475.

35 Boyt v Boyt [1948] 2 All E.R. 436; P(LM) v P(GE) [1970] 3 All E.R. 659; Poel v Poel (1970) 114 Sol. Jo. 720.

41.74 It would be inaccurate to suggest that these principles and considerations created and acknowledged by the courts necessarily defeat the purpose of the proceedings by destroying or inhibiting the way in which the discretion is exercised. They may be of some limited use. But frequently they complicate a process which is difficult enough without the creation of additional artificial problems. Their existence is merely symptomatic of the judicial reluctance to exercise a real discretion in the absence of effective rules or principles as a standard against which the decision may be made. This is not to say that a set of principles or presumptions could not or should not be devised. But that is surely a matter for the legislative rather than the judicial imagination on an ad hoc basis.

CHAPTER 42

THE CONTEMPORARY APPROACH IN ENGLAND: THE GUARDIANSHIP LEGISLATION

Section 1 - Introduction

42.1 The principal obstacle impeding analysis of the way in which the lower courts in England have interpreted the statutes which conferred jurisdiction upon them is the lack of reports. If the matter is taken to the High Court on appeal, there is a greater chance of the decision being reported. But the jurisdiction of the appellate court has until recently always been regarded as narrow when the trial judge has been exercising a statutory discretion.[1] But now, "if the decision of the court below is wrong", it is the duty of the appellate court to say so and to act accordingly.[2] Whether a decision is "wrong" may depend as much upon the reasoning underlying it as upon the relevant legal framework. The way may then be open to see more effectively the lower courts in action. The difficulty nevertheless still remains.

42.2 Although the Guardianship of Minors Act 1971[3]

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1 This approach has a long history. But see Re B (an infant) [1962] 1 All E.R. 872; Re B (TA) (an infant) [1971] Ch. 270.

2 Re O (infants) [1971] Ch. 748 at p. 755 per Davies L.J.

3 1971 c.3.

applies quite generally,[4] reference is not always made to it in decisions to which it applies. That is understandable when the Act is the source of jurisdiction. It is more open to criticism however when the court fails to refer to the legal framework of its decision-making process. Reference has been made, for example, relatively infrequently to the first section of the 1925 Act[5] in the context of matrimonial and wardship proceedings. Even the House of Lords in J v C[6] was more concerned with existing precedents than with the minutiae of the legislation. The guardianship legislation not only confers jurisdiction; it also directs its exercise. The interpretations given to section 1 of the 1925 Act in particular help to consolidate the analysis of the role of welfare in the other contexts in addition to giving direction to the jurisdictions specifically created by the legislation.

Section 2 - Inter-parental disputes

(a) General

42.3 Section 5 of the Guardianship of Infants Act 1886[7] had two effects: it enabled the mother of a child

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4 Paras. 35.81 to 35.84.

5 To which reference will normally be made, despite the 1971 consolidation, since most of the relevant cases were concerned with the earlier Act.

6 [1970] A.C. 668.

7 49 & 50 Vict., c.27.

to apply for custody and it conferred jurisdiction in certain cases upon the lower courts.[8] Its significance in the context of welfare was the creation of something in the nature of an administrative discretion in consequence of the direction to have regard to the welfare of the child and to parental conduct and wishes. For Lindley L.J. the Act was "essentially a mother's Act" but that emphasised only one aspect of the provision. The 1886 Act had in practice little direct effect except in relation to the jurisdictions which it created. Its influence otherwise was not very significant. Its principal contribution in England, but not in Scotland, was in its context to eschew the traditional threshold approach. Later, in combination with section 1 of the 1925 Act, this operated to influence the general development of the law in other jurisdictions away from the threshold approach and towards the balancing approach.

42.4 In a Canadian appeal in 1892[9] the Privy Council had emphasised that a local statute[10] had unquestionably introduced a discretionary function, one guided, as Lord Hobhouse pointed out, "by views on social and

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8 In re A and B (Infants) [1897] 1 Ch. 786 at p. 790 per Lindley L.J.

9 Smart v Smart [1892] A.C. 425.

10 The Canadian statute, 18 Vict., c.126: similar to Talfourd's Act except that jurisdiction extended to a child aged twelve.

domestic matters absolutely incapable of being brought under legal rules and definitions".[11] In indicating that approach the Privy Council had clearly moved beyond the threshold approach. This was also true of the Court of Appeal in In re A and B (Infants),[12] an application for custody by a mother under section 5 of the 1886 Act. Rigby and Lindley L.JJ. unequivocally rejected the threshold approach, for, as the latter said:-

> " ... to say that s.5 is to have no operation unless the father has so conducted himself towards his children as to justify the court in depriving him of his children is to reduce the section to a nullity ... "[13]

42.5 The substituted process involved a discretionary balancing of the various considerations,[14] particularly the welfare of the child and parental conduct and wishes, but including the rights of the father as modified by this approach.[15] Rigby and Lopes L.JJ. however went beyond the literal meaning of the Act. For them welfare was to be given a certain priority.[16]

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11 Smart v Smart [1892] A.C. 425 at p. 436 per Lord Hobhouse.

12 [1897] 1 Ch. 786.

13 [1897] 1 Ch. 786 at p. 791 per Lindley L.J.

14 Including their relative weight.

15 See Rigby L.J. for a description of this modification: [1897] 1 Ch. 786 at p. 793.

16 [1897] 1 Ch. 786 at pp. 794 and 792 per Rigby L.J. and Lopes L.J. respectively.

Precisely how was unclear. The chronological order of the statutory considerations in section 5 occasioned Rigby L.J. to make welfare a threshold consideration with consequential inherent priority. As he said:-

> "The mere putting of that [welfare] in the first place may perhaps be said not materially to alter the law ... " [17]

But he added significantly that after 1886 it was impossible to say that paternal rights were the first consideration; that had become the place reserved for welfare.[18] These comments indicate that welfare was perhaps not the threshold consideration but the primary or paramount consideration. Lopes L.J. seemed equally equivocal, for in his view the court was required to look "primarily" to the welfare of the child and "then" to parental conduct and wishes.[19] It is not entirely clear therefore whether welfare was the threshold or the paramount consideration. There is no doubt however that welfare was afforded a significantly privileged position.

42.6 Finally as late as 1940 Morton J. felt impelled to deny any effect to the threshold approach. By then section 1 of the 1925 Act was in force. The child in In re B's Settlement[20] was a ward of court. It was

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17 Ibid. at p. 793 per Rigby L.J.

18 Idem.

19 Ibid. at p. 792 per Lopes L.J.

20 [1940] 1 Ch. 54.

however an inter-parental dispute to which in Morton J.'s view the 1925 Act applied.[21] Welfare, he argued, was the first and paramount consideration. That was stated by him to be so even if the father's character or habits did not render him unfit to have custody.[22] Morton J. thus conceived the process as one integrated decision not divided into the establishment of threshold requirements followed by the exercise of a discretion. The significant feature of the interpretation placed upon the guardianship legislation by the English courts is not so much their rejection of the threshold approach but that they did so under the 1886 Act. The Scottish courts were not so decisive until 1925.[23]

42.7 The consequence was the earlier recognition and application of the balancing approach. Lord Hobhouse for the Privy Council in 1892[24] and the Court of Appeal in 1897[25] emphasised the discretionary nature of the process. In In re A and B (Infants)[26] the court was largely content to follow the direction in the 1886 Act

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21 He did not categorically say so; he merely acted on that assumption.

22 [1940] 1 Ch. 54 at pp. 63 and 64 per Morton J.

23 Paras. 39.63 to 39.89.

24 Smart v Smart [1892] A.C. 425.

25 In re A and B (Infants) [1897] 1 Ch. 786.

26 [1897] 1 Ch. 786.

to have regard to the welfare of the child and the conduct and wishes of the parents. Apart from giving welfare an apparently non-statutory priority, the judges simply applied the direction at face value. The same was true, for example, of Morton J.[27] and Lord Evershed M.R.[28] in later cases, the only difference being the application of the statutory direction to afford priority to welfare. The balancing approach is capable of a fairly sophisticated form of analysis. Questions of relevance, weight and relativity are discretionary but the strength of the ultimate decision reflects the validity of the rational nexus between these questions and the decision: in other words, a process comprising intellectual discretion.

(b) The approach of Megarry J.

42.8 These issues are implicit in several of the judicial pronouncements on the general approach to custodial and related questions. But on only one occasion has the decision-making process been closely analysed. Even on that occasion[29] Megarry J. felt himself somewhat constrained by the nature of the process, for he concluded:-

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27 In re B's Settlement [1940] 1 Ch. 54.

28 Re B (an infant) [1962] 1 All E.R. 872.

29 Re F (an infant) [1969] 2 Ch. 238.

> "There is a limit to the extent to which the court can fairly be expected to expound the process which leads to a conclusion, not least in the weighing of imponderables. In matters of discretion, it may at times be impossible to do much more than ensure that the judicial mind is brought to bear, with a proper emphasis, on all that is relevant, to the exclusion of all that is irrelevant." [30]

That conclusion does not per se take the analysis much beyond the legislation. The points made by Megarry J. in reaching that conclusion add more to the debate. His argument turned on seven points:-

1. the function of the court is to "consider and weigh" all relevant circumstances;[31]

2. welfare is not the sole or exclusive consideration;[32]

3. the conduct of the parties is relevant;[33]

4. "special weight" must be given to welfare;[34]

5. welfare may be conclusive, where it clearly points in one direction "even if every other consideration points in the opposite direction";[35]

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30 Ibid. at p. 242 per Megarry J.

31 Ibid. at p. 241 per Megarry J.

32 Ibid. at p. 244 per Megarry J. applying Re L (infants) [1962] 3 All E.R. 1.

33 Ibid. at p. 241 per Megarry J. rejecting the approach of Salmon L.J. in H v H and C [1969] 1 All E.R. 262 at p. 263.

34 A point mentioned three times: ibid. at pp. 241 and 242 per Megarry J.

35 Ibid. at p. 241.

6. non-welfare considerations may determine the matter, where welfare is equally or almost equally balanced whichever parent is selected;[36]

7. the issues thus cannot be solved arithmetically, quantitatively, according to a "points system" or any other formula; "it calls for the quality of judgment which inheres in the Bench".[37]

The second of the two conclusions in point seven does not seem necessarily to follow from the preceding points.[38] Otherwise Megarry J.'s analysis is unexceptionable.

42.9 Points one to four follow automatically from the terms of section 1 of the 1925 Act. Points five and six add the creative element of interpretation introduced by Megarry J. If welfare were to be regarded as the conclusive factor, it would remain for Megarry J. technically a matter of consideration only. This view appears however to take welfare beyond treatment as the first and paramount consideration. Something more

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36 Idem.

37 Ibid. at p. 241.

38 On the contrary the qualities of the bench are the ascertainment of facts and the application to such ascertained facts of rules of law (adjudication), rather than the speculative determination of issues appropriately to the individual not the general case (administration).

than weight and priority would be involved: an overriding quality. It would be a matter of the circumstances of each case whether the welfare balance weighs so much in one direction that equilibrium cannot in any event be achieved. This would come close to treating welfare as policy external to the process, above and beyond mere considerations. But that is not so here, for Megarry J. has retained the notion of welfare as a consideration per se, however important and even perhaps conclusive it may be in any individual set of circumstances. His analysis thus remains firmly attached to the phraseology of section 1 of the 1925 Act but he has pushed that section to its apparent limits. The words "first and paramount" may mean not only "most important" but also "conclusive in appropriate circumstances".

42.10 There is, consistently with this view, no real evidence that welfare has been treated as a matter of policy under the guardianship legislation. Most significantly two decisions which came close to a policy approach were wardship cases in which the 1925 Act was considered. In In re B's Settlement[39] Morton J. gave the merest hint that the court was trying to decide what was in the best interests of the boy.[40]

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39 [1940] 1 Ch. 54.

40 Ibid. at p. 62 per Morton J.

Vaisey J. went further.[41] He referred to it in these words:-

> " ... what is to the best advantage and most conducive to the true welfare of the infants themselves ... " [42]

Such comments are exceptional in relation to the 1925 Act, but less so in relation to the wardship jurisdiction generally.

42.11 Since the balancing approach met with general application, it is no surprise that the decisions turned upon an analysis of the various considerations, priority being afforded to welfare. These considerations were as diverse as the circumstances of the cases: for example, paternal rights,[43] parental conduct,[44] parental character,[45] maternal ties,[46] religion,[47] material benefits,[48] even the possibility of matrimonial reconciliation.[49] Nothing in this approach, provided

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41 Re X's Settlement [1945] 1 All E.R. 100.

42 Ibid. at p. 101 per Vaisey J.

43 In re A and B (Infants) [1897] 1 Ch. 786.

44 Idem.

45 Re F (an Infant) [1969] 2 Ch. 238.

46 Re M (Infant) [1967] 3 All E.R. 1071; Re F (an Infant) [1969] 2 Ch. 238; Re O (Infants) [1971] Ch. 748.

47 Re M (Infants) [1967] 3 All E.R. 1071.

48 In re Benner, Infants [1951] W.N. 436.

49 Re F (an infant) [1969] 2 Ch. 238.

these matters are treated as considerations, is in any way inconsistent with section 1 of the 1925 Act. It is also within the guidelines drawn by Megarry J.

(c) Principles and considerations

42.12 One of the difficulties arising in the exercise of the matrimonial jurisdiction was the relationship between considerations in the balancing approach and principles of a similar nature in the presumptive approach.[50] The same problem arises under the guardianship legislation. It is uncertain, for example, when Lord Hobhouse indicated in Smart v Smart[51] that the welfare of a family was "powerfully affected by the opinions of relatives, friends and neighbours which no judge has a right to disregard",[52] what function he was affording to that proposition. Probably he regarded it as a consideration rather than a principle. Later in Re M (Infants)[53] at first instance Goff J. treated preservation of the status quo, retention of the established family regime and the matrimonial guilt of the mother as matters of consideration.[54] In the Court of Appeal issues of

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50 Para. 41.66.

51 [1892] A.C. 425.

52 Ibid. at p. 436 per Lord Hobhouse.

53 [1967] 3 All E.R. 1071.

54 Ibid. at p. 1073 per Willmer L.J.

religion and the maternal tie were similarly treated.[55] This would be in accord with the general trend in this context, namely to treat these as considerations rather than presumptive principles.

42.13 This may be seen by looking at the so-called maternal tie. As the modern successor to the guardianship of the mother by nature and nurture,[56] it has reappeared recently in the wardship and matrimonial contexts. The strongest account of the principle may be found in the judgment of Roxburgh J. in Re S (an Infant)[57] in 1958:-

> " ... the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule."[58]

This clearly amounts to a principle of child care acceptable in the circumstances of the case.

42.14 The Court of Appeal in Re B (an Infant)[59] reversed the order of Pennycuick J. because he had applied the "prima facie rule" described by Roxburgh J.

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55 Ibid. at p. 1074 per Willmer L.J.

56 Paras. 32·49 to 32·52.

57 [1958] 1 All E.R. 783.

58 Ibid. at pp. 786 and 787 per Roxburgh J.

59 [1962] 1 All E.R. 872.

For his part Lord Evershed M.R. did not believe that in such cases there was any such rule. But, after referring to the need to decide each case in the light of its own circumstances, the Master of the Rolls added the qualification:-

> " ... though it is, of course, true to say that as a matter of human sense a young child is better with its mother and needs a mother's care." [60]

Donovan L.J. offered a dissenting judgment in Re B (an Infant)[61] and in the course of doing so commented:-

> "Prima facie a child of this age ought to remain with his mother and strong grounds are required to justify taking him away. I agree there is no rule of law to that effect but certainly it is the natural law and one that should, if possible, prevail." [62]

Harman L.J. declined to invoke the natural law. In his view section 1 of the 1925 Act created equality of parental rights in this matter and to put the mother in the position of being "one up" would conflice with that statutory concept.[63] Despite these alleged differences there would appear to be very little real distinction between the various views, whether it is described as a prima facie rule, a matter of human sense or a matter of natural law. At best the distinctions are semantic.

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60 Ibid. at p. 873 per Lord Evershed M.R.

61 [1962] 1 All E.R. 872.

62 Ibid. at p. 875 per Donovan L.J.

63 Ibid. at p. 874 per Harman L.J.

42.15 The same line was taken as late as 1967 by Willmer L.J. in Re M (Infants)[64]. For him it was a "well-established principle founded in common sense and ordinary human experience"[65]. Since then, the position has changed. Davies L.J. in Re O (Infants)[66] in 1971 indicated that, although there was no rule, the care and supervision which a mother could give to her children was "a very important factor"[67]. To treat the maternal tie as a consideration is consistent not only with section 1 of the 1925 Act but also with Harman L.J.'s notion[68] of equality of parental rights. It also fits into the scheme for decision-making described by Megarry J.;[69] that scheme, of course, is the epitome of the modern approach.[70] Megarry J. made it clear beyond doubt that the principle was not to be treated as a presumptive rule but only as a consideration. He expressed it generally in these words:-

> "Apart from the characters of the individuals concerned, there is a further practical consideration, recognised in many

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64 [1967] 3 All E.R. 1071.

65 Ibid. at p. 1074 per Willmer L.J.

66 [1971] Ch. 748.

67 Ibid. at p. 752 per Davies L.J.

68 Re B (an Infant) [1962] 1 All E.R. 872.

69 Re F (an Infant) [1969] 2 Ch. 238.

70 See also In re C (an Infant) (1971) 1 Family Law 21.

> cases ... that as a general rule it is better for small children, and especially little girls, to be brought up by their mother; and this is a consideration of great importance."[71]

Having established that as a consideration, but not as a principle, of general application, he concluded by giving it[72] effect in the circumstances of Re F (an Infant) :-

> "But I think that her failings as a wife have not made her so bad a mother as to displace the greater need that young children have for the mother rather than the father, and her ability to satisfy that need."[73]

It is at times a fine distinction between general principles, considerations of general application and considerations of more specific application. But decisions may depend upon such nuances. Megarry J. would appear to have succeeded where others have failed in invoking precisely the spirit as well as the letter of section 1 of the 1925 Act.

Section 3 - Parent-third party disputes

(a) General

42.16 The judicial approach to disputes involving a third party has evolved less clearly and more hesitatingly than the approach in other contexts.

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71 [1969] 2 Ch. 238 at p. 243 per Megarry J.

72 [1969] 2 Ch. 238.

73 Ibid. at p. 244 per Megarry J.

More often than not disputes involving a third party related to illegitimate children. That certainly had technical implications[74] but once the matter was properly before the court, the function of welfare depended less on the status of the child and more on the relationship of the parties. Section 1 of the 1925 Act had the effect in an inter-parental dispute of denying to one parent any preference over the other. This would not be so where a third party was involved. Arguably, that would give greater scope for priority to be afforded to the welfare of the child. But that did not happen. It was probably not until 1970 that the welfare doctrine became widely recognised and the older approach discarded.

42.17 This may be contrasted with the very early acknowledgement of the welfare approach in the case of orphans.[75] In that situation there was no parent who could claim a natural preference. The only real limitation on that approach was the posthumous control over a child in terms of the paternal wishes on the child's religious upbringing. But even that had considerably diminished in significance before the enactment of the 1925 Act, for in the Irish case of

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74 E.g. the power of a father to apply for custody.

75 Paras.41.12 to 41.18. See generally Ward v Laverty [1925] A.C. 101; Re Collins (An Infant) [1950] Ch. 498.

Ward v Laverty[76] in 1924 the House of Lords indicated that the wishes of the father would prevail only if they were "not displaced by considerations relating to the welfare of the children themselves".[77] Although the 1886 Act did not apply to that situation, Lord Cave L.C. felt that section 5 indicated "the modern feeling in these matters" by laying greater stress upon the welfare and happiness of the children.[78] These comments indicate the rejection of the threshold approach. The involvement of one parent however was sufficient, notwithstanding the 1925 Act, to justify the courts for some time at least in retaining a limited form of the threshold approach.

(b) The decisions in Thain and Carroll

42.18 The dispute in Re Thain: Thain v Taylor[79] was between the child's father and her maternal aunt. The child, exceptionally in this context, was legitimate. The originating summons was taken out on 11 August 1925, heard on 3 February 1926 and decided by Eve J. on 3 March 1926. There was no suggestion that the Act of 1925, which came into effect on 1 October 1925,[80]

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76 [1925] A.C. 101.

77 Ibid. at p. 108 per Lord Cave L.C.

78 Idem.

79 [1926] 1 Ch. 676.

80 1925 Act, s. 11(3).

did not apply.[81] Eve J. made no mention of it in his judgment. The Court of Appeal on the other hand referred to the 1925 Act but failed to analyse it, for section 1 "merely enacts the rule which had up to that time been acted upon in the Chancery Division".[82] Thus, unlike the Court of Session, the Court of Appeal has on the whole tended to avoid the complex implications of the Act.

42.19 The mother of the child in this case died when the child was very young. Since then the girl had lived with her maternal aunt and her husband at the request of her father. The father married again and was thus able to provide a family unit into which his daughter would be welcomed. The aunt declined to return the child to her father. The legal difficulty arose because neither party was in any way parentally unfit and each home was entirely acceptable for the child.[83] In these circumstances Eve J. concluded, relying upon In re O'Hara,[84] that it was well-settled practice that "the claim of the father must prevail, unless the court is judicially satisfied that the welfare of his child requires that the parental right should be

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81 Although he did refer to welfare as the paramount consideration.

82 [1926] 1 Ch. 676 at p. 689 per Lord Hanworth M.R.

83 Ibid. at p. 682 per Eve J.

84 [1900] 2 I.R. 232.

superseded".[85] The father had clearly in the circumstances neither surrendered his rights nor abandoned the child.[86] There was no ground to supersede his parental right. His claim thus prevailed.

42.20 That aspect of Eve J.'s judgment represents the traditional threshold approach. The existence of a legal right liable to be displaced on the grounds of the child's welfare followed, if the ground is established, by a decision, no doubt automatic in practice, whether to deprive the father of his right. So much is clear. But in the last paragraph of his judgment, specifically approved by the House of Lords in J v C,[87] he added:-

> " ... inasmuch as the rule laid down ... does not state that the welfare of the infant is to be the sole consideration but the paramount consideration, it necessarily contemplates the existence of other conditions, and amongst these the wishes of an unimpeachable parent undoubtedly stand first."[88]

This comment could have amounted to a guideline on the exercise of the discretion forming the second part of the traditional threshold approach. There was no suggestion however in Eve J.'s judgment that this was so. It remains unclear therefore whether Eve J. regarded the

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85 [1926] 1 Ch. 676 at p. 682 per Eve J.

86 With the further consequence that the Custody of Children Act 1891 did not apply.

87 [1970] A.C. 668 at pp. 698, 711 and 723 per Lords Guest, MacDermott and Upjohn respectively.

88 [1926] 1 Ch. 676 at p. 684 per Eve J.

position of the father as one of parental right liable to forfeiture or as the most important consideration other than welfare. This may have been the ambiguity to which Lord MacDermott referred in J v C[89] as the misleading aspect of the headnote.[90] The reporter's headnote[91] appears however to reflect faithfully what Eve J. said. The criticism of Lord MacDermott should have been directed towards the judge rather than the reporter. Eve J.'s approach overall, encompassing a threshold requirement antecedent to the exercise of a discretion, was thus traditional rather than contemporary.

42.21 The Court of Appeal affirmed Eve J.'s decision. Their reasons did not include any reference to forfeiture of a parental right. This accords with the view of the case taken by the House of Lords in J v C.[92] There was a clear consensus in the Court of Appeal that, although the decision was discretionary in nature, the first and paramount consideration was the welfare of the child,[93] either in terms of the existing equitable principles or

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89 [1970] A.C. 668.

90 Ibid. at p. 711 per Lord MacDermott.

91 [1926] 1 Ch. 676 at p. 677.

92 [1970] A.C. 668 at pp. 698, 711 and 723 and 724 per Lords Guest, MacDermott and Upjohn respectively.

93 [1926] 1 Ch. 676 at pp. 689, 690 and 691 per Lord Hanworth M.R., Warrington and Sargant L.JJ. respectively.

under section 1 of the 1925 Act. But Warrington L.J., after referring to that point, added:-

> " ... but it is only one amongst several other considerations, the most important of which, it seems to me, is that the child should have an opportunity of winning the affection of its parent, and be brought for that purpose into intimate relation with the parent." [94]

The first proposition is correct: welfare is not the exclusive consideration. The Lord Justice however gave to the parental tie a clear priority among all the "other" considerations. But he did not explain the relationship between the general priority to be afforded to welfare and the secondary priority, if it may be so expressed, to be afforded to the parental tie. Eve J., who had given secondary priority to the "wishes of an unimpeachable parent", would probably have argued that in the circumstances welfare, being equally balanced between the parties, had thereby become unimportant, if not irrelevant. This would have left the way open for the parental tie in the case of the Court of Appeal and the wishes of an unimpeachable parent in his own case to have attracted general rather than secondary priority.

42.22 The Court of Appeal did not approach it in that way. Warrington L.J. concluded that "it was for the welfare of the child that he [the father] should take over the duties and enjoy the active privilege of a

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94 Ibid. at p. 689 per Warrington L.J.

father".[95] Or, as Lord Hanworth M.R. said, "the true interests of the child are that she should be guided to feelings of love and affection towards her father ... ".[96] The parental preference was thus justified in terms of the child's welfare. Why then did the Court of Appeal refer to the parental tie as the consideration of "secondary" priority when it could have been handled in terms of welfare as the first and paramount consideration? The answer may be confusion between Eve J.'s reference to the "wishes of an unimpeachable parent" and to the desirability of the parental tie.[97] They are clearly not the same. Perhaps parental wishes were too closely associated with parental rights for the Court of Appeal and for that reason the less subjective doctrine of the parental tie seemed more consonant with the 1925 Act. This is mere speculation. It is however beyond speculation that the Court of Appeal adopted an approach different from that of Eve J. The latter pursued the traditional threshold approach; the former a more discretionary approach, concerned to achieve a balance of the various considerations, giving priority to welfare but guided by the presumption in favour of parental care.

42.23 Although Eve J.'s approach in Re Thain: Thain v

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95 [1926] 1 Ch. 676 at pp. 690 and 691 per Warrington L.J.

96 Ibid. at p. 689 per Lord Hanworth M.R.

97 Para. 42.20.

Taylor[98] was controversial, it was ultimately approved by the House of Lords.[99] The decision of the Court of Appeal in In re Carroll,[1] the first of the series concerning illegitimate children, was disapproved by the House of Lords in the same case.[2] The misconceptions created by the court in In re Carroll[3] held back the development of the law for nearly thirty years. The case was admittedly complex. It concerned an illegitimate child placed for adoption with the consent of the mother. When she ascertained that the child was likely to be brought up in a religion different from hers, she asked for the return of her child. This request having been refused, habeas corpus proceedings were brought. In the event the Court of Appeal decided that the mother's wishes should prevail.

42.24 Scrutton and Slesser L.JJ. reached that decision by applying rules approximating to the traditional threshold approach. It turned largely on the view that the 1925 Act applied only to inter-parental disputes.[4]

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98 [1926] 1 Ch. 676.

99 J v C [1970] A.C. 668 at pp. 698, 711 and 724 per Lords Guest, MacDermott and Upjohn.

1 [1931] 1 K.B. 317.

2 J v C [1970] A.C. 668 at pp. 699, 713 and 725 per Lords Guest, MacDermott and Upjohn.

3 [1931] 1 K.B. 317.

4 Ibid. at p. 355 per Slesser L.J. See also the implication to that effect: ibid. at p. 337 per Scrutton L.J.

The law applicable was thus the rules of equity in force immediately prior to the enactment of the 1925 Act. Slesser L.J. gave effect to the deprivation approach to the legal right of the mother not only to have custody of her child[5] but also to determine her child's religious education.[6] For him questions of custody and religion could not be separated.[7] The consequence of giving effect to the threshold approach was to place upon the non-parental claimant the burden of showing that "it would be detrimental to the interests of the child that it should be delivered to the custody of the mother or any person in whose custody she desires it to be".[8] The views of Scrutton L.J. were, if anything, stronger in relation to the parental right to control religion:-

> " ... unless the mother is of so bad a character that her wishes as to religion and education may be disregarded ... in my view the mother has a legal right to require that the child shall be brought up in her religion in which the child has been baptized."[9]

42.25 These views are a simple reflection of the law in England in the late nineteenth century. Few reasons

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5 Ibid. at p. 358.

6 Ibid. at p. 357.

7 Ibid. at pp. 354 and 357.

8 Ibid. at p. 358 per Slesser L.J.

9 Ibid. at pp. 335 and 336 per Scrutton L.J. He found support in s. 4 of the Custody of Children Act 1891.

were articulated why the 1925 Act did not apply. Both Scrutton and Slesser L.JJ. appeared to take the view that the Acts of 1886 and 1925 were intended to bring about and achieved only an equality of conditions between the parents.[10] The beneficiary of such equality could in certain circumstances be the child but that would have been an incidental consequence for these Lord Justices. Slesser L.J. paid considerable attention to the preamble of the 1925 Act[11] but the judgment of Scrutton L.J. is largely devoid of reasoning on this point. What is important is not whether these two Lord Justices were correct in their views but their failure to consider the Act in any detail. Their judgments revolved around the reported cases rather than the Acts of Parliament.

42.26 It is interesting that, although Scrutton and Slesser L.JJ. comprised the majority in the Court of Appeal, they were in the minority overall. Charles J. in chambers originally refused to order that the writ of habeas corpus should issue to the third party in control of the child. The Divisional Court, comprising Lord Hewart C.J., Avory and Wright JJ., dismissed the appeal against that decision. The Court of Appeal, Greer L.J. dissenting, allowed the appeal against that decision of

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10 Ibid. at pp. 335 and 355 per Scrutton and Slesser L.JJ. respectively.

11 Ibid. at p. 362.

the Divisional Court. The Chief Justice was clearly influenced by the "change in attitude" and the "development of thought"[12] which had occurred between the House of Lords' decision in Barnardo v McHugh[13] and the enactment of section 1 of the 1925 Act. He was uncertain whether the movement was real or apparent but in any event in 1926 the position was clear: parental wishes would not be allowed "to supersede the real interest of the child".[14] This view is clearly in conflict with the threshold approach of Scrutton and Slesser L.JJ. Whatever may have been the position before 1925, the Chief Justice, it is suggested, correctly described the approach after 1925.

42.27 Greer L.J., in his dissenting judgment in the Court of Appeal, did not expand much upon these general comments of the Chief Justice. He was particularly concerned with the relationship between the proceedings before him and the imminent adoption proceedings:-

> In my judgment the advantages to the welfare of the child are preponderantly in favour of leaving her where she is, until it is ascertained whether an adoption order will be made." [15]

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12 Ibid. at p. 324 per Lord Hewart C.J.

13 [1891] A.C. 388.

14 [1931] K.B. 317 at p. 324 per Lord Hewart C.J.

15 Ibid. at p. 346 per Greer L.J.

That comment, and indeed the tenor of the whole judgment, suggest a balancing approach rather than the threshold approach contemplated by Scrutton and Slesser L.JJ. The facts of the case were rather special. The relationship between adoption and custody was in 1930 a novelty for the courts. Too much therefore should not be made of Greer L.J.'s judgment. Overall however the judgment of the Court of Appeal clearly postulated the threshold approach. This was the unavoidable consequence of ignoring the 1925 Act.

42.28 If the Court of Appeal in In re Carroll[16] were correct in restricting the 1925 Act to disputes between parents, then the same court in Re Thain: Thain v Taylor[17] had erred in applying it to the dispute in that case between a child's father and her aunt, unless the cases could be distinguished for the reason that in one the child was illegitimate and in the other legitimate.[18] At the same time it seems that in the earlier case the court took the view that the Act simply enacted the existing law[19] while Slesser L.J. in the later case indicated that as between parents at least the 1925 Act

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16 [1931] 1 K.B. 317.

17 [1926] 1 Ch. 676.

18 A possible but unstated argument: supported however by the lack of any reference to Re Thain: Thain v Taylor [1926] 1 Ch. 676 in In re Carroll [1931] 1 K.B. 317.

19 Re Thain: Thain v Taylor [1926] 1 Ch. 676 at p. 689 per Lord Hanworth M.R.

had changed the legal approach.[20] By 1930 the Court of Appeal had done nothing to eradicate this confusion. All that could be said was that there was greater likelihood than earlier of the discretionary or balancing approach being used to settle parental disputes[21] concerning legitimate children; illegitimate children on the other hand would be dealt with under the traditional threshold approach. The difference was simply that an illegitimate child had only one parent, unless the putative father were to be treated as a parent for this purpose. That could not happen until 1959,[22] unless the wardship jurisdiction were invoked.[23] The system thus lacked rationality and sense.

(c) The evolution of the balancing approach

42.29 These anomalies appear by comparing two decisions of the Court of Appeal in the wardship jurisdiction in the 1950s and two later decisions of the same court under the Guardianship of Infants Acts. They all concerned illegitimate children. In Re A (an Infant)[24] the

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20 In re Carroll [1931] 1 K.B. 317 at p. 355 per Slesser L.J.

21 But not parental-third party disputes or non-parental disputes.

22 Legitimacy Act 1959 (7 & 8 Eliz. 2, c.73).

23 E.g. the two cases discussed in paras. 41.35 to 41.36.

24 [1955] 2 All E.R. 202.

putative father applied under section 9 of the 1949 Act[25] for the child to be made a ward of the court and for custody. The child had been placed for adoption by the mother. Harman J. gave care and control of the child to the father's brother and sister-in-law. The Court of Appeal, affirming his decision, rejected the argument that the wishes of the mother were entitled to prevail merely because she was in the absence of countervailing welfare considerations entitled to choose who should bring up the child.[26] The traditional threshold approach was thus rejected.

42.30 The approach of the Court of Appeal however remained equivocal. On the one hand, the implication was that the mother's wishes would prevail but only if she were to care for her child herself. That would amount to the modified threshold approach or a more rigorous version of the presumptive approach: that is, by substituting a general principle for a legal right. On the other hand, the court suggested that, welfare being the paramount but not the exclusive consideration,[27]

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25 Law Reform (Miscellaneous Provisions) Act 1949 (12, 13 & 14 Geo. 6, c.100).

26 [1955] 2 All E.R. 202 at p. 204 per Sir Raymond Evershed M.R.

27 Ibid. at p. 204 per Sir Raymond Evershed M.R. relying upon general principle and s. 1 of the 1925 Act.

all the alternatives should be considered and a decision made on what would be best for the child.[28] In that event the wishes of the mother would be neither disregarded nor given priority. The latter approach is what would be expected in the wardship jurisdiction. The possibility of the more restricted approach was impliedly canvassed but the court probably gave effect to the balancing approach.[29]

42.31 The issue in Re G (an Infant)[30] was much the same but in that case the putative father was coloured and the mother white. That aspect did not form any part of the judicial reasoning, although the father himself argued that his daughter should know him as a coloured person so as to reduce any possibility of colour prejudice.[31] Wynn-Parry J. had ordered the child to be handed over to her mother apparently for two reasons: first, being illegitimate, the child should prima facie

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28 Ibid. at p. 205.

29 Barnardo v McHugh [1891] A.C. 388 and In re Carroll [1931] 1 K.B. 317 were referred to by counsel in Re A (an Infant) [1955] 2 All E.R. 202 but were distinguished because in these two cases the father was not a party to the dispute. The better view may thus be that the 1955 case was treated as a dispute between parents rather than one between a parent and a third party.

30 [1956] 2 All E.R. 876.

31 Ibid. at p. 879.

be with her mother; second, "in order to give the child the best chance of obtaining the benefits of her mother's upbringing and affection, there must be a break between the mother and the father ... ".[32] If this was not a return to the traditional threshold approach, it certainly was an example of the modified threshold approach.

42.32 The father argued in the Court of Appeal in favour of contact with both parents rather than simply with the mother, because of the "natural affection" felt reciprocally between parent and child and implanted by nature "as a result of the community of blood".[33] Lord Evershed M.R. made two points in rejecting that argument. He emphasised that in the wardship jurisdiction the court would consider the interests of the child "as the paramount concern".[34] That being so, it might be in a child's interests to have a relationship with his putative father. Equally it might not. The Master of the Rolls concluded with this second point:-

> " ... the view which the courts generally take in regard to the interests of a child of lawful wedlock, viz., that is in the child's interests to know both parents, is not at any rate by any means necessarily applicable in the case of an illegitimate

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32 Ibid. at p. 878.

33 Ibid. at p. 879.

34 Idem. per Lord Evershed M.R.

> child. For I think that that general view proceeds on the premise that the parents mentioned are the child's lawful parents." [35]

That clearly draws a distinction between legitimate and illegitimate children. Lord Evershed M.R. thus treated the issue as one between the parent and a third party. The parental preference operated in favour of the mother in the case of an illegitimate child and the putative father would have to discharge a significant onus to overturn that presumption. The Court of Appeal effectively endorsed the views of Wynn-Parry J., thereby supporting the modified threshold approach. In any event, although the decision was taken in wardship proceedings, there was no suggestion at any stage of the process that the court had adopted an open-ended balancing approach.

42.33 The Court of Appeal in neither of these two wardship cases attempted to analyse the meaning or the application of the 1925 Act. At best only passing reference was made to welfare as the paramount consideration and in each case it was used to justify the presumptive principle of child care rather than to guide the individual decision. A different attitude became apparent in 1965[36] and was confirmed in 1970.[37] In each

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35 Ibid. at pp. 879 and 880 per Lord Evershed M.R.

36 In re H (Infants) (1965) 63 L.G.R. 396.

37 Re C(A) (an Infant) C v C [1970] 1 All E.R. 309.

of these two cases the issue arose specifically under the Guardianship of Infants Acts. In the earlier case the dispute was between the father and the mother; in the later case between the paternal aunt and the father. The children were illegitimate.

42.34 In In re H (Infants)[38] in 1965 the father applied to the magistrates for custody of his two illegitimate daughters. Their mother had evinced an intention to have them back. The magistrates considered that the girls' welfare was best served by their remaining with their father. Pennycuick J. affirmed that order. In the Court of Appeal the mother argued that as the children were illegitimate she had a legal claim superior to that of the natural father. Her claim should therefore prevail. That was the argument which had met with some sympathy but did not win approval in the wardship cases of Re A (an Infant)[39] and Re G (an Infant)[40]. It was however firmly rejected by the Court of Appeal in In re H (Infants)[41]. The reason was simply the different jurisdiction.

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38 (1965) 63 L.G.R. 396.

39 [1955] 2 All E.R. 202.

40 [1956] 2 All E.R. 876.

41 (1965) 63 L.G.R. 396.

42.35 A putative father could intervene in wardship proceedings simply by invoking the jurisdiction.[42] Such a person however could not obtain any benefit from the statutory jurisdiction until the power to apply for custody was extended in 1959.[43] According to the Court of Appeal in In re H (Infants)[44] the enactment of section 3 of the Legitimacy Act 1959 automatically extended the application of section 5 of the 1886 Act[45] and of section 1 of the 1925 Act[46] to illegitimate children. It followed therefore that:-

> "the Court is no longer to regard the mother of the illegitimate child as having a claim superior to that of the natural father in regard to the custody or upbringing of the child; or vice versa. The first and paramount consideration is the welfare of the child. The justices were right in not giving any superior weight to the mother's claim in point of law." [47]

It is consistent with these comments of Lord Denning M.R. that Harman L.J. advocated the balancing approach. But even in that case the Court of Appeal did not reject the presumptive approach. The court merely disapproved the presumption in favour of the mother of an illegitimate

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42 He was in no different a position in that sense from any other person.

43 Legitimacy Act 1959, s. 3(1).

44 (1965) 63 L.G.R. 396.

45 This was done specifically by s. 3(1)(a) of the 1959 Act.

46 By implication only.

47 (1965) 63 L.G.R. 396 at p. 398 per Lord Denning M.R.

child. The doctrine of the status quo was regarded as appropriate in the circumstances of the case. The children had always been under the control and care of their father. The question posed by Lord Denning M.R. was rather what would happen if the children were removed from their father than where it would be best for them to be. The rejection of the maternal preference coupled with the acknowledgment of the doctrine of the status quo indicates that the presumption in favour of the status quo may well be intrinsically different from the principle of maternal preference.[48]

42.36 The change from a threshold to a balancing approach came about in consequence of the technical reforms of 1959. It was also given effect in 1970 in a dispute between a putative father and his sister for custody of the illegitimate child.[49] There would have been even less justification under the older authorities for applying the 1925 Act to such a dispute for by no stretch of the imagination could it be said to be inter-parental.[50] The "community of blood" claim by the natural father met with no sympathy in Re G (an Infant)[51] but there the dispute had been between the mother and father of an illegitimate child. In that case it was disapproved because of the preferential position of the mother of an illegitimate child. In Re C (an Infant) C v C[52], it was disapproved because of the preferential position afforded to the welfare of the child in section 1 of the

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48 By arguing that the status quo doctrine is not really a presumption or principle of child care at all. It is simply a recognition of reality.

49 Re C(A)(an Infant) C v C [1970] 1 All E.R. 309.

50 That argument would be less strong in relation to a dispute between the mother and putative father of an illegitimate child.

51 [1956] 2 All E.R. 876.

52 [1970] 1 All E.R. 309.

1925 Act read in conjunction with section 3 of the 1959 Act.

42.37 The Court of Appeal in Re C(A)(an Infant) C v C[53] came closer to a simple welfare approach than in In re H(Infants)[54]. Each factor was considered in relation to its relative weight in the circumstances of the case rather than in terms of its alleged doctrinal preference. The mother of an illegitimate child had lost interest in him soon after his birth. His father accepted responsibility and committed him to the care of the child's aunt and grandmother. After the relationship between the father and his mother broke down, the child was removed by the father and the child's aunt commenced proceedings under the Guardianship of Infants Act to regain control. Plowman J. awarded custody to the father. The argument put to the Court of Appeal was that Plowman J. had placed too much emphasis on the position of the father of an illegitimate child. Harman L.J. in the Court of Appeal impliedly indicated that emphasis was a matter of discretion for the trial judge in the circumstances of the case. It was his function to "weigh" the arguments, to look at "the whole background" and to consider "where had the infant better be - and that is really the only question that the court has to ask."[55] That does not mean that welfare was the sole or exclusive consideration. Harman L.J. was saying in effect that the duty of the court was to decide the issue from the child's point of view. In so doing he came close to formulating a policy approach.

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53 Idem.

54 (1965) 63 L.G.R. 396.

55 [1970] 1 All E.R. 309 at p. 311 per Harman L.J.

42.38 Two significant consequences followed from that basic proposition. Both Harman and Edmund Davies L.JJ. firmly rejected any notion that there were principles of child care which could presumptively guide the court in the discharge of that duty.[56] Any such questions were not principles but "merely considerations which may weigh with the judge where the scales are nicely balanced."[57] The proper approach was thus to balance the relevant considerations, a matter of the exercise of a discretion, without affording any weight or priority in principle to one matter as against another. When this was applied to the facts of Re C(A)(an Infant) C v C,[58] there was no reason to disturb Plowman J.'s decision. He had not given to the position of the father any priority in principle. It had been accorded the weight that the circumstances of the case demanded. The father of an illegitimate child, as Harman L.J. said:-

> "... is a person who is not to be ignored, and his views, when he is a person who in many respects is a perfectly respectable member of society, can be given some weight. They will not be given much weight against the mother; but here there is no mother; there are only the aunt and the grandmother."[59]

42.39 It could be suggested that the first proposition in the last sentence of that extract from Harman L.J.'s opinion amounts to giving the mother of an illegitimate child a certain natural priority. That is probably not what Harman L.J. meant.

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56 Ibid. at pp. 311 and 313 per Harman and Edmund Davies L.JJ. respectively.

57 Ibid. at p. 311 per Harman L.J.

58 [1970] 1 All E.R. 309.

59 Ibid. at p. 311 per Harman L.J.

Indeed the context of his remarks indicates a balancing rather than a presumptive approach. Nor was he intending to give to the mother any legal priority. His reference, it is suggested, was simply to questions of relative weight, not questions of priority. If this is so, it emphasises a distinction which is crucial to this analysis. Relative weight and balance are identifiable and meaningful only in relation to a specific set of circumstances; they are the essence of the exercise of a rational discretion. Rules of law, general principles and presumptive guidelines are by implication of general validity only. Unless they are liable to be displaced or rebutted, they would be largely in conflict with the duty to decide with reference to the individual circumstances of the case.[60] It has been observed tritely that in these matters there is no rule or that the only rule is that there is no rule. In a sense that is true. But to take that comment too literally would be to deny any effect to section 1 of the 1925 Act. That provision may not be a rule in the sense that rules prescribe standards of behaviour applied by the courts.[61] It is however vital for it sets the context and identifies how a decision should be reached. The distinction between a "consideration" and a "principle" is thus fundamental. These have been some of the conceptual difficulties facing the courts once the adjudicative approach has begun to be abandoned and it has only been in the last decade or so that the difficulties and ambiguities created by the Court of Appeal in Re Thain, Thain v Taylor[62] and In re Carroll[63] have been

60 It is in essence the dilemma of the general and the special approaches.

61 If it is a standard, it is one imposed upon the court itself not upon the public at large.

62 [1926] 1 Ch. 676.

63 [1931] 1 K.B. 317.

clarified.

42.40 It would be simplistic to suggest that clarification of these issues was in any way instantaneous. The problems were solved slowly over a number of years in response to a number of differing pressures. The development of the wardship and matrimonial jurisdictions after 1925 no doubt had an influence, albeit unstated, on the judicial attitudes to the statutory jurisdictions created by the guardianship legislation. The mere efflux of time and the movement in social values and attitudes would also have induced judicial change. None of this could have happened if the legal régime had not been inherently discretionary. These influences are rather speculative in nature.[64] They are in a sense beyond the law. There was however one specifically legal context in which the court was forced to play a creative role, itself a reflection of these speculative influences. This occurred not long before the climax of development just discussed in relation to section 1 of the 1925 Act and illegitimate children.

42.41 By the 1960s the law of adoption had become much more sophisticated than in 1930 when In re Carroll[65] had been decided. That case, it will be recalled, was an application by the mother of an illegitimate child for habeas corpus in anticipation of an application for adoption by the persons then caring for the child. In the Court of Appeal only Greer L.J. paid any attention to the prospective adoption process.[66] But

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64 At least in the hands of a lawyer.

65 [1931] 1 K.B. 317.

66 Para. 42.27.

for Wilberforce J. in 1961 the relationship between applications for custody and adoption became critical.[67] In a sense this was just a matter of procedure but, as Wilberforce J. implied, the solution of the procedural problems could affect the substance of the decisions.[68] There have been different views about the best way to solve this procedural problem.[69] Nevertheless in effect Wilberforce J. went on to deal with the various substantive issues altogether.[70]

42.42 The decision of Wilberforce J.[71] adjourning the adoption proceedings pending determination of the putative father's claim for custody was somewhat hesitatingly approved by the Court of Appeal.[72] But in the Court of Appeal the opportunity was taken to examine the development of aspects of the law relating to custody since 1925. The precise condition of the putative father under the 1925 Act became relevant only after his right to apply for custody had been conferred in 1959.[73] The problem was whether that had placed the putative father in precisely the same position as the father of a legitimate child. In an earlier unreported judgment[74] Pennycuick J.

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67 In re Adoption Application 41/61 [1962] 2 All E.R. 833.

68 Ibid. at pp. 835 and 836 per Wilberforce J.

69 E.g. Diplock L.J. in the Court of Appeal in In re Adoption Application 41/61 [1963] 1 Ch. 315 at pp. 335 and 336; Lord Denning M.R. and Harman L.J. in In re "O" (an Infant) [1965] 1 Ch. 23 at pp. 27 and 31 respectively.

70 In re Adoption Application 41/61 (No. 2) [1964] 1 Ch. 48.

71 In re Adoption Application 41/61 [1962] 2 All E.R. 833.

72 In re Adoption Application 41/61 [1963] 1 Ch. 315.

73 Legitimacy Act 1959, s.3(1).

74 In re C B (an Infant) (1961) 27 July: see [1963] 1 Ch. 315 at pp. 321, 326 and 327.

concluded that that had been the effect of the 1959 Act. Moreoever in his view the decisions of the Court of Appeal in Re Thain: Thain v Taylor[75] and in In re Carroll[76] indicated that notwithstanding the 1925 Act the parents or parent had "retained their pre-eminent position."[77] The authorities thus indicated for Pennycuick J. that the traditional or at least the modified threshold approach had not been superseded by the balancing approach.

42.43 Although this interpretation of Re Thain: Thain v Taylor[78] and in In re Carroll[79] was implicably rejected by Danckwerts L.J. in the Court of Appeal in 1962[80], the Lord Justice, it is suggested, did not really meet Pennycuick J.'s argument. He avoided it by treating In re Carroll[81] as a case of a religious struggle which remained relevant as the vestige of the father's legal right[82] and by regarding the father's wishes in Re Thain: Thain v Taylor[83] as one of the factors affecting the welfare of the child.[84] Neither of these points is wholly justified. Danckwerts L.J. added further to his argument that even before 1886 the Court of Chancery had created "the principle that the welfare of

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75 [1926] 1 Ch. 676.
76 [1931] 1 K.B. 317.
77 See [1963] 1 Ch. 315 at p. 327.
78 [1926] 1 Ch. 676.
79 [1931] 1 K.B. 317.
80 [1963] 1 Ch. 315 at p. 328 per Danckwerts L.J.
81 [1931] 1 K.B. 317.
82 [1963] 1 Ch. 315 at pp. 327 and 328.
83 [1926] 1 Ch. 676.
84 [1963] 1 Ch. 315 at pp. 328 and 329.

the child was the first and paramount consideration."[85] That was so. It may indeed in appropriate circumstances be traced back to the middle ages. But that doctrine applied in guardianship cases[86] in the strict sense and in the corollary of such cases, namely the wardship jurisdiction.[87] These jurisdictions were inherently discretionary, for in the one[88] there was no legal right to form the threshold while in the other[89] the court regarded itself as the guardian of the child. Even in the wardship jurisdiction there were instances, as Danckwerts L.J. himself mentioned,[90] of the court depriving the father of his right as the condition precedent to determining the child's welfare. Danckwerts L.J. thus assumed that welfare had played one unchanging role thoughout the development of the law, at least in the hands of the Court of Chancery.[91]

42.44 It was against this background that Danckwerts L.J. indicated[92] that Pennycuick J. had misconstrued the Court of Appeal in Re Thain: Thain v Taylor[93] and In re Carroll.[94] What had happened, it has been suggested,[95] is that in these cases the Court of Appeal had misconstrued section 1 of the 1925 Act. In the event, Danckwerts L.J. concluded the debate by describing the contemporary law in these words:-

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85 Ibid. at p. 328 per Danckwerts L.J.

86 Para. 37.60.

87 Para. 41.41.

88 Guardianship.

89 Wardship.

90 [1963] 1 Ch. 315 at p. 328.

91 It has been the purpose of this whole study to examine the validity of that assumption.

92 [1963] 1 Ch. 315 at pp. 327 and 328.

93 [1926] 1 Ch. 676.

94 [1931] 1 K.B. 317.

95 Para. 42.28.

> "... there can only be one "first and paramount consideration",and other considerations must be subordinate. The mere desire of a parent to have his child must be subordinate to the consideration of the welfare of the child, and can be effective only if it coincides with the welfare of the child. Consequently, it cannot be correct to talk of the pre-eminent position of parents, or their exclusive right to the custody of their children, when the future welfare of those children is being considered by the court." [96]

That conclusion could scarcely be denied but it was effectively brought about by section 1 of the 1925 Act both in a general way and also quite specifically in the context of the statutory jurisdiction of the English courts.[97] Danckwerts L.J. did not by these words describe the balancing approach. What he did however was clearly to reject the traditional and modified threshold approaches.

42.45 These comments were made in the context of an adoption application. When Wilberforce J., his procedural decision having survived the Court of Appeal, proceeded to deal with the merits of the case, he was forced to consider the law relating not only to adoption but also to custody. In 1962 the role of welfare in adoption proceedings was defined by section 7(1)(b) of the Adoption Act 1958.[98]

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96 [1963] 1 Ch. 315 at p. 329 per Danckwerts L.J. approved in J v C [1970] A.C. 668.

97 I.e. the 1886 Act, s.5 as extended by the Administration of Justice Act 1928 (18 & 19 Geo. 5, c.26), s. 16 and by the Legitimacy Act 1959, s.3(1), and subject in each case to the direction in s.1 of the 1925 Act.

98 7 & 8 Eliz., 2, c.5.

Wilberforce J. was encouraged by the absence[99] of any matters prescribed by the adoption legislation to be taken into account. He consequently took a wide view of the substance of welfare including "the natural ties of blood and family relationship."[1] What escaped his attention however was that welfare played a role in the adoption context quite different from its role in the custody context.[2] Nevertheless, having satisfied himself that in each context the ties of blood and natural affection between a father and his illegitimate child were relevant,[3] he proceeded to deal with the whole matter on a "balance of considerations"[4], the implication clearly being that the welfare of the child was the guiding consideration for each decision. This would be true of the custodial question but not of the adoption application. To solve the dilemma of different statutory approaches, Wilberforce J. in effect selected the most flexible approach and applied it in each context, rather in the fashion of the lowest common denominator.

42.46 Was there any conflict between Wilberforce J. and the Court of Appeal on the position of the putative father? Probably not. Danckwerts L.J. had been at pains to point out that the position of a parent, including that of a putative

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99 With the one exception stated in s.7(2) of the Adoption Act 1958.

1 In re Adoption Application 41/61(No. 2) [1964] 1 Ch.48 at p.53.

2 In the adoption context it formed a requirement, being a part of the threshold approach. In the custody context it formed a consideration, a part but the most important part, of the balancing approach.

3 [1964] 1 Ch.48 at p. 53(adoption) and at p. 54 (custody).

4 Ibid. at p. 57 per Wilberforce J.

father, was not "pre-eminent".[5] Wilberforce J. had indicated that ties of blood and natural affection were simply relevant considerations.[6] The impact of these views was made clear eighteen months later when the matter again came before the Court of Appeal.[7] The views of Danckwerts L.J. in the earlier case were confirmed,[8] although Harman L.J. apparently had considerably more sympathy for Pennycuick J.'s views than Danckwerts L.J. had evinced.[9] The history of the evolution of the law was not traversed as Danckwerts L.J. had attempted to do; section 3 of the 1959 Act was given its literal meaning;[10] and section 1 of the 1925 Act applied to the position of the putative father as it had come to be applied more generally. Lord Denning M.R. expressed the matter very concisely:-

> "The natural father is not in the same position as a legitimate father. He is a person who is entitled to special consideration by the tie of blood, but not to any greater or other right. His fatherhood is a ground to which regard should be paid in seeing what is best in the interests of the child; but it is not an overriding consideration."[11]

42.47 It is thus the putative father's relationship with the child which makes his interest relevant. That relationship operates,

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5 In re Adoption Application 41/61 [1963] 1 Ch. 315 at p. 329.

6 In re Adoption Application 41/61 (No. 2) [1964] 1 Ch. 48 at p. 54.

7 In re "O" (An Infant) [1965] 1 Ch. 23.

8 Ibid. at p. 28 per Lord Denning M.R.

9 Ibid. at p. 30 per Harman L.J.

10 It gave to the putative father a locus standi to apply for custody under the guardianship legislation: ibid. at p. 28 per Lord Denning M.R.

11 Ibid. at p. 28 per Lord Denning M.R.

as it were, at the threshold. But that in itself gives no indication of what part the father's interest should play in the process. That is by implication a matter of discretion. Lord Denning M.R. thus rejected the threshold approach to welfare and acknowledged in its place the discretionary function of balancing. This same philosophy was subsequently applied, apart from the adoption implications, quite generally in relation to illegitimate children. The courts in England had therefore by the end of the 1960s given effect to the letter and the spirit of section 1 of the 1925 Act not only in the wardship jurisdiction and in the statutory jurisdictions under the guardianship legislation as it related to illegitimate as well as to legitimate children. The development of the law was eventful and disjointed but ultimately secure.

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12 Lord Denning M.R.'s use of the word "ground" in the last sentence of the preceding extract is misleading. It is a "ground" in the sense that the relationship creates the father's interest at the threshold; it is also a "factor" to which regard may be paid at the discretionary stage. This contrasts with the position of the child. He need not postulate a relationship or interest at the threshold. He has an interest since he is the subject of the dispute. Nor is his welfare now relevant at the threshold; it is relevant only at the discretionary stage of the process.

13 Para. 41.32.

CHAPTER 43

THE CONTEMPORARY APPROACH IN ENGLAND: THE ECLECTIC APPROACH - THE HOUSE OF LORDS IN 1969

Section 1 - Introduction

(a) General

43.1 By 1969 the welfare doctrine had been enshrined in statutory form for nearly forty five years. It might have been expected that such a period would have been sufficient for the application and interpretation of the legislation to have become reasonably well-established, apart even from the conceptually marginal but statistically important position of the putative father. Not so, for in early 1969 the House of Lords had an opportunity to discuss in contentious litigation[1] the general law relating to custody. It was the first time that the House of Lords had done so in an English case during the twentieth century.[2] The decision is moreover likely to be regarded as authoritative in Scotland.[3] There are sound practical reasons for this. It would constitute an acknowledgment of the identical

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1 The only area to avoid judicial scrutiny was the matrimonial jurisdiction.

2 Ward v Laverty [1925] A.C. 101 was an Irish case: the 1925 Act had not been enacted nor did it apply in Ireland.

3 Clive & Wilson, p. 572.

legislation in England and Scotland[4] but a partial rejection of the different foundations of the law[5] and the sometimes different approach of the Court of Session.[6] J v C was itself a decision by the English High Court in exercise of its wardship jurisdiction. To the extent that any of the reasons were peculiar to that jurisdiction, the decision could be regarded in Scotland as anomalous but to the extent that the decision turned on section 1 of the 1925 Act, it could legitimately be followed in Scotland.[7]

43.2 A great deal of legislation had been enacted between 1925 and 1969: much of it fundamental in concept and consequence.[8] This may be one of the reasons for the apparent uncertainty of the welfare doctrine between 1925 and 1969. The circumstances of J v C[9] could not have been contemplated in 1925. The child was in the care of the local authority under the Children Act 1948;[10] he was at one stage also in the care of statutory foster-parents; they intended to apply for his adoption. Welfare plays a

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4 The English consolidation of 1971 makes no difference.

5 They had been distorted by legislation before 1925.

6 Even under the 1925 Act itself.

7 To distinguish the wardship and guardianship jurisdictions in practice would prove very difficult.

8 E.g. the adoption legislation, the children and the children and young persons legislation and the social work legislation in Scotland.

9 [1970] A.C. 668.

10 11 & 12 Geo. 6, c. 43.

different role in these contexts. To some extent the decision of the House of Lords implied that the wardship jurisdiction took precedence over these statutory provisions. Does this mean that the courts in England acting as parens patriae as the delegate of the executive of the state have inherent powers and control over all other bodies, statutory or otherwise, judicial or administrative, exercising functions relating to children?

43.3 Danckwerts and Diplock L.JJ. in In re Adoption Application 41/61[11] were among the last before J v C[12] was decided to consider any of the earlier authorities bearing upon the issue before them. Even so, Danckwerts L.J. in particular did not trace the history of the law before 1925. If he had done so, he might have taken a different view of Re Thain: Thain v Taylor[13] and In re Carroll.[14] The Court of Appeal in that last case compiled an impressive list of nineteenth century and earlier authorities. That seems to have impressed the bench more than the phraseology of section 1 of the 1925 Act.[15] This does not mean that the pre-1925 authorities are irrelevant. Indeed it is the theme of this analysis that the present

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11 [1963] Ch. 315.

12 [1970] A.C. 668.

13 [1926] 1 Ch. 676.

14 [1931] 1 K.B. 317.

15 In re Carroll [1931] 1 K.B. 317 was disapproved by the House of Lords in J v C [1970] A.C. 668.

law can be fully understood against the background not only of cases dealing with the 1925 Act but also of those reaching much further back.

(b) The doctrine of precedent

43.4 These and other judgments leave an impression of the courts searching intensively for authoritative precedents in the tradition of the English common law. This is as true of earlier judgments as of those decided in this century. In some cases it was justified; in others not so. Where the process was fundamentally adjudicative, that approach would be unexceptionable; as, for example, when the courts were seeking to apply the rules of common law or even in certain contexts the rules of equity.[16] On the other hand, when the courts were asked to appoint or dismiss a guardian, protect the estate and later the person of an infant or ultimately act as guardian of the ward, the role of authorities and precedents had changed. The function was less adjudicative, more administrative. The issue was not so much whether the father had forfeited his right or even his interest but rather what would be better for the child: a forward-looking rather than a backward-looking decision.[17] In these cases authoritative precedents would be useful to identify the powers of the courts, how these

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16 E.g. when the court was adopting the threshold approach.

17 I.e. the balancing approach guided by the welfare doctrine.

powers should be exercised and how the court should approach its function of decision-making. For a court to seek from earlier cases by applying the traditional doctrine of precedent clear standards of conduct or behaviour falling within or beyond the acceptable norms might easily distort the function of the court.

43.5 It is by no means clear in each case what the court was trying to achieve in discussing earlier decisions. If the court was exercising an adjudicative function, which frequently it was during and even before the nineteenth century, then the traditional search for rules and standards in the interstices of the common law and even of equity was well justified. If not, then perhaps the courts would have been advised to pause before applying the traditional doctrine of precedent.

43.6 A number, perhaps even the majority, of decisions in the custody context are made nowadays without reference to authority. It is, the court would argue, entirely a matter of the circumstances of the case. That is undeniably true of the merits of the decision. But the law, statutory or otherwise, has set the limits within which these decisions can and are to be reached. This analysis has, for example, proceeded almost entirely in terms of powers, processes and approaches: rarely in terms of normative standards or rules in that sense. Considerable, if not total, reliance has been placed upon the way in which the courts have either conceived or implemented their functions rather than upon their actual

decisions.[18] This has meant discarding the traditional doctrine of precedent and substituting a modified version. If this is justified, it is simply a reflection of the changing role of welfare within the legal system as the law has been developed and modified at the hands of the courts and Parliament.

(c) Standards and structures

43.7 This is not to say that the courts have misconceived their function, misinterpreted the role of welfare or misapplied the doctrine of precedent. When statute created a new legal regime de novo, as in the case of adoption, the problems were fewer than in the case of legislation built into an existing and sophisticated legal structure, as with the custody and guardianship legislation. Sometimes the application of such legislation would have induced a decision different from the one likely to have been reached under the old system; sometimes not. This is probably inevitable when the law is creating structures not standards. It is readily understandable therefore why some judges said that the 1925 Act had not changed the law while others argued that it had. There is no necessary inconsistency in these views. It depends on whether they were thinking of the legal structure, the standards to be applied or the decision in the individual case.

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18 A good example is J v C [1970] A.C. 668 itself. The decision concerned the extent of the application of s. 1 of the 1925 Act but the significance of the decision affected wider matters.

43.8 The earlier legal regime was concerned with both standards and structures, depending on the context.[19] There is no clear point of change but during the nineteenth century the trend was a movement from standards to structures.[20] Since the early part of this century the law has been almost entirely structural: that is, providing for the creation of standards in the individual case but eschewing the creation of generally applicable legal standards. The tendency remaining even now is the retention of generally applicable social and moral standards, conceived in the judicial image of nature, but subject always to disapplication in individual circumstances.[21]

43.9 These broad developments have taken place over a long period with undercurrents of movement in different directions at the same time. This is true not only of judicially inspired but also of legislatively induced movements. It has been the function of this study to put them into some sort of perspective. It is not, indeed could not be, the function of a court, even of the House of Lords, to examine these movements. The courts normally only consider the law which is immediately and directly relevant to the decision required of it. Frequently, in

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19 The threshold approach involved applying standards; the balancing approach is largely structural.

20 The House of Lords saw the trend as a change in emphasis, from greater weight being paid to parental rights towards greater weight being paid to welfare.

21 Rather like the modified threshold approach in conjunction with the presumptive approach.

this context in particular, that is very little. Sometimes the court has seen fit to go into the law in more detail. That happened in In re Carroll[22] and in In re Adoption Application 41/61.[23] Perhaps the Court of Appeal in those cases went too far but not far enough.[24] It is impossible even to be sure that the correct historical balance has been achieved.

43.10 In view of the structural nature of the law, it is not surprising that the general practice of the courts has been to decide which aspect of the case before them is or could be particularly significant. For example, the father may, especially in the nineteenth century, have been taken as exercising a legal right; the application may have been for a writ of habeas corpus; the child may have been an orphan; the mother may have been educating the child inconsistently with the father's wishes; the father may have abandoned or neglected the child; the child may have been a precocious girl of seven or a backward boy of twelve; the mother may have committed adultery; the child may have been illegitimate; the grandfather may have made application for the child to be a ward of court; a distant relative may have asked the magistrates for custody; the child may have been awaiting adoption or in the care of the local authority. The

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22 [1931] 1 K.B. 317.

23 [1963] Ch. 315.

24 I.e. starting the analysis during the development of the law, not at the inception of the movement.

examples are infinite. The same problems could also arise in Scotland mutatis mutandis. The range there is also theoretically infinite but the simpler legal regime in Scotland has probably reduced the number of legal imponderables. Nothing however can limit the circumstances of any one case.

Section 2 - The importance of the point of commencement

43.11 It is a matter of discretion for the court as a decision-making body to determine where to start the argument and discussion. This comes close to treating that matter, whatever it is, as the threshold consideration. Nothing can be done to avoid this, simply because the process must begin somewhere. This initial step probably, but no doubt quite unintentionally, attracts greater weight in the general absence of legal standards.

43.12 The courts have in the past tended to introduce as the point of commencement a matter of legal consequence. This is a proposition of vague generality, almost impossible to prove, but, if justifiable, of considerable importance. If the child was, for example, illegitimate, that in itself would have had considerable legal and practical consequences. It would have cut off one approach[25] and created another.[26] So too, if the wardship jurisdiction were invoked[27] rather

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25 Inter-parental criteria.

26 Parent - third party criteria.

27 A possibly open, parent-substitute approach.

than a statutory jurisdiction;[28] or if the mother had been guilty of adultery and was seeking custody or access.[29]

43.13 It would appear that legal issues have played more than a mere part in the process; they have often been the introduction to the examination of the circumstances and have because of that attracted a relatively significant place in a process which has nevertheless remained formally judicial. This is no doubt changing. When there is no clear legal issue and the arguments centre on the merits of the dispute, the legal consequences of any actual circumstance will tend to become unimportant. In that event the decision will be reached almost exclusively on welfare considerations. The relationships of the parties rather than the legal consequences of such relationships will form the nucleus of the decision.

43.14 This study has attempted to consider the law in terms of such relationships.[30] This has not always been possible because of the way in which the decisions have been reached. To ignore either of these matters would be to distort the pattern of decision-making. For example, if the dispute is between two parents, then it is the child's relationship with each parent that is important. If the dispute is between a mother and a foster parent,

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28 Attracting the directive in s. 1 of the 1925 Act.

29 The threshold rather than the balancing approach.

30 E.g. by considering the issue as between parents, a parent and a relative, a parent and a stranger or between third parties; rather than in terms of the legitimate or illegitimate child, the guilty and innocent spouse or the jurisdiction of the court.

then it is the child's relationship with his actual parent and with the substitute parent that is important. And if the child is parentless, what is important is any relationship which he may have created. Once that has been done, then the quality of such relationships can be considered and the desirability of retaining them or discarding them decided. If that is so, then it probably matters little whether the child is illegitimate, what jurisdiction is being invoked and which parent is matrimonially culpable.

43.15 This is not to deny to parents or anyone else the value to them and to the child of their relationship with the child. It merely discards from consideration not the actual but only the legal consequences of what the parent or other person may or may not have done. This does not mean that parental commission of homicide or adultery will be ignored. That the parent has deliberately or negligently taken the life of someone else or that the parent has had a sexual encounter with a third party may well affect the relationship between the parent and the child. Only the specifically legal consequences should perhaps be ignored. Similarly if the homicidal parent were to be imprisoned or the adulterous parent divorced, the imprisonment or marital termination would affect the relationship between the parent and the child.

43.16 The courts have generally not looked at this in terms of relationships, more in terms of the legal consequences of relationships. The House of Lords in J v C [31]

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31 [1970] A.C. 668.

perhaps had the opportunity to create a total legal synthesis along these lines.[32] They did not do so.[33] They took what may be described as an eclectic view of the law. The tendency was to look at the legal relationships of those affected by the cases, involving naturally questions of legitimacy, status, jurisdiction, judicial competency: clearly important matters. It meant, too, that the quality of those relationships was perhaps less important. The House of Lords nevertheless clearly endorsed the contemporary approach to welfare, applied it as widely as possible and reduced legal technicalities to a minimum. But the width, nature and scope of the discretions built into the legal structure of the welfare doctrine still enable the individual judge to continue to give effect to his own preferences justified perhaps in terms of welfare but beyond legal control. Flexibility is both the strength and weakness of such a structure.

Section 3 - The case of J v C

(a) The trial judge

43.17 The child in J v C[34] was a boy aged nine who had

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32 Because of the psychiatric evidence which emphasised the desirability of retaining stable relationships and the dangers of disrupting them: see J v C [1969] 1 All E.R. 788 at pp. 797 and 798 per Ungoed-Thomas J.

33 See the comments on medical evidence and judicial knowledge by Lord Upjohn: [1970] A.C. 668 at p. 726.

34 [1970] A.C. 668. The judgment of Ungoed-Thomas J. is reported in [1969] 1 All E.R. 788 at pp. 791 to 802.

been made a ward of court sometime earlier. His former foster parents, who had care and control of him, sought an order that he be brought up in the Church of England, while his Spanish parents asked for care and control to be given to his mother. Ungoed-Thomas J. analysed the facts and circumstances very carefully, noted that the parental home was quite acceptable and the parents were in no way unfitted to have care and control and concluded that, if no other information had been available, he would have made an order in favour of the mother as the parents had asked.[35] What was decisive against that conclusion was the "dangers to the infant of adjustment to life in Spain".[36] A relationship had according to the evidence been created between the child and his foster parents which could be "crucially disrupted" if he were to be returned to his parents in Spain.[37] For Ungoed-Thomas J. therefore the welfare of the child in this sense was decisive.

43.18 In reaching that decision the learned judge considered briefly but carefully several of the more recent authorities. His argument was threefold:-

1. the welfare of the child was the paramount consideration;[38]
2. as a general principle it was for the child's welfare to be in the custody of unimpeachable parents;[39]

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35 [1969] 1 All E.R. 788 at p. 797.

36 Idem.

37 Ibid. at p. 798.

38 Ibid. at p. 801.

39 Ibid. at p. 799.

3. that principle would be overriden where, as here, the child's welfare indicated otherwise.[40]

That clear and simple argument was approved by the House of Lords. It is significant however that Ungoed-Thomas J. reached his decision entirely on the specific facts and circumstances affecting the child in question. Although he acknowledged the doctrine of parental preference, the circumstances as he described them denied its application. Generalities, apart from the paramountcy of welfare principle itself, played no part in the decision. The decision turned on the existence and acknowledgment of relationships; clearly not on any legal or other technicalities. Ungoed-Thomas J.'s decision approximated to the ideal described in the preceding paragraphs.[41]

(b) The approach of the House of Lords

(i) General

43.19 Although the number of authorities considered by the House of Lords was considerable, none of the Scottish decisions was mentioned. This might ultimately detract from the authority of the decision in Scotland. Scots law has benefited from a wider reporting of custodial and similar cases than English law, particularly during the period spanning the nineteenth and twentieth centuries, when the origins of the contemporary approach were

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40 Ibid. at p. 801.

41 Paras. 43.14 and 43.15.

beginning to emerge. Indeed Lord Upjohn, whose views of the development of the law were not exactly the same as those of his colleagues in the House of Lords, perceived something of a gap[42] between 1904 and 1925 when the contemporary approach was being evolved, as he said, "behind the closed doors of the Chancery Division".[43] Their understanding of the development of the law made this gap of less concern to Lords Guest and MacDermott but it is not altogether satisfactory that the apparently significant changes which then occurred went unrecorded, at least in England.

43.20 The authorities considered by the House of Lords did not go back beyond 1848.[44] Nor was an exhaustive citation or analysis considered necessary. For Lord MacDermott took the view that the authorities were "not consistent".[45] Indeed "the way along which they have moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion, [had] many twists and turns".[46] This was certainly true as a general proposition and the House of Lords tended on the whole to treat the movement as a change in emphasis.[47] Emphasis implies weight and balance; they suggest discretion;

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42 At least in the law reports.

43 [1970] A.C. 668 at p. 723 per Lord Upjohn.

44 I.e. Re Fynn (1848) 2 De Gex & Smale 457. The exception was Lord Upjohn who commenced his analysis with Johnstone v Beattie (1843) 10 Clark & Finnelly 42.

45 [1970] A.C. 668 at p. 703 per Lord MacDermott.

46 Idem.

47 Ibid. at pp. 695, 710 and 723 per Lords Guest, MacDermott and Upjohn respectively.

discretion contemplates considerations rather than rules. Lords Guest and MacDermott in particular saw the movement as a simple chronological development from the predominance of paternal rights, the equalisation of maternal and paternal claims, the increasing importance of welfare and finally the predominance of welfare.[48]

(ii) Lords Guest and MacDermott

43.21 That is certainly so in some but, it is suggested, not all circumstances. Lord Guest, referring to the period before 1886, pointed out that at that stage "the rights of the father appear to have been predominant".[49] The difficulty with that comment is that the word "predominant" suggests a certain weight of priority in a balancing process: that is, a discretionary approach. "Rights" on the other hand are the antithesis of a discretion. It is precisely this difficulty which has prompted this analysis to divide the older approach to custody into two parts: namely the threshold and discretionary stages. That enabled the rights of a father either to be given effect, which would have terminated the dispute, or to be suspended or superseded. In the latter event the court could, and in appropriate circumstances did, proceed to dispose of the custody of the child in a discretionary fashion, taking into consideration what was considered relevant. Factors

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48 Ibid. at pp. 694 to 696 per Lord Guest and at pp. 703 to 706 per Lord MacDermott.

49 Ibid. at p. 694 per Lord Guest.

deemed relevant included not only paternal or parental "rights" but also paternal or parental "preference".[50] The welfare of the child was also relevant.

43.22 Such a view was not stated in the House of Lords. It is however partially implicit in the comment following Lord Guest's reference to the earlier predominance of paternal rights. He added:-

> "and he [the father] would only be disentitled to these rights if he had by his conduct shown himself unfit to exercise them." [51]

That is a particularly clear statement of the threshold approach. Lord Guest concluded this series of comments with these words:-

> "The welfare of the infant appears to have been a subsidiary consideration." [52]

The use of the word "consideration" is partly misleading. Welfare was subsidiary in two senses: first at the threshold stage as the incidental consequence of the exercise of paternal rights; secondly at the discretionary stage as a relatively unimportant matter to be taken into account in balancing the various factors.

43.23 The judgment of Lord MacDermott reflected similar ideas. The common law, in his view, "recognised an almost absolute right in the father to the custody of his child and assumed no discretionary power to interfere with such

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50 I.e. the movement from the traditional threshold approach to the modified threshold approach.

51 [1970] A.C. 668 at p. 694 per Lord Guest.

52 Idem.

custody except in very extreme cases".[53] He indicated that in that situation welfare as such "was generally without relevance".[54] Although the Court of Chancery exercised "a wider and more benevolent discretion",[55] a point often mentioned but rarely clarified in detail, Lord MacDermott appeared to concede that in practice there was little difference between common law and equity. It has been suggested that both systems adopted the threshold approach, the common law treating welfare negatively and equity treating it more positively.[56] The difference was only one of degree. There is no inconsistency between that conclusion and the comments of Lords Guest and MacDermott.

43.24 The next step in the argument for these two members of the House of Lords was the 1886 Act and more particularly the decision in Re McGrath (Infants).[57] In consequence of that line of authority welfare was seen as "becoming as important a consideration as the rights of the parents".[58] The judgment of the Court of Appeal in 1893 assumed particular significance for Lord MacDermott.[59]

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53 Ibid. at p. 702 per Lord MacDermott.

54 Idem.

55 Idem.

56 Para. 32.85.

57 [1893] 1 Ch. 143.

58 [1970] A.C. 668 at p. 695 per Lord Guest.

59 Ibid. at p. 704.

For these two judges therefore the year 1893[60] was a watershed in the development of the law.

43.25 If the most helpful approach were a purely chronological analysis, at least from 1848, that would be so. But Lord Guest paid no attention and Lord MacDermott very little attention to the nature and context of the dispute in Re McGrath (Infants).[61] The parents in that case were dead. The rights or preferences were at best relevant only posthumously and by 1893 the courts were moving away slowly from the posthumous control of religion.[62] It is thus not at all surprising that welfare played a "dominant" role in Re McGrath (Infants)[63] at both the threshold and discretionary stages. The pivot around which Lords Guest and MacDermott's argument revolved was thus both contextually and substantively unrelated to the issue with which they were dealing. This criticism should not be made only of Lords Guest and MacDermott. The Court of Appeal in Reg v Gyngall,[64] which created or acknowledged the modified threshold approach,[65] was similarly influenced by Re McGrath (Infants).[66]

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60 In which not only Re McGrath (Infants) [1893] 1 Ch. 143 but also Reg v Gyngall [1893] 2 Q.B. 232 were decided.

61 [1893] 1 Ch. 143.

62 Para. 41.26.

63 [1893] 1 Ch. 143 at p. 148 per Lindley L.J.

64 [1893] 2 Q.B. 232.

65 Para. 41.25.

66 [1893] 1 Ch. 143.

(iii) Lord Upjohn

43.26 These comments are not intended to suggest that arguments and principles should not be extrapolated from one context to another. Far from it: it would however have clarified the issues considerably if the courts had indicated that they were doing so and provided their reasons. Lord Upjohn made specific reference to the context of some of the many authorities discussed, including the relationships of the parties. His analysis commenced with Johnstone v Beattie[67] decided in 1843. He specifically indicated that the child in that case, as in Stuart v Bute,[68] Re McGrath (Infants)[69] and Ward v Laverty,[70] was parentless. And he had no hesitation in extrapolating the dicta in these cases to the situation where, as in J v C,[71] a parent or even both parents were emphasising their interest against a third party.[72] No justification was tendered. In retrospect that does not matter, for the decision in J v C[73] confirmed that section 1 of the 1925 Act applied to all custodial disputes, irrespective of the

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67 (1843) 10 Clark & Finnelly 42.

68 (1861) 9 H.L.C. 440.

69 [1893] 1 Ch. 143.

70 [1925] A.C. 101.

71 [1970] A.C. 668.

72 Ibid. at pp. 721 and 723 per Lord Upjohn.

73 [1970] A.C. 668.

parties or the relationships of the parties.[74] But this hiatus renders speculative rather than authoritative an important part of the development of the law.

(iv) Conclusion

43.27 What has happened over the years is that in analysing the law the courts have tended to select at random isolated statements or comments concerning the welfare of the child. Little attempt, with the principal but limited exception of Lord Upjohn, has been made to put these comments into context. A series of Acts of Parliament had been enacted during this period[75] and the courts were reluctant on the whole to pay much attention to them. The 1925 Act received much the same cavalier treatment. The courts in Scotland on the other hand seemed more prepared to give effect to the legislation. In J v C[76] only Lord MacDermott was prepared to do much more than quote the words in section 1. It was thus the almost universal practice on the one hand to acknowledge the existence of the legislation and on the other hand to ignore what precise effect the legislation might have had on the outcome of the individual case.

43.28 Welfare, it has been suggested, has played as diverse and multifunctional a role in the legislation as

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74 Ibid. at pp. 697, 710 and 724 per Lords Guest, MacDermott and Upjohn respectively.

75 Those of 1839, 1873, 1886, 1891 and 1925.

76 [1970] A.C. 668.

it has done in the law generally. The legislation indicated a change in emphasis just as the judicial authorities had done. But it did much more.[77] Yet Lord MacDermott was content to say, having referred briefly to the Acts of 1839, 1873, 1886 and 1891:-

> "I have referred to these Acts because, as in the case of the authorities, they record an increasing qualification of common law rights and the growing acceptance of the welfare of the infant as a criterion."[78]

The important questions were how and to what extent were common law rights qualified, how and to what extent was welfare becoming more accepted as a criterion and finally as a criterion in relation to what. Answers to these questions would have made the subsequent analysis of section 1 of the 1925 Act and the judicial application of it very much easier.

Section 4 - The decision of the House of Lords

43.29 So much for generalities: the precise issue for the House of Lords was quite normal. Could the welfare of the child override the wishes of unimpeachable parents in a dispute with third parties? According to Eve J. in Re Thain: Thain v Taylor[79] the answer would probably have been negative. But according to Danckwerts L.J. in Re

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77 The same or similar roles can be attributed to welfare in the statutory context as in the judicial context.

78 [1970] A.C. 668 at p. 709 per Lord MacDermott.

79 [1926] 1 Ch. 676.

Adoption Application No. 41/61[80] it would probably have been positive. Yet the House of Lords was entirely content with both judgments.[81] It cannot simply be a matter of decision in the circumstances of the individual case, for Eve J. said that "the wishes of an unimpeachable parent undoubtedly stand first"[82] and Danckwerts L.J. concluded that it could not be "correct to talk of the preeminent position of parents".[83] Nor is it likely to have been a matter of the status of the child. Both decisions were made under the present statutory scheme. There probably was therefore an issue for the House of Lords.

43.30 The threshold approach had probably been discarded much earlier in the wardship and matrimonial jurisdictions then in the statutory guardianship jurisdiction so far as it related to inter-parental disputes concerning legitimate children. In J v C[84] the child was a ward of court. Prima facie this would have indicated the substituted parent approach but the argument for the parents relied upon the earlier case of Re Fynn.[85] Lord Guest's description of the argument for the parents could

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80 [1963] Ch. 315.

81 [1970] A.C. 668 at pp. 699 and 700, 711 and 713, and 723 and 724 per Lords Guest, MacDermott and Upjohn respectively.

82 [1926] 1 Ch. 676 at p. 684 per Eve J.

83 [1963] Ch. 315 at p. 329 per Danckwerts L.J.

84 [1970] A.C. 668.

85 (1848) 2 De Gex & Smale 457.

be described precisely as the traditional threshold approach: parents would be deprived of custody or care and control only if they were "unfitted by character, conduct or position in life".[86] Lords MacDermott and Upjohn on the other hand cast the argument in the form of the modified threshold approach, by replacing the right to custody with a strong parental presumption.[87] Nothing turned on this apparent difference. No reference to welfare was made by Lord Guest. Lord MacDermott's reference to welfare was simply to justify the parental presumption. It could not be regarded as a consideration in any process; it operated in the fashion of policy used to justify the preference given to the parents. That was true also of Lord Upjohn's allusions to welfare. It is clear therefore that welfare was not, indeed could not be, regarded in any way as a consideration to be weighed or balanced in a discretionary fashion. Welfare existed in that context as either justification for a policy or a ground for depriving a parent of his right.

43.31 The alternative argument postulated the balancing approach guided by the priority given to welfare. Lord MacDermott described it in these words:-

> "... to consider all material aspects of the case, including the claims of the parents, and then decide in the exercise of a judicial discretion what is best for the welfare of the child."[88]

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86 [1970] A.C. 668 at p. 692 per Lord Guest.

87 Ibid. at pp. 702 and 718 per Lords MacDermott and Upjohn respectively.

88 Ibid. at p. 702 per Lord MacDermott.

That approach was founded upon the notion of welfare as the "paramount and governing consideration".[89] It does not represent exactly what section 1 of the 1925 Act enacted. Nevertheless, the argument was clear enough. "Paramountcy" and presumably all its analogues were stated to imply a positive decisiveness. They involved more than simple priority but less than an all-embracing policy. As Lord MacDermott understood the contention, the claim of natural parents in particular, and presumably all non-welfare considerations, "had to yield if, in the end, the welfare of the child so required".[90] This is certainly an attractive view. It is by no means a "pure" welfare approach. For it may be taken as a partial reflection of the threshold approach if it could properly be paraphrased as affording an element of priority to parental claims unless to do so would be contrary to the welfare of the child. Such a view would render that contention close to the modified threshold approach.

43.32 The analysis by the House of Lords of the legal position prior to 1925 had produced a conclusion no more profound than a change in emphasis from paternal rights, through equality of parental rights and towards the welfare of the child.[91] The important and difficult issues were avoided. As it transpired, the lengthy judgments in

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89 Idem.

90 Idem.

91 Para. 43.21.

the House of Lords decided no more than that section 1 of the 1925 Act, being of universal application, guided the exercise of the judicial power to settle a dispute between the parents of a legitimate child and third party custodians of the child. The Act, by implication at least, also applied to a child who was a ward of court. The really important questions, namely the precise meaning of the direction in section 1 and the role of welfare in that direction, were largely ignored. Only Lord MacDermott considered section 1 in detail.

43.33 The principal contribution of Lord Donovan was to note the "almost refreshing clarity" of section 1.[92] It is not clear whether he was referring to the application or the content of section 1. Lords Guest and MacDermott were on the whole content to rely upon the dicta of Danckwerts L.J. in Re Adoption Application No. 41/61.[93] That however did not solve the problem of the relationship between parental claims and welfare. For Danckwerts L.J. had expressed his opinion negatively, by denying the preeminence of the parents, rather than positively, for example, by talking in terms of paramountcy. Neither Lord Guest nor Lord MacDermott denied the relevance to the child's welfare of the rights and wishes of "unimpeachable" parents. The fundamental conundrum thus remained.

43.34 Of all the law lords, Lord MacDermott alone

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92 [1970] A.C. 668 at p. 726 per Lord Donovan.

93 [1963] Ch. 315.

considered the meaning of section 1 of the 1925 Act apart from the authorities. He attributed to welfare a position beyond simple priority; it was not merely "the top item in a list of items relevant to the matter in question".[94] More positively, he said, the words "first and paramount":-

> "... connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed." [95]

That formulation comes close to treating welfare as the underlying and potentially overriding policy of the process. Although not normal, such an approach has been advocated on a few occasions. The significance of Lord MacDermott's formula originates in the force given to the word "paramount" as the positively determinant feature of the process. Welfare thus remained for Lord MacDermott a consideration but one so specially treated as almost to change it into a matter of policy itself.

43.35 Although his colleagues failed to express the meaning of section 1 so clearly as Lord MacDermott, none would have hesitated to accept that positive formulation of the role of welfare. The real problem was relating welfare to other considerations. This appeared in two ways: one relatively unimportant in the context of this decision,

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94 [1970] A.C. 668 at p. 710 per Lord MacDermott.

95 Ibid. at pp. 710 and 711 per Lord MacDermott.

the second being of considerable significance. The Scottish courts, it may be recalled, made some limited use of the subsumptive approach to welfare: that is, treating all strictly non-welfare considerations in the light of the child's welfare. Lord Guest regarded this to some extent as an incident of the paramountcy of welfare. Referring to the wishes of a father, they were, he said, to be considered "but only as one of the factors as bearing on the child's welfare".[96] Lord MacDermott took up the same theme but expressed it more generally:-

> "In applying s. 1, the rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to that issue."[97]

There welfare was regarded as an issue rather than as a consideration. That is consistent with but not the same as the policy approach. On the whole however there has been generally little evidence of the subsumptive approach in England.

43.36 The subsumptive approach would be meaningful only in specific circumstances. The second aspect of the relationship between welfare and other considerations is more general. It is also more difficult to analyse precisely, because it is not always clear whether welfare was being treated as a consideration in the process or used to justify another approach. The presumption that a

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96 Ibid. at p. 697 per Lord Guest.

97 Ibid. at p. 715 per Lord MacDermott.

child would in principle be better in parental rather than non-parental care has had a long history in one form or another. Ungoed-Thomas J. accepted in principle that it was "for the child's welfare to be in the custody of unimpeachable parents".[98] Lord Guest carefully avoided treating that principle as a general rule, for to do so would put the judge "in a straitjacket" and prevent him fulfilling his duty under section 1.[99] The argument was modified by Lord MacDermott. He thought that this principle was justifiable in terms of welfare for the rights and wishes of unimpeachable parents could "minister" to the "total welfare of the child in a special way".[1] Such matters would therefore in his view "preponderate in many cases".[2] For Lord MacDermott welfare in a broad sense justified the general principle and welfare in the specific sense was the most important consideration in the individual case. Thus welfare in the broad sense as manifested in the general parental preference also became important in the individual case. Even Lord Donovan lent his support to this approach.[3]

43.37 The strongest expression of views on parental preference came from Lord Upjohn. Danckwerts L.J. and

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98 [1969] 1 All E.R. 788 at p. 799 per Ungoed-Thomas J.

99 [1970] A.C. 668 at p. 700 per Lord Guest.

1 Ibid. at p. 715 per Lord MacDermott.

2 Idem.

3 Ibid. at p. 727 per Lord Donovan.

Wilberforce J., it will be recalled,[4] had been at pains to ensure that parents did not receive priority of treatment in the decision-making process. Indeed Wilberforce J. had hinted obliquely at the subsumptive approach. Lord Upjohn on the other hand thought that these two judges had hardly done justice to the position of the natural parents and he put forward two reasons for strengthening the parental claim:-

> "... first and principally, no doubt, because normally it is part of the paramount consideration of the welfare of the infant that he should be with them but also because as the natural parents they have themselves a strong claim to have their wishes considered as normally the proper persons to have the upbringing of the child they have brought into the world."[5]

This was not intended to reinstate the threshold approach, for he added that there was no question of anyone coming under an onus to displace parental wishes. Parental preference was thus only a matter to be weighed in the balance but a matter of some importance.

43.38 In each of the three principal judgments the dicta of Eve J. in Re Thain: Thain v Taylor[6] were not only given prominence but also approved.[7] In one part of his judgment Eve J. had indicated that the wishes of an unimpeachable parent stood "first".[8] He was probably thinking of parental

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4 Paras. 42.44 and 42.45.

5 [1970] A.C. 668 at p. 724 per Lord Upjohn.

6 [1926] 1 Ch. 676.

7 [1970] A.C. 668 at pp. 698, 711 and 723 per Lords Guest, MacDermott and Upjohn respectively.

8 [1926] 1 Ch. 676 at p. 684 per Eve J.

preference as a matter of considerable importance and attracting most weight. In the circumstances of his decision however welfare was evenly balanced between the two homes.[9] There was thus no welfare reason why the parental preference should not be the "first" consideration and hence prevail. It may be that Eve J.'s dicta were not altogether clear, perhaps to a degree misleading. His approach was thus not inconsistent with section 1 of the 1925 Act. The point which may be validly made is that Eve J.'s view of the substance of welfare was rather narrow. In his view the effects on the child of separation from his foster parents would be "mercifully transient".[10] But in J v C[11] Ungoed-Thomas J. accepted evidence of the "crucial disruption" of the existing relationship if the child were to be returned to Spain. That however is merely indicative of the consequence, but by no means the necessary consequence, of a flexible and discretionary process.

Section 5 - Conclusion

43.39 The decision in J v C[12] is important simply because it gave to the House of Lords the opportunity to discuss the development of the law over one hundred and twenty or so years. It regrettably added little or nothing new to the

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9 Ibid. at p. 682.

10 Ibid. at p. 684 per Eve J.

11 [1969] 1 All E.R. 788 at pp. 797 and 798 per Ungoed-Thomas J.

12 [1970] A.C. 668.

discussion. Their effective decision, that section 1 of the 1925 Act applied to disputes between parents and third parties, confirmed the general trend over the previous years. The main criticism which could be made of the court is a failure to identify precisely the role of welfare either before or to a lesser extent after 1925. The debate was almost entirely in terms of emphasis, general trends, considerations and weight. They are important but not, it is suggested, the complete picture. On the other hand no more was necessary for the decision.

43.40 The principal consequence of the judgment is the rejection of the threshold approach. It had indeed no part to play under the 1925 Act. The discretionary approach required under the Act was described rather imprecisely and hesitatingly. The tendency was to talk of welfare as the first and paramount consideration. Only Lord MacDermott attempted a positive description. Welfare probably performed a function lying between the extremes of a consideration, albeit the most important one, and an over-riding matter of policy. The word "paramount" had perhaps been given a meaning over the above "first". The welfare of the child had become the determinant. It will not always be so, for the circumstances may dictate otherwise. Frequently welfare will be the issue to resolve the impasse or push the decision in one particular direction. Much will depend on the judicial view of the substance of welfare and, in view of the expanded substantive concepts of welfare, equally balanced welfare consideration will be

less likely to arise.

43.41 The closest to a revival of the threshold approach was the considerable attraction for parental preference. This and related arguments have featured in many of the cases. It is probably part of the judicial attempt to eschew the exercise of a discretion and seek guidance from principles in one form or another. Unless this can be related somehow to welfare, for example in terms of the presumptive approach, it may run the risk of creating for the court a judicial straitjacket as Lord Guest suggested, and thereby preventing the operation of section 1 of the 1925 Act. Nevertheless the House of Lords in this case approved the principle of parental preference but were careful not to afford to it the status of anything more than a consideration, an important one but not the paramount consideration. J v C[13] thus finally indicates the universality of the application of section 1 of the 1925 Act and the decisive quality of welfare in appropriate circumstances coupled with the relative importance of parental preferences again in appropriate circumstances. The character of the process remains fundamentally discretionary.

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13 Idem.

CHAPTER 44

THE SUBSTANCE OF WELFARE

Section 1 - Introduction

44.1 The dynamic part[1] of this analysis has dealt only with the part played by welfare in the various decision-making processes.[2] Indeed the contribution of the law in relation to children is largely restricted to providing a framework within which decisions are made.[3] The law has been considered in terms of competency and to a lesser extent relevancy but not in terms of substance. But substance is important. When the law creates a threshold stage, the function of the court or whatever body is given the power to decide tends to be adjudicative and either Parliament or the courts have tended to identify relatively specific criteria by which the conduct of the person in question may be judged.[4] These criteria are not normally prescribed in terms of welfare. They tend to relate to facts or circumstances which only have an impact upon the welfare of the child.[5] For example, the requirements of the criminal law for the commission of an offence are intended to protect the child or his welfare but such requirements are not identified in terms of welfare. The same is broadly true of the requirements for removing a child from the care and control of his parent and for making an adoption order. They are threshold

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1 I.e. Part C.

2 Child care, adoption, custody.

3 To that extent the law is not normative.

4 This approximates to specifying enforceable standards of behaviour.

5 I.e. negative rather than positive welfare.

requirements in the sense already discussed.

44.2 The threshold approach devised by the courts to deprive a parent, especially the father, of his common law power over his child exhibits the same tendencies. The difference is that these criteria have been created by the courts rather than by Parliament.[6] The principal exception to that proposition is the Custody of Children Act 1891[7] which refers to abandonment, desertion and in effect neglect.[8] The earlier judicially created requirements for depriving a father of his power were stringent: physical abuse of the child, gross moral profligacy and similar parent-biased circumstances with an effect, but at most an indirect effect, on the child. By 1848 the substance of the criteria had been modified slightly to include not what was "merely better" for the child but only what was "essential" to his "safety or welfare."[9] The effect on the child's welfare itself was by the end of the nineteenth century becoming an accepted ground of intervention,[10] thus enabling the judicial power to be exercised. Welfare had always been in one form or another a test in the exercise of the power:[11] an altogether different matter. That is the essence of the distinction between the threshold and discretionary stages. Finally the threshold approach gave way to the discretionary approach.

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6 They are thus easier to change.
7 54 & 55 Vict., c. 3.
8 Ibid., ss. 1 and 3.
9 Re Fynn (1848) 2 De Gex and Smale 457 at pp. 474 and 475 per Knight Bruce V.-C.
10 Reg v Gyngall [1893] 2 Q.B. 232.
11 E.g. in the guardianship and probably also the wardship contexts.

44.3 What is important is the link between the changing judicial approaches to the custodial and related jurisdictions and the enlargening substance of welfare. There is no reason to doubt that each of them has imperceptibly influenced the other. Nor is there any legal reason why these changes took place in the way described.[12] The amendments introduced by Parliament have left the substance of the law largely unaffected. These movements reflected a change in judicial policy, although it is unlikely that the judges saw it in that way. It is one example of the courts reacting to social change. The wardship jurisdiction may have been one of the reasons in England for this adaptablility. This is unlikely to have been the sole reason, for the same processes of change were manifesting themselves in Scotland where the wardship jurisdiction has never existed. The movement for change may have occurred, therefore, not only in consequence of social change but also under the influence of Parliament. This is more likely in the twentieth rather than in the nineteenth century simply because of the increasing and in other contexts overwhelming statutory intervention.

44.4 It is impossible to draw a parallel between the statutorily induced changes and the movements in judicial opinion in relation to the substance of welfare but the trends are certainly in the same direction. The statutory criminal law as a

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12 The guardianship and custody legislation has, with the exception of the 1891 Act, always been structural in form.

source of threshold requirements has developed little, if at all, during the twentieth century. Indeed the contribution of criminal justice as a whole to solving the problems affecting children has been relatively small. On the other hand the intervention of the state under the child care legislation has had a great deal to offer to children needing care or protection. Threshold requirements have remained an integral part of the structure of the law and there is no doubt that the substance of welfare in that context has widened and become more general as Parliament has successively changed the grounds. The stage has not been reached when the state may intervene simply when the welfare of the child so requires. Nor have the courts reached that position in relation to custody, although the facts that the courts are judicial bodies and that welfare almost became a ground for intervention enabled them to approximate to it. In their case this possibility was superseded by the discretionary approach. Nevertheless, the widening statutory concept of welfare, directly or indirectly, is entirely consistent with the increasingly extended meaning given to welfare by the courts.

44.5 Parliament in the United Kingdom has never directly stated what is meant by the welfare, benefit or interests of the child, although these expressions have frequently been used. The legislation occasionally gives a direct indication of what may properly be included within such expressions;[13] or indirectly, for

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13 E.g. Children and Young Persons Act 1969 (1969 c. 54), s. 70(1) which provides that "care" includes protection and guidance and that "control" includes discipline; Matrimonial Causes Act 1973 (1973 c. 18), s. 41(6) which provides that "welfare" includes the custody and education of the child and financial provision for him.

example, by comparing the threshold requirements to be satisfied before the power of decision is available. Thus the substance of welfare probably goes beyond the context of the threshold requirements. Otherwise the existence of the discretion would be otiose. The word itself lacks definitive precision and its meaning is variable in the light of individual circumstances. So the meaning of welfare in the legislation is largely a matter for the person or body administering the Act. This is no doubt deliberate on the part of Parliament.

44.6 To the extent that the courts have introduced the word, the same comments apply. Since the threshold approach has largely been discarded in the custodial context, "welfare" is the only technical restriction upon the exercise of their powers by the courts. The word is susceptible to interpretational and applicational discretion. Thus there are only two restrictions upon the judicial discretion in the custody context: the technical need to comply with the structure of the law and the various practical restraints which the courts have placed upon themselves. From this it appears vital that the courts both understand and give effect to the structure of the system within which they are permitted to reach decisions. For this reason most of this analysis has been devoted to the structure of the law.

44.7 In practice substance interlocks with structure. This is true whether there is a threshold stage as well as the discretionary stage. The court's view of welfare in general will no doubt affect its view of the specific aspects of welfare

contained in the threshold requirements and vice versa. If, for example, the threshold requirements are parent-biased, there may be less scope for a wide view of welfare. In other words, in the case of discretions, the views of the person exercising the discretion on the policy underlying the discretion will significantl affect its exercise, perhaps unwittingly. So the wider the discretion, whether it is interpretational, applicational, intellectual or substantive, the more policy is likely to affect the decision. Where interpretational and substantive discretions co-exist in the same process, as in custodial matters, the way is technically open for the court to give effect almost to any policy deemed relevant and appropriate. It has not happened like that, for the courts have been at pains to seek guidelines in various ways. The sources of such knowledge thus acquire considerable significance.

44.8 Welfare is no more and no less than the sum of its component parts. By itself it is largely meaningless. It can only be analysed by considering its elements. The trend of the legislation towards greater generality of the elements of welfare disclosed by the statutory threshold requirements is clear not only from the child care legislation but also from the adoption legislation. In adoption fewer requirements have since 1975 been prescribed by statute.[14] Indeed welfare itself is no longer a requirement, merely a consideration.[15] The threshold

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14 Fisher D.E., "The 1972 adoption report: the emerging pattern" 1973 Juridical Review 180 at pp. 184 to 186.

15 Adoption Act 1958 (7 & 8 Eliz. 2, c. 5), s. 7(1)(b) was repealed in 1975 (Children Act 1975 (1975 c. 72), s. 108 and Sched. 4, Part III) when s. 3 of the 1975 Act was enacted.

requirements in the child care legislation remain to a large extent parent-biased.[16] These are simply reflections of the policies of the legislation. It is more difficult in the case of child care legislation than in the case of adoption legislation to find out how the requirements are interpreted, because the courts play little part in administering the former legislation. When they are involved, an interpretation of the substantive elements of the statutes is not normally what they are asked to give. The meaning of welfare thus appears largely from the judicial examination of the adoption and particularly the custody legislation.

Section 2 - The meaning of welfare: Scotland

(a) Custody and related issues

(i) General aspects of welfare

44.9 The substance of welfare is likely to be affected as much by general considerations conceived by the court to be relevant as by personal considerations relating to the child in question. A court may thus be inclined to reach a decision in terms of a general principle.[17] If so, that gives as clear an impression of the substance of welfare as an examination of the particular circumstances of the case. In practice the two aspects will be linked. In Scotland, for example, the wishes of a child

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16 Social Work (Scotland) Act 1968 (1968 c. 49), s. 32(2); Children and Young Persons Act 1969 s. 1(2).

17 I.e. the presumptive approach.

have been regarded traditionally as important: for example, the power to select a curator,[18] the doctrine of declining parental authority as the child advances in age[19] and the attention paid to the child's wishes in settling a dispute.[20] As time has advanced, however, the influence of English law has perhaps become more apparent and the significance of a child's wishes has depended more upon the personal circumstances of the child and the parents. Such a personal approach is probably more consistent with the welfare doctrine. Even so, a child's wishes may in appropriate circumstances be decisive.[21]

44.10 A child's wishes could not in themselves amount to a general principle. At most they comprise circumstances to be taken into account. Other questions with a clear bearing upon the substance of welfare may more appropriately be described as principles. They have already been considered in the context of the presumptive approach as part of the total legal structure. The most important in Scotland have been the desirability of preserving family unity, the existence of natural relationships, the retention of the status quo, the influence of religion and the relevance of justice. They are at most guidelines for the exercise of a discretion but their foundation is a substantive view of welfare.

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18 Logan v Cathcart (1827) 5 Shaw 341; Lady Bethune Petitioner (1851) 14 Dunlop 11; Fergusson v Dormer (1870) 8 Macpherson 426; Ferguson v Blair (1908) 16 S.L.T. 284.

19 Harvey v Harvey (1860) 22 Dunlop 1198.

20 Savage v Jardine (1891) 9 Sh. Ct. Rep. 139; Flannigan v Muir (1892) 19 Rettie 909; Morrison v Quarrier (1894) 21 Rettie 1071; Pow v Pow 1931 S.L.T. 485; Klein, Petitioner 1969 S.L.T. (Notes) 53; Johnson v Johnson 1972 S.L.T. (Notes) 15: cf. S v S (1960) unreported but see 1962 S.L.T. (Notes) at p. 62.

21 Gover v Gover 1969 S.L.T. (Notes) 78.

44.11 The general desirability of preserving the unity of the family may be traced at least as far back as the earlier part of the nineteenth century.[22] It is often not possible to keep the whole family together, simply because the occasion for considering the principle is when the family is divided: for example, when one parent dies, deserts the family or is divorced. In that event, the alternative is to keep the remainder of the family together so far as that is possible,[23] because that is "natural".[24] Sometimes in response to the circumstances of the case the court will be forced to split the family and fragment custody.[25]

44.12 Retaining the status quo is also a relatively simple solution to custody problems. The Scottish courts have perhaps paid less attention to it than the courts in England. When the action is for delivery rather than for custody, by way of enforcing a legal right, it is the legal status quo which is being retained.[26] That involves a change in the actual status quo. The Scottish courts have taken the view that the actual status quo should normally be preserved in the interim until the whole matter has been fully investigated.[27] That applies where no harm would

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22 Whitson v Speid (1825) 4 Shaw 42.

23 Lady Bethune, Petitioner (1851) 14 Dunlop 11; E S v A S (1870) 42 Scottish Jurist 480; Stuart v Stuart (1870) 8 Macpherson 821; Stevenson v Stevenson (1894) 21 Rettie 430; Minto v Minto 1914 2 S.L.T. 86; Walker v Croll (1919) 36 Sh.Ct.Rep. 31; Douglas v Douglas 1950 S.C. 453.

24 Begbie v Nichol 1949 S.C. 158.

25 Smith v Smith (1894) 2 S.L.T. 173; Wilson v McMinnim (1905) 12 S.L.T. 772;
Stewart v Stewart 1914 2 S.L.T. 310; Barr v Barr 1950 S.L.T. (Notes) 15; Johnson v Johnson 1972 S.L.T. (Notes) 15.

26 Hutchinson v Hutchinson (1890) 18 Rettie 237.

27 Stevenson v Stevenson (1894) 21 Rettie (H.L.) 96; Paden v Paden 1922 S.L.T. (Sh.Ct.) 4; Holmes v Holmes (1954) 70 Sh. Ct. Rep. 341; Mackay v Mackay 1957 S.L.T. (Notes) 17.

thereby be caused to the child.[28] At the final stage the status quo remains relevant but it has probably become much less significant by then.[29] Other factors tend to be decisive.[30]

44.13 On the other hand, the courts in Scotland seem to pay considerable attention to natural relationships.[31] But nature is as flexible a concept as welfare and the substitution of one for the other is of no real assistance. The test of nature has drawn the Scottish courts in different and inconsistent directions. The same has happened in England but there the issues have been argued differently[32] and in a much clearer fashion. Nevertheless the position in practice in Scotland is quite clear: it is natural for a child, particularly a young child, to be with his mother.

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28 Kincaid v Quarrier (1896) 23 Rettie 676; Macdonald v Macdonald (1908) 24 Sh.Ct.Rep. 271.

29 Smith v Smith (1890) 18 Rettie 241; Fisher v Edgar (1894) 21 Rettie 1076; Erskine v Connolly (1916) 32 Sh.Ct.Rep. 163; Law v Elrick (1939) 55 Sh.Ct.Rep. 253; Barr v Barr 1950 S.L.T. (Notes) 15; Hannah v Hannah 1971 S.L.T. (Notes) 42; A v N 1973 S.L.T. (Sh.Ct.) 34.

30 Begbie v Nichol 1949 S.C. 158.

31 Idem. where it was used to justify the desirability of retaining the family unit.

32 In terms of maternal preference, not necessarily in terms of natural relationships.

44.14 Rather strangely, one of the earliest cases in which natural preferences were debated took a fairly neutral stand.[33] A few judgments supported the natural claim of the father.[34] But they were in some respects special and the arguments founded on nature were intended to support the father's legal claim.[35] This would not have been justified after 1925,[36] except perhaps in relation to an illegitimate child. But the House of Lords' decision in J v C[37] has probably superseded that exception. Most reported cases however favoured the natural position of the mother.[38] This was true whether the child was legitimate or illegitimate, although in the latter instance the mother's position was supported by her legal status. The history of the law suggests that arguments based on natural relationships could not be examined independently of the legal consequences of the relationship. Such legal consequences are probably less important now and the courts are more concerned with the actual relationship between the parties.[39]

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33 Nicolson v Nicolson (1869) 7 Macpherson 1118.

34 Steuart v Steuart (1870) 8 Macpherson 821; Robertson, Petitioner 1911 S.C. 1319; Minto v Minto 1914 2 S.L.T. 381; Begbie v Nichol 1949 S.C. 158.

35 Except where the child was illegitimate.

36 Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c. 45), s.1 which restricted the relevance of the father's claim or right.

37 [1970] A.C. 668.

38 Ketchen v Ketchen (1870) 8 Macpherson 952; Mackenzie v Mackenzie (1887) 25 Scottish Law Reporter 183; Stevenson v Stevenson (1894) 21 Rettie (H.L.) 96; Cameron v Ross (1898) 14 Sh.Ct.Rep. 210; Moncrieff v Langlands (1900) 2 Fraser 1111; Reid v Reid (1901) 3 Fraser 330; AC v BC (1902) 5 Fraser 108; CD v AB 1908 S.C. 737; MacLean v MacLean (1916) 33 Sh.Ct.Rep. 316; Hatrick v Hatrick (1918) 34 Sh.Ct.Rep. 299; Campbell v Campbell 1920 S.C. 31; Walter v Culbertson 1921 S.C. 490; McLean v Hardie 1927 S.C. 344; Pow v Pow 1931 S.L.T. 485; Nicol v Nicol 1953 S.L.T. (Notes) 67; Holmes v Holmes (1954) 70 Sh.Ct.Rep. 341; Shanks v Shanks 1965 S.L.T. (Notes) 44; Hannah v Hannah 1971 S.L.T. (Notes) 42.

39 The reported cases indicate clearly that arguments based on nature have declined in number since 1925.

44.15 The concept of justice played almost no part in the development of English law until it was introduced quite recently by Lord Denning M.R. without much sympathy or support from his colleagues.[40] Justice, like nature, could be regarded as a substitute for welfare. That is why it is difficult to incorporate justice into the decision making process founded upon welfare. The courts in Scotland have almost never used the concept of justice in this way in custodial disputes.[41] It is unlikely now that they ever will be attracted by that idea.

(ii) Religion

44.16 Questions of nature and justice, family unity and the status quo are general. Other aspects of welfare are more specific: the child's religious and secular education, the child's health and morals. These will be considered in turn. Religion was not an aspect of the child's welfare which caused any specific concern until the law of Scotland was subjected to English influence in the late nineteenth century. The strength of the patria potestas in Scotland avoided religion being raised as a specific issue independent of the child's welfare. Religion

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40 Para. 41.40.

41 The exceptions are McFarlane v McFarlane (1847) 9 Dunlop 904; A v B (1870) 42 Scottish Jurist 224; Steuart v Steuart (1870) 8 Macpherson 821.

was simply incorporated in the paternal right.[42] The threshold approach to parental disqualification also obviated to some extent any need to consider individual aspects of the child's welfare.[43] Finally the absence of any wardship jurisdiction in Scotland and the supervisory nature of the Court of Session's function indicate a general incapacity in the Scottish courts to deal individually and separately with incidentals of the patria potestas or of guardianship.

44.17 In England the paternal right to custody and the paternal right to determine the child's religion had begun to emerge independently of each other during the nineteenth century with considerable inhibitory consequences for the development of the law. The law of Scotland probably never reached the same position as English law. But by the end of the 1880s the wishes of a parent in relation to religion were being increasingly recognised as relevant as an incident of the patria potestas.[44] This has probably remained so ever since[45] and the courts have had to deal with the question what part religion plays in relation to the child's welfare.

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42 McLay v Thornton (1868) 41 Scottish Jurist 68; Leys v Leys (1886) 13 Rettie 1223.

43 Because the threshold approach was concerned more with parental unfitness or misconduct than with specific or general welfare.

44 Brand v Shaws (1888) 15 Rettie 449.

45 It was impliedly recognised in s. 4 of the Custody of Children Act 1891. See also Kincaid v Quarrier (1896) 23 Rettie 676; Brown v Halbert (1896) 23 Rettie 733; Alexander v McGarrity (1903) 5 Fraser 654.

44.18 It was probably impossible in Scotland, unlike the position in England, for religion to be considered independently of custody. Thus many custody actions were prompted by a desire to preserve or change a child's current religious education.[46] When the Court of Session relied upon English authorities, as in Morrison v Quarrier,[47] the effect was to apply anomalous principles created in a different context. Lord Robertson L.P. took the view that there was a presumption in favour of the father's wishes in relation to the religious education of his child.[48] Lord Adam, on the other hand, indicated that the law of Scotland was not the same as the law of England. A father's wishes were not in his opinion paramount.[49] Soon after, however, Lord Robertson L.P. appeared to revert to the earlier Scottish position that the court would simply pay "due regard to religion" in considering the child's welfare.[50]

44.19 The other decision of the Court of Session which tended to treat the law in the two jurisdictions as equivalent was O'Donnell v O'Donnell.[51] The Lord President, Lord Strathclyde, followed the comments of Mellish L.J. in Andrews v Salt[52] that a child would require to be educated in the religion of his father unless he had done something to forfeit or abandon his right. Welfare was nevertheless the paramount consideration.[53] Lord

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46 Carlin v Quarrier (1889) 6 Sh.Ct.Rep. 90; Morrison v Quarrier (1894) 21 Rettie 889 and 1071; Reilly v Quarrier (1895) 22 Rettie 879; Hogg v Scarth (1896) 13 Sh.Ct.Rep. 29; Kincaid v Quarrier (1896) 23 Rettie 676; Cairney v Ross (1897) 13 Sh.Ct.Rep. 203; Erskine v Connolly (1916) 32 Sh.Ct.Rep. 163; O'Donnell v O'Donnell 1919 S.C. 14.

47 (1894) 21 Rettie 1071.

48 Ibid. at p. 1073 per Lord Robertson L.P.

49 Ibid. at p. 1075 per Lord Adam.

50 Reilly v Quarrier (1895) 22 Rettie 879 at p. 884 per Lord Robertson L.P.

51 1919 S.C. 14.

52 (1813) L.R. 8 Ch. 622 at p. 638.

53 O'Donnell v O'Donnell 1919 S.C. 14 at p. 17 per Lord Strathclyde L.P.

Skerrington rationalised the potentially decisive character of the religious issue by saying:-

> "... prima facie it is in the interests of a child that he should be educated in the religion of his parents, and, if there be a difference between the religion of the father and of the mother, in the religion of the father."[54]

In that case, since welfare considerations were equal as between the contending parties, the children were given into the custody of the party who would bring them up in the father's religion.

44.20 These two decisions[55] were rather exceptional in following the English approach so closely. More typical of the Scottish attitude was Murray v Maclay.[56] The paternal uncle of two orphans, their nearest male agnate, asked the court to approve that the children be brought up in the Roman Catholic faith and to ordain the respondent, their tutor and guardian properly appointed by their mother, so to bring them up or otherwise to deliver them to him. Such a series of requests implied that the Court of Session had a jurisdiction analogous to the English wardship jurisdiction. The Court of Session declined to treat the children as wards of court in that sense and adopted in effect the threshold approach as the foundation of

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54 Ibid. at p. 19 per Lord Skerrington.

55 Morrison v Quarrier (1894) 21 Rettie 1071; O'Donnell v O'Donnell 1919 S.C. 14.

56 (1903) 6 Fraser 160.

a supervisory jurisdiction. The theme underlying the judgment of the court was that the court would not control or direct a guardian in the administration of his duties. If he was failing in his duty or misconducting himself, he would be removed from office. Thus the question for the court was not in which religion the children should be brought up but whether the guardian was failing in his duty.[57] There was no suggestion of the substitute parent or substitute guardian approach as contemplated by the English Court of Chancery.[58] As Lord Kinross L.P. indicated:-

> "Prima facie one of the things which a guardian well nominated, and against the conduct of whose administration there has been not a whisper before us, should be allowed to judge in the first instance, at all events, is how the children should be educated, and in what faith they should be brought up. I do not in the least suggest that it might not be a most proper thing for him to have regard to the wishes of one or both parents in a matter of that kind."[59]

44.21 The enactment of the paramountcy of welfare principle in 1925 fitted very easily into that framwork. Welfare undoubtedly took precedence[60] and questions of religion have become almost without significance,[61] although it is apparently better for

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57 Ibid. at pp. 165 and 166 per Lords Kinross L.P. and McLaren respectively.

58 Ibid. at p. 164 per Lord Kinross L.P.

59 Idem.

60 Irwin v Bowie (1931) 47 Sh.Ct.Rep. 293.

61 McNaught v McNaught 1955 S.L.T. (Sh.Ct.) 9; Mackay v McKay 1957 S.L.T. (Notes) 17.

a child to have the opportunity of a religious education rather than to be brought up as an atheist.[62] Welfare in the context of custody is the vital question. Lord Wheatley integrated the various lines of development when he concluded in 1960:-

> "... if in granting custody of the child to the mother, the children will be deprived of the type of religious upbringing which the husband desires they should have, then he, and he alone, must accept the major responsibility for that."[63]

Religion remains a matter of statutory relevance in a number of contexts, but the tendency, both of Parliament and of the courts in their interpretation of the legislation, is clearly to treat religion and religious education as a relatively minor aspect of a child's welfare.

(iii) Physical and moral integrity

44.22 Religion as an element of welfare has both general and specific aspects. The solely specific aspects of welfare are as variable as the circumstance of any case. It is therefore impossible to create categories or even a list of the specific aspects of welfare. Some are related to the more general elements: for example, the age or sex of the child may affect the person

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62 McClements v McClements 1958 S.C. 286.

63 Zamorski v Zamorska 1960 S.L.T. (Notes) 26 at p. 27.

with whom it is "natural" for the child to be associated.[64] More importantly, the specific aspects may be considered either from the child's point of view, the parent's point of view or a combination of both. The age of the child is usually of considerable significance.[65] That too has a bearing on the importance of the child's own wishes.[66] The sex of the child[67] and any risks, medical[68] or other,[69] involved in an association with one or other parent or whoever else seeks custody may be significant. The personal qualities of the person seeking custody are unlikely to be ignored.[70] The contemporary balancing approach is essentially an intellectual and rational process for weighing up these factors and coming to a decision on the basis of them and whatever else is deemed relevant.

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64 Reid v Reid (1901) 3 Fraser 330.

65 Fisher v Fletcher (1827) 6 Shaw 270; Dallas v Dundas (1845) 8 Dunlop 318; McFarlane v McFarlane (1847) 9 Dunlop 904; Harvey v Harvey (1860) 22 Dunlop 1198; Bloe v Bloe (1882) 9 Rettie 894; Pagan v Pagan (1883) 10 Rettie 1072; Mackenzie v Mackenzie (1887) 25 Scottish Law Reporter 183; Miller v Miller (1889) 5 Sh.Ct.Rep. 289; Stevenson v Stevenson (1894) 21 Rettie 430; Martin v Martin (1895) 3 S.L.T. 150; Campbell v Croall (1895) 22 Rettie 869; Reid v Reid (1901) 3 Fraser 330; M v M 1926 S.C. 778; Christison v Christison 1936 S.C. 381; McLean v McLean 1947 S.C. 79; Brown v Brown 1948 S.C. 5; Loughran v Loughran 1949 S.L.T. (Sh.Ct.) 77.

66 Flannigan v Muir (1892) 19 Rettie 909; Fisher v Edgar (1894) 21 Rettie 1076; Morrison v Quarrier (1894) 21 Rettie 1071; Campbell v Croall (1895) 22 Rettie 869; McCarroll v McCarroll 1937 S.N. 62; Klein, Petitioner 1969 S.L.T. (Notes) 53.

67 Christison v Christison 1936 S.C. 381.

68 Logan v Cathcart (1827) 5 Shaw 341.

69 Runciman v Runciman 1965 S.L.T. (Notes) 6.

70 McLay v Thornton (1868) 41 Scottish Jurist 68; Martin v Martin (1895) 3 S.L.T. 150.

42.23 The two most important specific aspects of welfare have been and continue to be the child's physical and moral integrity. The parental duties to maintain and educate the child are directly related to these aspects of welfare. The legal approach to maintenance and education in singling them out for special regulation is an indication of their importance.[71] Otherwise, the child's physical and moral welfare has been treated in two ways: first, as the element of the child's welfare which has been or is likely to be affected by the conduct of the parent, and then as the element of the child's welfare which requires not only to be protected but also, if possible, improved.[72] This is to some extent the substantive reflection of the threshold and discretionary approaches.

44.24 Most of these earlier custody cases tended to consider the effect on the child's health or morals of a continuation of the relationship between the person alleged to have forfeited his rights over the child and the child himself. The others were concerned rather to include the child's physical and moral welfare in the search for a solution in the child's best interests. But it is expected even now that a court will ask the question

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71 For physical welfare: McFarlane v McFarlane (1847) 9 Dunlop 904; Cameron, Petitioner (1847) 9 Dunlop 1401; Muir v Milligan (1868) 6 Macpherson 1125; Lang v Lang (1869) 7 Macpherson 445; Bloe v Bloe (1882) 9 Rettie 894; Leys v Leys (1886) 13 Rettie 1223; Sutherland v Taylor (1887) 15 Rettie 224; Miller v Miller (1889) 5 Sh.Ct.Rep. 289; Gibson v Gibson (1894) 2 S.L.T. 71; Stevenson v Stevenson (1894) 21 Rettie 430; Mrs AB v AB (1950) 66 Sh.Ct.Rep. 225. For moral welfare: Steuart v Steuart (1869) 7 Macpherson 445; Bloe v Bloe (1882) 9 Rettie 894; Leys v Leys (1886) 13 Rettie 1223; Miller v Miller (1889) 5 Sh.Ct.Rep. 289; B v B 1907 S.C. 1186.

72 For physical welfare: Baillie v Agnew (1775) 5 Brown's Supplement 526; Logan v Cathcart (1827) 5 Shaw 341; Martin v Martin (1895) 3 S.L.T. 150; Black v Glendenning (1900) 16 Sh.Ct.Rep. 348; Byers v Donaldson (1903) 19 Sh.Ct.Rep. 242; Minto v Minto 1914 2 S.L.T. 381; Pow v Pow 1931 S.L.T. 485; Zamorski v Zamorska 1960 S.L.T. (Notes) 26; Cochrane v Keys 1968 S.L.T. (Notes) 64; A v N 1973 S.L.T. (Sh.Ct.) 34. For moral welfare: Byers v Donaldson (1903) 19 Sh.Ct.Rep. 242; Alexander v McGarrity (1903) 5 Fraser 654; Minto v Minto 1914 2 S.L.T. 381; M v M 1926 S.C. 778; Pow v Pow 1931 S.L.T. 485; Zamorski v Zamorska 1960 S.L.T. (Notes) 26; Cochrane v Keys 1968 S.L.T. (Notes) 64.

whether the continuation of an existing relationship would harm the child's health or morals where a presumptive approach has been adopted. Whatever approach has been or may be adopted, there is no doubt that much judicial attention has been focussed upon these two specific aspects of a child's welfare. One of the best examples of this interplay between the specific aspects of welfare, including reference to certain general aspects of welfare, is the decision of Sheriff-substitute Walker in Loughran v Loughran.[73] He looked not only at the matrimonial context of the dispute but also at the "social and emotional" influences between the parents and the child, the specialities of the child's physical condition, indeed all aspects of the alternative "environments" in which the child might find himself.[74]

(b) Adoption

44.25 The structural quality of much of the custody and guardianship legislation has given to the courts an opportunity to build upon the existing law and to continue to create a substance of welfare in the light of each case. This flexibility, almost absence, of standards has allowed the court to reflect changing social values. The adoption legislation on the other hand gives to the courts little opportunity to do likewise: firstly, because the legislation itself deals with certain fundamental aspects of welfare and also the creative function of

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73 1949 S.L.T. (Sh.Ct.) 77.

74 Ibid. at pp. 78 and 79.

the court is restricted to the extent that other bodies and persons are involved in the process.[75] The judicial approach to the substance of welfare in the adoption context is however much the same as in the custody context notwithstanding its much narrower scope.

44.26 It is not surprising that in the adoption context most of the issues determined by the courts have been those of competency or of policy: for example, the adoption of children by their grandparents[76] or the adoption of a young child by a single male petitioner.[77] Certain aspects of welfare nevertheless emerge from these issues: the age of the child[78] and the relative ages of the child and the petitioners.[79] The health of the child is a matter for consideration;[80] so is religion;[81] and there are examples of the need for stability and security[82] and also for a relationship.[83] In 1971 welfare was given a wide interpretation so as to include the child's spiritual, moral and material welfare.[84] This is consistent with the trends in the meaning of welfare in the custody context. Scottish examples are however rather few in number.

Section 3 - The meaning of welfare: England

(a) Custody and related issues

(i) Introduction

75 E.g. adoption agencies, local authorities, curator ad litem.
76 Mrs D,Petitioner 1951 S.L.T. (Sh.Ct.) 19.
77 E, Petitioner (1948) 65 Sh.Ct.Rep. 8; H, Petitioner 1960 S.L.T. (Sh.Ct.) 3.
78 E, Petitioner (1948) 65 Sh.Ct.Rep. 8; Mrs D, Petitioner 1951 S.L.T. (Sh.Ct.) 19.
79 B and B, Spouses 1936 S.C. 256.
80 G and G, Petitioners 1949 S.L.T. (Sh.Ct.) 60; K and K Petitioners 1950 S.L.T. (Sh.Ct.) 2.
81 H and H, Petitioners 1949 S.L.T. (Sh.Ct.) 68.
82 Mrs B, Petitioner 1952 S.L.T. (Sh.Ct.) 48.
83 AB, Petitioners (1962) 78 Sh.Ct.Rep. 148.
84 A and B, Petitioners 1971 S.L.T. 258.

44.27 The difference in approach of the Scottish and English courts to the substance of welfare is striking. The English courts have taken a much more expansive view; they have considered some very fundamental issues; they have introduced criteria of some complexity. In consequence some of their decisions have been controversial.[85] By comparison the Scottish courts have proceeded more cautiously and more systematically. One of the reasons for these differences is the distinctive nature of the judicial function in each jurisdiction. The Scottish courts see their function as more supervisory than creative. The English courts exercise a more positive parental jurisdiction originating in the wardship concept. These differences are simply a reflection of the separate foundations of the two systems, despite the imposition on both systems of an almost identical statutory superstructure.

44.28 In Scotland minority was effectively divided into three periods each comprising seven years:[86] the relative position of each parent and the child during each of these periods was fairly clearly demarcated. The accepted distinction between the person and the property of the child enabled the courts to concentrate on the major issue for determination. It was thus possible to identify during these periods an era of maternal preference, followed by one characterised by the strength of the

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85 I.e. substantively; not necessarily legally: e.g. the "blood tie" controversy.

86 Infancy, pupillarity, minority.

patria potestas in the father and culminating in an increasing degree of freedom of choice for the child. Although prima facie a fairly rigid and formal pattern, the Scottish system seemed to operate in a relatively flexible manner, partly because the parent was regarded as more than a parent, almost as a trustee for the welfare or benefit of the child. Into this pattern the offices of tutor and curator fitted very neatly. The judicial power of supervision with the sanction of removal from office for breach of duty gave to the court powers of control over the child which were indirect.

44.29 In England on the other hand the courts were faced with the monolithic concept of infancy during which the child was formally incapax. While in Scotland the law provided a structure more amenable to the vicissitudes of reality, in England the courts themselves had to create ad hoc principles and procedures for dividing infancy into more manageable elements. In doing so they relied much more than the Scottish courts upon ideas of nature, nurture and justice. The evolution of the wardship jurisdiction was both the cause and the effect of these conceptual difficulties. It is thus not altogether surprising that the English system now gives an impression of flexibility and of responsiveness to change apparently lacking in the Scottish system. The lack of flexibility in the Scottish system is probably also a mere impression but it may become a reality unless the distinctive historical antecedents of the contemporary position in Scotland are again recognised.

(ii) The general aspects of welfare

44.30 Since custody evolved in England from guardianship, it is no surprise that concepts of nature and nurture[87] were transposed from guardianship to custody. Thus the position of the mother as guardian by nurture emerged as a maternal preference in consequence of her natural relationship with the child.[88] The diversity of natural doctrine has allowed a father's legal right to be justified in terms of nature.[89] That is also true of the mother's status vis-a-vis her illegitimate child,[90] the father's control of his child's religious upbringing,[91] any preferences accorded to the father[92] and finally the instinctive relationship or "blood tie" between parents and children.[93] Nature is clearly a very convenient concept used to support a number of propositions in a variety of legal contexts.

44.31 Although nature has been used in that way for a long time, similar reference to justice is relatively recent Although some of the references to justice may be traced to the nineteenth century, it has been significant only since 1940 or so and particularly since about 1960. The nineteenth century cases

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87 R v Clarke (1857) 7 Ellis and Blackburn 186; In re Scanlan, Infants (1888) L.R. 40 Ch. D. 200.

88 Austin v Austin (1865) 34 Beavan 266; Stevenson v Florant [1927] A.C. 211; Vigon v Vigon [1929] P. 157; Boyt v Boyt [1948] 2 All E.R. 436; Harben v Harben [1957] 1 All E.R. 379; Re M (Infants) [1967] 3 All E.R. 1071; H v H and C [1969] 1 All E.R. 262; Re F (an infant) [1969] 2 Ch. 238.

89 Wellesley v Beaufort (1827) 2 Russell 1; Vansittart v Vansittart (1858) 2 De Gex and Jones 249; Swift v Swift (1865) 34 Beavan 266; In re Agar-Ellis: Agar-Ellis v Lascelles (1883) 24 Ch.D. 317.

90 R v Nash: In re Carey (1883) 10 Q.B.D. 454; Barnardo v McHugh [1891] A.C. 388.

91 In re Agar-Ellis: Agar-Ellis v Lascelles (1878) L.R. 10 Ch.D. 49.

92 W v W and C [1968] 3 All E.R. 408; Re C (A): C v C [1970] 1 All E.R. 309.

93 Warde v Warde (1849) 2 Phillips 786; R v Gyngall (1893) 2 Q.B. 232; Re G (an infant) [1956] 2 All E.R. 876; P(LM) v P(GE) [1970] 3 All E.R. 659.

illustrate a concept of justice almost devoid of content.[94] But now justice is meaningful. It may be a recognition of the child's best interests,[95] but normally justice has now come to mean parental or inter-parental justice. It might, for example, be unjust to reject the claim of an innocent father[96] or the father of an illegitimate child.[97] A solution might be sought consistently with justice to both parents.[98] Where one parent has succeeded in obtaining actual custody of his child by a trick or some unlawful means,[99] justice would deem it wrong for an advantage to be gained thereby. Justice is thus separate from and independent of welfare. Except in ancillary[1] and procedural matters,[2] it has become an argument, if not a factor, to be introduced in direct opposition to welfare, perhaps in substitution for legal rights or natural preferences in favour of parents, the validity of which has been either destroyed or seriously questioned in recent years. Justice may therefore be seen as a parent-biased factor balanced against the predominant status of welfare. In that sense it is not consistent with the paramountcy of welfare principle.

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94 Marsh v Marsh (1858) 1 Swabey and Tristram 312; Codrington v Codrington (1864) 3 Swabey and Tristram 494; Nugent v Vetzera (1866) L.R. 2 Eq. 704; Handley v Handley [1891] P. 124.

95 Pryor v Pryor [1947] P. 64.

96 Re L (Infants) [1962] 3 All E.R. 1.

97 Re C(MA) (an infant) [1966] 1 All E.R. 838.

98 Re O (Infants) [1962] 2 All E.R. 10; Re H (Infants) [1965] 3 All E.R. 906; Re F (An infant) [1969] 2 Ch. 238.

99 Wakeham v Wakeham [1954] 1 All E.R. 434; T v T [1968] 3 All E.R. 321.

1 R v R and I [1961] 3 All E.R. 461.

2 B(B) v B(M) [1969] P. 103; S v McC and M [1970] 1 All E.R. 1162; W v W [1970] 1 All E.R. 1157.

44.32 The other issues of general concern which have been used in the custodial context tend to be more sympathetic to the position of the child. The first is a fairly recent development. The threshold approach was effective to protect the immediate welfare of the child rather than to devise a solution appropriate to the child's future. It was not until the threshold approach had been discarded that the long-term aspect of welfare became predominant. The first reference to the long-term aspects of welfare probably occurred in 1924 but in a decision which anticipated a number of later developments.[3] Since 1962 the long-term view has been of general application[4] except in jurisdictional[5] or clearly temporary contexts.[6] How long is a long term is a matter for the circumstances of each case but the significance of a long-term approach to welfare lies in the recognition that the whole future of the child is in question, not just his immediate protection.

44.33 The preservation of the status quo[7] has on the other hand had a long history in English law. Indeed the object of habeas corpus proceedings was to preserve the legal rather than the actual status quo. In the early nineteenth century there was probably a tendency to keep intact the existing position,[8]

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3 Ward v Laverty [1925] A.C. 101.
4 Re O (Infants) [1962] 2 All E.R. 10; Re E (an infant) [1963] 3 All E.R. 874; Re R(M) (An Infant) [1966] 3 All E.R. 58; Re M (Infants) [1967] 3 All E.R. 1071; Eve (1973) 137 J.P. 85.
5 Re H(GJ) (An Infant) [1966] 3 All E.R. 154; Re G (An Infant) [1969] 2 All E.R. 1135.
6 S v S [1962] 2 All E.R. 1; L v L [1969] P. 25.
7 R v Hopkins (1806) 7 East 578.
8 Lyons v Blenkin (1820) Jacob 245; R v Wilson (1829) 4 Adolphus and Ellis 648n.

particularly if the father was dead,[9] rather than to devise or approve a solution which might or might not be better. Change was often too speculative.

44.34 Later the status quo doctrine took a new form. It became part of what may be called the risk philosophy. What were the risks to the child of keeping him where he was against the risks of changing his care and control?[10] It was not quite marshalling the known against the unknown, for even the alternative of keeping the child where he was contained an element of speculation. The risk philosophy was essentially negative but it contained a choice of negatives rather than no choice at all.

44.35 The early references to the risk philosophy concerned the risks involved in remaining in a certain geographical location with certain identifiable people.[11] Sometimes such risks were ignored.[12] The current version of the philosophy, a consequence of admitting psychiatric evidence, involves an examination of the risks attached to continuing an existing relationship compared with those likely to arise from a new relationship.[13] The risk is psychological rather than physical. Eve J. said in 1926:-

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9 Talbot v Shrewsbury (1840) 4 Mylne and Craig 672.

10 Stourton v Stourton (1857) 8 De Gex, Macnaghten and Gordon 760; In re Curtis (1859) 28 L.J. (Ch.) 458; In re Goldsworthy (1876) 2 Q.B.D. 75; R v Walker (1912) 28 T.L.R. 342; Allen v Allen [1948] 2 All E.R. 413.

11 Religion was often the motivating factor.

12 Hawksworth v Hawksworth (1871)L.R. 6Ch.App.539; In re Agar-Ellis: Agar-Ellis v Lascelles (1878) L.R. 10 Ch.D. 49; Stark v Stark [1910] P. 190.

13 Re W (Infants) [1965] 3 All E.R. 231; Re H (Infants) [1965] 3 All E.R. 906; Re C(MA) (An infant) [1966] 1 All E.R. 838; Re G (An infant) [1969] 2 All E.R. 1135; H v H and C [1969] 1 All E.R. 262.

> "... how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends ..."[14]

This is probably no longer taken for granted and allegations of risk in consequence of a change in relationships are now likely to be seriously discussed. Indeed in J v C[15] according to Ungoed-Thomas J., the "crucial disruption of [the child's] relationship with the foster parents"[16] was the principal reason for denying to unimpeachable parents their right to care and control of their child. Thus the risks in breaking as well as retaining a relationship have probably been acknowledged as the foundation of the risk philosophy in England and such risks may play a significant and perhaps a decisive part in the judicial decision-making process in appropriate circumstances. This is a considerably modified version of the status quo doctrine of the early nineteenth century.

44.36 The final general aspect of welfare in England is the most difficult to isolate. To some extent it is a consequence of the recognition of certain procedures and powers.[17] For the sake of convenience it may be called the choice philosophy. The

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14 Re Thain: Thain v Taylor [1926] Ch. 676 at p. 684 per Eve J. See also Re O (Infants) [1962] 2 All E.R. 10.
15 [1970] A.C. 668.
16 J v C [1969] 1 All E.R. 788, at p. 798 per Ungoed-Thomas J.
17 Paras. 45.50 to 45.52.

question before the court is not so much whether the application before it should be granted but rather whether it is best for the child that this application should be granted, bearing in mind the range of alternatives that may be available. More "remedies" have always been available in England than in Scotland, particularly wardship. Thus the range of alternatives has always been greater in the English system, at least theoretically, although it is not suggested that the court could grant an order not the subject of application. In certain contexts[18] however the court felt free to look at the desirability of alternatives and if one seemed appropriate, for that reason to refuse the order sought.[19] The courts may now in certain circumstances go further and make an order not specifically contemplated by the parties.[20]

44.37 It is too soon to attempt to construct a general doctrine to this effect. Nevertheless there are instances of debate on the comparative desirability of home care or institutional care,[21] parental care, foster care[22] or adoptive care.[23] The impetus for this sort of discussion probably arose in consequence of conjoined adoption and custody proceedings or at least the relationship between such proceedings. Many decisions have in

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18 Particularly conjoined or related custody and adoption proceedings.

19 Re A (An Infant) [1955] 2 All E.R. 202; Re E (An Infant) [1963] 3 All E.R. 874; Re C(A) (An Infant) [1966] 1 All E.R. 560; Re R(PM) [1968] 1 All E.R. 691; F v S [1973] 1 All E.R. 722. Cf. the earlier position: R v Gyngall [1893] 2 Q.B. 232; Re J.M. Carroll [1931] 1 K.B. 317.

20 Paras. 36.37 to 36.48.

21 Re E (An Infant) [1963] 3 All E.R. 874.

22 Re R(PM) (An Infant) [1968] 1 All E.R. 691.

23 Re C(MA) (An Infant) [1966] 1 All E.R. 838.

effect been made between home care or institutional care, but not determined in that way.[24] The most that the courts may now do is to consider the relative advantage of adoption, parental care or institutional care in dealing with the application before them. The choic philosophy may some day take on the form of a legal doctrine.

(iii) The wishes of the child

44.38 Although the wishes of the child are not themselves an aspect of the welfare of the child, they are related to any decision affecting the child. The position in Scotland was for historical reasons fairly clear.[25] In England the wishes of the child are entirel a matter for the court. It is difficult to identify any general trends, for the status to be afforded to the child's wishes has always been determined on an individual basis. One early view was that a child's wishes were largely irrelevant, irrespective of the child's age.[26] Another was to ascertain the wishes of the child, particularly in relation to questions of religion[27] and access[28] and decide in terms of age and intelligence what weight, if any, should be given to them. Although it remains an individual matter, the courts have recently been more inclined to consider the child's own suggestions.[29] The tendency therefore is to consider the quality and viability

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24 I.e. they have been determined without regard to the alternatives

25 Para. 44.9.

26 R v Clarke (1857) 7 Ellis and Blackburn 186; In re Newberry (1868) L.R. 1 Ch. 263; Boyt v Boyt [1948] 2 All E.R. 436.

27 Stourton v Stourton (1857) 8 De Gex, Macnaghten and Gordon 760; Andrews v Salt (1873) L.R. 8 Ch. App. 622; D'Alton v D'Alton (1878) 4 P.D. 87; In re Agar-Ellis: Agar-Ellis v Lascelles (1883 24 Ch. D. 317; R v Gyngall (1893) 2 Q.B. 232; In re W: W v M [1907] 2 Ch. 557.

28 Stark v Stark [1910] P. 190.

29 Re S (Infants) [1967] 1 All E.R. 202; Re T (An Infant) [1969] 2 All E.R. 998.

of relationships. For to order a child to reside with a person with whom there is no sympathy would, it has been argued, be contrary to the child's welfare. For that reason, it should be avoided. But no such proposition of general validity can be established.

(iv) Religion

44.39 Religion played almost no part in the Scottish system until it came under increasingly stronger English influence towards the end of the nineteenth century. Even in England religion was not an issue of much concern until paternal rights became increasingly liable to forfeiture. Thus the paternal right to control religion became almost a substitute for general paternal rights in an attempt to support the position of the parents against judicial and statutory erosion. Indeed in 1969 in the House of Lords Lord Upjohn was critical of the influence which the religious upbringing of the child had had on the development of the law.[30] Some of the decisions were in his view "dreadful."[31]

44.40 It is impossible to be precise about the development of the law or when the various changes occurred. But four broad stages may be identified. First, the father's right to control his child's religious education was almost absolute.[32] This was

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30 J v C [1970] A.C. 668 at p. 717 per Lord Upjohn.

31 Particularly In re Agar-Ellis: Agar-Ellis v Lascelles (1883) 24 Ch.D. 317 and R v New (1904) 20 T.L.R. 583; see J v C [1970] A.C. 668 at pp. 721 and 723 respectively per Lord Upjohn.

32 Hawksworth v Hawksworth (1871) L.R. 6 Ch. App. 539; In re Andrews (1873) L.R. 8 Q.B. 153; In re Agar-Ellis: Agar-Ellis v Lascelles (1878) L.R. 10 Ch.D. 49; In re Clarke (1882) 21 Ch.D. 817; In re Agar-Ellis: Agar-Ellis v Lascelles (1883) 24 Ch.D. 317; In re Montagu: In re Wroughton: Montagu v Festing (1884) 28 Ch.D. 82; In re Scanlan, Infants (1888) L.R. 40 Ch.D. 200; In re Newton [1896] 1 Ch. 740; Re J.M. Carroll [1931] 1 K.B. 317.

modified to constitute a desire to give effect to the paternal or maternal wishes where possible.[33] Religion then became simply one among a number of considerations.[34] Finally, religion is either ignored[35] or the courts exact some form of undertaking from the custodial party.[36] But this is largely unenforceable in practice.

44.41 This pattern suggests that the courts have been reluctant to discard or even reduce the significance of religion. If this is the policy of the judiciary, it is also the policy of Parliament. It is not unreasonable to suggest that the courts have probably been guided, albeit indirectly and unarticulately, by the clear policy of Parliament in this matter. The only statutory provision dealing with religion in a custodial context is section 4 of the 1891 Act.[37] This section clearly implies a parental legal right and to that extent it is not consistent with later legislation. However it remains a provision enacted by Parliament. Statute has preserved the parent's interest in the religious education of the child in other contexts[38] but the change introduced in 1975 in relation to adoption[39] is now symptomatic of the general view that religious aspects should not inhibit a decision otherwise for the benefit of the child. Thus, although religious considerations continue to be recognised, they have become largely unenforceable and ineffectual.

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33 Talbot v Shrewsbury (1840) 4 Mylne and Craig 672; R v Clarke (1857) 7 Ellis and Blackburn 186; Stourton v Stourton (1857) 8 De Gex, Macnaghten and Gordon 760; Austin v Austin (1865) 34 Beavan 257; Skinner v Orde (1871) L.R. 4 P.C. 60; Andrews v Salt (1873) L.R. 8 Ch.App. 622; In re Nevin [1891] 2 Ch. 299; Barnardo v McHugh [1891] A.C. 388; In re McGrath [1893] 1 Ch. 143; In re X: X v Y [1899] 1 Ch. 740; F v F [1902] 1 Ch. 688; Re C(MA) (An Infant)[1966] 1 All E.R. 838.

34 D'Alton v D'Alton (1878) 4 P.D. 87; R v Gyngall [1893] 2 Q.B. 232; In re W: W v M [1907] 2 Ch. 557; Re M (Infants) [1967] 3 All E.R. 1071.

35 Re Collins (An Infant) [1950] Ch. 498; Re O (Infants) [1962] 2 All E.R. 10; J v C [1970] A.C. 668.

36 Re A (An Infant) [1955] 2 All E.R. 202; Re E (An Infant) 3 All E.R. 874.

37 Custody of Children Act 1891, s.4. 38 Paras.6.13 to 6.17.

39 Children Act 1975 (1975 c. 72), s.13; Adoption Act 1976 (1976 c. 36), s.7.

(v) The specific aspects of welfare

44.42 The more the courts have been prepared to embrace the balancing approach, the greater has become the scope for widening the substance of welfare. But the opportunity for expanding the content of welfare in this way has not been taken to any extent until the last twenty or so years. It is not however simply a question of opportunity. The legal system is unlikely to create new social attitudes. Unless the information and the ideas are available and acceptable in a social sense, the courts will hesitate to move in a new direction. Thus the widening of the substance of welfare is a reflection as much of new social attitudes as of a changing legal approach. Effective changes are unlikely to occur, therefore, unless society and the legal system are moving in the same direction.

44.43 The older decisions disclose a view of substantive welfare closely related to the threshold approach; rather formal in approach but largely parent-biased and narrow in substance. The age of the child has become a matter of considerable significance[40] but in 1804 the age of the child was regarded as insignificant, perhaps even irrelevant, in view of the strength of the paternal right.[41] The nineteenth century view of welfare was restricted to

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40 Curtis v Curtis (1858) 1 Swabey and Tristram 192; Barnes v Barnes (1867) L.R. 1 P. & D. 463; Harben v Harben [1957] 1 All E.R. 379; Cooper v Cooper [1961] 3 All E.R. 539; Re Kernot [1965] Ch. 217; Re M (Infants) [1967] 3 All E.R. 1071; W v W and C [1968] 3 All E.R. 408; Re T (An Infant) [1969] 3 All E.R. 998; Re F (An Infant [1969] 2 Ch. 238; H v H and C [1969] 1 All E.R. 262; Re C(A): C v C [1970] 1 All E.R. 309.

41 R v De Manneville (1804) 5 East 221.

the financial and material aspects of the child's well-being[42], his physical and moral integrity[43] and, to a lesser extent, his education[44]. Questions of custody and guardianship in a dynamic context cannot be separated from maintenance[45] and education[46]. Each of these matters is now dealt with specifically by the law[47] and partly for that reason the child's financial and educational circumstances, admittedly vital for the child, are now no longer significant only in the custody context.

44.44 The child's physical and moral integrity remain aspects of welfare relevant in the custody context[48]. But they are perhaps less important than in the earlier periods. The health and physical well-being of the child are as important as ever to the child and his parents. But the quality of physical care has undoubtedly improved during the twentieth century, probably the consequence of public regimes of health and education. The more basic needs of children have to some extent been satisfied and the chances of one parent being able to provide a significantly better physical environment for the child than the other parent or indeed any other

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42 Talbot v Shrewsbury (1840) 4 Mylne and Craig 672; Bazeley v Forde (1868) L.R. 3 Q.B. 559. But material factors were not necessarily paramount: R v Gyngall [1893] 2 Q.B. 232.

43 R v De Manneville (1804) 5 East 221; Wellesley v Beaufort (1827) 2 Russell 1; In re Fynn (1848) 2 De Gex and Smale 457; Stourton v Stourton (1857) 8 De Gex, Macnaghten and Gordon 760; In re Curtis (1859) 28 L.J. (Ch.) 458; Andrews v Salt (1873) L.R. 8 Ch. App. 622; In re Goldsworthy (1876) 2 Q.B.D. 75; In re Elderton (1883) L.R. 25 Ch. D.220; In re McGrath [1893] 1 Ch. 143.

44 Lyons v Blenkin (1820) Jacob 245; D'Alton v D'Alton (1878) 4 P.D. 87.

45 Ward v Laverty [1925] A.C. 101; Flood v Flood [1948] 2 All E.R. 712; Kirke v Kirke [1961] 3 All E.R. 1059.

46 Hope v Hope (1854) 4 De Gex, Macnaghten and Gordon 328.

47 Paras. 44.60 to 44.70.

48 Pryor v Pryor [1947] P. 64; Allen v Allen [1948] 2 All E.R. 413; Willoughby v Willoughby [1951] P. 184; In re Benner, Infants [1951] W.N. 436; Re E (An Infant) [1963] 3 All E.R. 874; Re C(MA) (An Infant) [1966] 1 All E.R. 838.

person are gradually being reduced. The reason again is probably the impact of public legislation.

44.45 This cannot be said of the child's moral welfare. Legislation has, on the contrary, extended personal responsibility in this area.[49] So questions of moral welfare have been treated more liberally both in the general context and perhaps even between parent and child in the last decade or so. So far as the child is concerned, this extension of personal responsibility has come about, at least partly and perhaps rather paradoxically, in consequence of the greater public involvement in education. It would be totally misleading to consider the judicial view of the substance of welfare without acknowledging that in one way or another[50] the state rather than the individual parent has to a large extent taken over responsibility for the basic physical and educational needs of the child.

44.46 This is one reason why in recent years the courts have introduced new dimensions to their views of the substance of welfare, to some extent but not altogether in substitution for the more traditional aspects of welfare. There are other reasons why this change may have taken place: greater judicial flexibility, the increasingly discretionary nature of the legal structure, scientific advances in the areas of pediatrics and child psychiatry, movements in social attitudes.[51] These changes are part of a whole pattern. It is impossible to state precisely when or how it began. Each part has reacted with the others and the changing pattern has only gradually evolved.

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49 I.e. the area of sexual morality in particular.

50 E.g. by depriving parents of the power to exercise their parental rights generally or by providing the service directly for the child, for example, education.

51 See e.g. the references in the non-legal bibliography.

44.47 One of the most significant decisions in England in a number of contexts was In re McGrath (Infants).[52] Having identified the welfare of the child as the "dominant" matter for consideration, Lindley L.J. added:-

> "But welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."[53]

In 1893 such views were progressive. But they caught the spirit not only of the earlier period but also of the contemporary aspects. "Affection" is not a precise word but it clearly goes beyond the material, physical, moral and religious integrity of the child. Behind it lies the idea of a relationship. Such an idea, apart from purely legal relationships, has been introduced only recently with any judicial feeling of confidence.[54] The quality of relationships is certainly becoming more important for the law but it is probably too soon to characterise it as the normal view.

44.48 Nevertheless certain more specific aspects of such a relationship may be identified as part of the contemporary view in England of the substance of welfare. The courts have always been prepared to look at the parental and more general qualities or deficiencies of the competitors for

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52 [1893] 1 Ch. 143.

53 Ibid. at p. 148 per Lindley L.J.

54 It appeared in the unusually progressive decision in Ward v Laverty [1925] A.C. 101 and more recently, e.g. in Re L (Infants) [1962] 3 All E.R. 1.

custody or guardianship and at the consequences for the child of these qualities or deficiencies.[55] The system has been sufficiently flexible to enable the social aspects of welfare to be considered.[56] During the twentieth century the child has come increasingly to occupy the central position in the judicial decision-making process. Even now the substance of welfare is fragmented into these various specific aspects, even although the current movement may be towards creating a integrated idea of welfare in terms of a relationship. This simply means putting each of the fragmented elements of welfare together, deciding whether they relate and what relationship is thereby created and then using that as the basis for the welfare decision.

44.49 Such a view of welfare is still speculative. No such doctrine yet exists. It would nevertheless be the logical conclusion of two current trends. An examination of the characters of the parties is not new.[57] It tended to be in the past their moral rather than their parental qualities.[58] But in

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55 Even in terms of the threshold approach.

56 Re G (An Infant) [1956] 2 All E.R. 876; Re O (Infants) [1962] 2 All E.R. 10; Re E (An Infant) [1963] 3 All E.R. 874; Eve and O (1973) 137 J.P. 85.

57 E.g. Hawksworth v Hawskworth (1871) L.R. 6 Ch. App. 539; In re McGrath [1893] 1 Ch. 143; W v W [1926] P. 111; Boyt v Boyt [1948] 2 All E.R. 436.

58 Allen v Allen [1948] 2 All E.R. 413.

the few recent cases when the courts have been searching for parental qualities,[59] either in a parent or in a third party, they seem to have being doing so to find where the child would have a secure and continuous relationship.[60] In a sense this is substituting one generality devoid of context for another equally lacking in substance. True, no doubt, in certain circumstances but when the second trend is added to this possible quest for a relationship, this view of the substance of welfare becomes more intelligible.

44.50 The possibility of a judicial attempt to create a new relationship or recognise an existing one must be balanced by the judicial reluctance to destroy an existing relationship. The traditional status quo doctrine, it has been argued, has now taken the form of the risk philosophy.[61] This in turn was the consequence of the admissibility of special psychiatric or medical evidence of risks inherent in the disruption of the relationship. For that purpose legal relationships were irrelevant. Only actual relationships were important. That is a negative approach but when the more questionable but positive approach is added,[62] then, it is suggested, the courts are moving towards a more general concept of relationship in custody matters. This is not, nor would it be, the only matter to be taken into account in a custody dispute. It is not a substitute for welfare.

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59 Re M (Infants) [1967] 3 All E.R. 1071; F v F [1968] 2 All E.R. 946; Re F (An Infant) [1969] 2 Ch. 238; H v H [1969] 1 All E.R. 262; Re C(A): C v C [1970] 1 All E.R. 309.

60 Re E (D) (An Infant) [1967] Ch. 287 and 761; Re M (Infants) [1967] 3 All E.R. 1071.

61 Para. 44.34.

62 I.e. the quest for a relationship.

It is merely an aspect of the child's welfare as the paramount consideration in custodial decisions. But as such it may in the future attract more attention in appropriate cases as a factor of some significance.

(b) Adoption

44.51 As in Scotland so in England, in consequence of the largely uniform statutory background to adoption, most of the specific welfare factors are prescribed by the legislation[63] or form part of the statutory procedures.[64] There is less scope for the courts to create a substance of welfare. Their role is fundamentally interpretational. The exceptions are where the legislation is silent or resorts to language which attracts interpretational discretion; for example, the general welfare requirement[65] now superseded by the general welfare factor[66] or unreasonable withholding of agreement as a ground for dispensing with the parent's agreement.[67] Broadly, therefore, there are three aspects of the substance of welfare: where it is used to support a general principle, almost as a policy in itself; where a general aspect of welfare forms part of the decision-making process; and where a specific aspect of welfare does likewise.

44.52 Welfare and elements of welfare as items of policy have already been discussed in their policy context.[68] The issues

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63 E.g. the specific threshold requirements for the making of an adoption order (chapter 23) or the objective grounds for dispensing with parental agreement (chapter 28).

64 I.e. the duties of the local authority or the guardian ad litem.

65 Adoption Act 1958 , s. 7(1)(b).

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

67 Children Act 1975, s. 12(2)(b); Adoption Act 1976, s.16(2)(b).

68 Paras. 26.8 to 26.58.

tended to be broad and not related directly to the welfare of the child in question. Frequently the question was one of competency. Was it open to make an adoption order in favour of the child's grandparents?[69] Or other relatives?[70] Could "accommodation" orders be made?[71] Although these are legal questions, they were answered partly by a judicial examination of the consequences of such orders. That involved the court in considering the "natural" or "unnatural" quality of such consequences which implied certain general views on the welfare of the child.

44.53 Similar issues arose once it had been decided that such orders could competently be made. The question then was whether such an order should be made, thus directing the court's attention not to general policy but to the implications for the child in question of the arguments concerning the general and specific aspects of welfare. Was it for this child's benefit for a relationship to continue with his mother but in the capacity of sister?[72] Or for this child to be adopted by a single male applicant?[73] Or for the putative father's interest to be recognised?[74] Was it reasonable for a parent to change his or her mind on the whole proposal?[75] These questions were considered partly in terms of nature, instinctual relationships or blood ties.[76] These

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69 In re DX [1949] 1 Ch. 320.
70 Re F (An Infant) [1970] 1 All E.R. 344.
71 Re A (An Infant) [1963] 1 All E.R. 531.
72 In re DX[1949] 1 Ch. 320.
73 In re RM [1941] W.N. 244; R v City of Liverpool Justices: ex parte W [1959] 1 All E.R. 337.
74 Re Adoption Application 41/61 [1963] Ch. 315; Re O (An Infant) [1965] Ch. 23; Re E(P) (An Infant) [1969] 1 All E.R. 323.
75 In re Hollyman [1945] 1 All E.R. 290.
76 Re C(MA)(An Infant) [1966] 1 All E.R. 838; Re B (An Infant) [1971] 1 Q.B. 437.

considerations were not always related to the child's welfare but several of the arguments were probably founded upon the view that the natural parent-child relationship was in principle better for the child than an adoptive relationship. That may or may not be so. But that is part of the decision with which the court is faced and if the court were to take that view in principle, it would be tantamount to anticipating an important element in the argument.

44.54 These general aspects of welfare are peculiar to the adoption process. This is also true, but to a lesser extent, of the desirability in the child's interests of the creation of a new status.[77] The tendency has probably been not to consider this question in isolation but in conjunction with the other possibilities: for example, legitimation,[78] parental care,[79] care by the putative father,[80] foster care.[81] It involved an examination of their comparative benefits: occasionally adoption itself was regarded as a benefit.[82] Not all of these possibilities involve a change in status. To that extent the court is asking the question where is this child likely to receive the best care and upbringing. That is manifestly not the only issue but its acknowledgment indicates that the courts are searching for a viable relationship and not merely a legal status.

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77 Skinner v Carter [1948] 1 Ch. 387; Re G (An Infant) [1956] 2 All E.R. 876; Re F (An Infant) [1957] 1 All E.R. 819; In re D [1959] 1 Q.B. 229; Re E(P) (An Infant) [1969] 1 All E.R. 323.

78 Re CSC (An Infant) [1960] 1 All E.R. 711.

79 Re Adoption Application 41/61 [1963] Ch. 315, [1964] Ch. 48; In re B (An Infant) [1962] 1 All E.R. 872.

80 Re E(P) (An Infant) [1969] 1 All E.R. 323.

81 Re F (An Infant) [1970] 1 All E.R. 344; Re B(MF) (An Infant) [1972] 1 All E.R. 898.

82 Hitchcock v WB [1952] 2 Q.B. 561; In re K [1953] 1 Q.B. 117; Re W (Infants) [1965] 3 All E.R. 231; Re E(P) (An Infant) [1969] 1 All E.R. 323; Re F (An Infant) [1970] 1 All E.R. 344.

44.55 The prospect of a viable relationship depends as much upon the specific as upon the general aspects of welfare. The same range of specific factors emerges as in the custody context: the financial[83] and material[84] benefits flowing from adoption, the characters and qualities of the prospective adopters,[85] the religious implications[86] and any risks[87] inherent in disrupting a relationship between the child and the adopters created while the child "had his home"[88] with the applicants or was in their "care and possession" for the prescribed periods.[89] The task of a parent in seeking to recover his child from applicants for adoption will be made more difficult to the extent to which the courts accept and apply this risk philosophy, particularly since the purpose of the "home" or "care and possession" requirement is to see if a viable relationship is possible. The Houghton-Stockdale Committee were concerned to reduce these difficulties to a minimum.[90] These difficulties will probably never be eliminated unless the initial placement is treated as final or the parent is disabled from withdrawing agreement after it has been given. Neither is likely to come about in the forseeable future. Thus, although the general and specific welfare considerations in adoption are much the same as in custody matters, the nature and purpose of the adoption legislation indicates that they are used somewhat differently.

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83 In re D [1959] 1 Q.B. 229; In re P (Infants) [1962] 3 All E.R. 789; Re A (An Infant) [1963] 1 All E.R. 531.

84 In re Frame: Edwards v Taylor [1939] 1 Ch. 700; In re K [1953] 1 Q.B. 117; In re P (Infants) [1962] 3 All E.R. 789; Re W (Infants) [1965] 3 All E.R. 231.

85 W v W [1952] 1 All E.R. 858; In re L (WJG) [1966] Ch. 135.

86 Re G (An Infant) [1962] 2 Q.B. 141; Re C(MA) (An Infant) [1966] 1 All E.R. 838.

87 In re C(L) [1965] 2 Q.B. 449; Re W (Infants) [1965] 3 All E.R. 231; Re F (An Infant) [1970] 1 All E.R. 344; Re PA (An Infant) [1971] 3 All E.R. 522.

88 Children Act 1975, s. 9; Adoption Act 1976, s. 13.

89 Adoption Act 1958, s. 3(1).

90 Houghton-Stockdale Report, para 242.

Section 4 - Legal constraints on the substance of welfare

(a) Introduction

44.56 The welfare of the child is affected by statute in apparently every context. Although the private interests of parents remain the static foundation of the law, they have become little more than formal in a dynamic context. The individual parent-child relationship may on the one hand be terminated,[91] suspended[92] or controlled.[93] But on the other hand it has not been destroyed.[94] Indeed these various powers of termination, suspension or control are intended in the long term to support the relationship of parent and child in the most effective way in the circumstances of each case. The system so created acknowledges the private interests of parents but has modified them in the general public interest, either by providing for settlement of private disputes in terms of public interest criteria, by imposing public interest criteria directly on the parents or by a combination of both. The welfare of the child in one form or another is relevant at all stages of State intervention. It may therefore be seen as a grundnorm, depending upon the nature of the legislation.

44.57 To the extent that the law is structural, it contains no standards. That is left to the court or whatever is the decision-making body on an ad hoc individual basis, subject only

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91 Adoption.

92 Official care.

93 Custody disputes.

94 Adoption substitutes one parental relationship for another.

to the meaning and role of welfare. The State has however intervened further in three ways which cut across the legal structures just described. Their purpose is not to provide machinery for determining the person likely to make the best decisions for the child but to enforce against those persons exercising parental powers the minimum standard required of them or, if that cannot be done, to ensure that the child receives that minimum standard. One way of achieving the last objective is to suspend the exercise of parental rights. That simply illustrates that the legal system is a series of related cross-currents. Another way of achieving that objective is for the State itself to provide the minimum standard while leaving parental rights intact.

44.58 The three areas in which these minimum standards apply are in a sense the three basic needs of children: physical protection; maintenance; education. It is only in relation to physical protection that the standards are relatively specific. This is simply because the criminal law has been selected as the ultimate mechanism for enforcement of these standards.[95] The alternative is for the State to intervene not as prosecutor but as a form of statutory guardian to suspend the exercise by parents of their parental rights.[96] There is, and always has been, an affinity between the substance of the criminal law and the

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95 Chapters 11 to 13.

96 E.g. under the official child care legislation.

grounds for activating the official care legislation. They are clearly not the same but if a parent has been found guilty of an offence against his child he will almost automatically be liable to have his parental rights suspended.

44.59 The standards relative to maintenance and education are much less specific. As in custody, it is more an issue to be determined in the circumstances of the case. But the conceptual basis of maintenance and education is quite different from that of custody. The patria potestas in Scotland and guardianship and later custody in England were originally conceived as the legal means whereby the duties to care for, maintain, educate and generally bring up the child were to be given effect.[97] This is still true to some extent, despite the growing judicial enthusiasm for the principle of custody as a right but later partially superseded by the welfare doctrine. It is quite normal for the law to impose duties on certain persons, natural or artificial, supported by powers enabling these duties to be performed. The problem with the law of children is that these powers and duties are so closely related both historically and conceptually. This is entirely consistent with the view that the positions of a parent, a guardian, a court as guardian of its ward, a local authority as statutory guardian, a foster parent or any other person exercising parental

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97 Para. 32.9.

powers are conceptually similar: they come under certain duties and responsibilities, deriving from different sources and containing differing subject matter, but each is in the nature of a holder of an office to which are annexed certain powers the exercise of which is restricted variously in terms of the welfare doctrine. Hence the legal system is fundamentally structural rather than normative, administrative rather than substantive and functional rather than formal.

(b) Maintenance

44.60 The existence, extent and enforcement of the alimentary obligation is a subject by itself[98] and forms no part of this analysis. It is unavoidably related to the child's welfare and for that reason the relationship between maintenance and custody needs to be examined. In Scotland the duty to aliment an illegitimate child is a joint obligation imposed by the common law on both parents and the action of aliment is an action of debt being a claim of relief against the father for half of the expenses of caring for the child.[99] Until 1930 the amount was more or less fixed[1] but since then[2] it has been a matter for discretion.[3]

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98 See generally Clive & Wilson, pp. 592 to 595 and Scottish Law Commission, Memorandum submitted to the Finer Committee on One-parent Families in Report of the Committee on One-parent Families, 1974, Cmmd. 5629-1 Appendix 6.

99 Oncken's Judicial Factor v Reimers (1892) 19 Rettie 519; Ames v Brown (1924) 40 Sh. Ct. Rep. 275.

1 E.g. Malcolm v McGregor (1892) 9 Sh.Ct.Rep. 43; Leuchars v Scott (1892) 9 Sh.Ct.Rep. 108; Fraser v Campbell 1927 S.C. 589.

2 Illegitimate Children (Scotland) Act 1930 (20 & 21 Geo. 5, c.33), s. 1(3).

3 Irvine v Dick 1935 S.L.T. (Sh.Ct.) 33; Mottram v Butchart 1939 S.C. 89.

The courts have followed a fairly rigid approach.[4] A legitimate child on the other hand has a natural right to aliment during his father's lifetime.[5] This has now been supported by legislation.[6] But the amount in financial terms is flexible, depending upon the status of the parties. In all circumstances, therefore, whether the jurisdiction is common law or statutory, matrimonial, custodial or independent, it is very much a matter of discretion. Lord Thomson L.J.-C. commented in 1952:-

> "The rules of law relating to aliment and maintenance are necessarily fluid and vary with social conditions."[7]

If anything, they are more flexible than the rules relating to custody, for the welfare grundnorm has no part to play in maintenance matters. This no doubt is because maintenance is an aspect of welfare.

44.61 The close relationship between custody and aliment arises from the right of the father to discharge his alimentary duty in the way least burdensome to himself,[8] for example, by caring for him in the family home. This was also the foundation of the putative father's defence to an action of aliment by offering to assume the custody of the child.[9] The law reports suggest that that was the context in which aliment and custody were most frequently related. These rules meant that a father

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4 Scottish Law Commission, op. cit., p. 184. 5 Stair, I.v 6 and 7.
6 Poor Law (Scotland) Act 1845 (8 & 9 Vict., c.83), s. 80; National Assistance Act 1948 (11 & 12 Geo. 6, c. 29), s. 51; Ministry of Social Security Act 1966 (1966 c. 20), s. 30. See Wilson v Mannarn 1934 S.L.T. 353; Corcoran v Muir 1954 J.C. 46; Cullen v MacLean 1960 S.L.T. (Notes) 85.
7 Polland v Sturrock's Executors 1952 S.C. 535 at pp. 544 and 545 per Lord Thomson L.J.-C. 8 Paras. 40.61 and 40.62.
9 Of which there are many reported instances, some of which have already been discussed in another context: paras. 40.63 to 40.67.

who could provide a home for his child was in a very strong legal position. This is no longer true now.[10]

44.62 The current attitude probably is that in dealing with maintenance the court should avoid hardship to the child[11] and consider his interests and needs.[12] This may be so even where the child's interests are raised in the context of his mother's claim.[13] But the settlement of alimentary claims on a purely private basis is no longer the sole interest of the law.

44.63 It has long been possible for a public body to assume responsibility for the maintenance of a child. Such responsibilities are normally statutory and the relationship between the public body, the parents and the child will be governed by the statute; otherwise the static common law would apply. It had been held in 1844 that custody rights were not affected when the child was maintained by the parish,[14] although that left open the question whether in the case of an illegitimate child at least the putative father was liable to the public body.[15] These questions have been superseded by the detailed provisions of the modern legislation.[16] The issues are now resolved not in

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10 The offer of custody as a defence to a claim for aliment in relation to an illegitimate child has been destroyed by statute but in Ramsay v Ramsay 1945 S.L.T. 30 at p. 31 Lord Keith, having awarded a sum to the mother as aliment for the child, said: "... the decree carries with it no implication in the matter of custody and that the defender will be entitled to terminate his liability by offering to take the child into his own care."

11 Wilson v Wilson 1957 S.L.T. (Notes) 6.

12 Mizel v Mizel 1970 S.L.T. (Sh.Ct.) 50.

13 Nicol v Nicol 1970 S.L.T. 302.

14 Weepers v Kennoway (1844) 6 Dunlop 1166.

15 Penningham Parish Council v McAdam (1896) 13 Sh.Ct.Rep. 126.

16 Children Act 1948 (11 & 12 Geo. 6, c. 43) ss. 23 and 24; Social Work (Scotland) Act 1968 (1968 c. 49), Part VI.

terms of the child's maintenance but in terms of his welfare. But if neither the custody of the child nor the quality of parental care is in dispute, any question of maintenance will be resolved in terms of the law of maintenance, including the availability of public financial benefits. But the extent to which these public benefits are to be considered in determining the quantum of aliment to be awarded by the court is not altogether clear. Probably public benefits dependent on need are ignored while those not so dependent are taken into account.[17] The overall consequence is that the more the alimentary obligation is satisfied by the State, the less significant maintenance will become in relation to custody. It is unlikely, at least in the forseeable future, that welfare will become completely devoid of any alimentary context.

44.64 The development of the law in England has been fundamentally different. The common law recognised at most a moral obligation on parents to maintain their children.[18] This is why statute intervened at an early date to impose an obligation upon parents in the context of the poor law.[19] The modern equivalent[20] had also passed into Scots law where it may be seen to support the existing obligations rather than create new legal

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17 Clive & Wilson, p. 551; Scottish Law Commission, op. cit., p. 179.
18 Bevan, pp. 453 and 454.
19 Poor Relief Act 1601 (43 Eliz. 1, c. 2).
20 National Assistance Act 1948, s. 42; Ministry of Social Security Act 1966, s. 22.

obligations. In England also a guardian was liable to maintain the child only to the extent of the child's property.[21] Even so, as it has been seen, the parental right to custody was to some extent considered as the means of giving effect to the parental moral duty to care for the child. The relationship between the power and the duty in England was thus much weaker than in Scotland. In that jurisdiction aliment was an incident of status and enforceable in a dynamic context with marginal statutory assistance, while in England in the absence of any underlying static relationship the creation of judicial powers impliedly recognised legal obligations in a dynamic context only.

44.65 It is not surprising that the consequential legal regime in England is statutory and that the legislation not only has created jurisdictions and confers powers but also has provided in detail for their exercise. This is particularly true of the matrimonial jurisdiction[22] and the general approach established in that context has tended where the legislation permits to prevail in the other jurisdictions also.[23] It is largely a matter of discretion exercisable in the circumstances of the individual case, having regard to the statutorily identified factors but implying a balancing approach tempered by rational judgment.[24] The welfare of the child as such naturally

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21 Bevan, p. 455. 22 Matrimonial Causes Act 1973 (1973 c.18), s. 25(2).

23 Matrimonial Proceedings (Magistrates' Cours) Act 1960 (8 & 9 Eliz. 2, c. 48), s. 2(1)(h); Family Law Reform Act 1969 (1969 c. 46), s. 6(2), Guardianship of Minors Act 1971 (1971 c. 3), ss. 9(2) and 20(2).

24 Bevan. pp. 467 to 472.

plays no part in the process. The financial needs and resources of the child are an integral part of the process[25] but the slant is perhaps rather towards the family rather than any specific member of the family.

44.66 The reasons no doubt are that maintenance is a much narrower and more specific concept than custody and that there has always been a very close nexus between the two concepts. It has been recognised in a number of cases that maintenance is a correlative of custody.[26] The relationship between custody and maintenance has been noted in several contexts,[27] while custody and even more widely the child's interests have been part of the argument in relation to maintenance[28] and associated areas.[29] There is thus in practice common ground between the two jurisdictions despite their major and at times fundamental points of difference. The common ground is, as would be expected, largely statutory and, so far as Scotland is concerned, imposed upon a common law structure which had not proved to be completely sterile at the hands of the judiciary.

(c) Education

44.67 Although the law of aliment and maintenance provides for a considerable element of State intervention, either by way of support for parents or temporary suspenstion of their parental responsibilities, in practice the alimentary obligations

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25 Matrimonial Causes Act 1973, s. 25(2); see also Roberts v Roberts [1970] P. 1.

26 Hope v Hope (1854) 4 De Gex, Macnaghten and Gordon 328; Barnardo v McHugh [1891] A.C. 388; Humphreys v Polak [1901] 2 K.B. 385.

27 Higgs v Higgs [1941] P.27; Flood v Flood [1948] 2 All E.R. 712; Harris v Harris [1949] 2 All E.R. 318; Re W(Infants) [1956] Ch. 38[illegible]

28 Nowell v Nowell [1951] 1 All E.R. 474; Goodinson v Goodinson [1954] 2 All E.R. 623.

29 Atkins v Atkins [1939] 3 All E.R. 872; Re Heyworth's Settlements [1956] 2 All E.R. 21.

of parents and those in loco parentis are implemented privately. Rarely does the State accept full responsibility for the child. But that happens sufficiently often to make the legal regime for State responsibility important. Education, on the other hand, is largely now the responsibility of the State or bodies recognised by the State; few parents assume the responsibility personally. The general law, nevertheless, has often taken account in a loose sense of the education of the child.[30]

44.68 The English common law recognised neither a duty to maintain nor a duty to educate. As Bevan said, education depended upon the "whim" of the parents,[31] which would no doubt in turn depend upon their personal capacity to educate the child or their financial capability of delegating the function. The position in Scotland was not basically different. Control of education was an aspect of the patria potestas, not supported by a correlative duty. This is not to say that the courts were not concerned with education in parental or guardianship disputes in either England or Scotland, even after the introduction of public education. Education, in other words, developed largely outwith the legal system until the increasingly extensive assumption of responsibility during the late nineteenth[32] and twentieth centuries[33] by the State.

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30 E.g. in England Lyons v Blenkin (1820) Jacob 245; Hope v Hope (1854) 4 De Gex, Macnaghten and Gordon 328; in Scotland Baillie v Agnew (1775) 5 Brown's Supplement 526; Walker v Walker (1824) 2 Shaw 788; Whitson v Speid (1825) 4 Shaw 42; Young v Elliot (1904) 21 Sh.Ct.Rep. 12; M v M 1926 S.C. 778; Mizel v Mizel 1970 S.L.T. (Sh.Ct.) 50.

31 Bevan, p. 432.

32 Elementary Education Act 1870 (33 & 34 Vict., c. 75).

33 Education Act 1944 (7 & 8 Geo. 6, c. 31), s. 36.

44.69 The nature and structure of the education codes and the almost universal reliance upon delegated responsibility for education have completely transformed the legal issues. The legal regime itself is not concerned with the substance of the educational system. That is devolved upon the statutory body which then becomes the principal decision-maker, aided only marginally at the instance of the parents. Nevertheless, the duty around which the whole structure pivots is the obligation cast upon the parent of the individual child "to cause him to receive efficient full-time education suitable to his age, ability, and aptitude, either by regular attendance at school or otherwise." This is supported by a series of enforcement provisions exercisable at the option of the education authority. The only substantial obligation on the authority is to make available schools "sufficient in number, character and equipment,"[34] an obligation generally devoid of specifically enforceable content. Equally difficult to enforce is the general principle that pupils are to be educated in accordance with the wishes of their parents,[35] partly because it is a principle to which the authority is only obliged to "have regard" and partly because the principle itself is qualified in terms of overall efficiency and matters of public expenditure. The legislation has been so structured therefore that the interests of the individual child or parent are more likely to be prejudiced than to be promoted when they are in conflict with the system of the authority as a whole.

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34 Ibid., s. 8(1).

35 Ibid., s. 76.

44.70 This general pattern was set in the nineteenth century. Since then education has become a matter of public administration[36] and the function of the courts in England and in Scotland has been restricted to ensuring that the statutory procedures have been followed,[37] that the details of the legislation have been correctly interpreted[38] and that the general principle of

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36 In England Woodward v Oldfield [1928] 1 K.B. 204; Spiers v Warrington Corporation [1954] 1 Q.B. 61; Re B (Infants)[1962] Ch. 201, sub nom. Re Baker (Infants) [1961] 3 All E.R. 276; Cumings v Birkenhead Corporation) [1971] 2 All E.R. 881; in Scotland Lord Advocate v Stow School Board (1876) 3 Rettie 469; Perth School Board v Henderson 1917 1 S.L.T. 92; Farquhar v Aberdeen School Board (1918) 34 Sh.Ct.Rep. 217; Quinn v Dundee Education Authority 1929 S.C. 77; Bannon v Dunbarton County Council (1934) 50 Sh.Ct.Rep. 307; Birnie v Aberdeen County Council Education Committee 1937 S.L.T. 30; Parlane v Perth & Kinross Joint County Council 1954 S.L.T. (Sh.Ct.) 95.

37 In England Margerison v Hind [1922] 1 K.B. 214; in Scotland France v Anderson (1877) 4 Rettie (J) 42; Macauley v Macdonald (1887) 14 Rettie (J) 43; Thomson v Scott (1901) 3 Fraser (J) 79; Sinclair v Moulin School Board 1908 S.C. 772.

38 In England Hares v Curtin [1913] 2 K.B. 328; Fox v Burgess [1922] 1 K.B. 623; Jenkins v Howells [1949] 2 K.B. 218; Shaxted v Ward [1954] 1 All E.R. 336; Plunkett v Alker [1954] 1 Q.B. 420; in Scotland Campbell v Jamieson (1877) 4 Rettie (J) 17; Macdonald v Lamont (1892) 19 Rettie (J) 41; Barr v Smith (1903) 5 Fraser (J) 24; Gillies v Quigley (1905) 8 Fraser (J) 1; Muiravonside School Board v Mackay & Baird (1909) 25 Sh.Ct.Rep. 132; Turnbull v Monzievaird and Strowan School Board (1911) 27 Sh.Ct.Rep. 358; Gowling v Castleton School Board (1911) 28 Sh.Ct.Rep. 165; Mackenzie v Smith 1927 J.C. 47.

following parental wishes has been given effect within its own statutory limitations.[39] The system is thus almost entirely a legal framework for administrative decision-making created by Parliament, conceived in the public interest and designed to promote the interests of the individual child where they are not in conflict with the public interest at large. This is another example of a legal system which is structural in form and almost free from substantive legal content. Although the system is no doubt intended to provide for the educational needs of the individual child, it does so in a way which mostly leaves the child and his parents out of the system, except at the point of enforcement of the education authority's decision.

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39 In England Spiers v Warrington Corporation [1954] 1 Q.B. 61; Watt v Kesteven County Council [1955] 1 Q.B. 408; Cummings v Birkenhead Corporation [1970] 3 All E.R. 302, [1971] 2 All E.R. 881; in Scotland Perth School Board v Cushnie (1906) 23 Sh.Ct.Rep. 30; Calder v Alexander 1926 J.C. 51; Parlane v Perth & Kinross Joint County Council 1954 S.L.T. (Sh.Ct.) 95; Huckstep v Dunfermline District Education Sub-committee 1954 S.L.T. (Sh.Ct.) 109; McLeman v Moray & Nairn Joint County Council 1955 S.L.T. (Sh.Ct.) 14; Auld v Ayr County Council (1960) 76 Sh.Ct.Rep. 38; Dornan v Glasgow Corporation 1970 S.L.T. (Sh.Ct.) 29.

CHAPTER 45

THE INCIDENTALS OF THE WELFARE DOCTRINE

Section 1 - Introduction

45.1 In 1974 Roskill L.J. said:-

> "Any order for custody, any order for access, has by its nature an element of the experimental. It cannot be otherwise. No one can foretell exactly how the children will react, or how a parent or parents will react."[1]

That comment could be applied with equal force to adoption, intervention by the State or any context in which decisions affecting children are made. Each of these processes, whether the decision is made by a judicial or an administrative body, is flexible, attracts discretions of various kinds and contains a minimum of prescriptive measures. The approach of the legal system as a whole and of the courts in particular is entirely consistent with that process. If welfare has properly been described as the grundnorm of that process, that concept itself exhibits these same characteristics.

45.2 The preceding chapter has indicated very clearly how diverse and multi-facetted are the aspects of welfare. Yet the theme emerges strongly that some judges have striven to find

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1 D v D (Infant: access) (1974) 4 Family Law 195 at p. 196 per Roskill L.J.

a more formal and legalistic approach and have countered the discretionary structure of the processes by seeking rules, guidelines, presumptions or principles to govern the exercise of their discretion. On the other hand other judges have felt free to adopt an open and imaginative view of their functions. To some extent it is a matter of words but it would be difficult to deny that either view may, to some extent, be sustained by the legislation.

45.3 The structural nature of the legal system and the flexibility of the welfare grundnorm create a few technical constraints. The restrictive features of the system are likely therefore to be the jurisdiction of the courts, the procedures with which they or the other relevant bodies must comply, the statutory powers which they exercise, the techniques used to investigate the individual case or the sources of the information and knowledge available to them. But far from being constraints, these matters have also been influenced by the welfare doctrine. That doctrine is not only the justification for and the essence of the system but it is also used to support modifications to other features of the judicial process. Welfare is not simply part of the process; it justifies on a policy basis relaxation of other rules. Each of these five potentially restrictive aspects of the legal system will be examined in turn so that the methods of their relaxation may be considered.

Section 2 - Sources of knowledge

(a) Introduction

45.4 Where the decision falls to be made by a person or body clearly not judicial, it is in principle open to that person or body to acquire the relevant information in whatever way seems most appropriate. This applies at any stage of the process: threshold or discretionary. But where the decision is made by a court, unless there is a statutory or other rule or practice to the contrary, the court would normally be expected to follow the usual judicial procedures. It has been the theme of this analysis to suggest that to the extent that the welfare doctrine is relevant and perhaps even binding, the function of the court is more administrative than judicial. The welfare doctrine involves an examination of what has happened and what is likely to happen. The traditional judicial procedures may be sufficient to cope with that situation.[2] But the welfare doctrine may, depending on how it is treated, also require the court to make a choice between a number of alternatives. This is part of the "experiment" to which Roskill L.J. referred. It is also the element which has caused both Parliament and the courts to consider whether the traditional judicial procedures may have become insufficient at that point: whether, in other words, the adversary system should not be supported by a degree of inquisition. Parliament has recognised this and acted upon it. So, to a lesser extent, have the courts.

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2 See Law Reform Committee, Seventeenth Report (Evidence of Opinion and Expert Evidence), (H.M.S.O., 1970), Cmnd 4485, para 2. That Report is hereafter referred to as the "Evidence Report."

45.5 The fundamental problem, particularly in England, is the technical incapacity of an infant.[3] In Scotland this is true of a pupil, but less so of a minor. The struggle has evolved therefore between that incapacity and the desire to afford some recognition to the interests of the child as distinct from those of the parent or guardian. There has certainly been a movement, largely disjointed and ad hoc, in that direction but it would hardly be justified to conclude that a child's interests now receive independent acknowledgement. Thus, although the substantive aspects of the welfare doctrine have become reasonably well recognised, the incidental, but nevertheless practically important, formal aspects of the doctrine have received less attention.

45.6 It was put to the Morton Commission that "the root of the trouble lay in the fact there is at present no adequate means of ensuring that someone is especially charged to look after the children's interests."[4] The suggestion that the court should accept entire responsibility for this did not meet with unqualified approval[5] and the ensuing legislation,[6] applicable in the matrimonial and consistorial contexts, placed only limited responsibility on the court. The same question has been raised again in other contexts[7] but so far no general approach to the

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3 The word "minor" is now sometimes used to refer to an "infant" in English law.

4 Morton Report, para. 367.

5 Ibid., paras. 372, 377 and 385.

6 Matrimonial Proceedings (Children) Act 1958 (6 & 7 Eliz., 2, c.40).

7 Field-Fisher Report, paras. 228 and 229: see also Social Work (Scotland) Act 1968 (1968 c. 49), s. 34A and Children and Young Persons Act 1969 (1969 c.54), s. 32B added by Children Act 1975 (1975 c.72), ss. 66 and 64 respectively.

recognition and enforcement of the child's independent interests has been introduced.[8] It is evolving slowly from context to context.

(b) Judicial relaxation of the rules of evidence

45.7 To some extent the courts have also accepted some of the consequences of the welfare doctrine. In Scotland, since a minor was in a less restricted position than a pupil, the courts have usually been prepared to consider the minor's own preferences and wishes in determining his future.[9] While in England, one of the earlier controversies was whether the court should or could interview the child to enable his views to be ascertained and perhaps taken into account.[10] There seems to have been some hesitancy about considering the child's personal wishes and even in 1968 it could not be said that there was an established practice of doing so.[11]

45.8 The tendency during the earlier periods was probably to follow the adversary approach and rely upon the evidence adduced by the parties. This was consistent with the threshold approach. Considerable reliance in England was placed upon affidavit evidence, especially in the Court of Chancery.[12] Now several judges have taken the view that affidavit evidence is unsatisfactory,[13] that it is important to see the parents and others in person[14] and that as much information as possible about the family should be available.[15] This

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8 It commenced in the adoption context.
9 Para. 44.9.
10 Hawksworth v Hawksworth (1871) L.R. 6 Ch. App. 539; In re W: W v M [1907] 2 Ch. 557; Ward v Laverty [1925] A.C.101.
11 Law Commission, Published Working Paper No. 15 (Report by Mr. John Hall), 1968, pp. 9 and 10. See also Re T (An Infant) [1969] 3 All E.R. 998. The Commission's paper is hereafter referred to as the "Hall Report".
12 Re Kernot [1965] Ch. 217.
13 Rossage v Rossage [1960] 1 All E.R. 600; H v H and C [1969] 1 All E.R. 262.
14 H v H and C [1969] 1 All E.R. 262.
15 S v S [1949] P. 269; Cooper v Cooper [1961] 3 All E.R. 539; Re P (Infants) [1967] 2 All E.R. 229. Cf. Witt v Witt [1891] P. 163.

has occasioned the greater admissibility of hearsay evidence,[16] of expert psychiatric and psychological evidence[17] and of fresh evidence not before the court of first instance[18] and a general relaxation of the application of res judicata.[19] These modifications have been justified in terms of the welfare doctrine.

45.9 There is little indication on the other hand of similar relaxations of the rules of evidence in Scotland. It is the general practice in both the Court of Session in consistorial causes and in the sheriff court in actions of separation and adherence for sufficient evidence to be adduced to substantiate the grounds before any decree may be granted.[20] Presumably that applies also to the extent that custody or access is incidental to the process. On the other hand proof seems not be essential in an action for custody only.[21] It is nevertheless now very unlikely that the status quo would be changed except after a full inquiry into the facts and circumstances.[22]

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16 Rossage v Rossage [1960] 1 All E.R. 600; Re J (An Infant) [1960] 1 All E.R. 603; Re K [1962] 3 All E.R. 1000.

17 Allen v Allen [1948] 2 All E.R. 413; Re E (An Infant) [1963] 3 All E.R. 874; Re W (Infants) [1965] 3 All E.R. 231; Re C(MA) (An Infant) [1966] 3 All E.R. 838; Re S (Infants) [1967] 1 All E.R. 202; Re R(PM) (An Infant) [1968] 1 All E.R. 691.

18 Corbett v Corbett [1953] P. 205; Re B(TA)(An Infant)[1971] Ch. 270; Razelos v Razelos [1970] 1 All E.R. 386.

19 Lindsay v Lindsay [1934] P. 162; Corbett v Corbett [1953] P. 205; Hull v Hull [1960] P. 118; F v F [1968] 2 All E.R. 946; Re F(W) (An Infant) [1969] 2 Ch. 269; Porter v Porter [1971] 2 All E.R. 1037.

20 Court of Session Act 1830 (11 Geo. 4 & 1 Will. 4, c. 69),s. 36. See also Walker and Walker, The Law of Evidence in Scotland (Edinburgh, 1964), p. 166.

21 Burt v Nicol (1918) 34 Sh. Ct. Rep. 196; Christie v Christie 1919 S.C. 576; Walker and Walker, op. cit., p. 167, n. 6.

22 Paterson v McNicoll 1934 S.L.T. (Sh. Ct.) 2.

45.10 In the early nineteenth century the courts in Scotland were reluctant to admit medical evidence without specific judicial authority.[23] As late as 1943 the view was expressed that the ordinary rules of evidence applied in custody cases.[24] The Scottish approach may however be becoming more flexible, for in 1954 medical evidence was "reluctantly" admitted,[25] RSSPCC evidence was used in 1960,[26] while in 1964 ex parte statements of counsel were not sufficient.[27] The overall pattern is clear. The courts in Scotland have not given effect to the incidental consequences of the welfare doctrine in the way in which the English courts have begun to do in the last decade or so.

(c) Techniques of investigation

45.11 The reluctance of the Scottish courts to relax the traditional rules of evidence and the greater willingness of the English courts to do so cannot be considered in isolation from other sources of knowledge. If other acceptable techniques of investigation are available, their use may bypass the question whether the traditional rules of evidence should in the individual case be relaxed. This is probably what has happened in Scotland. In England, on the other hand, although the concept of the Crown and later the Court of Chancery as parens patriae

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23 Walker v Walker (1824) 2 Shaw 788; Logan v Cathcart (1827) 5 Shaw 341. Cf. Pow v Pow 1931 S.L.T. 485.

24 McKenzie v McKenzie 1943 S.C. 108.

25 G v Glasgow Corporation (1954) 70 Sh.Ct.Rep. 358.

26 Zamorski v Zamorska 1960 S.L.T. (Notes) 26.

27 Peploe v Peploe 1964 S.L.T. (Notes) 44.

provided an opportunity for relaxed, informal and perhaps even inquisitorial processes, the court was in the early period more concerned with the property than with the person of the ward and this possible line of development came to almost nothing. It was not until the 1950s that the English legal system produced a workable solution to the problem of supporting the welfare doctrine with effective investigative techniques, at least in the custody context.[28] Before then support servives had been provided in the adoption[29] and criminal processes[30] but they were statutory. In England the courts themselves were never able to solve the problem of acquiring the information necessary to give full effect to the welfare doctrine. It is thus understandable why it is only in the last twenty five years in England that the welfare doctrine has taken on a more fundamental and positive role.

45.12 The last twenty five years have not witnessed the same dramatic development in Scotland. One important reason is that even in the nineteenth century the Scottish courts acknowledged that it was almost impossible to give effect to the policy to do what was best for the child without appropriate and effective means of investigation apart from merely relying upon the partial views of the parents. This may be a consequence of the civilian tradition of much of the earlier law of Scotland.

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28 Report of the Departmental Committee on the administration of the law of divorce and nullity of marriage (H.M.S.O., 1946), Cmd. 7024 in consequence of which court welfare officers were experimentally appointed to the Divorce Division in 1950; Morton Report, paras. 369, 387 and 388.

29 Adoption agencies.

30 Probation officers.

In 1970 the English Law Reform Committee noted that, in jurisdictions whose procedures were civilian, "the courts adopt a more inquisitorial role than is consonant with the adversary system upon which the practice of the English courts is based."[31] No reference was made then, or by the Morton Commission in 1956, to the investigative techniques used in Scotland consistently with the adversary system.

45.13 Since the middle of the nineteenth century the courts in Scotland have demonstrated a clear desire to have a full inquiry when the welfare of the child was in issue,[32] involving the attendance of all the parties and the child.[33] In a sense it was a mere detail how best to investigate the circumstances of the individual case. Probably the most common procedure when the matter came before the Court of Session was to appoint the local sheriff,[34] but sometimes a member of the bar,[35] to investigate and report. On one occasion at least the sheriff personally visited the home in question.[36] Sometimes a curator ad litem would be appointed,[37] particularly if the court considered that otherwise

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31 Evidence Report, para. 13.

32 Denny v Macnish (1863) 1 Macpherson 268; Stewart v Brodie (1887) 3 Sh.Ct.Rep. 405; Macdonald v Macdonald (1908) 24 Sh.Ct.Rep. 271; MacLean v MacLean (1916) 33 Sh.Ct.Rep. 316; Smith v Glasgow Corporation (1933) 50 Sh.Ct.Rep. 103; Mottram v Butchart 1939 S.C. 89.

33 Stewart v Brodie (1887) 3 Sh.Ct.Rep. 405.

34 Kennedy v Steele (1841) 4 Dunlop 12; Muir v Milligan (1868) 6 Macpherson 1125; McLay v Thornton (1868) 41 Scottish Jurist 68; Markey v Colston (1888) 15 Rettie 921; Mackenzie v Keillor (1892) 19 Rettie 963; Patterson v Patterson (1899) 2 Fraser 81; Crawford, Petitioner (1899) 6 S.L.T. 380; Mitchell v Wright (1905) 7 Fraser 568; M v M 1926 S.C. 778; Pow v Pow 1931 S.L.T. 485; Christison v Christison 1936 S.C. 381; Hannay, Petitioner 1947 S.L.T. (Notes) 55.

35 Campbell v Croall (1895) 22 Rettie 869; Walter v Culbertson 1921 S.C. 490. See also Peploe v Peploe 1964 S.L.T. (Notes) 44.

36 Brown v Halbert (1896) 23 Rettie 733.

37 Flannigan v Muir (1892) 19 Rettie 909; Fisher v Edgar (1894) 21 Rettie 1076; Morrison v Quarrier (1894) 21 Rettie 889 and 1071.

only one view would be presented to the court. It was also normal when heritable property of the child was being sold by the guardian for the question to be remitted to the Accountant of Court or a man of business.[38] If the child's personal welfare was in issue, a report could be sought from a medical expert.[39] Once a report from "Shelter" was admitted.[40] These procedures contrast strongly with the position in England before 1950 or, more generally, 1958. So, when the system of court welfare officers was set up by statute in 1958,[41] it was in Scotland building upon an investigative structure which had been in use for some time.

45.14 The 1958 Act gave to the Scottish procedures a professional[42] slant which before then they had largely lacked. This no doubt added a new dimension to the investigations. Thenceforth they would involve not only eliciting the facts and circumstances but also an element of prognosis or speculation. This may have happened before, but a professional social worker might be expected to offer an expert opinion which the sheriff or advocate might earlier have hesitated to do. This sophistication has created difficulties.

45.15 The application of the welfare doctrine requires the expression of opinion by the court on a question of fact: what

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38 Logan, Petitioner (1897) 25 Rettie 51; McFadzean 1917 S.C. 142; Collins, Petitioner 1921 2 S.L.T. 36; Shearer's Tutor 1924 S.C. 445.
39 Gibson v Gibson (1894) 2 S.L.T. 71; Black v Glendenning (1900) 16 Sh.Ct.Rep. 348.
40 Stewart v Stewart 1914 2 S.L.T. 310.
41 Matrimonial Proceedings (Children) Act 1958, s. 11.
42 In the child care sense.

is best for the child. But that fact is a conclusion based on a number of other facts and circumstances from which the opinion is deduced. To the extent that the witnesses and the expert state and report these pre-existing facts and circumstances, there is no problem. But once the matter goes beyond that, the witness or the expert is in danger of answering the very question which it is the duty of the court to answer: hence the often stated judicial reluctance to allow experts to "usurp" the function of the court. The problem is the nature and extent of judicial knowledge. The Law Reform Committee indicated that the test of admissibility of opinion evidence should be:-

> "... has the witness who expresses his opinion some relevant knowledge not shared by the judge which makes the opinion of that witness more likely to be right than the opinion of someone who does not possess that knowledge?"[43]

This raises two separate but related questions: what is the extent of judicial knowledge and how may any relevant gaps in that knowledge be filled?

(d) Judicial Knowledge

45.16 If the judges can attribute to themselves the appropriate knowledge, there is no need of expert opinion. The

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43 Evidence Report, para. 2.

Scottish judiciary has generally been hesitant to claim a great deal of knowledge while their English counterparts have been prepared to assume more extensive knowledge. Judicial knowledge and the use of child care principles are closely related. This element in English law has certainly facilitated the presumptive approach which, it would appear, is more common in England than in Scotland. It is nevertheless rare for the courts to talk in terms of judicial knowledge. Many matters are just taken for granted without further explanation.

45.17 The flexibility of judicial knowledge has a fairly long history in English law. As early as 1747 it was considered natural to provide for children[44] and by 1865 the court was prepared to acknowledge the risk of irreparable harm to young children on the loss of their mother.[45] The judges of the Victorian era were quite ready to talk rather grandly of their knowledge of the world[46] and of human nature,[47] of their experience of life[48] and of the "natural order of things."[49] More particularly in one instance the court was able to consider the Roman Catholic propensities of one English county.[50]

45.18 There is no evidence of such extensive judicial knowledge in Scotland in the nineteenth century. Invocations of nature were very rare.[51] Indeed there are no examples quoted

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44 Haws v Haws (1747) 3 Atkyns 524: see also Mendes v Mendes (1747) 3 Atkyns 619.
45 Austin v Austin (1865) 34 Beavan 257.
46 In re Besant (1879) 11 Ch. D. 508.
47 In re W: W v M [1907] 2 Ch. 557.
48 In re Goldsworthy [1876] 2 Q.B.D. 75.
49 In re Agar-Ellis: Agar-Ellis v Lascelles (1883) 24 Ch.D. 317.
50 In re Clarke (1882) 21 Ch. D. 817.
51 Steuart v Steuart (1870) 8 Macpherson 821.

by Walker and Walker of facts within judicial knowledge which are particularly germane to this subject. The closest analogy is "the accepted conventions of society."[52] The decisions in Bennet Clark v Bennet Clark[53] and Ross v Ross[54] indicate how difficult it is to identify what are the accepted conventions of society. There has been however in more recent years an indication of greater flexibility towards matters within judicial knowledge: for example, the alleged facility of young children to adapt to new surroundings[55] and the apparent recognition of religion as a feature of civilized society.[56]

45.19 In England meantime the robustness of the Victorian judges seems to have deserted their twentieth century colleagues until the last decade or so. The extension of the presumptive approach has been justified by reference to common sense, humanity, human experience from which have evolved instinctual ties between parents and children and general maternal preferences.[57] This flexibility of judicial knowledge is however rather exceptional. For the inadequacies of judicial knowledge have been from time to time been accepted.[58] So the greater effectiveness of the welfare doctrine has come not from judicial knowledge but from other techniques used to fill the gaps in knowledge.

(e) Specialist Knowledge

45.20 The Law Reform Committee in 1970 identified three

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52 Walker and Walker, op cit., p. 49, n. 76.
53 1909 S.C. 591.
54 1930 S.C. (H.L.) 1.
55 Pow v Pow 1931 S.L.T. 485; Begbie v Nichol 1949 S.C. 158.
56 Mackay v Mackay 1957 S.L.T. (Notes) 17.
57 Re B (An Infant) [1962] 1 All E.R. 872; Re C(MA) (An Infant) [1966] 1 All E.R. 838; Re M (Infants) [1967] 3 All E.R. 1071; H v H and C [1969] 1 All E.R. 262.
58 Re K (Infants) [1962] 3 All E.R. 1000.

ways in which judicial knowledge could be supplemented by a more scientific approach to evidence of specialist opinion: assessors,[59] court experts[60] and the expert evidence adduced by parties.[61] Assessors have never been used in this context. The use of court experts is, in Scotland at least, an extension of the special investigative techniques already noted.[62] The admisibility of expert evidence adduced by the parties themselves is again an extension to this context of practices established in other areas of the law.

45.21 Although the Law Reform Committee used the expression "court experts",[63] the system which has evolved scarcely warrants that description. The use of welfare officer's reports began in London in 1946 and was extended in practice throughout England on the recommendation of the Morton Commission.[64] It was intended that probation officers should form the nucleus of the service which was restricted to matrimonial causes.[65] In Scotland the use of welfare officer's reports was regulated by statute[66] and the existing powers of the courts to appoint a person to investigate and report were preserved.[67] The Scottish provisions were similarly restricted to consistorial causes. The availability of welfare officer's reports has now been extended in Scotland to cover applications for custody under the guardianship legislation[68] and they are mandatory when a relative,

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59 Evidence Report, paras. 9 to 12.

60 Ibid., paras. 13 to 16. 61 Ibid., para. 18.

62 Para.45.13.63 Evidence Report, para. 13.

64 Morton Report, para. 389.

65 Ibid., para 390.

66 Matrimonial Proceedings (Children) Act 1958, s. 11(1).

67 Idem.

68 Guardianship Act 1973 (1973 c. 29), s. 12(2)(a).

step-parent or foster parent is seeking an award of custody.[69] In England, on the other hand, the preparation of such reports remains a matter of practice in the matrimonial context.[70] The English courts now have statutory power to call for such reports in applications for custody under the guardianship legislation,[71] for variation or discharge of a supervision order under the 1973 Act[72] or for custodianship under the 1975 Act.[73] The statutory pattern is complex but there can be no doubt that the principle of welfare officer's reports is now firmly established.

45.22 The English provisions have been drafted more widely than the Scottish powers. In England it is largely for the court to specify what the report is to deal with,[74] while in Scotland the legislation lays down that the reporter is to "investigate and report ... on all the circumstances of the child and on the proposed arrangements for the care and upbringing of the child."[75] The report in Scotland is clearly concerned only with the child. This will no doubt include other aspects and their effect on the child but not otherwise. It is particularly significant that the Scottish provisions refer to the "proposed" arrangements for the child, for this emphasises that the investigation is intended to go beyond the status quo and to consider the alternatives which may be available. But in

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69 Children Act 1975 (1975 c. 72), s. 49(2).
70 Despite a suggestion to the contrary: Hall Report, p. 37.
71 Guardianship Act 1973 (1973 c. 29), s. 6(1).
72 Idem.
73 Children Act 1975, s. 39(1).
74 E.g., idem.
75 E.g., Guardianship Act 1973, s. 12(2)(a).

practice the different statutory powers are unlikely to be very important. The courts in both jurisdictions have apparently formed a clear view of what is expected of these reports.

45.23 The Law Reform Committee was careful not to suggest any change to the existing English practice in relation to these reports.[76] It was acknowledged that the welfare officers could hold opinions which would be "of great assistance" to the court, but the Committee emphasised the important factual information which the reports provided.[77] Indeed in Hull v Hull[78] Sachs J. was at pains to state that "save only in regard to welfare officers' reports, this court is, in custody proceedings, bound by the usual rules of admissibility."[79] These reports have generally been welcomed by the courts.[80] But in 1968 there appeared to be considerable discrepancies in their use.[81] They have been stated to be valuable because the cross-examination technique may thereby be avoided,[82] and because of the advice which the welfare officers may provide.[83] The evaluation of evidence, reaching conclusions and considering specialised advice are largely discretionary matters in any event and it is very much a question of personal preference whether such reports are called for and what will happen to the information and advice when available.

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76 Evidence Report, para. 16.

77 Idem.

78 [1960] P. 118.

79 Ibid. at p. 126 per Sachs J.

80 Hayes v Hayes [1948] W.N. 361; F v F [1959] 3 All E.R. 180; Bilainkin v Bilainkin [1959] 1 All E.R. 161; S v S [1962] 2 All E.R. 1; Fowler v Fowler and Sine [1963] p. 311; Re M (Infants) [1967] 3 All E.R. 1071; W v W and C [1968] 3 All E.R. 408; H v H and C [1969] 1 All E.R. 262; Re O (Infants) [1971] Ch. 748.

81 Hall Report, pp. 5 to 7.

82 S v S [1962] 2 All E.R. 1.

83 Re M (Infants) [1967] 3 All E.R. 1071.

45.24 The attitudes of the Scottish judges are fundamentally the same. They too have been careful not to give up the function cast upon them of making the final and binding decision. One of the prime movers in using these reports has been Lord Kilbrandon. He has emphasised that the purpose of the procedure is to obtain facts, so that the court may be influenced by them, and yet at the same time it is not intended that the reporter should express his views on how the case should be decided, that being for the court.[84] The following year he expanded upon the philosophy of the legislation.[85] The welfare doctrine in effect required that reports should be made available in every custody case where the application would involve a change in the status quo unless the case was "very clear" or there was no opposition to the claim.[86]

45.25 Although Lord Wheatley took a similar view of the policy of the legislation in 1963,[87] he took great care to fit these statutory procedures into their overall context. In his view:-

> "The responsibility for providing evidence in relation to the circumstances in which the children of the marriage are being reared and maintained, is the responsibility of the party bringing the action."[88]

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84 Macintyre v Macintyre 1962 S.L.T. (Notes) 70.

85 Zwiernik v Zwiernik; Stewart v Stewart 1964 S.L.T. (Notes) 6 at p. 7 per Lord Kilbrandon.

86 Idem.

87 Wallace v Wallace 1963 S.C. 256.

88 Ibid at p. 258 per Lord Wheatley.

And the statutory procedure was:-

> "only justified when the court feels that more information regarding the children should be laid before the court than has been adduced in the evidence, particularly when it is thought desirable that an independent inquiry by an independent investigator should be made." [89]

It followed in Lord Wheatley's view that the obtaining of welfare officer's reports would be "exceptional." There is thus a difference of view about the way in which the power should be exercised. Lord Wheatley's view is likely to prevail.[90] Nevertheless in 1964[91] Lord Cameron purported to follow Lord Kilbrandon's practice.[92] The circumstances are not clear from the report but it may be possible to treat them as "exceptional" and bring them within the guidelines adumbrated by Lord Wheatley. In summation, therefore, welfare officer's reports are in appropriate cases a useful and valuable fact-finding technique but the courts in England and Scotland have treated them as part of the adversary system[93] rather than as a novel inquisitorial instrument.

45.26 The other method of supplementing judicial knowledge on matters of opinion is the admission of evidence by expert witnesses.[94] It is open to the parties themselves to do this but the evidence so acquired is likely to be partial, as, for

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89 Idem.

90 For two reasons: it is more conservative; he secured the unanimous agreement of the judges in the Outer House of the Court of Session.

91 Peploe v Peploe 1964 S.L.T. (Notes) 44.

92 Although he appointed a member of the Bar rather than a designated welfare officer.

93 Which implies a need to comply strictly with the procedures, including their disclosure to parties.

94 Re E (An Infant) [1963] 3 All E.R. 874; Re W (Infants) [1965] 3 All E.R. 231; Re S (Infants)[1967] 1 All E.R. 202; B (M) v B(R) [1968] 3 All E.R. 170; R v R [1968] P. 414.

example, in the case of medical or psychiatric evidence, the child is likely to be taken for examination by one party only to the specialist of that party's choice.[95] To avoid that difficulty the practice has grown up in England of securing the appointment of the Official Solicitor as guardian ad litem and for the examination to be conducted through him on the child's behalf and in the child's interests.[96] It is also possible for the Official Solicitor to investigate the circumstances and to make his own report to the court.[97] These problems become particularly acute in relation to psychiatric evidence of the risks involved in changing the actual parentage of the child and the courts seem to prefer the involvement of the Official Solicitor in these matters.[98]

(f) Sources of knowledge: other contexts

45.27 The preceding paragraphs have been concerned to examine the position in the custodial context where the system has been relatively free from statutory control, at least until recently. The same problems arise whenever a court is asked to make a decision with respect to the child, whether the child is in need of care under the child care legislation or proposed

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95 Re C (MA) (An Infant) [1966]3All E.R. 838; Re S (Infants) [1967] 1 All E.R. 202; B(M) v B(R) [1968] 3 All E.R. 878.

96 R v R [1968] P. 414.

97 C v C [1947] 2 All E.R. 50 at p. 52; Re AH [1963] Ch. 232; Re T (An Infant) [1969] 3 All E.R. 998.

98 See also Evidence Report, para. 16.

to be adopted. The functions of juvenile courts in England and of children's hearings in Scotland are statutory. The welfare doctrine has been built into these Acts[99] and procedures have been specially designed to provide the information necessary to give effect to the policy of the legislation. Where the court is not involved, the problems of the application of the ordinary rules of evidence do not arise.[1] In Scotland, for example, the investigative function is conferred upon the statutory reporter[2], supported by the local authority.[3] But where the final decision on the welfare of the child rests with the court, as in England under the Children and Young Persons Act 1969[4] but not under the Children Act 1948, or in Scotland where the child has been prosecuted for an offence[5], support services of inquiry and report are available.[6] There are differing views about the function of the investigating officer, particularly whether he should make any suggestions about the best way of dealing with the child.[7] Although the context of these facilities for obtaining information is different from those supporting custodial decisions, the problems are similar.

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99 Children and Young Persons Acts 1933 (23 & 24 Geo.5,c.12), 1963 (1963 c.37) and 1969 (1969 c.54); Social Work (Scotland) Act 1968 (1968 c.49).

1 Simply because the local authority or whatever administrative body is involved may inform itself how it likes.

2 Social Work (Scotland) Act 1968, s. 38.

3 Ibid., s. 39(4).

4 S. 1(2).

5 Social Work (Scotland) Act 1968, s. 3(1): see HM Advocate v Donaldson 1970 S.L.T. 2.

6 Children and Young Persons Act 1969, s.9. See generally Bevan, pp. 80 to 84; Cavenagh, pp. 195 to 204; Watson, pp. 32 to 44; Watson and Austin, pp. 88 to 101; Walker N., Sentencing in a Rational Society (Harmondsworth, 1972), pp. 123 and 223; Thomas D.A.; Principles of Sentencing (London, 1973), pp. 318 to 320.

7 I.e. as in custody proceedings, the question which the court has to decide.

45.28 The other area where the final decision on the child's future rests with a court is adoption. The process is entirely statutory and the whole procedure has been designed to suit the needs of adoption since its inception. It is not surprising that the most comprehensive set of investigative procedures is to be found in this context. The two features of the adoption legislation which secure recognition and protection of the child's interests as such are the use of adoption agencies and the appointment of guardians or curators ad litem.

45.29 Probably the most important decision in the whole adoption process is the decision to place the child for adoption with the persons so selected. Once this decision has been implemented, it becomes increasingly difficult to change the decision.[8] The welfare doctrine has been part of this decision only since 1975.[9] The general trend of the legislation has been to bring placement more and more under public control.[10] When the new rules are in force, a child may not be placed for adoption except by an adoption agency.[11] The principal exception is if the adopter is a relative of the child.[12] Greater responsibility for the success of adoptions is thus being given

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8 Because of the increasingly strong arguments founded on the welfare doctrine.

9 Children Act 1975, s. 3; Adoption Act 1976 (1976 c. 36), s. 6.

10 Fisher D.E., "The 1972 Adoption Report: The Emerging Pattern" 1973 Juridical Review 180 at pp. 186 and 187.

11 Adoption Act 1958 (7 Eliz. 2, c. 5), s. 29(1) as substituted by Children Act 1975, s. 28; Adoption Act 1976, s. 11(1).

12 Ibid., ss. 29(1)(a) and 11(1)(a) respectively.

to agencies. Accordingly more central control of their capacities and operations has been reserved to the Secretary of State,[13] except for these agencies which are local authorities.

45.30 The functions of adoption agencies have always been carefully controlled.[14] Once a child had been either awaiting or placed for adoption, he became a "protected child" and fell under the control of the local authority for certain purposes.[15] The recent legislation has provided further protection against removing a child from the status quo where the parent has agreed to the making of an adoption order or where the child has had his home with that person for a period of five years.[16] It has additionally always been essential for a guardian or curator ad litem to be appointed to the child when the application comes before the court.[17] The duties of that person are set out in detail;[18] he is concerned only with the interests of the child. The adoption process is thus a complex blend of administrative and judicial functions. The former tend to predominate and their concern is largely with the child's interests.

45.31 The court too is vitally concerned with the child, although perhaps less so than formerly,[19] and it is probably only

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13 Children Act 1975, s. 4; Adoption Act 1976, s. 3.

14 Adoption Agencies Regulations 1976 (S.I. 1976 No. 1796); Bevan, pp. 326 and 327.

15 Adoption Act 1958, Parts III and IV.

16 Ibid., ss. 34 and 34A as substituted and inserted respectively by Children Act 1975, s. 29; Adoption Act 1976, ss. 27 and 28.

17 Adoption Act 1958, ss. 9(7) and 11(4); Children Act 1975, s. 20(1)(a) and (4); Adoption Act 1976, s. 65(1)(a).

18 Magistrates' Courts (Adoption) Rules 1976 (S.I. 1976 No. 1768); Adoption (County Court) Rules 1976 (S.I. 1976 No. 1644); Adoption (High Court) Rules 1976 (S.I. 1976 No. 1645); See also Bevan, pp. 353 to 355. The suggestion of the Houghton-Stockdale Report to make the appointment discretionary rather than mandatory has not been accepted: Fisher, op. cit., pp. 190 and 191.

19 Welfare is no longer a sine qua non of an adoption order; it is the first consideration.

at the judicial stage that a parent or guardian can make known any views or change of views which he wishes to put forward formally. The opinion has been expressed that the courts are no more than "rubber-stamps."[20] One of the reasons for this comment, whether it is justified or not, is no doubt the heavy administrative structure of the adoption process preceding the final decision of the court. The recent changes add, if anything, to this administrative structure which is intended to give more protection to the position of the child.

45.32 The attitude of the courts, as would be expected, is entirely consistent with these incidentals of the welfare doctrine built into the adoption legislation. The courts have stessed the importance of establishing the "truth",[21] of obtaining all the facts and having the fullest inquiry[22] and of seeing the parties, particularly where there is a proposal to dispense with parental agreement. So far as the parties are concerned, it is for them to provide the information in support of their claims. In the

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20 Para. 25.24.

21 H and H, Spouses, Petitioners 1944 S.C. 347.

22 Z v Z 1954 S.L.T. (Sh. Ct.) 47;
X v Y 1967 S.L.T. (Sh. Ct.) 87.

case of dispensations with parental agreement, this is likely to take the form of psychiatric or psychological evidence of harm to the child in consequence of disrupting either the actual or the legal relationship with the child.[23] The problems are similar to those in the custodial context.

45.33 Once the matter reaches the court, the adoption agency's task is over and it may generally be assumed, unless otherwise indicated, that the agency has done its job properly.[24] So the way in which the child's interests are specifically brought to the attention of the court is by means of the guardian or curator ad litem. It has been stressed that his duty is to safeguard the child's interests.[25] Nevertheless a full investigation is necessary, even if it involves looking at the circumstances of the adopters and of the parents from the child's point of view.[26] The final decision, as in custody, rests with the judge and it is for him to deal with the evidence, the factual elements in the reports and the more speculative parts of them as he sees fit.[27] Finally the judge may use his own judicial knowledge either as the basis for the whole exercise or to supplement the other information he has received: for example, the social implications

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23 In re C(L) (An Infant) [1965] 2 Q.B. 449; Re W (Infants) [1965] 3 All E.R. 231; Re E(P) (An Infant) [1969] 1 All E.R. 323.

24 H and H, Petitioners 1949 S.L.T. (Sh. Ct.) 68.

25 H and H, Spouses, Petitioners 1944 S.C. 347; Re AB (An Infant) [1948] 2 All E.R. 727; Skinner v Carter [1948] 1 Ch. 387.

26 Z v Z 1954 S.L.T. (Sh. Ct.) 47; R v City of Liverpool Justices: ex parte W [1959] 1 All E.R. 337.

27 Apart from his function of ensuring that the rules of procedure are followed e.g. disclosure of reports: Re JS (An Infant) [1959] 3 All E.R. 856; Re G (An Infant) [1963] 2 Q.B. 73.

of religious differences[28] and of broken homes[29]; blood-tie factors in family relationships[30]; the risks inherent in disrupting relationships.[31] The information put before the court in the adoption process is much more official and formal than in the custodial context. This is the consequence of greater public control. It does not mean that the traditional sources of knowledge and information are not available to the judge. They are used by the courts. But the specifically judicial contribution to the process is however quantitatively much less than in relation to custody. This is merely a reflection of the different statutory structures.

(g) Serological evidence

45.34 The welfare doctrine, either in its application or in its incidentals, is of no consequence except in the context of a specific relationship involving the child. Many of the legal issues concern the existence of the appropriate relationship.[32] More often than not they are matters of statutory interpretation to which welfare is only indirectly related. Welfare may be relevant as an item of policy supporting one rather than another interpretation. In one context only is welfare directly relevant

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28 H and H, Petitioners 1949 S.L.T. (Sh. Ct.) 68.

29 Hitchcock v W E B [1952] 2 Q.B. 561.

30 Mrs D, Petitioner 1951 S.L.T. (Sh. Ct.) 19; Re F (An Infant) [1970], 1 All E.R. 344.

31 A and B, Petitioners 1971 S.L.T. 130 and 258.

32 E.g. legitimacy, legitimation, child of the marriage, child of the family, status of guardian, status of local authorities.

when the existence of the relationship is in issue. The results of blood tests have become increasingly accepted over the last two or three decades as evidence supporting or denying paternity.[33] The legal systems have attempted, with varying degrees of success, to respond to these scientific developments.

45.35 The difficulties have arisen not in relation to the relevance or competence of the evidence when it has been placed before the court but about the mechanisms whereby it may be made available against the wishes of the parties involved. The Scottish courts have taken a very narrow view of serological evidence. It has been accepted as admissible but unlikely in itself to rebut the presumption of legitimacy.[34] For fundamental reasons the courts have declared themselves unable to require blood tests to be taken by parties against their wishes or for a sample to be taken of the child's blood for purposes of grouping.[35]

45.36 The English courts, on the other hand, after some judicial controversy decided in 1968 that:-

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33 Fisher D.E., "Serological evidence and the question of paternity" (1969) 6 (No. 2) University of Queensland Law Journal 14.

34 Imrie v Mitchell 1958 S.C. 439 at p. 465 per Lord Clyde L.P. In his view the evidence was not infallible.

35 Whitehall v Whitehall 1958 S.C. 252.

> "... in proceedings relating to the custody of a child, any judge of the High Court can order a test to be taken of the child's blood. So also in a paternity issue, or any proceedings where it is in the best interests of the child to have its paternity settled one way or the other, the court can order a blood test. Even in a petition for divorce on the ground of adultery, the judge can in my view order a blood test on the child, for then too the child is vitally affected by the outcome."[36]

This power was derived from the "right and duty of the Crown as parens patriae."[37] The absence of such a wardship jurisdiction in Scotland could be put forward as one reason for the different position in that jurisdiction. Lord Denning M.R., it should be noted, did not explain how the power should be exercised. His reference to "the best interests of the child" was related to the settling of the paternity issue not to the use of blood tests. So the welfare doctrine appears to have been used to justify the power rather than to regulate its exercise.[38]

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36 In re L (An Infant) [1968] P. 119 at pp. 157 and 158 per Lord Denning M.R.: confirmed by the Court of Appeal in B(BR) v B(J) [1968] P. 466.

37 Ibid. at p. 156.

38 On blood tests generally in England see Law Commission, Blood Tests and the Proof of Paternity in Civil Proceedings (Law Commission No. 16, 1968), pp. 8 to 13; Bevan, pp. 243 to 246; Cretney, pp. 317 and 318; Harris B, The Use of Blood Tests in Determining Paternity (Chichester, 1973); Hayes M., "The Use of Blood Tests in the Pursuit of Truth" (1971) 87 Law Quarterly Review 86; Hall J.C. [1971] Cambridge Law Journal 34.

45.37 When Parliament enacted legislation for blood tests for England in 1969,[39] the method of the exercise of the power of direction[40] was also left unregulated. Lord Reid nevertheless indicated that the legislation had not conferred "an unfettered discretion" on the courts.[41] He did not say how the courts should exercise the statutory discretion but he seemed to envisage that the principles laid down independently of the legislation would apply to the exercise of the statutory power. The House of Lords in that case indicated quite clearly what those principles were.

45.38 In 1970 the House of Lords had before it two appeals from the Court of Appeal on the judicial power to order the blood test of a child: in one decision the majority in the Court of Appeal has posed the question whether it was in the child's interest that a blood test should be required[42] and in the other the view was that the interests of justice could override the interests of the child.[43] In the event the House of Lords as a whole reconciled the interests of the child and the interests of justice by acknowledging that normally the two would be consistent. As Lord Hodson expressed it:-

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39 Family Law Reform Act 1969 (1969 c. 46), Part III.

40 Ibid., s. 20(1).

41 S v McC; W v W [1972] A.C. 24 at p. 45 per Lord Reid.

42 W v W [1970] 1 All E.R. 1157 per Winn and Cross L.JJ. at pp. 1160 and 1161 respectively.

43 S v McC [1970] 1 All E.R. 1162 per Lord Denning M.R. and Karminski L.J. at pp. 1165 and 1170 respectively.

> "The interests of justice in the abstract are best served by the ascertainment of the truth and there must be few cases where the interests of children can be shown to be best served by the suppression of truth."[44]

Although Lords Reid and MacDermott would have agreed with that proposition, they supported their overall conclusions with arguments particularly germane to the theme of this analysis.

45.39 The issue before the court, it should be recalled, was not where the child's future was likely to be most secure but whether a sufficient relationship existed between the child and the husband of the child's mother: that is, a jurisdictional question in relation to custody rather than a custodial question. Lord MacDermott placed the functions of the court in relation to children into two broad categories: "the protective" and "custodial" jurisdictions,[45] each deriving ultimately from the Court of Chancery.[46] The former is designed to prevent the child being prejudiced by his incapacity, while the latter is intended to determine the best course for the child's future. This is similar to the theme in this analysis which has attempted to

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44 S v McC; W v W [1972] A.C. 24 at p. 57 per Lord Hodson.

45 Ibid. at p. 48 per Lord MacDermott.

46 Although the protective function was also derived from the courts of common law: idem.

distinguish between the "threshold" and "discretionary" approaches. It is however not the same, particularly because one of the aspects of this analysis is that the "custodial" jurisdiction as contemplated by Lord MacDermott itself contains at different stages both the threshold and the discretionary approaches. Thus Lord MacDermott's categories and this analysis are not inconsistent but this analysis has attempted to take the concepts further. In the event Lord MacDermott decided that the power to direct the child's blood to be tested fell "outside the custodial jurisdiction and within what I have termed the protective and ancillary jurisdictions of the court."[47] The welfare doctrine did not therefore apply and the question could not be determined in terms of the child's best interests. The interests of justice would, if they were in conflict with those of the child, prevail.

45.40 There is nothing in Lord Reid's judgment which is in any way inconsistent with the views of Lord MacDermott. Indeed by implication Lord Reid acknowledged the protective and custodial jurisdictions of the court. For on the one hand the authorities and principles relating to custody were in his view irrelevant to the issue before the court and on the other hand he did not doubt that "every court in any litigation must see that the interests of a child are not neglected."[48] Lord Reid however stated more positively than any of the other judges the role played by welfare in what Lord MacDermott called the "protective jurisdiction." Lord Reid concluded:-

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47 Ibid. at p. 50 per Lord MacDermott.

48 Ibid. at p. 44 per Lord Reid.

> "I would, therefore, hold that the court ought to permit a blood test of a young child to be taken unless satisfied that that would be against the child's interests." [49]

The child's interests are thus relevant at the threshold stage. If the answer to the question whether a blood test is against the child's interests is negative, a test will be taken; if positive, no test will be taken. The discretionary element has been removed from the process. In that sense the process is vitally different from the application of the welfare doctrine. This also underlies the judgment of Lord Hodson who talked of the court's function in these paternity cases as "the duty of arbitrament between parties."[50] This is similar to the description of the threshold approach as adjudicative and of the discretionary approach as administrative. Conceptual support may therefore be found for the theme of this analysis in the rather unlikely context of blood tests.

Section 3 - Judicial powers

(a) Jurisdictional powers

45.41 The power to order blood tests, although in itself important, is ancillary to the issue with which it is concerned. Of the several judicial powers relating to custody, some create jurisdictions. They are of fundamental importance but relate

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49 Ibid. at p. 45 per Lord Reid.

50 Ibid. at p. 59 per Lord Hodson.

only indirectly to the welfare doctrine. Others, on the other hand, directly support the welfare doctrine. They are less important conceptually but without them the welfare doctrine would be less effective. A few of these powers have already been mentioned. It is nevertheless worthwhile at this stage to attempt to examine them together so that the categories and trends may be disclosed.

45.42 The jurisdiction of the common law courts in England evolved through habeas corpus largely to enforce the right of the father. The equitable jurisdiction, on the other hand, derived from the Crown as parens patriae to supplement the paternal duty to protect the child.[51] In Scotland, similarly, the powers of the Court of Session are probably founded on those of the Scottish Privy Council, while the function of enforcing the legal rights of the father devolved upon the sheriff. These distinctive jurisdictions in each system are no longer of practical importance. They have been either assimilated or superseded by legislation. But in all other contexts, particularly in England, the present jurisdictions have been directly created by Parliament. It is to this complex structure of judicial powers creating technical jurisdictions that the welfare doctrine has been applied as the grundnorm of each jurisdiction.

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51 J v C [1970] A.C. 668 at pp. 720 and 721 per Lord Upjohn.

45.43 One of the problems of the earlier legislation was whether it simply created jurisdictions or purported additionally to regulate their exercise. This was true particularly of the Matrimonial Causes Act 1857[52] and the Conjugal Rights (Scotland) Amendment Act 1861.[53] The question was whether in relation to the custodial powers conferred upon the courts the legislation merely enabled the issue to be determined, impliedly in terms of the existing law, or whether it did so in terms of an unfettered discretion. The tendency was to apply existing principles.[54] One of the effects of the 1886 Act was to clarify that it did more than confer jurisdictional powers upon the various courts in relation to applications by the mother. It stated how the power was to be exercised.[55] It was judicial hesitation in giving effect to that statutory direction which probably contributed to the enactment of the general paramountcy of welfare principle in 1925.[56] Since then the courts have increasingly applied the welfare doctrine in exercising their various custodial jurisdictions and Parliament has enacted aspects of the doctrine where deemed appropriate in other contexts.[57]

45.44 Welfare plays no part in the creation of these statutory jurisdictions. But it would be difficult to deny that welfare has been one of the major policy considerations

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52 20 & 21 Vict., c. 85, s. 35.

53 24 & 25 Vict., c. 86, s. 9.

54 Paras. 33.101 and 34.108.

55 Guardianship of Infants Act 1886 (49 & 50 Vict., c. 27), s. 5.

56 Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c. 45), s. 1.

57 I.e. adoption and official child care legislation.

prompting the creation of these jurisdictional powers. The purpose has no doubt been to facilitate the settlement of custodial disputes by extending the range of courts capable of determining such issues[58] and by making available the remedies to the mother[59] as well as to the father[60] in relation not only to the legitimate but also to the illegitimate child.[61] The policy of extending the context of these powers was continued in 1958 as a result of the recommendations of the Morton Commission.[62] The legislation of that year widened the range of actions to which the powers applied[63] and similarly extended the groups of children liable to be affected by the decisions of the courts.[64] Problems arising about these questions are matters of interpretation of the legislation in which welfare plays only an indirect part. The extension of the capacity of the courts to deal with custodial issues has thus expanded the contexts in which the welfare doctrine is relevant and given greater opportunity for its analysis both judicially and academically.[65]

(b) Substantive powers

45.45 As the jurisdictional powers of the courts have been extended, so has the range of substantive powers available to the courts. This has taken place partly within the judicial

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58 1886 Act, s. 9; 1925 Act, s. 7; Sheriff Courts (Scotland) Acts 1907 (7 Edw. 7, c. 51) and 1913 (2 & 3 Geo. 5, c. 28); Matrimonial Proceedings (Magistrates' Courts) Act 1960 (8 & 9 Eliz. 2, c. 48), s. 2(1)(d).

59 1886 Act, s. 5.

60 Administration of Justice Act 1928 (18 & 19 Geo. 5,c.26), s. 16.

61 Illegitimate Children (Scotland) Act 1930 (20 & 21 Geo. 5, c.33) s.2(1); Legitimacy Act 1959(7 & 8 Eliz. 2, c.73), s.3(1).

62 Morton Report, paras. 393, 394, 398 to 402.

63 In England, Matrimonial Proceedings (Children) Act 1958, ss. 3 and 4; in Scotland, ibid., ss. 9 and 14(1).

64 In England, ibid., s.1; in Scotland, ibid., s. 7.

65 See generally, Clive & Wilson, pp. 572 to 580.

system by adapting existing legal concepts and partly by legislation. The tendency in England has been for existing legal concepts to be adapted by the courts in exercise of their wardship jurisdiction and for these adaptations to be made available, where possible, in other jurisdictions. The Scottish courts have not generally felt able to expand their powers in this way and the legislation has probably had a greater impact in Scotland than in England. These powers are ancillary to the main question before the court: the disposition of the child's best interests. Some are more important than others. Traditionally a court can only grant or refuse the application before it. It cannot dispose of the child's best interests in any way it may deem appropriate, unless that option is part of the application or the court otherwise has power to make that decision.

45.46 The situation may arise where the court feels disinclined to grant custody, access or whatever to either the father or the mother.[66] Since custody involves duties, parental functions cannot, as the present system with one exception operates,[67] be conferred by the court on any person without that person's consent. Such consent is normally established by that person specifically seeking custody or control of the child. That raises two separate but related

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66 Morton Report, para. 395.

67 Committal of the care of the child to a local authority.

questions: can non-parents or third parties apply for custody or control and can the court award custody or control to third parties.

45.47 In England the concept of guardianship was recognised long before the correlative concept of custody, while wardship, the position of the Crown and ultimately the court as parens patriae, was an aspect, but a public aspect, of guardianship. Guardianship and wardship were originally concerned with the property of the child but once their importance for the person of the child was acknowledged, the possibility of adapting the concepts to modern conditions emerged. The vital factor is that is was open to anyone to seek to protect and later to benefit the child by invoking these powers.[68] There was no reason why the court could not appoint a third party as guardian. More important the invocation of the wardship jurisdiction had the effect of giving custody to the court.[69] There would thus be no conceptual difficulty in the court in consequence delegating responsibility for the child to the applicant. The wardship jurisdiction has always been exercisable only by the High Court and its equitable predecessors. In every other jurisdiction third party intervention depends entirely upon the legislation.

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68 In re Fynn (1848) 2 DeGex and Smale 457; Austin v Austin (1865) 34 Bevan 257; In re Kaye (1866) L.R. 1 Ch. 837; Re D (An Infant) [1943] Ch. 305; Re C (An Infant) [1959] Ch. 363: cf. Re H (An Infant) [1959] 3 All E.R. 746. See generally Bevan, pp. 269, 288, 289 and 412.

69 Bevan, p. 422.

45.48 Wardship is unknown in the law of Scotland. It is nevertheless possible for third parties to intervene in the common law custodial processes. The matter had not been canvassed in any detail until recently in response to the recent legislation[70] which probably did little more than confirm the existing rules of Scots law.[71] Parliament acted however in response to the view of the Houghton-Stockdale Committee.[72] Their recommendations seem to have proceeded upon an over-simplistic understanding of Scots law and probably even of English law. It has now been clearly demonstrated that relatives of the child, tutors and factors loco tutoris can bring an action before the court, certainly the Court of Session, to enable the custody of the child to be determined by the court.[73] Particularly important is the fact that there are several very recent instances of applications by relatives.[74] The position of other third parties remains doubtful.[75]

45.49 There are two further points. Only a parent can call for the personal care of the child. Neither a certain type of tutor nor a factor loco tutoris has a personal right to custody.[76] They merely have the power to provide for the child's care, protection, education and upbringing. What is important is that a child may by these private law procedures be removed from an unfit parent. The child does not become a ward of

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70 Children Act 1975, s. 47.
71 Fisher D.E., "Adoption and the courts: an examination of the 1972 Report" 1973 S.L.T. (News) 145 at p. 149; Wilkinson A.B., "Children Act 1975" 1976 S.L.T. (News) 237 at p. 240.
72 Houghton-Stockdale Report, para. 117.
73 Clive E.M., "Getting children out of dangerous homes" 1976 S.L.T. (News) 201 at pp. 205 and 206: Wilkinson, op. cit. at p. 239.
74 Richardson v Burns 1963 S.L.T. (Sh. Ct.) 26; Cochrane v Keys 1968 S.L.T. (Notes) 64; Kelly v Marks 1974 S.L.T. 118.
75 Clive, op. cit. at pp. 205 and 206.
76 Fraser, pp. 220 and 221.

court, as in England; the child remains under the control of the tutor or factor but that person also is subject to the jurisdiction of the court. What is important however is that a petition for appointment as a factor loco tutoris may be presented by someone not related to the child. This is very unusual but competent.[77] It is therefore possible for any person to seek appointment as factor loco tutoris. If appointed, he will have title to sue for the purpose of having the parent deprived of custody and thus come under the responsibility of providing for the child's future. Clearly this is a cumbersome procedure. But its existence suggests that, if a general title to sue were to be enacted as suggested,[78] such a provision would be not inconsistent with the policy of Scots law and the effect would be merely to simplify existing complex procedures.

45.50 These Scottish rules on title to sue do not necessarily imply that the court has power to award custody to the third party applicant: they mean no more than that the court may deal with the application. Nor does it mean that, if the relative, tutor or factor actually retained control of the child, that person would be acting unlawfully. He will be acting unlawfully only when the parent successfully enforces his interest in the court. Section 47 of the Children Act 1975, however, provides that an applicant specified in subsection (1) "may be granted"[79] custody "in the same manner as any person so qualified" before

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77 Black and others, Petitioners (1839) 1 Dunlop 676; Davison and others, Petitioners (1855) 17 Dunlop 629. In each of these cases there were funds requiring to be administered.

78 Clive, op. cit. at pp. 207 and 208.

79 Subject to the provisions of subsection (2).

the commencement of the 1975 Act. Only by implication does that confer upon the court a power to grant custody. In any event the power appears to be restricted by reference to the law before 1975. That could have the consequence of nullifying the whole provision if a court were to decide that it had no power to award custody to a foster parent, for example, before 1975. That section is thus in many ways unsatisfactory.

45.51 The position in the various statutory jurisdictions is perhaps clearer but by no means beyond dispute. The legislature has intervened in terms of judicial powers rather than title to sue. Neither the Matrimonial Causes Act 1857 nor the Conjugal Rights (Scotland) Amendment Act 1861 said anything about awarding custody to a third party intervener in the matrimonial or consistorial cause. But the courts in both countries felt able to do so.[80] In Scotland the power has been confirmed by section 14(2) of the Matrimonial Proceedings (Children) Act 1958[81] and by implication in England by section 43(1) of the Matrimonial Causes Act 1973. Section 43(1) was derived from section 5(1) of the 1958 Act which was the English version of section 10(1) of that Act. The substance of sections 5(1) and 10(1), which authorise committal of the child to the care of the local authority, is different. The Scottish version specifically

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80 In England, 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; D'Alton v D'Alton (1878) 4 P.D. 87; Pryor v Pryor [1947] P. 64: in Scotland, Pow v Pow 1931 S.L.T. 485; see also Clive & Wilson, p. 576.

81 See McKenzie v McKenzie and another 1963 S.C. 266. Cf. Smith v Smith 1964 S.C. 218 and Stokes v Stokes 1965 S.C. 246, 1967 S.C. (H.L.) 46.

incorporates a reference to individuals other than parents; the English version does not. Similar powers are now available in the other custodial jurisdictions: that is, the wardship jurisdiction,[82] the matrimonial jurisdiction of the English magistrates,[83] the custodianship jurisdiction in England[84] and the guardianship jurisdictions in England[85] and Scotland.[86] The English version of the provision has been preferred in all these instances, including the statutory guardianship jurisdiction in Scotland. There seems no reason why the clearer Scottish model should not have been used for Scotland.[87]

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82 Family Law Reform Act 1969, s. 7(2).

83 Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(e).

84 Children Act 1975, s. 33(1): this is a different approach.

85 Guardianship Act 1973, s. 2(1) and Sched. 2, Part II (i.e. Guardianship of Minors Act 1971, s. 9 as amended).
But see also Children Act 1975, s. 108 and Sched. 3, para. 75. Bevan has taken the view that the power exists in the absence of statutory support: Bevan, p. 270.

86 Guardianship Act 1973, s. 11(6) and Sched. 4, Part II (i.e. Guardianship of Infants Act 1925, s. 3 as amended).

87 Generally see Clive & Wilson, pp. 576 and 577 and Bevan, pp. 270, 272 and 279.

45.52 The powers of the various courts in the two systems in relation to third parties represent the most complex aspect of the substantive powers available to the courts. Bevan talks of these powers as enabling the court to grant custody to the third party.[88] The legislation does not however say so. It speaks merely of "exceptional circumstances making it impracticable or undesirable for the child to be entrusted to either of the parties ... or to any other individual." So the status of the third party is rather unclear, except where the court is prepared to go slightly beyond the phraseology of the legislation and make an award of custody to the third party.[89]

45.53 These powers relating to third parties exist only by way of preamble to the power to commit the child to the care of the local authority. That was seen by the Morton Commission as the ultimate procedure for caring for a child whose parents were unsuitable and whose other relatives were unwilling to accept the responsibility.[90] The power was first introduced in 1958.[91] It was clearly to be exercised in "exceptional circumstances" but the paramountcy of welfare principle no doubt applies to the exercise of the power. Once

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88 Bevan, idem.

89 Cf. the guardianship jurisdiction in England: Children Act 1975, s. 37(3) which contemplates awarding "legal custody".

90 Morton Report, para. 395.

91 Matrimonial Proceedings (Children) Act 1958, ss. 5 and 10. For England see now Matrimonial Causes Act 1973, s. 43.

a child has been committed to the care of a local authority, Part II of the Children Act 1948 and sections 20 and 21 of the Social Work (Scotland) Act 1968 apply. As an alternative, where committal to the care of the local authority was not appropriate, the Morton Commission recommended that the child could be placed under the supervision of an independent person while remaining in the custody of the parent.[92] This too was introduced in 1958.[93] The power to require supervision has been "very sparingly" exercised.[94] Nevertheless the powers to commit to the care of a local authority[95] and to require supervision[96] have been extended to all the relevant jurisdictions.

45.54 These substantive powers have clearly enabled the court to do much more than grant or refuse the application before it. In consequence the welfare doctrine is more likely to be realistically applied. The 1975 Act rules relating to custodianship in England[97] and title to sue for custody in Scotland[98] similarly extend the range of alternatives available to the court, but in that case only at the option of the third party applicants. The final example of wider powers attempts

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92 Morton Report, para. 396.

93 Matrimonial Proceedings (Children) Act 1958, ss. 6 and 12. For England, see now Matrimonial Causes Act 1973, ss. 44.

94 Hall Report, p. 8. See e.g. Runciman v Runciman 1965 S.L.T. (Notes) 6.

95 Family Law Reform Act 1969, s. 7(2); Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(e); Guardianship Act 1973, ss. 2(2)(b) and 11(1)(a).

96 Family Law Reform Act 1969, s. 7(4); Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(f); Guardianship Act 1973, ss. 2(2)(a) and 11(1)(b).

97 Children Act 1975, ss. 33 and 44.

98 Ibid. s. 47.

to bridge the gap between custody and adoption. Before 1975 adoption and custody proceedings could be conjoined to enable the court to determine the issue partly on a comparative basis.[99] But that device was available only where there were two applications before the court. It is now competent in certain applications for adoption for the court to direct that the application be treated as one for custodianship in England[1] or custody in Scotland[2]; not vice versa. The test is comparative welfare.[3]

45.55 There are, finally, two further types of powers available to the courts enlarging the range of decisions, thereby contributing to the potential effectiveness of the welfare doctrine. One is fragmentation. There are two aspects to it. An application for custody relates to the child as the unit subject to the process. It is however difficult to isolate the child from his family, especially when considering his best interests. The courts do not ignore the familial context of the process. This manifests itself in the principle or presumption already analysed: that it is generally better to keep the family together as a unit than to break it up into individual units.[4] This does not mean that the court may competently dispose of the whole family when dealing with the custody of one member of it. It may be that the applicant parent

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99 Paras. 25.45 to 25.47.

1 Children Act 1975, s. 37.

2 Paras. 36.54 and 36.55.

3 Para. 44.11.

4 Paras. 40.35 to 40.38 and 41.72.

is seeking custody of one child only or that the other children are beyond the jurisdiction of the court. The court may nevertheless take account of the family as a unit while dealing formally with one member of it.[5]

45.56 The other aspect of fragmentation is referred to by Bevan as "divided orders".[6] This simply means that parental authority may be divided or split into its various component parts to achieve the desired solution. It is much more common in England although there is probably no conceptual reason why authority may not be fragmented in this way in Scotland.[7] Wardship has undoubtedly facilitated its use in England, with the court in a sense delegating different aspects of its parental authority to separate persons. The generality of judicial powers over custody in the matrimonial[8] and guardianship[9] legislation has enabled the courts in those jurisdictions to do likewise. The more limited nature of the powers of the magistrates in matrimonial proceedings has[10] denied to them a similar competence. The desirability of fragmenting parental authority in this way is a matter for the circumstances of the individual case, guided by the paramountcy of welfare principle.[11]

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5 In re Fynn (1848) 2 DeGex and Smale 457; Spratt v Spratt (1858) 1 Swabey & Tristram 215; Curtis v Curtis (1858) 1 Swabey & Tristram 75; In re Newton [1896] 1 Ch. 740; Ward v Laverty [1925] A.C. 101; Re O (Infants) [1962] 2 All E.R. 10.

6 Bevan, pp. 263 to 265 and pp. 276 and 277.

7 Clive & Wilson, p. 567.

8 Matrimonial Causes Act 1973, s. 42.

9 Guardianship of Minors Act 1971, s. 9.

10 Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(d); Wild v Wild [1969] P. 33.

11 See generally Talbot v Shrewsbury (1840) 4 M&C 673; Pryor v Pryor [1900] P. 157; Vigon v Vigon [1929] P. 157; Allen v Allen [1948] 2 All E.R. 413; Wakeham v Wakeham [1954] 1 All E.R. 434; Cooper v Cooper [1961] 3 All E.R. 539; S v S [1967] 2 All E.R. 10; Re W (An Infant) [1964] Ch. 202; Re M (Infants) [1967] 3 All E.R. 1071; Re S (Infants) 1 All E.R 202; W v W and C [1968] 3 All E.R. 408.

45.57 The other types of power, also largely a matter of common law, concern the removal of the child from the jurisdiction Normally it is a matter for the child's parents, acting separately or together, or for his guardian[12] whether a child should remain in the jurisdiction or not.[13] Many of the earlier cases were concerned with the enforcement of these rights after the child, whose care had been delegated to a third party, had been removed from the country.[14] Welfare was not in issue. The cases where the child has been or is abroad, possibly involving the order of a foreign court, raise special considerations and will be considered separately.[15]

45.58 Where a person has been given custody, that would normally include power to decide where the child should reside. If there is any question of the child being taken out of the country by such a person, the court could deal with the issue by prohibiting or permitting it.[16] Generally the test for the exercise of that power is the welfare of the child.[17] The

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12 Including e.g., the local authority in relation to a child in its care: Children Act 1948, s.17; Social Work (Scotland) Act 1968, s. 23.

13 McCallum v McDonald (1853) 15 Dunlop 535; Maquay v Campbell (1888) 15 Rettie 606: In re Curtis (1859) 28 L.J. (Ch.) 458.

14 Markey v Colston (1888) 15 Rettie 921; Delaney v Colston (1889) 16 Rettie 753; Edgar v Fisher's Trustees (1893) 21 Rettie 59; Hogan (McCrossan's Trustee) (1899) 7 S.L.T.22; Robertson, Petitioner 1911 S.C. 1319; Bergius, Petitioner 1924 S.L.T. 349; Oludimu v Oludimu 1967 S.L.T. 105: Cartlidge v Cartlidge (1862) 2 Swabey & Tristram 567; R v Barnardo (Tye's case) (1889) 23 Q.B.D. 305; Barnardo v Ford (Gossage's case) [1892] A.C. 326

15 Paras. 45.69 to 45.81.

16 Matrimonial Proceedings (Children) Act 1958, s.13. There are however jurisdictional problems in England: Re E (An Infant) [1956] Ch. 23; Fabbri v Fabbri [1962] 1 All E.R. 35.

17 Huddart v Huddart 1961 S.C. 393; Runciman v Runciman 1965 S.L.T. (Notes) 6: In re Callaghan: Elliott v Lambert (1884) 28 Ch. D. 186; In re Benner, Infants 1951 W.N. 436.

difficulty is the enforcement of the order after it has been made.[18] This also raises the special considerations referred to. Despite these problems the courts have a power to authorise the temporary or permanent removal of the child from the jurisdiction.

Section 4 - Questions of procedure and jurisdiction

(a) Relaxation of procedures

45.59 A great deal of the law relating to children is concerned with procedures and jurisdictions. Welfare does not normally play a part in these matters. But, as in other cases, it is often the factor motivating these procedural and jurisdictional rules. As expected, these rules are now mostly statutory. The two principal codes, official care and adoption, have contained detailed procedural rules since their original enactment. Attention has been drawn to them: for example, the nature and structure of juvenile courts in England and children's hearings in Scotland, the protective measures built into the system and the continuing recognition afforded to interests other than those of the children. Although many of these rules are enacted in the form of rights and duties, there is often a power to modify and relax their application. Thus protection of the child under the legislation is as much a matter of administrative decision as of law. Thus, except where the power of relaxation is conferred directly upon the court, the scope for judicially created protection is reduced.

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18 Corcoran v Corcoran [1950] 1 All E.R. 495; Hadkinson v Hadkinson [1952] 2 All E.R. 567; O'Donovan v O'Donovan [1955] 3 All E.R. 278. See generally Morton Report, paras. 420 to 424; Bevan, pp. 298 and 299.

45.60 Procedural protection for the child in custody cases, on the other hand, is largely a matter for the courts. Just as the rules of evidence apply unless they may justifiably be relaxed, so the normal judicial procedures are followed. But in a few instances the interests of the child have influenced the court in adapting the normal procedures to the circumstances of the case. The general argument for relaxing the procedures has been put by Lord Greene M.R.:-

> "When one comes to deal with the case of an infant, the position is fundamentally different, because orders in respect of infants are not made for the benefit of any litigating party, such as a party to a divorce suit. They are made for the benefit of the infant and, therefore, one would expect to find that the rules relating to the enforcement of orders in the matter of infants by committal or attachment would recognise a fundamental difference ... The enforcement of such an order [of custody made in the Divorce Division] is perhaps necessarily left to the interested party, the parent to whom custody has been given, and it may be that no serious inconvenience comes from that. But when it comes to enforcing an order made for the benefit of the infant at the instance of one of the parties to the litigation who may make a mistake in procedure and may

> not comply with all the rigours of the rules, the person who suffers is not necessarily the interested party, as it would be in ordinary litigation, but is the unfortunate infant, who does not get the protection of the enforcement of the order which has been made in its interest, merely because the parent who has taken upon himself or herself the burden of trying to enforce that order has made some slip or been prevented by some accident from carrying out the strictness of the rules." [19]

It is probably impossible on that basis to identify every situation in which relaxation of the rules may be appropriate. Each case must be examined individually. What is important is the general recognition that the interests of the child may warrant amendment or adaptation of the normal rules.

45.61 Several areas may nevertheless be identified where relaxations have been acceptable. The appointment of a curator or guardian ad litem is specifically provided for in the adoption legislation[20] and now in relation to juvenile courts in England[21] and children's hearings and the relative jurisdiction of the sheriff[22] in Scotland. The flexibility of the wardship jurisdiction[23] and of the nobile officium enable the courts to do likewise and the Matrimonial Causes Rules in England directly

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19 Gordon v Gordon [1946] P.99 at pp.104 and 105 per Lord Greene MR

20 Children Act 1975, s.20; Adoption Act 1976, s.65.

21 Children Act 1948, s.4B and Children and Young Persons Act 1969, s. 32B inserted by Children Act 1975, ss.58 and 64 respectively.

22 Social Work (Scotland) Act 1968, ss. 18A and 34A inserted by Children Act 1975, ss. 78 and 66 respectively.

23 Bevan, p. 420.

provide for separate representation of the child.[24] Other procedures are the holding of proceedings in camera,[25] staying and sisting proceedings,[26] expediting proceedings,[27] regulating expenses and costs,[28] relaxing enforcement procedures,[29] granting emergency injunctions[30] and providing the protection of confidentiality for reports.[31] As with evidence, so with procedures, the general impression is that the English courts are prepared to be more accommodating to the interests of the child than their Scottish counterparts.

(b) Jurisdiction: restrictions

45.62 Questions of jurisdiction are probably of more fundamental importance in the application of the welfare doctrine than matters of procedure. The courts in both systems have shown a capacity to respond to the welfare doctrine in relation to jurisdiction, apart from showing flexibility of interpretation of the legislation when Parliament has intervened. The English courts have, once again, indicated a stronger inclination to do so than the Scottish courts. There is however one aspect of statutory intervention in both systems which is vital to this question, namely the statutory restriction on the matrimonial and consistorial jurisdictions of the courts created to protect any relevant children.[32] This restriction, if applied strictly, is a threshold requirement in a very precise sense and thereby becomes a matter of fundamental importance.

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24 Bevan, p. 266.
25 In re An Infant [1965] 1 W.L.R. 754.
26 Re S [1958] 1 All E.R. 783.
27 Beattie v Beattie (1883) 11 Rettie 85.
28 Bergius, Petitioner 1924 S.L.T. 349.
29 Shirer v Dixon (1885) 12 Rettie 1013.
30 Re B(Infants) [1965] 1 W.L.R. 946.
31 Gordon v Gordon [1946] P. 99.
32 L v L [1969] 1 All E.R. 852.
33 Official Solicitor v K [1965] A.C. 201.
34 Matrimonial Proceedings (Children) Act 1958, s. 8(1). Matrimonial Causes Act 1973, s. 41.

45.63 The history of the restriction in England indicates that it is intended to be important. The provision originated in a recommendation of the Morton Commission[35] and the reasoning underlying the recommendations[36] emphasised the need to protect children whose parents were being divorced. Scarman J.'s decision in 1961[37] that failure to comply with section 2 of the Matrimonial Proceedings (Children) Act 1958 rendered the decree void was clearly consistent with that recommendation.[38] However in October 1969 Simon P. decided not to follow these authorities and held that a failure to comply with these requirements rendered the decree voidable.[39] In 1970 the Court of Appeal affirmed Simon P.'s views.[40]

45.64 In 1969 the President had spelt out the background to the legislation which he summed up as giving "the interest of the children priority over that of their parent."[41] Priority involves the recognition of other considerations: that is, the balancing rather than the threshold approach. Davies L.J. in the Court of Appeal regarded the rule as a "procedural matter"[42] and as such not a threshold requirement in the strict sense. The rule was however amended by Parliament in 1970[43] but the amended approach was not operative until 1 January 1971.[44] The 1970 Act provided for English law that failure to comply with the requirement made the decree void, while at the same

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35 Morton Report, para. 373. 36 Ibid. paras. 368 to 372.
37 B v B [1961] 2 All E.R. 396.
38 That is also true of Scarman J.'s decision in N v N (1964) 108 Sol.Jo.99 and of Baker J.'s decision in Shelton v Shelton (1965) 109 Sol. Jo. 393.
39 F v F [1971] p. 1. 40 P v P [1971] P. 217.
41 F v F [1971] p. 1 at p. 12 per Simon P.
42 P v P [1971] p. 217 at p. 223 per Davies L.J.
43 Matrimonial Proceedings and Property Act 1970 (1970 c.45),s. 17.
44 Ibid. s. 43(2).

time stating that the validity of the decree could not be challenged on the ground that the statutory requirements had not been fulfilled.[45] That may, as Phillimore L.J. suggested, be a "strange situation."[46] But Parliamentary support for Scarman J.'s original view indicates that the provisions were not intended to be procedural; nor were they intended to give "priority" to the interests of the children. The interests of the children were, it would appear, to be given absolute supremacy, for without satisfactory arrangements in relation to them the court would simply lack jurisdiction to grant the decree or make it absolute. The threshold approach has thus been distinguished from the discretionary or balancing approach. The former is the more fundamental way of safeguarding and protecting the child's interest.[47]

(c) Welfare and jurisdiction: creation

45.65 There remains the jurisdiction of the court ratione personae.[48] Before 1857 proceedings relating to children in England came before the Court of King's Bench or the Court of Chancery. The common law court could do little more than enforce the paternal right recognised by the common law; jurisdiction[49] was based upon the presence of the child within

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45 Ibid. s. 17(3).
46 P v P [1971] P. 217 at p. 225 per Phillimore L.J.
47 The 1958 Act remains in force in Scotland without any amendment. It has not been judicially interpreted. But a Scottish decree has been stated not to be reducible except for fraud on the court: Clive & Wilson, p. 578.
48 See generally Custody of Children - Jurisdiction and Enforcement within the United Kingdom (1976) (Law Commission Working Paper No. 68; Scottish Law Commission Memorandum No. 23).
49 Bevan, p. 297 n. 6.

the jurisdiction. The Court of Chancery was originally concerned with the property of the child. But as wardship relating to the person of the child evolved, the basis of jurisdiction was relaxed. This may be seen partly as a response to the increasing significance of the welfare doctrine. The foundation of jurisdiction was the reciprocal relationship between on the one hand the Crown and later the court as parens patriae and on the other hand the child. The parens patriae owed a duty to protect the child who at the same time owed allegiance to the sovereign sustaining that protective duty.[50] It can readily be seen how nationality became a basis for jurisdiction,[51] whether the place of residence of the child was England or elsewhere and whether the child was present in the jurisdiction or not.[52] From that it was a short step to recognise the presence of the child within the jurisdiction as sufficient, whatever nationality he might have.[53] The need for a property qualification, however formal, also disappeard.[54]

45.66 Several of these ideas had gained acceptance by 1886. When the guardianship legislation appeared in that year, nothing was said about jurisdiction beyond restricting the county court[55] and later the magistrates' court[56] to proceedings wherein the

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50 De Manneville v De Manneville (1804) 10 Vesey Junior 52; Hope v Hope (1854) 4 DeGex, Macnaghten and Gordon 328; Brown v Collins (1883) 25 Ch.D.56; In re Willoughby (1885) L.R. 30 Ch. D. 324.

51 Brown v Collins (1883) 25 Ch. D. 56; In re Willoughby (1885) L.R. 30 Ch. D. 324; Re P (GE) (An Infant) [1965] Ch. 568.

52 Re Liddell's Settlement Trusts: Liddell v Liddell [1936] Ch.365; Re Dulles' Settlement Trusts: Dulles v Dulles [1950] 2 All E.R. 1013; Harben v Harben [1957] 1 All E.R. 379; R v R and I [1961] 3 All E.R. 461.

53 Re P(GE) (An Infant) [1965] Ch. 568.

54 Law Reform (Miscellaneous Provisions) Act 1949 (12, 13 & 14 Geo. 6, c. 100), s. 9; Bevan, pp. 416 to 419.

55 Guardianship of Infants Act 1886, s. 9.

56 Guardianship of Infants Act 1925, s. 7.

respondent resided within the jurisdiction. The custodial jurisdiction of the Divorce Court, being ancillary in nature, depended upon the jurisdiction of the court in the matrimonial cause.[57] Thus welfare as such had nothing to do with jurisdiction but the welfare doctrine has had an influence on the development of jurisdiction in England where legislation has not otherwise provided.[58]

45.67 In Scotland, on the other hand, custody came to be regarded as an incident of the patria potestas which was itself an aspect of status. The courts of the domicile were thus regarded as appropriate to deal with custody. This was consistent with the system for regulating custody in the Conjugal Rights (Scotland) Amendment Act 1861. That jurisdiction, exercisable in the Court of Session, now clearly includes not only the consistorial remedy sought between the spouses but also any ancillary matter, including custody.[59] In all contexts therefore the courts of the domicile have been treated as having preeminent jurisdiction over custody.[60] The sheriff had only limited powers regarding custody. There was thus nothing unusual in further restricting his jurisdiction, because of the local nature of his office, to respondents resident in his sheriffdom.[61] There are however certain exceptions to domicile as the foundation of custodial jurisdiction in Scotland. The

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57 Bevan, p. 279.

58 The legislation on adoption and official care provides for jurisdiction in these matters.

59 Domicile and Matrimonial Proceedings Act 1973 (1973 c. 45), s. 10: on another section of that Act see Williams, Petitioner 1977 S.L.T. (Notes) 2.

60 Barkworth v Barkworth 1913 S.C. 759; Westergaard v Westergaard 1914 S.C. 977; Radoyevitch v Radoyevitch 1930 S.C. 619; Ponder v Ponder 1932 S.C. 233; McLean v McLean 1947 S.C. 79; Babington v Babington 1955 S.C. 115.

61 Guardianship of Infants Act 1886, s. 9.

welfare doctrine clearly forms a part of the justification for these exceptions.

45.68 The eventual generality of the English wardship jurisdiction evolved from the parens patriae concept. One of the earliest statements of the law of Scotland to eschew reference to domicile as the basis of jurisdiction seems to have come under strong English influence. In 1861 the view was expressed in the House of Lords, referring to the custodial jurisdiction of the Court of Session, that:-

> "By their nobile officium conferred upon them by their sovereign as parens patriae it is their duty to take care of all infants who require their protection, whether domiciled in Scotland or not." [62]

This made the need for protection the basis of jurisdiction. The ground has been progressively narrowed since then. In 1914 some form of parental ill-treatment seems to have been envisaged,[63] although foreign children may have quite generally come under the protection of the Court of Session if they "might chance to be in Scotland".[64] The more recent authorities contemplate "immediate danger to the child", but that would enable the Scottish court to make only an interim order.[65] The protective jurisdiction of the Scottish courts is thus extremely

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62 Stuart v Moore (1861) 4 Macqueen 1 at p. 60 per Lord Campbell L.C.

63 Westergaard v Westergaard 1914 S.C. 977 at p. 981 per Sir J.H.A Macdonald L.J.-C.

64 Radoyevitch v Radoyevtich 1930 S.C. 619 at p.626 per Lord Clyde L.P.; Westergaard v Westergaard 1914 S.C. 977 at p.981 per Lord Salvesen.

65 Ponder v Ponder 1932 S.C. 233 at p. 238 per Lord Alness L.J.-C; McShane v McShane 1962 S.L.T. 221 at p. 222 per Lord Johnston; Oludimu v Oludimu 1967 S.L.T. 105 at p.107 per Lord Fraser.

limited. This confirms the general view of the courts in Scotland: they are not, unlike those in England, prepared to use the welfare doctrine to justify general relaxation of the rules relating to evidence, procedure or jurisdiction.

(d) Foreign complications

45.69 The corollary of these jurisdictional differences is the attitude of the courts in England and Scotland to children who are the subject of foreign custody orders or who have been taken out of the jurisdiction with which they have an existing affinity. The position in both systems has become somewhat complex. The courts are caught between a desire on the one hand to respect the judgments of foreign courts and their duty on the other hand to give effect to the paramountcy of welfare principle required of them by domestic legislation. These difficulties reflect the issues underlying this analysis as a whole. It is thus appropriate to conclude the analysis by examining these issues in this context.

45.70 The traditional view of the Scottish courts was to recognise and enforce decrees of foreign courts in relation to custody and guardianship where these decrees were competently made by the court of the domicile.[66] The English courts had probably never adopted that position, partly perhaps in consequence of their wider bases of jurisdiction. In 1886, before the welfare doctrine had been recognised to any extent in legislation, the Court of Chancery expressed the view that international law made it impossible for an English court to

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66 Guardianship orders: Elder, Petitioner (1903) 5 Fraser 307; McFadzean 1917 S.C. 142; cf. Ogilvy v Ogilvy's Trustees 1926 S.N. 166. Custody orders: Foxwell v Robertson (1900) 7 S.L.T. 353; Barkworth v Barkworth 1913 S.C. 759; Westergaard v Westergaard 1914 S.C. 977; Radoyevitch v Radoyevitch 1930 S.C. 619; Ponder v Ponder 1932 S.C. 233; McLean v McLean 1947 S.C. 79; Calder v Calder 1960 S.L.T. (Notes) 52.

disregard a guardian competently appointed by a foreign court.[67] Although the appointment was recognised in that case, the Vice-Chancellor indicated that the foreign guardian could be superseded in England by the appointment of an English guardian. So the existence of a competently appointed foreign guardian attracted no automatic recognition in England, merely a presumption in his favour.

45.71 That remained so until 1940. The impetus for change came no doubt from the increasing acceptance of the welfare doctrine in domestic legislation and the greater international mobility of families generally. In In re B's Settlement[68] Morton J. did not think that it would be right "blindly to follow"[69] the foreign order. His reason was section 1 of the Guardianship of Infants Act 1925. He concluded:-

> "...I ought to give due weight to any views formed by the courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the courts of any other country."[70]

A foreign order remained relevant but the weight to be attached to it was a matter for the circumstances of each case. Morton J.'s view thus espoused the discretionary or balancing approach to the welfare doctrine. The Privy Council endorsed these views in 1951[71] in relation to the law of Ontario, adding that it was the

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67 Nugent v Vetzera (1866) L.R. 2 Equity 704.

68 [1940] 1 Ch. 54.

69 Ibid. at p. 62 per Morton J.

70 Ibid. at pp. 63 and 64 per Morton J.

71 McKee v McKee [1951] A.C. 352.

same in England and Scotland.[72] Referring to welfare, Lord Simonds said:-

> "To this paramount consideration all others yield. The order of a foreign court of competent jurisdiction is no exception. Such an order has not the force of a foreign judgment. Comity demands, not its enforcement, but its grave consideration."[73]

45.72 That is the most extreme example of the welfare approach in this context, if not in any context. It comes close indeed to making welfare decisive, but probably not exclusive. The later English cases indicate a movement away from that extreme position.[74] The first step was taken in 1965 by Cross J. In his view, although welfare was the chief consideration, it was "far from being the only consideration".[75] He emphasised the importance of an order of a foreign court, while acknowledging that the weight attached to such an order was a matter for the circumstances of the case. To this extent Cross J.'s views reflected those of Morton J. expressed twenty years earlier. Cross J. was very conscious of the potential conflict between the various considerations and he was most concerned to ensure that the court would be satisfied, "before it sends the child back, that the child will come to no harm".[76] These comments were approved by the Court of Appeal[77] and two years later, encouraged no doubt by that, Cross J. went so far as to create something more in the nature of a general principle:-

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72 Ibid. at p. 365.

73 Idem. per Lord Simonds.

74 Re H (Infants) [1965] 3 All E.R. 906.

75 Ibid. at p. 915 per Cross J.

76 Ibid. at p. 916 per Cross J.

77 [1966] 1 All E.R. 886.

> "... a judge should ... pay regard to the orders of the proper foreign court, unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child."[78]

This was approved by the Court of Appeal[79] and followed later by Buckley J. in 1969.[80]

45.73 When the question of jurisdiction was raised in the House of Lords in 1969, comments were made on the relevance of comity to custody.[81] It is significant that no reference was made to the later authorities, particularly the views of Cross J. Thus the House of Lords seems to have preferred the balancing approach of Morton J. in In re B's Settlement[82] to the more extreme version of the welfare doctrine in McKee v McKee.[83] The overall position is not altogether clear. The view common to most of the judgments is that custody remains a matter largely for the discretion of the court in the circumstances of the individual case, even where there is a foreign order in existence. This is not inconsistent with the more recent approach which in effect amounts to a presumption in favour of the foreign order liable to be displaced by negative welfare considerations: this is an example of the threshold approach and to some extent represents a reversion to the nineteenth century attitudes of the Court of Chancery.

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78 Re E(D) (An Infant) [1967] Ch. 287 at p. 289 per Cross J.

79 [1967] Ch. 761.

80 Re G (An Infant) [1969] 2 All E.R. 1135.

81 J v C [1970] A.C. 668 at pp. 700 and 701, 714 and 720 per Lords Guest, MacDermott and Upjohn respectively.

82 [1940] 1 Ch. 54.

83 [1952] A.C. 352.

45.74 Similar problems arise where the relationship between the child and the foreign jurisdiction is much less formal than a foreign custody order, whether binding or persuasive. In Re Kernot(An Infant)[84], for example, the question was more one of the forum conveniens than recognition of a foreign order. The view of Buckley J. was that the English court should be very slow to decline to exercise its jurisdiction, particularly where it appeared that the foreign court had not fully inquired into the best interests of the child.[85] This was similar to the argument of Morton J. in In Re B's Settlement[86] where he appeared particularly unimpressed because the foreign order was interlocutory.[87] In Re T (An Infant)[88] questions of comity and forum conveniens attracted little weight in the analysis of Graham J.[89] In that case the child was approaching majority and the foreign custody order had been made many years before. Morton, Buckley and Graham JJ. were impressed by their duty to treat the child's welfare as paramount.

45.75 A few years earlier Vaisey J. had adopted more of a compromising attitude.[90] In a rather difficult case involving the Scottish and English courts, he stressed the importance of the courts co-operating as effectively as possible and reducing conflict to a minimum in an attempt to reach whatever decision would be best for the child.[91] As he rather diplomatically put it:-

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84 [1965] Ch. 217.

85 Ibid. at p.224 per Buckley J.

86 [1940] 1 Ch. 54.

87 Ibid. at p. 62.

88 [1969] 3 All E.R. 998.

89 Ibid. at pp. 999 and 1000.

90 Re X's Settlement [1945] 1 All E.R. 100.

91 Ibid. at p. 103.

> "Neither court is avid of jurisdiction, and neither court will disclaim the jurisdiction with which it is entrusted." [92]

45.76 The courts in England have adopted a different view in recent years where there exists some affinity between the child and the foreign jurisdiction. The Court of Appeal in 1968 indicated clearly that:-

> "...where the children belong in a foreign jurisdiction and are brought over here this court should send them back again if there is no obvious danger or obstacle against such a course." [93]

Similar views were repeated by the Court of Appeal in 1970.[94] That case was not regarded as a "kidnapping" case of that type and consequently that approach, although recognised, was not given effect.[95] That is also true of the decision of the House of Lords in J v C.[96] Even so, the more recent decisions suggest that when the children "belong" in another country, the English courts should, even in the absence of a custody order, return the child to that country unless that would clearly be contrary to the child's welfare. This implies a return to the threshold approach after the liaison with the more positive aspects of the welfare doctrine had proved to be to some extent unacceptable.

45.77 The trends are the same when the English courts are

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92 Idem.per Vaisey J.

93 Re T (Infants) [1968] Ch. 704 at p. 716 per Harman L.J.

94 Re A (Infants) [1970] Ch. 665 at p. 673 per Harman L.J.

95 Idem.

96 [1970] A.C. 668 at p. 720 per Lord Upjohn.

faced with foreign complications, either in the presence of a foreign custody order or where there is only a social or familial relationship between the child and the foreign country. The movement is away from the welfare doctrine in the general contemporary sense and back towards the threshold approach. This is the reverse of the general tendency of the courts to give full effect to the welfare doctrine both substantively and incidentally.

45.78 Finally what is the attitude of the Scottish courts to cases with foreign complications? The opportunity for flexibility is limited to the extent that the court of the domicile is regarded as having pre-eminent jurisdiction. The exceptional "protective" jurisdiction of the Scottish courts was at one stage the only justification for qualifying the strict rules of comity. As Lord Sands explained it, by reference to a foreign judgment:-

> "Doubtless it is the duty of this court to extend protection to every child found within its jurisdiction, and it may in certain cases be our duty to extend such protection even against a claim based upon a legal award of custody. The court will not de plano in every case order delivery to the legal custodier. Even in the case of a custodier resident within the jurisdiction, I apprehend that immediate delivery might be refused." [97]

Such a possibility was regarded as exceptional. Although Lord Sands did not apply the principle in that case, he clearly implied that a foreign judgment, recognised by the Scottish courts,

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97 Radoyevitch v Radoyevitch 1930 S.C. 619 at p. 628 per Lord Sands.

might not be enforced in precisely the same way that a domestic custody order might not be immediately given effect.[98]

45.79 It is significant that Lord Sands supported these comments in terms of the court's protective jurisdiction. He made no reference to section 1 of the Guardianship of Infants Act 1925, as, for example, Morton J. had done in In Re B's Settlement.[99] More recently, however, once the modern welfare doctrine had become established, Lord Avonside expressed a view more consistent with the balancing approach advocated by Morton J. The context of his remarks was consistorial and he supported them specifically with reference to section 1 of the 1925 Act and section 8 of the Matrimonial Proceedings (Children) Act 1958.[1] According to Lord Avonside:-

> "In determining that issue [the child's best interests] the court will take into account the whole circumstances of the case. One such circumstance will certainly be, where it exists, any pronouncement on custody made by the court of the domicile of the child. An order by the court of the domicile always will be treated with respect, but the weight to be given to it will vary according to all the facts presented in the case. It is not, in law, conclusive so as to forbid question. Such an order may well tip the scales when it appears that the welfare of the child is equally well served by entrusting him or her to either of competing parents. That welfare, however, is, in my opinion, the primary interest of this court."[2]

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98 See also Clive & Wilson, p. 682.

99 [1940] 1 Ch. 54.

1 The opportunity for considering a more flexible approach came about because in 1949 the consistorial jurisdiction of the Court of Session had been extended beyond domicile: Law Reform (Miscellaneous Provisions) Act 1949 (12, 13 & 14 Geo. 6, c. 100), s. 2.

2 Battaglia v Battaglia 1967 S.L.T. 49 at p. 51 per Lord Avonside.

Lord Avonside was claiming for the court a much wider discretion than Lord Sands. In exercising that discretion the welfare of the child was regarded as the primary consideration and, in appropriate circumstances, the decisive factor.

45.80 Whether this represents the law of Scotland, either generally or only in relation to custody as ancillary to consistorial proceedings, is unclear. In 1973 the Inner House recognised and gave effect to a foreign custody order made by the court of the domicile.[3] Lord Emslie L.P. said:-

> "It is clearly competent for this court to give effect to the judgment of a foreign court of competent jurisdiction, provided that this court is also satisfied that it will be in the best interests of the child to do so." [4]

No full inquiry into the circumstances was necessary. This view is similar to the recent line of English authority supporting the threshold approach. The difference is that Lord Emslie L.P. expressed the principle positively, while Cross J. had explained it negatively. The implication of Lord Emslie L.P.'s dictum is similarly negative that a Scottish court should not give effect to a foreign order if to do so would be contrary to the child's interests. The two propositions are not the same. The implication may not therefore be warranted.

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3 Sargeant v Sargeant 1973 S.L.T. (Notes) 27.

4 Ibid. at pp. 27 and 28 per Lord Emslie L.P.

45.81 What is important is that the Lord President has emphasised the importance of an order of the court of the domicile at the expense to some extent of the welfare doctrine. This is consistent with the more recent authorities in England and, like them, at odds with the mainstream of the development of the welfare doctrine. The essence of the welfare doctrine is that it gives to welfare a positive role in the decision-making process. The threshold approach on the other hand gave to welfare at most a negative and indirect part to play. The judicial attitude to the foreign aspects of these cases represents to some extent an exception to the contemporary welfare doctrine. The recognition of this exception, it is suggested, tends to support by way of comparison the generally consistent line of development of the welfare doctrine in Scotland and England over the last two hundred years or so, during which the law has been forced to cope with the emerging concept of the nuclear family.

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