CHAPTER 17.

THE STATUS OF CHILDREN COMPULSORILY IN CARE.

Section 1 - Introduction.

17.1 Children may come into care in a number of different ways. When children are received into care under section 1 of the Children Act 1948[1] or section 15 of the Social Work (Scotland) Act 1968,[2] the local authority is doing little more than reacting negatively to a situation which has arisen. This is not to belittle the function so created. It simply emphasises how it contrasts with the other methods under which children come into care.[3] When the powers in section 1 of the Children and Young Persons Act 1969[4] or Part III of the Social Work (Scotland) Act 1968 are exercised, there is more likely to be a conscious decision positively to bring about a different state of affairs from the situation then in existence. Such a decision is, potentially at least, likely to be much more drastic for the parents and the child. That no doubt is why the decision was reserved to a court until 1968 when the institution of children's hearings was introduced in Scotland.

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1 11 & 12 Geo. 6, c.43.

2 1968 c.49.

3 Committal into the care of a local authority is now an option available in exercise of matrimonial, consistorial, custodial and wardship jurisdictions: this is not pursued here. See paras. 36.31 to 36.36.

4 1969 c.54.

17.2 Assumption of parental rights under section 2 of the 1948 Act or section 16 of the 1968 Act draws upon both techniques. The power to assume is unavailable unless the child is already in care under section 1 or 15, while the drastic nature of the consequences of the exercise of the power has justified judicial involvement in the event of parental objection.[5] There is thus an element of compulsion in relation to parents in the context of care proceedings and the powers in Part III of the 1968 Act and also in the context of assumption of parental rights: that element of compulsion is lacking when children are simply received into care. It is for that reason that children received into care were considered in chapter 16 and that this chapter deals with the consequences of the assumption of parental rights and the status of children committed to the care of the local authority.

Section 2 - The statutory schemes.

(a) Assumption of parental rights.

17.3 Sections 1 and 2 of the 1948 Act and sections 15 and 16 of the 1968 Act were designed to deal with different situations: sections 1 and 15 to provide temporary care in a short-term emergency situation, sections 2 and 16 to provide more permanent care.[6] The threshold requirements for each

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5 1948 Act, s. 2(5); 1968 Act, s.16(8).

6 Re G (infants) [1963] 3 All E.R. 370 at p. 373 per Ungoed-Thomas J.; MacEwan, op. cit, p. 90. This distinction cannot, of course, be taken too far. Admission to care under s. 1 may, in certain circumstances, be a longer rather than a shorter term remedy, a point noted by Lord Parker C.J. in Barker v Westmorland C.C. (1958) 56 L.G.R. 267. It is however unlikely that s. 2 would be used if a short term remedy was desirable. Much will ultimately depend upon administrative circumstances and the local authority's view of the issues.

section are not fundamentally different with one important qualification; under section 1 intervention must be necessary in the interest of the welfare of the child in addition to the fulfilment of one of the other requirements.[7] Welfare is therefore part of the test for reception into care. Parental absence, incapacity or unfitness is the test for assumption of rights under section 2. Welfare originally played no part under that section[8] but in the event of the matter coming before a court, the assumption will not be effective unless it is in the interests of the child.[9]

17.4 The two sets of provisions differ greatly in several respects. Some difficulty has been experienced in analysing the balance between parental desires and the welfare of the child for the purposes of section 1. Section 2 controls this balance quite differently. It is clear that the reception of a child into care under section 1 involves no change in status of any of the parties involved. This is the consequence of regarding section 1 as an exercise in parental delegation. An order under section 2 has far reaching consequences for the parents, sufficient perhaps to modify their status. Finally, section 2 affects the welfare of the child just as significantly as section 1, but the legal consequences for the child are more fundamental. This may be one reason why section 2 has attracted more judicial and academic notice.

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7 1948 Act, s. 1(1)(c); 1968 Act, s. 15(1)(c).

8 Cheetham v Glasgow Corporation and others 1972 S.L.T. (Notes) 50 at p.51 per Lord Dunpark.

9 1948 Act, s. 2(5)(c); 1968 Act, s. 16(8)(a).

17.5 The general scheme of the provisions[10] is clear and does not suffer from many of the interpretational problems of section 1. It may be set out as follows:-[11]

(a) if any of the threshold requirements is satisfied, the local authority may in its discretion resolve that the relevant parental rights shall vest in them;[12]

(b) no further procedure is required if the parent consents in writing;[13]

(c) if not, notice of the resolution must be served by the authority in writing[14] and service in return by the parent of an objection in writing causes the resolution to lapse;[15]

(d) after receipt of notice of objection the local authority may apply to the court for an order that the resolution shall not lapse;[16]

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10 Any reference in this chapter to the 1948 Act is a reference to the provision of the Act as substituted or amended by the Children Act 1975 and includes reference to the corresponding provision of the Social Work (Scotland) Act 1968 unless otherwise stated.

11 Generally see Bevan, pp. 147 to 151; Leeding, pp. 68 and 69; Eekelaar, pp. 163 and 164; Cavanagh, p. 135; Cotter B.E.H., "Assumption of Parental Rights" (1972) 136 J.P. & L.G.R. 42, 63, 75; and Cotter B.E.H. "More about the assumption of parental rights" (1972) 136 J.P. & L.G.R. 551. For a general judicial analysis, see R. v Oxford City Justices, ex parte H. [1974] 2 AllE.R. 356 at pp. 357 and 358 per Bagnall J.

12 1948 Act, s.2(1); 1968 Act, s.16(1)(a).

13 1948 Act, s. 2(2); 1968 Act, s.16(5).

14 1948 Act, s. 2(2); 1968 Act, s.16(5).

15 1948 Act, s. 2(4); 1968 Act, s.16(7).

16 1948 Act, s. 2(5); 1968 Act, s.16(8); the juvenile court in England and the sheriff in Scotland.

(e) the court, if satisfied that the threshold requirements had been fulfilled and continue to be fulfilled and that it is in the interests of the child, may then make an order that the resolution shall not lapse;[17]

(f) the effect of a resolution in England is to vest in the local authority the "parental rights and duties"[18] of the relevant person[19] (preserving however liability to maintain[20] and rights concerning religion[21]);

(g) the effect of a resolution in Scotland is the same except to vest in the local authority "the relevant parental rights and powers";[22]

(h) the local authority is not disabled from allowing care to be taken over by a parent, guardian, relative or friend "when it appears to the authority to be for the benefit of the child";[23]

(i) the local authority may rescind the resolution if it appears to them that that will be for the benefit of the child;[24]

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17 Idem. The requirement relating to the interest of the child was added in 1975.

18 1948 Act, s.2(1): cf. 1948 Act, s.3(1) and (2) repealed by the 1975 Act, s.108 and Sched. 5, Part 8.

19 Who may be one parent both parents, guardian or custodian: 1948 Act, s.2(1) and (11).

20 1948 Act, s.3(6).

21 1948 Act, s.3(7).

22 1968 Act, s.16(1) and (3). It is difficult in practice to see any real difference between "rights and powers" in Scotland and "rights and duties" in England.

23 1968 Act, s.17(3). S.3(3) of the 1948 Act was repealed in England by the Children and Young Persons Act 1969, s.72(4) and Sched. VI without any substituted provision being enacted. Clarke Hall & Morrison, p.887 imply that s.13 of the 1948 Act enables such a child to be under the charge and control of a parent.

24 1948 Act, s.4(2); 1968 Act, s.18(2).

(j) the parent may apply to the court for an order determining the resolution if there was no ground for making the resolution or if it should be determined in the interests of the child;[25]

(k) since the operation of the 1975 Act the local authority may resolve to vest the parental rights and duties in the voluntary organisation in whose care the child had been prior to the resolution[26] provided inter alia one of the section 2 threshold requirements has been fulfilled and it is necessary in the interest of the welfare of the child;[27] the local authority is under a duty to transfer these rights to itself where that is "necessary".

17.6 This scheme involves divesting parents of "all" their rights qua parents with certain exceptions in relation to adoption.[28] The provisions relating to Scotland are different from those relating to England. For Scotland the reference is to "all the rights and powers in relation to the child." In England the reference is on the one hand wider, as it includes "duties", and on the other hand narrower, as it mentions the legal rights and duties of the mother and father in relation to a legitimate child and his property. The Scottish provisions also set out in great detail the actual relationship affected by the resolution. The differences however seem to be drafting

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25 1948 Act, s.4(3); 1968 Act, s.18(3). It has been stated that there is an important practical difference between s.2(1) and s.4(3). The onus lies on the local authority in the former case and on the parent in the latter case: Re L (AC) (an infant) [1971] 3All E.R. 743 at p.753 per Cumming-Bruce J.

26 1968 Act, s.16(1)(b); 1975 Act, s.60. The Scottish provision, being in s.16, attracts the whole of the procedures in s.16; the English provision does not.

27 1968 Act, s.16A; 1975 Act, s.61.

28 1948 Act, s.2(11); 1968 Act, s.16(3).

techniques and the overall effect, for present purposes at least, is much the same. Furthermore, the 1975 Act provisions, relating to Scotland and England, seem to introduce no concepts unfamiliar in the earlier law.

17.7 If this is so, the scheme outlined above is the same conceptual model as the earlier one and it would be surprising if the principles created under the earlier statutes were to be cast aside by the courts in interpreting the new provisions. At the moment it is possible to proceed only on that assumption. Either scheme is thus consistent with the overall policy promulgated by Parliament that suspension of parental rights may be achieved only by order of a court. Subject to the earlier discussion of section 1(3) of the 1948 Act,[29] parents cannot otherwise[30] be deprived of their rights.

17.8 Sections 2 to 4 of the 1948 Act may authorise the suspension of rights but confer no substantive rights upon parents in return. All they can do is to use the procedures provided to safeguard their interests before the decision is finally made that their rights and powers shall vest or not in the local authority. The procedural powers conferred by the sections are very important and the parents' safeguards lie in the way in which the courts insist upon strict compliance with

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29 Paras 16.20 to 16.23 in particular.

30 I.e. other than by order of a court.

the procedures laid down[31] and with the requirements for the exercise by the local authority of their powers. It is axiomatic that just as parents have no substantive rights after the final decision, so the local authority has none until the final decision has been made.

17.9 The procedures have been enacted principally in the parent's interest. None directly benefits the child.[32] The child's welfare nevertheless is clearly fundamental to the legislation. The threshold requirements represent the dangers from which the legislation is designed to preserve the child.[33] The earlier scheme contained no reference to welfare as such in relation to the assumption of rights,[34] although it was the test for rescinding or determining the resolution of the local authority.[35] The interests of the child have now however been introduced as the test for resolving to vest parental rights in the voluntary organisation[36] but not in the local authority except when the issue is contested and goes before the court.[37]

17.10 The precise function which the welfare test is intended to fulfil when the local authority proposes to rescind a section 2 resolution under section 4(2) of the 1948 Act or on complaint to the court under section 4(3) of that Act has been a matter of some controversy. The power is available "if

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31 E.g. Re L (AC) (An Infant) [1971] 3 AllE.R. 743.

32 They may do so indirectly by promoting the parent's interest but only where that is consistent with the child's welfare. That is unlikely in the context of this legislation.

33 See para. 17.3

34 See para 17.5.

35 1948 Act, s.4(2) and (3); 1968 Act, s.18(2) and (3).

36 1968 Act, s.16(4)(b); 1975 Act, s.60(1)(c).

37 1948 Act, s.2(5)(c); 1968 Act, s.16(8)(a).

it appears to [the local authority] that the rescinding ... will be for the benefit of the child" and on complaint to the court if satisfied that "the resolution should be in the interests of the child be determined". This, in the first place, gives the authority and the court considerable interpretational discretion. Although the condition for the exercise of the power is a threshold requirement, it is directed rather to the future welfare of the child. On the face of it, therefore, it would appear to require a value judgment on what will be best for the child. This must almost necessarily involve some sort of comparison of the alternatives open to the authority or the court.

17.11 In the case of Mary[38] the illegitimate daughter of a mother whose rights had been assumed by the local authority under section 2 was not returned to her when she sought an order from the juvenile court determining the resolution.[39] The mother argued that her mental capacity was restored and she was quite capable of looking after her child. The court apparently took into account the excellent foster home in which the child was living and decided not to determine the resolution, thus leaving the child with her foster parents.

17.12 There were other marginal issues involved but this decision attracted the criticism of the British Association of

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38 [1971] The Observer, 5 March: see "Minority Report" by D. Wilson.

39 Presumably under section 4(3) of the 1948 Act.

Social Workers as "a hideous story of incompetence and injustice."[40] It would be unwise to comment on the merits of the decision from the welfare point of view.[41] But there seems no reason to suggest that the court either misinterpreted section 4(3) or misconceived its statutory function. The court is bound to consider the interests of the child in deciding whether it may determine the resolution. Once that has been decided, there is nothing in section 4 of the 1948 Act or indeed in the remainder of the Act to indicate how the court should exercise its discretion. It may however be that the court is bound at this stage by the paramountcy of welfare principle in section 1 of the Guardianship of Infants Act 1925 or by the general directive in section 44(1) of the Children and Young Persons Act 1933.[42] Neither of these has a strong claim for application, particularly as the provision in question enacts a totally effective test. Perhaps the court came to the wrong decision on the merits, but, it is suggested, the court appeared to comply with the relevant statutory provisions.

17.13 The journalistic comment on the case was:

> "This raises the most serious questions: if a woman of low income is taken ill, and her child is boarded out with a

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40 [1971] The Observer, 5 March.

41 Because it is impossible to be certain that the newspaper report contains all the relevant information and also because this writer is not qualified to pass any comments on what is best for a child, for that has become almost a science or an art in itself.

42 23 & 24 Geo. 5, c.12.

> foster mother, should she have to prove later that she is not only now fit to have her child, but also that she is able to compete with the cultural and material superiority of the foster parents?" [43]

This is a fair comment. But once Parliament has provided that either welfare is the test or the court has an unrestricted discretion, the way is open for the court to proceed precisely on that basis. It would not be proper to reject certain aspects of welfare while retaining more desirable features. In this case, for example, the mother could have argued on the basis of the natural qualities of a mother as against foster parents, however materially superior the foster home. Welfare is such a flexible concept that it is not surprising that some decisions generate a great deal of controversy. The alternatives would be to amend the relevant provisions to modify the open-ended quality of the welfare test, to introduce a completely different approach or, in the absence of a statutory appeal, to challenge the decision by one or other of the administrative remedies or by recourse to wardship proceedings. These comments demonstrate the highly technical aspects of the relevant law, despite its apparent simplicity.

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43 [1971] The Observer, 5 March.

17.14 It is interesting that, although the welfare of the child is relevant in rescinding or nullifying a section 2 resolution and in certain other respects, there is no mention of welfare in relation to passing a resolution, vesting parental rights[44] in the local authority. Welfare, of course, is one of the threshold requirements in section 1.[45] This is understandable in the context of that section. Section 2(1) is discretionary. There are no relevant restrictions in section 2 upon the exercise of that discretion. It would however be inconceivable in practice for a local authority to pass a section 2 resolution unless the child's best interests so required.[46] But does section 2(1) afford a completely unfettered discretion?

17.15 Subsection (1) applies only to a child in the care of the local authority.[47] Section 12 of the 1948 Act and section 20 of the 1968 Act prescribe the duty of the local authority towards children in its care.[48] These provisions relate to reaching decisions about children in care. Section 2(1) of the 1948 Act and section 16(1) of the 1968 Act involve such decisions. There is therefore no reason to indicate that a local authority is not bound by that duty in the exercise of its functions under section 2(1) or 16(1). The local

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44 Para. 17.9.

45 1948 Act, s.1(1)(c); 1968 Act, s.15(1)(c).

46 As a matter of administrative policy.

47 Re S (an infant) [1965] 1 All E.R. 865 at p. 871 per Pearson L.J.

48 The provisions substituted by the Children Act 1975, ss.59 and 79 do not affect this argument, although they prescribe a new duty.

authority thus does not have an unfettered discretion under section 2(1) or 16(1); it must inter alia "give first consideration to the need to safeguard and promote the welfare of the child, throughout his childhood." The only exception to this duty is where there is a need to protect the public in England.[49] The same formula was introduced by the 1975 Act in the adoption contexts where it will be considered in detail. Whatever the formula means, sections 12 and 20 clearly require the local authority to carry out this aspect of the policy of the legislation.

17.16 Although there may be difficulties of application of certain of the provisions in section 2 or 16 in any particular set of circumstances, the immediate problem is the relationship created between the children, the parents and the local authority. How much power is given to the local authority? What is the nature and extent of its rights? Have the parents been deprived of their status? Are there any residual parental powers? The answers to these questions affect considerably the well-being and interests of the child, in so far as the decision on one or more aspects[50] of a child's welfare may rest with the local authority, parent or even a third party. If welfare is fragmented in this way, the effect on the child is indirect but nevertheless real.

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49 1948 Act, s.12(1A).

50 E.g. access, education, religion.

17.17 The issue, at least in England, is again clouded by the relationship between the statutory jurisdiction of the local authority and the prerogative jurisdiction of the courts. This problem has already been mentioned[51] in the context of section 1 of the 1948 Act. It has been judicially stated that the actual source of the local authority's power[52] makes no difference for this purpose.[53] The same principles probably apply to section 2.[54] It is therefore open to the court in certain circumstances in the exercise of its wardship jurisdiction to deal with the welfare merits of an application even where the child is the subject of a resolution under section 2 of the 1948 Act. The Scottish courts are probably even less uninhibited. The relevant and important decision thus may rest with the court rather than the local authority or the parents.

17.18 A more complicated situation may arise where that decision is fragmented rather than unitary.[55] Fragmentation of parental powers may be the consequence of the legislation.[56] The question is what rights and powers are conferred upon the local authority by the various provisions. The better approach, in view of the reported cases, is to analyse the

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51 Paras. 16.7 and 16.11.

52 E.g. under the Children and Young Persons Acts (committal to care), s.1 of the 1948 Act (reception into care) or s.2 of the 1948 Act (assumption of parental rights).

53 Re T (AJJ) (An Infant) [1970] 1 All E.R. 512 at p. 517 per Ungoed-Thomas J.

54 Re M (An Infant) [1961] 1 All E.R. 201 and 788; Re L (AC) (An Infant) [1971] 3 All E.R. 743. See also Cotter, "More about the assumption of parental rights" (1972) 136 J.P. & L.G.R. 551.

55 I.e. where parental powers are split into several aspects and a different person may have responsibility for each aspect.

56 Paras. 17.48 to 17.63.

consequences of local authority care comparatively by reference to the sources of the authority's power. Although the threshold requirements of care proceedings under section 1 of the Children and Young Persons Act 1969 have already been studied,[57] the administrative process leading to the committal of a child to the care of a local authority has not been considered. The effect of the assumption of parental rights under section 2 of the 1948 Act[58] appears more dramatic against this comparative background. There is no direct Scottish model of comparison, for committal to the care of the local authority[59] has been superseded[60] by the making by a children's hearing of a supervision requirement under section 44(1) of the Social Work (Scotland) Act 1968.[61] Supervision[62] is a concept different from care: care seems to involve the substitution of the local authority pro tanto for the parents while supervision tends to complement the parents' role, admittedly by restricting it in some respects. In other words, care relates directly to parental rights; supervision does not. Both, of course, affect such rights.

(b) Committal to the care of a local authority

17.19 Care orders under sections 1 and 20 of the Children and Young Persons Act 1969 are prima facie quite straightforward, but to understand the effect of a care order the relevant

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57 Paras. 15.21 to 15.23, 15.38 to 15.51.

58 S.1 of the 1948 Act is not a useful comparative model: it has been examined separately in chapter 16.

59 Under ss.66 and 80 of the Children and Young Persons (Scotland) Act 1937.

60 Except, of course, in other contexts where committal to the care of a local authority is competent.

61 The effect of such a requirement has not been judicially determined but its existence does not affect the general jurisdiction of the courts: see W. v Glasgow Corporation 1974 S.L.T. (Notes) 5.

62 Supervision is also a remedy available in England in care proceedings: Children and Young Persons Act 1969, s.1(3)(b) and 11 to 19.

statutory provisions should be reviewed. A care order is simply an order "committing [the child] to the care of a local authority."[63] The use of the word "commit" indicates an involuntary decision from the point of view of the recipient and, in this context, that includes the child's parents.[64] Once the committal has been decided, the effect is governed by section 24 of the 1969 Act. The local authority comes under a duty "to receive him into their care and, notwithstanding any claim by his parent or guardian, to keep him in their care" while the order is in force.[65] In support of this duty the authority is given "the same powers and duties with respect to a person in their care ... as his parent or guardian would have".[66] Specific authorisation is conferred to "restrict his liberty to such extent as the authority consider appropriate."[67]

17.20 There is an element of common ground between care under section 1 of the 1948 Act and care under the Children and Young Persons Act 1969. Indeed section 11 of the 1948 Act applies Part II of that Act to children in care by virtue of a care order under the 1969 Act.[68] In particular sections 12 and 13 of the 1948 Act extend to children committed to care as they apply to children received into care. The complexities of the scheme of sections 1 and 2 of the 1948 Act have been examined.

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63 Children and Young Persons Act 1969, s.20(1).
64 Essentially an administrative process but one governed by certain aspects of legislative policy: e.g. s.44 of the Children and Young Persons Act 1933 which directs regard to the welfare of the child. Cf. Cotter, "Assumption of Parental Rights" (1972) 136 J.P. & L.G.R. 75.
65 1969 Act, s.24(1).
66 Ibid., s.24(2), first limb.
67 Ibid., second limb.
68 Which approximates to the position in Scotland under s.44(1) and (5) of the 1968 Act: para 17.18.

The major differences between the 1948 and 1969 Acts lie not in looking after the child once he is in care but in determining when he comes into care, how care terminates and the consequences of local authority care. Section 24 of the 1969 Act affects parental rights more dramatically than section 1 of the 1948 Act. In particular the local authority has the same powers as the child's parent would have, including the privilege of restricting his liberty. This sets committal apart from reception into care. Does the 1969 Act take away from parents the rights which they would otherwise have? Does it merely suspend them? Does a care order perhaps supplement the parent's role? What is the consequence of the use by the local authority of parental resources under either section 12(2) or 13(2) of the 1948 Act? Does that destroy or modify the status of the local authority?

17.21 These may seem questions of little more than academic interest but it is suggested that the answers vitally affect not only the concept of welfare under the legislation but also the welfare of the individual child subject to the legislation. The courts have recently pronounced, rather strangely at times, upon some of these matters. It may therefore be possible,

admittedly with considerable hesitation, to construct a conceptual edifice around these issues and to compare it with the scheme similarly evinced by the 1948 Act.

17.22 Section 24 of the 1969 Act does not itself confer any status on the parties involved. It merely provides powers. It does not even take away rights from the parents. In this sense it may thus operate to transfer powers to the local authority rather than to substitute the authority for the parent. Section 13(2) of the 1948 Act however seems to separate "charge and control" from "care" by enabling the former to be "delegated" to the parents while the latter is retained by the authority. Where does residual responsibility lie? It could be argued both ways. If section 24 of the 1969 Act does not in terms remove any powers or responsibilities from parents, then their ultimate common law position would remain intact. This would amount to regarding section 24 as a temporary statutory transfer of powers. On the other hand, if section 24 substitutes the local authority for the parent, the parent would have no <u>locus</u> pending the care order. In that event responsibility would lie with the authority.

Section 3 - The concept of local authority guardianship.

17.23 The issues giving rise to the quartet of reported cases which examined one aspect of the problem of status flow from the potential criminality of parents or guardians whose children or wards have committed offences. Section 55 of the Children and Young Persons Act 1933[69] enables the court to order that fines or awards of compensation[70] should be paid in certain circumstances by parents or guardians. The question in essence is whether a local authority with statutory care of a child is a guardian for this purpose. The courts have, perhaps for underlying policy reasons, been reluctant to hold local authorities liable in this way. Hence they have adopted what may best be described as a "realist" approach. Lord Widgery C.J. has been a party to the four decisions. There has thus been a certain uniformity of personnel if not of rationalisation.

17.24 In the Croydon[71] case the juvenile court ordered the local authority to pay fines incurred by a child in their care. The child was resident in a children's home owned and run by the local authority. He was subsequently in a remand home and in a classification school with a view to being sent to an approved school. The fact that "at the relevant time [the child] was in a home actually owned and organised by the local authority

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69 As amended by the Criminal Justice Act 1967 (1967c. 80), s.103 and Sched. 6, the Criminal Appeal Act 1968 (1968c.19) ss.52 and 55(2) and Sched. 5, the Children and Young Persons Act 1969 s.72(3) and (4) and Scheds. V and VI, and the Courts Act 1971 (1971 c.23), s.56 and Sched. 8, Part II, para. 22.

70 Awards of compensation were included by the amendment to section 55 introduced by the Criminal Justice Act 1961 (9 & 10 Eliz. 2, c.39), s.8(4).

71 R. v Croydon Juvenile Court Justices, ex parte Croydon London Borough Council [1973] Q.B. 426.

itself"[72] proved to be of major significance. According to the Chief Justice the purpose of section 55 of the 1933 Act was clear enough: "to make provision whereby parents who have not exercised due care over the conduct of their children may be made to pay fines which would otherwise be imposed on the children."[73] The section applies to guardians as well as parents and the interpretation of "guardian" in section 107(1) of the 1933 Act included "anybody who in the opinion of the court has for the time being the charge of or control over the child". Lord Widgery C.J. had little doubt that in the circumstances of that case the local authority had charge and control. The order made by the juvenile court was thus competent.

17.25 There was no need for the court to go further but it adduced additional reasons to rebut the local authority's argument that they were in a rather special situation, unlike the "normal" guardian. The authority argued on the basis of the rather discretionary nature of the legislation and the consequential status of the relevant parties. Lord Widgery C.J. conceded that "the natural parent does not wholly lose his status and authority as a result of a care order" and so "the natural parent continues to have some status".[74] On the other hand he pointed out that "the local authority acting under the care order [is] equated in their powers and duties to the natural parent".[75] The former comments suggest that the parents may retain some residual powers and responsibilities. The latter comment is more equivocal.[76] The outcome of the Croydon[77] case is thus to look realistically at the actual

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72 Ibid. at p. 431.
73 Ibid. at p. 430.
74 Ibid. at p. 431.
75 Ibid. at p. 432.
76 Does it imply a substitution of the local authority for the parent?
77 R. v Croydon Juvenile Court Justices, ex parte Croydon London Borough Council [1973] Q.B. 426.

circumstances in an entirely pragmatic fashion to decide where charge and control lie while at the same time conceding that the parents retain some of their rights.

17.26 The three other reported cases do nothing to cast doubt upon these propositions; indeed they tend to reinforce them by indicating differing illustrations. In the Somerset[78] case the issues were the same but the child who had been committed to the care of Somerset County Council was subsequently sent by them to a community home in Monmouthshire. The juvenile court, it was decided, had no jurisdiction to make a compensation order against Somerset County Council. Cusack J. summed up the decision succintly:-

> "I take the view that once the County Council placed him as a resident in an independent school such as this, he ceased to be in the charge or control of the County Council and passed into the charge and control of the school. That corresponds with reality, because the school had de facto control, and I believe that is what one should look at, as the county council was not entitled to interfere with the day-to-day running of the school, or to order that the boy should be kept or confined in any particular part of the institution.
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> This case is to be distinguished from R. v Croydon Juvenile Court Justices; ex parte Croydon London Borough Council.[79] It is to be distinguished from that

78 Somerset County Council v Brice [1973] 3 AllE.R. 438.

79 [1973] Q.B. 426.

> case because the child there was actually resident in a house belonging to the local authority. That is not the case in the present instance."[80]

Given the Croydon[81] case, this decision was inevitable. It merely stresses that actual control is the test. The question of status was not as such raised.

17.27 In Lincoln[82] and Brent[83] the difference was that the local authority exercised their powers under section 13(2) of the 1948 Act by allowing the child to return to live with his parents. While at home he committed further offences. Was the local authority liable under section 55 of the 1933 Act? The statutory status of the parents was thus raised. To apply the test of actual control propounded in the earlier cases would be sufficient to exonerate the local authority. Lord Widgery C.J. commented on two matters; one technical, the other on the status of parents.

17.28 It will be recollected that the two earlier cases were concerned with the meaning of "guardian" only for the purposes of section 55 of the 1933 Act. Section 13(1) of the 1948 Act, which authorises boarding out in some form of residential establishment, does not contain the word "guardian". On the other hand, in the two later cases, where the children

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80 [1973] 3 AllE.R. 438 at p.445 per Cusack J.
81 R. v Croydon Juvenile Court Justices ex parte Croydon London Borough Council [1973] Q.B. 426.
82 Lincoln Corporation v Parker and another [1974] 2 AllE.R. 949.
83 Brent Corporation v McLymont and another [1974] 118 Sol. Jo. 499.

were returned to their parents, the local authority were relying upon the powers in section 13(2) of the 1948 Act, which does refer to "guardian". The importance of these statutory references is that the interpretation of "guardian" is different in the 1933 and 1948 Acts. In section 107(1) of the 1933 Act the interpretation of the word "guardian" includes the charge or control test already discussed. That section also contains an interpretation of "legal guardian" amounting in effect to a person formally appointed as such.[84] On the other hand the meaning attributed to "guardian" in section 59(1) of the 1948 Act is almost identical to the interpretation given to "legal guardian" by the 1933 Act. In a sense, the matter is further complicated by the reciprocal cross-references to the 1948 and 1969 Acts in those Acts. Section 11 of the 1948 Act, which provides to which children Part II of that Act applies, makes reference to children in care by virtue of a care order under section 20 of the 1969 Act. Section 24(7) of the 1969 Act in effect recognises the relevance for the 1969 Act of the powers in Part II of the 1948 Act. The 1948 Act is not formally part of the 1969 Act; but it would seem clear that section 55 of the 1933 Act, if not part of the 1969 Act, has a very close nexus with it.[85]

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84 The statutory definition is "a person appointed, according to law, to be his guardian by deed or will, or by order of a court of competent jurisdiction".

85 Children and Young Persons Act 1969, s.73(1).

17.29 The first question is which definition applies. The juvenile court was purporting to operate section 55 of the 1933 Act. That provision deals with the liability of a "guardian" to be fined or subjected to a compensation order. Section 13(2) of the 1948 Act enables the local authority to allow a child in their care to be under the charge and control of a parent or guardian. There is no question that the local authority exercised that power to confer "charge and control" upon the parent. It is unlikely that Parliament intended that "charge and control" could be exercisable by two different persons at the same time. Thus, the local authority would not have "charge and control" to qualify as a "guardian" under section 107(1) of the 1933 Act. On this reasoning the local authority could not be liable under section 55 of the 1933 Act. Equally there can be no doubt that the child's parents could be liable under section 55.

17.30 This is the conclusion reached by the court in Lincoln[86] but the reasoning of the court[87] was founded marginally upon the definition of "guardian" in the 1948 Act. That, it is suggested, was unnecessary and misleading for the meaning of "guardian" in section 59(1) of the 1948 Act for the purposes of section 13(2) of the 1948 Act was quite irrelevant.[88] The definition of "guardian" in section 107(1) of the 1933 Act was

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86 Lincoln Corporation v Parker and another [1974] 2 AllE.R. 949.

87 Especially that of Lord Widgery C.J.; ibid, at p. 957.

88 Because in s.13(2) of the 1948 Act a guardian would be given care of the child by the local authority. The court was concerned with the liability of the local authority as "guardian" not with the authority as grantor of "guardianship".

sufficient to reach the correct conclusion. This was the main argument in the reasoning of Lord Widgery C.J.[89] but his explanation was not very explicit. He went on, however, to explain the position of parents under the legislation:-

> "In my judgment when an order is made under s.13(2) of the 1948 Act, the charge of or control over the child for the present purpose leaves the authority in whose favour the care order was made and vests for the time being in the parents. Accordingly, when that happens the liability of the local authority as guardian for the purposes of s.55 of the 1933 Act ceases for the time being and the natural parents take on that onus with the responsibility it entails.[90]

In Brent[91] the same view was taken by the Divisional Court where Kenneth Jones J. held that the liability of the local authority as guardian of the boys in question ceased for the time being when they entered their parents' charge and control. Thus, so far as care orders under the 1969 Act are concerned, the courts rely entirely upon the test of charge or control on a purely factual and realistic basis.

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89 [1974] 2 All E.R. 949 at p.954.

90 Idem.

91 Brent Corporation v. McLymont and another (1974) 118 Sol. Jo. 499.

17.31 The question, presently unanswered, is whether this analysis is relevant outwith the scope of section 55 and the "guardianship" status of a local authority under section 107(1). The test of charge or control is found only in that context.[92] If this test is relevant generally in the context of care orders, then, it is suggested, it effectively modifies the language of section 24(2) of the 1969 Act by limiting the statutory conferment on the local authority of "the same powers and duties ... as [the] parent or guardian would have." The alternative, of course, would be to suggest that the status of a local authority in right of a care order rests upon the language of section 24 without reference to the special circumstances of section 55. This would, it is suggested, imply a more dramatic view of the local authority's position.[93]

Section 4 - The effect of the old system "fit person" orders

17.32 The structure, and perhaps even the purpose, of care orders under the 1969 Act is fundamentally different from orders available in similar circumstances under the earlier legislation,[94] principally fit person orders.[95] The wording of the legislation giving effect to these orders is different from the statutory phraseology relating to care orders. There are nevertheless certain similarities which make an analysis worthwhile. This

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92 It is not mentioned, e.g., in section 24 of the 1969 Act.

93 Paras.17.20to17.22.There has been little comment on this question. Holden, p. 110 suggests that the purpose of the care order "is to put the child or young person entirely into the hands of the local authority." He was, of course, comparing the 1969 Act position with the earlier system by emphasising the greater powers of the local authority under the new system. Watson and Austin, p.128 merely rehearse the local authority's powers without going further.

94 Children and Young Persons Act 1933; Children and Young Persons (Scotland) Act 1937.

95 1933 Act, ss.61(1), 75 and 76; 1937 Act, ss.65(1), 79 and 80.

also leads logically to a discussion of other aspects of this whole problem. Section 75(4) of the Children and Young Persons Act 1933 and section 79(4) of the Children and Young Persons (Scotland) Act 1937 stated:-

> "The person to whose care a child or young person is committed by any such order as aforesaid [i.e. a fit person order] shall, while the order is in force, have the same rights and powers and be subject to the same liabilities in respect of his maintenance as if he were his parent, and the child or young person so committed shall continue in his care notwithstanding any claim by a parent or any other person."

The concepts of involuntary committal and abrogation or removal of parental rights are common to this provision and to section 24 of the 1969 Act. Otherwise the phraseology is, it is suggested, only marginally different.

17.33 In Gilmour v Ayr County Council[96] the sheriff-substitute[97] was required to construe section 79(4) of the Scottish Act of 1937. The pursuer's son had been committed to the care of the local authority under sections 66(2)(b) and 80 of the 1937 Act. An action was raised concerning an award of access. This raised unequivocally the status of the local authority under section 79(4). The judge latched on to the

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96 1968 S.L.T. (Sh. Ct.) 41.

97 D.M.K. Grant.

words "... the same rights and powers ... as if he were his parent ..."[98] and argued thus:-

> "The phrase 'as if he were' that father or mother [parent] means, in my view, that the fit person has to be regarded as being in fact that father or mother; and is then accorded the rights and powers of that father or mother. The fit person therefore comes to be regarded in fact and in law as the father or mother, as the case may be, of the child. That being so, no other person, including the natural parent, can, it seems to me, have any rights or powers of a parent. In my view, when a committal order under s.66(2)(b) is made, the rights and powers of the parent, which must include the right of access, fly off and fasten on the fit person; and the former is left with none of such rights and powers."[99]

The clarity of that view is impeccable. No suggestion was made that the local authority were in a rather special position as "fit person" and an attempt to treat access as special was also rejected. There are two consequences of this judgment: first, the fit person is given a complete discretion, including a decision on access, and thus assumes a position stronger than that of a parent at common law;[1] secondly, the courts may be excluded from the process,[2] although their standing was conceded by Sheriff-substitute Grant in a very limited fashion.[3] These two comments do not necessarily mean

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98 1968 S.L.T. (Sh. Ct.) 41 at p.42.
99 Ibid. at p.42 per Sheriff-substitute Grant.
1 This argument did not concern the sheriff-substitute: see 1968 S.L.T. (Sh. Ct.) 41 at p.42.
2 A point discussed by Lord Fraser in Browne v Browne 1969 S.L.T. (Notes) 15 at p.16: para. 17.37.
3 1968 S.L.T. (Sh. Ct.) 41 at p.42.

that the sheriff-substitute's views on the status of a fit person were wrong. The individual parent's right may well fly off without the other parent being prejudiced or the position of the courts jeopardized. This case however suggests that committal to the care of a fit person under the old legislation involves more than a transient delegation or transfer of certain rights. It implies the idea of a substituted parent.

17.34 Some of these comments were taken further by Lord Fraser in Browne v Browne.[4] A wife was awarded custody of four children of the marriage in her successful petition for divorce. One child was later committed to the care of the local authority under the 1937 Act just as in Gilmour.[5] The divorced father remarried. The local authority handed the child over to the father.[6] The mother lodged a minute in the divorce process craving access. She was eventually successful.

17.35 So far as the reported facts are concerned, there is no distinction between the cases. In Browne[7] nothing turned upon the decision by the local authority to hand the child over to his father. Lord Fraser's opinion implies that the result would have been the same whoever had physical control of the child. There is moreover only one point of difference between

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4 1969 S.L.T. (Notes) 15.

5 Gilmour v Ayr County Council 1968 S.L.T. (Sh. Ct.) 41.

6 Presumably under s.13(2) of the 1948 Act.

7 Browne v Browne 1969 S.L.T. (Notes) 15.

the grounds of the two judgments, although the dicta are divergent to a greater extent. Sheriff-substitute Grant looked at the parents of the child as a unity. Lord Fraser considered each parent separately. Both analysed the same words in section 79(4) of the 1937 Act but in Lord Fraser's opinion:-

> "Their effect is to place the town council in the same position as if it were the parent of Joseph. If the town council were in fact Joseph's parent, to whose care Joseph had been committed, there would, in my opinion, be nothing incompetent in Joseph's other parent applying to the court for access to Joseph ..."[8]

This reasoning, given the phraseology of the Act, is convincing. It is interesting that it precedes similar reasoning in the English courts by four or five years.[9] There is no indication that the English courts were aware of Lord Fraser's judgment.

17.36 What, then, is the distinction of approach between Sheriff-substitute Grant and Lord Fraser. The former thought of the local authority as superseding both parents and becoming solely responsible for the child. The latter regarded the authority as a parent, subject, in other words, to the rights of the other (if any) parent. The distinction may be technical[10]

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8 Ibid. at p.16 per Lord Fraser.

9 See the English cases discussed at paras. 17.23 to 17.31.

10 S. 79(4) of the 1937 Act refers throughout to the fit person and the parent in the singular.

but it can be of practical importance to the child. There is presumably no reason why the rights of both parents could not be affected by proceedings under the Children and Young Persons Act, provided always that the threshold requirements have been met in the case of each parent.[11] It is a matter for careful consideration on the part of the person bringing the proceedings.

17.37 On a wider plane Lord Fraser's dicta were more circumscribed than those of the Sheriff-substitute. Lord Fraser disagreed that the parent was left with none of his rights and powers in relation to the child.[12] In his opinion:-

> "The subsection [s. 79(4)] will ... receive full effect if it is read in what seems to me to be its natural sense, as putting the fit person in place of a parent, but without prejudice to the rights of the natural parents to seek access in the same way as either might do if custody had been awarded to the other."[13]

Otherwise, he indicated, the jurisdiction of the courts would be ousted, for which there was no clear statutory warrant.[14] This interpretation, it is suggested, is consistent with the overall attitude of Sheriff-substitute Grant. Both support the idea of a substituted parent rather than a mere transfer of rights. Their differences are of degree not of the nature

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11 It is interesting that s.1 of the 1969 Act, which sets out the current threshold requirements, does not use the word "parent": cf. other threshold requirements discussed in chapter 15. S.1 of the 1969 Act is drafted passively, looking at the situation from the point of view of the child.

12 1969 S.L.T. (Notes) 15 at p.16.

13 Idem.

14 Idem. Lord Robertson in W. v Glasgow Corporation 1974 S.L.T. (Notes) 5 at p.5 similarly decided that a supervision requirement made by a children's hearing under s.44(1) of the Social Work (Scotland) Act 1968 did not affect the power of the court to deal with wider issues of custody.

of the statutory substitution. Lord Fraser put the local authority in the same position as that of a parent; the Sheriff-substitute gave the local authority greater powers than a parent would have. Given the words in section 79(4), Lord Fraser, it is suggested, was correct.

17.38 A not dissimilar situation arose in England in H. v H. (Child in care: court's jurisdiction)[15]. After his parents separated, a boy was committed under section 62 of the Children and Young Persons Act 1933 to the care of the local authority. The mother later obtained a divorce. The local authority allowed the boy to live with his father with subsequent staying access to the mother for a weekend once a month. She failed to return the child and arranged for him to live with foster parents. The mother applied to the court for a direction that the child should live with the foster parents. Most of Wrangham J.'s judgment dismissing the application was concerned with the relationship between the statutory jurisdiction of the court and that of the local authority. In her summons the mother had asked originally for custody. Wrangham J. suggested that it should be amended "because her summons for custody would appear by itself not adequately to describe what it was she really wanted."[16] He went on to comment:-

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15 [1973] Fam. 62.

16 [1973] Fam. 62 at p.63.

> "Indeed, she still has, in common with the father of the child, the custody of this child.[17] They were by nature[18] joint custodians of this child, and there is no order depriving either of them of the custody of the child, though, of course, the effect of the order under section 62 of the Children and Young Persons Act 1933 was to suspend the right of either of them to care and control of the child."[19]

This comment implies a fragmented concept of care. The parents retain residual responsibilities while a right to care and control of the child is transferred to the local authority and the corresponding parental function temporarily "suspended". This scareely amounts to the idea of a substituted parent. It is much more limited; a temporary transfer with correlative suspension. Wrangham J. did not expand upon this theme but it is unlikely he would have been sympathetic to the views either of Lord Fraser or of Sheriff-substitute Grant.

Section 5 - The effect of assumption of parental rights.

17.38 It seems clear that to understand the effect of a care order under the 1969 Act consideration had to be given not only to the section dealing with the effect of the order but also to the context of that section and the whole general scheme of such orders. So it is with resolutions to assume parental rights under section 2 of the 1948 Act. It will be recalled

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17 It is difficult to understand this proposition, on the basis that Wrangham J. gave his judgment on 13 October 1972 i.e. before the Guardianship Act 1973 (1973c.29) even received the Royal Assent. S.1 of the Act created equality of parental rights in relation inter alia to custody.

18 It is unlikely that nature would accord legal status to equality of parental rights.

19 [1973] Fam. 62 at pp. 63 and 64 per Wrangham J.

that the consequence of such a resolution was that "all rights and powers" of the deceased parent or the person on whose account the resolution was passed "shall, in respect of the child, be vested in the local authority in accordance with the resolution."[20] Subsection (3) of section 1 of the 1948 Act, the troublesome provision already discussed in the context of reception into care, was positively stated not to apply to the person on whose account the resolution was passed.[21] This indicates at least that there were clear differences, as indeed there still are, between reception into care and assumption of parental rights.

17.39 Before looking at the cases, there are several statutory provisions which modified the fairly dramatic impact of a vesting in the local authority of "all rights and powers". They apply also to the current provisions. Section 3(7) of the 1948 Act, for example, effectively saves the parental right to determine the religious creed in which the child should be brought up.[22] The same, rather interestingly, applies to a child the subject of a care order.[23] The parental right to withhold consent or agreement to adoption was similarly preserved in relation to a child committed to the care of a local authority[24] and also to one subject to a section 2 resolution.[25] The same

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20 1948 Act, s.3(1); 1968 Act, s.17(1); these provisions have been superseded by the Children Act 1975; paras. 17.6 and 17.7. See generally Cotter B.E.H. "Assumption of Parental Rights" (1972) 136 J.P. & L.G.R. 63.

21 1948 Act, s.3(2), second limb: now superseded.

22 This is not, of course, an absolute right.

23 1969 Act, s.24(3).

24 Adoption Act 1958 (7 Eliz. 2, c.5), s.4(3)(a).

25 Ibid. s.4(3)(c) and (d).

position seems to have been achieved by different drafting techniques in the Children Act 1975, at least in regard to assumption of parental rights.[26] The principal parental liability, to maintain or contribute to such maintenance, remains intact when rights and powers have been assumed.[27] There is however a separate statutory code regulating parental contributions to the maintenance of children committed to the care of the local authority under care orders.[28] There is thus a number of specific provisions affecting the relationship of parents, children and local authorities in various ways which are not subject to the generality of the rules in section 3(1) and (2) of the 1948 Act and section 24(2) of the 1969 Act. They cannot be ignored in any attempt to identify whatever status is created by the legislation.

17.40 Of the four cases[29] which looked closely at section 3(2) of the 1948 Act the decision of Lord Stott in the Court of Session in McGuire v McGuire[30] was first in point of time and not cited in the later English cases. The parents in that case were divorced. Parental rights had been assumed by the local authority under section 2(1)(b) of the 1948 Act in respect of the father's mental instability. One of the children was living with his mother on a trial basis under the auspices of the local

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26 1975 Act, ss.57 and 74 substituting 1948 Act, s.2(11) and 1968 Act, s.16(3) respectively.

27 1948 Act, s.3(6).

28 Children and Young Persons Act 1933, ss.86 to 89. Generally see Bevan, pp. 494 to 497.

29 McGuire v McGuire 1969 S.L.T. (Notes) 36; Re K. (An Infant) ReM. (An Infant) Hertfordshire County Council v H. [1972] 3 All E.R. 769 ("the Hertfordshire case"); R. v Oxford City Justices, ex parte H. [1974] 2 All E.R. 356 ("the Oxford case"); S. and another v Huddersfield Borough Council and another [1974] 3 All E.R. 296 ("the Huddershifeld case").

30 1969 S.L.T. (Notes) 36.

authority. His father sought access. Lord Stott regarded the claim as incompetent and, even if it were competent, not justified on its merits.[31] The opinion of Lord Fraser in Browne v Browne[32] was drawn to Lord Stott's attention. The latter judge accepted the former judge's views but pointed out that McGuire v McGuire[33] was concerned with section 3(2) of the 1948 Act which was "significantly different from the terminology of the 1937 Act."[34] Lord Stott summed up the distinction in these words:-

> "Unlike the subsection which Lord Fraser was considering, which can properly be read as putting the town council in a place of a parent, but without prejudice to the rights of the natural parents to seek access, as either might do if custody had been awarded to the other, the 1948 Act contemplates that all the parent's rights in respect of the child will rest in the council and, if all the parent's rights are so vested, it seems to me to be impossible to hold that the parental right of access to the child remains with the parent. This reasoning is applicable to the pursuer in the present case, since it appears from the evidence that he was a person on whose account the resolution of the local authority was passed."[35]

17.41 This construction, it is suggested, is entirely sensible. On the undisputed basis that the father was the

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31 Ibid. at p.36.

32 1969 S.L.T. (Notes) 15.

33 1969 S.L.T. (Notes) 36.

34 Ibid. at p.37 per Lord Stott.

35 Idem.

person on whose account the resolution was passed, there can be do doubt that all the paternal rights and powers were vested in the local authority. The rights of the mother of the child were presumably unaffected.[36] Thus the father's right to claim access would be inconsistent with the powers vested in the local authority either against the local authority itself or against the mother. The local authority, not being an individual, is in a slightly anomalous position as the statutory grantee of parental rights and powers. The authority as such cannot exercise a right of access but it clearly can control access, the only restriction being that the father here has no right to access nor even a right to claim access. He has only a hope that the local authority may in its discretion permit him to have access. Clearly, therefore, as Lord Stott held, "the matter of access to the child was within the discretion of the local authority."[37] This applies to the father only, as the parent affected by the resolution, and not to the mother. There is no reason why the mother could not have petitioned the court for access, if, for example, the child had been boarded out with foster parents or some relative or friend, and the local authority in their discretion had declined her request. The result of Lord Stott's opinion is that a resolution under section 2 has the exact effect stipulated in

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36 R. v Oxford City Justices, ex parte H. [1974] 2 AllE.R. 356 at p.360 per Bagnall J.

37 1969 S.L.T. (Notes) 36 at p.36 per Lord Stott.

section 3(2), namely that all rights and powers of the relevant parent are vested in the local authority, subject only to the limitations set by Parliament itself.

17.42 How does this compare with Lord Fraser's view[38] of the effect of a fit person order? It is difficult to see any fundamental differences. Lord Fraser talked of putting the fit person in place of a parent, saving the position of the other parent.[39] Lord Stott indicated a difference between the two Acts but, apart from repeating the statutory wording, he failed to identify that difference.[40] Indeed each judge would probably have come to the same conclusion in the other case. The view taken by Sheriff-substitute Grant[41] reflects a reference to both parents rather than to a single parent. This is a vital distinction. The overall position is not very precise but probably fundamentally uniform.

17.43 Two of the English cases were decided in the Divisional Court and one in the Court of Appeal. The decisions of the Divisional Court in the Hertfordshire and Oxford cases are difficult to reconcile satisfactorily and are in some respects inconsistent with the views of the Scottish courts. The issue in the Hertfordshire case was similar to that in McGuire v McGuire[42] except that in the former case the putative

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38 Browne v Browne 1969 S.L.T. (Notes) 15.

39 Para. 17.35.

40 1969 S.L.T. (Notes) 36 at p.37.

41 Gilmour v Ayr County Council 1968 S.L.T. (Sh. Ct.) 41.

42 1969 S.L.T. (Notes) 36.

father claimed access to a child subject to a section 2 resolution while in the latter case the applicant was the child's legitimate father. In neither case would such a claim be incompetent in the absence of a resolution under section 2. In the Hertfordshire case the applicant was not the person whose parental rights had been assumed. Indeed it is unlikely that the "parental" rights[43] of a putative father could be subject to section 2. If Lord Stott's arguments[44] were applied to that case, there would be no reason why an order for access could not be made in favour of the putative father. Payne J. in the Hertfordshire case did not contemplate the effect of a section 2 resolution as enacted in section 3; he regarded the matter[45] as a conflict between section 2 of the 1948 Act and sections 9(1) and 14(1) of the Guardianship of Minors Act 1971.[46] He resolved this conflict by applying the views of Lord Evershed M.R. in Re M. (an infant)[47] and concluded that "the justices in the circumstances of this case had no alternative but to decline the application of the father and to leave the discretion with regard to access to the local authority."[48] He declined to comment on the argument that the court could not make an order for access; he merely said that they should not make such an order.[49] This view leaves unanswered the question with which this chapter is concerned. The implication of Payne

43 However attenuated they may be.
44 In McGuire v McGuire 1969 S.L.T. (Notes) 36.
45 [1972] 3 All E.R. 769 at p.771.
46 1971 c.3.
47 [1961] 1 All E.R. 788. This case concerned the conflict between the prerogative wardship jurisdiction and the statutory jurisdiction of the local authority, an issue different from the Hertfordshire conflict. This discrepancy was also noted but apparently ignored by Buckley L.J. in S. and another v. Huddersfield Borough Council and another [1974] 3 All E.R. 296 at p.301.
48 [1972] 3 All E.R. 769 at p.772 per Payne J.
49 Idem. Emphasis added.

J.'s judgment is, of course, that the way was technically open to the court to make an order for access to a child subject to a section 2 resolution. But under what circumstances?

17.44 In the Oxford case the putative father sought custody of his child the rights of whose mother had been vested in the local authority under section 2. The foundation of the applicant's argument was the same as in the Hertfordshire case, namely sections 9(1) and 14(1) of the 1971 Act. Bagnall J. acted upon the implication of Payne J.'s judgment in the earlier case to the effect that, in Bagnall J.'s words:-

> "...in that case [Hertfordshire] itself it seems to me to be clear that the Divisional Court held that there was jurisdiction but that the jurisdiction had to be exercised in the light of the statutory scheme contained in the 1948 Act, and that when Payne J. observed that the justices had no alternative but to decline the application in front of them, his reference to no alternative existing in the circumstances of that case was consistent only with a view that the justices had jurisdiction to determine the case but had to take all circumstances, including the statute, into account."[50]

Bagnall J. went further than Payne J. to conclude that, given the existence of the jurisdiction, the rights of the father, here the putative father, were "untouched" by the assumption of the mother's parental rights by the local authority.[51] To this

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50 [1974] 2 AllE.R. 356.

51 Idem.

extent the view of Bagnall J. is wholly consistent with the opinion of Lord Stott in McGuire v McGuire.[52] That case, it should be recalled, concerned access, while the Oxford case raised the issue of custody. The earlier Hertfordshire case also concerned access. Bagnall J. explained that decision on the basis of jurisdiction and the way the powers should be exercised. He however added a comment that custody and access might be treated differently. In this sense he introduced an argument not discussed in the Scottish courts. In his view:-

> "... [the Hertfordshire case] in the Divisional Court of the Family Division ... was concerned only with access, a matter which must necessarily be under the day-to-day and continuing control and discretion of the local authority. It may well be that a question of custody falls within a quite different category, though I am anxious to express no opinion of my own on it."[53]

If custody and access were distinguishable in that sense, it would help to explain the two English cases but it would conflict with Lord Stott's opinion. Bagnall J.'s view implies that custody is a fundamental concept, almost the nexus of the relationship, while access is a mere incident of that relationship. This may be true from the point of view of either the parent or the local authority as a parent-substitute,

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52 1969 S.L.T. (Notes) 36.

53 [1974] 2 AllE.R. 356 at p.360 per Bagnall J.

subject always to ultimate judicial control. But from the point of view of the child access is more than an aspect of routine management. Such a distinction would be rather a dangerous ground upon which to explain an unfortunate precedent. But apart from these marginal points, the overall attitudes of the Court of Session and of the Divisional Court are consistent. A resolution under section 2 vests all the rights and powers of the relevant parent in the local authority but leaves unaffected the rights of the other parent and any other interested person.

17.45 The Court of Appeal judgment in the Huddersfield case was complicated; Buckley L.J.'s analysis careful. A new dimension, adoption, was introduced. Most of the issues were related solely to adoption.[54] The point of present concern was the relationship between the Adoption Act 1958 and the Children Act 1948, for the parental rights relating to the child, the subject of the adoption application, had been assumed by the local authority. The child was illegitimate. The mother's rights and powers were vested in the local authority, who boarded the child out with foster parents. The mother was treated as having abandoned the child and her consent to adoption could therefore be dispensed with. The father was showing increasing interest in the child. The foster parents applied for adoption. The court made an interim order

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54 E.g. dispensation with maternal consent and the meaning of section 8 of the Adoption Act 1958.

under section 8(1) of the Adoption Act 1958 awarding custody to the applicants with staying and visiting access to the father, while local authority supervision was to continue. The issue of current interest is whether the court could use its powers in such a way as to restrict the powers of the local authority under the 1948 Act.[55] In other words, what is the status of the local authority: a substituted parent or a special statutory "guardian" with greater powers than those of a mere parent? As Buckley L.J. put it:-

> "...did the legislature intend that s.8 should operate in respect of a local authority which is in loco parentis by virtue of a s.2 resolution in any way different from that in which it operates in relation to a parent or any other person having parental rights and powers?"[56]

17.46 To answer this question Buckley L.J. looked carefully at the Adoption Act 1958. He said almost nothing about the Children Act 1948. The context of his comments is therefore very restricted but taken with the cases already discussed his opinion forms part of a reasonably consistent whole. He noted firstly that an adoption order interfered with the assumed parental rights and powers of a local authority "in the most drastic way,"[57] by causing the resolution under section 2 to cease to have effect.[58] Buckley L.J. then

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55 [1974] 3 All E.R. 296 at pp. 302 and 303 per Buckley L.J.

56 Ibid. at p.303 per Buckley L.J.

57 Ibid. at p.302.

58 Adoption Act 1958, s.15(4).

saw section 8 of the Adoption Act 1958 as part of the general machinery of the legislation "for ensuring that the process of adoption ... is carried to a conclusion in the best interests of the child."[59] These and other factors enabled him to conclude that:-

> "...the Act contains clear implications that the legislature intended, so far as practicable, to equate the position of a local authority in whose care the relevant child is, whether or not such authority has assumed parental rights and powers under the Children Act 1948, s.2, with the position of a parent or legal guardian. Nor can I see any particular reason why a local authority who has so assumed parental rights and powers should be differently treated under the Adoption Act 1958 from a parent."[60]

This conclusion is necessarily founded upon the lack of any conflict between the two legislative schemes, a point earlier established by the judge.[61]

17.47 This view effectively discounts any difference between a child committed to the care of a local authority and one subject to a section 2 resolution. It has already been suggested that there is probably no such difference. As

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59 [1974] 3 All E.R. 296 at p.303.

60 Idem.

61 [1974] 3 All E.R. 296 at p.301 where Buckley L.J. explained: "Where (a) Parliament confers on a body or person statutory powers of discretions, whether they be associated with a duty or not, and (b) by a later statute Parliament gives a court a discretionary jurisdiction to make orders which may inhibit or restrict the free exercise of the powers or discretions under (a), it does not, in my opinion, necessarily follow that (c) Parliament intended that the Court should never exercise its discretionary jurisdiction under (b) in any way which would have such an inhibiting or restrictive effect."

Stephenson L.J. added nothing to the argument, the Court of Appeal is effectively represented by the views of Buckley L.J. That approach is consistent with the conclusion already tentatively expressed that the local authority becomes a substituted parent for the parent whose rights have been abrogated with no more or less discretion than a parent would normally have, unless statute has otherwise clearly provided.[62]

Section 6 - Conclusions

(a) General

17.48 The preceding paragraphs emphasise clearly that local authority care and assumption of parental rights are, apart from the fulfilment of the threshold requirements, fundamentally discretionary matters. The legislation sets out or implies three aspects of the process; the person or body who is responsible for the relevant decision; the policy which the process is designed to achieve; the relevant factors in reaching such a decision.[63] These three aspects may merge in practice and it may be difficult to ascertain precisely at any point in the process which aspect is under consideration.[64] The importance of the status of the affected parties, particularly

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62 Paras. 17.22 and 17.37.

63 None of these three matters is necessarily easy to identify and apply. The legislation is frequently complex.

64 E.g. from an administrative point of view, May and Smith, "Policy Interpretation and the Children's Panels: A Case Study in Social Administration" (1970) 2 Applied Social Studies 91 at p.91 recognise "three critical stages in social policy implementation. (1) The stage at which general policy objectives are translated into legislation. (2) The stage at which legislation is translated into an administrative structure. (3) The stage at which the administrative structure gives rise to the day-to-day activities of 'front-line' units." The three aspects of the administrative process referred to in the text could be relevant at any of the three stages recognised by May and Smith.

here the local authority, is to be found in the first of the three aspects, namely the person responsible for the decision.

17.49 Apart altogether from child protection legislation, the parental decision-making process is fragmented.[65] In a static[66] situation the concept of equality of parental rights as between father and mother[67] causes no difficulty. But the introduction of conflict or disagreement between parents, that is the dynamic situation, immediately fragments that static unity. Neither parent may, for example, as against the other parent, monopolise the decisions about the child's future and welfare, whether from the residential, educational, religious or any other point of view. Nor may one parent deprive the other of access. Whether the passive parent is prepared to contest the issue is another matter. If he does, the introduction of the courts into the decision making process introduces a further fragmenting consideration. The problem of competing jurisdictions[68] confuses the matter further. It is suggested that the introduction of the local authority to whatever extent simply brings in a further fragmentary element, an additional potential decision maker. The process thus divides to include unified parents, then father and mother

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65 Paras. 45.55 to 45.56.

66 I.e. where everybody, parents, statutory bodies and the like, accept the status quo.

67 Guardianship of Minors Act 1973 (1973 c.20), ss. 1 and 10.

68 More particularly in England before the Family Division of the High Court was set up. There could nevertheless still be some conflict within the English judicial system.

individually, thereafter a judicial tribunal, then an administrative body, with the ultimate introduction of a judicial tribunal again to control the administrative body.[69] Each may have responsibilities for different elements in the whole process. It depends ultimately upon the distribution of powers among these bodies. Without any question the subject matter of the process, the child, will be materially affected by this distribution of powers.

17.50 Academic commentators have on the whole tended in their analyses of the effects of care orders and assumptions of parental rights to rely heavily upon the statutory phraseology without further elaboration.[70] This is understandable.[71] In any event some of the relevant cases were decided after the texts were written. There have however been one or two periodical contributions[72] to this topic but this analysis relies almost entirely upon the relevant legislation and the judicial commentaries.

(b) Academic commentaries

17.51 It is again worthwhile bearing in mind the exact words in the legislation. Section 3(1) and (2) of the 1948 Act conferred no discretion upon the local authority.[73] The authority could not select which rights and powers it would

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69 Any of these parties could "delegate" care to a third party; e.g. parents to relatives, local authority to foster parents, court to guardian, etc.

70 E.g. Bevan, p.50; Watson and Austin, p.128.

71 Given the complexity of the issues and the degree of generalisation needed to produce an intelligible synthesis, even then one without authoritative validity.

72 Especially Thomson J.M. "Local Authorities and Parental Rights" (1974) 90 L.Q.R. 310 and the most recent contributions of Clive E.M., "Getting children out of dangerous homes" 1976 S.L.T. (News) 201 and "Refusing to return children to dangerous homes" 1976 S.L.T. (News) 265.

73 Nor does s.24(1) and (2) of the Children and Young Persons Act 1969 in the context of care orders, except for the discretion to restrict the child's liberty set out in the last limb of subsection (2).

like. "All" rights and powers were"vested" in the authority "in accordance with the resolution".[74] The last phrase did nothing to suggest a discretion to select powers. It would on the other hand be open to the local authority to select which rights and powers vested in it were to be exercised. But this practical discretion would remain subject to the general duty under section 12 of the 1948 Act. It might be easier to consider the meaning of section 3(1) and (2) from the parent's point of view. In effect he loses "all rights and powers" in respect of the child.[75] The position was the same in Scotland under the original provisions of the 1968 Act. The 1975 amendments have probably done nothing, either in England or in Scotland, to alter these conclusions.

17.52 Some commentators have equated these statutory provisions with the conferment of custodial rights upon the local authority.[76] This, it should be emphasised, is not what the legislation has stated. Thomson, for example, suggested that it was probably not the intention of Parliament to enable the local authority to assume the "full complement of parental rights."[77] He noted the statutory exceptions relating to maintenance, religion and adoption. It could however be argued that where Parliament enacted certain exceptions, they intended

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74 1948 Act, s.3(2).
75 E.g. Leeding, p.69.
76 This is a generalisation only and consideration will be given to the details in the following paragraphs.
77 Thomson, op.cit., p.310.

no others. Thomson also pointed to other examples which, in his view, indicated that not all parental rights are lost under a section 2 resolution. He instanced intestacy.[78] The right to succeed on intestacy is, it could be argued, a right inherent in the child and, as Thomson himself later indicated, children's "rights" are not affected.[79] The examples of domicile and name[80] may be similarly explicable. The child's right, in a sense, is derived in the first place from the parent, but this does not make it a parental right. The example[81] of the power to appoint a guardian under section 4 of the Guardianship of Minors Act 1971 is also irrelevant, for the local authority, not being a natural person, has perpetual existence until Parliament provides otherwise. There is no need of such a power in the local authority.

17.53 Thomson concluded that not all rights are assumed by the local authority under a section 2 resolution. This cannot be denied, whatever view is taken, given the qualifications prescribed by statute. It would probably not be misleading to suggest that according to Thomson it is principally custodial rights which are transferred to the local authority by a section 2 resolution. To some extent he implies this himself and his list of rights transferred[82] confirms that view. Custody[83] itself is transferred to the local authority; so are care and control, determination of education, consent to medical treatment, discipline, services, consent to marriage. There are problems even in this list. Apart from the question of what is custody, it is by no means certain

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78 Ibid. p.311. 79 Ibid. p.312. 80 Ibid. p. 311.

81 Ibid. p.311. 82 Ibid. p.312.

83 Custody, of course, is a word with varying shades of meaning. Here it probably means custody in the wide sense, the general power to control and direct the upbringing of a child.

what is the content and extent of some of the parental rights listed, particularly determination of education[84] and consent to medical treatment.[85]

17.54 However, Thomson's most significant argument relates to access.[86] Here he was influenced by judicial interpretations of the Act.[87] If custodial rights alone are conferred by section 3, Thomson suggested,[88] the parental right to claim access before the courts will be preserved. "For even if a parent loses the custody of his child, he will still be entitled to access unless a court thinks that such a visit would be clearly prejudicial to the child ..."[89] This argument, although technically correct, is unhelpful, for it applies also to a transfer of all parental rights, not merely custodial rights. Firstly, access is not a right;[90] a parent may merely ask a court in appropriate circumstances to grant access. Secondly, it may not be merely a parental right, even assuming that it is a right; the

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84 Determination of education itself is now closely regulated by statute and the appropriate statutory balance between the education authority and parents may be difficult to achieve.

85 This too is affected by statute. E.g. is failure to consent "neglect"; does failure to consent open the way to care proceedings; what is the position of the medical adviser and the health authority?

86 Thomson, op.cit., pp.313 and 314.

87 Particularly the Hertfordshire and Oxford cases.

88 Thomson, op. cit., p.312.

89 Ibid., p.313.

90 At least not in the sense that there is a correlative duty in someone.

substantive beneficiary of the action is the child and, if it is not in the child's interest for the parent to have access, it will not be granted. Finally, the argument fails to place enough weight upon the view that it is only the parent in respect of whom the resolution was passed whose rights and powers are transferred.[91] Thus the "innocent" parent or any other person unaffected by the resolution may competently bring an action against the local authority for access in addition to asking the authority administratively to facilitate access. The "guilty" parent whose rights have been assumed would not on present authority[92] be able to claim access. Thomson's argument on access thus does not, it is suggested, clarify what rights and powers are conferred by a section 2 resolution. The relevant authorities depend solely upon the words of the legislation and not upon custody as either a part or the totality of the rights transferred.[93]

17.55 Two other academic comments have alluded to custody. Eekelaar[94] indicated that a section 2 resolution "vests all the parental rights of the deprived parent in the authority, which means that his or her custody is vested in the authority."[95] This leaves open the question whether rights other than custody are vested in the authority. Custody, of course, may well be the

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91 Paras. 17.5 and 17.6.

92 Paras. 17.40 and 17.41.

93 But this does not mean that the authorities do not support wider arguments on this point.

94 Eekelaar, p.164.

95 Cf. the similar but slightly different explanation of a care order given by Jarvis F.V. Probation Officers' Manual (London, 2nd ed., 1974) at p.222: "A care order places the local authority in loco parentis, with prior right to custody of the child or young person and the power to restrict his liberty if necessary." Emphasis added. The word "prior" is interesting as it suggests that there are no absolute rights in this area.

most important one in practice. Eekelaar's comment thus contributes little to this discussion.

17.56 Much may also depend upon the attitude of the "innocent" parent and upon whether a static or dynamic situation exists. This point has been noted by Bevan.[96] He contemplated a divided judicial order in force, giving custody to the father and care and control to the mother. Assuming that the resolution applied to the mother alone, the father's judicial custody order would remain intact. Bevan concluded that the local authority "would be required to consult [the father] on the child's upbringing."[97] If such is the effect of holding a custody order,[98] that consequence cannot be denied. But it merely reiterates that only the relevant parent is affected. It now seems unnecessary to postulate the rather special circumstances contemplated by Bevan. Section 1 of the Guardianship of Minors Act 1973 creates equality of parental rights. Custody thus inheres in each parent until one or other or both are deprived of it. Bevan's comment would therefore appear to apply quite generally. This merely stresses that great care should be taken by the local authority in drafting and substantiating the resolution. The extent of rights and powers transferred by a section 2 resolution cannot, it is suggested, be analysed in terms of custody alone.[99]

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96 Bevan, p.150. He does not use this terminology.

97 Idem.

98 Which it probably is; but that conclusion assumes that the local authority is a substituted parent, with no more powers than a parent. That, of course, is the whole issue under discussion.

99 This seems to be implied by Clive E.M., "Getting children out of dangerous homes" 1976 S.L.T. (News) 201 and p.203 and "Refusing to return children to dangerous homes" 1976 S.L.T. (News) 265 at pp. 265 and 269. See also MacEwan J.N.S., "Powers and duties of local authorities with regard to children" 1971 S.L.T. (News) 89 at p. 91.

(c) The judicial decisions

17.57 Academic commentaries thus do not produce any coherent or consistent analysis. Is it possible on the other hand to synthesise the series of cases discussed? The courts have not generalised the concepts under discussion, simply because it was not necessary. To interpret the Act was enough. It may nevertheless be possible to create a useful framework from the authorities. There are, of course, two sets of cases. One concerned section 55 of the Children and Young Persons Act 1933.[1] The issue in those cases was ultimately the responsibility of the local authority for the child in question. It concerned the statutory liability of the local authority, not its rights and powers. Section 3 of the 1948 Act was thus strictly irrelevant. The answer depended entirely upon the terms of the 1933 Act itself, namely whether the local authority fell within the meaning of "guardian" with charge or control of the relevant child.[2] The test applied by the courts was entirely factual. It is thus possible for a local authority to be responsible for the actions of its "ward" for the purposes of section 55 of the 1933 Act. Similar issues could arise where the parent has privately delegated custody or care and control or whatever to a relative or friend or a voluntary or indeed official residential establishment. A local authority is thus in no

1 Paras. 17.23 to 17.31; see generally Hoggett B., "Children in Care: Who is Responsible?" (1974) 118 Sol. Jo. 722.
2 Para. 17.30.

different a position from any other person, natural or artificial, who may be responsible for a child.

17.58 The second series of cases[3] is potentially more rewarding in a positive sense, for they deal with rights and powers rather than liabilities. Some of the cases, under the Children and Young Persons Acts, concerned the transfer of powers under fit person orders; others, under the Children Act 1948, assessed the effect of a section 2 resolution. It has been stated that the effect of a resolution is "much stronger"[4] than that of a care order. There is judicial support that the consequences of these respective decisions are different.[5] There is however little in the cases to support these views. The statutory terminology in the two codes is different; the purposes and procedure may be different; but the result seems to be much the same in either case. It may be that circumstances have not yet arisen judicially which require distinctive analysis. If so, the reported cases give an incomplete picture. This may be so but, it is suggested, the evidence favours similarity of consequence between fit person or care orders and section 2 resolutions rather than differences.

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3 Paras. 17.32 to 17.47.

4 Leeding, p.69.

5 E.g. McGuire v McGuire 1969 S.L.T. (Notes) 36 at p.37 per Lord Stott.

17.59 Apart from these negative considerations, the second series of cases seems to indicate overall that the effect of a fit person order (and possibly now a care order in England) and of a section 2 resolution is merely to substitute the local authority for the parent who has infringed the standards prescribed by the relevant threshold requirements.[6] The authority has no more and no less power than the parent; it exercises no wider discretion; one decision maker is merely substituted for another. Whatever rights the child may have are unaffected. It may even be that parents, as administrative decision makers, have no substantive rights, as against the child, in the dynamic aspect of their relationship with the child. These views are supported, it is argued, by the judicial retention, in both Scotland and England, of the locus of the courts in relation to the child.[7] The statutory jurisdiction of the local authority is acknowledged, just as the position of the parents is recognised. The courts have insisted upon their own residual role in the decision making process.

17.60 These arguments emphasise that the care of children, whether the responsibility lies with parents, local authority or court, is an administrative process in which notions of substantive rights are almost if not entirely irrelevant.[8] Legal rules merely indicate which person or body makes the decision. This is probably fairly clear for administrative bodies like local authorities; less clear in the case of parents and courts. Even so, it may be asked, if a local authority is a mere

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6 Paras. 17.37 and 17.47.

7 In Scotland without difficulty; in England as a consequence of the series of cases regulating the relationship between the prerogative jurisdiction of the court and the statutory jurisdiction of the local authority.

8 A fundamental point considered in detail as regards parents and courts passim.

substitute for a parent as a decision maker, why does the legislation set out the aims and methods to be implemented by the authorities? This has not been done directly for parents,[9] and only very generally for the courts.[10] The reason, it would appear, is that local authorities are themselves statutory bodies and, without an appropriate framework of legislation, they cannot operate. Such a statutory framework can also include a statement of the way in which the statutory powers are to be exercised, thus setting out certain policies relating to child care and currently acceptable within the community. Otherwise the local authorities would have a substantively unfettered discretion which would no doubt be generally unacceptable

17.61 These comments go much further than any of the judicial statements. But there is no inconsistency, it is submitted, between these comments and the relevant judicial statements. If the cases indicate, as it is suggested they do, that the effect of care orders, fit person orders or section 2 resolutions is to substitute one decision maker for another, this is not in conflict with the phraseology of the legislation. Section 3(1) and (2) of the 1948 Act was drafted in terms of rights and powers. Section 24(1) of the 1969 Act spoke of reception into care and keeping in care. Section 24(2) of that

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9 Although the courts in exercise of their once equitable and now statutory discretions have introduced many criteria which imply standards of conduct required of parents: Chapter 44.

10 Guardianship of Infants Act 1925 s.1; Guardianship of Minors Act, s.1; Children and Young Persons Act 1933, s.44(1); the Social Work (Scotland) Act 1968 contains no similar provision.

Act mentioned "powers and duties." The new provisions are not conceptually different. This language reflects duties and responsibilities. Indeed "care" infers duties not rights. Duties cannot be implemented without the conferment of certain powers, particularly in the case of a local authority dependent upon statute for its status. The same is true of the common law wherein notions of rights and powers evolved in consequence of the implementation of duties.[11] Thus section 2 resolutions are approached from the point of view of powers; care orders from the point of view of duties coupled with powers. They are not intrinsically different. There is thus no logical or semantic reason why local authorities should not be in the same position under both sets of legislation.

17.62 The last point is whether there is any conflict between the two series of cases. It is suggested that there is not. The cases dealing with section 55 of the 1933 Act concerned the legal liabilities of local authorities as statutory guardians. They are in no different a position from any other guardian or parent. That is true also of the second series of cases. They show that the legislation has assimilated the positions of local authority and parent as much as possible: not always from the same point of view, sometimes approached by

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11 Paras. 32.9 and 32.51.

the conferment of powers, otherwise by the imposition of duties, but always with more or less the same result.

17.63 This rather long analysis and consequential synthesis indicates that care by local authorities is fundamentally no different from care by parents or other official or unofficial guardians or parent substitutes. The creation of the care relationship differs, naturally, depending upon who is the person involved.[12] But the objectives of care, the powers available and the restrictions upon their exercise, the possibility of suspension or deprivation of the care function and the residual and ultimately protective role of the court are more or less the same in both situations.

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12 In the case of a parent, by virtue of the natural relationship; in the case of an artificial person, by virtue of the fulfilment of the statutory requirements.

CHAPTER 18.

OFFICIAL CARE LEGISLATION AND DISCRETIONS - PART I.

Section 1 - Adjudication and discretion.

18.1 The criminal process involves three distinct parts: a decision to prosecute, determination of the guilt or innocence of the accused and a decision on the relevant sentence. The second is a matter of adjudication and represents the threshold requirement for the exercise of the sentencing power. The same pattern emerges under the official care legislation. The clearest model is Part III of the Social Work (Scotland) Act 1968.[1] Once the appropriate information has been received and investigations made,[2] the reporter decides whether to refer the matter to the children's hearing.[3] Where the grounds of referral are not accepted, the matter is directed to the attention of the sheriff for determination.[4] Finally the case is disposed of by the children's hearing.[5] The second of these three stages, the determination by the sheriff, is an adjudicative function and is the threshold requirement for the final substantive decision by the children's hearing. The same analysis may be applied to care proceedings under the Children and Young Persons Act 1969.[6] In that context the division of function is less obvious as the second and third stages are both within the competence of the juvenile court.[7] The feature of the process

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1 1968 c. 49.
2 Ibid., ss. 37(1) and 38(1).
3 Ibid., s. 39(3).
4 Ibid., s. 42(2)(c)
5 Ibid., s.44.
6 1969 c.54.
7 Ibid., s. 2(2) and (3).

as a whole is a blend of adjudicative and discretionary functions. Satisfaction of the threshold requirements represents the principal adjudicative function, notwithstanding that the person performing that function is an administrator or lay justice, a professional magistrate, a sheriff or whoever is given the duty.

18.2 It is no accident that the standards of conduct set by the criminal law are identified in relation to the adjudicative function when guilt or innocence is being established. Similarly the standards of parental care which the law seeks to enforce as a minimum are ascertainable only by examining the threshold requirements for the exercise of the various statutory powers. The criminal law, as a whole, sets out relatively directly and objectively identifiable standards required of the community at large. The law relating to children, on the other hand, has not so far attempted to state generally what is required of parents and others in loco parentis. At this point any analogy between criminal law and children's law breaks down. For this branch of the law simply explains when a parent is falling below the required standard. The general standard can, at best, only be inferred from that.

18.3 This may be demonstrated by contrasting section

1(1) of the Children and Young Persons Act 1933[8] and section 1(2) of the Children and Young Persons Act 1969. The former protects children from their parents by attaching criminal liability to certain acts of wilful abuse. The latter protects children civilly but includes the need of care or control requirement.[9] It is the latter provision which introduces the flexibility of approach which makes it almost impossible to identify a general standard of acceptable child care. Parliament has thus intervened in relation to children by conferring powers, prescribing conditions for the exercise of these powers, setting out objectives and considerations, creating the necessary administrative apparatus and providing procedures designed to safeguard the various interests; not by enacting generally applicable standards. This is why the law in relation to official care at least is structural rather than normative in character.[10]

18.4 Attention so far has been concentrated upon the adjudicative functions built into the official care legislation. This has involved analysing the threshold requirements . But it has proved impossible to consider these requirements adequately without at the same time looking briefly at some of the other aspects of the legislation: for example, the consequences of the legislation for parents and their children,

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8 23 & 24 Geo. 5, c.12.

9 1969 Act, s. 1(2): para. 15.23.

10 This applies generally in the law of children.

questions of policy and some of the procedural safeguards involved. Some of these, particularly policy, are framed neither specifically nor objectively, but in terms of general welfare, interests, benefit or advantage. To deal with the threshold requirements as part of the overall system and not in isolation is not a disadvantage, for it shows quite clearly that to be effective the law relating to children must be conceived as an integrated whole and not as fragmented particles. Analysis leads almost inevitably to synthesis and this branch of the law is no exception.

18.5 Two general features have so far emerged. Most situations which may arise call for the use of remedies and procedures from different areas of the legal system.[11] Parents, for example, may be convicted of an offence against their children. The children may then be received into the care of the local authority with the consent of the parents. The juvenile court or children's hearing may make a care order or supervision requirement against the parents' wishes. The parental rights of the offending parent may be assumed by the local authority. The parents may seek the return of their children in terms of the statutory procedures or by reference to the court under wardship or other proceedings. The child may have been placed with foster parents who then seek to

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11 E.g. the Maria Colwell case: chapter 21.

adopt him. A number of the reported cases already discussed raise a multitude of such related issues. No problem can be satisfactorily solved in isolation from the others. One of the legal problems is the relevance of alternatives in deciding the issue before the court.[12] Thus criminal, civil or administrative remedies may all be included in a complete assessment of any one set of circumstances.

18.6 This emphasises that what is desirable in one case is not necessarily a reasonable solution in another. Hence the system confers considerable discretions upon the various persons and bodies to enable a decision to be reached in accordance with the needs of the individual person; in other words, the concept of individualised justice.[13] This may also be the disadvantage of the system. Powers may be abused; administrative procedures distorted; staff inadequate; resources insufficient.[14] But the legal framework of the system is not necessarily responsible for such deficiences. Discretion renders possible a human decision-making process. A discretionary system does not operate automatically. It is the human dimension which, it is suggested, is both the strength and the weakness of a discretionary system.

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12 Paras. 45.45 to 45.54.

13 See Kilbrandon Report, p.12.

14 Paras. 20.1 to 20.21.

18.7 The second general feature in a sense is a corollary of the first. It is clear that satisfaction of the various threshold requirements prior to the exercise of a discretion involves no substantive discretion. Any discretion is merely interpretational. But such a discretion cannot be ignored, for it plays an important part in the overall statutory scheme. Some threshold requirements operate retrospectively in the sense that proof of past conduct or behaviour is the justification for the exercise of the power. Other such requirements, which tend to involve an element of interpretational discretion, look to the future as the basis for decision-making.[15] These requirements are difficult to analyse, for the adjudicative function and the dispositional function exist largely in terms of each other. They are inextricably interrelated, and, although in theory they may be distinguishable, in practice they cannot be separated. The dispositional function almost always involves an element of substantive discretion; the adjudicative function does not.

18.8 This statutory division into adjudication and discretion is not new.[16] Nor is it accidental.[17] It has simply become more obvious in recent legislation, particularly the Social Work (Scotland) Act 1968, because there the functions have been conferred on separate bodies: in the case of the

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15 E.g. the need of care or control in the 1969 Act, s.1(2). See also the Kilbrandon Report, p.29. It is also true in the adoption context: see Cavanagh W.E. and Post R., "Adoption Procedure - Views from the Court" (1971) 1 Social Work Today, No. 11, p.33 at p.33.

16 It has a long history in the U.S.A. both in statute and in the commentaries.

17 Kilbrandon Report, pp.26 and 35; Ingleby Report, p.28.

adjudicative function, upon the sheriff and in the case of the dispositional function, upon the children's hearing. A similar distinction in the English system has been fairly widely conceded.[18] The same division of function may also be seen in the statutory process of adoption. Determination of the existence of the threshold requirements for the making of an order or for dispensing with parental agreement is clearly adjudication. A decision whether the order would be for the welfare of the child under the earlier legislation attracted features of both the adjudicative and discretionary functions. But the welfare test is now clearly part of the decision whether to make an order even where all the threshold requirements have been satisfied.[19] There is thus common ground between the two principal areas where Parliament has intervened in the natural parent-child relationship.

Section 2 - The importance of discretion.

18.9 The analysis of this Part has so far only considered the nature of the discretion in the context of understanding the threshold requirements. The principal aim of this chapter is to look at the use of discretions in the context of statutory child care and at some of the disadvantages of using the discretionary system. A discretion is thus the link between the adjudicative function and the dispositional

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18 E.g. Cavanagh, pp. 183 and 184 and pp. 188 to 190. It is also implicit in Bevan, p.80, Watson and Austin, p.107 and Holden, p.22. It has been more carefully analysed in Younghusband E., "The Juvenile Court and the Child" (1957) 7 British Journal of Delinquency 181; Cavanagh W.E., "Justice and Welfare in Juvenile Courts" (1957) 7 British Journal of Delinquency 196 ; and Cavanagh W.E., "What Kind of Court or Committee?" (1966) 6 British Journal of Criminology 123.

19 These matters are considered in detail in paras. 18.21 to 18.28.

function. But, it will be seen, it is much more than that.

18.10 At the outset, it may be asked, why should people, particularly children, not be treated alike in similar circumstances?[20] The answer lies partly in the justification for juvenile courts and children's hearings.[21] State intervention to protect children is much older than the introduction of procedural and other specialities in the form of juvenile courts or children's hearings. If state intervention is to be successful, the court or whoever makes the decision must have adequate information on which to base its decision for the child's future welfare.[22] It is probably also essential for the state to provide appropriate facilities or at least to ensure that private facilities are adequate.[23] Experiments in some states in the U.S.A. and Australia in the nineteenth century laid the foundations for the subsequently more extensive establishment of similar systems throughout the Anglo-American jurisdictions.[24] The Children Act 1908[25] inter alia established juvenile courts for England. They were never generally adopted in Scotland[26] where the initial reaction seems to have been one of considerable suspicion,[27] principally because it involved the idea of lay justice.[28]

18.11 The welfare or discretionary function of juvenile courts was recognised early in American jurisprudence as being

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20 I.e. the doctrine of equality.
21 Mack J.W. "The Juvenile Court" (1909) 23 Harvard Law Review 104.
22 The provision of which is the object of the Social Work (Scotland) Act 1968, ss. 37(1), 38 (1) and 39(4) and of the Children and Young Persons Act 1969, ss. 2(1) and 9. See also Ingleby Report, p. 84.
23 Social Work (Scotland) Act 1968, Part IV; Children and Young Persons Act 1969, Part II.
24 Mack, op. cit.
25 8 Edw. 7, c.67.
26 See Kilbrandon Report, p.23.
27 See Ketchen W.T., "Juvenile Courts" (1938) 54 Scottish Law Review 135.
28 Ibid, at p.137.

distinct from their adjudicative function. Mack[29] accepted this judicial view:-

> "Before the state can be substituted to the right of the parent, it must affirmatively be made to appear that the parent has forfeited his natural and legal right to the custody and control of the child by reason of his failure, inability, neglect or incompetency to discharge the duty and thus to enjoy the right."[30]

This is a paraphrase of the threshold approach incorporated in the earlier discussion of threshold requirements.[31] Juvenile courts merely provide the mechanism for ensuring that, once the threshold requirements have been satisfied or the parental right forfeited, there is a greater chance of the best decision being reached on the child's future.

18.12 A substantive discretion is relevant only at the point of disposition. The concept of individual justice is the justification for such a discretion. This has been recognised in a number of contexts.[32] It forms, for example, an essential part of the philosophy underlying the Social Work (Scotland) Act 1968.

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29 Op. cit. at p.112.
30 Mill v Brown (1907) 88 Pac. 609 (Supreme Court of Utah).
31 The threshold approach may be described in several ways but it is fundamental to the Anglo-American system. For instance, Young, "The Problem of Neglect - the Legal Aspects" (1964) 4 Journal of Family Law 29 at p.41 emphasised that statutes tended to recognise and support the presumption of parental fitness which had to be overcome by satisfactory evidence of parental unfitness and not by a mere balance of welfare against the parents. Indeed it was put to the Ingleby Committee that welfare should be the criterion of intervention but this was not accepted: Ingleby Report, p.25.
32 Kilbrandon Report, p.12.

During the second reading in the House of Commons it was argued by the Secretary of State for Scotland:-

> "These wide powers [in clause 44] are needed to enable the children's hearings to deal properly and constructively with the wide variety of circumstances which lead to children being brought before them. The clause sets out these powers in general terms rather than in specific measures because the children's hearings must be able to apply to each child those measures which the child really needs rather than a specific measure, laid down in statute, which is the nearest approximation to what the child might need."[33]

This argument also incorporates reference to the generality of the drafting of the provision. Wide drafting, of course, invites the criticism of uncertainty and imprecision.[34] This applies not only to the conferment of powers, as in clause 44, but also to the words creating the substantive provisions, for example, threshold requirements. Wide drafting confers interpretational discretion. This is important, particularly at the point of disposition where there is also a substantive discretion. During the debate on the Bill when it was in committee in the House of Lords, the Minister of State at the Scottish Office explained:-

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33 (1968) 764 H.C. Deb. 5 s. col. 55 (Mr. Ross).

34 Part III of the Social Work (Scotland) Bill was criticised for "wooliness about the processes proposed.: (1968) 764 H.C. Deb. 5 s. col. 101 (Mr. M. Clark Hutchison).

> "I cannot conceive of a wider definition of 'welfare' than we have put into this Bill. In fact, the comment which we received from every direction is that for the very first time 'welfare' has been defined in a Bill in such a way as to make it almost inconceivable that one could find something which would not fall within its ambit."[35][36]

Whatever 'welfare' means, the use of that or indeed any word is a limiting factor; for, however wide its meaning, any word incorporates certain semantic and contextual restrictions. Nevertheless, it cannot be denied that 'welfare' is a word of very wide application and content.

18.13 The philosophy underlying the Children and Young Persons Act 1969[37] is not fundamentally different from that of the Social Work (Scotland) Act 1968.[38] The methods of achieving these objectives differ in several respects.[39] Although both systems recognise the distinct adjudicative and dispositional functions, the main difference is probably that the Scottish Act confers continuing responsibility upon the hearings for the treatment of children referred to them by requiring the periodical review of

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35 There does not appear to be a definition of 'welfare' in the Act: perhaps he was referring to what was enacted as s.12.

36 (1968) 291 H.L. Deb. 5 s. col. 212 (Lord Hughes).

37 E.g. Holden, pp. 21 to 23; Watson, pp. 4 to 15; Watson & Austin, chapter 4; "New therapy for disturbed boys" [1971] The Times, 15 June.

38 E.g. Children's Hearings: Notes on Part III of the Social Work (Scotland) Act 1968 (Edinburgh, H.M.S.O., 1970); Grant J.P., "Juvenile Justice: Part III of the Social Work (Scotland) Act 1968" (1971) 16 Juridical Review 149.

39 See Seed, "North and South of the Border" (1971) 2 Social Work Today No. 12, p.21.

supervision requirements.[40] The English juvenile court, on the other hand, loses all such responsibility when the initial order is made and the local authority in effect through its professional staff becomes responsible for the child's welfare.[41] This has been a major point of criticism of the English Act.[42] But it may be that in either case, whether formal responsibility lies with the hearing or the local authority, the professional social worker occupies a position of great influence. This may perhaps be less justifiable for Scotland where the standing of the hearing and the important functions of the reporter[43] may reduce the impact of professional advice. It has, nevertheless, been stated:-

> ".... the function of the panel [hearing] is not to determine treatment and training at all. Its function is to supervise the professionals, to ensure that they are subject to a degree of lay control, and that individual civil liberties are not jeopardised by granting them excessive power."[44]

Clearly such a view does not reflect the formal statutory position; nor has it apparently been proved to be true in practice, although at least two commentators have suggested in the context of adoption, which is not necessarily analogous, that the courts merely check the legal formalities and act as a "rubber stamp".[45] It is difficult to accept that this would be true of children's hearings.

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40 Social Work (Scotland) Act 1968, s. 48.
41 E.g. Samuels A., "Children and Young Persons Act 1969"(1969) 119 New Law Journal 1084.
42 Paras. 20.5 and 20.6.
43 Social Work (Scotland) Act 1968, ss. 37 to 39.
44 May and Smith, op. cit., at p. 96.
45 Kermack S."Thoughts on Adoption Procedures" (1968) 54 Child Adoption 39 at p. 40; TriseliotisJ.P., Evaluation of Adoption Policy and Practice (Edinburgh, 1970), p. 119.

18.14 The position in England is perhaps even more confused. The reason, as articulated among others by Younghusband,[46] is clear: the dilemma facing the juvenile court is that at the same time it has to diagnose the "malady" and prescribe exactly what treatment is required and for how long.[47] This distinction is not the same as the one already discussed between the adjudicative and dispositional functions. It goes deeper. The symptoms of the "malady" are the facts and circumstances satisfying the threshold requirements. The cause of the "malady" may be quite different. The treatment to be prescribed by the court is presumably directed at the cause rather than the symptom. This makes the task of the court, or for that matter the children's hearing, more difficult. Cavanagh, on the other hand, takes a slightly more traditional and perhaps legalistic view of the courts' function.[48] It is regarded sometimes as a diagnostic clinic, but in her view it is not an ad hoc device for furthering the child welfare provisions of a post-war welfare state, but rather a slightly modified version of an adult court. Technically this may be so, but adult courts in the criminal context may also be faced with dilemmas of policy at the stage of sentencing, albeit they are less dramatic.

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46 Younghusband E., "The Juvenile Court and the Child" (1957) 7 British Journal of Delinquency 181.

47 A similar distinction between symptom and cause was drawn by Paulsen M.G., "Juvenile Courts, Family Courts, and the Poor Man" (1966) 54 California Law Review 694.

48 Cavanagh W.E., "Justice and Welfare in Juvenile Courts" (1957) 7 British Journal of Delinquency 196; "What Kind of Court or Committee" (1966) 6 British Journal of Criminology 123.

18.15 Whatever the technical differences between the two systems, their objectives are reasonably consistent. The purpose of children's hearings has been officially stated to be:-

> "..... to discuss in a concerned and informal way the difficulties of children and to provide the most appropriate measures of care and treatment for those who need them." [49]

The simplicity of that statement contrasts with the detail of Younghusband's view of the role of the juvenile court at the stage of disposition.[50] She describes it as "benevolent, reformative" and continues:-

> "We should seek, with the aid of psychiatrists, psychologists and social workers, to understand the individual child's life history and what at this point of time made him commit a delinquent act. In the light of this understanding we should aim (for therapeutic reasons) either to allay or mobilize guilt, to lessen family stresses and to bring about beneficient changes in his environment."[51]

This is no easy task. It needs a great deal of knowledge of the individual case, considerable professional skill, time and resources, apart altogether from a viable statutory framework. It is readily understandable, therefore, why discretion lies at

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49 1968 Act Notes, p.9.

50 Younghusband E., "The Juvenile Court and the Child" (1957) 7 British Journal of Delinquency 181.

51 Ibid., at p. 184.

the foundation of the dispositional function of the tribunal, whether juvenile court or children's hearing.

Section 3 - The nature of the statutory discretion

(a) Local authority powers

18.16 Discretion has been discussed so far in very general terms. A glance at the classification of welfare[52] indicates that there are several ways in which a discretion may be exercised in terms of its statutory framework. Statutory powers may normally be exercised only after the threshold requirements have been satisfied. A good example is the power to assume parental rights under section 2(1) of the Children Act 1948 or section 16(1) of the Social Work (Scotland) Act 1968. If the exercise of that power is restricted, it is in terms of section 12 of the 1948 Act or section 20 of the 1968 Act.[53] There is no obligation to assume parental rights even where the threshold requirements have been satisfied. The power under section 4 of the 1948 Act or section 18 of the 1968 Act to rescind or determine a resolution assuming parental rights is slightly different.[54] The conditions for its exercise indicate also the purpose of its exercise.

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52 Chapter 5. 53 Para. 17.5. 54 Para. 17.9.

18.17 Although the purpose of the power to assume parental rights does not form part of the conditions for its exercise, the method of its exercise is not unregulated. As that power is available only in the case of children received into care,[55] the exercise of the discretion is effectively limited by the general duty placed upon the local authority vis-a-vis children in their care inter alia to apply the primacy of welfare principle,[56] subject only to the qualification in section 27(2) of the Children and Young Persons Act 1969 which gives priority to protecting members of the public even when to do so would be inconsistent with the welfare of the child. There is no exception to the primacy of welfare principle in Scotland.

18.18 These arguments apply only where the child is in the care of the local authority. It may be that the relationship between the local authority and the child in the care of the authority is more a general question of status than nominated discretionary powers.[57] There are however legal relationships between a local authority and a child independent of any such status. Although the decision whether to make an order in care proceedings under section 1 of the Childrens and Young Persons Act 1969 is a matter for the juvenile court, the local authority has considerable responsibilities under that Act. They may, for example, bring the child or young person

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55 Children Act 1948, s.2(1); Social Work (Scotland) Act 1968, s.16(1).
56 Children Act 1948, s.12(1); Social Work (Scotland) Act 1968, s.20(1)
57 Paras. 17.16, 17.17 and 17.63.

before the court if there are grounds for believing that statutory care may be desirable.[58] Indeed section 2(2) places a duty upon the local authority to exercise that power unless inter alia it is neither in the child's interest nor in the public interest to do so. Strictly speaking this is not a discretion, it is technically a disabling restriction. But the phraseology and context of the provision leave the decision largely to the local authority. It is thus a discretion of interpretation and application.

18.19 One of the remedies available to the juvenile court under section 1(3) of the 1969 Act is a supervision order. There is no question of a status being created in consequence of making such an order.[59] A child subject to a supervision order is clearly not a child in the care of the local authority. The legislation seems to contemplate either a local authority or an individual person being nominated supervisor.[60] Although the duty of the supervisor is simply to "advise, assist and befriend" the supervised child,[61] the supervisor has within the limits prescribed by the legislation a considerable discretion in giving directions for the child's place of residence and day-to-day activities.[62] There is no specific provision in the 1969 Act or any other Act which would operate to restrict or regulate the way in which these discretions may be exercised.[63]

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58 Children and Young Persons Act 1969, s.1(1).

59 Ibid, s.1(3)(b).

60 Ibid, ss.11 and 13.

61 Ibid, s.14.

62 Ibid, s.12(2)(a) and (b)(i) and (iii). This was quite deliberate as the foundation for "intermediate treatment": see Intermediate Treatment: a guide for the regional planning of new forms of treatment for children in trouble (London, H.M.S.O., 1972 and Intermediate Treatment Project: Development Group Report (London, H.M.S.O., 1973).

63 Samuels A., "Children and Young Persons Act 1969" (1969) 119 New Law Journal 1084; ClarkeHall & Morrison, p. 153 (n to s.14).

The supervisor would no doubt as a matter of policy exercise these powers so as to promote the welfare of the child but there is no legal obligation to do so. An unregulated discretion of this type is exceptional.

18.20 A comparison with the Scottish provisions on supervision is illuminating. The Social Work (Scotland) Act 1968 does not require the appointment of a supervisor; there is in fact no reference to such a person. The statutory machinery is in the form of a supervision requirement.[64] The body entrusted with the enforcement of that requirement is the relevant local authority[65] and that authority is clothed with the appropriate powers and subject to the relevant duties. In particular, "a child who is subject to such a supervision requirement shall, for the purposes of sections 16 to 18, 20, 20A, 24 to 26, 28 and 29 of this Act, be in their care."[66] Thus the formal responsibility for a child subject to a supervision requirement rests with the local authority. Whether this amounts to the creation of a status, as in the case of children formally in the care of a local authority, does not really matter, for the application of section 20 effectively places upon the local authority, and in practice its staff, the duty to apply the primacy of welfare principle. Thus in Scotland the discretions built into the supervision

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64 Social Work (Scotland) Act 1968, s.44(1).

65 Ibid., s.44(5).

66 Idem.

process are limited by reference to that general functional duty; in England the equivalent discretions are apparently unlimited.

(b) The powers of the juvenile court.

18.21 The foregoing paragraphs were concerned only with the exercise of discretions before and after a decision whether compulsory care is necessary. What about the power to make a care order, a supervision order or a supervision requirement in the first place? The power to make these orders is contained in section 1(3) of the Children and Young Persons Act 1969 which, of course, also sets out the whole range of dispositional orders available to the juvenile court to treat children in need of care. The restrictions placed by statute upon the exercise of these dispositional discretions apply to all the remedies contemplated by section 1(3) of the 1969 Act. In Scotland, on the other hand, the generality of the supervision requirement renders a wide range of such remedies redundant.

18.22 There are several considerable differences between the relevant provisions in the English and Scottish legislation Consider first the English Act: section 1(2) and (3) of the 1969 Act confers the relevant discretions upon the juvenile

court. The exercise of these discretions is restricted by the provisions of section 44(1) of the Children and Young Persons Act 1933. It is worthwhile recalling the exact wording of this vital functional requirement:-

> "Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young persons and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training." [67]

There are a number of points to make about this provision:-

(a) it applies to every juvenile court;[68]

(b) it applies to all candidates for dispositional treatment under section 1 of the 1969 Act whatever condition in subsection (2) has been satisfied;[69]

(c) it imposes a duty[70] but the burden of the duty is less onerous because of the "have regard to" formula[71] and the interpretational discretion inherent in the words "welfare", "in a proper case" and " proper provision" ;

(d) there are effectively three duties in the provision; one negative, removal from undesirable surroundings;

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67 S. 44(1) of the Children and Young Persons Act 1933 as amended by s. 72(4) of and Schedule 6 to the Children and Young Persons Act 1969.

68 Probably also any other court having jurisdiction over children and young persons as offenders or otherwise, by way of appeal or otherwise.

69 I.e. the "offence" condition and all the others.

70 Every court "shall" have regard.

71 For judicial comment on this formula in other contexts, see Simpson v Edinburgh Corporation 1960 S.C. 313 at p.318 and Hanks v Minister of Housing and Local Government [1963] 1 Q.B. 999 at p. 1020.

one positive, securing provision for education and training; the last neutral, welfare as a consideration;

(e) the provision states that welfare must be taken into account; it does not state what weight should be afforded to that consideration; nor does it exclude other relevant considerations;

(f) it applies only in "dealing" with a "child or young person" who is "brought before" the court: it is not relevant to local authorities; the reference to "dealing" probably refers to the dispositional rather than the adjudicative stage of the proceedings;

(g) the provision is not relevant until the threshold requirements have been made out.

18.23 These views have been expressed somewhat categorically. It must be conceded that there has been some difference of opinion about the fundamental function, if not the meaning, of section 44(1). The potentially conflicting views have been described by Cavanagh.[72] Even Bevan has hesitated to commit himself to a view on the meaning of the section.[73] Both commentators, it would seem, approach the section more from the point of view of policy rather than interpretation. Cavanagh asks what is the "function of the juvenile court in making an order";[74] Bevan talks of the "nature

72 Cavanagh, pp. 188 to 191.

73 Bevan, p. 16.

74 Cavanagh, p. 188.

of care jurisdiction as defined in section 1 of the Children and Young Persons Act 1969."[75] Both are perfectly proper issues. Neither is concerned with interpretation. Each issue raises fundamental issues of policy which may be implicit in the legislation. But, given the nature of British legislation, policy is not normally to be found clearly and precisely enacted by Parliament. Policy is thus an inference from the words of the legislature. It may undoubtedly be relevant in case of interpretational ambiguity but probably not otherwise.

18.24 Although there may be differences of view about the purpose or nature of care proceedings, either in a "criminal" or non-criminal context, the meaning of section 44(1) is clear and, perhaps most important of all, it can accommodate both views of policy. The first limb of the provision simply means that the welfare of the child must be taken into consideration. Otherwise the discretion of the court, apart from any specific limitations attached to the individual power conferred upon the court,[76] is unregulated. Thus to that extent the court may take into consideration any other considerations it pleases and place what weight it wishes upon them. In so doing it may not conflict with the presumed policy of the legislation but Parliament has seen fit to give juvenile courts this privilege.[77] Thus the view taken by Pearce that the Act[78] laid

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75 Bevan, p. 16.
76 E.g. Children and Young Persons Act 1969, ss. 2(10), 12(1) 21(1) and 21(2).
77 Pearce, Juvenile Delinquency, (London, 1952), p. 9, quoted in Cavanagh, pp. 188 and 189.
78 Emphasis added: he did not refer to any specific section.

down welfare as the first consideration may well be correct as a matter of policy. If he had said that section 44(1) stated that welfare was the first consideration, he would clearly have been wrong. On the other hand, if, as a result of their view of the policy of the Act, a court were to treat welfare as the first consideration, their decision would not be in conflict with section 44(1), for they would have fulfilled their statutory duty to have regard to the child's welfare. The only foreseeable challenge would be that the court, by treating welfare as the first consideration, had thereby limited the discretion which they otherwise should have exercised.[79] The success of such a challenge would probably depend upon the form of words used to express the court's decision; in other words, something in the nature of a semantic criterion.[80]

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79 Associated Provincial Picture Houses Ltd. v Wednesday Corporation [1948] 1 K.B. 223 at p. 228 per Lord Green M.R. who stated:- "The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversly if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters"; Hanks v Minister of Housing and Local Government [1963] 1 Q.B. 999 at p. 1020 per Megaw J. These cases concerned an "executive discretion" entrusted to a local authority. It is assumed that the juvenile court, although it acts judicially for other purposes, is exercising such an executive discretion when "dealing" in this way with a child or young person.

80 In Hanks v Minister of Housing and Local Government [1963] 1 Q.B. 999 at p. 1020 per Megaw J. it was suggested that the multiplicity of words used, e.g. "objects", "purposes", "motives", "motivation", "reasons", "grounds", "considerations," caused confusion in testing the validity of the exercise of a statutory power.

18.25 A similar analysis may be made of Bevan's view of section 44(1). He argued that the nature of the care jurisdiction is such that, once the threshold requirements have been fulfilled, "the juvenile's welfare becomes not merely the paramount but the exclusive consideration in deciding upon the order to be made in respect of him."[81] This approach is more radical than that of Pearce to the extent that it makes welfare the exclusive and not merely the first consideration. There is clearly no statutory warrant for this view. But if, in exercise of their discretion, a court were to ignore, or at least give no weight to, considerations other than welfare, their decision would, it has been suggested, be impossible to challenge on that ground. According to Bevan, section 44 is particularly uncertain in relation to the criminal jurisdiction, as criminality may "involve the interests of the public as well as those of the juvenile."[82] True, but the civil jurisdiction of the court involves the interests of the child's parents, his extended family, perhaps even the public, apart from those of the child. In each jurisdiction, therefore, there may be a conflict of interests for the court to resolve. In each case the only mandatory consideration is the welfare of the child. Why? Partly, it is suggested, as a matter of public policy[83] and partly because otherwise the child's interests might be

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81 Bevan, p.16. 82 Bevan, p.16.

83 I.e. to ensure that welfare is not excluded without at the same time either excluding other relevant considerations or determining in advance the weight to be given to these factors.

ignored or understated. The other interests involved are more likely to be adequately articulated without statutory encouragement. There is thus no reason to doubt that Bevan's views on policy can be accommodated within section 44(1) without in any way becoming mandatory.

18.26 Finally, the third view is that section 44 means "only that 'the welfare of the child or young person,' etc., shall be kept in mind when the Bench is reviewing the methods of disposal which are appropriate to a particular case."[84] It is not without significance that this is the only approach characterised by words such as "interpret" and "mean." This view is more or less in accord with the interpretation of section 44 suggested in paragraph 18.24. The only qualification is that the court must do more than "keep in mind" the welfare of the child. The evidence and arguments relating to welfare will normally be discussed in the course of the court's decision. Reasons will be given to substantiate the introduction of other considerations, to support any balance struck between the various factors and to justify any attempt to disregard the welfare consideration. This would probably happen in any event[85] but the enactment of section 44(1) forces the court to rationalise its decision in terms of welfare. It cannot lawfully be ignored.

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84 Cavanagh, p. 189.

85 As part of the normal function of a court, even although it would be acting administratively at this stage.

(c) The powers of children's hearings

18.27 The equivalent of section 44(1) in the Scottish Act of 1937[86] has become largely redundant[87] since 1968 and a new statutory formula has been introduced to regulate the manner of the exercise of the substantive discretion by the children's hearing.[88] A great deal will have happened before the stage of disposition is reached.[89] That stage arrives after the reporter has referred the case to a children's hearing[90] and the grounds for the referral have been accepted or established under section 42 of the Social Work (Scotland Act 1968.[91] The chronology of subsequent events leading up to disposition is not completely clear from the Act[92] but it seems to be as follows:-

(a) The hearing is directed to consider the accepted or established grounds for referral, the report prepared by the local authority under section 30(4) and any other available relevant information;[93]

(b) The hearing must then "proceed in accordance with the subsequent provisions of this section to consider on what course

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86 Children and Young Persons (Scotland) Act 1937 (1 Edw. 8 & 1 Geo. 6, c.37) as amended by the Social Work (Scotland) Act 1968, s.95(2) and Sched. 9.

87 It is still possible for a child to be prosecuted for an offence in either the High Court of Justiciary or the sher iff court: Social Work (Scotland) Act 1968, s.31.

88 Social Work (Scotland) Act 1968, ss. 43 and 44.

89 See generally Grant J.P., "Juvenile Justice: Part III of the Social Work (Scotland) Act 1968" (1971) 16 Juridical Review 149 and 1968 Act Notes, pp. 14 to 19.

90 Social Work (Scotland) Act 1968, s. 39(3).

91 If the grounds are not accepted or established, the hearing has no jurisdiction to proceed further: 1968 Act, s.42(5).

92 See also 1968 Act Notes, pp. 22 and 23.

93 1968 Act, s. 43(1).

they should decide in the best interests of the child."[94] The reference to "the subsequent provisions of this section" is both restrictive and puzzling. It is restrictive because the section provides either for discharge of the referral or for further investigation; the power of disposal by way of a supervision requirement is contained in section 44. It is puzzling because section 44 itself does not regulate how the dispositional discretion it contains should be exercised. The problem is solved, however, because section 44 cannot operate until section 43 has been implemented.[95] By that time the hearing will have decided what is best for the child,[96] for, if discharge was not proposed, disposal under section 44 would be the only alternative. Thus the child's best interests regulate the general dispositional discretion[97] of the hearing.[98]

(c) Having exhausted section 43 without discharging the referral, the hearing must then consider the case before it, decide whether the child is in need of compulsory measures of care, and if so, whether to make a supervision requirement.[99] Two

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94 Idem.

95 This is the logical sequence of events. S. 44(1) begins "Subject to the provisions of this Part of this Act" which amounts to the legal acknowledgement of that logical sequence.

96 Technically, that compulsory measures of care are needed, but without specifying what measures are appropriate: that comes later.

97 There are three elements in the discretion: is further action necessary (section 43(2)); are compulsory measures of care needed (section 44(1)); and if so, what measures are appropriate (section 44(1)).

98 This conclusion seems implied in 1968 Act Notes, pp. 22 and 23.

99 1968 Act, s. 44(1).

decisions need to be made by the hearing.[1] The first is the more important. If the answer is positive, then it is almost automatic[2] that a supervision requirement will be made. On this basis, the exercise of the discretion turns upon the need for compulsory measures of care. At this stage, of course, the threshold requirements will have been satisfied. It is clear in the Scottish context that the need for compulsory measures of care does not form part of the threshold requirements.[3] They are contained in subsection (2) of section 32 of the 1968 Act. Subsection (1) of that section states merely that "a child may[4] be in need of compulsory measures of care" if any of the requirements in subsection (2) is satisfied.[5] Section 94(1) emphasises that compulsory measures of care are intelligible in terms of dispositional powers rather than threshold requirements. There seems no reason to doubt that, on the basis of this statutory scheme, the need for compulsory measures of care and hence the desirability of making a supervision requirement are regulated by the decision" in the best interests of the child."

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1 As already mentioned, they are: are compulsory measures of care necessary; if so, what measures are appropriate.

2 In the sense that, although it is a matter for the hearing's discretion, there is really no alternative.

3 Cf. the position in England, especially the double requirement prescribed in s. 1(2) of the Children and Young Persons Act 1969 where the "need of care and control" is built into the threshold requirements. In Scotland there is no doubt that the need of compulsory measures of care is a matter for decision by the hearing at the stage of determining the best interests of the child.

4 Emphasis added.

5 The interpretation of "compulsory measures of care."

18.28 This rather complicated analysis indicates clearly the different roles of "welfare" and "best interests" at the stage of the exercise of the dispositional discretions in the two jurisdictions. In practice similar motives and objectives may without infringment of the provisions inspire the decision-makers despite the different statutory framework. In England[6] the only statutory mandate is "to have regard to welfare". In Scotland it is to decide what course is "in the best interests of the child."[7] The Scottish test, it is suggested, makes the child's best interests the sole objective of the process. The conceptual difference between these approaches has already been discussed[8] and this present analysis, it is suggested, confirms the earlier conclusions.

Section 4 - Welfare, discretion and the judiciary.

(a) General.

18.29 The foregoing analysis is not supported by authority other than the logic, grammar and syntax of the statutory provisions themselves. There have, perhaps strangely, been no reported cases in England dealing with section 44(1) of the Children and Young Persons Act 1933, but of the reported decisions in Scotland on the Social Work (Scotland) Act 1968, two are of present relevance. The only

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6 1933 Act, s. 44(1). 7 1968 Act, s.43(1). 8 Paras. 18.9 to 18.15.

other views of any significance are set out in the official commentary prepared by the Social Work Services Group of the Scottish Education Department.[9] Although they are in no way authoritative, they indicate official thinking on the intention of the provisions, if not their strict meaning.

(b) The function of the child's best interests.

18.30 H. v McGregor[10] was concerned with the very technical question of the meaning of "decision" in section 49(1) of the 1968 Act for the purposes of an appeal to the sheriff. After analysing the particularly relevant provisions in the Act, Lord Wheatley found reinforcement for his views "in a wider consideration of the policy and provisions of the Act." Having little doubt that the interests of the child were the inspiration of the processes and procedures in the Act, he went on:-

> "The Act is inter alia designed to secure an informal and expeditious procedure for dealing with children in need of compulsory care. The paramount consideration, expressed in s.43(1), is the best interests of the child."[11]

It is suggested that, if that comment was intended as an interpretation of section 43(1), it is lacking in accuracy.

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9 1968 Act Notes. 10 1973 S.L.T. 110.

11 Ibid. at p. 115 per Lord Wheatley.

The child's best interests are expressed neither as a consideration nor a fortiori as the paramount consideration. Lord Wheatley's comment admittedly is an obiter dictum but even as such it will carry great weight.

18.31 One other view of the function of the child's best interests in section 43(1) should be examined before any conclusions are reached. In his early commentary on Part III of the 1968 Act,[12] Grant suggested that "As no other criterion - such as public interest - is mentioned it can safely be taken that the best interests of the child is the sole factor to be considered."[13] It is perhaps relevant to recall that section 44(1) of the English Act of 1933 mentions no criterion other than welfare. But that section cannot be construed so as to exclude other relevant considerations.[14] That, however, is probably not the basis of Grant's comment, for he may have been relying more upon the phraseology of section 43(1) rather than the absence of other stated criteria. It is certainly true that section 43(1) refers only to the best interests of the child but they are not expressed as a factor or consideration. In that sense Grant's view is not strictly consistent with the legislation.

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12 Grant J.P., "Juvenile Justice: Part III of the Social Work (Scotland) Act 1968" (1971) 16 Juridical Review 149.

13 Ibid. at p. 167.

14 Para. 18.22

18.32 There remains nevertheless a problem of interpretation seeking solution. Both Lord Wheatley and Grant talk in terms of criteria, considerations or factors. Section 43(1) is not drafted in those terms. If Lord Wheatley correctly refers to "the paramount consideration," that implies that other considerations are relevant. Grant's views too contain an element of truth; but they are also to some extent misleading. What part, then, do the child's best interests play in section 43(1) and, more generally, in the exercise of their general dispositional discretion by children's hearings? The section, it will be recalled, requires the hearing to "proceed ... to consider on what course they should decide in the best interests of the child." Does the phrase "in the best interests of the child" qualify "consider", "course" or "decide"? To qualify "consider" would be too remote and rather senseless.[15] It probably qualifies "decide." But even if it qualifies "course", a fairly clear pattern emerges. The child's best interests are unquestionably vital in the decision-making process. Section 43(1) is drafted in terms of the future. The words "course", "should", "decide" and even "in" support that proposition. The phrase in question, therefore, does not form a consideration to be taken into account; it is more a statement of the objective of the

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15 Because that would to some extent reduce its status to a "consideration".

process, of the target to be aimed at or of the goal to be achieved. In that sense, the child's best interests are not part of the decision-making process. They stand outside it. Considerations to be taken into account, on the other hand, are part of the process and occupy a position inside it. Therein lies a distinction of fundamental importance.

18.33 This interpretation is supported by the preceding provisions in section 43(1). They require the hearing to consider the grounds of referral, the section 39(4) report and such other relevant information as may be available. These requirements, it is suggested, are procedural. They do not refer to any "policy" consideration such as welfare. They do not explain how the discretion should be exercised. They simply ensure that certain information is available. It would be difficult to argue that these procedural requirements are juristically analogous to the child's best interests. They do not therefore constitute substantive considerations to which attention must be paid as in the case of section 44(1) of the English Act of 1933. In other words they have no "policy" connotation. That is to be found, it is suggested, solely in the last phrase in section 43(1). The legislature in 1968 selected a formula for Scotland quite different from the one enacted in 1933 for England or indeed in 1937 for Scotland.

It would be strange if the two approaches, prima facie different, meant the same.

18.34 This hypothesis, it could be argued, is more apparent than real. But if it is justified, it indicates a legal framework with certain consequences which could have practical implications. If the child's best interests are the objective of the process in sections 43 and 44, it follows that the exercise of the discretion is otherwise unregulated. No considerations are specified. But if the hearing is properly to achieve its objective, it presumably must take into consideration every factor relevant to the objective.[16] That may mean looking at every piece of available information relating to the child, not merely to his best interests, for to decide in the child's best interests requires a view of the child's total situation from which whatever course is in his best interests may be distilled. There is no such explicit duty imposed by statute.[17] It may not therefore be legally enforceable. But there cannot on any reading be any doubt that the lesser duty, that is, to consider all the information relating to the child's best interest, is legally enforceable. That interpretation would be consistent with but not identical to Grant's views.

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16 This is probably the intention and effect of the procedural requirements in s. 43(1).

17 It depends upon the meaning of "relevant" in s. 43(1): relevant to what: the child or his best interests. The former makes more sense.

18.35 On this basis the problem becomes simply what information[18] the hearing must analyse in its decision-making process.[19] There are three possibilities:-

(a) if the child's best interests are the paramount consideration, as Lord Wheatley indicated, they are relevant, mandatory and attract a certain priority; other relevant considerations may be taken into account;

(b) if they are the sole factor, as Grant suggested, they are relevant and mandatory; no other considerations may be taken into account;

(c) if they form the objective of the process, everything relevant either to the child's best interests or to the child[20] must form part of the process; nothing else forms part of the process.

18.36 The third possibility, it is suggested, more accurately reflects the formula in section 43(1). The first alternative in (c)[21] approximates most closely to the approach in (b). But (b) and (c) are fundamentally different from (a), which however is the only approach with judicial approval. There would thus appear to be a certain ambiguity about the

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18 I.e. apart from the procedural requirements in s. 43(1).

19 This anticipates K. v Finlayson 1974 S.L.T. (Sh.Ct.) 51 in some respects. See para. 18.44.

20 Which is to be preferred, as it is more consistent with the policy of the legislation.

21 I.e. a reference to the child's best interests rather than to the child generally.

part played by the child's best interests in section 43(1). To identify that part is vital for children's hearings. The formula in section 43(1) and in section 44(1) of the English Act of 1933 are repeated not infrequently in other statutory contexts and a definitive statement of their distinctive meanings would be helpful. They reflect in summary the roles of welfare in the decision-making processes, as it relates to children.

(c) Grounds for referral and the dispositional discretion.

18.37 The arguments in the second case, K. v Finlayson[22], raise some fundamental questions about the relationship between the threshold requirements and the dispositional discretions in the Social Work (Scotland) Act 1968. The issue before the sheriff could have been determined quite simply[23] but Sheriff Sinclair went on to introduce further comments which have been fairly severly criticised.[24] The criticism, it is suggested, is justified.

18.38 The mother of the child in question refused to accept the grounds of referral to the children's hearing prepared by the reporter. They were remitted to the sheriff under section 42(2)(c) of the Act. The grounds were found established and the case was remitted back to the hearing

22 1974 S.L.T. (Sh.Ct.) 51.

23 I.e. the inadequacy of the reasons given by the hearing for their decision.

24 Grant J.P., "More Bridges, but More Gaps; two further decisions on children's hearings" 1974 S.L.T. (News) 213.

under section 42(6). At the subsequent stage of the proceedings the children's hearing had available not only the sheriff's findings but also a hospital report and a social work report, neither of which had been given to the sheriff. A supervision requirement was prescribed for the child. The mother appealed against this decision on the ground that it was partially based upon irrelevant considerations. The acceptance by the sheriff of that ground of appeal caused the difficulties under consideration, although the inadequacy of the reasons given by the hearing for its decision may well have been sufficient to allow the appeal.

18.39 The reasoning of Sheriff Sinclair in effect fails to acknowledge the fundamental distinction which has been suggested to exist between the establishment of threshold requirements and the consequent dispositional discretion; in other words, the distinction between the grounds creating the discretionary jurisdiction and the later exercise of that discretion. It has been argued that section 32(2) of the Act merely prescribes the threshold requirements which must be satisfied before the children's hearing can proceed to exercise its discretion, albeit limited, under sections 43 and 44. This distinction is implicit in the official commentary on Part III of the Act.[25] It is also reflected in the argument

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25 1968 Act Notes, pp. 21 and 22.

put on behalf of the reporter that "the hearing is ..... in no way whatever bound by the grounds of referral established by the court."[26] Sheriff Sinclair commented:-

> "For this extremely wide sanction the reporter depends on s.32 of the Act, which, he said, laid down the conditions under which a child was to be held in need of compulsory methods of care: and if any one of those conditions was fulfilled the hearing then had absolute power to take any steps they considered to be in the child's best interests - and without having any further regard to any limitation in their discussion, the child and the parents being safeguarded by the fact, and only by the fact, that there is a right of appeal to the sheriff against their decision."[27]

18.40 The argument thus attributed to the reporter, it is suggested, is fundamentally correct. The only qualification may be that the work "absolute" is rather extreme: this analysis has tended to regard the hearing's powers as discretionary but limited in terms of their mandatory objective.[28] The sheriff however would have disagreed. In her opinion, the reporter's argument "put the hearing's powers too high."[29] Three statements in particular, which are consistent inter se but, it is submitted, not with the Act, were made in support of this view. They may profitably be examined in turn.

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26 1974 S.L.T. (Sh.Ct.) 51 at p. 53.
27 Idem.
28 Para. 18.35.
29 1974 S.L.T. (Sh.Ct.) 51 at p. 53.

18.41 Firstly: "... when the matter is remitted back to the panel[30] for reconsideration under s.42(6) they are bound to interpret the statement that 'lack of parental care is likely to cause unnecessary suffering', etc., in the context of what has been held by the court to be established: and that they are not entitled to look at other matters."[31] Sheriff Sinclair relied heavily upon section 42 in support of her opinion. But section 42(6) in particular does not provide for the matter to be remitted back to the hearing for reconsideration. It requires the reporter to make arrangements for a hearing for consideration and determination of the case. Section 42(6) is thus administrative. Consideration and determination of the case are governed by sections 43 and 44.

18.42 What the sheriff may have meant was that at the stage of consideration and determination of the case only the grounds for referral held as established by the court could be taken into account. In that event, the sheriff's second statement is little more than a corollary of the first. She found it unthinkable that:-

> "a person who has denied the original grounds of referral against her - and denied them successfully in two out of three cases - should be judged as unfit to carry out any part of her parental role (for that is

30 More correctly, "hearing".

31 1974 S.L.T. (Sh.Ct.) 51 at p. 53.

> really what the condition of the child's residence in an institution amounts to) on grounds which have not been stated as grounds of referral and which she has no opportunity of denying or having examined in court."[32]

This view makes the grounds of referral pre-eminent to the extent almost of discounting the functions of the hearing. Moreover it almost renders simple denial to be proof of the inaccuracy of the allegations denied.

18.43 The sheriff's comments demonstrate, it is argued, a lack of understanding of the balance between the parts played by the threshold requirements and the dispositional discretion, between the grounds for referral and the powers of disposal, between the functions of the sheriff and of the hearing. There are three principal reasons to justify this criticism. First, section 42 of the Act deals only with determining the accuracy of the grounds of referral. Sections 43 and 44 regulate what happens if the grounds of referral have been accepted or established as accurate. Second, these two sections are irrelevant if the grounds have not been so accepted or established. In that event the application must be dismissed and the referral on those grounds discharged.[33] This indicates a distinction between jurisdiction and

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32 Idem.

33 1968 Act, s. 46(5).

discretion. Finally, section 43(1) provides that, before determining the best interests of the child, the hearing must effectively consider the grounds for referral, the report obtained under section 39(4) and any other available relevant information. A hearing is therefore not only entitled but obliged to look at matters other than the grounds held to be established by the court.

18.44 One final comment may be made on the sheriff's second statement. She was obviously concerned that a parent could be required to give up his parental role for reasons not fully examined and subject to scrutiny by him.[34] The sheriff's fears, however, are unfounded. The grounds of referral may be challenged. They are concerned principally with the adequacy of the parent-child relationship. Their establishment merely opens the way for a consideration of whether in consequence the child is in need of compulsory measures of care[35] and, if so, what measures are appropriate. The child's best interests determine these two issues.[36] Parliament has seen fit to prescribe a different procedure in respect of each of these two types of functions: one adjudicative, for it relates back to past events and also encompasses present circumstances; the other dispositional, for it looks forward to what will be best for the child.

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34 1974 S.L.T. (Sh.Ct.) 51 at p. 53.

35 1968 Act, s. 32(1).

36 Ibid., ss.43 and 44.

18.45 The sheriff's third statement may be disposed of more quickly. She concluded:-

> "I am satisfied that a decision based on any grounds other than those accepted by the appellant or established by the court must be ultra vires of its powers and that the powers set out in s.32 of the Act must be read in conjunction with the following and limiting sections of the Act and in particular with the strict limitations laid down in s.42." [37]

The first part of the statement is entirely in conformity with section 43(1) of the 1968 Act. Only the grounds for referral which have been accepted or established under section 42 create jurisdiction in the hearing to exercise its powers under sections 43 and 44. Indeed no other grounds may be considered.[38] But that clearly does not mean, as Sheriff Sinclair suggested, that no other matters may be taken into consideration by the hearing in deciding what is best for the child. Indeed other relevant information must be taken into account so far as it is available. The uncertainty of "relevance" in this context introduces a degree of interpretational discretion. In the case of K. v Finlayson[39] itself there was no reason why the hospital and social work reports should have been made available to the sheriff in establishing the grounds for

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37 1974 S.L.T.(Sh.Ct.) 51 at p. 54.

38 See the first two lines of s. 43(1).

39 1974 S.L.T. (Sh.Ct.) 51.

referral. Nor is there any doubt that these reports were competently before the hearing. On the contrary they were probably required to be made available to the hearing. That would depend upon their contents.

18.46 The second part of the third statement does not add to this analysis. The only comment is that section 32 of the Act does not set out or confer powers upon any person.[40] It merely describes the requirements one of which must be satisfied before a hearing can decide whether a child needs compulsory measures of care. To talk of section 32 powers, therefore, is misleading.

18.47 No apology is given for having looked at K. v Finlayson[41] in such detail or for having used Sheriff Sinclair's opinion as a touchstone against which to argue the logic, grammar and syntax of Part III of the Act. No other opportunity has yet arisen to discuss these issues judicially. The matter is not easy; nor is it helped by the lack of judicial authority. Despite criticism of them, Sheriff Sinclair's views help to put welfare into its statutory perspective.

Section 5 - Conclusions.

18.48 Whatever the nature of the functions of the juvenile

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40 As the sheriff had suggested.

41 1974 S.L.T. (Sh.Ct.) 51.

court and of children's hearings, whether there is a distinction between adjudication and disposition, whatever part welfare plays in the process or, even more broadly, irrespective of the conceptual and political framework of the legislation, there can be no doubt that considerable discretions have been built into the Acts at various stages of the decision-making process. This chapter has merely considered the legal framework for the exercise of those discretions.[42] Two quite separate areas of discussion have emerged. First, how does statute regulate the decision whether to require a child to undergo compulsory measures of care? Secondly, how should the marginal discretion be exercised? They include the decision whether to activate the procedures and the ways in which the child can be treated once compulsory care has been found necessary. By dealing with the marginal questions first this chapter in a sense began at the periphery of the process and worked inwards towards the substantive decision. A similar approach will be used in the next chapter. The reason is none other than that it probably makes the legislation easier to handle.

18.49 Whether the discretions are substantive or peripheral has no bearing upon the ways in which they are regulated. Nothing therefore turns upon that aspect. There seem to be four ways in which Parliament has intervened to

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42 Not, of course, how they work in practice: that requires other than legal expertise.

regulate the exercise of such discretions. The discretion may be unlimited.[43] Although this may happen in the case of ancillary or procedural powers, it is unusual in the case of a substantive power. This is for the moment discounted. Otherwise the four methods of control are:-

(a) the exercise of the discretion may attract its own individual limitations;[44]

(b) the Act may set out a substantive policy consideration to which the body in question must have regard;[45]

(c) the Act may impose a duty upon the relevant body which effectively states the objective of the use of the powers in question;[46] or

(d) the Act may simply set out the objective of the whole process.[47]

Methods (c) and (d) are similar in several respects, particularly their political dimension. Method (c) however is more tightly drawn, for it creates a duty. There is a greater likelihood of its being judicially enforced. Method (b) is different. It is the least positive. The limitations imposed by method (a) may well be similar to those contemplated by methods (b), (c) or (d). But method (a) is more likely to use the

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43 See chapter 19. 44 This is rather unusual in this context.
45 E.g. Children and Young Persons Act 1933, s. 44(1).
46 E.g. Children Act 1948, s. 12(1); Social Work (Scotland) Act 1968, s. 20(1).
47 E.g. Social Work (Scotland) Act 1968, s. 43(1).

techniques of methods (c) or (d), even although they tend to complexity and ambiguous interpretation. Method (b), on the other hand, is simpler but more open to misapplication than misconstruction.

18.50 The analysis of these methods in this chapter indicates that, apart from matters of policy and philosophy, there are several technical problems thrown up by the legislation. Many of them do not reach the courts: perhaps because most people simply accept what the local authority or the court decides; perhaps because they are unaware of their rights; perhaps becauee many neglectful parents do not care, almost literally, what happens to their children. Whatever the correct interpretation of the statutes, there is a place for a close and precise analysis of the provisions indicative of the part played by welfare in the exercise of statutory discretions.

CHAPTER 19

OFFICIAL CARE LEGISLATION AND DISCRETIONS - PART II

Section 1 - Introduction

19.1 Much of the discussion in the preceding chapter was concerned with the questions whether official care was necessary and how the powers of the local authority were circumscribed once the state had intervened. Little attention was paid to the initial decision whether the various statutory procedures should be set in motion, including what may now be regarded as the residual possibility of prosecution. This chapter deals with these matters. Once they have been taken into account, it will be possible to obtain a proper perspective of the part played by welfare in the process as a whole. The child's well-being is affected not only by the way he is treated once he is in the care of the local authority and the decision that compulsory care is necessary but also by the initial decision to set the statutory process in motion. Just as in the adoption process the initial placement decision is vital for the child,[1] so in the care process the decision that care may be necessary may have the most important implications for the child's future, whether or not he eventually is taken into the care of the local authority. Similarly the decision

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1 See Houghton-Stockdale Report, para. 70.

whether to prosecute or not and the outcome of any successful prosecution clearly affect the child and his welfare directly.

19.2 To consider first the context in which the initial decision to set in motion the statutory care process operates. The degree of statutory control over the exercise of the various discretions is probably less than at the later stages of the whole process. The method of control is also rather different. It tends to be negative rather than positive. Hence there is probably more scope for the individual decision-maker. American commentators have reached similar conclusions on their systems.[2] They have identified within the "screening" process two separate stages: administrative "on-the-spot" decisions by the police whether to do nothing, refer for a formal decision or take into custody; thereafter judicial involvement once the child is in custody with decisions being taken at a professional level.[3] This type of model does not apply precisely in this country but it provides a background against which the English and Scottish systems may be judged. The two jurisdictions again differ and they require separate analysis.

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2 E.g. "Juvenile Delinquents: the Police, State Courts and Individualised Justice" (1966) 79 Harvard Law Review 775. This is relevant particularly in the case of potential criminal proceedings. It could also be relevant to the "offence" condition in the English and Scottish systems of compulsory care.

3 Idem.

Section 2 - The screening process in England

(a) Preventive measures

19.3 Prevention of delinquency and family breakdown is a policy long espoused by Parliament.[4] If it were successful, the whole statutory apparatus already discussed would be unnecessary. For example, Collis has written:-

> "... the one concern which stands out above all else in the minds of child-care workers is the need for a system of child and family welfare which will bring the most effective help to bear at the earliest possible moment, with the minimum of agencies and administrative processes becoming involved, so as to reduce this steady stream of children into the care of children's departments and through the courts. An effective system of preventive work to avoid family breakdown and delinquency, with the consequent disruption of the lives of the children, must go hand in hand with satisfactory methods of treatment when breakdown occurs and, if we are to do the best in these spheres, hand in hand with an integrated system of research."[5]

Flexibility is probably of the essence of the preventive approach. An excess of rules and administrative processes will impede rather than promote that objective. The formula adopted by Parliament is simply to impose a duty, no doubt

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4 The success of the legislation may leave much to be desired.

5 Collis, "The work of the Children's Department in relation to the Juvenile Court" (1957) 7 British Journal of Delinquency 242 at p. 244.

deliberately left rather vague, "to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into or keep them in care ... or to bring children before a juvenile court."[6] The objective of the provision clearly is to provide help before the need for compulsory care arises. The means of achieving that objective are the provision of advice, guidance and assistance. The implementation of this duty, which naturally implies the relevant power, is left unregulated other than by a statutory statement of its objective. There is considerable interpretational discretion built into this provision.[7] In practice, therefore, the local authority function of prevention is largely unrestricted and open-ended. This is consistent with the general policy as expressed by Collis.

19.4 The provision of such advice, guidance and assistance as a preventive measure is an alternative to the compulsory care process. The duty to receive certain children into care under section 1 of the Children Act 1948[8] is, in a sense, an intermediate facility open to the local authority. But, as already discussed,[9] that section contains a complex

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6 Children and Young Persons Act 1963 (1963 c.37), s. 1(1). S. 12(1) and (2) of the Social Work (Scotland) Act 1968 (1968 c.48) makes similar provision in Scotland but the application of the Scottish provisions is wider.
7 E.g. promote the welfare of children.
8 11 & 12 Geo. 6, c.43.
9 Paras. 16.3 to 16.6.

balance between threshold requirements and discretion. The problem now is to identify the extent of discretion built into the "screening" process before the compulsory care machinery is invoked.

(b) The duty to bring care proceedings.

19.5 The power to bring a child or young person before a juvenile court is given only to a local authority, constable or authorised person.[10] There is however no reason why any person should not give information to the local authority or the police if he suspects that circumstances have arisen which may require care proceedings.[11] There is no duty in the 1969 Act to do so. Such a duty would be impossible to enforce but the reluctance of the public to interfere in the problems of other families may be one of the weaknesses of the system. There is little that can be done about the problem but more specialised persons or bodies, such as doctors, teachers, hospitals or schools may have an important part to play but only as members of the public.

19.6 Once the local authority receives information indicating that care proceedings may be justified, they must

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10 Children and Young Persons Act 1969 (1969 c.54), s. 1(1). For "authorised person" see section 1(6) of that Act. In fact only the N.S.P.C.C. is authorised for this purpose: see Bevan, p.50 and Clarke Hall and Morrison, p. 133.

11 See s.2(1) of the Children and Young Persons Act 1969. The Scottish provisions directly say so: Social Work (Scotland) Act 1968 ss. 37(1) and 38(1).

"cause enquiries to be made into the case unless they are satisfied that such enquiries are unnecessary".[12] Moreover, the local authority comes under a further duty to bring care proceedings, if it appears that there are grounds, "unless they are satisfied that it is neither in his interest nor the public interest to do so or that some other person is about to do so or to charge him with an offence".[13] Three situations can arise in relation to enquiries:-

(a) if the information satisfies the local authority that proceedings are justified, they must be brought;[14] enquiries under section 2(1) would be unnecessary;

(b) if the information does not satisfy the local authority but merely suggests that there are grounds for proceedings, further enquiries must be made;[15]

(c) if the information does not suggest any ground for proceedings, there is no duty to enquire further; but presumably there is nothing to prevent further enquiry if the local authority's curiosity has been aroused.

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12 Children and Young Persons Act 1969, s. 2(1).

13 Ibid., s. 2(2).

14 Idem., excluding the qualification in that subsection which does not relate to enquiries.

15 Ibid., s. 2(1).

It is thus difficult to see when the local authority will rely upon the "unnecessary" test[16] to dispense with enquiries. It would be dangerous for the local authority not to enquire further unless it were absolutely clear that proceedings were or were not justified. In either case there would be no need to rely upon the dispensation power. Although "unnecessary" is a categorical test, it is tempered by the word "satisfied". But even so the local authority would presumably want strong reasons to satisfy them that enquiries were "unnecessary." It is suggested that the dispensation provision would be difficult to apply, that it is not necessary in practice and that it should be removed. In any event as a matter of policy, apart from the staff and resources problem,[17] it would be better for all suggestions of child neglect or delinquency to be looked at.[18]

19.7 Section 2(2) both sets out a duty and provides for its avoidance. That provision requires care proceedings to be brought "if it appears to the local authority that there are grounds for bringing [them]". Section 1(1) also applies to a local authority, enabling them to bring a child or young person before a juvenile court if they "reasonably believe" that there are grounds. The local authority must presumably satisfy both tests. It is suggested that the tests are

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16 In s. 2(1) of the Children and Young Persons Act 1969.

17 Paras.20.10 to 20.11.

18 This may attract the criticism that the state, through local authorities and their employees, are "spying" upon families and infringing their right to privacy.

different as a result of the use of the word "reasonably" in section 1(1).

19.8 What about the criteria for dispensation in section 2(2)? The last two criteria cause no problems: where some other person is about to bring care proceedings or to charge the child or young person with an offence. The first criterion is particularly relevant: where the local authority "are satisfied that it is neither in the interest of the child or young person nor the public interest" to bring proceedings. This criterion, it is clear, contains a double qualification.[19] Even if it is not in the child's interests to bring proceedings, that is not sufficient to exonerate the local authority from their duty. A consideration of the public interest must lead to the same conclusion.

19.9 That apart, there are two issues for analysis. What is the consequence if the local authority are so satisfied? What does the "interest" formula mean? To consider the first question: section 2(2) requires the local authority to bring proceedings unless they are satisfied in respect of one of the criteria. Does this phrase exonerate the local authority from implementing the duty or disable them from exercising the power? It is ambiguous. The wording "it shall be the duty ... unless ..." suggests that, if the qualification is satisfied, the

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19 I.e. child's interest and public interest.

result is the absence of a duty. That indicates that a power or discretion may still subsist. This may be true here, for section 1(1) independently of section 2(2) gives to the local authority power to bring the child before the juvenile court. On the other hand, it may be argued, this is nonsense. For the local authority have just satisfied themselves that it is in the interest neither of the child nor of the public to bring care proceedings. Even if technically there is a residual discretion the local authority's own conclusion effectively preempts them from exercising it. Moreover, the interest of the child or the public could change. Would this revive the power, the duty or both? The common sense view is that, once this criterion is satisfied, the local authority should not and probably cannot then bring care proceedings.

19.10 There is the recurring problem of the meaning of the "child's interest" and here also of the "public interest". Assuming that can be solved, what role is envisaged for these interests? The authority is not asked the question: what course should they decide in the child's best interests.[20] The question is: is it in the child's interest to bring proceedings. They are not faced with a choice of alternatives. In fact they must decide whether a certain conclusion is justified. The child's interest is thus not the objective of a process; it is rather a conclusion from a set of circumstances. Although it is not a conclusion based upon the child's future well-being,

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20 As in, e.g., Social Work (Scotland) Act 1968, s. 43(1).

it may nevertheless be difficult to reach a sound conclusion without looking at the child's future, for an element of projection or prognostication is almost inevitable. The provision refers to "interest", not "interests" nor even "best interests". What difference that makes is not entirely clear: probably none, for these words are too general to be precisely analysed. What is clear, however, is that the part played by the child's interest is different from the part played by any of the formulae so far considered. It is possible to identify the proper question to ask. That should enable sensible reasons to be given in support of a sensible conclusion. Beyond that it is difficult to go with any degree of confidence.

(c) Emergency detention

19.11 Although orders made in the course of care proceedings are temporary in the sense that they are always open to variation or discharge,[21] they are designed presumably as the remedial measures appropriate to the child's needs and as such permanent within their own framework.[22] It takes time to make such orders: rightly so, given their consequences. The Act thus makes provision for emergency situations.[23] The nature and extent of the discretions in the emergency proceedings and the part played by the child's interests are worthy of consideration.

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21 Children and Young Persons Act 1969, ss. 15 and 21: but see the restriction placed upon the exercise of the discretion by s. 21(2A) inserted by the Children Act 1975 (1975 c.72), s.1 and Sched. 3, para. 69.

22 See ss. 17 and 20(3) of the Children and Young Persons Act 1969.

23 See generally Oliver, "Mischievous Minors" [1974] Criminal Law Review 419 at pp. 421 and 422.

19.12 Section 40(1) of the Children and Young Persons Act 1933[24] authorises a justice in two sets of circumstances to issue a warrant to search for the child or young person, thereafter to remove him, if found, to a place of safety[25] and for him there to be detained until he can be brought before a juvenile court. The circumstances are firstly assault, ill-treatment or neglect in a manner likely to cause the child unnecessary suffering or injury and secondly commission of any of the scheduled offences of which the child is the victim.[26] The first set of circumstances may appear prima facie to be identical to the circumstances constituting criminal behaviour under section 1(1) of the Act. This is not so. The list is less extensive and the word "wilfully" does not appear in section 40(1). Nor is the list co-extensive with the threshold requirements for care proceedings under section 1(2) of the 1969 Act. It is likely however that the objective element of the grounds in section 40(1)(a) will in practice attract an interpretation consistent with the interpretation of the similar provisions in section 1(1) of the 1933 Act and section 1(2) of the 1969 Act. The grounds enabling detention in a place of safety thus objectively

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24 23 and 24 Geo. 5, c.12, as amended by the Children and Young Person Act 1963, s.64 and Sched. 3, para. 11.

25 Defined in s. 107(1) of the Children and Young Persons Act 1933.

26 I.e. any of the offences mentioned in the First Schedule to the Children and Young Persons Act 1933. They are conveniently set out in Clarke Hall & Morrison, pp. 245 and 246. They are serious offences in which broadly the physical or sexual integrity of children is prejudiced.

protect the child's well-being but only when it is being or has been detrimentally affected. Neither welfare or interests as such nor need of protection or care plays any part. Once the statutory grounds have been established, the way is open for the justice to grant a warrant. His power is a discretion. He is under no duty to grant a warrant. If the justice may properly be regarded as a court, section 44(1) of the 1933 Act will apply to restrict the way in which this discretion may be exercised.[27]

19.13 Just as section 40(1) of the 1933 Act indicates that any person may bring the matter before the justice,[28] so any person may apply to a justice under section 28(1) of the 1969 Act for authority to detain a child and take him to a place of safety. The scheme of the section is twofold: the establishment of the threshold requirements followed by the exercise of a discretion, which is probably limited,as in the case of section 40(1) of the 1933 Act, by section 44(1) of that Act. The substance of the threshold requirements[29] is in effect the

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27 Para. 18.22.

28 Provided that, in the opinion of the justice, he is acting in the best interests of the child or young person. This is presumably intended to avoid the malicious intimation of information intended to embarrass the parents rather than benefit the child.

29 The text is "if ... the justice is satisfied that the applicant has reasonable cause to believe" that the requirements have been met. This is rather strange, for the applicant has to prove not that the requirements have been met nor that there is reasonable cause so to believe, but that he has reasonable cause so to believe: emphasis added.

conditions in section 1(2) of the 1969 Act to be met before an order may be made under section 1(3) of the Act, with the exception of the offence condition.[30] It is noteworthy that the care or control test, that is the second part of the double requirement in section 1(2) of the 1969 Act, does not apply to these emergency powers. Two separate powers are conferred. A justice is given power to detain and remove to a place of safety.[31] A constable has the more limited power of detention.[32]

19.14 There are restrictions upon the detention power which are particularly relevant to this study for one of the criteria is the child's interests. This formula appears in section 28(4)(b) and (5) and section 29(1)(i). There are two principles underlying these provisions. A constable acting alone is not empowered to detain a child or young person without further procedure. Eight days is the maximum period for such detention.[33] Section 28(4)(b) requires the detaining constable to arrange for a superior officer to enquire further into the case and as a consequence the child or young person must be released or "if the officer considers that he ought to be further detained in his own interests" detained in a place of safety. Section 29(1)(i) similarly provides for the release or further

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30 There is also a requirement unrelated to any other: s. 28(1)(c) of the 1969 Act.

31 Children and Young Persons Act 1969, s. 28(1).

32 Ibid., s. 28(2): a constable does not have the benefit of the ground in s.1(2)(e) of the 1969 Act.

33 Ibid., s. 28(5). The maximum period of detention in a place of safety pursuant to a warrant under s. 23(1) of the Children and Young Persons Act 1963 is twenty eight days.

detention of a child arrested for homicide and a young person arrested for any offence. An identical test applies if during the period of eight days the person detained applies to a justice for his release. In that event he must be released "unless the justice considers that he ought to be further detained in his own interests." [34]

19.15 The general position is clear. In the circumstances contemplated the child or young person must be released. But he may be further detained if the police officer or the justice, as the case may be, considers that to be "in his own interests". This formula, it is suggested, is similar if not identical to the one used in the context of section 2(2) of the 1969 Act. The police officer and the justice are not concerned with the child's future well-being or his long-term best interests or similar considerations. The relevant and only question is: is it in the interests of this child or young person to be further detained. No doubt the immediate objective of the exercise is to secure his physical protection and provide for adequate care until the whole matter can be resolved. But that is not written into the sections. There is therefore no reason why other objectives may not inspire the police officer or the justice to come to a decision in the child's interests. Whatever the reasons for the decision, a potentially wide-ranging enquiry may be necessary to enable the question to be answered properly.

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34 Idem.

(d) The investigative process.

19.16 The importance of securing the provision of adequate and accurate information as the basis for making a decision on the child's future has already been acknowledged. Information produced by the "parties" might be totally inadequate. Parliament apparently has taken the view that administrative investigations of family life, potentially an infringement of privacy, are justified in the interests of the child allegedly affected. Section 2(1) of the 1969 Act requires enquiries to be made in certain circumstances. That provision applies to the stage of the process which precedes the decision to bring proceedings. Section 9(1) of the 1969 Act imposes a similar duty upon the local authority after it has been decided to bring proceedings. The purpose is to provide the court "with such information relating to the home surroundings, school record, health and character [of the relevant person] ... as appear to the authority likely to assist the court". This confers a considerable discretion upon the local authority in deciding what information to seek and provide. The court is not however left at the mercy of the authority's discretion, for section 9(2) enables the court to request the authority to make investigations or further investigations and provide information or further information and the authority is bound to do so. There is no exemption from the duty in section 9(2). There is on the other hand an escape route for the local authority in section 9(1). The duty subsists "unless they are of opinion that it is unnecessary to do so". "Unnecessary"

is a strong word, and the comment made in relation to that test in section 2(1) probably applies also to section 9(1); that, given the purpose of these investigations and the policy of the legislation, it would be an overconfident authority which decided, almost on a technicality, not to investigate a case.

Section 3 - The screening process in Scotland.

(a) The functions of the reporter.

19.17 The pivotal person in the Scottish system is the reporter.[35] Although the Social Work (Scotland) Act 1968 contains provisions similar to those discussed in the English context, the administration of the system is different and in Scotland all decisions are channelled through the reporter. The overall impression is that the Scottish system, both conceptually and legally, is in many respects simpler.

19.18 Information may come to the reporter from any source,[36] including the police[37] but it is his decision how to interpret the information and what to do with it. Although he has a considerable substantive discretion, his methods and procedures are closely controlled by statute. It is indeed a feature of sections 37 to 39 of the Act that the child's

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35 Grant J.P., "Juvenile Justice: Part III of the Social Work (Scotland) Act 1968" (1971) 16 Juridicial Review 149. at p. 155.
36 Social Work (Scotland) Act 1968,ss. 37(1) and 38(1).
37 Ibid., s. 38(2).

interests are referred to only once and then only in a relatively minor context.[38] Parliament thus has placed considerable confidence in the reporters that they will operate the Act according to the largely unstated but well-recognised policy of promoting the child's interests and welfare.

19.19 The duty to make an initial investigation of the case is imposed by section 38(1) to enable the reporter to decide what action, if any, is required for the child. If compulsory measures of care are envisaged, he comes under a further duty to obtain information from the local authority for use by the hearing.[39] The information thus obtained plays a vital role in the dispositional process and the acquisition of further information is contemplated by section 43(3).

19.20 The reporter is concerned with many matters other than the investigation process. For example, the fact that a child has been detained or taken to a place of safety must be reported to him.[40] If he considers that compulsory measures of care are not required, the child shall be released.[41] But if his view is that compulsory measures may be needed, he must arrange for a hearing to sit within a very short period of time.[42] If they cannot then dispose of the case, a warrant for detention may be issued but only where they are satisfied inter alia "that his further detention is necessary in his own

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38 Ibid., s. 37(4). 39 Ibid., s. 39(4). 40 Ibid., s. 37(2).
41 Ibid., s. 37(3)(a).
42 Ibid., s. 37(4).

interests".[43] This decision rests with the hearing. The relevant criterion, however, is different from the one in the English Act. "Necessity" forms no part of the English criterion. It would therefore, at least in principle, be more difficult to satisfy the Scottish test. This is understandable if the liberty of the individual is to be preferred to his unnecessary but perhaps desirable detention.

19.21 The reporter's controlled procedures but wide substantive discretion are clearly demonstrated by the sequence of events prescribed by section 39. Three alternative courses of action after the initial investigation are contemplated: no further action; preventive measures; apparent need of compulsory measures of care. The grammatical formula is the same in each case: the substantive decision falls within the introductory conditional clause and the duty, always administrative, is contained in the principal clause. Moreover the conditional clause confers a power of decision which is effectively unregulated. For example, subsection (1) requires the reporter to inform inter alia the child and his parent when he decides that "no further action is required". He is required by subsection (2) to refer the case to the local authority to arrange preventive measures where he considers it "to be the proper course". Subsection (3) imposes a duty to arrange a hearing where it appears to him that "the child is in need of compulsory measures of care".

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43 Idem.

19.22 These decisions are of fundamental importance to the child in question. They could conceivably change the pattern of his life. There is nothing in the Act to provide for a review of the reporter's decisions by way of appeal or otherwise. Neither the local authority nor the children's hearing is in any way responsible for what he does. He is a statutory creature sui generis.[44] The legality of his decisions will be governed solely by the provisions of the Act and the availability of administrative law remedies. But, assuming that he operates correctly within the procedural framework of the Act, it is unlikely that the reporter's decisions would be successfully challenged. It is suggested, therefore, that the Scottish "screening" system is much more discretionary in character than its English counterpart.

(b) The liability of children to prosecution.

19.23 One of the controversial aspects of the Children and Young Persons Act 1969, before and after its enactment,[45] was the emergence of civil care jurisdiction over juvenile offenders[46] and the intended decline in the criminal jurisdiction over juveniles.[47] Because of the decision to postpone bringing sections 4 and 5 of the Act into force the position of children and young persons as offenders has become somewhat complex.

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44 Grant J.P., op. cit., pp. 156 and 157.
45 See Berlins and Wansell, chapter 3.
46 I.e. the "offence" condition in care proceedings; namely s. 1(2)(f) of the Children and Young Persons Act 1969.
47 Restricted to homicide if s. 4 of the 1969 Act were to be implemented.

The result is that care proceedings and criminal proceedings are alternative procedures where a child between the ages of ten and fourteen is alleged to have committed an offence.[48] There is thus at the moment a choice to be made between these alternatives. That choice does not appear in any way to be regulated.

19.24 The Social Work (Scotland) Act 1968 which also enacted restrictions on prosecuting children is different. The new system is in operation. The Lord Advocate has considerable discretion. The matter has been the subject of official direction and judicial comment. It is thus worthwhile to look in greater detail at the Scottish system than at the English approach as an example of the way discretions operate at the initial stages of proceedings in respect of children.

19.25 The choice is not simply between prosecution or not. Indeed in a real sense prosecution is a remedy of last resort. But if the child's needs are to be met by providing assistance or guidance to his family,[49] the administrative structure of the Scottish system, centred as it is round the reporter, is potentially more effective than its English counterpart. In England, if informal remedies are appropriate or if services provided by the local authority are desirable, informal

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48 Bevan, p. 31. Cf. the position in Scotland where the age of criminal responsibility remains eight: the amendment introduced by s. 16(1) of the Children and Young Persons Act 1963 was not applied to Scotland.

49 Children and Young Persons Act 1963, s. 1; Social Work (Scotland) Act 1968, s.12.

consultation will be necessary.[50] Oliver[51] was referring to the Children and Young Persons Act 1969 when he made the following remarks but they are probably of wider significance:-

> "Very often the answer to a child's problem will lie with his parents who will be only too anxious to assist once they have been made aware of what has happened. The persons who are competent to bring care proceedings must consider what alternatives there are and if, in their judgment, the answer lies in informal action, then they must take steps to ensure that every assistance and guidance is given to secure a satisfactory outcome. The answer may be with the school or other institution but it is a duty upon all concerned to find out the best possible action in all the circumstances. Consultation between the authorities is essential, not only to avoid dual action but in order to get the best possible background to the case, and on the whole, the intention of the Act does not seem to have been frustrated."[52]

19.26 Police cautioning as an informal remedy, on the other hand, is an alternative only to prosecution.[53] It may operate as a very informal warning by the constable on patrol or as a relatively formal caution by a senior officer as part of the decision-making process where prosecution is not envisaged.[54] The latter, according to the evidence, is not statistically

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50 There is no coordinator like the reporter in the English system.

51 Oliver, "Mischievous Minors" [1974] Criminal Law Review 419.

52 Ibid. at p. 422.

53 See generally Somerville, "A Study of the Preventive Aspect of Police Work with Juveniles [1969] Criminal Law Review 407 and 472; Watson and Austin, chapter 7; Berlins and Wansell, chapter 4.

54 Somerville, op. cit., at pp. 408 and 409.

insignificant.[55] Concern has however been expressed at the lack of consistency in the use of this device, particularly in England and Wales.[56] As a follow-up to these procedures police juvenile liaison schemes have emerged in certain areas.[57] They, of course, go beyond the decision not to prosecute and involve informal preventive measures intended to help the young offender and possibly his family. In some respects the reforming legislation of 1968 and 1969 may have overtaken these schemes. In any event these schemes and the cautioning systems are informal and outwith statutory control. They flow from the discretion to prosecute or not. Perhaps their informality, lack of regulation and general flexibility are their worthwhile features. Apart from the original decision not to prosecute, they depend largely upon co-operation and consent for their effectiveness; certainly not upon any legal sanction.

19.27 The next stage, assuming these informal measures have been rejected, is the discretion to prosecute. Section 31(1) of the Social Work (Scotland) Act 1968 states simply:-

> "No child shall be prosecuted for any offence except on the instructions of the Lord Advocate, or at his instance ..."[58]

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55 Somerville, op. cit., at pp. 409 and 412; Watson and Austin, pp. 84 to 86; Berlins and Wansell, pp. 43 and 44.
56 Somerville, op. cit., at pp. 473 and 474; Watson and Austin, p. 86.
57 Somerville, op. cit., at pp. 475 to 479.
58 See generally Gordon G.H., "Prosecuting Children: An assessment of the situation in the light of the 1968 Act" (1973) 18 Journal of the Law Society of Scotland 346.

This implies that the Lord Advocate may in the exercise of his discretion bring a prosecution against a child.[59] It is also possible for a child to be in need of compulsory measures of care by virtue of the commission of an offence.[60] The decision to refer the latter issue to a children's hearing rests with the reporter. The Lord Advocate, Crown Office and Procurator-Fiscal service on the one hand and the reporters on the other hand are quite independent of each other. There is no statutory means of inter-communication or solution of potential conflicts. It is thus possible for a child to be the subject of a prosecution and of a referral to a children's hearing at the same time. Good administration should ensure that this does not happen; but there can be no guarantee of that.[61]

19.28 The most important question is how the discretion to prosecute under section 31(1) of the 1968 Act is exercised. It seems that a considerable number of such prosecutions are brought each year.[62] The problem is not illusory. The grammatical structure of section 31(1) indicates that proseuction is intended in exceptional circumstances only and that juvenile offenders

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59 I.e. a child of the age of criminal responsibility, namely eight years: see s. 55 of the Children and Young Persons (Scotland) Act 1937 (1 Edw. 8 & 1 Geo. 6, c.37). Cf. England where the age of ten was substituted for eight by virtue of s. 16(1) of the Children and Young Persons Act 1963.

60 Section 32(2) of the Social Work (Scotland) Act 1968.

61 This dual system has attracted some criticism: see e.g. Bruce, "Two Scales of Justice" [1974] The Scotsman 2 February.

62 Bruce, op. cit. pointed out that in 1972 the ratio was 1 : 7 as between offenders prosecuted and those referred to hearings.

are principally for the reporter and children's hearings. If this is so, it would be consistent with the philosophy underlying section 4 of the Children and Young Persons Act 1969 which, if brought into effect, would render children liable to prosecution only for homicide: the difference being that in Scotland the question is one of discretion while in England it would be one of law.

19.29 But, in practice, the answer lies only partly in section 31(1). The Lord Advocate may at his own instance prosecute a child. He may also give instructions for the prosecution of children.[63] The Lord Advocate has been questioned in the House of Commons on at least two occasions on his policy regarding prosecuting children. There are apparently as many as seven categories of cases which Chief Constables have been directed to report to the Procurator-Fiscal for consideration of the Lord Advocate's discretion. The final category mentioned is rather general: "any other offence which in the opinion of the Chief Constable is so serious as to warrant the instruction of solemn proceedings by the Lord Advocate in the public interest".[64] There is no easily discernible rationalisation in the cases mentioned: they cover serious offences, offences allegedly committed by a child while acting with an adult, offences carrying special penalties and offences allegedly

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63 On 27 November and 3 December 1973: noted in 1973 S.L.T. (News) 280 and 281. See also Gordon G.H., op. cit., para. 19.27, n. 58.

64 1973 S.L.T. (News) 281.

committed by children subject to a supervision requirement. There was also reference to a direction by the Lord Advocate to Procurators -Fiscal giving the latter a discretion but the terms of that direction seem not to have been disclosed.[65]

19.30 This official reticence makes it difficult for the public to know what is likely to happen. Instructions may presumably be varied at any time. The Lord Advocate is not bound to continue his announced policy. There is thus no reason why the commission of any offence may not render a child liable to prosecution. Moreover no prosecution can be successfully challenged on this ground. In M. v Dean[66] objection was taken to the competency of a complaint laid against a child aged fourteen on the ground that it had not been established that it had proceeded on the instructions of the Lord Advocate. The Advocate-depute informed the court that when the prosecution commenced there were in existence general instructions to Procurators -Fiscal authorising prosecution of various types of offences, including the one in question. Lord Wheatley L.J.-C. accepted this argument and refused the appeal. He relied principally upon the presumption omnia rite acta and went on to suggest that neither written authority nor individual instruction in each case was necessary. The court was satisfied that the general instructions given by the Lord Advocate were sufficient and that there was no reason to doubt that they had been given.

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65 1973 S.L.T. (News) 280.

66 1974 S.L.T. 229.

19.31 The Lord Advocate's discretion in section 31(1) would thus appear to be absolute and unrestricted. Not only can he delegate his power to the Procurator-Fiscal but he need not make known publicly what is his policy, delegated or otherwise. Parliament has undoubtedly given the Lord Advocate a discretion but certain aspects of its exercise are perhaps questionable, if not legally at least politically.[67] The liability to prosecution of juvenile offenders is thus unsatisfactory in several respects both in England and in Scotland.

19.32 One case in particular, unconnected with these technicalities, caused considerable public unease. Mary Cairns, when aged eight, was charged with stabbing a friend aged eleven. In response to a plea of guilty, she was sentenced by Sheriff Bell[68] to be detained[69] under section 57(2) of the Children and Young Persons (Scotland) Act 1937 in a place to be determined by the Secretary of State.[70] The dramatic details of the impact on the girl of the judicial procedure and the sentence[71] and the comments by community leaders[72] were duly recorded in the press. Indeed the publicity given to the case by certain newspapers was

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67 Particularly if it is correct to suggest that prosecutions of children should be "exceptional": para. 19.28.

68 Who in terms of s. 57(2) of the Children and Young Persons Act (Scotland) 1937 was required to be "of opinion that none of the other methods in which the case may legally be dealt with was suitable".

69 Not imprisonment.

70 Thus in effect giving the Secretary of State complete discretion, the discretion presumably being exercised in the child's best interests.

71 [1973] The Times, 19 September.

72 [1973] The Scotsman, 20 September.

the subject of serious criticism by Lord Wheatley L.J.-C. when the case was decided on appeal by the High Court. His criticism was directed not towards the publicity itself but to the inaccurate basis upon which the comments were founded.

19.33 It would nevertheless be impossible to challenge the competency of the prosecution, the sentence or the publicity in this case. Each decision is founded upon a discretion. Any challenge would require to be based upon a misapplication or misuse of the discretion. There was no evidence of that.[73] Criticism have however been directed at the policy implications of these decisions. For example, no child of eight, it has been suggested, should be subjected to the rigours of solemn criminal procedures.[74] But Parliament has conferred a discretion to do just that.[75] No such child should perhaps be subject to detention.[76] Again Parliament has decided otherwise.[77] But the force of Lord Wheatley's criticism was that the press had given the impression that the detention in this context amounted to imprisonment,[78] which it clearly did not.[79] Finally, restriction on publicity was a matter for the sheriff.[80] The Mary Cairns case shows clearly that the exercise of discretions may lead to political controversies and criticisms on that basis.

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73 Generally see Mathie A.D., "The Mary Cairns Case" (1973) 18 Journal of the Law Society of Scotland 389; letter by Mr. Paul Burns (1974) 19 Journal of the Law Society of Scotland 48.

74 Lord Provost Gray of Glasgow [1973] The Scotsman, 20 September.

75 Social Work (Scotland) Act 1968, s.31(1).

76 Director of Social Work for Glasgow [1973] The Scotsman, 20 September.

77 Children and Young Persons (Scotland) Act 1937, s.57(2).

78 Mathie, op. cit., at p. 391.

79 Mary Cairns was in fact taken to a assessment centre for a full assessment of what should be done: e.g. local authority home, residential school, list D school, hospital.

80 Children and Young Persons (Scotland) Act 1937 s. 54; Children and Young Persons Act 1963, s. 57.

Section 4 - The treatment of juvenile offenders.

19.34 One of the aspects of the Mary Cairns case illustrates that what happens to an offender after conviction, juvenile or otherwise, affects him just as much as the initial decision to prosecute. The tendency, if not the policy, to assimilate offenders and non-offenders in this context for the purposes of treatment or the exercise of the dispositional discretion has been both applauded[81] and criticised.[82] Different considerations and objectives may apply to each of the two categories. Whether they do or not is not particularly germane to this discussion. Parliament has decided that the courts both in England and Scotland should have a distinct, though to some extent overlapping, range of remedies available for each of these two categories of children and young persons in need.[83] This has proved a particularly controversial area and it may be that some aspects of criminological theory are far in advance of public opinion. The present aim is much more mundane: merely to consider the structure of the relevant provisions and to identify what part the child's welfare or interest plays in the process.

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81 Kilbrandon Report, p.35.

82 Berlins and Wansell, especially chapters 10 and 11.

83 The range of remedies is summarised for England in most of the textbooks: see e.g. Bevan, chapter 4; Watson and Austin, chapters 10, 11 and 12.

19.35 The position in England and Scotland, once again, differs but more in point of detail than general principle. The structure of the legislation in the two jurisdictions is fundamentally similar. There is no need for present purposes to deal with the two systems separately. The broad structure of the Criminal Justice Acts in this regard is to confer powers subject to a minimum of restriction, from the point of view of policy or otherwise, in relation to their exercise but at the same time to indicate a very strong presumption against detention in Scotland and imprisonment in England. There is moreover nothing further to indicate which remedy or power should be selected from the range available. Each power is subject to its own application requirements[84] and the criteria for the exercise of the powers, where they are prescribed, tend to be similar, if not identical.[85] Once the more exotic penalties had been abolished,[86] the only indication of policy is

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84 I.e. the general requirements prescribed by Parliament and unrelated to the particular child or young person or his welfare. Cf. threshold requirements which relate to the specific child or young person and his welfare.

85 E.g. Criminal Justice Act 1948 (11 & 12 Geo. 6, c.58), s. 7(1) (discharge), s. 3(1) (probation); Criminal Justice Act 1961 (9 & 10 Eliz. 2, c. 39), s. 1(2), (borstal training) where the test is "expediency" having regard to certain factors. Most other discretions are open ended. S. 11(1) of the Criminal Justice Act 1948 alone refers to the purpose of the exercise of the power, namely "the reformation of the offender." That section contains supplementary provisions as to probation and discharge.

86 Penal servitude, hard labour and whipping were abolished by ss.1(1), 1(2) and 2 of the Criminal Justice Act 1948 respectively.

the one already mentioned, namely the presumption against detention or imprisonment. The court is thus faced with a number of questions at this stage of the process.[87] Is it appropriate to impose detention or imprisonment? Can the court legally do so? If the answer to either question is negative, which alternative remedy is most suitable? Finally, is the one selected competent?

19.36 This is probably an oversimplication but it indicates the fairly wide dispositional discretion entrusted to the courts.[88] There are, of course, no threshold requirements to be satisfied, other than a conviction. Any conditional provisions merely describe the circumstances in which the discretion is exercisable.[89] They are quite general. There is no question of investigating the quality of parental care or the need for care and control in the individual case, as in the context of care proceedings or the other methods of administrative intervention.

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87 In R. v Lowe [1964] 2 AllE.R. 116 at pp. 117 and 118 Lord Parker C.J. set out the correct modus operandi in sentencing young offenders according to the relevant statutory background. The questions posed in this analysis do not precisely correspond with the scheme contemplated by Lord Parker C.J., but, it is suggested, they are consistent with it.

88 The powers of the courts and the purposes for which they are intended to be used have often been described. This exercise is not concerned with these aspects. See e.g. Bevan, pp. 111 to 138; Watson and Austin, chapter 12; Thomas D.A.,Principles of Sentencing (London, 1970), chapter 6; West D.J., The Young Offender (Pelican, 1967), chapter 9; Walker N.,Sentencing in a Rational Society (Pelican, 1972), chapter 13.

89 I.e. application requirements: para. 19.35.

19.37 Two examples should suffice to illustrate the structure of the provisions. The application of the power to impose borstal training is for England set out in section 20 of the Criminal Justice Act 1948. The exercise of the power is regulated by section 1(2) of the Criminal Justice Act 1961.[90] The latter provides:-

> "The power of a court to pass a sentence of borstal training under the said section 20 in the case of a person convicted as therein mentioned shall be exercisable in any case where the court is of opinion, having regard to the circumstances of the offence and after taking into account the offender's character and previous conduct, that it is expedient that he should be detained for training for not less than six months."

Section 20(1) of the 1948 Act thus contain the general application requirements for borstal training: section 1(2) of the 1961 Act refers back to these requirements and indicates how the power is thereafter exercisable in the individual case. The test is "expediency".[91] But the court is also directed to consider the circumstances of the offence and the offender's character and conduct.[92] This is supported by information provided under section 1(3) of the 1961 Act.[93] In a sense, as the power to sentence to borstal training is not available unless it is expedient to use it, this operates as a threshold

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90 For Scotland see Criminal Justice (Scotland) Act 1949, s.20(1).

91 As in the case of probation and discharge; see ss.3(1) and 7(1) of the Criminal Justice Act 1948.

92 The formula in the case of probation and discharge refers generally to "the circumstances including the nature of the offence and the character of the offender": see ss. 3(1) and 7(1) of the Criminal Justice Act 1948.

93 There is however no obligation to obtain the report contemplated by s. 1(3): R. v Lowe [1964] 2 AllE.R. 116. It would however be difficult to fulfil the obligation in s. 1(2) without the benefit of such a report.

requirement. But it is another example of the substance of the threshold requirement being projected to some extent into the future. Expediency probably involves, it is suggested, an element of desirability. This provision is thus couched in terms of a broad substantive discretion coupled with a wide interpretational discretion. The wideness of the discretion in the context of probation, where the statutory formula is not much different, has been noted by Clarke Hall and Morrison.[94] But they add the qualification that "it must be exercised judicially".[95] This may reduce the scope for judicial arbitrariness but largely through procedural safeguards.

19.38 The Act says no more about the objective of borstal training than that it involves "detention" for "training" for not less than six months. That it is designed to be an individual treatment is clear from the statutory circumstances to be taken into account. The rules made under the legislation add little, but what they contain clearly supports these views.[96] The interests of the child and to some extent of his family are the criterion for the exercise of some of the delegated powers.[97] The stated objects of borstal training also suggest the individual approach.[98] It is nevertheless remarkable that the Act says nothing about the interests of the offender or indeed

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94 Clarke Hall & Morrison, p. 180.
95 Idem.
96 Borstal Rules 1964 (S.I. 1964 No. 387); Borstal (Scotland) Rules 1950 (S.I. 1950 No. 1944).
97 E.g.rr. 32(1) and (2) and 35(2) of the Borstal Rules 1964; rr.57(1) and (2) of the Borstal (Scotland) Rule 1950.
98 R. 1(2) of the Borstal Rules 1964 and r. 4(1) of the Borstal (Scotland) Rules 1950.

of the public or community at large. The rules, of course, specify the relevant objectives and criteria once the offender has been sentenced and has become an inmate of the institution. Section 1(2) of the 1961 Act specifies the approach to be adopted when the sentencing decision is being made. This is an important distinction. The rules, then, do not bear directly upon the exercise of the dispositional discretion. They are merely indicative of the regime which an inmate will encounter if he were so sentenced.

19.39 So much seems clear from the statutory formula. The official and judicial views are quite consistent with this interpretation. The Home Office has indicated that "the emphasis in borstal training is on remedial and educational treatment based on close study of the individual. Borstals are organised so as to facilitate individual study, personal training and wise leadership. Standardisation is not sought."[99] But according to Thomas[1] rehabilitative training is in the view of the court not the only function of Borstal. He states:-

> "- on the one hand it is still primarily a rehabilitative training measure, and most issues of policy in the use of borstal training are decided in the light of this view. In a limited number of cases it is treated as a tariff sentence, and in those cases tariff

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99 Home Office, Handbook on the Treatment of Offenders, The Sentence of the Court (London, H.M.S.O., 1970), para 111.

1 Thomas, op.cit., pp. 237 and 238.

> principles are applied. The sentence is thus governed by different principles according to the purpose for which it is imposed."[2]

In the case of the first alternative, the sentence is clearly being used as "an individualised rehabilitative measure"[3]; not so in the case of the second alternative, where for example the sentence may be used as a deterrent.[4]

19.40 Does the statutory formula allow these different policies? The court must, it will be recalled, look at the circumstances of the offence and the offender's character and previous conduct. The first circumstance indicates the possibility of a tariff sentence; the second contemplates the needs of the offender.[5] In R. v Scott,[6] for example, a young offender guilty of a trivial offence was sentenced to borstal training. According to the decision his "whole history showed that the best course in his own interest and that of the community was that he should undergo borstal training."[7] On the other hand, in R. v Lowe,[8] a case of serious assault, where there was no suggestion that training was the objective, the court passed a sentence of borstal training. The sentence originally found appropriate by the trial judge was two years' imprisonment. That was not competent.[9] The trial judge then sentenced him to three years' imprisonment. On appeal the

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2 Idem. 3 Ibid. at p. 244. 4 Ibid. at p. 245.
5 The court is clearly not bound by these considerations.
6 [1969] Criminal Law Review 156.
7 Idem. Note that the interests of both the offender and the community led to the same conclusions that made the judge's decision easier.
8 [1964] 2 AllE.R. 116.
9 Criminal Justice Act 1961, s. 3(1).

Court of Criminal Appeal substituted a sentence of borstal training. Lord Parker C.J. seemed to recognise the anomalous quality of this decision but he justified it as follows:-

> "The court would add that, as they understand it, there are a number of different types of borstal institution, and the court can see no reason why, in a case such as this, the judge should not set out his reasoning, and in particular indicate that the sentence he would like to give is one of punishment to deter others rather than a sentence of a reformatory character. It may be, the court does not know, that, in those circumstances, the prisoner would go, in the first instance at any rate, to an establishment more akin to a prisoner's centre where he would be dealt with as a person deserving punishment."[10]

These two rather extreme decisions, which are legally unchallengable, illustrate the breadth of the discretion conferred by the Act. Thus the courts seem to be prepared to use the legislation, admittedly quite legitimately, to achieve whatever is conceived to be appropriate in the individual case, perhaps contrary to stated policy.[11]

19.41 The dilemma facing the court in R. v Lowe[12] was the overriding statutory restriction upon the imprisonment of young offenders.[13] There is no absolute prohibition on sentencing

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10 [1964] 2 All E.R. 116 at p. 118 per Lord Parker C.J.

11 I.e. officially stated policy.

12 [1964] 2 All E.R. 116.

13 See generally Criminal Justice Act 1948, s. 17(1) and (2) and Criminal Justice Act 1961, s. 3.

a young offender to imprisonment.[14] When that happens, it would normally be in the case of a very serious offence,[15] probably for reasons of deterrence. The offender's needs would be largely irrelevant. The statutory position in England is thus complex. It is perhaps slightly clearer in Scotland[16] because of the availability in Scotland of Young Offenders Institutions.[17]

19.42 But even in Scotland the conflicts of policy facing the sentencing tribunal are quite apparent. These problems are thrown into sharp relief when a court in exercise of the powers in section 56 or 57 of the Social Work (Scotland) Act 1968 either remits a case for disposal by a children's hearing or seeks the advice of a children's hearing on the question of treatment. In two cases[18] Lord Wheatley L.J.-C. categorically rejected the advice given by children's hearings. In one case the hearing recommended a deferred sentence for a serious assault; in the other a fine was recommended for perjury during a High Court trial. In the former case the boy of sixteen was sent to a Young Offenders' Institution for three years; in the latter the boy, also aged sixteen, was similarly

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14 Except for the minimum age for imprisonment: s. 17(1) of the Criminal Justice Act 1948 as amended by s. 2(2) of the Criminal Justice Act 1961.

15 Thomas, op. cit., p. 248. In England the court imposes detention under s. 53(2) of the Children and Young Persons Act 1933. For recent examples see R. v Storey; Fuat and Duignan [1973] Criminal Law Review 645 (attempted murder, wounding with intent, robbery), R. v Bryson [1974] Criminal Law Review 197 (arson), R. v Jones [1974] Criminal Law Review 614 (wounding with intent and assault with intent to rob): in all these cases the protection of the public featured prominently.

16 See generally "Custodial Sentences on the Young Offender and First Offender" (1973) 18 Journal of the Law Society of Scotland 367.

17 Criminal Justice (Scotland) Act 1963, ss.1 and 2. See generally Smith A.D., "Young Offenders' Institutions in Scotland" 1968 S.L.T. (News) 17.

18 Both reportedly briefly in [1973] The Times, 19 February.

sentenced for a period of two years. In his criticism of their recommendations Lord Wheatley L.J.-C. impliedly indicated that the hearings were not aware of the relevant circumstances.

19.43 To examine the Scottish formula as a model: section 1 of the Criminal Justice (Scotland) Act 1963 provides that "no court shall impose detention on a person under twenty-one years of age unless it is of the opinion that no other method of dealing with him is appropriate".[19] Detention is thus competent but only if no other method is appropriate. Subsection (2), in support of this, requires the court to obtain a report about the accused's circumstances and to consider it with any other information about his character and physical and mental conditions. It is further provided in support of this general principle that a court of summary jurisdiction imposing detention on a person under twenty-one shall state reasons for its opinion that detention is the only appropriate method.[20] Finally, in the case of an offender between sixteen and twenty-one and where detention is in the opinion of the court the only appropriate sentence, the young offender must be detained in a Young Offenders' Institution unless inter alia the court is satisfied, having considered all the circumstances, that neither borstal training nor detention in a detention centre should be imposed.[21]

19.44 The general trend of these provisions is clear. Detention is the last method of treatment in order of preference and it is the least desirable method of custodial treatment. The choice, despite this list of statutory preferences, lies

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19 The English provision is the same: s.17(2) of the Criminal Justice Act 1948.

20 Presumably this obligation applies only to a court of summary jurisdiction because it is assumed that the High Court of Judiciary will in all cases do so.

21 These complex rules are set out in "Custodial Sentences on the Young Offender and First Offender", op. cit. at p.368.

almost entirely with the court. The exonerating factor in the first case is the court's opinion of the appropriateness of any other methods of treatment. In the second case the court need do no more than consider all the circumstances. It will thus be almost impossible to challenge the court's decision on its merits. An allegation of technical incompetency is probably the only available means of review. Such a discretion enables the court to promote the best interests of the young offender, as they are conceived by that tribunal, or to acheive more or less any other policy considered appropriate by the court. In the context of such a statutory regime the child's interests may be advanced; equally they may not.

Section 5 - Conclusions.

19.45 Prima facie much of this chapter may not seem particularly germane to the topic under analysis. There is, however, little doubt that a wide discretion exists before a decision on care proceedings is taken, when prosecution is being contemplated or when the tribunal is considering what sentence to impose after successful prosecution. Even where the power is dependent upon statutory provisions, the legislative formula enables the decision-maker, with almost no exception, to reach whatever decision he feels appropriate on its merits. The procedural safeguards are minimal, when they indeed apply at all. It is thus difficult, in the light of current administrative law doctrine, to envisage judicial control of decisions on emergency detention, on the institution of care proceedings, on referrals to children's hearings or on

prosecution of young offenders. In the context of sentencing, the court being the sentencing tribunal, decisions are firmly within the structure of judicial appeals.

19.46 Such a system of wide substantive discretions may be desirable. Arguably it may not. Much depends on the nature of each decision to be taken. No generalisation is possible. In such a system the existence of a discretion may be balanced only by the existence of tightly drawn threshold requirements. Such requirements would reduce the impact of the substantive discretion, as in the case of care proceedings and associated procedures. But where no such requirements are made, as in the case of the prosecuting and sentencing powers, the child or young person who is the subject of the process is largely in the hands of the decision-maker. Arguably, perhaps, he is safeguarded by the procedural and evidential requirements of the trial. A mistaken decision to prosecute could nevertheless be very damaging to the child. But even these safeguards do not apply to the sentencing process.

19.47 Concern has been expressed over some of these issues and other aspects of child care and protection legislation. The movement towards discretion has continued over a considerable period, justified by concepts of individualised justice and the welfare of the child in the contexts of compulsory care and treatment of young offenders. The main purpose of this study is to examine what role the welfare of the child plays in the system. A wide discretion enables welfare to play a major or minor role, to be used expansively

or restrictively or to operate positively or negatively. It may even be ignored. Almost everything in the event of a discretionary system depends upon the person in whom the discretion is vested. This raises a number of interesting and practical considerations, which, although they are slightly outwith the mainstream of this analysis, are worth some consideration.

CHAPTER 20

THE SYSTEM OF CHILD CARE IN PRACTICE

Section 1 - Criticisms of Discretions

20.1 The Social Work (Scotland) Act 1968,[1] which is fully operational, has received criticism from several quarters. The Children and Young Persons Act 1969,[2] although not fully implemented, has also received considerable criticism. Some of the criticism applies to both Acts; much of it has been reserved for one particular aspect of the 1969 Act.[3] Most of the criticisms are of a fairly practical nature. They do not so much concern the ways in which the statutory discretions themselves are exercised by the relevant authorities but rather the day-to-day restrictions placed upon the exercise of these discretions by the physical rather than doctrinal problems created by the legislation.

20.2 But before looking at these physical problems, some attention should be paid to the theoretical or doctrinal criticisms made about the legislation affecting children. This takes up the argument from the last part of the preceding chapter. It concerns the wide judicial

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1 1968 c.49.
2 1969 c.54.
3 The failure to deal adequately with "criminal" juveniles.

discretion in sentencing young offenders. Criticism has been directed at the very nature of that discretion.

20.3 For some time the trend in the U.S.A. has been to some extent to become suspicious of the specialities of juvenile courts.[4] Constitutional difficulties have emphasised this tendency. Commentators in England have recently questioned the present discretionary approach to sentencing young adult offenders.[5] Hawkins in particular has identified these problems of discretion:-

> "The more flexible the penal system the more essential it is to see that the intentions of the legislature are put into effect: discretion needs to be guided by, for example, precise statutory pronouncements about the aims of decisions and the criteria to be employed. Standards scattered throughout the report such as 'unavoidable', 'wholly failed' and 'reasonable' should be much more clearly defined if decisions are to be reasonably consistent. Discretion also need to be controlled by the adoption of procedural safeguards such as personal hearings, reason for decisions and right of review." [6]

This view does not argue against a discretionary system. It merely suggests a much more tightly drawn and regulated discretionary system. It does not suggest a replacement for a system of individualised justice or welfare; it indicates a better one. Although Hawkins' comments were

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4 In consequence of In re Gault (1967) 1 United States 1.

5 See (1974) 14 British Journal of Criminology 388 to 403 commenting on the Report of the Advisory Council on the Penal System, Young Adult Offenders (London, H.M.S.O., 1974).

6 (1974) 14 British Journal of Criminology at p.403.

directed towards the treatment of young adult offenders, they could apply equally to most of the discretionary elements in the legislation so far discussed.

20.4 Welfare, it has been seen, plays various roles in the exercise of a statutory discretion. Welfare and its equivalents are themselves expressions of considerable flexibility. The statutory formula in which they appear is not always clear beyond doubt. The absence of welfare and similar factors may leave their relevance open to question. Thus a fundamental reconsideration of such statutory formulae would render the legislation technically easier without necessarily changing the underlying policy. Indeed in the same context as Hawkins, Hood called for "less executive discretion, for more law in sentencing and more control over the judiciary in the exercise of their discretion, for openness in procedure".[7] Ours, he argued, is "a democratic age, not a paternalistic one".[8] These comments, it is suggested, are worth bearing in mind in a wider context.

Section 2 - Criticisms of the 1969 Act

(a) Local authority executive powers

20.5 One of the principal criticisms of the Children and Young Persons Act 1969, both in theory and in practice, has been not the extent of discretion conferred by the

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7 Ibid. at p.395.
8 Idem.

legislation but the body entrusted with certain of the discretions. Once the juvenile court has made an order under section 1 of the Act, particularly a care order or a supervision order, their duty has been discharged and they are no longer responsible for what happens to the child thereafter.[9] They have, in particular, no power to insist upon continuance of custodial treatment for the child. Once an order has been made, the exercise of the discretion with regard to the child thereafter is vested in the local authority or its officers.[10] This change from judicial to executive responsibility has caused the English magistracy considerable concern.[11]

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9 Para. 17.20 see also an address by Mr Leo Goodman to the Institute for the Study and Treatment of Delinquency reported in [1972] The Times, 9 November.

10 Para. 17.19: see also a letter from Mr John Watson in [1972] The Times, 8 July.

11 Ford, chapter 3; Berlins and Wansell, pp.81 and 82; (1972) 136 J.P. 321 where the Magistrates' Association has been reported to have taken this attitude: "What appears to be common to virtually all the complaints received by the Magistrates' Association and included in their dossier is the failure of local authority social service departments to exercise proper control of those committed to care by the courts under s.1 of the Act. From the dossier it would seem that it is now commonplace for a child subject to a care order by virtue of para. f. of s.1(2) (i.e. because he has committed an offence) to be allowed to return home, even though he has demonstrated that he is a repeater, and notwithstanding that it was clear to the juvenile court that home was the last place he should be and that almost certainly the purpose of the police in bringing the child to court was to ensure his departure thence. Equally, it would seem, the absconder from the 'community home' can now be reasonably confident that he will not be returned."

20.6 There are several aspects to this. The magistrates have noticed their lack of continuing responsibility particularly in the case of young offenders.[12] The principles of the 1969 Act have worked well in the case of children needing care and protection other than offenders.[13] But young offenders, according to some magistrates, are being treated leniently by the local authority's officers. They are being allowed to reside at home with little or no effective supervision, perhaps to commit further offences.[14] The public, they argue, is left unprotected. The dilemma is founded, it is suggested, simply upon the different ways in which the continuing dispositional discretion may quite legitimately be exercised. The way is open to emphasise the needs of the individual child, as the social work profession would probably incline, or to afford greater weight to the interests of the public, as the magistrates would perhaps favour. If this is so, it merely reinforces the view that the quality of the exercise of a discretion reflects the views of the person exercising it.

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12 Their complaint is twofold: giving responsibility for continuity of treatment to the executive; restricting thereby and by abolishing approved schools the courts' powers to require the young offender to reside in secure accommodation without sentencing to detention centres or borstal institutions. See e.g. (1972) 136 J.P. 442 and 797; (1973) 137 J.P. 334 and 335; Berlins and Wansell, [1972] The Times, 8 and 10 November; a committee of the Society of Conservative Lawyers, [1973] The Times, 30 July; Stockport Juvenile Court, [1974] The Times, 26 October.

13 Berlins and Wansell, p.78 ; House of Commons Expenditure Committee, Eleventh Report, Session 1974-1975 (Children and Young Persons Act 1969), Vol.1 (London, H.M.S.O., 1976), paras. 13 to 22.

14 As described in the letter by Mr John Watson [1972] The Times, 8 July.

20.7 It may, on the other hand, be argued that neither the magistrates nor the local authority have an absolute discretion. This is true. The technical restrictions on the exercise of these discretions have already been discussed.[15] The criteria for making an order are not the same as those for the treatment of children in care or under supervision. But in either case the statutory formula is sufficiently flexible either at the stage of interpretation, disposition or continuing care that the decision of the court or the local authority is virtually unchallengeable. The real issue is thus one of policy[16] and that is precisely the issue avoided by Parliament. Policy may be of some assistance in interpretation or in the exercise of a discretion but those responsible for administering the legislation are forced to rely upon whatever policy they can divine from the legislation or, more likely in practice, the background Parliamentary materials preceding the legislation. This may or may not accord with the intentions of the legislature.[17] It is thus not surprising that in the light of the statutory formulae there is considerable dispute about how the various powers should be exercised.

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15 Paras. 18.16 to 18.26.
16 See a letter by Miss Valerie Bean [1974] The Sunday Times, 28 July.
17 Assuming always that where there is a policy, it can be ascertained quite readily.

20.8 This particular problem does not arise under the Social Work (Scotland) Act 1968, for the children's hearings are given continuing responsibility for the children referred to them.[18] So in Scotland the social work profession, at least technically, has an advisory rather than executive function. In England, of course, its role is advisory at the stage of disposition and executive once the order has been made. Otherwise the same types of criticism apply to Scotland as well as to England.

20.9 The consequences of this especially English problem are significant. It has been suggested that children under seventeen are able to commit most crimes with impunity;[19] the law is irrelevant and an object of mockery;[20] the public are unprotected;[21] juvenile crime is on the increase;[22] children are more likely to turn into hardened criminals;[23] the police are unable to cope.[24] Thus according to many this aspect of the legislation has been a failure. This analysis is not concerned with the

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18 1968 Act, s.48.
19 Berlins and Wansell, p.78.
20 Idem.
21 Geraghty, "Children Beyond the Law" [1974] The Sunday Times, 7 July.
22 Criminal Statistics (England and Wales, 1973, Cmnd. 5677); [1974] The Times, 25 July; [1974] The Scotsman, 19 September.
23 Berlins and Wansell [1974] The Times, 25 July.
24 Adrian, "Children and the Law" [1972] The Times, 27 September.

truth of these allegations.[25] If they were true, it would be simplistic to point only to an over-wide discretionary power of treatment given to local authority officers in place of courts and to an unhelpful statutory formula.[26]

(b) Shortages of staff and accommodation

20.10 Of greater practical significance to the working of the Children and Young Persons Act 1969 is the lack of sufficient resources to give effect to it. Some of the criticism attached to the alleged misapplication of their powers by local authorities and their officers was based upon the extended functions conferred upon them and the consequent numerical and professional inadequacy of the staff required to cope.[27] It takes time and resources to train social workers.[28] They tend to be overworked[29] and underpaid.[30] Some of the ideas of the young social workers were perhaps rather progressive and they have been criticised for their inexperience and being "soft" to young offenders. Again the truth of these allegations is not in issue here, but when people, experienced or not, young or old, are forced to

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25 That is a very difficult and controversial matter. See House of Commons Expenditure Committee, Eleventh Report, Session 1974-1975, op.cit. and Observations thereon (London, H.M.S.O., 1976) Cmnd. 6494.

26 Not that these are irrelevant to the analysis.

27 Berlins and Wansell, chapter 9; Adrian, "Children and the Law" [1972] The Times, 27 September; "The Failure of the Children's Act" [1972] The Times 12 October; Blom-Cooper L.J., "Juvenile Justice" (1973) 137 J.P. 87; Berlins and Wansell [1973] The Times, 12 January.

28 Report of the Central Council for Education and Training in Social Work [1974] The Times, 15 August.

29 See [1971] The Times, 21 June.

30 See [1971] The Times, 4 May.

make decisions about the lives of others, lack of consistency and differences of view are inevitable.[31] There is however no doubt that the 1969 Act depends to a large extent for its success upon sufficient and adequate staff.[32]

20.11 The other major resource deficiency often mentioned is the lack of sufficient and suitable residential facilities, including secure accommodation.[33] Domestic treatment under supervision probably does little to overstretch the physical resources of the local authority. But the intention to phase out approved schools[34] and to introduce community homes is a long-term proposition and requires considerable planning and resources in the form of money and then buildings. An economic use of resources requires accurate prediction of the number of places required and of the type of place required. This is likely to be very difficult, especially when doctrinal changes are being introduced simultaneously.

20.12 The criticisms of the Act in practice have thus been substantial and severe. It is easy to understand the allegation of lack of physical resources. This can

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31 This is not intended as a criticism; indeed it is probably a feature of the system of individualised justice. It is not however what the public, the young offender and his family are likely to expect.

32 See e.g. (1971) 814 H.C. Deb. 5s. cols. 941 to 961.

33 The lack of secure accommodation for young offenders has caused them to be held in adult prisons: see [1974] The Times, 24 July. This has been severely condemned: House of Commons Expenditure Committee, Eleventh Report, Session 1974-1975, op.cit., para.23. But the practice of keeping young offenders in adult prisons has not been discontinued: [1977] The Times, 24 June.

34 The use of approved schools declined after 1971: Berlins and Wansell, [1972] The Times, 8 November.

be remedied if the intention and the finances are available.[35] The other two major criticisms[36] are more equivocal. The problems of who should exercise the discretion and how it should be exercised raise issues of fundamental importance. They have been considered over the years by various committees and bodies. It is premature, it is suggested, to reject these parts of the 1969 Act almost out-of-hand, in the light of the many difficult matters involved, particularly when so many other reforms were contained in the Act. Indeed despite their criticisms of it, some magistrates feel the Act is sound and should be given a chance.[37] Suggestions for change have already been put[38] but the whole area of children in need of care or in trouble is in such a general state of flux and is so beset with

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35 Attempts seem to have been made to provide further facilities: see [1972] The Times, 18 November and [1973] The Times, 15 January.

36 I.e. misplaced discretion; staff shortages.

37 (1973) 137 J.P. 34.

38 One of the most radical perhaps came from McClintock in his address to the Institute for the Study and Treatment of Delinquents reported [1974] The Times, 8 November: he indicated that methods of prevention and control may be outside the legal and penal process. Berlins and Wansell [1972] The Times, 13 November suggested that a return to more discipline coupled with therapy in secure establishments might be the answer. Leys, [1972] The Times, 13 December took issue with Berlins and Wansell and tended to favour the approach of the Kilbrandon Report. The Bow Group, [1971] The Times, 25 October suggested new courts for offenders aged seventeen to twenty-one. More practical in terms of the 1969 Act however were the Parkhouse experiment. [1971] The Times, 15 June, the Newnham Scheme, [1971] The Times, 30 June and the NACRO (i.e. National Association for the Care and Resettlement of Offenders) project, see [1974] The Times, 14 January.

conflicts of social policy that time is perhaps needed to give the 1969 Act an opportunity to work.

Section 3 - Children's Hearings in Scotland

20.13 The system of children's hearing under Part III of the Social Work (Scotland) Act 1968 has attracted its share of criticism but it has also been received sympathetically on a number of counts.[39] The mechanics of the system have probably been successful.[40] Not everyone, of course, would agree that the system is in principle desirable. The defects tend to be found in the provision of back-up facilities and resources, as in England. To remedy such defects is more a matter of the availability of funds and efficient administration rather than theoretical dispute. The system nevertheless retains the confidence of the Government.[41]

20.14 The differences between children's hearings in Scotland and juvenile courts in England are to some extent formal. They set out to achieve similar objectives. The remedies are not basically different.[42] The keynotes of the Scottish system are informality, relaxed attitudes, devotion of time and attention to the individual, treating

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39 See "Children's Panels: Are they really successful?" (1973) 18 Journal of the Law Society of Scotland 330.

40 Idem. See also Grant J.P., "Social Work in Scotland in 1971 - An Unsatisfactory Report" 1973 S.L.T. (News) 169.

41 See a series of Parliamentary questions reported in [1972] The Scotsman, 3 August.

42 Although a wider range of remedies has been advocated for Scotland: see a letter by Mr James Wilkie [1974] The Scotsman, 27 May and Grant, J.P. op.cit. These comments however ignore the flexibility of the supervision requirement in s.44 of the Social Work (Scotland) Act 1968.

the child as part of the family and thus looking to the family unit as the potential subject for consideration and treatment.[43] No doubt these features could be achieved in the English system. Their presence in the Scottish system is due, it is suggested, principally to the simple procedures devised for the children's hearings.[44] Indeed as the Reporter for Glasgow is reported to have said: "Without any disrespect to any other system, we have been given a system which affords us more time and more efficient information. We should be better."[45]

20.15 Just as in the 1969 Act system so with children's hearings, it is really impossible to determine at this stage and indeed for some time to come whether the legislation is a success or not. There may be problems. Resources may be insufficient. Delinquency rates may rise. Each child may not receive the treatment he needs. But social legislation of this type requires time to work through society. It will be years before any beneficial effects manifest themselves. Equally, of course, the mistakes in the system may similarly be concealed for a long period.

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43 See "Children's Hearing in Action" (1971) 16 Journal of the Law Society of Scotland 126; Saunders [1971] The Scotsman, 6 August; Finer [1972] The Sunday Times, 30 April.

44 Children's Hearings (Scotland) Rules 1971 (S.I. 1971 No.492), especially rr.9 and 17: see also Children's Hearings: Notes on Part III of the Social Work (Scotland) Act 1968 (Edinburgh, H.M.S.O., 1970),pp.20 to 22.

45 See Saunders, [1971] The Scotsman, 6 August.

20.16 The pattern of the system in practice has become clear.[46] Most grounds for referral relate to offences. A considerable number of young offenders are merely warned by the police. But of those referred to the reporter "no action"[47] is taken in about one-third. One-half of the total number before the reporter is subsequently dealt with by hearings, the balance being dealt with by the local authority social work department. Concern has been expressed at the large number of cases reported by the police to the reporter but not subsequently referred to the children's hearings.[48] This has been called a "weakness" in the Act.[49] It does not, of course, mean that nothing happens and the child gets off "scot free". The reporter and the child's parents may have discussed the matter and some voluntary solution reached. The child may already have been subject to some form of treatment which the reporter has decided should not be interrupted.[50] Indeed this voluntary approach is an integral part of the system. Its legal source lies in the wide discretions conferred upon the reporter.

20.17 Some of the criticism of the Scottish system is directed not towards the hearings but at the way their decisions are implemented. This is the responsibility of the executive. This should not be confused with the

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46 See particularly Scottish Social Work Statistics 1972 (Edinburgh, H.M.S.O., 1974) reported [1974] The Scotsman, 3 July.

47 That does not necessarily mean that nothing happened.

48 See the address by H.M. Chief Inspector of Constabulary for Scotland to the Institute for the Study and Treatment of Delinquency reported [1971] The Scotsman, 15 November.

49 Idem.

50 See the comments thereon by the Reporter for Edinburgh reported idem.

continuing responsibility of the hearings for review of the supervision requirements made by the hearings in the first place. The range of available remedies has been regarded as unsatisfactory.[51] The types of person comprising the panels from whom the members of the hearings are selected has been criticised for being too narrow and thus unrepresentative.[52] Indeed the concept of probation or supervision can leave the wrong impression.[53] But overall the principal problems in the Scottish system appear to be, as in England, a lack of social workers and inadequate, overcrowded and unsuitable facilities.[54] Thus children are accommodated in institutions quite unsuitable for their current needs. For example, the absence of a place at an assessment centre has led to admission to prison[55] or being sent home.[56] Most importantly it has been suggested that the whole system might break down because of the insufficiency of List "D" schools.[57]

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51 Grant J.P., "Social Work in Scotland in 1971 - An Unsatisfactory Report" 1973 S.L.T. (News) 169; letter by Mr James Wilkie [1974] The Scotsman, 27 May; comments by a panel member reported [1974] The Scotsman, 16 March.

52 "Children's Panels: Are they really successful?" (1973) 18 Journal of the Law Society of Scotland 330: see also May and Smith, "Policy Administration and the Children's Panels: A case study in Social Administration" (1970) 2 Applied Social Studies 91.

53 See the address by the Director of Social Work at Paisley to the Institute for the Study and Treatment of Delinquency reported [1971] The Scotsman, 15 November.

54 "Children's Panels: Are they really successful?" (1973) 18 Journal of the Law Society of Scotland 330; Grant J.P., "Social Work in Scotland in 1971 - An Unsatisfactory Report" 1973 S.L.T. (News) 169.

55 Hume and Appleton, [1974] The Scotsman, 12 March.

56 [1974] The Scotsman, 12 June; [1974] Daily Telegraph, 12 July.

57 In May 1974 there was a waiting list of 600 for places at List "D" Schools: see [1974] The Scotsman, 31 May.

20.18 Many of these problems are just a reflection of others. Lack of adequate or skilled supervision perhaps indicates overworked or undertrained social workers. Unsuitable detention suggests inadequate assessment centre places. Everything could be blamed on deficient resources, but, as in England, it is probably only part of the problem in Scotland. Indeed to some extent these shortages were anticipated when Part III of the 1968 Act was about to be implemented.[58] Attempts have been made to solve some of these resource problems[59] but apparently without much success.[60]

20.19 Both England and Scotland suffer from insufficient professional social workers.[61] The difficulties in Scotland were probably exacerbated by the incorporation of probation functions in those of the local authority social work departments.[62] This may have overstretched the profession to the disadvantage of probation.[63] The general criticisms are reminiscent of those in England;

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58 Davidson, "Children's Panels: when ideals and reality clash" [1971] The Scotsman, 6 April: see particularly the comments there attributed to the Chief Adviser on Social Work with the Social Work Services Group of the Scottish Education Department.

59 The proposed annual development of these services, idem; subsequent attempts to ameliorate the situation, [1974] The Scotsman, 10 and 23 September.

60 E.g. continuing pressure in Glasgow [1973] The Scotsman, 23 March and from the Scottish Labour Women's Advisory Council [1974] Edinburgh Evening News, 14 January.

61 "Children's Panels: Are they really successful?" (1973) 18 Journal of the Law Society of Scotland 330; Grant J.P., "Social Work in Scotland in 1971 - An Unsatisfactory Report" 1973 S.L.T. (News) 169; Geddes, "Expertise in Short Supply" [1973] The Scotsman, 31 January.

62 Geddes, "Where probation is failing" [1973] The Scotsman, 30 January, particularly the comments attributed there to Sheriff Aikman Smith.

63 According to the Sheriff's Association at least.

lack of experience and maturity of the social worker; an unbalanced approach; too much sympathy for the offender.[64] The result has been general suspicion of supervision as a remedy. It would be unfortunate if supervision as a remedy were to acquire such a reputation, not for its own sake but because of a temporary lack of expertise.

20.20 That comment probably also applies to the system generally as a result of the inadequate and unsuitable accommodation available. The provision of adequate and suitable accommodation is a problem, even if the necessary money were to be made available, for nobody will be able to predict precisely what will be required. The legislation, as one would expect, gives no detailed help. Section 59(1) of the 1968 Act states that "It shall be the duty of a local authority to provide and maintain such residential and other establishments as may be required for their function under this Act or arrange for the provision of such establishments."[65] Such a duty is largely unenforceable. The matter thus rests in the discretion of the local authority or at least of the local authority in conjunction with the Secretary of State.[66]

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64 Geddes, "Where probation is failing" [1973] The Scotsman, 30 January.

65 The duty to provide staff is similarly drafted. Section 3(7) of the 1968 Act provides: "A local authority shall secure the provision of adequate staff for assisting the director of social work in the performance of his functions".

66 When the provision of money, by way of grant or loan, is involved, as it inevitably will be.

20.21 The major criticism has been in relation to List "D" schools. They are the successors, in practice but not in theory, to approved schools, for they represent the first stage in the removal of young offenders from their home environment. Such treatment would probably be the first choice for a young offender for whom supervision at home is not appropriate nor borstal training desirable. Pressure on these schools causes pressure on other residential establishments and so the problem becomes worse.[67] This is again under the legislation the responsibility of the executive. The hearings are thus in the difficult situation of having duties to perform but no control over the staff or facilities needed to carry out their decisions. No doubt they are unhappily but suitably constrained by these exigencies.

Section 4 - Child protection and child abuse

(a) The background

20.22 The main criticisms directed against the 1968 and 1969 Acts concern the practical limitations[68] imposed upon the relatively wide discretions conferred by statute. Little criticism, perhaps strangely, has been directed at the existence of the discretions;[69] relatively minor criticism at the way the discretions have been exercised, apart from the practical constraints mentioned. On the whole

67 Hume and Appleton, "Punishment fails to fit the Crime" [1974] The Scotsman, 12 March.
68 I.e. inadequate resources of various types.
69 It is however growing: para.20.3.

it is the treatment of the young offender which has been under attack from various quarters.[70] Most of the commentators take the view that children in need of care, apart from offenders who are in any event most significant statistically, are well served by the legislation.[71] Even if this is generally true, it is an oversimplification.

20.23 Young offenders enjoy the statutory privilege, if it is such, of a relatively wide judicial discretion supported by questionable professional and residential facilities.[72] The problems are thus political, not legal. They have a centrifugal dimension. On the other hand, in the case of children in need of care, the issues are less political, more legal. They are also more wide-ranging, more diffuse. They encroach upon different areas of law. The need for compulsory measures of care is only one side of the problem. The quality of parental care will often be in question[73] and that may also raise the problem of parental criminal liability. The state may thus intervene in one or more of several ways.

20.24 The diversity of state intervention is well established. How does it operate in practice? Although it is a difficult and non-legal question, it is worth

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70 Either as being too radical or too conservative.
71 E.g. Berlins and Wansell.
72 Political as the adjective of "policy".
73 Except where the parent is dead or mentally incapable.

considering some of the legal issues involved. Child abuse is the best example at the moment. The baby battering syndrome is only one aspect of child abuse. Parents do not necessarily restrain themselves from physically injuring or indeed killing their older children. The problem may be considered generally first of all and then by an analysis of the Maria Colwell case.

(b) Child abuse in general

(i) The nature of the problem

20.25 The physical abuse of children is not a new phenomenon.[74] Early societies[75] made deliberate use of infanticide for a number of purposes.[76] The industrialised society of Victorian Britain developed more oblique but equally effective methods of child abuse.[77] The earlier examination of the criminal law methods of protection of children indicated that neglect, assault and death were not uncommon.[78] Child abuse is thus not a twentieth century manifestation but it is only fairly recently that scientific investigation of it has seriously commenced. The first studies began in the U.S.A. and the phrase "baby battering syndrome" was created by Dr Henry Kempe of Colorado.[79] These American investigations

74 Renvoize, pp.50 and 51.
75 E.g. Babylonian, Egyptian, Greek, Roman.
76 Illegitimate children, unwanted children, too many children, neglected children, defective children, sacrifice, etc. See Howells J.G., Remember Maria (London, 1974), p.23 and Resnick, Modern Perspectives in Psycho-obstetrics (1972).
77 Working in mines and factories.
78 Chapters 11, 12 and 13.
79 See (1971) 1 Family Law 97.

of the 1960s had little or no impact in this country whose conscience was finally awakened in the early 1970s by the Maria Colwell case.

20.26 The criminal law punishes acts and behaviour of commission and omission towards children. The effects of the former are more easily discernible than those of the latter. Indeed Franklin has written:-

> "Positive harm reveals itself most clearly in physical injury but the negative harm of deprivation, whether it be of love or food or any other necessity, shocks us too when we recognise it."[80]

The relationship between abuse, neglect and battering is close. It has been informatively described as follows:-

> "A neglected child might be undernourished, insufficiently clothed, perhaps left uncared for hours at a time or even all night. He may never be physically attacked in any way but he is likely to suffer various accidents because nobody thinks to remove dangers out of his way. There may be real love between him and his family, or there may be absolute indifference on the part of the parents - either way the child's welfare is neglected.

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80 Franklin, p.1.

> The physical abuse of children has been defined by Dr D. Gil as 'non-accidental physical attack or physical injury, including minimal as well as fatal injury, inflicted upon children by persons caring for them'. Again, the quality of the parents' affection for their child is not relevant to the diagnosis of 'abuse'. A battered baby is a baby who is also physically abused by his parents or guardians, and whose injuries are often repeated. Nevertheless, his parents, who appear to love him, are generally over-fussy, over-anxious and over-possessive."[81]

20.27 Statistically such offences against children are not unimportant. The Chief Constable of the Lancashire Police Force has reported that for 1971 two-thirds of the murder inquiries by his force related to "battered baby" cases.[82] A survey of offences of criminal violence, cruelty and neglect against children in Lancashire[83] painted a "gloomy picture" of the position in 1972.[84] It has also been suggested that about five hundred children may die every year from parental battering

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81 Renvoize, pp.26 and 27.
82 See [1972] The Times, 1 April.
83 Mounsey J., "Offences of criminal violence, cruelty, and neglect against children in Lancashire" in Franklin, pp.127 to 130.
84 Ibid. at p.128.

and that some eleven thousand may be at risk.[85] But by 1973 the estimated number of children battered to death had risen to seven hundred every year and the estimated number of those merely battered could be as high as four thousand six hundred.[86] The overall picture has been quite dramatically painted by Kellmer Pringle:-

> "Every day, at least two children are known to be battered to death in this country; one more child at least suffers permanent brain injury, and a further 10 to 12 are treated in hospital for 'non-accidental injuries'."[87]

These, it should be stressed, are known minima. They represent what is probably "only the tip of the iceberg".[88]

20.28 The causes of the conduct giving rise to these alarming figures, whether sociological, psychological, environmental or whatever,[89] are not part of this analysis, although they are fundamental to any meaningful exercise in law reform. The ideal would be to prevent the offensive parental behaviour in the first place but the eradication of the risk of injury or death to young children has been stated to be impossible.[90] The solution

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85 Address by Dr M.A. Hall to the Royal Society of Health reported [1972] The Times, 26 April.
86 See [1973] The Sunday Times, 11 November.
87 Letter by Dr Mia Kellmer Pringle [1973] The Times, 26 November.
88 Mounsey, op.cit., at p.127; Dr Kellmer Pringle reported [1973] The Sunday Times, 9 December.
89 Renvoize, pp.34 to 51; Franklin, chapters 4 to 6.
90 Letter by the Director, Family Services Units [1973] The Sunday Times, 25 November.

may therefore be for the symptoms to be ascertained as soon as possible and action taken to prevent deterioration of the situation.

(ii) Criminal Law and the police

20.29 That comment is quite meaningless except in the context of the powers available to take action of one kind or another. The criminal prosecution of a parent is relevant only after the injury has been caused.[91] A sentence of detention will certainly prevent any subsequent injury caused by that parent during the period of detention. But according to Wolff[92] the deliberate break-up of the family by "imprisonment of the culpable member is prejudicial to the resolution of the difficulties" of the family.[93] Indeed it "adds yet further to the burden of people already in difficulties, without the least likelihood of being in any way remedial".[94] What about the impact on the child? Such enforced separation between parent and child may be detrimental to the child but the question, it is suggested, is whether such separation is more or less detrimental than the risk of repetition of the offence. Much will depend on the nature and extent of that risk and the possibility of its being reduced by

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91 Either directly for the purpose of the prosecution or indirectly as evidence of the commission of an offence in subsequent care proceedings. The importance of a conviction for the latter purpose should not be overlooked.

92 Wolff S., Children under Stress (Pelican, 1973).

93 Ibid., p.209.

94 Idem.

careful and continuous supervision of the family. The issues, even in legal terms, are both complex and difficult.

20.30 Although the criminal law may play a very minor part in child protection, it would nevertheless be unwise to discount it altogether. The decision of the court on the sentence of the parent is probably no more important than the original involvement of the police and the consequent investigation which may also cause concern to the family and through it the child. Both, it must be stressed, are largely discretionary decisions. Child abuse in its various aspects constitutes one or more offences. Their occurrence must be reported to the police. This, however, does not often or even normally happen.[95] The caring professions seem to be suspicious of the police and of the way they handle their investigations, possibly to the disadvantage of the child.[96] The police in turn are critical of the social work profession.[97] It is an area of dispute and controversy. But even if there is evidence to support a prosecution, one will not necessarily be brought. Indeed the impression is that only a very small proportion of prosecutable parents are charged.[98]

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95 See Collie J., "The Police Role" in Franklin, pp.123-125; Renvoize, chapter 6.

96 Renvoize, chapters 4 and 5; N.S.P.C.C. Report, pp.106-107.

97 In his address to the Police Superintendents' Association of England and Wales Chief Superintendent Trussler said that a number of battered children cases were kept from police attention "simply because the social services are at pains to avoid us knowing": [1974] The Scotsman, 2 October. In reply the President of the Association of Directors of Social Service indicated that their policy was not to avoid prosecution but to seek co-ordination between the various services: [1974] The Scotsman, 3 October.

98 Renvoize, p.122; study by Smith, Hanson and Noble reported [1973] The Scotsman, 16 November.

20.31 There are thus problems of police involvement in these offences. But, it is suggested, where there is the possibility of a crime having been committed, it must be investigated. Otherwise the criminality of the conduct is otiose. The problem is to devise the best way to do so, for ill-timed police interrogation may defeat the purpose of the exercise.[99] There is no necessity for the police as such to be the investigating body.[1] Perhaps a special department of the police or a body not within the police establishment should have this investigative function. Again there is no reason why the decision to prosecute must rest with the police. In Scotland, for example, the Procurator-Fiscal could ask for the advice of the reporter to the children's hearings, of the social work department of the local authority or of the medical or other professions involved. In a sense this is analogous to making formal and perhaps compulsory the case conference[2] method already adopted in some places.

(iii) Civil remedies and procedures

20.32 A decision on prosecution is likely to be affected by a review of the alternatives.[3] As they are likely to be within the competence of the local authority or the

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99 See "Battered babies" 1974 Criminal Law Review 629.

1 The criticisms of the role of the criminal law in (1971) 1 Family Law 98 seem to imply that the police are concerned only with convictions and punishment. This clearly is not so, particularly when children are involved.

2 Renvoize, pp.119-123; Franklin, Appendix II; "Battered babies" 1974 Criminal Law Review 629.

3 Assuming that the police exercise their discretion and do not prosecute, in England at least, as a matter of course.

reporter and the children's hearings, that is further reason for collaboration at the beginning of the investigation. These alternatives are either emergency remedies or considered treatment. What are they? The most immediate remedy is detention by a police constable in a place of safety.[4] It has been suggested[5] that this power is wide enough to allow the constable to take the child to hospital, where, for example, the parent opposes treatment in hospital or wishes to remove his child already in hospital. This power, however effective, places great confidence in the judgment of the individual constable. The approach of some police forces however is unequivocal: "It is always our approach that if we see a child in need of assistance, who is being cruelly treated, we don't hesitate. We take that child away to a place of safety".[6] A place of safety order made inter alia by a justice of the peace.[7] transfers the responsibility from the individual to the court but the procedure involved renders it a less immediate remedy. That is also true of a warrant under the Criminal Procedure (Scotland) Act 1975. But such procedures might be useful as a result of a prior case conference.

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4 Children and Young Persons Act 1969, s.28(2); Social Work (Scotland) Act 1968, s.37(2) as substituted by Children Act 1975, s.83; Criminal Procedure (Scotland) Act 1975 (1975 c.21), ss.14 and 323. See generally Clive E.M., "Getting children out of dangerous homes" 1976 S.L.T. (News) 201 at pp.201 to 203; N.S.P.C.C. Report, p.109.

5 "Battered babies" 1974 Criminal Law Review 629.

6 A comment to the conference of the Police Superintendents' Association of England and Wales by Chief Superintendent Vickers reported [1974] The Scotsman, 2 October.

7 Children and Young Persons Act 1969, s.28(1); Social Work (Scotland) Act 1968, s.37(2).

20.33 The long-term solutions may be found either in care proceedings or compulsory measures of care or alternatively in the exercise of their various statutory functions by local authorities under section 2 of the Children Act 1948 or section 16 of the Social Work (Scotland) Act 1968.[8] One of the threshold requirements in relation to care proceedings in England is ill-treatment.[9] There is little doubt that baby battering falls within that description. Even if it did not, the circumstances would probably be covered by the avoidable prevention or neglect of the child's proper development.[10] The Scottish formula is different.[11] Ill-treatment as such is not a condition justifying compulsory measures of care. Reliance would have to be placed upon unnecessary suffering or serious impairment to health or development as a result of lack of parental care[12] or alternatively upon the commission by the parent of one of the scheduled offences.[13] This latter ground in Scotland thus links parental criminality directly with the need for compulsory measures of care. The test is the commission of an offence, not the conviction for such an offence. There would appear to be no need for a successful prosecution in the criminal court but that would clearly be the best evidence of the

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8 Generally see Graham-Hall J., "Court Proceedings" in Franklin, pp.136-138; Cavanagh W.E., "Battered children cases in the courts" in Franklin, pp.141 to 146; N.S.P.C.C. Report, pp.107 to 113, 117 and 118.

9 Children and Young Persons Act 1969, s.1(2)(a).

10 Idem.

11 Social Work (Scotland) Act 1968, s.32(2).

12 Ibid., s.32(2)(c).

13 Ibid., s.32(2)(d). The scheduled offences include those relevant to baby battering.

commission of an offence. In England, it should be recalled, the need of care or control must also be proved to the satisfaction of the juvenile court.[14] This would be little more than a formality in most cases of baby battering but in Scotland there is no such double requirement. Although the statutory formulae differ in England and Scotland, there is little doubt that in either system these proceedings are both competent and appropriate in baby battering cases.

20.34 There are technical problems surrounding such proceedings.[15] They are perhaps heightened when criminal proceedings against the parent are brought concurrently. The different standards of proof,[16] the proof of mens rea in relation to the alleged offences[17] but not the care proceedings, the proof of the second of the two requirements in English care proceedings,[18] the problem of professional witnesses,[19] the effect of the criminal proceedings on the care proceedings,[20] the difficulties in deciding what remedy is appropriate for the child[21] : all these issues are of practical concern and may affect the outcome of a case which is simple and straightforward on its merits. Technical legal expertise is probably as important to success as the justice of the case.

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14 Children and Young Persons Act 1969, s.1(2).
15 See particularly Cavanagh W.E., "Battered children cases in the courts" in Franklin, pp.142 to 146.
16 Care proceedings are not criminal.
17 The Children and Young Persons Act 1933, s.1(1) and the Children and Young Persons (Scotland) Act 1937, s.12(1) include the word "wilfully".
18 I.e. proof of the need of care or control.
19 Giving evidence of whether a care order is needed.
20 Particularly if the parent is imprisoned.
21 I.e. the whole issue of treatment.

20.35 Not all of these comments apply to the Scottish system. The position of the reporter, the possibility of closer co-operation between police, reporter and local authority and indeed the formula of the legislation may result in a more efficient machine to protect the children at risk from their parents. There is no guarantee of this.[22] The system merely allows for the possibility. Comments do not appear to have been directed towards the Scottish features of baby battering. It is thus impossible to argue whether the system in Scotland is more effective or not.

20.36 These procedural and evidential problems, particularly in England, have little or no relevance to the administrative powers of intervention conferred upon the local authorities. The problems of implementing sections 1 and 2 of the Children Act 1948 and sections 15 and 16 of the Social Work (Scotland) Act 1968 lie rather in the wording of the threshold requirements. Ill-treatment, cruelty, violence, or whatever form no part of the grounds for reception into care or for the assumption of parental rights.

20.37 The only ground for reception into care which could be relevant to baby battering, it is suggested, is where the child's "parents ... are ... prevented by reason of ...

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22 So does the English system. But the Scottish system, it is suggested, is more likely to have the desired effect.

any other circumstances from providing for his proper ... upbringing".[23] Intervention must, of course, also be necessary in the interests of the child.[24] The real difficulty is what is covered by "any other circumstances". The circumstances described in the preceding phrases of paragraph (b) of section 1(1) comprehend either physical or mental incapacity. Does this restrict the "other circumstances" to those ejusdem generis? If it does, it is difficult to include baby battering within the circumstances contemplated. If it does not, the argument would be that the parents by battering their child are not providing for his proper upbringing. But the word "prevention" in relation to parents is not apt to include baby battering under the circumstances contemplated. "Prevention" suggests some circumstances outwith the parents' control. Their own violence tends to go beyond that description. It is therefore suggested that a literal interpretation probably excludes baby battering from the circumstances prescribed by section 1(1) of the 1948 Act or section 15(1) of the 1968 Act. If a liberal interpretation were justified, which may be questionable in the absence of ambiguity, reliance could be placed upon the policy of the Act. This could justify extending the circumstances contemplated by the sections to include baby battering but that argument, it is suggested, is not strong.

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23 Children Act 1948 s.1(1)(b); Social Work (Scotland) Act 1968 s.15(1)(b). Note that in the Scottish provision "parent" is in the singular.

24 Ibid. ss.1(1)(c) and 15(1)(c).

20.38 These comments apply only to battering as the ground for reception into care. If a parent or both parents are sentenced to imprisonment for ill-treating their children or indeed for any other reason, the way is open for the child to be received into care. But in that case the ground would be imprisonment not child battering. Imprisonment, it is suggested, is an incapacity preventing the provision of parental care. Despite these comments, there seems no doubt that in practice local authorities do receive battered children into care under section 1 or 15.[25] The matter does not appear to have been judicially determined. Perhaps it may be wiser not to test it.

20.39 The threshold requirements of sections 2 and 16 of the 1948 and 1968 Acts, on the other hand, are wider and include as a ground for assumption of parental rights where the parent "is of such habits or mode of life as to be unfit to have the care of the child".[26] A parent given to battering his child clearly falls within that category. But that is of no avail to the child or the local authority. For sections 2 and 16 apply only to children in the care of the local authority under sections 1 and 15 respectively. It has been suggested in the previous paragraph that sections 1 and 15 may not apply to children battered by their parents. Equally, therefore, sections 2 and 16 would not so apply.

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25 Para.20.42, n. 31.
26 1948 Act, s.2(1)(b)(iv); 1968 Act, s.16(2)(d).

20.40 Statements have however been made which indicate or imply a contrary view. The Chairman of the Wrekin Juvenile Court has written:-

> "If the provisions of this section [section 2 of the 1948 Act] were automatically applied where suspected non-accidental injuries have occurred, the child becomes protected by the Juvenile Court and the onus of proving that they are proper people to care for this child lies with the parents."[27]

That would be true if section 2 were available in the first place. But it is not available in the case of "non-accidental injuries", if a child so suffering cannot be received into care. Perhaps Wrekin Juvenile Court thinks otherwise.

20.41 The difficulties of local authorities under section 1 of the 1948 Act also derive partly from doubts about its meaning. Is it unavailable unless the parents or guardians agree to their child being received into care? The answer lies in the relationship between subsections (1) and (3) in particular.[28] Even if section 1 is fundamentally consensual, that would not help the argument. First, on a practical plane, a child battering parent is unlikely to ask the local authority to receive his child into care.

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27 Letter [1973] The Sunday Times, 2 December.
28 Paras. 16.3 to 16.6.

In any event the local authority cannot pressure a parent into "agreeing".[29] Secondly, consent does not give the local authority power. The source of the authority's power is subsection (1). These requirements may not be satisfied in the case of child battering. A local authority may therefore be acting ultra vires in receiving a battered child into their care.[30]

20.42 These issues seem to have escaped attention in the examples given by Renvoize.[31] She quotes a Director of Social Services as saying that the child in question "was originally taken into care by the welfare department with the agreement of the mother and stepfather". He apparently continued: "When they demanded his return we had no real option because there appeared to be no evidence on which we could proceed to assume parental rights under the 1938 (sic) Children's Act".[32] He concluded that the 1969 Act would have been more effective. Ignoring the several technical

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29 Para. 16.3, n.10.

30 See Renvoize, p.72, founding upon a report from The Times of some unspecified date in 1972.

31 But there is evidence that local authorities do receive battered children into their care: N.S.P.C.C. Report, pp.117 and 118; a note on battered babies in (1972) 136 J.P. 369 where it is stated: "When a child is received into care the responsibility is with the local authority including deciding if and when the child should be restored to its parents. Then further supervision will be needed"; a statement in [1973] The Sunday Times, 11 November of the alternatives open where a battered child leaves hospital: they include being "taken into care at the parents' request to relieve the strain in a difficult family situation". The same point is made in Renvoize, p.90, who supports it by reference to Home Office analysis of reports from medical officers of health and children's officers. To some extent therefore there is official support for this practice.

32 Renvoize, p.72.

and interpretational inaccuracies in the Director's reported remarks, the point he makes is quite clear. But his whole argument is founded upon the assumption that section 1 of the 1948 Act is available in the case of battered children.

20.43 Much more ambivalent are the views of Drake[33] in her description of the local authority's role in relation to battered children. Two statements in particular are worth examining:-

> "By statute the local authority has the power to remove a child and perhaps to break up a family. The powers and duties of parents may be vested in the local authority."[34]

The sources of these powers are not quoted. But she appears to be referring in fairly clear terms to sections 1 and 2 of the 1948 Act. Later she writes:-

> "The responsibilities of the local authorites in the field of child care have developed extremely rapidly in the last twenty years so that there is now a framework of legislation which allows a social services department to develop a very comprehensive child care service, incorporating preventive, protective, treatment, care and rehabilitative functions for all children in trouble."[35]

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33 Drake F.M., "The position of the local authority" in Franklin, pp.85-94.
34 Ibid. at p.86.
35 Ibid. at p.88.

These functions as such are not so described in the legislation but it is possible to identify and accept the statutory source of the preventive,[36] treatment,[37] care[38] and rehabilitative[39] functions. But it is difficult to accept the protective function if its source is sections1 and 2 of the 1948 Act. Drake does not say so, but the implication is that sections 1 and 2 apply to battered children. Thus, whatever the legislation states, it seems that in practice local authorities do and are expected to receive battered children into their care and to assume parental rights in relation to such children.

20.44 It would seem therefore that statutory powers are available to reduce the risk of child battering. There can be no doubt about this under the Children and Young Persons Act 1969 and Part III of the Social Work (Scotland) Act 1968. Strictly perhaps local authorities are not themselves entitled to intervene administratively to remove a battered child from his parents. They appear to do so in practice. This is not to say that local authorities play no statutory part in the process. On the contrary, their part is vital, especially in England.

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36 Children and Young Persons Act 1963, s.1; Social Work (Scotland) Act 1968, s.12.

37 I.e. the remedies or orders available under the Children and Young Persons Act 1969, s.1(3) and the Social Work (Scotland) Act 1968, s.44.

38 Children and Young Persons Act 1969, s.1(2); Social Work (Scotland) Act 1968, s.32(2).

39 Probably part of the treatment function.

They instigate action before the juvenile court; they are responsible for gathering the information; they will probably be responsible, directly or indirectly, for implementing the decision of the court. In Scotland the local authority's collaboration with the reporter is equally important.

(c) Failings in the system: possible solutions

20.45 A glance at some of the cases shows that the machine can break down. Criticism tends to be levelled at the way the system works rather than at the technicalities of the law. A considerable number of institutions and an even larger number of people may be involved in any one case. The general medical practitioner, the hospital with the various persons within its structure, the social worker, supervisors, the police, the NSPCC, the school authorities: all may be affected.[40] An extremely good system of distributing and filing information would be needed to keep each person up-to-date with developments. What is particularly disturbing to the authorities is not that some cases of child battering may go unnoticed but that cases of which they are aware deteriorate and perhaps end in death. This happens despite the knowledge of the local authority. Some cases reflect mistakes by hospital authorities;[41] others errorsof judgment by local

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40 Apart from parents, guardians, step-parents, foster parents, relatives and so on.

41 Ralph [1973] The Sunday Times, 11 November; Child X [1973] The Sunday Times, 11 November; Pugh [1973] The Times, 18 December; Naseby [1974] The Times, 3 February.

authorities.[42] Inquiries tend to exonerate the parties involved in the decision-making process.[43] Blame is cast upon the system or lack of communication within it.

20.46 Any system of administration depends ultimately upon the staff involved. Greater efforts to eliminate child battering or at least to ascertain when it takes place and to attempt subsequent prevention require more and perhaps better staff. Social work resources, it has been seen, are probably already strained beyond an acceptable limit. Any attempt to grapple with the "battered baby scandal" will merely spread the resources even more thinly. The increase in the number of cases had already caused a crisis in the social services department in East Sussex, the authority involved in the Maria Colwell case.[44] If this is so, the solution lies with the central government in the allocation of funds for education, training and research in this area.

20.47 Apart from the resources question, if many of the problems are administrative, it requires only administration to attempt a solution. Some initiatives in this context have been taken. Lack of communication has frequently been stated to be the principal defect in the present system; in particular, lack of communication within the medical profession and between the medical profession and the social services.[45] More co-operation at this

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42 Bagnall [1973] The Sunday Times, 11 November: often the error of judgment involves returning the child to his parents from the care of foster parents.

43 See e.g. on the Bagnall case [1973] The Times, 26 February and on the Naseby case [1974] The Sunday Times, 16 June.

44 [1974] The Times, 15 October.

45 Jones, "The Battered Babies Scandal" [1973] The Sunday Times, 11 November.

level has thus been suggested. But as local health boards are responsible, the central government is in a position only to persuade and encourage. The same comment applies to local authorities. Thus early in 1974 the relevant Secretary of State indicated that "local councils and health boards will be asked to review their joint arrangements for dealing with battered-baby cases".[46] As a result of an investigation into the Ralph case,[47] the South Worcestershire Hospital Management Committee suggested that the problems of battered babies should be specifically drawn to the attention of nursing and junior medical staff. In particular, they recommended, "instructions to medical staff should be redrafted to be more specific about battered babies and ... more explicit instructions should be given on the method by which suspicion must be conveyed to the consultant in charge and the consultant paediatrician".[48] Ideally, it has been suggested,[49] parents should also be admitted to hospital to see whether it is truly a case of battering.

20.48 The only specifically Scottish suggestion to come to notice is eminently realistic. The Social Work Department of Lanark County Council introduced in 1974 a system whereby every general practitioner in the county was notified of two points of contact to whom he

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46 [1974] The Sunday Times, 27 January.
47 See [1973] The Times, 21 December.
48 Idem.
49 In an address to a conference on battered babies at Chester by Miss Jean Davies: see [1974] The Times, 26 November.

could report immediately any cases where children were suspected of being physically or emotionally abused or at risk. These contacts, a doctor and an assistant director of social work, could then arrange to have the children removed to a place of safety, with or without the consent of parents, or, in less extreme cases, to enlist the help of social workers for supervision.[50] Thus attempts have been made to investigate and act upon suspected cases of child battering within both branches of the medical profession.[51]

20.49 These administrative reforms, the significance of which should not be discounted merely because they are unspectacular, can be given effect within the present statutory framework. Two administrative reforms have been suggested which would probably require legislation to make them legally effective. The reporting of suspected cases of child abuse has been mandatory in most states in the U.S.A. since 1966.[52] This approach has never appealed to the British government,[53] although it has been urged upon it from time to time.[54] There is no reason at the moment why suspicions of child battering should not be reported to the local authority, the reporter or indeed the police. The legislation in fact contemplates this

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50 [1974] The Scotsman, 31 August.

51 Cf. the policies drawn up by a special inquiry following upon the Lockhart case where a girl of two died from neglect and starvation: they merely indicated a need to take extreme care and to take strong supervisory measures in relation to complaints about children: [1974] The Scotsman, 20 August.

52 Jones, "The Battered Babies Scandal" [1973] The Sunday Times, 11 November.

53 Idem.

54 E.g. letter by Kellmer Pringle [1973] The Times, 26 November; Renvoize as reported [1974] The Times, 30 May.

possibility. Lanark County Council officials urged the public to react in this way [55] but the apparent reluctance of the British public to do so is reflected in the view attributed to Judge Scott at Leeds Crown Court in December 1973 that it is not thought right to "sneak" in this way.[56] Such reluctance of the public, it is suggested, perhaps indicates a need for stronger official procedures.

20.50 The questions, however, are who is to report what to whom.[57] These, and other, questions have remained largely unanswered. Reporting is justified in terms of the child's best interests: as such, it represents a clear interference with parental rights. But, unless the duty were placed upon the public at large, it is difficult to see that it would achieve anything which could not be achieved by adopting appropriate administrative procedures within the relevant institution. If such a duty were created, there would be problems of enforcement, particularly if the duty were to arise if there were suspicions of child battering. It may therefore be more profitable to consider the source of the problem, the injuries to the child, rather than to become anxious about a failure to report what has a priori become a known fact anyway. Thus, despite the attractiveness of the suggestion, it is unlikely to be introduced in the present climate of opinion.

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55 [1974] The Scotsman, 31 August.
56 "Battered babies" 1974 Criminal Law Review 629.
57 Generally see Bevan H., "Should reporting be mandatory?" in Franklin, pp.133 and 134.

20.51 A related but potentially independent administrative reform which has been suggested, often in conjunction with mandatory reporting,[58] is the setting up of a register of battered children or children at risk. Mandatory reporting would probably be ineffective without such a register, but it seems that a register may be useful in the absence of mandatory reporting. Legislation would not be necessary unless the keeping of such a register were to be compulsory. The Department of Health and Social Security has now decided[59] to ask all health and social services authorities to open central registers of battered children and children suspected of being at risk. The two categories of children are to be carefully distinguished and the importance of preserving confidentiality[60] has been emphasised. A contact service has also been suggested.[61]

20.52 Of far greater significance, however, is the other judicial procedure intended as a protection for children, namely the provision of independent representation for the child in the courts.[62] This reform, regarded by Kellmer Pringle as "far-reaching", has been described by her in these words:-

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58 Renvoize, pp.189 and 190; NSPCC Report, p.211.
59 [1976] The Times, 7 February.
60 Particularly when the matter is being arranged administratively in the absence of legislation.
61 Possibly along the lines of the Lanark experiment: para.20.48.
62 See e.g. "Children's Advocate" (1974) 124 New Law Journal 838; Renvoize, pp.188 and 189; Jones, "The Battered Baby Scandal" [1973] The Sunday Times, 11 November.

> "A spokesman might be appointed for each victim - a child's advocate - who would regard the long-term interests of the child as paramount, thus counterbalancing the largely adult-centred stance of too many social workers, doctors and lawyers."[63]

This proposal, which seems to go beyond the purpose of an appointment of a guardian or curator ad litem in the adoption process,[64] is an implicit acknowledgement that interests as distinct from rights require channels of communication if not enforcement. It is the logical consequence of the child's interests being written into the fabric of the legislation in various ways. It is also recognition of a potential but probably not inevitable conflict between the interests of the various parties affected. What is strange is that it has taken so long for the proposal to receive active support and ultimately Parliamentary approval.[65]

20.53 The procedure is restricted to applications before the courts and children's hearings. Representation of the child's interest has always been a feature of the adoption process and sometimes in other judicial proceedings.[66] Administrative decision-making processes are different. They are supported by their own inquisitional

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63 Letter by Dr Kellmer Pringle [1973] The Times, 26 November: see also [1973] The Times, 7 December.
64 Bevan. pp. 353 to 365.
65 1948 Act, s.4B; 1968 Act, s.34A; 1969 Act, ss.32A and 32B: inserted by the Children Act 1975, ss.58, 66 and 64 respectively.
66 Para. 45.61.

powers and statute directs them to consider the child's interest. How important, on the other hand, is the idea for children's hearings? They have executive powers and are free from many of the usual judicial constraints. Hearings exercise only the dispositional function, while juvenile courts in England are also responsible for adjudication of the threshold requirements. It has never been suggested that the child's representative has a role to play only at the stage of adjudication. Indeed at that stage the child is more likely to receive procedural protection from the court itself. So, it is suggested, a representative of the child is likely to have an equally significant function at the dispositional stage of the process, when the future rather than the past is under consideration. Provision had already been made before 1975 for representation of children and their parents at children's hearings.[67] But such representation is not mandatory. Nor is separate representation for the child and his parents mandatory. This, it is suggested, was a defect in the Scottish procedure. The new provisions added in 1975 cure[68] some of these defects. Representation has not become mandatory in all cases. But it is available at both the adjudicative and dispositional stages. The

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67 Children's Hearings (Scotland) Rules 1971 (S.I. 1971 No. 492), r.11. It is interesting that r.11(3) provides for the exclusion of a representative if he persists in behaviour inter alia which is "likely to be detrimental to the interests of the child". The decision on the child's interests rests with the hearing not the representative.

68 Para. 20.52, n.65.

duty is merely to consider whether representation is necessary to safeguard the interests of the child. This is true in both jurisdictions. The decision lies ultimately with the court or the children's hearing.

20.54 Another reform intended to reduce the risk of child battering is the substantive counterpart of the appointment of a child's advocate. Although such an appointment is merely one of the mechanisms which render the child's interests more secure and more effective, it is important because the statutory formulae used in support of the child's interest are so vague and generalised that they give rise to interpretational discretion. It is thus possible for idiosyncratic views of what is best for the child to prevail. This is not to suggest that there can only be one view of what is best for the child. Far from it. The argument simply is that the extent of child battering could be reduced if a different approach to the child's welfare were adopted. This, unquestionably, is a controversial area. A number of people take the view that, if less attention were paid to the so-called "blood-tie" between child and parent, the powers conferred by statute could be more effectively utilized. Although there is an increasing amount of sociological and medical evidence on this matter, it is probably premature to claim the existence of any scientifically proved doctrine.[69] Even

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69 Para. 21.48, n.44.

if there were, would it be acceptable in the current statutory and judicial context?

20.55 It seems likely that the "blood-tie" thesis has lost ground in recent years.[70] It is indeed a strange argument for it is at the same time founded upon the welfare doctrine and represents a negation of it. It proceeds upon the basis that the child's best interests require him to remain under parental control, because parental care is best. No child would ever be removed from his parent on the strength of that view. It is perhaps fair to say that the evidence does not support the "blood-tie" argument. Its rejection has been dramatically articulated by Renvoize:-

> "Sentimental assumptions about parents' rights and natural ties must not be allowed to interfere with a decision which should be made by a committee sufficiently expert to be able to ensure as near as humanly possible that a mistake is not made. Such a decision should never be left in the hands of one or two people, whose prejudices or lack of experience may well result in the death of a child whose life ought to have been saved." [71]

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70 Paras. 21.42 to 21.45.
71 Renvoize, p.142.

Kellmer Pringle has developed a similar theme:-

> "A misplaced faith in the blood tie, and unjustified optimism about the chances of successfully treating the battering parent by casework or psychiatric methods, has placed many a child at risk of repeated injury."[72]

Warnings have, of course, been given of the danger of too great a reaction against the natural family.[73] But one of those closely associated with the Maria Colwell case has concluded that "the child's welfare must always come first. If the emotional stability of an adult must be put at risk in order to ensure the safety of a child, then this must be done."[74] The NSPCC also tends to the view that instinctual parent-child ties are illusory.[75] The outcome therefore has been a call for a shift from parents' rights to welfare, for greater restrictions on personal liberty and greater powers of entry into the home,[76] for less weight for the family and parents' rights, for emphasis upon parental duties and the welfare

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72 Letter by Dr Kellmer Pringle [1973] The Times, 26 November: see also Viewpoint [1972] The Times, 16 October.

73 Director of the National Council for One-Parent Families [1973] The Times, 7 December.

74 Letter by Miss Ann Turner [1974] The Sunday Times, 10 February.

75 "The Battered Baby Syndrome" (1971) 1 Family Law 98.

76 See address by Dr Sydney Brandon to a conference on battered babies in Manchester reported [1974] The Times, 27 November.

of the child.[77] Most of these objectives could have been achieved, if that were desirable, within the pre-1976 framework. But even current statutory formulae are no guarantee of success.

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77 See Dr David Owen's private member's Children's Bill of 1973 and 1974 and to some extent the public measure which later superseded these private measures, the Children Act 1975.

CHAPTER 21

THE MARIA COLWELL CASE

Section 1 - Introduction

21.1 There is probably no typical case of child battering, even from the legal point of view, although the local authority tends to feature in most cases. This is not surprising in the light of the statutory framework. So, too, one or more branches of the medical profession often play a part. This case is probably not unusual.[1] A thirteen month old baby was found to have a broken arm and six broken ribs. The mother was convicted of grievous bodily harm. The child was placed in the care of the local authority. After two months he was sent home. Five months later the mother's paramour was sent to prison for the manslaughter of the child. Chapman J. was critical of the local authority's decision to release the child from their care. Criticisms however are often made with the benefit of hindsight. It may not have been a wrong decision when it was made. The problem thrown up by the case was how the decision of local authorities should be reviewed.[2] The better solution, it is argued, is to ensure that a reasonable decision is made in the first place.

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1 (1972) 136 J.P. 384.

2 Idem.

21.2 Local authorities often run into problems with foster children. They have an interest in two families: the foster parents, the natural parents and the child in the middle. In the case of Richard Clark[3] the local authority attracted substantial criticism. A married couple, the Duncans, admitted cruelty and unnaturally treating Richard Clark, aged three, who had been in their care for ten weeks. It is not clear how the child was given into their care. One report states that Richard's mother was admitted to hospital and that "the Social Work Department arranged for the two children [Richard and his stepbrother] to live with the Duncans."[4] The local authority is later reported to have stated that the child was not in the care of the council and at all times remained in the legal custody of his father and that the child had not been placed by the social work department in the care of the Duncans.[5] Two other facts are particularly relevant. In 1969 the Duncans had been convicted of neglecting their own children.[6] In 1974 Mrs Duncan was under the supervision of the Social Work Department after having been convicted of stabbing her husband.[7] As a result of their ill-treatment of Richard Clark, Duncan was sent to prison for two years and his wife for four years.[8] The local authority themselves were concerned about the case[9] but an inquiry was ordered by the Secretary of State.[10] It seems well justified.

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3 Known journalistically as the "vegetable boy" case: [1974] The Scotsman, 17 July, The Times, 18 July.
4 [1974] The Scotsman, 17 July.
5 [1974] The Scotsman, 19 July.
6 [1974] The Scotsman, 17 July.
7 Idem.
8 [1974] The Times, 18 July.
9 They proposed their own independent inquiry: [1974] The Scotsman, 19 July.
10 [1974] The Times, 24 July. It opened on 12 September.

21.3 Child battering involves a complex of legal issues. Criminal law and civil law are closely enmeshed. The state as prosecutor of parents or protector of children has different roles to perform. The private responsibilities of parents inter se and between parents and foster parents form a background to the legal issue. The administrative framework within which the system operates is significant, more in the case of failure than of compliance. Finally, and perhaps most importantly for present purposes, the statutory formulae may provide the excuse for error of judgment. And judgment is the foundation of the issue.

21.4 It may not be necessary to go beyond the two cases briefly examined in this section to understand the force of these complexities. But there can be no better example than the case of Maria Colwell. Much has been written about it.[11] But the results of two pieces of research are particularly significant. The report of the official inquiry[12] tends to consider the details of the administrative procedures. Howells' study[13] raises what is

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11 The official inquiry was fully reported in the press between 9 October 1973 and 7 December 1973 when the inquiry was hearing evidence and in September 1974 after the report was published on 4 September 1974. Detailed comment and reaction came later: see e.g. "Protecting the Young" (1974) 124 New Law Journal 837; "Violence and Children" (1974) 118 Solicitor's Journal 634; "Battered Babies" 1974 Criminal Law Review 629.

12 Report of the Committee of Inquiry into the care and supervision provided by local authorities and other agencies in relation to Maria Colwell and the co-ordination between them (London, H.M.S.O., 1974) here referred to as "the Report". Any reference in this chapter to "paragraph", abbreviated "par" to distinguish it from other references, is a reference to a paragraph of the Report unless otherwise stated.

13 Howells J.G., Remember Maria (London, 1974).

the more fundamental issue, namely what principles are relevant to the proper exercise of statutory discretion.[14]

Section 2 - The Report

(a) General

21.5 A perusal of the Report demonstrates the complexity of the case on two levels; the difficult questions of doctrine concerning the welfare of children; and the day-to-day administration of the system,[15] including the importance of answering the telephone, making notes, passing on information, discussion with supervisors, visiting, asking questions and so on. These relatively mundane matters were examined thoroughly by the committee of inquiry.[16] The members of the committee talked, somewhat avidly perhaps, in terms of co-operation, co-ordination, administration and the "system".[17]

21.6 One member of the Committee[18] added an analysis[19] which in many ways was sympathetic not just to the social workers who probably bore the brunt of the criticisms for the failings in the system but in almost all directions. This indicates, it is suggested, the complexity of the issues on a purely personal

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14 He does not state the problem in those words. But these words, it is suggested, set the legal context of the issues identified by him. He discussed "the nature of loving care", and "the evil of no-separation".

15 Paras. 70 to 148 in particular.

16 Report, chapter 3.

17 It was concluded that many individual mistakes took place but they "were either the result of, or were contributed to, by inefficient systems operating in several different fields, notably training, administration, planning, liaison and supervision:" para. 241. The overall impression was that "while individuals made mistakes it was "the system", using the word in the widest sense, which failed her:" para. 242.

18 Miss Stevenson.

19 Report, chapter 5.

basis. Her analysis was couched in terms of separation, anxiety, disturbance, trauma. She did this not in terms of abstract theory but in terms directly related to the circumstances in question. Miss Stevenson's analysis is thus closer to that of Howells. But the findings of the inquiry found their practical effect more in the review of the procedures and machinery of the system than in terms of doctrine.[20]

21.7 It was not part of the inquiry's purpose to consider either the decisions of the juvenile court[21] or the law in general. Reference was made from time to time to the legal background against which the social workers in particular had to reach their decisions. This provides first-hand evidence of the views of the local authorities of the various statutes. It is thus worthy of examination for that reason alone.

(b) The legal events

21.8 The changes brought about in the first few years of Maria's life, each the result of a decision with distinctive legal consequences, probably laid the foundation for her subsequent difficulties. She was herself in no way responsible. Probably none of the individuals was. They were all perhaps the victims of circumstance and the subject of

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20 Certain provisions in the Children Act 1975: para. 20.52.
21 Par. 225.

failures in the system.[22] The law thus had a substantial but inarticulated impact upon Maria's welfare.

21.9 The death of Maria's father resulted, as a consequence of her mother's inadequacies, in the neglect of Maria and her older brothers and sisters.[23] Maria was only four months old. In August 1965 she was handed over by her mother to Mrs Cooper, Maria's mother's sister-in-law.[24] This amounted to no more than a voluntary delegation of parental responsibilities. A few months later Maria's four brothers and sisters were removed from their mother's care under a place of safety order made by the juvenile court[25] and their care was subsequently committed to the local authority by the court.[26]

21.10 In the following June, apparently when Maria's mother and her future husband, Kepple, intended to set up house together, Maria was returned to her mother's care.[27] But as a consequence of housing problems, that arrangement was unsuccessful.[28] Maria was left, not with the Coopers, but with another woman. These events were within the knowledge of the local inspector of the NSPCC. As a result of his concern about this placement, a place of safety order[29] was obtained and Maria

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22 Pars. 240 to 242.
23 Par. 13.
24 Par. 14.
25 Children and Young Person Act 1933 (23 & 24 Geo. 5, c. 12), ss. 40 and 67. The 1969 Act had not been enacted at that stage of the events.
26 Ibid., s. 62; the narrative is set out in pars. 14 and 15 of the Report.
27 Par. 15.
28 Par. 16.
29 1933 Act, ss. 40 and 67.

returned unofficially to the Coopers.[30] In August Maria was placed in the care of the local authority[31] who, after contemplating placing Maria in a residential nursery,[32] boarded her out with the Coopers.[33]

21.11 This remained the legal position until November 1971 when the care order was discharged[34] and a supervision order[35] made in its place.[36] No further legal changes took place before Maria died in January 1973. The care order had been discharged on the application of Maria's mother.[37] The local authority would not themselves have taken the initiative in this matter. Her mother had been pressing for discharge of the order for some time.[38] The local authority, somewhat reluctantly it appears, agreed not to oppose the application[39] and attempts were made over a period of time to increase contact between Maria and her mother and stepfather. This was not an easy time for Maria and she reacted against her mother on occasions but seemed more inclined to accept her mother the greater the contact between them. The period before discharge of the care order was difficult also for the professionals involved.[40] After discharge of the order the story was of continuous and probably increasing neglect and abuse.[41] Despite neighbour's complaints

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30 Par. 16. "Unofficially" because the placement was made by the NSPCC, a procedure criticised by Miss Stevenson: par. 254.
31 1933 Act, s. 62. 32 Par. 16.
33 Children Act 1948 (11 & 12 Geo. 6, c. 43), s. 13(1).
34 Children and Young Persons Act 1969 (1969 c. 54), s. 21(1) which by then was in force: see the Children and Young Persons Act 1969 (Commencement No. 3) Order 1970 (S.I. 1970 No. 1498).
35 Ibid., ss. 1(3)(b) and 11. 36 Pars. 67 to 70. 37 Par. 67.
38 Par. 31. 39 Par. 67. 40 Pars. 31 to 66.
41 Pars. 76 to 146.

and other evidence that all was not well, the local authority did not intervene to take action. There was inadequate supervision.[42]

(c) The legal rules

(i) The foster parents

21.12 What did the parties conceive their legal powers and duties to be during these events? There are probably four legal aspects of significance. In relation to the time when Maria was removed by her mother from the Coopers in June 1966, the Report stated that "she was perfectly entitled to do so since the arrangement ... was an entirely private and voluntary one".[43] Maria was clearly not a foster child vis-a-vis the Coopers for the purposes of the Children Act 1958[44] as Mrs Cooper was Maria's aunt. The local authority had no locus to intervene. The Coopers were thus "unofficial" foster parents.

21.13 The Report however stated that Maria's mother was "entitled"[45] to remove her. This represents a judgment on the merits of the case rather than a statement of legal right. Although the matter has not always been free from doubt,[46] a parent may be unsuccessful in a custody action in a competition between the parent and any non-parental custodian.[47]

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42 Par. 243.
43 Par. 15.
44 6 & 7 Eliz. 2, c. 65, s. 2(3)(a).
45 Par. 15.
46 Because of the strength of the paternal right.
47 E.g. Custody of Children Act 1891 (54 & 55 Vict, c. 3), ss. 1 and 3.

Unquestionably a parent has a right to apply to the court for an order for custody. But the court may find against the parent. If, for example, the Coopers had declined to comply with Maria's mother's request and so retained physical possession of Maria, her mother would have been forced to seek enforcement of her inchoate right before the court. In that event the court would have been obliged to regard Maria's welfare "as the first and paramount consideration".[48] It is impossible to predict how a court would have reacted to the circumstances pertaining in June 1966 but Maria's mother may have succeeded. The Report does not contain sufficient information to come to any reasonable conclusion.[49] However the main factors against Maria's mother would have been her past history as a mother and the circumstances, albeit slightly peripheral, of her other children.[50] What is clear is the less than accurate reference in the Report to Maria's mother's "entitlement". That view represents, if anything, what has been called the static position. The dynamic position is the important one.

21.14 What would be the position once the Coopers had become Maria's official foster parents after the juvenile court had placed Maria in the care of the local authority who had subsequently boarded her out with them? Maria would not be

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48 Guardianship of Minors Act 1971 (1971 s. 3), s. 1.

49 The view however has been expressed in a letter by the Secretary of the Association of Foster Parents that if the Coopers "had been well advised legally, Maria's death could have been avoided." [1973] The Sunday Times, 18 November.

50 Four were in care; two resided with their grandmother; two lived with foster parents: par. 14.

a foster child within the meaning of the Children Act 1958 but a relationship would exist between Maria's mother and the local authority and between the local authority and the Coopers. This situation is more complicated because of the superstructure of statutory functions imposed upon the static rules affecting the parent. The Report talked of the foster parents "having no rights, except perhaps in rare cases that of making the child a ward of court and allowing the High Court to decide what is best in the interest of the child".[51] Later in the Report this was qualified by reference to the reluctance of the court to exercise its undoubted jurisdiction where the local authority was properly carrying out its statutory functions.[52] The point was made however whether this information ought to have been given to the foster parents. The answer presumably would be to tell the foster parents to seek legal advice. In Maria's case two social workers told the Coopers that "there was no possibility of resisting the return of Maria".[53] Social workers, it is thought, should decline from giving advice of this nature, particularly when it is so patently inaccurate.

21.15 Unravelling the relationship of parent, foster parent and local authority can be acutely difficult. Foster parents, it may be said with some confidence, had no substantive rights.[54] Indeed that may well be true even of parents in the

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51 Par. 35. 52 Par. 229. 53 Idem.

54 The Children Act 1975 has probably not changed that, although it has probably made it easier for them to protect their interest.

context of a dynamic as distinct from a static situation. On the other hand foster parents had, and still have, an interest which is enforceable at least to the extent of instituting wardship proceedings. Theirs is also an interest which could scarcely be ignored by the court when it comes to determine the child's best interests.[55] Even if the foster parent's interest is not one which may be pursued from their point of view, it is clearly one relevant to a determination of the issue from the child's point of view. These are not easy matters. Their solution is rendered no easier by the functions conferred by statute upon the local authority.

(ii) The application to discharge the care order.

21.16 The decision of the juvenile court to substitute a supervision order for the care order proved vital for Maria. It was made on the application of Maria's mother.[56] The local authority did not oppose the application but suggested supervision. The court came to its decision on the evidence of Maria's mother and the social worker's report.[57] According to the committee this vital decision was taken "on the nod" and "the case for the opposition as it were, wholly by default."[58] The Coopers' interest was not represented. They received no notice of the hearing.[59]

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55 Par. 228. 56 Par. 67. 57 Idem. 58 Par. 226.

59 Par. 228. They were not entitled to notice of the hearing.

21.17 The application for discharge was made, presumably,[60] under section 21(2) of the Children and Young Persons Act 1969. That subsection provides that "if it appears to a juvenile court, on the application of a local authority to whose care a person is committed by a care order or on the application of that person, that it is appropriate to discharge the order, the Court may discharge it ..." There can be no question that this confers a considerable discretion upon the court.[61] Prima facie only the local authority or the person in care may apply.[62] However in terms of section 70(2) of the 1969 Act the power to apply conferred upon a child or young person may also be exercised by his parent or guardian "on his behalf". Most commentators merely point out that parents may apply.[63] Their right however is unquestionably representative. Thus when a parent applies for the discharge of a care order, as in the case of Maria's mother, that application is not designed to protect or promote the parent's interest. It is intended, it is suggested, to enable the court to review the status quo and decide whether discharge is appropriate in the child's interests.[64] This is not directly written into section 21(2) of the 1969 Act. But it is the consequence of section 70(2).

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60 The Report does not state anywhere the statutory authority for the various decisions.

61 By virtue of the words "appears" and "appropriate".

62 I.e. in terms of s. 21(2) alone.

63 E.g. Clarke Hall & Morrison, p. 164: Bevan, p. 153; Watson and Austin, p. 124.

64 The emphasised words form no part of section 21(2) but they are implied, it is suggested, by the representative nature of the application.

21.18 The committee made no reference to this point as such.[65] It would not matter if the interests of the parent and child were, if not identical, at least not in conflict. But the nature of the jurisdiction almost predicates such a conflict of interest. This is impliedly recognised by the comment of the committee that an independent report should always be available:[66] independent, that is, of the parents and of the local authority, for there may be no necessary community of interest between the local authority and the child. Indeed in Maria's case the local authority was more or less forced to attempt a reconciliation between Maria and her mother by the pressure exerted by her mother. No doubt the report prepared by the local authority social worker attempted to be fair and reasonable,[67] but, as the committee pointed out,[68] the social worker would probably be prompted, albeit unconsciously, by a desire to support the local authority's decision. Thus procedural technicalities can be of considerable significance. But the importance of the representative nature of the application of Maria's mother seems to have escaped the notice both of the court and of the inquiry. As a consequence, it is suggested, the court may have failed properly to exercise its statutory discretion. At least there is no evidence that it did so properly.

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65 They did however suggest the need for an independent report: par. 227.
66 Par. 227.
67 As the committee accepted: par. 227.
68 Para. 227.

(iii) The criteria relevant to discharging the care order.

21.19 There is more to exercising a discretion than observing procedural formalities. Section 21(2) of the 1969 Act does not specify how the discretion is to be exercised. The only criterion is "appropriate". Although the decision rests with the juvenile court, the local authority, having the care of the child, is directly involved. Any decision they make, either to apply for a discharge or not, whether to support another's application or not, is regulated by section 12 of the Children Act 1948. Their decision therefore had to be taken "so as to further [the child's] best interests".[69] This means in practice that the child's interest and the decisions of the local authority on the child's interests should be consistent but this may not be so in practice. In Maria's case, however, the committee of inquiry were satisfied that this was the local authority's approach to the question of attempting to reconcile Maria and her mother.[70]

21.20 The approach of the juvenile court on the other hand is differently prescribed. There seems little doubt that section 44(1) of the Children and Young Persons Act 1933[71] applies to an application for discharge under section 21(2) of the 1969 Act.[72] The only argument against that conclusion is that the

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69 Children Act 1948, s. 12(1): now superseded: paras.16.16 to 17.15.
70 Par. 38. 71 Paras. 18.22 to 18.26.
72 This assumes that the various Children and Young Persons Acts in England constitute a single code: an assumption difficult to deny.

child is not "brought" before the court,[73] as, in a sense, an application for discharge is a continuation of the earlier proceedings. Equally, it is possible to consider the child as being "brought" before the court again to consider the application. This view is preferable. The court is thus under a duty to "have regard to the welfare of the child", "in a proper case take steps for removing him from undesirable surroundings" and take steps "for securing that proper provision is made for his education and training." It would be difficult for the court in Maria's case to have given effect to these duties in the absence of evidence on the child's welfare, especially from an independent source.

21.21 The committee explained the legal background to the court's decision in these words:-

> "It was put to us and we accept that there was a strong presumption that the magistrates would return a child to the parent once the parent's fitness was proved unless it could clearly be shown not to be in the best interests of the child."[74]

Miss Stevenson put the point more strongly when she commented on the legal framework "that a parent had a right to reclaim a child if he or she could prove themselves to be 'fit persons ...".[75] In a later part of her analysis she reiterated the view

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73 S. 44(1) of the 1933 Act uses "brought".

74 Par. 42. This was specifically accepted by Miss Stevenson in par. 314, but she added a further comment: see the later part of this para.

75 Par. 255.

attributed to her inquiry colleagues and added:-

> "All experienced social workers in child care are aware that until very recently the courts have sought to balance the welfare of the child with the rights of natural parents and it has not always been clear that the former is paramount."[76]

Miss Stevenson's colleagues also at one stage of their discussion commented on the possibility of Maria's welfare being "of paramount importance."[77]

21.22 These various statements may be crystallised in three questions:-

1. is there either a presumption or a right that a child will be returned to his parents from the care of the local authority once the parent's fitness has been proved, unless this is not in the child's best interests?
2. is the court obliged to balance the welfare of the child and the rights of the natural parents?
3. is the child's welfare paramount?

The answer to the first question is clear. There is nothing in the legislation to indicate such a presumption or right. There are two aspects to this problem. The local authority is empowered to allow a child in their care to be under the charge

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76 Par. 314.

77 Par. 228.

and control inter alia of a parent,[78] or, in other words, to delegate care and control to the parent in the same way as a parent may do in normal circumstances. The parent could therefore argue that he is at some stage fit to have the child "returned" in this sense. But section 13(2) confers no right upon the parent. It is a matter for the local authority, guided, as always, by the principle in section 12(1) of the Children Act 1948. Even if the power were exercised, the child would remain in the care of the local authority. His status is unchanged. The parents do not thereby accede to any rights. This local authority power is available only in respect of a child in their care. Section 13(2) thus does not deal with the question whether a care order should be terminated.

21.23 Section 1(3) of the Children Act 1948 also governs the relationship between local authority and parent. Its meaning has been examined.[79] But it only applies where the child has been received into care under section 1(1) of the 1948 Act. Section 1(3) may or may not be indicative of a presumption or right along the lines claimed,[80] but it is not relevant to the discharge of a care order. Thus neither section 1(3) nor section 13(2), the only conceivable statutory supports, applies to the issue under consideration, although they do in some respects deal with children in care.

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78 Children Act 1948, s. 13(2).

79 Paras. 16.3 and 16.7 to 16.15.

80 I.e. by the committee of inquiry at par. 42 of their Report: para. 21.21.

21.24 The second aspect of the first question is whether, given the absence of statutory authority for the proposition, the committee's view is permissible as a matter of policy within the appropriate statutory framework. This turns upon the construction of section 21(2) of the Children and Young Persons Act 1969 and section 44(1) of the Children and Young Persons Act 1933. Under section 21(2) the onus is on the applicant to prove that "it is appropriate to discharge the order." In deciding whether it is so appropriate the court is required to have regard inter alia to the welfare of the child.[81]

21.25 There is, it is suggested, a further implied requirement. To produce arguments and evidence to support the discharge of the order probably means proving that the grounds for making the order no longer exists. This, however, is not entirely sensible. There are, it will be recalled, two types of threshold requirements in section 1(2) of the 1969 Act: those in paragraphs (a) to (f) which relate to a state of affairs existing when the order is made; the "care or control" requirement which projects inquiries into the future. Once the order has been made, the paragraphed grounds, it is suggested, become irrelevant for the purposes of discharge, for the mere taking of the child into care in the physical sense removes the source of the parental defect which gave rise to concern.

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81 Children and Young Persons Act 1933, s. 44(1).

21.26 Take, for example, Maria's case. Neglect was stated to be the ground for committing her to the care of the local authority.[82] Once in care, Maria no longer suffered from such neglect which had therefore become of historical significance only. It is thus profitless to ask whether, in contemplation of an application for discharge, such neglect no longer exists. Further, since the grounds are drafted in terms of the child not the parent, it is equally senseless to ask whether the parent is now careful rather than neglectful.[83]

21.27 On the basis of this argument the grounds for making the order, with the once exception,[84] disappear as soon as the order is effected. The "care or control" requirement thus becomes the sole test relevant at the stage of potential discharge. In expanded form the question is whether the child continues to be in need of care or control which he is unlikely to receive unless an order under section 1 remains in force.[85] The applicant must prove that this is not so to justify a discharge of the order. But even if the applicant satisfies the court on this point, which thus takes on the character of an unarticulated threshold requirement, the applicant is not guaranteed success. For the court then must go on to consider whether to make such an order is appropriate having regard to the child's welfare. There is a further point where the

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82 Par. 232. Note that neglect as such was not a ground specified in s. 2 of the Children and Young Persons Act 1963, but it probably fell within s. 2(2)(b) of that Act. Neglect has on the other hand been included in section 1(2)(a) of the 1969 Act.

83 These comments do not apply to the "offence" condition: it is altogether different.

84 I.e. the "care or control" requirement.

85 Not necessarily a care order. A supervision order may be substituted, as in Maria's case: see s. 21(2) of the 1969 Act.

application is by a representative: whether to discharge the order is in the child's interests.[86] If that is a requirement, it is clearly positive.

21.28 It is inaccurate to speak of a parent's "right" in this context. Nor, it is suggested, is there any "presumption" one way or the other. Indeed to adopt a presumptive approach or one founded on "rights" is tantamount to declining to exercise the discretion conferred by the statute. Whether to adopt a presumptive approach conflicts with the duty to have regard to the child's welfare is discussed later in a wider context.[87] It is wrong therefore to talk in terms of rights or presumptions in the present statutory context. The proper approach is to ask the correct questions. If the analysis in the preceding paragraphs is correct, these questions are:-

1. is the child still in need of care or control?

2. is the child unlikely to receive the necessary care and control other than under the Act?

These two questions are linked and probably are inseparable. They come close to asking, as the committee attributed to the magistrates,[88] whether the parent was fit to resume parental responsibilities. The two approaches, although similar, are probably not identical.[89]

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86 Para. 21.17. 87 Paras. 40.25 and 41.74. 88 Para. 42.
89 E.g. as Bevan, p. 25 has pointed out, s. 1 of the 1969 Act makes parental quality "an important but not conclusive factor" in deciding whether to make inter alia a care order. This would also be true in deciding whether to discharge such an order.

3. if not, is it appropriate to discharge the order having regard to the child's welfare?

4. finally, where the application is by a representative, is discharge of the order in the child's interests?

The apparent simplicity of section 21(2) thus evaporates when all the statutory ramifications are considered.

21.29 Two other propositions were inferred in relation to the exercise of the discretion to discharge the care order.[90] They concerned the balance between welfare and parental rights and the paramountcy of welfare. They arise not at the threshold stage but when the discretion is being exercised. The statutory test, it will be recalled, is "appropriate".[91] This is probably broad enough to include as a matter of policy an attempt to strike a balance between welfare and parental rights and also a decision to treat welfare as the paramount consideration. The formula "have regard to welfare", which is the legal minimum, is satisfied in either case. It is thus not an invalid approach to balance welfare and parental rights or to treat welfare as paramount as a matter of policy in the exercise of that discretion, provided that in either case it does not amount to a refusal to exercise the discretion conferred by the legislation. There is no legal obligation to do either.

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90 Para. 21.22.
91 1969 Act, s. 21(2).

(iv) The consequences of the various orders.

21.30 Maria was the subject first of a care order and thereafter of a supervision order. Probably it was the lack of effective supervision, brought about by a number of circumstances including complacency, which provided the occasion for what happened to her. The technical differences between these remedies have been considered[92] and the comments of the committee are not in conflict with that earlier analysis. The Report noted, for example, that "... the powers of a supervising authority do not approach those available under a care order under which the authority becomes literally 'in loco parentis' with all that that implies. Under a supervision order, the supervising authority is under a statutory duty to 'advise, assist and befriend' - words which by their very nature emphasise the change of the role involved."[93] It was also recognised that the method of fulfilling the duties of supervision was unregulated and was "left entirely to the discretion of the supervising authority."[94] This was contrasted with the detailed rules for regulating foster parents under the Boarding-out of Children Regulations 1955.[95]

21.31 The committee clearly took the view that such an unregulated discretion was undesirable.[96] They pointed inter alia to the need for a prospective stepfather, such as Maria's, to be investigated[97] and to the desirability of requiring minimum

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92 Paras. 17.19 and 18.19 93 Par. 72. 94 Pars. 73 and 231.
95 S.I. 1955 No. 1377. 96 Pars. 231 to 239.
97 Par. 232.

periods for visiting.[98] The policy of local authorities to adopt a standard not less than the comparable standard prescribed by the Boarding-out of Children Regulations was freely conceded.[99] Nevertheless they thought that a statutory minimum standard should be set.

21.32 The objection to such statutory intervention is entirely understandable, if it would "remove initiative and critical judgment from social workers."[1] The committee however rationalised their view by arguing that "no harm could be done by assisting the social workers concerned in their difficult task by laying down certain ... statutory criteria."[2] It is a question of balancing these two different but not necessarily conflicting aspects. Miss Stevenson, interestingly, did not accept any need to spell out standards of supervision.[3] Her views do not necessarily reject the conclusion that the exercise of discretionary powers may not in some cases lead to an error of judgment. The legal problem is to devise a formula for creating minimal standards while not at the same time suffocating the professional expertise of those concerned.

(d) Conclusions.

21.33 This analysis of the legal aspects of the official

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98 Par. 237. 99 Par. 73. 1 Par. 233.

2 Idem.

3 She dissented from the views expressed in pars. 230 to 239 of the Report: see par. 7.

report of the Maria Colwell case indicates a number of points of some significance. It was not suggested by the committee that a different legal context would necessarily have prevented what happened to Maria. The system as a whole was held responsible, of which the law was only a part.

21.34 A number of administrative procedures affecting the several interested bodies were found to be deficient. Probably reforms of an administrative nature would be sufficient to remedy such deficiencies. The public, or more particularly those interested in the child in question, would be affected only indirectly by those administrative procedures, even although errors of judgment by these administrative bodies could prove to be serious or even fatal for the child. It is thus questionable how useful it would be to make such administrative procedures legal requirements.

21.35 The Report also indicated very clearly how wide are the discretions conferred by the legislation, both substantively and interpretationally. Indeed there seem to be implications that the legislation is considered more as an administrative irritant rather than as a medium for social reform. It is suggested however that the benefits of the legislation would be more apparent if it were to be scrutinised carefully to elicit a precise interpretation before general and rather questionable statements about the law are made.

21.36 The law nevertheless is deficient in many respects. Some discretions are so widely drafted as to invite errors of judgment. The meaning of some of the statutory formulae used is not always clear, particularly when the subject matter is the welfare, interests, best interests or whatever of the child. Much of the detail of the system is thus left to the imagination and professional expertise of those responsible. This, of course, is entirely consistent with the concept of individual justice. Few, if any, problems arise when justifiable decisions are made and the public have confidence in the system. This is not so when circumstances arise which indicate that the system has failed. An automatic and self-adjusting system is the ideal. The Maria Colwell official report shows that that ideal has not and probably cannot be achieved.

Section 3 - The Howells Analysis.

21.37 The official report said very little about the general principles of child care. The inquiry was more concerned with administration. But administration is only as good as the principles which it claims to administer. Some such principles may be found in the legislation; most probably are not, at least in the present context. One such principle implied, perhaps somewhat inaccurately, from the legislation was the purported right or presumption that a child removed from his parents under the legislation would be returned to them once their parental fitness had been proved unless that would clearly

not be in the child's best interests.[4] This may more concisely be called the presumption in favour of parental care. It is scarcely, of course, a legal presumption. It is no more than a principle or policy applied in exercise of a unrestricted discretion or conceived to be part of the legislation.

21.38 Whether or not this principle amounts to "the blood-tie"[5] is irrelevant. It was however discussed twice[6] in the official report each in the context of the decision whether or not to re-establish a relationship between Maria and her mother after Maria had resided for a number of years with the Coopers. The immediate problem was the failure of the social workers to obtain expert opinion on the apparent reluctance of Maria to attempt to re-establish a relationship with her mother.[7] According to the majority of the committee:-

> "It is obvious to us, as was Dr. White Franklin's opinion, that the child had very strong feelings and was demonstrating them in a significant way. The doctor also gave it as his opinion that for practical purposes at this time Maria was a part of the Cooper family. Moreover, in his view, to remove a child after such a period of time would be a very dangerous thing to do unless she had an equal relationship with the people to whom she was going. He also told us that the so-called 'blood tie' was a totally inadequate substitute if this had not been present when the child was developing."[8]

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4 Par. 42 of the Report: paras. 21.21 to 21.28.
5 The meaning of the "blood-tie" concept is not altogether clear.
6 Pars. 66 and 315.
7 Par. 60.
8 Par. 66.

On the other hand Miss Stevenson's view of the "blood-tie" was probably narrower.[9] She indicated that it was not "an emotional relationship, which in some way takes precedence over others, ... simply because of consanguinity".[10] Rather it was "the development in a child of a good self-image and sound sense of identity."[11]

21.39 Each of these views contemplates the creation and existence of a relationship founded upon emotional attachment rather than biological proximity. These are ideas quite alien to the legislation.[12] There is however no reason why they should be necessarily excluded as principles upon which decisions may quite properly be taken within the legal system as it is.[13] It depends, it is suggested, upon the statutory formulae used, the meaning of welfare and related concepts and the part which they play in the decision-making process. The preceding analysis of the Colwell case contains no indication that such principles could not have been applied to Maria.

21.40 This is the nature of the theme developed by Howells. He left no doubt about the position which he supports. Miss Stevenson, who came closest of the three members of the committee

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9 She dissented from inter alia par. 66: see par. 7.
10 Par. 315.
11 Idem. There are two aspects of this: a child should know who his parents are; his perception of them should not give him the impression that he comes of "bad stock".
12 In the sense that they form no part of it.
13 I.e. on the basis of discretion within the statutory framework of references to the welfare and interests of the child.

to this issue,[14] adopted a more equivocal attitude. Their background positions, of course, were different. Howells seems to have relied upon newspaper reports of the evidence given to the inquiry; Miss Stevenson was a member of the committee of inquiry. He is a specialist child psychiatrist; Miss Stevenson a social worker. Although there may be differences of interpretation of the circumstances of Maria's case, there is an impression of underlying unity of approach.

21.41 The decision which led eventually to Maria's death was, of course, the discharge of the care order and the substitution of a supervision order. Howells stated categorically:-

> "The major and overwhelmingly decisive factor that led to the removal of Maria from the foster parents was the supposed 'special feeling' about her natural parents (although one was dead) and thus the need to be with her mother. Here the child care authorities lent on established opinion - the supposed ever present strong bond between child and mother."[15]

It is not clear from the Report whether this accurately represents the local authority's position.[16] To some extent the local authority social workers relied upon what view they thought the magistrates would take of the legal background,[17]

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14 Pars. 314 and 315.
15 Howells, p. 6.
16 Pars. 31 to 42.
17 Par. 42.

namely what has been called the presumption in favour of parental care. If the preceding legal analysis is correct, the vital decisions were therefore based upon a misconception of the law.

21.42 Howells went on to point out that the same established opinion acknowledged a further principle, namely that this ever present mother-child bond was "unique".[18] These two principles in conjunction led to a potentially dangerous conclusion: that children should not be removed from their mother and should be returned to their natural parents whenever the opportunity arose.[19] This final comment approximates closely to the presumption in favour of parental care. This therefore may be the part of the "blood-tie" doctrine upon which the authorities relied and which ultimately led to disaster.

21.43 These principles, according to Howells at least, form the substance of the "blood-tie" doctrine.[20] The link between natural parent and child, identified by these principles, is said to be "essential" to the child's welfare and "so irreplaceable that it outweighs all other relationships."[21] These views were categorically rejected by Howells. The importance of parental care was not thereby discounted. It represented the norm. But where parents fell short of the normal standard, parental care could become a liability and

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18 Howells, p. 6. 19 Idem.
20 Cf. the views of the majority of the committee and of Miss Stevenson: para. 21.38.
21 Howells, p. 17.

adequate care should be sought elsewhere. As Howells put it:-

> "In normal circumstances, care in the natural family is the best way of guaranteeing that the child's essential requirement, loving care, is satisfied. Should the family fail, for a number of reasons, to supply this care, it has to be obtained elsewhere. Caring is more important than the method employed." [22]

Arguably, certainly on a semantic level, this view is not much different from the presumption in favour of parental care. True. But it is probably a question of degree, of attitude, of willingness to terminate the parent-child relationship, of interpretation of individual circumstances.[23]

21.44 The range of non-parental care is wide: for example, adoptive parents, foster parents, relatives, friends, paid nannies, boarding schools, residential schools, hospitals.[24] Non-parental care need not be full-time: baby-minding, day nurseries, play groups, nursery schools, day schools and so on.[25] The problem, where parental care is inadequate, is one of choice. Howells has listed possible priorities. "A good adoption is to be preferred to a hostel. But a good hostel is preferable to a poor adoption. The quality of the loving care that can be given is the essential matter."[26] Does this mean that no general rules are possible? Is it sufficient to rely upon a

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22 Howells, p. 54.
23 It has, for example, frequently been suggested that children should more often be removed from their parents.
24 Howells, p. 57. Most of these are covered by legislation in one form or another.
25 Idem.
26 Howells, pp. 57 and 99.

very wide discretion? Is the law an impediment rather than a help?

21.45 Non-parental care involves separation of parent and child. This is the practical effect which causes the most concern. If some form of non-parental care is appropriate, then "separation in the interest of the child may be essential".[27] Howells carefully distinguished separation from deprivation. The latter "is a term which indicates that a loss is suffered and when applied to the child it usually denotes that the child is deprived of the necessary loving care for its emotional growth. In deprivation the child has lost love. Thus, deprivation can occur with the parent, or apart from the parent."[28] Separation may therefore be the answer to deprivation. Emotional stability rather than material considerations may be the key to the problem of choice.

Section 4 - Conclusion.

21.46 These ideas are of wider relevance[29] than Howells' analysis of the Maria Colwell case. If they had been applied to Maria, he argued, she would not have been returned to her natural home.[30] A number of others have expressed views, general or related to Maria, which are sympathetic to the Howells approach.[31] Others would disagree.[32]

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27 Howells, p. 63. 28 Howells, p. 64.

29 They may be relevant in adoption, custody, wardship proceedings as well as in relation to foster parents: it is a question of the substance of welfare: see chapter 44.

30 Howells, p. 93.

31 E.g. Dr. Kellmer Pringle [1972] The Times, 23 September, [1973] The Times, 26 November, [1973] The Sunday Times 16 December; letter from Mrs Linda Larkin [1973] The Sunday Times, 25 November; Renvoize, p. 142; "Protecting the Young" (1974) 124 New Law Journal 837.

32 Rowlands, Children Apart - Problems of Early Separation from Parents (London 1973), p. 63. He was writing in a slightly different context.

21.47 Putting these ideas into effect may cause many other problems. Except where voluntary action can be arranged, which would be unusual where action is regarded as necessary, the state in one or more of its capacities will become even more involved than it presently is. This, in the particular context of the parent-child relationship, will cause many people considerable concern.[33] On a practical level, too, there are problems of resources. Staff, training, buildings, facilities; apart from enacting the appropriate legal structures.

21.48 Child welfare in the context of official care is thus a matter fraught with both doctrinal[34] and practical problems, whichever discipline is involved. The legal system itself cannot devise appropriate principles and procedures of child welfare. It can however enact them, once they have been established, in an intelligent, intelligible and helpful form and so make easier the task of the decision-makers which is complex enough without unnecessary and avoidable legal complication.

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33 Because it is so sensitive and because it affects so many people.

34 Howells writes cogently and authoritatively. Not every child psychiatrist would agree with him, particularly if properly validated scientific evidence were considered necessary to support every principle ennunciated. There are acknowledged gaps, although the literature is extensive. See Rutter M., Maternal Deprivation Reassessed (Penguin, 1972).

CHAPTER 22

THE STRUCTURE OF THE ADOPTION LEGISLATION

Section 1 - General

22.1 Adoption legislation has recently undergone considerable change.[1] In Scotland the law will be contained in the Adoption Acts of 1958,[2] 1960,[3] 1964[4] and 1968[5] and Part I of the Children Act 1975;[6] in England in the consolidating legislation of 1976.[7] But several of the new provisions are not yet in force. There is much to be said for considering the 1958 Act and 1975 Act provisions in conjunction. Fortunately only a relatively small number of provisions is currently relevant. That method will be used.

22.2 Most of the provisions in Part I of the Children Act 1975 are not in force and it may be some time before they are brought into effect.[8] Some involve changes in words;[9] others introduce new or modify existing procedures;[10] a few enact fundamental changes of principle.[11] Given this

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1 Largely in response to the Houghton-Stockdale Report.
2 7 & 8 Eliz.2, c.5.
3 1960 c.59.
4 1964 c. 57.
5 1958 c.53.
6 1975 c.72.
7 1976 c.36.
8 See the comments attributed to the Minister of State in the Department of Health and Social Security in (1975) 6 Family Law at p.208.
9 E.g. 1975 Act, ss.10 and 11.
10 Ibid., ss.9 and 14.
11 Ibid., ss.3 and 13.

state of flux, it will be difficult to avoid a consideration of the 'old' and 'new' systems at the same time. This comparative approach however tends to highlight some of the issues and may for that reason be worthwhile. As this analysis is concerned particularly with the structure of the legislation and the part therein played by welfare and related concepts, a number of the authorities on the structure of the old legislation will remain relevant for this discussion, although they may be concerned directly with provisions technically repealed or amended or to be repealed or amended.

22.3 The broad structure of the legislation has not been altered by the 1975 Act.[12] But the policy trends over the past years[13] have clearly been to create an administrative structure with extended discretionary powers[14] and to place the welfare of the child in an increasingly prominent position.[15] The provisions of the 1975 Act follow quite closely the recommendations in the Houghton-Stockdale Report. Two features of these recommendations have already been identified: a tendency to greater administrative flexibility and a reduction in direct legal prescription.[16] This is true also of the Act.[17]

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12 This is not surprising: the Houghton-Stockdale Report did not comment on such technical matters.
13 Including the recommendations in the Hurst Report.
14 In an attempt to create a system of individualised justice.
15 Reflecting changing social attitudes.
16 Fisher D.E., "The 1972 Adoption Report: the Emerging Pattern" 1973 Juridic al Review 180 at pp.183, 184 and 198.
17 See generally paras. 22.14 to 22.19 and chapter 23.

Section 2 - The structure of the 1958 Act

22.4 The earlier legislation follows a broad pattern similar to that already identified in relation to child care. Three types of provision appear. Firstly, there are what have been called application requirements. These are requirements which apply to all persons involved and are in no way related to the welfare of the child. No special or individual issues are raised. They tend to be matters of jurisdiction or similar formal issues.[18] Next, certain threshold requirements have to be satisfied before the court can even contemplate the making of an adoption order in the individual case. They represent the minimal substantive legal prescription in the legislation. Thus one person alone or two spouses jointly may apply.[19] The minimum age of the applicant is twenty-five except in the case of an applicant who is a relative of the child, where the minimum age is twenty-one.[20] Most important perhaps is the need for the consent[21] of the child's parents or guardians to the proposed adoption order.[22]

22.5 These threshold requirements relate to an easily identifiable existing state of affairs. They should cause

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18 Adoption Act 1958, ss.1(1) and (5), 9 and 12.
19 Ibid., s.1(2).
20 Ibid., s.2(1) and (2).
21 "Agreement" in the 1975 Act.
22 1958 Act s.4(1).

few problems.[23] The welfare of the child is also enacted in the form of a threshold requirement but it relates to the future. The court must be satisfied that "the order if made will be for the welfare of the child."[24] This provision introduced problems vital to an understanding of the welfare doctrine. The use of the word "welfare" gives rise to interpretational discretion and the statutory formula leaves in some doubt the precise role which welfare is to play in the decision-making process.[25]

22.6 A further requirement which can probably be described as a threshold requirement but which is more administrative than substantive in character is the need for continuous care and possession of the child for at least three consecutive months immediately preceding the date of the order.[26] This is an important provision from the point of view of the welfare of the child. Despite its character it may reasonably be regarded as a threshold requirement for present purposes.[27]

22.7 The third type of provision is discretionary. The making of an adoption order is fundamentally a discretionary judicial process.[28] Even if all the requirements, both application and threshold, were to be satisfied,

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23 They are analysed in chapter 23.
24 Adoption Act 1958, s.7(1)(b). The word "child" is substituted in consequence of the 1975 Act, s.108 and Sched.3, para.21(2).
25 Chapter 25.
26 Adoption Act 1958, s.3(1).
27 Chapter 24.
28 1958 Act, s. 1(1).

the court could decline to make an order. No person thus has a right to adopt a child. This discretion is technically unregulated. The courts however take matters of public policy and public interest into account in reaching their decisions as well as matters of relevance only to the individuals in question.[29]

22.8 Discretions are built into other provisions of the legislation. Section 2(3) of the Adoption Act 1958 provides that an order shall not be made in favour of a sole male applicant in respect of a female child. There is however the qualification that such an order may be made if there are special circumstances justifying such an exceptional measure. The words "special" and "exceptional" import certain characteristics into the discretion which is otherwise not specifically regulated.

22.9 Parental consent, it has been suggested, is a threshold requirement. Such consent may be dispensed with by the court.[30] The structure of the dispensation provisions reflects that of the Act generally. Section 5(1)(a) and (b) and (2) set out the threshold requirements. Dispensation with parental consent amounts to deprivation of parents of certain of their rights. It is thus no surprise that the grounds for dispensing with consent are not generically different from those justifying care

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29 Chapter 31.
30 Adoption Act 1958, s.5(1) and (2).

proceedings under the Children and Young Persons Act 1969[31] or compulsory measures of care under the Social Work (Scotland) Act 1968.[32] Most of the grounds for dispensing with consent are quite straightforward.[33] One introduces interpretational discretion.[34] If these requirements are not satisfied, the court is not empowered to dispense with consent. Even if they are satisfied, the decision whether to dispense with consent remains one for the discretion of the court.[35] Just as applicants have no right to an adoption order, so they have no right to have parental rights forfeited.

22.10 These various provisions merely regulate the rights, liabilities and interests of individual persons inter se. They are affected by the views of them taken by the courts. The role of the court, however, is a matter of some dispute in the adoption process. Perhaps it acts merely to check judicially that the requirements have been satisfied.[36] Rarely will a court interfere on

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31 1969 c.54.
32 1968 c.49.
33 I.e. abandonment, neglect, ill-treatment, inability to be found, incapacity to give consent, failure to discharge parental obligations.
34 Unreasonable withholding of consent.
35 Even although the judicial attitudes to unreasonable withholding of consent have tended in practice to restrict the way in which the discretion may be exercised: see chapter 31.
36 See e.g. Kermack S.G., "Thoughts on Adoption Procedures" (1968) 54 Child Adoption 39; Blom-Cooper I.J., "Parental Rights in Adoption Cases: a New Approach to the Law of Adoption" (1968) 54 Child Adoption 19.

the basis of welfare.[37] Other parts of the 1958 Act, not substantially affected by the 1975 Act, afford to the state a function as protector of the child in a wider sense.[38] Apart from their position as placement agencies, local authorities have general supervisory duties to perform. They must be informed, for example, of certain proposed adoptions.[39] They have functions towards protected children.[40] For example, visits must be made to such protected children.[41] The local authority may prohibit placing for adoption.[42] They may remove children from unsuitable surroundings.[43] These measures protect candidates for adoption by administrative means. The structure and formulae used in the provisions setting out these means are no different from several already discussed.[44]

Section 3 - The structure of the 1975 Act

(a) General

22.11 Although the formal structure of the provisions of the 1975 and 1976 Acts is not new, a few words are

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37 It can do so and occasionally does.
38 Adoption Act 1958, s.28(2).
39 Ibid., s.3(2). S.1 of the Children Act 1975 makes these local authority functions mandatory.
40 As defined in s.37 of the Adoption Act 1958.
41 Adoption Act 1958, s.38.
42 Ibid., s.41.
43 Ibid., s.43
44 They follow the pattern of threshold requirements followed by a discretion.

necessary to put them into perspective.[45] The provisions referred to in the preceding section of this chapter will at some stage be repealed and similar but by no means identical enactments substituted. In addition some new principles have been enacted. Replacement provisions enable a married couple where each has attained twenty-one years of age to apply for an adoption order.[46] There are certain restrictions upon one person applying for an order[47] and upon the mother or father of the child alone applying for an order.[48] An order cannot be made in respect of a child who is or has been married.[49] Parental agreement remains a threshold requirement,[50] although that issue may be determined in advance of the adoption application by an order of the court freeing the child for adoption.[51]

22.12 The three months' continuous care and possession requirement[52] will be repealed and a different but related concept introduced. In the normal case an adoption order shall not be made "unless the child is at least nineteen weeks old and at all times during the preceding thirteen weeks had his home with the applicants or one of them."[53]

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45 For a statement of the effects of the 1975 Act in relation to adoption in Scotland, see Wilkinson A.B., "Children Act 1975" 1976 S.L.T.(News) 221 to 225 and 237 to 239.
46 Children Act 1975, s.10(1); Adoption Act 1976, s.14(1).
47 Ibid., s.11(1); s.15(1).
48 Ibid., s.11(3); s.15(3).
49 Ibid., s.8(5); s.12(5).
50 Ibid., s.12(1); s.16(1).
51 Ibid., s.14; s.18.
52 Adoption Act 1958, s.3(1).
53 Children Act 1975, s.9(1); Adoption Act 1976, s.13(1).

In any other case the periods are twelve months.[54] The age requirement is straightforward but the concept of "having his home" with the adopters is new. This formula no doubt is intended to avoid some of the problems of what is "continuous care and possession" by introducing as the statutory requirement the general approach adopted by the courts.[55] No doubt there will be marginal cases for the courts to consider but the new concept is probably simpler than the one it replaces.

22.13 The fundamentally discretionary nature of the judicial adoption process has been preserved and to some extent extended by the 1975 Act. The whole statutory approach is simply to restrict the discretionary power to make an order by enacting a few minimal requirements related to welfare. The generality of the discretion is not available in the absence of an application for an adoption order.[56] For a court cannot make an adoption order ex proprio motu when determining, for example, a custody issue between a parent and a third party.[57] So much for the overriding discretion: an element of discretion is also built into section 11(3)(b) of the 1975 Act and section 15(3)(b) of the 1976 Act which permit adoption by the mother or father of the child alone in rather

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54 Ibid., s.9(2); s.13(2).
55 Chapter 24.
56 Children Act 1975, s.8(1); Adoption Act 1976, s.12(1).
57 Cf. Children Act 1975, ss.37 and 53.

special circumstances. Otherwise the other major point at which a discretion is exercisable remains dispensation with parental agreement.[58]

(b) Section 3 of the 1975 Act

22.14 There is however one critical change introduced by the 1975 Act. It will be recalled that under the 1958 Act the discretion inherent in exercising the powers to dispense with consent and to make an order was not regulated by the Act. The courts introduced restrictions of their own. The Act, of course, prevented an order from being made unless it would be for the welfare of the child.[59] But that was technically a threshold requirement and not a restriction upon the way the discretion should be exercised. This threshold requirement will be repealed[60] and not replaced with any equivalent provision. Section 3 of the 1975 Act,[61] however, which is now in force,[62] provides that:-

> "In reaching any decision relating to the adoption of a child, a court or adoption agency shall have regard to all the circumstances, first considerations being given to the need to safeguard and promote the welfare of the child through his childhood; ..."

This is a provision of very general application. It

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58 Children Act 1975, s.12(2); Adoption Act 1976, s.16(2).
59 Adoption Act 1958, s.7(1)(b).
60 Children Act 1975, s.108 and Sched.4, Part III.
61 1976 Act, s.6.
62 Effective from 1 January 1976: Children Act 1975, s.108(4)(a).

regulates how a court should reach its decision,[63] particularly in regard to the making of an order and dispensing with parental agreement.[64] In the latter context the discretion is now statutorily regulated for the first time. In the former context this provision in effect replaces[65] the threshold requirement in section 7(1)(b) of the 1958 Act. This section of the 1975 Act also prescribes how an adoption agency should reach its decision. This is particularly significant since placement is probably the most important decision for the child.[66] Hitherto the administrative bodies have been left to create their own policy guidelines.[67] According to Triseliotis some of these policies are questionable and outmoded.[68]

22.15 The formula in section 3 is partly traditional and partly novel. The duty is merely to "have regard" to all the circumstances. This approach is well precedented.[69] Substantively however the words "have regard" are almost devoid of any meaningful obligation. Their use may affect the justification for any decision but not the decision itself. Similarly the phrase "all the

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63 In any context.
64 These are the two most important judicial decisions.
65 Although technically they are in different categories.
66 Houghton-Stockdale Report, paras. 70 and 84; Blom-Cooper, op. cit.
67 Within, of course, the relatively small area prescribed by statute: see generally Triseliotis J.P., Evaluation of Adoption Policy and Practice (Edinburgh 1970), pp.71 to 96.
68 Triseliotis, op. cit., p.71.
69 Paras.4.9 to 4.14.

circumstances" is so wide as to be rather unhelpful. It means presumably every piece of information which the interested parties, including the agency and the guardian or curator ad litem, provide. The key to the policy of the legislation however is to be found in the final phrase of the provision. It contains two elements: "first consideration" and then "the need to safeguard and promote the welfare of the child". It is a novel formula in British legislation.

22.16 The provision differs firstly from section 44(1) of the Children and Young Persons Act 1933[70] which merely provides "have regard to the welfare". It also contrasts with section 1 of the Guardianship of Infants Act 1925[71] or of the Guardianship of Minors Act 1971[72] which requires the court to "regard the welfare of the child or minor as the first and paramount consideration". There is therefore at best a mere superficial similarity between these provisions and the approach in section 3. The duty to "regard" is really the only point of similarity. The 1933 Act makes welfare an item of obligatory relevance. The 1925 and 1971 Acts go further by stating the procedural and substantive priority to be afforded to welfare.[73] The 1975 Act makes all circumstances of statutory relevance. But that, it is suggested, is so general as to introduce an almost unrestricted interpretational discretion.

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70 23 & 24 Geo. 5, c.12: paras.18.22.
71 15 & 16 Geo 5, c.45.
72 1971 c.3.
73 This is explained further: paras. 35.77 to 35.96.

22.17 The introduction of the words "first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood" create two aspects of the new dimension in section 3.[74] Firstly, the need to safeguard and promote welfare has been directly[75] recognised by Parliament for the first time.[76] "Safeguard" involves retention of the status quo unless that is dangerous or prejudicial to the child. It is essentially negative. "Promote" involves a positive decision to improve where possible the child's situation. Both of these ideas are already implicit in legislation of the British Parliament and even in decisions of British courts. But so far Parliament has not seen fit to use these precise words. Section 3 clearly enacts as a policy the need to safeguard and promote the child's welfare at all stages in the adoption process, both administrative and judicial. These words are general and confer upon the decision-making body an element of interpretational discretion. This is inevitable if the objective is individualised justice.[77]

22.18 More difficult, however, is to identify what part this stated need is to play in the whole process. The

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74 For the background see the Houghton-Stockdale Report, paras.17 and 18 and 205 to 218.
75 It had probably been implicitly recognised before.
76 A duty to "promote social welfare" was written into s.12(1) of the Social Work (Scotland) Act 1968: at that time a new formula.
77 Para.71 of the Houghton-Stockdale Report indicates that this may be so.

Act does not simply command attention to this need. Attention is directed to all the circumstances. Is this stated need one of these circumstances or does it play a more fundamental role? It is likely that the courts will eventually answer this question. Rather than interpret section 3 on the basis of its own structure, the courts may well assume that it means something rather like section 1 of the 1925 or 1971 Act. It is unclear what even that section means, especially in the light of judicial attempts to analyse it.[7] [8]

22.19 The approach required by section 3 of the 1975 Act is, it is suggested, rather different from that enacted in these other provisions. The paramountcy of welfare principle requires the welfare of the child to be regarded as the first and paramount consideration. Section 3 of the 1975 Act omits the reference to "paramount". The syntax of the phrase separates "all the circumstances" from the function of this need. The need is not merely one of the circumstances to which attention must be paid. Rather it may be the aim or objective of the whole process. It is not "first" simply as the item at the top of the list of circumstances. It may be "first" in the sense that the question asked at the beginning of the decision-making process is "what is our decision trying to achieve?" Thus the structure

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78 Chapters 39 to 43.

and syntax of section 3 may indicate that welfare is intended to play a role which is probably different from that in section 1 of the 1925 or the 1971 Act.[79] If Parliament had intended to cast welfare in section 3 of the 1975 Act in the same role as in section 1 of the 1925 or the 1971 Act, why did it not use the same formula?

Section 4 - Conclusion

22.20 The changes introduced by the Children Act 1975 reviewed briefly in this chapter are important for the law of adoption and the persons thereby affected. They do not cast doubt upon this analysis of the structure of the legislation; indeed they probably confirm it. The part played by welfare is however modified by the 1975 Act in a way which may prove to be particularly significant. It is impossible to reach any firm conclusion until section 3 has been interpreted judicially. The purpose of this chapter has been merely to provide the background to a detailed discussion of welfare in the context of adoption. The formula adopted in section 3 of the 1975 Act will be considered again[80] and the other changes will be noted, if not analysed, in the relevant context.

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79 The precise nature of the role of welfare in these sections is a matter of concern. If the view discussed in paras. 35.92 to 35.96 is acceptable, it may be that there is no fundamental difference between them and s. 3 of the 1975 Act. However, judicial authority probably suggests otherwise and the courts may well treat s. 1 of the 1925 or 1971 Act and s. 3 of the 1975 Act similarly, but for reasons rather different from those suggested here.

80 Paras. 30.65 to 30.83.

CHAPTER 23

GENERAL THRESHOLD REQUIREMENTS

Section 1 - Introduction

23.1 The civil law as well as the criminal law protects the welfare of children in various contexts in a direct and objective manner; for example, the threshold requirements relating to voluntary and compulsory official care.[1] The principal function of these requirements is to protect children from their own inadequate parents or parent-substitutes. The purpose of adoption is quite different. It is to substitute for an existing legal relationship a new relationship in as complete a fashion as possible. Despite this fundamental difference, it is remarkable how similar is the structure of the law in each context; particularly the statutory stipulation of certain requirements conceived to be in the interests of the child followed by the exercise of a discretion. The balance between those two elements is the principal point of distinction.

23.2 Although the current adoption legislation comprises a comprehensive code relating to the whole concept of adoption, it contains very few precise criteria related to the welfare of the child, failure to satisfy which would necessitate the refusal of an adoption order. If that were to happen, the sanction would not be criminal; it would be much more effective; no order. Failure to satisfy such requirements normally involves no discretion on the part of the court; at least no substantive discretion for in certain instances the judge is

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1 Chapters 14 and 15.

vested with an element of interpretational discretion. This does not change the fundamental nature of the statutory scheme.

23.3 The purpose of these limited threshold requirements is to set a statutory minimal substratum for the relationship between adoptive parent and child. This is designed to protect the child by requiring the artificial adoptive relationship to reflect as closely as possible the natural relationship which in most cases it supersedes. The threshold requirements relating to voluntary and compulsory official care, on the other hand, are probably intended to protect the interests of the parents in addition to securing the well-being of the child. Because the care requirements are more detailed and yet at the same time more flexible, their satisfaction would lead in the normal case to a positive decision against the parents. The adoption requirements are more specific but fewer in number. Thus satisfaction is less likely to lead almost automatically to a decision to make an adoption order. The specific welfare requirement in the adoption legislation[2] thus assumed a much more important role in the adoption process than the general welfare references in the care legislation. That specific requirement has now been superseded by the primacy of welfare principle.[3] The consequence is to make the structure of adoption legislation even more similar to the care legislation. This may not be an advantage.

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2 Adoption Act 1958 (7 & 8 Eliz. 2, c.5), s.7(1)(b).

3 Children Act 1975 (1975 c. 72), s. 3, Adoption Act 1976 (1976 c.36), s. 6.

23.4 Parliamentary hesitation to prescribe rigid qualifications for adoption has undoubtedly been a deliberate political decision. The legislation contains few objective criteria. Thus, given the need for each case to be considered in the light of its own circumstances, control over the adoption process in the individual case has been effectively delegated to adoption agencies and local authorities acting administratively.[4] The Hurst Committee in 1954 took the view that the attainment of positive age requirements or age differentials would be too restrictive: a degree of flexibility was needed.[5] That Committee also indicated that, although adoption by a married couple was desirable, that would not always produce the best result in each individual case. Some discretion was thus stated to be justified.[6]

23.5 The same trend is apparent in the Houghton-Stockdale Report. That committee indicated that "detailed criteria of suitability cannot be prescribed by statute, and that this must continue to be left to the judgment of agencies and courts."[7] Indeed their recommendations[8] implied the desirability of even less statutory prescription than in the Adoption Act 1958[9] and a policy of correspondingly greater administrative discretion.[10] They made no suggestion that the "formal"

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4 This emphasises the importance of applying the primacy of welfare principle at the placement stage.

5 Hurst Report, p.38.

6 Ibid., p.47.

7 Houghton-Stockdale Report, p.20 para. 80.

8 Ibid., p.22, para. 80.

9 Ss.1 and 2: para. 22.4.

10 See Fisher D.E., "The 1972 Adoption Report: the emerging pattern" 1973 Juridical Review 180 at pp.184 to 186.

requirements[11] of domicile[12] and residence[13] were unnecessary. The committee however considered marital status and minimum age.[14] They remain the subject of direct legal prescription;[15] and have an impact upon the interests of the child. An analysis of the ways in which statute has regulated these two substantive matters is therefore justified.

Section 2 - Criteria relating to the prospective adopters

23.6 Part 1 of the Adoption Act 1958 included several specific examples of criteria directed to the welfare of the adoptive child.[16] They operated either directly in relation to the child or indirectly through the prospective adopter. For example, section 2 contained various requirements as to the age and sex of the applicant in relation to the child proposed to be adopted. Consider first the age qualification. Except in the case of a mother or father applying for an adoption order in respect of her or his own child, section 2(1) prescribed a minimum age of at least twenty one years on the part of an applicant who was a relative of the infant and one of at least twenty five years in any other case. These requirements were supplemented by section 2(2) which enabled an order to be

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11 Or application requirements: e.g. those establishing the appropriate jurisdictional nexus.

12 Adoption Act 1958 s.1(1); Children Act 1975, ss.10(2)(a) and 11(2)(a); Adoption Act 1976, ss.14(2)(a) and 15(2)(a).

13 Adoption Act 1958, s.1(5) But the later legislation appears to have substituted "presence" for "residence": 1975 Act, s.100 and 1976 Act, s.62.

14 Houghton Stockdale Report, paras. 70 to 80.

15 Children Act 1975 ss. 10 and 11; Adoption Act 1976, ss.14 and 15.

16 Generally see Bevan, pp.321 to 324 and Josling, pp.14 to 19.

made in favour of two spouses where one or the other was the mother or the father or where one of the applicants was a relative and had attained twenty one or had attained twenty five provided that in the two latter instances the other applicant had attained twenty one years. The recent legislation has simplified these rules. The age of twenty one is now the minimum requirement in all cases.[17]

23.7 These age requirements are mandatory; there is no judicial power of relaxation. These requirements are not couched in terms of age differentials; they merely prescribe the attainment by the applicant of the specified age. Most adoptions relate to very young children;[18] in that sense these requirements operate in fact as an age differential. In any event they ensure, whatever the age of the child, that the prospective adopters will have achieved a certain formal maturity. The absence of any further statutory requirement in this regard gives a degree of flexibility to those administering the adoption legislation. They could, for example, decide that an individual aged twenty two was for that reason unsuitable. Thus the welfare of the child is protected partly by the provisions of the Act and partly by whatever concept of welfare appears desirable to the administrators.[19]

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17 Children Act 1975, ss.10(1) and 11(1); Adoption Act 1976, ss.14(1) and 15(1).

18 Seglow, Pringle and Wedge, p.56. By "very young" is meant under three months.

19 It is well recognised that adoption agencies apply further non-statutory criteria in placing children for adoption. Age may be a matter for administrative regulation in this way: see e.g. Seglow, Pringle and Wedge, p.95; Triseliotis, op.cit., pp. 91 to 96.

23.8 The earlier adoption statutes dealt with the question of age rather differently. Section 2(1) of the Adoption of Children (Scotland) Act 1930[20] and of the Adoption of Children Act 1926[21] prohibited the making of an adoption order where inter alia the applicant was less than twenty one years older than the child. The court was however given a discretion to grant an order "where the applicant and the infant are within the prohibited degrees of consanguinity". This provision was in issue in B and B, Spouses, Petitioners[22] and in In re C and the Adoption of Children Act 1926.[23] In the Scottish case of B. petitioners[24] who were husband and wife sought to adopt the female child of the female petitioner by a previous marriage. The child was aged nine; the male petitioner twenty eight and the female petitioner twenty nine. The order was granted without the delivery of opinions on the part of the court.[25] The age differential between each applicant and the child was less than twenty one years. On the face of it this would be inconsistent with the provisions of the Act and reliance would have to be placed upon the discretionary power vested in the court. But there was no evidence of this.

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20 20 & 21 Geo. 5, c.37.

21 16 and 17 Geo. 5, c. 29.

22 1936 S.C. 256.

23 [1938] 1 Ch. 121.

24 1936 S.C. 256.

25 The Inner House of the Court of Session.

23.9 The English court in C.[26] was obliged to consider the terms of the discretion. The problem was similar to that in B.[27] The child was however the illegitimate daughter of the female applicant. The child was nineteen years of age and less than twenty one years younger than the applicants. It was ultimately decided that the female adopter was within the prohibited degree of consanguinity while the male adopter was not; the discretion was thus available in the case of the female but not the male adopter. An order allowing the child to be adopted by the mother alone was made. Luxmoore J. declined to treat "prohibited degrees of consanguinity" as including the prohibited degrees of affinity or as meaning within the prohibited degrees of marriage.[28] He adopted a simple literal interpretation:-

> "In my judgment, the phrase 'within the prohibited degrees of consanguinity' on its proper construction defines the particular degrees of blood relationship between the proposed adopter and the infant proposed to be adopted, which must exist in order to confer on the court the power of relaxing the prohibition contained in the sub-section, and is not limited to the cases where the parties are of opposite sex".[29]

Thus, without expressly saying so, Luxmoore J. almost seems to have founded his argument upon the policy considerations put forward by the Attorney-General: "It is clear that the object [of the proviso] is that where both adopter

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26 [1938] 1 Ch. 121.

27 1936 S.C. 256.

28 [1938] 1 Ch. 121 at pp. 125 and 126.

29 Ibid. at pp. 127 and 128.

and adopters are in the same family the judge is given a discretion whether to insist on the difference in age."[30] Luxmoore J.'s interpretation thus achieved what would appear to have been the purpose of the provision: namely to preserve the natural age differential in the adoptive relationship. It is likely that the 1958 Act provision was intended to deal with this problem differently from the earlier legislation[31] merely to avoid these interpretational difficulties. That objective would appear to have been achieved; the provisions of the later legislation have been couched in clear and objective language which should attract few legal complications.[32]

23.10 The approach of the legislation to differences in sex is different. Section 2(3) of the 1958 Act could be analysed as a mandatory requirement subject to a judicial power of relaxation. The provision prohibited making an adoption order in favour of a male adopter in respect of a female child. It rested presumably upon the assumption that

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30 Ibid. at p.123.

31 The legislation effective between the Acts of 1926 and 1930 and the Act of 1958, namely section 2(1) of the Adoption Act 1950 (14 Geo. 6, c.26), prohibited the making of an adoption order unless (a) the applicant was 25 and at least 21 years older than the infant or (b) the applicant was 21 and was a relative of the infant or (c) was the mother or father of the infant. This represents a situation substantially midway between the earlier and the 1958 legislation. It was implicit in the decision of the Court of Appeal in In re D, an infant [1959] 1 Q.B. 229 that section 2(1) of the 1950 Act related effectively to the age differential between applicant and infant. It was there decided formally that the 1950 Act made it competent for the court to make an order in favour of her illegitimate child.

32 In particular, the phrase "prohibited degree of consanguinity" was dropped.

the moral welfare of a young girl was liable to be prejudiced by continual contact with a single male adoptive relation. But such a situation was probably not uncommon in the natural parent-child relationship; for example, where the mother has predeceased the father, leaving a young daughter. The Act however left relatively unregulated the circumstances in which the power was exercisable. The court was to be satisfied that "special circumstances" existed which justified the "exceptional measure" of making an adoption order. These are strong words, "special" and "exceptional". But their generality gave a wide measure of discretion, both interpretational and substantive, to the court.

23.11 This approach did not survive the 1975 Act. The Houghton-Stockdale Report considered that there was no reason to single out such an adoption for qualified prohibition; the decision could quite properly be left to the circumstances of the case.[33] Section 2(3) of the 1958 Act was therefore prospectively repealed by the 1975 Act[34] and nothing put in its place. But the repeal of that discretionary element was compensated by the creation of a different and new element of discretion. Current philosophy favours adoption by a married couple.[35] Although adoption by one person is competent,[36]

33 Houghton-Stockdale Report, para. 78.

34 Children Act 1975, p.108 and Sched. 4, Part IV.

35 Children Act 1975, s.10; Adoption Act 1976, s.14: except where the married couple consists of the child's parent and step-parent, in which case the statute gives to the court in England an element of discretion: 1976 Act, s.14(3).

36 Ibid., s.11(1); s.15(1).

the mother or father of the child is disabled from applying alone for an adoption order unless the court is satisfied on one of two points.[37] The second is where "there is some other reason justifying the exclusion of the other natural parent."[38] The Act gives no indication of what reasons might be sufficient.

23.12 It is too early to see how section 11(3)(b) of the 1975 Act will operate in practice. There is however evidence of how the discretionary element in section 2(3) of the 1958 Act was exercised. Although that provision has been prospectively repealed and it operated in a context different from section 11(3)(b) of the 1975 Act, there is reason to suspect that the judicial approach to these discretionary elements may be similar. The court is likely to be influenced by considerations of policy underlying the legislation. It is thus worth pausing briefly to consider the way in which section 2(3) of the 1958 Act has been applied.

23.13 It was naturally difficult to predict how a court would exercise that power. It had been suggested that the mere fact that the applicant was the putative father of the child would not be sufficient to justify making an adoption order.[39] This is probably true in the sense that no decision is ever likely to be made on the basis of one consideration only. The only reported instance of the exercise of

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37 Ibid., s.11(3); s.15(3).

38 Ibid., s.11(3)(b); s.15(3)(b).

39 See Re R M (an infant) [1941] W.N. 244 and Clarke Hall & Morrison, p.1029.

this power is the decision of Sheriff-substitute Bryson in H, Petitioner.[40] A policeman and his wife had received a month-old female child into their care for adoption purposes. The wife died. The policeman went to live with his mother-in-law who thereafter looked after the child. He applied for an adoption order. The Sheriff-substitute considered the whole circumstances and came to the conclusion that certain of the established facts were so "special" as to justify an order; namely, the unexpected death of the policeman's wife, the policeman's own excellent character and the wife's mother's regard for the child. Two of these considerations had a direct bearing upon the welfare of the child. The judge thus clearly regarded the child's welfare as a factor to "keep in view". The decision was made entirely in the light of the circumstances prevailing at the time; future possibilities, for example the applicant's subsequent marriage or transfer, were ignored. This approach, it would appear, was entirely consistent with the terms of section 2(3) of the 1958 Act. The section made no reference to welfare; nor was the court prohibited from taking it into account. The approach was to this extent consistent with the policy of the Act in promoting the interests of the child.

23.14 If the adoptive relationship is to be assimilated as closely as possible to the natural relationship, it is not unexpected that the legislation should treat adoption by a

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40 1960 S.L.T. (Sh. Ct.) 3.

married couple as the norm. This view of the welfare of the child was reflected in section 1(2) of the Adoption Act 1958 which provided:-

> "An adoption order may be made on the application of two spouses authorising them jointly to adopt an infant; but an adoption order shall not in any other case be made authorising more than one person to adopt an infant".[41]

Different phraseology in the current legislation achieves the same effect.[42] The legislature has thus clearly taken the view that adoption by spouses approximates to the natural relationship and thus benefits the child. The provisions are apparently free from interpretational difficulty.[43] Their underlying policy is equally clear; it was used in J S - Petitioner[44] as the basis for the decision of the sheriff-substitute. An adulterous couple, neither of whom had been divorced, produced several children. The man alone attempted to adopt one of their offspring. Although the mother consented, the application was dismissed. There seemed to be no objection to the adoption on the ground of material welfare. Sheriff-substitute Kermack relied not upon any legal technicality but upon the public policy underlying section 1(3) of the 1930 Act:-

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41 The same policy was built into the earlier legislation: 1926 and 1930 Acts, s.1(3), 1950 Act, ss.1(2) and 2(3).

42 Children Act 1975, s.10; Adoption Act 1976, s.14.

43 In In re RA (Minors)[1974] The Times, 10 June; 124 N.L.J. 599, for example, the Divisional Court held that a joint adoption order authorising two people who were not spouses to adopt an infant was void as it was made with a complete lack of jurisdiction. The arguments before the court accepted beyond question that an order in favour of unmarried applicants was in breach of the Act; the difficulty was the power of the appellate court to set aside an order of an inferior court.

44 1950 S.L.T. (Sh.Ct.) 3.

> "I am clear that public policy prevents the adoption in the present circumstances and that the Acts intend to maintain this policy. The clearest indication of this is that otherwise they would have authorised the joint adoption by persons who were not married, whereas such an adoption is explicitly prohibited by section 1(3) of the principal Act [Adoption of Children (Scotland) Act 1930]. It would be an evasion of this principle to allow the female parent to give a pretended consent to adoption by the male parent with whom she intends to go on bringing up the children".[45]

Thus the technical legal rule and the policy on which it was based were clearly co-extensive and protected the welfare of the child as conceived by Parliament. The court has not been given statutory discretion to circumvent this rule.[46] There is thus no scope for the judge to substitute his version of what the child's welfare requires in place of what Parliament has decreed.

Section 3 - Criteria relating to the child to be adopted

23.15 The most important threshold requirements of the legislation which have direct relevance for the interests and well-being of the infant or child restrict the operation of the Acts to persons under eighteen years of age[47] and exclude those who are or have been married.[48]

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45 Ibid. at pp. 3 and 4.

46 As pointed out by the Sheriff-substitute: ibid. at p.4.

47 Adoption Act 1958, s.57(1), definition of "infant", as amended by s.1(3) of and Sched. 1 to the Family Law Reform Act 1969 (1969 c.46) for England and by s.1(3) of and Sched.1 to the Age of Majority (Scotland) Act 1969 (1969 c.39); Children Act 1975, s.107(1) and Adoption Act 1976, s.72(1), definition of "child".

48 Adoption Act 1958, s.57(1), definition of "infant"; Children Act 1975, s.8(5); Adoption Act 1976, s.12(5).

This is another example of the Parliamentary policy of equating so far as possible the positons of the natural child and the adopted child. These have been fundamental principles of the legislation since the first statutes, except that before 1969 the relevant age had been twenty one.

23.16 The requirement of celibacy is simple and clear. There are two reported instances of its operation. The petition in N, Petitioner[49] was brought under section 1 of the Adoption of Children (Scotland) Act 1930 which according to Sheriff-substitute Gillon rendered liable to adoption only those persons who were under twenty one years of age and never married. The candidate for adoption in this case was a married man of twenty five. There was no suggestion that the petitioner had relied upon section 10 of the 1930 Act.[50] Leaving aside the age requirements, it is clear that the requirement of celibacy was not satisfied. The second condition was thus "unpurified" and the petition was "unhesitatingly" refused.[51] Sheriff Milne on appeal took the same view.

23.17 The issue in Mrs F - Petitioner[52] was to some extent similar. A married woman presented a petitioner for the adoption of her illegitimate son, then aged thirty three and married

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49 (1945) 62 Sh. Ct. Rep. 76.

50 I.e. Adoption of Children (Scotland) Act 1930, s.10 which permitted an adoption order to be made in respect of an existing de facto adoption: see paras.

51 (1945) 62 Sh. Ct. Rep. 76 at p.77.

52 1951 S.L.T. (Sh. Ct.) 17.

But in F,[53] unlike N,[54] the petitioner relied upon section 10 of the 1930 Act. One of the aspects of Sheriff-substitute Kermack's judgment was that section 10 of the 1930 Act did not stand alone.[55] He tended to the view that section 10 attracted the other requirements of the Act.[56] Assuming that it did, the sheriff-substitute clearly concluded that the applicant had failed to fulfil inter alia the requirement of sections 1(1) and 45 of the Adoption Act 1950 (formerly section 1(1) of the 1930 Act) that the child should not be married. The petition was refused.

23.18 The other statutory requirement which was fulfilled neither in N[57] nor in F[58] was the age qualification.[59] This issue had also arisen in the context of section 10 applications.[60] Section 1(1) of the earlier Acts[61] had enabled adoption orders to be made only in respect of children under the age of twenty one years. The 1950 Act was the same, while the present provisions apply to children under eighteen years of age. In N[62] the "child" was aged

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53 Idem.

54 (1945) Sh. Ct. Rep. 76.

55 1951 S.L.T. (Sh. Ct.) 17 at p.18.

56 Idem.

57 (1945) 62 Sh. Ct. Rep. 76.

58 1951 S.L.T. (Sh. Ct.) 17.

59 Para 23.15.

60 I.e. Adoption of Children (Scotland) Act 1930, s.10; the equivalent English provision has long since been regarded as redundant: paras. 23.20 to 23.33.

61 Adoption of Children Act 1926; Adoption of Children (Scotland) Act 1930.

62 (1945) 62 Sh. Ct. Rep. 76.

twenty five. The petition under the 1930 Act was unequivocally refused. Mr and Mrs T B, Petitioners[63] also involved the 1930 Act. There the child had become twenty one on 17 March 1950; the petition had been lodged on 16 March 1950; the child, of course, was twenty one by the time the sheriff-substitute came to consider the matter. He concluded that the relevant punctum temporis for determining the age of the child was the date of the application, largely because it was a definite date. It was thus open to the court to make an adoption order.[64]

23.19 The petition in Mr and Mrs R B, Petitioners[65] was presented under section 10 of the 1930 Act. The child was over twenty one. The judge[66] refused the petition for other reasons but commented that the adoption of children over twenty was permitted under section 10 but not under section 1. The decision thus turned upon the provisions of section 10 alone. By inference the provisions of section 10 were treated as independent of section 1. Sheriff-substitute Kermack said:

> "... to treat the case apart from section 10 would directly conflict with section 1 of the Act which makes twenty years the maximum age for adoption. Any remedy would have to be given by the legislature, preferably perhaps by an extension of the power to alter the register of births, rather than by a change of Adoption Acts".[67]

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63 1950 S.L.T. (Sh. Ct.) 74.

64 Sheriff-substitute Kermack later made an order.

65 1950 S.L.T. (Sh. Ct.) 73.

66 Sheriff-substitute Kermack.

67 1950 S.L.T. (Sh. Ct.) 73 at p.74.

The position with regard to ordinary petitions for adoption is clear. The age qualification of the child is a mandatory requirement. It has the effect of assimilating, in conjunction with the other provisions discussed, the adoptive relationship to the natural relationship.

Section 4 - Section 10 of the 1930 Act in Scotland

23.20 Section 10 of the 1930 Act attracted similar types of problems. Although that provision has not been repealed for Scotland, it is by reason of the passing of time of no practical value now. It was intended to regulate existing de facto adoptions. Nevertheless the way in which the courts have approached the statutory requirements of section 10 is indicative of their general attitude, including the function of welfare.

23.21 Certain difficulties with regard to the age requirement have arisen in relation to section 10. That section contains other requirements. But before looking at these difficulties, the full text of the provision may profitably be set out in full:-

> "Where at the date of the commencement of this Act [1 October 1930] any child under the age of twenty one years is in the custody of, and being brought up, maintained and educated by any person or two spouses jointly as his, her or their own child under any de facto adoption, and has for a period of not less than two years before such commencement been in such custody and been so brought up, maintained and educated, the court may ... make an adoption now authorising him, her or them to adopt the child without requiring the consent of any parent guardian of the child to be obtained, upon being satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child that no such consent should be required and that an adoption order should be made."

There was obviously a number of requirements apart from the age qualification: some objective;[68] others more flexible.[69] The totality of the provision suggests that it was intended merely to formalise an existing relationship, the power to do so being available only in stringently defined circumstances.

23.22 One of the problems which faced the court was whether section 10 was independent of the rest of the provisions of the Act or whether the other statutory requirements had to be satisfied. A glance at section 10 shows that it contained requirements which would also apply to a normal adoption application: for example, the age qualification and the welfare requirement.[70] It has already been suggested[71] that Sheriff-substitute Kermack in Mr and Mrs R B, Petitioners[72] hinted obliquely that section 10 was independent. On the other hand the same judge in Mrs F, Petitioner[73] seemed to take the alternative view that section 10 attracted the other requirements of the Act. The "child" in that case was the thirty three year old married son of the petitioner. It was held that the existence of his marriage was a contravention of section 1(1) of the 1950 Act and that the requirement in section 2(6)(a) of that Act of three months' continuous care and possession had not been fulfilled. If these provisions

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68 E.g. the age requirement; being brought up, maintained and educated under a de facto adoption; two years' custody.

69 E.g. the just and equitable requirement; the welfare requirement.

70 Welfare as a requirement before the 1975 Act.

71 Para. 23.19.

72 1950 S.L.T. (Sh. Ct.) 73.

73 1951 S.L.T. (Sh. Ct.) 17.

applied, there could be no adoption order. Sheriff-substitute Kermack, after analysing G, Petitioner,[74] expressed the view:

> "There is no reason, therefore, from the decision in G - Petitioner to make one think that the court intended to abrogate as regards section 10 any other provision of the Adoption Acts, such as the requirement of celibacy, or to constitute section 10 as a separate code in its own right. To hold otherwise would lead to the absurd result that an adoptee who married before twenty-one could not get adopted between his marriage and his majority, but could get adopted after his majority."[75]

He concluded that the care and possession requirement did not apply to section 10 petitions for the reason that it was inappropriate in relation to persons over twenty one, who, it had already been decided, were liable to adoption under section 10. The requirement of celibacy however did apply to section 10 petitioner; it had been infringed. An adoption order was thus refused.[76]

23.23 A fundamentally different attitude was taken by Sheriff-substitute Prain in H - Petitioners.[77] The subject of the application was twenty three and had lived all his life with his mother. At the date of the application he was residing in Scotland but, before the matter came before the court, he had gone to Canada. The judge recognised that section 10 petitions were not confined to those who were under twenty one at the date of the order but argued, consistently with Sheriff-substitute Kermack in F,[78] that the care and possession requirement could not apply to section 10 petitions.

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74 1939 S.C. 782.

75 1951 S.L.T. (Sh. Ct.) 17 at p.18.

76 Ibid. at p.19.

77 1952 S.L.T. (Sh. Ct.) 15.

78 1951 S.L.T. (Sh. Ct.) 17.

The former judge went further and denied that any provision of the legislation, other than section 10 itself, applied to section 10. He put the view succinctly:-

> "It is apparent also that in other respects in applying the section 10 code, the provisions of the general Adoption Act cannot be followed. The conditions, for example, of paras. (a) and (b) of section 2(6) of the 1950 Act requiring a period of continuous care and possession and notification to a welfare authority prior to the granting of the order, are inapplicable. It seems, accordingly, that, provided the conditions of prior de facto adoption in Scotland postulated in section 10 itself are satisfied, the status of the adoptee as at the date of the order is immaterial, and other conditions appropriate to the adoption of persons who at the date are within the definition of 'infant' do not apply".[79]

The issue was whether the residence of the adoptee in Canada at the date of the hearing was a bar to the granting of an adoption order. Section 2(5) of the 1950 Act required both the applicant and the infant to reside in Scotland before an adoption order could be made. Section 10 of the 1930 Act, on the other hand, said nothing about residence. The judge concluded:-

> "The condition that the infant reside in Scotland must necessarily be, and was, in this case, satisfied as at the date of the commencement of the 1930 Act. On the view, however, that section 10 is a separate code of continuing effect available to all who had the necessary qualifications in 1930, it would, in my opinion, be unfortunate unless one were forced to do so, to confine its operation twenty years later to those qualified persons who had remained resident in this country. There is nothing in section 10 itself which indicates that the adoptee must be resident in Scotland as at the date of the granting of the order, and, if as was decided in L, Petr,[80]

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79 1952 S.L.T. (Sh. Ct.) 15 at p.16.

80 1951 S.L.T. 270.

> the status qualification of the adoptee is to be fixed as at the date of the commencement of the 1930 Act, it seems to me that it is that date which should also determine the residence qualification."[81]

The order was granted. This would have followed on either view propounded by the judge. Nevertheless he clearly indicated that section 10 constituted a separate and wholly independent code.

23.24 The nature of the residence qualification was unclear. In H,[82] the same case, Sheriff-substitute Prain regarded the requirement "as a restriction on the power of the Court to grant"[83] an order and not as "an essential to the jurisdiction of the Court".[84] The latter depended apparently upon the domicile of the applicant. The judge did not set out any reason to support this assertion. It is suggested that the residence qualification of the child to be adopted arguably forms part of the jurisdictional requirement in that it establishes a nexus between the child and the court. This argument would appear to be supported by its inclusion as a requirement for an ordinary adoption[85] order but not for a section 10 order. In the case of an ordinary order the child would have been in the care and possession of the applicant for the prescribed period; this would not necessarily amount to residence. The applicants moreover would be required to be domiciled in Scotland (or England). The absence of a residence qualification for the child

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81 1952 S.L.T. (Sh. Ct.) 15 at p.16.

82 1952 S.L.T. (Sh. Ct.) 15.

83 Ibid., at p.16.

84 Idem.

85 At least before the 1975 Act: para. 23.5, n.13.

would leave open the possibility of the adoption of a child brought to Scotland for that purpose. This might have been regarded as undesirable. The position under section 10 was quite different. It merely recognised, without altering, an existing relationship; and it had been interpreted to apply to persons sui iuris.[86] In these circumstances there would be less need for a residence requirement.

23.25 In any event H [87] threw no doubt upon the conclusion that section 10 of the 1930 Act formed an independent code. The most authoritative decision supporting that conclusion is L, Petitioner.[88] The Inner House of the Court of Session in that case was called upon to consider the competency of an adoption order under section 10 in respect of a person sui iuris.[89] Lord Cooper L.P. doubted the interpretation placed upon section 10 in G, Petitioners[90] but felt obliged to follow it:-

> "In that situation, I feel that we have no option except to treat section 10 of the 1930 Act as constituting a species of code separate from the general Adoption Act, and that we have no option but to continue to apply to section 10 the interpretation which has been given to it since the case of G." [91]

There would seem little doubt therefore that the better view would be to regard section 10 as an independent code.

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86 See e.g. Sheriff-substitute Prain in H, Petitioners 1952 S.L.T. (Sh. Ct.) 15 at p.16.

87 1952 S.L.T. (Sh. Ct.) 15.

88 1951 S.C. 605.

89 Such an order had been held to be competent in G, Petitioner 1939 S.C. 782.

90 1939 S.C. 782.

91 1951 S.C. 605 at p.607.

23.26 That having been established, the question reverts to the age qualification of the potential adoptee under section 10. The answer to that question lay within the precise provisons of section 10 alone. The relevant provision read:-

> "Where at the date of the commencement of this Act any child under the age of twenty one years..."

The problem was whether the age reference related to the age of the adoptee at the date of the commencement of the Act or at the date of the petition or even of the order. The simple grammar of the provision suggested that the child had to be under the age of majority at the date of the commencement of the Act. If so, the age of the child at any other time would be irrelevant; the child would have a "right"[92] to be adopted by the adopters if the other statutory criteria were satisfied. In G, Petitioner,[93] the controversial case already referred to, the child was below majority at the date of the commencement of the Act but had attained majority at the date of the petition. The attention of the Inner House of the Court of Session was drawn by the curator ad litem to the age problem. An adoption order was made; but no opinions were

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92 Technically s.10 conferred a discretion upon the court; to that extent no "right" was conferred by the Act. However if all the statutory requirements had been fulfilled, it would be difficult for the court to refuse to make an order. Thus even if the adoptee did not have a right in the sense of a "claim", he clearly came under a "liability" to be adopted in such circumstances.

93 1939 S.C. 782.

delivered. In K, Petitioner,[94] to the decision in which Lord Cooper L.P. was party, the court made an adoption order in relation to an adoptee aged thirty seven. The Lord President two years' later in L[95] questioned the value of such a view. But as in G[96] so in K,[97] the matter was not debated by the court. Finally, in Mr and Mrs R B Petitioners[98] Sheriff-substitute Kermack remarked obiter that the adoption of children over twenty years of age had been held competent under section 10 by the Court of Session.

23.27 It was not until Lord Cooper L.P. looked at the question more analytically in L[99] that some of the problems were judicially debated.[1] All the statutory criteria were satisfied in that case, including the requirement that the child, the illegitimate son of the petitioner, should not be major at the date of the commencement of the Act. In fact he was aged eleven then; but he was thirty one at the date of the petition, married, with a family of four children and holding a responsible job. The petition was granted. Lord Cooper took the view that the purpose of the adoption in question was "to overcome the embarrassment which the adoptee suffers by means of the discrepancy between the name on his birth certificate and the name which he and

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94 1949 S.C. 140.

95 1951 S.C. 605 at p.607.

96 1939 S.C. 782.

97 1949 S.C. 140.

98 1950 S.L.T. (Sh. Ct.) 73.

99 1951 S.C. 605.

1 The court in neither F 1951 S.L.T. (Sh. Ct.) 17 nor H 1952 S.L.T. (Sh. Ct.) 15 analysed this issue, but it applied the same principles enunciated by the court of Session.

his family bear".[2] This purpose would be inconsistent with the objects underlying the Adoption Acts.[3] He would therefore have hesitated, apart from authority, to allow an adoption of a person sui iuris; he regarded it as "anomalous".[4]

23.28 Regrettably the Lord President did not take his reasoning any further. It may however be reasonably suggested that in his view the concept of adoption embodied in the legislation did not contemplate persons sui iuris. For instance the requirements of section 10 not paralleled in the provisions governing ordinary adoptions would not indicate a relationship between a person sui iuris and his parents; questions of custody, maintenance and education would rarely be appropriate to persons who had attained majority. It may be argued on the other hand that these requirements would need to be fulfilled only in so far as the adoptee was under twenty one at the date of commencement of the Act. To justify that interpretation, the words "at the commencement of this Act" in section 10 would have to qualify the whole section and not merely the age qualification. It is unclear on a purely grammatical level which view is correct. The judicial uncertainties and inconsistencies are thus understandable.

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2 1951 S.C. 605 at p.607.

3 These were not explicitly stated by the court; but Lord Cooper's point has been established aliter: see para. 26.34.

4 1951 S.C. 605 at p.607.

23.29 The argument founded upon the notion that adoption applies only to pupils and minors relied to some extent upon the other provisions in the adoption code. This was contrary to the statements that section 10 formed a separate code. A stronger argument may be that the age of the adoptee at the date of the petition or order is irrelevant, because if the section 10 requirements had been satisfied as at the date of commencement of the Act, a right to an adoption order would have accrued and the later petition, by which time the adoptee might have reached majority, merely perfected an otherwise inchoate right. This argument is admittedly largely speculative but it is based upon the policy of the legislation and its grammatical structure so far as that is meaningful. But no positive conclusion can be reached.

23.30 It is instructive that the welfare doctrine had not been used to assist the interpretation of section 10. Its possible impact was probably difficult to assess. It may be that the welfare doctrine would have indicated an interpretation supporting an approximation to the natural relationship[5]; if so, the doubts expressed by Lord Cooper L.P. in L[6] were probably justified. Otherwise it is difficult to predict what conclusions could have been justified by the welfare concept; it is such a volatile and indeterminate idea. Its absence in the context of the age qualification in section 10 is thus indirect evidence that it probably played no part even where the question was not free from ambiguity.

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5 As in the case of ordinary adoptions.

6 1951 S.C. 605.

23.31 Apart from the age qualification, welfare was clearly relevant to an application under section 10. The requirements of two years' custody, maintenance and education were doubtless necessary to instruct an existing and viable relationship between adopter and adoptee.[7] This would have been vital in the interests of the child to be adopted. Assuming that preservation of the status quo would be an advantage, the adoptee's welfare in the wider sense was thus protected by the fulfilment of these objective criteria. These criteria have been treated as mandatory and failure to satisfy the court would necessitate the refusal of an adoption order.[8]

23.32 Finally welfare was also specified in section 10 as a general requirement. It contained a double discretionary element: firstly, the interpretational discretion built into the word "welfare"; and then the substantive discretion conferred by the provision.[9] Once the statutory requirements prescribing the objective welfare criteria[10] had been satisfied, it was open to the court to exercise its discretion provided that it was "for the welfare of the child". This, of course, was a functional provision indicating the purpose of the exercise

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7 See K, Petitioner 1949 S.C. 140 at p. 142 and Mr and Mrs R B Petitioners 1950 S.L.T. (Sh. Ct.) 73 at p. 74. As to the residence qualification, see H, - Petitioners 1952 S.L.T. (Sh. Ct.) 15.

8 K. Petitioner 1949 S.C. 140; Mr and Mrs R B Petitioners 1950 S.L.T. (Sh. Ct.) 73.

9 Although it was formally a threshold requirement.

10 E.g. age, custody, maintenance, education etc.

as a limitation upon the exercise of the discretion." There is no reason to doubt that welfare is in some respects relevant in exercising that discretion.[11]

23.33 It is possible that the courts could have avoided some of the difficulties affecting the interpretation of section 10 by using welfare as an aid to interpretation; for example, by acknowledging that a person sui iuris was liable to be adopted and at the same time exercising these discretionary powers to refuse an order. The cases have indicated no substantial inclination to use this approach. The courts have tended to rely upon traditional methods of interpretation. They may have created some difficulties, especially in relation to section 10, but the approach generally has been adherence to the strict language of the statute and the application of objectively ascertainable criteria related to the welfare of the child.

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11 As in the case of the 1958 Act, s. 7(1)(b).

CHAPTER 24.

ADOPTION - THE CARE AND POSSESSION REQUIREMENT

Section 1 - Introduction

24.1 A number of threshold requirements without which an adoption order may not be made have been identified.[1] The last chapter dealt generally with several of them. Of the others the most important are the care and possession requirement,[2] recently superseded by the "home" requirement,[3] the welfare requirement itself,[4] now superseded by the primacy of welfare test,[5] and the need for parental and other consents[6] or agreement.[7] When the care and possession requirement has been repealed, its earlier treatment by the courts will remain instructive in indicating the statutory and judicial approaches to the welfare of the child. Even more importantly, although some new controls have been introduced by the Children Act 1975, the change to the fundamental care and possession requirement is largely terminological: for the words "continuously in the care and possession of" there have been substituted "had his home with". Judicial comments on the provision in the Adoption Act 1958 may thus remain of general relevance to the approach to the welfare doctrine. The first three sections of this

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1 Paras. 22.4 to 22.6.

2 Adoption Act 1958 (7 & 8 Eliz. 2, c.5), s.3.

3 Children Act 1975 (1975 c.72), s.9; Adoption Act 1976 (1976 c.36), s.13.

4 Adoption Act 1958, s.7(1)(b).

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

6 Adoption Act 1958, s.4.

7 Children Act 1975, s.12; Adoption Act 1976, s.16.

chapter will deal with the care and possession requirement and the fourth section with the 1975 Act provisions.

24.2 Section 3(1) of the Adoption Act 1958 clearly restricts the power of the court to make an adoption order. It does not however prescribe requirements relating directly to the child's welfare, although the welfare of the child is probably the consideration motivating the provision. The terms of section 3(1) do not fit exactly into any of the classifications so far adopted. The provision is couched in objective terms which relate indirectly to the welfare of the child. It involves the exercise of a function and the standard imposed by the statute can be achieved only by the performance of the function. It is thus an important provision and merits detailed analysis.

24.3 Section 3(1) provides:-

> "An adoption order shall not be made in respect of any infant unless he has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order, not counting any time before the date which appears to the court to be the date on which the infant attained the age of six weeks."

The purpose of this provision has been differently expressed[8] but it seems to be commonly accepted that it is intended to provide an opportunity for the adopters and the child to create and sustain a satisfactory relationship. This could not be established other than by a process of trial and error; hence the need for this "probationary period" of three months' continuous care and possession. On this basis there is a certain

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8 E.g. Bevan, p.328; Bromley, p.252; Cretney, p.345; "Adoption - the Period of Care and Possession" (1961) 105 Sol.Jo. 220.

mutuality of interest between the adopters and the child. A satisfactory probationary period is to the advantage of both parties. Indeed the Hurst Committee in 1954 indicated that the provision was for the protection of both the child and the adopters.[9] Nor did the Houghton-Stockdale Report suggest otherwise. Indeed that committee merely indicated a preference for an interpretation of the provision which would not be "too restrictive".[10] That suggests that policy may play a role in interpretation.

24.4 Although the broad policy of section 3(1) may seem clear, it can never be guaranteed. The judges have not hesitated to express their views of the purpose of the legislation. In Re W (infants),[11] for example, Cross J. hesitated to accept the view of a social worker that the three months' probationary period was intended "to give either side, the natural parents and the adopting parents, an opportunity of changing their minds."[12] The priority given by the social worker to interests other than those of the child was not reflected in A, Petitioners[13] where Sheriff-substitute Prain assumed "that the three month period was a probationary period to enable it to be seen whether the child would settle down with, and be properly looked after, by the adoptive parents."[14] More generally, in E O Petitioner[15]

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9 Hurst Report, p.15

10 Houghton-Stockdale Report, p.68, para. 242.

11 [1965] 3 All E.R. 231.

12 Ibid. at p.238.

13 1958 S.L.T. (Sh. Ct.) 61.

14 Ibid. at p.61.

15 1951 S.L.T. (Sh. Ct.) 11.

Sheriff-substitute Hamilton considered that the equivalent provision of the 1950 Act,[16] namely section 2(6)(a), was "for the protection of children."[17] Bevan adopted a similar child-orientated approach when he indicated that the matching of the child and the adopter in the interests of the child's welfare was the primary object of the provision.[18] These latter views are to be preferred; they are conspicuously in sympathy with the concept of welfare in its protective and promotive aspects. If so, to this extent the policy and phraseology of the statute are consistent.

24.5 Notwithstanding this conclusion, it has been remarked that "construed literally they [the words in section 3(1)] produce absurd consequences."[19] Roxburgh J. instanced the interruption of the continuity of care and possession in the case of the child spending one night in hospital or even some time at school.[20] It is possible to interpret a provision flexibly if absurd consequences would otherwise result.[21] No apparent use has been made of this technical rule of interpretation in this context. Probably it was not necessary for fundamentally the issue turns upon the meaning of the

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16 Adoption Act 1950 (14 Geo. 6, c.26).

17 1951 S.L.T. (Sh. Ct.) 11 at 12.

18 Bevan, p.329.

19 Re C S C (an infant) [1960] 1 All E.R. 711 at p.715 per Roxburgh J.

20 Idem. This is the sort of difficulty to which the Houghton-Stockdale Committee drew attention in their recommendation for an interpretation which should not be "too restrictive". See the new approach introduced by the Children Act 1975: paras. 24.23 to 24.27.

21 See e.g. Maxwell, pp.210 to 212.

words "continuous care and possession". But Lord Cooper L.P. thought that the issue was redundant and declined to define "care and possession" or to deal with "difficult borderline cases."[22] In that event any decision would be determined in an essentially subjective and empirical fashion.

24.6 Lord Cooper L.P.'s robust confidence has to some extent been misplaced. The courts, largely under the influence of the sheriffs-substitute in Scotland, have evolved a reasonably flexible but not unrestricted interpretation. The significance of the care and possession requirement should not be overlooked either in its technical aspects or in its contribution to welfare. Its technical significance lies in the mandatory nature of the provision. The English courts have tended to treat it as a jurisdictional requirement;[23] the Scottish courts as the "peremptory" provision.[24] Probably it is immaterial which is correct. Both emphasise the importance of the provision and the welfare concept which it embodies.

Section 2 - The Scottish approach

24.7 There are two elements in section 3(1) of the 1958 Act for consideration: the continuity aspect and the care and provision factor. As the Scottish cases predominate and lay

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22 M, Petitioner 1953 S.C. 227 at p.229 per Lord Cooper L.P.

23 Re C S C (an infant) [1960] 1 All E.R. 711; Re M (an infant) [1964] 2 All E.R. 1017. See also "Adoption - the Period of Care and Possession" (1961) 105 Sol. Jo. 220.

24 E O - Petitioner 1951 S.L.T. (Sh. Ct.) 11; M, Petitioner 1953 S.C. 227. See Duncan D.J.S., "Care and Possession in Adoption" 1964 S.L.T. (News) 169.

the foundation, it is appropriate to consider them first. Continuity has received less attention than care and possession, largely as a result of the view taken by the courts that the care and possession requirement is not so much a matter of simple objective fact as a viable relationship between the parties.

24.8 Although the words "care and possession" are normally used together, according to E O - Petitioner[25] they contain two separate and distinct ideas. In that case, the aunt of two girls aged nine and eight applied to adopt her nieces after the death of their mother. Since her death the children, their father and their aunt had lived together in the same house and the aunt continued to "look after" the girls.[26] Sheriff-substitute Hamilton felt obliged to refuse the petition. His reason was failure to comply with the care and possession requirement:-

> "It could be said I think that she [the aunt] has had the 'care' of them and I refer to that no further. The possession is a different matter. It denotes more than care. While not capable I think of exact definition, it has meant ... the state of owning or having a thing as one's own. In this particular case the children are in fact and in my view, in law too, living with their father, although the petitioner is living with them also. I do not think the layman would ever say they lived with their aunt. He would say they lived with their father. From the presence of the father in the house it seems to me plain that he is the person in possession of the children and in control of them as well and that he cannot be displaced from that position because his sister the petitioner attends to them."[27]

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25 1951 S.L.T. (Sh. Ct.) 11.

26 Ibid. at p.11 : these words were used deliberately by Sheriff-substitute Hamilton.

27 Ibid. at p.12.

According to the judge therefore the aunt had care of the girls; presumably in the sense that she was responsible for or had a share in the day-to-day activities of the children. On the other hand the relationship between the aunt and the children did not amount to "possession". That word contains nuances connected with property which are currently out of sympathy vis-a-vis a child. Sheriff-substitute Hamilton treated "possession" in the family context as amounting to "living with" and "having control of". If that test were to be applied, the aunt in that case clearly would not have possession. So it was decided.

24.9 The circumstances in E O[28] were abnormal because the natural parent and the adopting parent were living in the same house. The norm, if one exists, in adoption is where the young child to be adopted is separate from his natural parent.[29] In such a case there is likely to be no problem in satisfying the care and possession requirement. There was nevertheless a problem in G - Petititioner,[30] as a result of the slightly unusual circumstances in that case. It is superficially similar to but is fundamentally different from E O.[31] A child of seven had lived in the home of her grandmother since birth;

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28 1951 S.L.T. (Sh. Ct.) 11.

29 The adoption legislation is conceived largely on the basis that children of tender years will be the subject of adoption order; older children are not, of course, excluded. The statutory provisions are merely less apt in their case.

30 1955 S.L.T. (Sh. Ct.) 27.

31 1951 S.L.T. (Sh. Ct.) 11.

first with both her parents, then with her mother alone after her parents were judicially separated and finally with her grandmother alone after her mother's death. The mother died on 28 January 1954; the child was removed to hospital suffering from tuberculosis on 27 March 1954; a petition was presented for adoption by the grandmother on 5 May 1954. If the decision in E O[32] were to be applied, the period prior to 28 January 1954 would clearly have to be disregarded for the purposes of the care and possession requirement. Less than three months had elapsed between the mother's death and the hospitalisation of the child.

24.10 The issue was whether part of the three month period could derive from the period of hospitalisation. The element of continuity also became a factor in this set of circumstances but Sheriff-substitute Garrett founded essentially upon the existence of a parental or quasi-parental relationship between the child and the adopter:-

> "In my view the child, whose only home has been with the petitioner and with regard to whom the petitioner is in loco parentis, fails to be regarded as being in her care and possession for the purposes of the section albeit that, owing to the circumstances of the illness he has been physically absent from the adoptive home during the period." [33]

The judge's logic is not impeccable. As already noted, the relationship between the child and the petitioner prior to the mother's death could scarcely have amounted to care and

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32 Idem.

33 1955 S.L.T. (Sh. Ct.) 27 at p.27.

possession within the analysis expounded by Sheriff-substitute Hamilton in E O.[34] But if that test had been satisfied in the circumstances obtaining after the mother's death, the issue would have been whether that quasi-parental relationship continued after the commencement of hospitalisation. The judge clearly took the view that such continuity did exist, regrettably without giving any reason. But apart from the continuity element, there would seem little reason to doubt that the quasi-parental relationship existed, so far as possible, during the period of enforced separation as a consequence of hospitalisation. This is not what Sheriff-substitute Garrett said; it may be what he meant.

24.11 The same test in effect was applied in A, Petitioners[35] in circumstances which were again rather abnormal. The mother of an illegitimate child and her subsequent husband attempted to adopt the child. The child and her mother lived in the wife's parents' home; the husband lived there as often as his periods of leave from the Army permitted. At no time did these periods amount to three months. Sheriff-substitute Prain faced a self-imposed dilemma. On a strict literal interpretation the care and possession requirement could have been satisfied by the male applicant. Nevertheless he inclined to apply the test propounded in E O[36] and G[37]; whether

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34 1951 S.L.T. (Sh. Ct.) 11.

35 1958 S.L.T. (Sh. Ct.) 61.

36 1951 S.L.T. (Sh. Ct.) 11.

37 1955 S.L.T. (Sh. Ct.) 27.

"effective control and quasi-parental standing" existed without so many interruptions as would break any element of continuity. He felt that he was "stretching the statutory provisions at least up to their extreme limit."[38] Nevertheless an order was pronounced.

24.12 What particularly disturbed Sheriff-substitute Prain was not the decision in the case but the consequence of a provision, designed to protect children, which effectively denied to the court the chance of making an order "so manifestly for the benefit and welfare" of the child.[39] As he said:

> "At the moment there seems to be some confusion between the necessary legislation for the protection of children generally and the aims of the restrictions placed on the granting of adoption orders. The latter are presumably intended as protective provisions but, in fact, they operate in the other direction."[40]

This raises a fundamental and difficult point. The structure of the adoption legislation is such that certain requirements must be fulfilled as a sine qua non of an adoption order; they are intended objectively to protect the child. It was also a requirement before the Chidren Act 1975 that the order if made would be for the welfare of the child.[41] This was an open-ended and to some extent subjective requirement. It gave rise, therefore, to possibly conflicting views of welfare. This could not happen where welfare contains

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38 1958 S.L.T. (Sh. Ct.) 61 at p.62.

39 Idem. The interpretational difficulties of this case have already been discussed: paras. 9.8 to 9.12.

40 Idem.

41 Adoption Act 1958, s.7(1)(b).

objectively prescribed elements. There were, and indeed are, at least two aspects of welfare in the context of adoption. This is thus the first example of the multifunctional scope and nature of the welfare concept. Failure to acknowledge this may have caused some of Sheriff-substitute Prain's difficulties.

24.13 To revert to the care and possession requirement: the test of a parental or quasi-parental relationship implies an element of continuity[42] similar to the element of continuity specifically contained in the statutory requirement.[43] Thus, if a parental relationship between the child and the adopter has been established at any point of time, provided this relationship has not been interrupted so that it has been completely destroyed, then the criteria satisfying the continuous care and possession requirement will have been met.

24.14 On this basis the other problem revealed by some of the Scottish cases falls into place. If the establishment of a parental relationship by means of the control test were the criterion, it is understandable why an adoption order was refused in M, Petitioner,[44] Mr and Mrs A.B. Petitioners[45] and F, Petitioners.[46] In each of these cases the child had almost attained majority. In M[47] he had commenced his term of

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42 A relationship may be analysed in two ways: it may be considered statically at a given moment of time; or it may be looked at as a long-term relationship covering a tract of time, thus operating dynamically.

43 Adoption Act 1958, s.3.

44 1953 S.C. 227.

45 (1954) 71 Sh. Ct. Rep. 14.

46 1955 S.L.T. (Sh. Ct.) 12.

47 1953 S.C. 227.

service in the RAF not long before the petition was lodged. The same circumstances obtained in Mr and Mrs AB[48] and in F.[49] In no case could it have been said that the young man had been in the care and possession of the applicants, even if he had spent whatever time could be spent with the prospective adopters. The court in each case was rather reticent in giving a reason for this conclusion. It was not expressed in these terms but it would appear that to some extent at least the indicia of a parent-child relationship were absent. In other words if there had been such a relationship at an earlier point of time, it would have been terminated by forisfamiliation.[50]

24.15 If this is a reasonable view of these cases, the argument may be taken one stage further. It is not a particularly difficult matter to determine whether or not a parental or quasi-parental relationship exists statically at a given moment of time. It is perhaps sufficient to ask the questions posed by Sheriff-substitute Hamilton in E O;[51] namely, whether the child is under the control of the applicant.[52] Admittedly difficulties could arise in answering these questions in the individual case, but they are probably matters of fact. A real problem arises when the dynamic element of continuity is introduced. Continuity is a question of degree. There is

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48 (1954) 71 Sh. Ct. Rep. 14.

49 1955 S.L.T. (Sh. Ct.) 12.

50 See also Re A (an infant)[1963] 1 All E.R. 531 at p. 536 per Cross J. and Mrs F, Petititioner 1951 S.L.T. (Sh. Ct.) 17.

51 1951 S.L.T. (Sh. Ct.) 11.

52 Para. 24.8.

scope for judicial flexibility. The cases already examined are really examples of such an approach. They tend to regard care and possession in terms of its continuity. The other cases have pushed this tendency to its logical conclusion by interpreting care and possesion entirely as a dynamic and hence more flexible concept founded entirely upon continuity.

24.16 The issue in A, - Petitioners[53] was decided in the context of continuity but the arguments used were remarkably similar to those dealing with care and possession. Indeed it is perhaps surprising that the fulfilment of the care and possession requirement was not challenged, since the child was rather close to a condition of forisfamiliation. A married couple sought to adopt a girl aged eighteen who had been in their custody almost since birth. For over two years she had been employed as a probationer nurse, returning to the applicants' home only at weekends and during periods of leave. Was continuity established? Sheriff-substitute Middleton commenced by explaining that "obvious absence for a night or even for a few days will not be sufficient to interrupt the running of the three month period."[54] That had not always been obvious to some of his judicial colleagues. He went on:-

> "The question seems to be whether the adoptive home is the home and the only home of the child and whether the applicants are in all respects in loco parentis to the child during that period. If that is so, then, for the purpose of the section, the child has been in their care and possession throughout and absence from the adoptive home for the purpose of training, through illness or for any other sufficient reason does not affect the position. What constitutes interruption of the

53 1953 S.L.T. (Sh. Ct.) 45.

54 Ibid. at p.46.

> period in the case of a young child may not be interruption in the case of an adult. It will depend upon whether the effective control and quasi-parental standing of the applicant in relation to the child has been affected."[55]

The relevant criteria in assessing continuity of care and possession appear to be intrinsically similar if not identical to those applying to care and possession itself. Care and possession are indicia of a relationship; continuity is simply the absence of a sufficient interruption of such a relationship. In each case it is a matter of its individual circumstances; there are no absolute rules; there exists merely a broad and flexible pattern to which the relationship should conform. The question is impliedly bound up with the welfare concept itself. That is a flexible notion; the total image is therefore not static but dynamic.

24.17 In A[56] the absence for training of the probationer nurse, which in the event did not interrupt the period of care and possession, related to the prospective adoptee; in XY - Petitioner[57] the absent party was one of the adopters. The identity of the absent party is not a distinguishing factor. The judge, the same sheriff-substitute as in A,[58] introduced the notion of a "temporary" absence;[59] presumably in distinction to a permanent absence. In that case the male applicant had left Scotland for Canada shortly after the

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55 Idem.

56 1953 S.L.T. (Sh. Ct.) 45.

57 1954 S.L.T. (Sh. Ct.) 86.

58 1953 S.L.T. (Sh. Ct.) 45.

59 1954 S.L.T. (Sh. Ct.) 86 at p.86.

petition had been presented and at the date of the hearing he had been there for over two months. The requirement of three months' continuous care and possession had not therefore bee fulfilled. The sheriff-substitute point out that "the child may be in the care and possession of an applicant 'continuously' even when there are temporary absences from one another provided their permanent home is the same."[60] Just as in A[61] so in XY[62] the approach to the interpretation of the care and possession requirement was essentially flexible. The court would appear to have been searching for a parent-child relationship, the antithesis of a condition of forisfamiliation. Its continuity was a matter of circumstances or of degree.

24.18 It may be recalled that in E O[63] Sheriff-substitute Hamilton expressed doubts that the care and possession requirement could by its objectivity thwart its purpose of protecting the child's welfare, which, as he noted, was in itself a consideration upon which the court had to be satisfied before granting an order.[64] If the view of the cases postulated in the preceding paragraphs is correct, namely proof of an existing but flexible relationship, the judge's doubts were probably unfounded. The apparent narrow objectivity of the requirement receded before the flexibility shown by the Scottish courts. This approach complements the

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60 Idem.

61 1953 S.L.T. (Sh. Ct.) 45.

62 1954 S.L.T. (Sh. Ct.) 86.

63 1951 S.L.T. (Sh. Ct.) 11.

64 Ibid. at p.13.

concept of welfare as the foundation of the requirement without at the same time compromising it in any way. Thus both the letter and the spirit of the law have been observed.

Section 3 - The English approach

24.19 The English cases on this topic are in a sense little more than a postscript to the foundation laid by the Scottish courts.[65] They may nevertheless be noticed briefly. Re C S C (an infant)[66] is the case in which the judge took the view that a strict literal construction of "continuous care and possession" would produce "absurd consequences."[67] Be that as it may, Roxburgh J. in that case paid more attention to the somewhat cryptic remarks of Lord Cooper L.P. in M - Petitioner[68] than to the profounder analyses of some of the Scottish sheriffs. This is doubtless understandable in view of the position of the shrieval judiciary in the legal hierarchy. In any event Roxburgh J. on appeal from the local justices in that case declined to make an adoption order in the absence of continuity of care and possession. During the three months' period in question the adopters had allowed the mother to have the infant for three nights, two consecutively. The reason does not appear to have been disclosed. Nevertheless it was decided that continuity had been interrupted.

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65 Bevan, pp. 328 to 330, although recognising the contribution of the Scottish courts, has accused them of inconsistency in applying the principles.

66 [1960] 1 All E.R. 711.

67 Ibid. at p.715 per Roxburgh J.

68 1953 S.C. 227.

24.20 This case can, it is suggested, be distinguished from the Scottish cases. In CSC[69] the interruption was brought about by the deliberate act of the adopters. In the Scottish cases continuity was interrupted by events effectively outside the control of the parties. Such events do not necessarily break an existing relationship. In CSC[70] the parent in effect resumed her parental relationship with the child. The only possible ground for negativing that conclusion would be that the arrangement was temporary. No such suggestion was made, although on the face of it there is no reason to suppose that that argument might not have succeeded. No adoption order was made. In this way therefore the English decision, perhaps at first inconsistent with the Scottish cases, may be reconciled with them without damaging the principle involved.

24.21 There can be little doubt that the views expressed in Re B (an infant)[71] are patently consistent with, and indeed to some extent founded upon, the relevant Scottish cases. The issue was less a question of continuity and more whether care and possession had been established. The mother of an illegitimate child attempted to adopt her own child. She was employed as a hospital midwife and was engaged in night duty. Arrangements were made for mother and child to be with each other as much as possible. Nevertheless the child spent some of his time with certain

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69 [1960] 1 All E.R. 711.

70 Idem.

71 [1964] Ch. 1.

other couples. The test applied by Buckley J. in holding that the necessary continuous care and possession had been established was fundamentally who exercised effective control over the child. He introduced the concept of vicarious control which had not been used by the Scottish courts:-

> "In my judgment it is right in the circumstances of the present case to regard the care and control which Mr and Mrs B. have exercised in respect of the child as having been exercised on the applicant's [mother's] behalf and as having been vicariously exercised by the applicant herself." [72]

This view represents little more than a jurisprudential gloss upon the attitudes of the Scottish judges. These two English cases thus reinforce the arguments and conclusions in the preceding paragraphs to the effect that the establishment of continuous care and possession amounts to proof of a viable relationship subject only to temporary interruptions.

24.22 The requirement of continuous care and possession applied not only to ordinary adoptions but also to provisional adoptions under section 53 of the Adoption Act 1958 by persons domiciled outside Great Britain. The provisions of section 3(1) applied subject to the substitution of six months for three months.[73] There would thus appear to be no difference in principle between ordinary and provisional adoptions. The duty correlative to the care and possession requirement in section 3(1) of the 1958 Act was the obligation in section 3(2) to give notice to the local authority of intention to apply for an adoption order. Section 3(2) was modified in

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72 Ibid. at p.8.

73 Adoption Act 1958, s.53 (4) and (5).

relation to applicants not ordinarily resident in Great Britain in terms of section 12(1) and (3).[74] The position was complex but section 12(3) introduced the concept of spouses "living together." It is not presently necessary to become involved in these intricacies, but the purpose of this requirement of notification would appear to be to provide a means of enforcing the care and possession requirement. So far as this analysis is concerned, the important issue is the proper approach to the construction of these provisions. The words "living together" involved such physical propinquity between spouses as the exigencies of the consortium permitted.[75] This is obviously not a literal construction in the sense of absolute cohabitation. The judicial approach has therefore been in harmony with the interpretation placed upon the care and possession requirement; namely the establishment of facts and circumstances from which a viable relationship can be inferred.

Section 4 - The "home" test

24.23 The Houghton-Stockdale Committee impliedly approved the fairly flexible approach adopted by the judiciary to section 3 of the Adoption act 1958 in seeking an existing relationship based upon a control test rather than "continuous physical possession."[76] Parliament however has now changed

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74 See Re W (an infant)[1962] Ch. 918.

75 Re M (an infant)[1965] Ch. 203.

76 Houghton-Stockdale Report, p.68, para. 242.

the statutory formula.[77] No adoption order may be made unless the child has "had his home with the applicants or one of them" for the relevant period.[78] Thus for Scotland the new formula takes the place of the continuous care and possession requirement,[79] although it may be mentioned in passing that by section 107(2) of the Children Act 1975 the phrase "actual custody" is given the meaning "care and possession". This, unlike the equivalent provisions in England, seems to have no bearing upon the requirement in question as the expression "actual custody" does not appear in section 9 of the 1975 Act.

24.24 On the other hand, section 87(3) of the 1975 Act, which applies only in England,[80] provides that any reference to a person with whom a child has his home refers to "the person who, disregarding absence of the child at hospital or boarding school and any other temporary absence, has actual custody of the child". Moreover the person with actual possession of the child's person is treated as having actual custody.[81] The same pattern naturally is repeated in the Adoption Act 1976 with the definitions in section 87 of the Children Act 1975 applied to the 1976 Act in consequence of their inclusion[82] as section 19A of the Interpretation Act 1889.[83] This complex statutory pattern does little more than put into legislative form the flexible

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77 Children Act 1975, s.9; Adoption Act 1976, s.13.

78 Thirteen weeks when the applicant is a parent, step-parent or relative of the child of the child has been placed by an adoption agency; twelve months otherwise.

79 Wilkinson A.B., "Children Act 1975" 1976 S.L.T. (News) 237 at p. 237.

80 Children Act 1975, s. 94.

81 Ibid. s. 87(1)

82 Ibid. s. 89(1)

83 52 and 53 Vict., c. 63.

construction placed upon section 3 of the 1958 Act by the courts. It appears to avoid the problems of interruption of continuity felt by Roxburgh J.[84] by indicating disregard for the two specific absences which he contemplated[85] and for any other temporary absence. The element of care is now no longer part of the requirement.[86] The result, in England at least, is that "continuous care and possession" has become "actual possession" with inherent discretion at the interpretation stage to disregard temporary absences. This seems to be an unnecessarily cumbersome method of achieving a result which had become accepted in any event. Scotland, perhaps by omission, has been given the doubtful privilege of a new concept. The simple solution for the Scottish courts would be to interpret the "home" test in accordance with the formulae which they have evolved over the years.

24.25 Section 9 of the Children Act 1975 has done more than substitute the "home" test for the continuous care and possession requirement.[87] One of the changes supported by the Houghton-Stockdale Committee was that independent placements by non-relatives for adoption should be prohibited.[88]

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84 Re CSC (an infant) [1960] 1 All E.R. 711 at p.715: para. 24.5.

85 I.e. in hospital or at school.

86 Because care is not part of the definition of "actual custody".

87 That in effect is what was achieved by s.9(1) of the Children Act 1975 and s.13(1) of the Adoption Act 1976.

88 Houghton-Stockdale Report, p.24, para. 88.

Four recommendations were proposed in support of that change, including the requirement that an applicant, not being a relative of the child, should have cared for the child for at least twelve months if an adoption agency had not made the original placement.[89] This has been enacted as sub-section (2) of section 9 of the 1975 Act.[90] Although this has been accused of undermining the purpose of prohibiting independent placement,[91] applications by non-relatives for adoption of a child not placed by an agency are competent provided that this requirement is met. This is the reason for the two periods specified in section 9.

24.26 The "home" test has been strengthened by the further threshold requirement in subsection (3) that the adoption agency or the relevant local authority must be given sufficient opportunities to see the applicant or applicants and the child together in the home environment. This was prompted by the recommendations of the Houghton-Stockdale Committee that the court should have a discretion in relation to applicants resident overseas to modify the care and possession requirement.[92] That has been achieved but the formula adopted by Parliament has effectively placed a further restriction upon the judicial power to grant an adoption order in any case, for the requirement is not restricted to applicants resident overseas.

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89 Ibid. p.25, para. 92, recommendation 15.

90 Adoption Act 1976, s.13(2).

91 Freeman, n. to Children Act 1975, s.9(2).

92 Houghton-Stockdale Report, p.68, para. 243; Freeman, general n. to Children Act 1975, s.9.

It is however consistent with the policy that the adoption should be in the best interests of the child.

24.27 These changes were introduced for a number of different reasons. The welfare of the child was an element but not the only factor in the reasoning supporting these changes. It is however significant that the techniques used to bring about these changes have taken the form of threshold requirements even where, as in one instance, it was intended to give to the courts a discretion. The form of the provisions is thus not only of technical but also of substantive importance. These terminological nuances have a bearing upon the role placed by welfare in the legislation.

CHAPTER 25

THE APPROACH TO THE WELFARE REQUIREMENT

Section 1 - Introduction

25.1 Section 7(1)(b) of the Adoption Act 1958[1] required the court to be satisfied before making an adoption order that "the order if made will be for the welfare of the infant [child]."[2] This constituted a threshold requirement. Thus if the court were not so satisfied, an order could not be made. On the other hand, if an order would be for the child's welfare, there was no duty to make an order. At that stage it became a matter for the court's discretion. Although the exercise of that discretion was not directly regulated by the 1958 Act, the various threshold requirements, in particular the welfare requirement and the need for parental consent,[3] tended to direct attention to most of the fundamental issues. The most important questions were thus resolved at the threshold stage rather than when the decision was made whether or not to make an adoption order. To some extent this indicates why the judicial function is sometimes regarded as entirely formal.[4]

25.2 The question which the court was required to ask itself under section 7(1)(b) of the 1958 Act is unequivocal. Will an adoption order be for the welfare of this child? It is

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1 7 Eliz. 2, c.5.

2 Repealed from 1 January 1976: Children Act 1975 (1975 c.72), s.108(4)(d) and Sched 4, Part III.

3 Adoption Act 1958, s.5, which will be repealed and replaced by ss.12 and 14 of the Children Act 1975.

4 Paras. 25.20 to 25.24.

directed towards the individual child. It contemplated the child's future and to that extent it was speculation, but speculation based upon existing circumstances. It contained an element of interpretational discretion with regard to the meaning of "welfare". Equally clearly, it is suggested, it was not a policy decision. No choice was involved. The discretion based on choice came later in the process whether or not to exercise the discretion to make an order. But welfare played no formal part in that decision.[5] These considerations emphasise that section 7(1)(b) was a threshold requirement and not a factor relevant in exercising a discretion. This is vital in determining what role welfare played in the adoption process.

25.3 Parliament gave the courts some assistance in deciding what matters might be relevant in answering the question posed by section 7(1)(b). It was provided by section 7(2) of the 1958 Act[6] that:-

> "In determining whether an adoption order if made will be for the welfare of the infant [child], the court shall have regard (among other things) to the health of the applicant, as evidenced, in such cases as may be prescribed, by the certificate of a fully registered medical practitioner, and shall give due consideration to the wishes of the infant [child], having regard to his age and understanding."

In a sense this provision was an acknowledgement of the interpretational discretion built into section 7(1)(b). The considerations referred to in section 7(2) represented a minimum only. Other considerations could clearly be relevant in deciding whether an adoption order would be for the welfare

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5 But it was not necessarily irrelevant.

6 Also repealed from 1 January 1976: Children Act 1975, s.108(4)(d) of and Sched.4, Part III.

of the child. The applicant's health would be a matter for consideration in every case but the relevance of the child's wishes would in practice be a matter for the court to decide in the circumstances of each case. Section 7(2) thus scarcely placed any restriction upon the way the court would exercise its interpretational discretion in deciding whether an order would be for the child's welfare. It is significant that section 7(2) used the formulae "have regard to" and "give due consideration to". They indicate the regulation of the exercise of a discretion. In form, of course, section 7(1)(b) was a threshold requirement. In substance it probably involved the exercise of a discretion.

25.4 The Children Act 1975 has enacted what is in form and principle an altogether different role for welfare to play in the adoption process. It is worth repeating the exact words of section 3 of the Children Act 1975:- [7]

> "In reaching any decision relating to the adoption of a child, a court ... shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding."

The formula used in section 3 indicates the regulation of the exercise of a discretion. All the circumstances are treated as relevant. This direction is rather unhelpful and perhaps even otiose. The child's wishes and feelings must be ascertained but only "so far as practicable" and

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7 In England, Adoption Act 1976 (1976 c.36), s.6.

must be taken into consideration but only in the context of the child's age and understanding. These two qualifications take away almost the whole substance of the provision and give to the court something in the nature of an interpretational discretion. The elements in section 3 so far examined, therefore, although they purport to regulate the exercise of discretion, do so only by conferring a different type of discretion upon the court.

25.5 The remaining element in section 3 is the duty to give first consideration to the child's specified need.[8] It is not actually stated to be a duty but there can be little doubt, given the syntactical structure of the section, that it is. The problem of interpretation is whether the substance of this duty is simply one of the circumstances required to be considered or whether it has a different and more positive role to play, for example, as a statement of the objective of the whole process. The use of the word "first", even without "paramount"[9], indicates an intention to create priorities. One view may be that the provision merely sets out welfare at the top of the list of priorities for consideration, without specifying others beyond the relevance of the child's wishes and feelings. If so, the next issue is whether first means first in point of time or in point of substance. If the former, it means very little. If the latter, it comes close to prescribing welfare as the

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8 I.e. the need to safeguard and promote the welfare of the child throughout his childhood.

9 Which is included in the Guardianship of Infants Act 1925.

objective of the process. The inclusion of the word "paramount" would probably have pointed towards the latter conclusion.[10] Its omission may prove to be a matter of some consequence. But in practice the courts will arguably take a broad view of the section, as they have usually done with section 7(1)(b) of the Adoption Act 1958 and section 1 of the Guardianship of Infants Act 1925, rather than engage in such a detailed analysis as this.

25.6 Whatever "giving first consideration" means, welfare now plays a different formal role in the adoption process as a whole rather than just at the judicial stage. Section 7(1)(b) of the 1958 Act was repealed with effect from 1 January 1976 and section 3 of the 1975 Act came into effect on that date.[11] Under the 1958 Act welfare was a sine qua non of an adoption order. But the courts did not always look at it like that. Making welfare a threshold requirement in that way would have ensured that every adoption was for the child's benefit. Equally it would have ensured that an adoption order would not be made simply because to do so would be for the child's benefit. Thus an order clearly for the child's benefit would not necessarily be made. The concept of welfare in the 1958 Act thus operated as a strong restraining influence, designed to protect the child but not necessarily to promote his welfare.

25.7 The 1975 Act is different. Welfare is no longer a threshold requirement. It is to be considered in reaching

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10 See the discussion of the meaning of "paramount" in the custodial context: paras. 35.92 to 35.96 and 43.31.

11 Children Act 1975, s.108(4)(a).

any decision, including the judicial decision to make an adoption order or not. True, first consideration must be given to the need to safeguard and promote the welfare of the child throughout his childhood. The need has been strongly stated but what is vital is how the courts will deal with it. The duty is couched in administrative language.[12] It is annexed to the exercise of a discretion. It introduces a function of an administrative nature,[13] which, apart from its own problem of interpretation, will be difficult to enforce.[14] Welfare is no longer a legal requirement; it is simply part of an administrative process. To that extent its significance has been reduced. This indicates the movement from legal prescription to administrative flexibility in the adoption process.[15]

Section 2 - The background to section 3

(a) The Houghton-Stockdale Report

25.8 The 1975 Act purported inter alia to implement several of the recommendations of the Houghton-Stockdale Report.[16] It has however done more in the area of welfare than simply enact the recommendations in that Report. It is thus worth considering some of the recommendations of the Report and the views expressed in Parliament, if only in an attempt to understand the policy underlying section 3.

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12 I.e. "have regard to".

13 There is an element of choice : not simply answering a question.

14 It would be difficult to prove otherwise when it is stated that enumerated factors have been taken into account.

15 See Fisher D.E., "The 1972 Adoption Report: The Emerging Pattern" 1973 Juridical Review 180.

16 See (1975) 356 H.L. Deb. 5s. col.16 (Lord Elwyn-Jones L.C.); (1975) 893 H.C. Deb. 5s. cols. 1823 and 1824 (Dr. David Owen).

25.9 The Houghton-Stockdale Committee acknowledged that the welfare principle had influenced many of their propositions.[17] They also suggested the application of the paramountcy of welfare principle to adoption law.[18] This principle was in their view particularly relevant to the resolution of conflicts. As they said:-

> "... because although the 1958 Act already requires the court to be satisfied that an adoption order, if made, will be for the welfare of the child, it does not contain a provision requiring the court, in cases where it is asked to dispense with the natural parents' consent, to consider the child's welfare at that stage."[19]

They continued:-

> "We think that the child's welfare should always be the first consideration. We consider in Chapter 8 the way in which this principle should be applied to the law dispensing with consent to adoption."[20]

The report seems therefore to have been based upon the assumption that section 7(1)(b) of the 1958 Act would remain in force. There was no suggestion in the report that it should be repealed. Their recommendation was that the test or principle to which they referred[21] would apply only to dispensation with consent.[22] So far the report is clear. Nevertheless, although they were discussing the paramountcy of welfare principle, they indicated that welfare should be the "first" consideration. This is rather ambiguous. Did they mean "first" and not "paramount"? Or did they treat the two words as meaning the same?

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17 Houghton-Stockdale Report, para. 17.

18 Ibid., para. 18.

19 Idem.

20 Idem.

21 I.e. the primacy of welfare principle.

22 The Committee dealt in detail with this aspect in paras. 205 to 218 of the Report.

25.10 The report talked generally and rather imprecisely of the "principle". Normally this meant the paramountcy of welfare principle. The committee, however, after taking account of comments on their working paper, declined to suggest that the paramountcy principle should be applied generally to adoption law.[23] On the contrary they decided that that principle was inconsistent with the unreasonable withholding of consent as a ground for dispensation with consent.[24] It was therefore recommended that "in deciding whether a parent is withholding consent to adoption unreasonably, the court shall have regard to all the circumstances,[25] first consideration being given to the effect of the parent's decision on the long-term welfare of the child".[26]

25.11 It is crucial to recognise that this recommendation was directly related to establishing the ground of unreasonable withholding of consent. It was not relevant to deciding whether to dispense with consent once the ground had been established. Dispensation remained a matter of discretion. On the other hand, section 3 of the 1975 Act seems to have been sufficiently widely drafted to apply to the judicial decisions whether agreement was being unreasonably witheld and whether agreement should be dispensed with.[27] Section 3, of course, applies even more widely than that, for it refers to "any decision relating to the adoption of a child". Thus

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23 Houghton-Stockdale Report, paras. 208 and 209.

24 Ibid, para. 212.

25 Ibid., para. 215.

26 Ibid., para. 218.

27 It is now more appropriate in the context of the 1975 Act to refer to "agreement" in place of "consent".

section 3 has effect in relation to decisions not contemplated by the committee. In this sense it appears to fill the vacuum left by the repeal of section 7(1)(b) of the 1958 Act but in a way not intended or foreseen by the committee. Section 3 probably assists in the context of dispensation with agreement. It is on the other hand a weak, almost no, substitute for section 7(1)(b). Much will depend on the meaning, as distinct from the function, of section 3. The inclusion of the need to safeguard and promote the welfare of the child throughout his childhood is a factor giving strength to the provision. The significance of "first consideration" remains equivocal.

(b) The discussion in Parliament

25.12 It is significant that most of the considerable debate on what became section 3 of the 1975 Act was concerned with the meaning of the "first" consideration and of the other alternative formulae. Little was said about the nature or function of the provision or about any of other elements in it. The repeal of section 7(1)(b) of the 1958 Act, a matter of vital concern, went apparently almost unnoticed. There was however a motion to include an additional clause which would contain a duty to safeguard and promote the child's welfare in the form of a threshold requirement rather than as a means of controlling the exercise of a discretion as in section 3.[28] The argument turned on the meaning of "first" and "paramount" and the function of the provision was not debated. In any

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28 (1975) 899 H.C. Deb. 5s. cols. 1435 and 1436. (Mr. Gordon Wilson). Lord Simon also suggested a type of threshold requirement directed towards welfare in the context of unreasonable witholding of consent; but it was subsequently withdrawn: see (1975) 357 H.L. Deb. 5s. cols. 1090 to 1100.

event the motion was withdrawn.

25.13 Three different formulae were put before Parliament during the Bill's passage. Nothing of significance was said about the content of the duty, of the administrative nature of the provision or of the "have regard to" formula. The debates dealt principally with the meaning of "first" and "paramount" in relation to the part to be played by the welfare concept in the administrative process.[29] The Bill as drafted required the court to take "full account of the need to safeguard and promote the welfare of the child." This reflects the narrative of the committee's report but not their recommendation. Their recommendation was contained in Lord Wigoder's amendment that the court should "have regard to all the circumstances, first consideration being given" to the welfare concept. The third situation contemplated but never moved formally was to require the court to regard the welfare duty as the first and paramount consideration, along the lines of section 1 of the Guardianship of Infants Act 1925[30] or the Guardianship of Minors Act 1971.[31] Lord Wigoder's formula was eventually enacted not only in section 3 in relation to adoption but also in a number of sections relating to official care of the child.[32] The new formula is thus a matter of some importance.

25.14 Despite the considerable time spent by Parliament on these issues, there seems to have been and indeed to continue to be an element of inherent confusion about the

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29 The formulae were reviewed in simple terms by Lord Wigoder: (1975) 357 H.L. Deb. 5s. cols. 1057 and 1058.

30 15 & 16 Geo. 5, c.45.

31 1971 c.3.

32 Children Act 1975, ss. 59 and 79.

meanings of the words in question: not only from the semantic aspect but also about the way the courts have interpreted "paramount" in other contexts.[33] The report of the Houghton-Stockdale Committee did not appear to suffer from such confusion. They felt unable to suggest that adoption law should incorporate the paramountcy of welfare principle either generally or in relation to unreasonable withholding of agreement as a ground for dispensation with such agreement.[34] The proper approach in the latter context, they clearly concluded, was to give first consideration to welfare.[35] This probably amounts to enactment of the views expressed by the House of Lords in Re W[36] and A and B, Petitioners[37]. It involves a recognition that "there are a number of interests to be considered" among which the interests of the child should be put first.[38]

25.15 This was merely the outcome of the discussion in Parliament. Lord Hailsham clearly rejected the relevance of the paramountcy principle to adoption,[39] without however stating precisely what test should apply. Others, including Lord Simon, thought that the principle should apply generally in the adoption context.[40] In a sense as a compromise, but undoubtedly giving effect to the committee's views, the middle

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33 Especially custody: see paras. 39.63 to 39.89 and chapter 42.

34 Houghton-Stockdale Report, para. 218.

35 Idem.

36 [1971] A.C. 682.

37 1971 S.L.T. 258.

38 Houghton-Stockdale Report, para. 216.

39 (1975) 356 H.L. Deb. 5s. col. 33 (Lord Hailsham).

40 E.g. (1975) 356 H.L. Deb. 5s. col. 49 (Baroness Bacon); (1975) 356 H.L. Deb. 5s. col. 785 (Baroness Fisher); (1975) 357 H.L. Deb. 5s. col. 1061 (Lord Simon).

line proposed by Lord Wigoder was accepted: what has been called for convenience the primacy of welfare principle.[41] It applies generally in adoption law, not just to unreasonable withholding as a ground for dispensation with agreement as the committee intended.

25.16 The confusion concerning "paramountcy" and "primacy" was apparently resolved by the circulation of written memoranda by certain judicial members of the House of Lords.[42] The views of Lord Simon were preferred to those of the Lord Chancellor and Lord Hailsham. In the event paramountcy was rejected, primacy accepted. The real problem was the meaning of "paramount". According to Lord Simon, "the test of the first and paramount consideration is not an all-exclusive one; it does not exclude other considerations."[43] The Lord Chancellor was particularly concerned that parental rights should not be left out of account."I should have thought", he said,"that in this field, if the welfare of the child was paramount, there could be little or no question of parental rights at all. This is the difficulty I find with it. Clearly in this field parental rights have to be considered."[44] To this argument Lord Simon replied that "... surely the word "paramount" merely means that, when there is any conflict, the considerations of the parents should not be excluded but the welfare of the child is to prevail."[45]

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41 (1975) 357 H.L. Deb. 5s. col. 1061 (Lord Simon).

42 Lord Elwyn-Jones L.C. and Lord Simon.

43 (1975) 356 H.L. Deb. 5s. cols. 791 and 792 (Lord Simon).

44 Ibid., cols. 793 and 794 (Lord Elwyn-Jones L.C.).

45 Ibid., col. 794. (Lord Simon).

25.17 The issue reached a climax at the report stage in the House of Lords. Lord Wigoder's amendment, which became section 3, was accepted by the Lords against the advice of the Lord Chancellor and his ministerial colleagues.[46] The section as enacted is therefore founded upon a distinction between "first" and "paramount": a distinction not altogether apparent from a glance at the dictionary. Lord Wigoder described the paramountcy principle as follows:-

> ".... it is to be the over-riding consideration and it is to overrule any other considerations that there may be to the contrary."[47]

Primacy on the other hand:-

> "means that the most important consideration to be borne in mind is the need to safeguard and promote the welfare of the child, but that is not to overrule all other considerations. It is one of a number of factors, but it remains one which is of prior importance."[48]

In reaching these conclusions he relied upon judicial dicta of Lords Simon, Donovan and Reid.[49]

25.18 Lord Simon supported Lord Wigoder's amendment during the debate at the report stage. The former's opinions probably encouraged his House of Lords colleagues to reject the arguments of the Lord Chancellor and Lord Hailsham. They are therefore worth repeating:-

> "To say that the welfare of the child shall be paramount means that in case of conflict, but I think only in case of conflict, it is the

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46 (1974) 357 H.L. Deb. 5s. col. 1070.

47 Ibid., col. 1057 (Lord Wigoder).

48 Idem.

49 Ibid., col. 1058 (Lord Wigoder).

> welfare of the child which must overweigh all other considerations. But the direction that the welfare of the child shall be the first consideration does not mean that the welfare of the child must necessarily, even in the case of conflict overweigh other considerations. It means merely that that is the first thing the social worker, the local authority, the court must direct its mind to and, in fact, a direction that that is what most weight must be given too [sic]. That is what is meant by the"first consideration". [50]

So the matter rested. The Government did not attempt to reinstate its version of the provision in the House of Commons[51] nor did any member seriously challenge the clause as approved by the Lords.

25.19 Section 3 of the 1975 Act will not be considered further at this stage. It will become relevant again when the paramountcy principle is considered later in the context of custodial proceedings.[52] In any event until the matter has been considered judicially by the courts, it will be impossible to ascertain authoritatively what it means. The Lords' debates merely gave an indication of policy. There was disagreement more about the paramountcy test than about the primacy test. As the Lord Chancellor himself said, the Government version of the clause[53] simply sought "to establish that the welfare of the child is a primary consideration to be balanced against the position of the parents of the child."[54] Lords Wigoder and Simon probably had a similar objective but thought stronger

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50 Ibid., col. 1061 (Lord Simon).

51 (1975) 893 H.C. Deb. 5s. col. 1825 (Dr. David Owen).

52 Paras. 39.63 to 39.85 and chapter 42.

53 I.e. to take "full account" of welfare.

54 (1975) 356 H.L. Deb. 5s. cols. 795 and 796 (Lord Elwyn-Jones L.C.).

words were necessary to carry the policy into law. Either way the primacy principle is probably no more than a guide to the exercise of an administrative discretion. The paramountcy principle may be something quite different.

Section 3 - The judicial function and the welfare requirement[55]

25.20 Section 7 of the Adoption Act 1958 is headed "Functions of court as to adoption orders". On the face of the Act the court is concerned only with section 7 and the other provisions of the Act which have a bearing upon section 7. Of the four functions conferred by section 7,[56] the most important is probably the welfare requirement in section 7(1)(b). Section 7 however is not exhaustive of the judicial functions under the Act, for the power to make an order and the power to dispense with parental and other consents are to be found in sections 1 and 5 respectively.[57] The judicial function under the Act is thus limited but not so limited as section 7 would suggest.

25.21 The Children Act 1975 contains no section headed "Functions of the court". Such functions are scattered throughout Part I. Apart from the repeal of section 7(1)(b)

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55 Although s.7(1)(b) and (2) of the Adoption Act 1958 has been repealed, the remainder of this chapter is written in the present tense. In practice, for reasons to be analysed, the new approach may not be much different from the approach under the 1958 Act.

56 I.e. the implications of giving consent, the welfare requirement, the absence of payments or rewards and the imposition of terms and conditions.

57 That is also true of the Children Act 1975 and the Adoption Act 1976: 1975 Act, ss. 8 and 12; 1976 Act, ss. 12 and 16.

of the 1958 Act and the enactment of section 3 of the 1975 Act, the nature of the judicial function in relation to adoption probably remains fundamentally the same. Section 3 of the 1975 Act is probably less restrictive than section 7(1)(b) of the 1958 Act, partly because it operates as a guide to the exercise of a discretion rather than as a threshold requirement. The new procedures for freeing a child for adoption[58] also afford to the court greater flexibility. Thus what was true of the nature of the judicial function under the 1958 Act is also likely to be relevant to its nature under the 1975 Act. In either case the court relies heavily upon expert opinion and the background information provided for it.[59] To this extent the judicial function is formal rather than creative.

25.22 If the court were concerned merely to check that the formal statutory requirements have been satisfied[60], it would be limited to mechanical functions. Whether this is so depends largely upon its attitude to the welfare requirement. Neither under the 1958 Act nor under the 1975 Act can welfare be ignored by the court. Judicial reaction to the welfare concept will identify how effective will be the court's contribution to the whole process. The views of the practical commentators provide some assistance.

25.23 The dilemma facing the courts in the adoption process has been recognised in a number of quarters, including the

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58 Children Act 1975 s.14; Adoption Act 1976, s.18.

59 The administrative support process in aid of the court is vital to the proper exercise of its functions.

60 Which is largely what it is required to do in relation to the objective threshold requirements in the legislation.

central government. The Advisory Council on Child Care has accepted that the role of the judge is partly social and partly judicial.[61] The problem is to distinguish between the two. Kermack has sought to separate "tangibles" and "intangibles" in the adoption process.[62] Such a division is not precisely the same as the distinction between judicial and social functions but it is probably sufficiently analogous to be helpful. Triseliotis has also spoken in terms of "intangibles", the principal intangible feature being the welfare of the child.[63]

25.24 Kermack has dramatically described the problem facing the court. As a judge he felt confident while handling technical matters; not so with intangibles.[64]

> "Given my lack of confidence in disagreeing with the placement, consider now my position if I want to push my disagreement to the point of refusing the order. The child has been living with the adopters for the last three months, the mother has given it up, the placing and supervision agency feel satisfied with their decision on the child. The material and psychological problems involved in unscrambling the situation are immense. Nor can I order it to be unscrambled; for all I do, the child can stay with the adopters without the advantages of adoption." [65]

There is the possibility of harm in such a system for "... the facade of the court's final decision screens the social

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61 A Guide to Adoption Practice (London, H.M.S.O., 1970) pp. 124 and 125.

62 Kermack S.G., "Thoughts on Adoption Procedures" (1968) 54 Child Adoption 39 at p.39. It may be possible to equate "tangibles" with threshold requirements and "intangibles" with discretionary matters. The foregoing analysis of the legislation indicates a heavy emphasis on intangibles.

63 Triseliotis, p.119.

64 Kermack, op. cit., at p.39.

65 Ibid., at p.40.

workers from facing their own responsibility for the intangibles."[66] The vital decisions are thus made before the court is in any way involved.[67] This is entirely consistent with the conclusion reached by Triseliotis "that, from the way well over ninety per cent of orders were granted, courts acted mainly as rubber-stamps for the views of curators and the placing practices of adoption agencies".[68] To record the alternative view, however, requires reference to the report of the Hurst Committee in 1954. While acknowledging the reliance placed by courts upon the report of the guardian ad litem, they stated that "no colour should be given to the impression that the court acts merely as a rubber stamp for giving effect to the views of the guardian ad litem.[69] This is understandable in view of the technical responsibility of the court for the order.[70] Whether it is a recognition of the reality of the situation is another matter.

25.25 It seems that satisfaction of the welfare requirement as part of the judicial function comes too late in the adoption process to be helpful to the child. Further, the substance of the requirement[71] makes it difficult for a

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66 Idem.

67 The Houghton-Stockdale Report also commented that the placement decision was crucial in the adoption process: para. 70 of the Report.

68 Triseliotis, p. 119.

69 Hurst Report, p. 23.

70 Ibid., p.22.

71 I.e. Welfare, not being a matter of legal expertise.

court to come to a justifiable decision without relying heavily upon external guidance or giving effect to its own views on child welfare.[72] Such views are also reflected by Blom-Cooper[73] but he has gone further and has analysed them on a more juristic plane. The judicial resolution of conflicts between adopting parents and natural parents over the question of consent is acknowledged by Blom-Cooper but he comments:-

> "The courts do not perform this task well, because the process of adoption is not essentially justiciable; the issues in adoption are hardly susceptible of solution by the application of legal concepts and rules of law."[74]

The function of the court thus "while formally judicial, is really administrative."[75] This, it is suggested, is certainly true of the welfare concept under both the 1958 and 1975 Acts. It might however be less justifiable in the case of most of the other threshold requirements. They involve relatively straightforward issues and adjudication in the normal sense should not prove particularly difficult. The introduction of welfare in relation to dispensing with agreement on the ground of unreasonable withholding creates the problems identified by Blom-Cooper in a context otherwise justiciable.[76]

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72 The latter sometimes happens.

73 Blom-Cooper L.J., "Parental Rights in Adoption Cases: A New Approach to the Law of Adoption" (1968) 54 Child Adoption 19.

74 Ibid., at p.23.

75 Idem.

76 None of the other grounds for dispensing with agreement refers to welfare as such; each sets objectively identifiable standards of parental behaviour.

25.26 Kermack earlier expressed similar views in a judicial context. Perhaps they form part of the background to his commentary on the judicial function. In H and H, Petitioners[77] he was faced with a religious difference between the adopters and the child.[78] The child had been placed for adoption by a registered adoption society which evoked the comment that such societies were "presumably manned by a staff trained to look out for such points."[79] This would seem to be judicial recognition of delegation by the court to the agency of responsibility for "intangibles". He went on to suggest that "... it is not the sort of point on which a court is specially fitted to adjudicate ..."[80] This comes close to indicating that "intangible" issues are not justiciable.

25.27 Generalisation is not possible. The nature of each individual function requires to be separately analysed. Some are justiciable; others are more administrative and social in character. Those involving welfare tend to fall into the latter category. They are in the context of children probably the most significant. It is important nevertheless to appreciate precisely the nature of the function conferred upon the court, particularly in relation to the welfare concept. Failure to do so may result in a misconception of the judicial function and in expectations of

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77 1949 S.L.T. (Sh. Ct.) 68.

78 Adopters were Jewish, the child a Christian.

79 1949 S.L.T. (Sh. Ct.) 68 at p.68 per Sheriff-substitute Kermack.

80 Idem.

the court unlikely to be achieved.[81]

Section 4 - The courts and the welfare requirement

(a) Introduction

25.28 Of practical importance is the way in which the courts find the welfare requirement satisfied. It is premature to look in this way at section 3 of the 1975 Act. There is, however, considerable authority on the operation of section 7(1)(b) of the 1958 Act and the cases demonstrate the judicial approach to the welfare requirement. Section 3 of the 1975 Act, despite its different functions, character and phraseology, may not operate so differently in practice.[82] Consideration of the judicial approach to section 7(1)(b) of the 1958 Act may therefore prove helpful, albeit not directly authoritative.

25.29 Section 7(1)(b) of the 1958 Act has received little detailed analysis. Textual commentaries are rather superficial.[83] The courts, as the cases will indicate, have

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81 E.g. if the limitations on the judicial function described by Kermack, Blom-Cooper and Triseliotis are ignored, the impression is that the court is in a position effectively to protect and promote the child's welfare. The child's welfare in practice is more a matter for the local authority, placement agency and curator or guardian ad litem. Their functions cannot be other than administrative and they too have been accused of ineffectiveness: see Triseliotis, passim.

82 The reason, of course, is the generally imprecise approach of the courts to the legislation. They tend to take a broad view of the statutory references to welfare.

83 E.g. Clarke Hall and Morrison, pp. 1039 to 1041; Bevan pp. 359 to 362; Cretney, pp. 360 and 361; Eekelar, p. 202; Josling, pp. 36 to 38; Cavanagh and Post, "Adoption Procedures - Views from the Court" (1971) 1 Social Work Today No. 11, p. 33.

tended to eschew a precise consideration of the legislation. It is sometimes unclear whether section 7(1)(b) is under discussion or whether welfare is being considered in relation to the general discretion to make or refuse to make an adoption order.

(b) The role of the welfare requirement

25.30 The only question before the court in this connection is "will the order if made be for the welfare of the child". There is no choice involved, no discretion. Nor will the answer to this question alone determine whether an order will be made or not.[84] The provision is not couched in terms of a consideration to which regard must be had in determining another issue; nor, as a corollary, is the provision drafted in terms of weight or priority. Only one interest is relevant: that of the child. There can therefore be no conflict of interest.

25.31 In practice, it is suggested, the question will necessitate looking at the child's situation, both present and future, from two angles: where an order has been made and where an order has not been made. In this sense the position, attitudes, circumstances and aspirations of the natural and adopting parents become relevant, but merely as background facts and circumstances, not, it is suggested, as "interests" carrying some legal significance. This distinction, it is argued, is vital and follows from the formula in section 7(1)(b).

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84 E.g. the other threshold requirements must be satisfied, including, of course, parental agreement or dispensation therewith.

25.32 Little consideration has been given to questions of this type. The procedure proposed is first to identify what part the welfare requirement plays in the adoption process generally. Thereafter it will be possible to examine how in practice the courts approach their duty of satisfying themselves that the order will be for the welfare of the child. The two questions are related. The first is intended to look at the welfare requirement as it relates externally to the total process. The second is designed to consider the requirement internally without reference to other aspects of the process.

25.33 Bevan has written:-

> "Where no difficulties arise over consent, the court ought to treat the child's welfare as paramount, even though the Adoption Act 1958 does not expressly make it so, since there is no conflict of interests other than those of the child which has to be resolved." [85]

This suggests that interests other than those of the child may be relevant to the point of conflict and that welfare as a priority has some part to play. Bevan was writing in the context of section 7(1) of the Act but his comment seems relevant, if at all, to the discretion to make an order. Questions of paramountcy and of conflict or absence of conflict of interests seem to play no part in section 7(1)(b). Indeed if welfare were paramount, the answer to the question in section 7(1)(b) would determine the whole issue, or, as Cavanagh and Post expressed it, "a certificate from the social welfare authority would be decisive in a disputed[86] adoption".[87]

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85 Bevan, p.360.

86 Or indeed in an undisputed adoption.

87 Cavanagh and Post, op. cit., at p.34.

This was not the position under the 1958 Act nor is it so under the 1975 Act. The Parliamentary discussion on these matters also indicates that it was not intended to be the law under the 1975 Act.

25.34 The attitude of the courts is somewhat equivocal and in practice Bevan's comment probably indicates the approach of some courts. One of the most helpful judgments comes, perhaps not surprisingly, from Sheriff-substitute Kermack in S, Petitioners.[88] The issue was whether he should approach the petition as he would examine a claim to custody. The petitioners posed no problem except that in the opinion of the curator ad litem one aspect of their background "militates against this being a household which it is for the child's interest to enter".[89] This proposition does not refer to the precise formula in section 7(1)(b) of the 1958 Act but there can be little doubt that it is that provision which was under consideration. The curator's objection related to the return by the petitioners of a child handed over earlier with a view to adoption. The reasons for the return were quite insubstantial.[90] The point was made by the Director of Welfare that another adoptive home free from this difficulty could be found for the child.[91]

25.35 The alternative approaches open to the court were neatly expressed as follows:-

> "The question therefore seems to me to be as to whether the court may consider this as it would a custody case. Should the court treat this as a competition between the hypothetical home the welfare department could arrange and the actual claim of the petitioners? If so, which is entitled to the custody?
>
> The alternative method is to refuse an application only when it can be said that the financial, physical or moral welfare of the child may be affected. I think this latter is the test, but, in my opinion, this test should be applied without any presumption in the adopters' favour."[92]

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88 (1945) 61 Sh. Ct. Rep. 131. 89 Ibid., at p. 131.

90 Apparently because the petitioners' son and "worst of all" their dog objected.

91 (1945) 61 Sh. Ct. Rep. 131 at p. 131.

92 Ibid. at pp. 131 and 132 per Sheriff-substitute Kermack.

In other words the judge asked the question "will an adoption in favour of these petitioners[93] be for the welfare of the child?" He did not choose between competing claimants nor arbitrate on a conflict of interests. The test in custody proceedings, the paramountcy principle[94], was irrelevant. In the event Sheriff-substitute Kermack decided that the petitioners' background did not prejudice the child's welfare and he made an interim order. This, rather than making a final order, was his only concession to the curator's view.[95] His approach, it is suggested, was exactly in terms of section 7(1)(b).[96]

25.36 No other reported judgment seems to have attempted to analyse section 7(1)(b) in such detail.[97] There have however been a number of relatively peripheral points made by the courts which tend to support the approach adopted by Sheriff-substitute Kermack. For example, the mere desirability of an adoption order in the child's interests will not justify making such an order.[98] "All the circumstances" must be taken into account in deciding whether an adoption will be for the welfare of the child.[99] These points regrettably do little to assist the understanding of the welfare requirement.

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93 These five words are implied only.

94 Guardianship of Infants Act 1925, s.1; Guardianship of Minors Act 1971, s.1.

95 (1945) 61 Sh. Ct. Rep. 131 at p. 132.

96 The petition was presented under the Adoption of Children (Scotland) Act 1930 (20 & 21 Geo. 5, c. 37) section 3(b) of which contains a welfare requirement identical to the welfare requirement in section 7(1)(b) of the 1958 Act.

97 Some have clearly distinguished between adoption proceedings and custody proceedings but may have failed to give effect to that distinction in practice.

98 Re F (an Infant) [1957] 1 All E.R. 819.

99 In re D, an Infant [1959] 1 Q.B. 229 at p. 236 per Lord Denning.

25.37 It was not explicit from Sheriff-substitute Kermack's judgment[1] whether the question was whether any adoption order would be for the child's welfare or whether an adoption order in favour of the actual petitioners would be for the child's welfare. The former includes the latter but not vice-versa. It seems however that the former approach, which is wider, was endorsed by the English courts in the case of Re A (Infant)[2] where it was held that the advantage flowing to the child from adoption could arise from being adopted generally, not necessarily by the applicants in question.[3]

25.38 In reaching that conclusion Cross J. relied upon a further argument. "'Welfare'", he said, "simply means 'benefit'".[4] The word "welfare", it would seem, has a connotation different from "benefit". Indeed Parliament uses both words and they would not do so, it may be presumed, on an indiscriminate basis. Cross J. expressed the view that "the word 'welfare' might perhaps be thought to point rather to the physical or moral well-being of the infant than to such a benefit as he will secure here if the order is made."[5] It is understandable why Cross J. in that case sought to apply an extended notion of welfare. But in the event it made no difference to the decision, for an order was refused on another ground.[6]

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1 S, Petitioners (1945) 61 Sh. Ct. Rep. 131.

2 [1963] 1 All E.R. 531.

3 Ibid. at pp.534 to 536 per Cross J.

4 Ibid. at p.533 per Cross J.

5 Idem.

6 In exercise of the discretion whether to make an order.

25.39 In equating "benefit" with "welfare" in Re A (an Infant)[7] Cross J. was guided by the views expressed by Lord Denning in In re D, An Infant.[8] That case was decided under the Adoption Act 1950[9] which contained in section 5(1)(b) a welfare requirement identical to section 7(1)(b) of the 1958 Act. No reference was made to section 5(1)(b) in the judgments either of the county court or the Court of Appeal. They tended to emphasise the discretion inherent in making an order. The reasoning however suggests rather the application of the welfare requirement. Strangely, in the light of Cross J.'s remarks, Lord Denning nowhere used the word "benefit" in his judgment. He did however remark that "The judge[10] has asked what advantage is gained by making an adoption order."[11] The county court judge saw none; indeed he doubted whether the purpose of the order, the removal of the stigma of illegitimacy, was in the public interest.[12] Lord Denning on the other hand saw several advantages,[13] which were, as it transpired, generally applicable to any illegitimate child and not personal to the child in question. This distinction did not find a place in Lord Denning's judgment. He did nevertheless acknowledge that "there must, of course, always be an inquiry whether the mother is a suitable person to be given an adoption order and

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7 [1963] 1 All E.R. 531.

8 [1959] 1 Q.B. 229.

9 14 Geo. 6, c.26.

10 I.e. Judge Clothier of the Lambeth County Court.

11 [1959] 1 Q.B. 229 at p.235.

12 Ibid. at p.231.

13 E.g. in the context of succession to property rights: see ibid. at pp. 235 and 236.

whether the home is suitable".[14] Thus, according to the Court of Appeal followed by Cross J. in the later case,[15] general as well as personal criteria were relevant in answering the question "will the order if made be for the welfare of the child".

25.40 This conclusion implies a fairly extended construction of the welfare requirement.[16] The statute contains neither warrant nor mandate to ask what advantage or benefit is gained by making an order. "Welfare" is not necessarily synonymous with "advantage" or "benefit".[17] The question posed by the welfare requirement is, it is suggested, personal to the child and the adopters. It is whether the order in question, that is on the application of these adopters, would be for the welfare of the child in question: not whether any adoption order would be for the benefit of the child, as Cross J. suggested.[18] The latter view would not exclude the general advantages of adoption being considered in relation to the specific child but general advantages alone would probably not be sufficient.[19] The wider view may be correct; it is certainly authoritative. But it probably does not reflect precisely the language of the legislation.

25.41 The word "welfare" itself is imprecise and flexible in content.[20] These two cases may perhaps be justified on the

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14 [1959] 1 Q.B. 229 at p.235.

15 Re A (an infant) [1963] 1 All E.R. 531.

16 In relation not only to its content but also to its function.

17 The latter are probably wider in meaning than the former. Thus if the legislation had used the word "benefit", as it does sometimes, it probably would have been justifiable to include "welfare" therein.

18 Para. 25.37.

19 A point clearly recognised by Lord Denning in In re D, an infant [1959] 1 Q.B. 229 at p.236.

20 It may, e.g., be synonymous with "benefit" in some circumstances.

ground of the interpretational discretion thereby afforded to the court. To the extent that the welfare requirement is in the form of a threshold requirement, it operates as a restriction or limitation upon the existence of the consequent discretion but not upon the exercise of that discretion. As Cavanagh and Post stated:-

> " ... the child's welfare comes in rather as a limiting factor which may restrain the court from granting an order even after all required consents have been given." [21]

The courts have sometimes advocated[22] a discretion unrestrained in this way or at least one restrained in a less obvious and more manageable fashion, as, for example, in custodial proceedings. The restrictive nature of threshold requirements may have been one of the considerations prompting Sheriff-substitute Prain to hope that "the courts will be given as wide a discretion as possible in relation to the granting of these orders" in the next review of the legislation.[23] The basis of his comment was the alleged "confusion between the necessary legislation for the protection of children generally and the aim of the restrictions placed on the granting of adoption orders. The latter are presumably intended as protective provisions but, in fact, they operate in the other direction".[24] Lord Denning and Cross J. may

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21 Cavanagh and Post, op. cit, at p. 33.

22 As comments made ex proprio motu in the course of judgments by judges who felt a different decision would have been justified. Perhaps the courts may have even exercised interpretational discretion to achieve the desired result.

23 A - Petitioners 1958 S.L.T. (Sh. Ct.) 61 at p. 62.

24 Idem. Some of these difficulties have already been commented on: para. 9.9.

have responded that the welfare requirement was not intended to protect the child but rather to ensure that he obtained some advantage or benefit from being adopted.[25] Thus making "benefit" or "welfare" a pre-condition to the making of an order is restrictive in the sense only that it seeks to enforce the fundamental purpose of the Act, to promote the welfare of children requiring a substitute family.

25.42 A preference for an unrestricted discretion also seems apparent in Sheriff-substitute Garrett's opinion in Z v Z.[26] He referred in terms to section 5(1)(b) of the 1950 Act and paraphrased it in these words:-

> "... even if a parent's consent is dispensed with ..., the court must still be satisfied that adoption is consistent with the child's welfare in terms of section 5(1)(b)."[27]

True, but consistency is not the test in the welfare requirement. That requirement is positive and prognostic; consistency would not, it is suggested, suffice. The sheriff-substitute's emphasis, on the other hand, upon the need for a detailed investigation into the whole circumstances of the case for the purpose of deciding whether an order would be for the welfare of the child is apt and indicates, rather contrary to the English attitude, that the personal background of the relevant persons is important.[28] He contrasted custody and adoption proceedings but added "that

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25 To the extent thatthe welfare requirement is directed to the child's future rather than his past, such a comment would probably be well founded.

26 1954 S.L.T. (Sh. Ct.) 47.

27 Ibid. at p.48 per Sheriff-substitute Garrett.

28 Idem.

in adoption proceedings the welfare of the child is also an important and perhaps an overriding consideration, but it is not a consideration truly relevant to the question of the withholding of a parent's consent."[29] The latter comment was probably justified in 1954[30] but the former comment questionable in the context of the welfare requirement. The child's welfare was not under the 1950 and 1958 Acts couched in terms of a consideration at all, whether important or overriding. That may have been the policy of the legislation;[31] if it was, Parliament did not enact it in these terms.

25.43 A slightly different attitude to policy and discretion was taken by Hodson L.J. in In re D, An Infant.[32] He did not appear to be referring specifically to the welfare requirement in the act when he said:-

> "The exercise of the discretion of the court is required to ascertain whether the mother or the applicant for the adoption order is able to look after the child and attend to the welfare of the child, the welfare of the child being the paramount object of the Act."[33]

In relation to adoption, it has been suggested, the discretion arises when the court decides whether or not to make an

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29 Idem.

30 I.e. before the authoritative decisions of the House of Lords in 1969.

31 It probably was not the policy of the first statutes on adoption. Some Parliamentarians suggested that welfare should be paramount but the implication is that it was not: see e.g. (1925) 182 H.C. Deb. 5s. cols. 1719 and 1720 (Sir Henry Slesser), col. 921 (Mr Galbraith), cols. 927 and 928 (Mr Rentoul), cols. 946 and 947 (Mr Pethick-Lawrence).

32 [1959] 1 Q.B. 229 at p.237.

33 Idem.

order. There is no formal discretion, except interpretational discretion, when the court is considering the question whether the order will be for the welfare of the child. Hodson L.J. indicated the existence of a choice: in his own terms he asked whether the mother or applicant was able to care for the child. That is not a helpful question. The answer is normally likely to be clearly yes. Perhaps he meant which of the two is better able to care for the child. That is altogether different. It involves discretion or choosing between alternatives and the principle of paramountcy, either as a consideration or as the object of the Act, is relevant. Such proceedings would be more akin to custodial proceedings. If that is what Hodson L.J. meant, it is certainly meaningful but probably not what the welfare requirement means. If that is not what he meant, the approach achieves very little.

25.44 This analysis indicates quite clearly, it is suggested, that the courts, although acknowledging in principle the difference between adoption and custody and the distinctive roles of welfare therein, have tended to ignore the precise wording of the welfare requirement and to treat welfare as a concept in the way they would do in custodial proceedings. There is in other words a gradual but unarticulated assimilation of the roles of welfare in the contexts of adoption and custody. It has not been done deliberately. But the phraseology is sufficiently similar, at least <u>prima facie</u>, that it has become easy for the

judges to discuss adoption in terms more appropriate to custody.

25.45 There is one particular area in which it is reasonable to expect difficulty of approach; that is, where adoption and custody proceedings are conjoined. Such cases can be complex, not only procedurally but also substantively. A child may, for example, have been placed for adoption and there is for some reason a delay. Perhaps the parent has changed his or her mind on consent. Application to dispense with consent may have been made. The child nevertheless remains with the potential adopters and the natural parent seeks to enforce his or her rights by custody or wardship proceedings. The whole issue may thus come to the High Court or the adoption or custody proceedings delayed pending the hearing of the other proceedings. There may no doubt be technical problems but custody is governed by one statute and adoption by a separate code. Welfare plays a different role in each Act. It may be possible for the one court to give effect to the welfare requirements in both Acts, which probably is the correct procedure, or for one principle, almost certainly the paramountcy of welfare concept, to take precedence.

25.46 The particularly difficult case of Re C (M A) (an infant) [34] involved applications for custody and adoption.

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34 [1966] 1 All E.R. 838.

According to Ungoed-Thomas J. the real issue was "whether the child should be brought up by the father and his wife or be brought up by the proposed adopters..."[35] That clearly involves the exercise of a discretion. The appropriate approach to the problem in Ungoed-Thomas J.'s view was:-

> "The first and paramount consideration is the welfare of the child, to which all other considerations are subordinate." [36]

This clearly reflects the custodial nature of the proceedings. If the court were to apply that test, would it also be fulfilling its functions under section 7(1)(b) of the 1958 Act? It is realistic to suggest that, if it were decided that an order would be for the welfare of the child, the application of the paramountcy of welfare principle would indicate the making of an order. On the other hand, the prior application of the paramountcy of welfare principle would not necessarily lead to the making of an order and the welfare requirement in the adoption legislation would become redundant. Since the attitude of Ungoed-Thomas J. was endorsed on appeal by the Court of Appeal,[37] the latter approach seems authoritative. The paramountcy of welfare principle thus overrides the welfare requirement in the adoption legislation. This is understandable but there seems to be no reason why both provisions could not be satisfied. They are not necessarily inconsistent. If each

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35 Ibid. at p.840.

36 Ibid. at p.841.

37 Ibid. at p.849 per Willmer L.J., at p. 857 per Harman L.J. and at p.860 per Russell L.J.

were to be satisfied independently of the other, the requirements thought appropriate by Parliament in each context would have played their distinctive parts.

25.47 It is not surprising that in Re C (M A) (an infant)[38], given the custodial approach of the courts, no adoption order was made and custody awarded to the child's father. On the other hand in Re E (P) (an infant)[39] the court approached the conjoined proceedings more in the spirit of the adoption legislation. The nature of the case[40] pointed to an adoption-orientated approach and it was to be expected that the court found itself looking for advantages if an order were to be made. Harman L.J. summed up his position neatly:-

> "This is a question of fact - what is best for the child? It is best for the child that he should be adopted and become so far as possible a respectable member of society..."[41]

To some extent he seems to have been answering the question "will an order be for the welfare of the child?" But Harman L.J. went slightly beyond that question, which involved no alternative, by asking "what is best for the child?" He implied a range of possibilities from which one was to be selected. Thus he exhibited features of both adoption and custodial proceedings. It is moreover interesting that he talked of welfare or the best course for the child as a question of fact. That is certainly true of welfare in the context of section 7(1)(b) of the 1958 Act, as it involved

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38 Ibid.

39 [1969] 1 All E.R. 323.

40 It was an application by the mother of an illegitimate child and her husband to adopt that child against the wishes of the child's father.

41 [1969] 1 All E.R. 323 at p.325 per Harman L.J.

no legally recognised interest other than that of the child. Welfare in the context of the paramountcy of welfare principle is arguably less a matter of fact and more the objective of the resolution of a conflict between legally recognised interests. It seems clear therefore that in conjoined proceedings the approach may vary from adoption-orientated to custody-orientated premises.

(c) Satisfaction of the welfare requirement

25.48 So much for the part played by the welfare requirement in the adoption process generally: how do the courts satisfy themselves that the order if made will be for the welfare of the child? Harman L.J., it will be recalled,[42] indicated that the question "what is best for the child?" was a matter of fact.[43] Whether an adoption order will be for the welfare of the child is also, it is suggested, an issue of fact. But in each case the role of the answer is very much a matter of law. Equally, it is argued, the way the court goes about its task of answering these questions is not free from legal regulation.

25.49 If the courts in practice were to equate the welfare requirement and the paramountcy of welfare principle, as they probably do, it would follow almost automatically that the method of answering the question in the welfare requirement would be similar if not identical to regarding welfare as the final and paramount consideration in the exercise of their discretion. There is indeed an affinity between the two methods.[44] This will cause no problem if welfare is properly a matter of fact.

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42 Para. 25.47.

43 Re E (P) (an infant) [1969] 1 All E.R. 323 at p. 325.

44 I.e. both deal with matters of fact.

25.50 A judgment of Sheriff-substitute Kermack is again a good point to begin. In G and G, Petitioners[45] the female petitioner had earlier been treated for tuberculosis of the lung and the medical evidence was that it would be unwise for her to have close contact with a young child. The judge concluded that "it would not be in the child's interest to grant the adoption. It is an overweighing factor, even compared with the offer of an otherwise happy home with these petitioners".[46] His view clearly was that an adoption order in favour of these petitioners would not be for the welfare of the child. He had no option but to refuse an order.[47] Although the judge's comment was not couched in the statutory language, the circumstances of the case suggest that "welfare" was being interpreted in the normal meaning of the word. Health clearly falls within that concept of welfare.[48] But it was also treated as "an overweighing factor". Since welfare is a matter of fact, there is no reason to suppose that in determining that issue all relevant circumstances should not be taken into account.[49]

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45 1949 S.L.T. (Sh. Ct.) 60.

46 Ibid. at p.60 per Sheriff-substitute Kermack.

47 The process had not reached the stage of discretion.

48 The judge was in effect looking at the health of the child as part of the welfare of the child. Section 7(2)of the 1958 Act directed the attention of the court only to the health of the applicant. The judge clearly followed that direction but he was obviously concerned with the effect of the health of the applicant upon the welfare (here health) of the child.

49 On the contrary it is probably necessary to do so.

None, other than those in section 7(2) of the 1958 Act,[50] are prescribed. So determination of that fact is a matter for the court in the exercise of its otherwise unregulated discretion. In particular, the 1958 Act gave no indication of what weight or priority should be afforded to any of the relevant circumstances.[51]

25.51 There are other examples of a similar approach. In K and K, Petitioners,[52] a case of a tubercular male petitioner, where the child would live with the petitioners even if an order were not made, Sheriff-substitute Garrett took the view that that circumstance "must overweigh the consideration raised by the male petitioner's state of health".[53] He therefore made an order. The main personal objections to the petitioner in Mrs D - Petitioner[54] were her age of sixty four and her state of viduity. She was however the child's grandmother, the "head of the family" and a "woman of sufficient force of character".[55] Sheriff-substitute Kermack was satisfied that these facts were "sufficiently important to turn the balance".[56]

25.52 These cases clearly exemplify the meaning and intention of the welfare requirement. The judges reached a decision in a way wholly consistent with the character of the welfare requirement. Less clear juristically but

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50 Which did not apply in that case.

51 Cf. Children Act 1975, s.3.

52 1950 S.L.T. (Sh. Ct.) 2.

53 Ibid. at p. 2.

54 1951 S.L.T. (Sh. Ct.) 19.

55 Ibid. at p. 19.

56 Idem.

nonetheless understandable is the approach of Sheriff-substitute McDiarmid in Mr and Mrs L, Petitioners.[57] The parents of the child made it clear that their child was unwanted. The petitioners' circumstances, at least materially, were excellent. The judge hesitated to believe that the legislation was intended as a legal escape for the parents of unwanted children. After referring precisely to section 7(1)(b) of the 1958 Act he made an order but "with considerable reluctance and misgiving". His main reason was that "to return her to her natural home as an unwanted child" would cause an "upset which would not be for her good."[58] He expressed himself as "taking the welfare of the child as of paramount importance - even greater than the public interest."[59] It is possible in these unusual circumstances to understand and sympathise with his feelings of reluctance. But did he properly apply the Act?

25.53 Two criticisms may be made. To conclude that to return a child to her parents would not be for her good does not answer the question whether an adoption order would be for the welfare of the child. The statutory question is positive and constructive. The question which the judge answered is negative. In any event the issue was not, for the purposes of section 7(1)(b), whether the parents or the adopters would be better for the child. That is a

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57 1965 S.L.T. (Sh. Ct.) 66.

58 Ibid. at p.66.

59 Idem.

custodial issue, not what the adoption legislation required. Sheriff-substitute McDiarmid also talked in terms of balance and weight, by treating welfare as paramount and of greater weight than the public interest. Questions of weighing and balancing welfare against other considerations, it has already been suggested, were not relevant to section 7(1)(b) of the 1958 Act.[60] For the purposes of the welfare requirement nothing except the welfare of the child is relevant. There is therefore nothing against which it can be weighed or balanced, paramount or otherwise. The welfare of the child may at some stage be a matter of greater significance than the public interest, but the public interest is not specifically acknowledged in the legislation. Sheriff-substitute McDiarmid's approach in Mr and Mrs L, Petitioners,[61] it is argued, is somewhat misleading. He may admittedly have been thinking, in his reference to weight and balance, of the general discretion to make an adoption order. If so, he was possibly on stronger ground. But the context of his remarks clearly implied the application of the welfare requirement.

25.54 An order in circumstances fundamentally similar to those of that case was made by Sheriff-substitute Kermack in Mr and Mrs L H , Petitioners.[62] But there the judge did not use phraseology inconsistent with the Act. The use of the correct phraseology is not a matter merely of semantic concern.

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60 Para. 25.30.

61 1965 S.L.T. (Sh. Ct.) 66.

62 1951 S.L.T. (Sh. Ct.) 46.

The use of unjustified expressions indicates the possibility of an incorrect approach. In an uncontested petition this may not matter in practice; but the judge in an uncontested petition has a particularly important role to play. In every case adopting the right approach is vital. Sheriff-substitute Kermack's judgment in Mr and Mrs L H, Petitioners[63] however cannot be criticised on these grounds. He granted an order in favour of the child's maternal grandfather and his second wife after the child's parents had separated without showing interest in the child. The judgment concluded:-

> "I consider that the parents are very much to blame but I am satisfied that here there is no hope of the parents or either of them taking back the child as an object of affection and that, therefore, it is in the child's best interests to be adopted." [64]

Assuming that "best interests" and "welfare" are synonymous for these purposes, that judicial comment is in effect an answer to the question whether the order would be for the welfare of the child. The sheriff-substitute's approach was thus consistent with the Act.

25.55 It has been remarked in passing that it is not always clear beyond doubt whether the court is discussing satisfaction of the threshold welfare requirement or how its discretion to make an order should be exercised. Hodson L.J. in In re D, an Infant,[65] for example, talked of welfare in terms of the court's discretion and as the paramount object of the Act. He did so in a context perhaps more appropriate to the welfare requirement.

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63 1951 S.L.T. (Sh. Ct.) 46.

64 Ibid. at p.46.

65 [1959] 1 Q.B. 229 at p.237.

25.56 There was nothing in the Adoption Act 1958 to indicate how any of the discretions therein should be exercised. This is not surprising in view of the structure of the Act, provided that welfare is a threshold requirement. Indeed to prescribe what weight should be afforded to welfare in the exercise of a discretion would in the context of the 1958 Act be slightly anomalous. It would on the one hand be quite meaningless to indicate what part welfare should play in deciding whether an order would be for the welfare of the child. On the other hand, when the discretion is being exercised, it makes sense to direct what part welfare should play but, having already satisfied the threshold requirements about welfare, to do so would achieve nothing, unless "welfare" were to have a different meaning in each of these two contexts. [66]

25.57 Part of this problem is reflected in In re G (DM) (An Infant).[67] This was an appeal to the High Court from a decision of the Wisbech justices making an adoption order. The county council appealed on the ground that the order would not be for the welfare of the child. Part of the discussion concerned the powers of the High Court on appeal from the justices. Pennycuick J. pointed out:-

> "The Act[68] itself provides no guidance as to the principles upon which this court should act upon appeal from an order of the justices; but, as regards the welfare of infants, the principles upon which this court and the Court of Appeal act on appeal in cases relating to the guardianship, custody and care and control of infants appear to be equally applicable here". [69]

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66 E.g. as "benefit" or "advantage" compared with the narrow meaning of physical or material well-being.

67 [1962] 2 All E.R. 546.

68 I.e. the Adoption Act 1958.

69 [1962] 2 All E.R. 546 at p.550.

It is difficult to see how the principles applicable by the High Court and the Court of Appeal in custodial appeals can be the same as those in adoption appeals, particularly as regards the welfare of infants, for the function of the court and of welfare is clearly different in these two contexts. True, Pennycuick J. was talking in terms of the jurisdiction of the court. In that sense he may be right. But he referred specifically to welfare. That indicates matters of substance rather than of jurisdiction. He continued, after setting out the circumstances in which the High Court would interfere:-

> "It will not interfere with the exercise by the justices of their discretion, at any rate unless it comes to the clear conclusion that that exercise is wrong, in the sense of not being the course most beneficial to the infant".[70]

25.58 He was there referring unequivocally to the exercise of a discretion. Yet the appeal concerned section 7(1)(b). It may be inferred therefore that when the matter was discretionary, the judicial function would be to follow the course most beneficial to the child. There was nothing in the Act to require such a course; nor was there anything to prevent it. This indicates a custodial approach to the exercise of the discretion in which the "benefit" of the child would be afforded "most" weight. This may be justifiable in the discretionary context; it is unlikely to be so under section 7(1)(b). Pennycuick J. supported

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70 Idem.

these propositions by reference In re O (Infants)[71] but there the Court of Appeal was concerned with section 1 of the Guardianship of Infants Act 1925. The courts therefore seem to have equated custodial and adoption proceedings not only in relation to the powers of the High Court on appeal from the justices but also in the context of welfare, despite the clearly distinctive role of welfare in these proceedings. Certainly at the point of the exercise of a discretion, custodial and adoption proceedings may assimilate the role of welfare but the appeal before Pennycuick J. was concerned with the threshold welfare requirement peculiar to the adoption legislation. It is thus difficult to see the significance of Pennycuick J.'s references to welfare.

Section 5 - Conclusion

25.59 The attitude of the courts in relation to the welfare requirement has been analysed in two ways: first, the part played by the requirement as an element in the adoption process as a whole; secondly, how the courts have approached the need to satisfy the requirement. Some judges look at the requirement in section 7(1)(b) strictly in terms of the question which it contains and isolated from any other aspect of the adoption process. This, it is suggested, is the approach indicated by the legislation and the best examples of this approach may be found in the judgments of Sheriff-substitute Kermack. Other judges, on the other hand, view the requirement less strictly and apply it more in the way

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71 [1962] 2 All E.R. 10.

in which they would approach a question of custody. In this sense they take an overall view of the decision which they are required to make. No doubt such an attitude is influenced by the word "welfare" in section 7(1)(b), to the extent that it clearly introduces an element of interpretational discretion. This judicial approach comes close to exercising a discretion rather than satisfying a threshold requirement. The interpretational discretion built into the word "welfare" does not justify the exercise of a substantive discretion. There is thus a clear divergence of approach to the role of the welfare requirement.

25.60 There is more unity about the second aspect of the analysis. The question posed by the welfare requirement is a matter of fact.[72] How to decide that is left largely unregulated. It is therefore open to the court to weigh and balance the various factors affecting the child's welfare. What is clearly not relevant is the child's welfare in another form. So the application of the paramountcy principle to the welfare requirement is difficult to sustain. Of the reported cases most judgments seem to treat the question as a matter of fact decided by a balancing of the relevant factors while a few are misled by the application of the paramountcy of welfare principle. In some cases it is unclear whether the court is dealing with the welfare requirement or purporting to exercise its discretion. Such cases are unsatisfactory in all respects. Overall, however, the position is reasonably clear and consistent with the legislation.

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72 At least, the answer is the conclusion derived from the relevant facts.

CHAPTER 26.

THE SUBSTANCE OF THE WELFARE REQUIREMENT

Section 1 - Introduction

26.1 The final question in relation to the welfare requirement in section 7(1)(b) of the Adoption Act 1958[1] is in effect the meaning of welfare. The extent of the involvement of the court will depend largely upon its attitude to this question. The substance of welfare generally will be considered in detail later.[2] There are however certain specialties of welfare in relation to adoption which set it apart from other contexts. It is thus perhaps appropriate to look at the substance of welfare in the adoption context at this stage.[3]

26.2 The courts look at welfare either narrowly or broadly; that is, welfare in the sense of the child's personal well-being or alternatively welfare as a "benefit" or "advantage" accruing to the child or even more generally the child's "interests" or "best interests". All these expressions have been used in relation to section 7(1)(b). Sometimes factors personal to the parties and the child are considered; sometimes issues of general concern or public interest; sometimes a combination of both personal and general factors. Flexibility is the character of the concept; rules and norms are almost irrelevant. This is the essence of interpretational discretion.

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1 7 & 8 Eliz. 2, c.5.

2 Chapter 44.

3 The substance of welfare and the arguments in this chapter are likely to be as relevant to s.3 of the Children Act 1975 (1975 c.72) as they are to s.7(1)(b) of the 1958 Act.

26.3 Welfare in this sense is part of the threshold requirement in section 7(1)(b). There is no other such requirement. This is deliberate on the part of the Parliament. A considerable discretion is thus given to adoption agencies and others in placing the child for adoption. This discretion is unlikely in practice to be limited by the obligation created by the recent legislation and imposed upon adoption agencies to give effect to the primacy of welfare principle.[4] The threshold requirements as a whole reveal few legal problems except in relation to the welfare requirement under discussion. The courts have not been wholly clear about the function and meaning of the welfare requirement. The adoption agencies are unlikely to find it easier to handle. Indeed Triseliotis has established that a wide variety of eligibility criteria is used by agencies.[5] He does not regard it as a "really healthy flexibility" for it merely enables individual and perhaps questionable beliefs and prejudices to be the foundation of the placement decision.[6] This approach, he emphasises, tends to look only at factual and environmental information, thus almost disregarding emotional, personal and psychological considerations.[7] The small number of objective threshold requirements and the generality of the welfare requirement suggest an opportunity for individual decision-making on the part of the courts. In a limited sense this is probably so.

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4 Children Act 1975, s.3; Adoption Act 1976 (1976 c.36), s.6.

5 Triseliotis, p.91.

6 Idem.

7 Ibid., p.96.

26.4 Most of the decisions on the substance of the welfare requirement involve issues of general policy and criteria of a general nature. Few consider the individual circumstances of the prospective adopters and child to be adopted. This would tend to confirm the views of Kermack, Blom-Cooper and Triseliotis[8] that courts are reluctant to grapple with the welfare of the individual child and prefer to accept advice from the experts.[9] In other words, the courts hesitate to exercise their discretion in relation to "intangible" factors. Once the threshold requirements, including the welfare requirement, have been satisfied, a very strong presumption in favour of making an order will arise.[10] It would however be pushing the argument too far to suggest that the discretion is not to make an order but only to refuse it. Similarly the threshold welfare requirement, to the extent that it impinges upon "intangibles", is more a matter for the expert advisers than for the court, at least in practice. Thus it is not surprising that the courts tend to argue in terms of competency and public policy rather than individual welfare and to favour retention of the status quo rather than the introduction of change.[11]

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8 Paras. 25.24 and 25.25.

9 I.e. the "rubber stamp"approach.

10 It has never been expressed judicially in this way. But in S, Petitioners (1945) 61 Sh. Ct. Rep. 131, although he discounted any presumption in the adopter's favour, Sheriff-substitute Kermack talked in terms of looking for factors to "disqualify" the petitioners. By that time however he may have moved into the discretionary stage of the process.

11 See TF and HF, Petitioners 1949 S.L.T. (Sh. Ct.) 48 and K and K, Petitioners 1950 S.L.T. (Sh. Ct.) 2.

Section 2 - Individual welfare

26.5 Questions of individual welfare appear to relate normally to medical and moral issues. The medical aspects of adoption were of some concern to the Houghton-Stockdale Committee[12] and they suggested better procedures for making the information available.[13] The decision however remains with the court. Some judges have exhibited concern for the medical aspects of the child's welfare. In G and G, Petitioners[14] and K and K, Petitioners[15] the effect on the child of a tubercular petitioner was the welfare consideration examined by the court.[16] Moral issues have also been raised. In S, Petitioners[17] the petitioners' earlier decision to reject a child offered for adoption[18] was considered but rejected as a ground for disqualification. Other instances of moral objections related to the former adulterous relationship of the petitioners[19] and to the male petitioner's conviction for indecent assault a number of years before.[20] In no case was an order refused for these reasons. The evidence is therefore that courts practically never refuse an order for reasons

12 Houghton-Stockdale Report, paras. 342 to 359.

13 Ibid., para. 359.

14 1949 S.L.T. (Sh. Ct.) 60.

15 1950 S.L.T. (Sh. Ct.) 2.

16 These cases were considered in a different context in paras. 25.50 and 25.51.

17 (1945) 61 Sh. Ct. Rep. 131.

18 For quite absurd reasons: para. 25.34.

19 See Petition C (1944) 60 Sh. Ct. Rep. 61 and H and H, Petitioners 1948 S.L.T. (Sh. Ct.) 37.

20 See In re G (DM) (An Infant) [1962] 2 All E.R. 546. Cf. Re J (a minor) (adoption order: conditions) [1973] 2 All E.R. 410 where unusually an order was made with a condition securing access to the natural father despite his open support of several mistresses.

connected with the personal welfare of the child. In other words the welfare aspects of placements are normally accepted by the courts.

26.6 Social factors fall within neither personal welfare nor public policy. They may be relevant to the child's welfare, in the sense that they are likely at some stage to interact with it. Sheriff-substitute Kermack has indicated:-

> "The question at issue is the best interests of the child proposed to be adopted. There is no doubt that this involves social or psychological aspects as well as physical ones".[21]

Religion has proved to be one such factor. Parental wishes in relation to religion are governed by statute[22] but religion may also be relevant apart from parental preferences. In H and H, Petitioners[23] Sheriff-substitute Kermack made an adoption order in favour of Jewish petitioners in relation to a Christian child. He approached the question very circumspectly, balancing the religious factor against the other and ultimately paying more attention to the need for a home and affection. In the event he probably relied to a great extent upon the quality of the placement in the first instance, particularly as it was well arranged by a registered adoption society, the presumed experts in the area.[24]

26.7 On the other hand in Re G (An Infant)[25] a county court judge, in not fundamentally different circumstances,

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21 H and H, Petitioners 1949 S.L.T. (Sh. Ct.) 68 at p.68 per Sheriff-substitute Kermack.

22 Adoption Act 1958, s.4(2); Children Act 1975, s.13; Adoption Act 1976, s.7.

23 1949 S.L.T. (Sh. Ct.) 68.

24 He thus hesitated to intervene in relation to intangibles.

25 [1962] 2 Q.B. 141.

refused an order in favour of Jewish adopters in relation to a Christian child. Apparently it did not seem to him "right" to do so.[26] The application was for a provisional adoption order under section 53 of the 1958 Act, the consequence of which was to vest custody of the child in the provisional adopters to enable them to take the child out of the jurisdiction to be formally adopted abroad.[27] But the requirements for making such an order were the same as for making an adoption order.[28] There would therefore seem to be no reason to adopt a different approach. The Court of Appeal decided that the county court judge had erred in the exercise of his discretion by giving consideration only to the religious aspect of the case. Ormerod L.J. argued:-

> "In considering matters of this kind the paramount question is the welfare of the child. That is the matter which the judge must have in mind when considering the circumstances, all of which he must take into account." [29]

Whether he was referring to the substantive discretion to make an order under section 1 or to the interpretational discretionary element in the welfare requirement in section 7(1)(b) is unclear. It looks as though the Court of Appeal was adopting a custodial approach.[30] But even if it was not, it would be invalid to consider only the religious aspect of the case. To do so would therefore in all circumstances[31] be wrong. It

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26 Ibid. at p.143.

27 Adoption Act 1958, s.53(1).

28 Ibid., s.53(4).

29 [1962] 2 Q.B.141 at p.144 per Ormerod L.J.

30 As a consequence of referring to "all the circumstances" and the paramountcy of welfare.

31 I.e. if the approach were either custody-orientated or adoption orientated.

is perhaps unfortunate thatthe judgment of Sheriff-substitute Kermack[32] was not drawn to the attention of either the county court or the Court of Appeal. His judgment, it is suggested, consistently applied the Act. Reference to it in the English case might have encouraged the English courts to apply the legislation with more regard to its meaning. The Court of Appeal clearly came to the correct conclusion but some aspects of the judicial reasoning seem questionable.

Section 3 - Policy considerations

(a) Introduction

26.8 So much for personal welfare and certain social overtones: most of the judicial discussion has centred around competency, public policy, the nature and consequences of the adoption relationship and the combination of all of these various aspects of welfare. The very limited number of threshold requirements, objective or general, leaves relatively wide open the question of competency. Thus, provided the objective threshold requirements have been satisfied, an order becomes competent. Its desirability is affected by these other considerations, including the welfare requirement.

26.9 Adoptions administered by registered adoption societies or local authorities where complete anonymity is preserved between natural and adopting parents seem to cause few legal problems. They simply provide a suitable home for a child who needs one. Applications or petitions by natural parents, grandparents, relatives, foster parents and others with an established relationship with the child are apt to create difficulties. In these cases a new legal relationship is

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32 I.e. in H and H, Petitioners 1949 S.L.T. (Sh. Ct.) 68.

being substituted for an existing legal and actual relationship. Problems of purpose and motive become relevant. No such issue arises in simple adoptions where a new relationship, both legal and actual, is being created where in effect none existed.

26.10 The courts seem to have taken the view that, when the statutory threshold requirements have been satisfied, an order will be made[33] provided to do so will be for the welfare of the child[34] and not contrary to public policy.[35] They also seem to have exercised their discretion less in relation to welfare[36] and more with regard to public policy. They have therefore built a further non-statutory requirement into the whole adoption process. Thus the problems arising from the existing relationship are solved partly in terms of welfare and partly in terms of policy. Sometimes they are not even considered.

(b) Adoption by parents of their legitimate children

26.11 In M and M - Petitioners[37] the petitioners sought to adopt the child born to them in Greece before their marriage there. The child was registered as illegitimate in Greece. The family later came to Scotland. Sheriff-substitute Kermack took the view that the child was legitimated by their subsequent marriage. This situation was not provided for specifically in the adoption legislation and the petition was dismissed. The ground was policy implied from the legislation.

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33 Almost as a matter of course.

34 I.e. the statutory welfare requirement

35 Not a statutory requirement.

36 Partly because it is a statutory requirement anyway and partly because it is an "intangible" for which they rely upon the advice of others.

37 1950 S.L.T. (Sh. Ct.) 3.

The judge argued:-

> "It seems to me a fundamental principle that parents cannot adopt their own legitimate child. The provisions of section 5 of the Adoption of Children (Scotland) Act 1930[38] seem inconsistent with any other principle".[39]

Normally there would be no advantage for the child in being adopted by his or her own legitimate parents. It would mean creating in some ways a lesser relationship out of a greater relationship. Here, however, it would have given the child a certificate from the Adopted Children Register. This may have been the purpose of the petition, for, as Sheriff-substitute Kermack remarked, "It is unfortunate that the child cannot get a birth certificate in this country showing her legitimacy or indeed at all".[40] In any event a principle was created for which there was no direct statutory authority.

26.12 On the other hand no similar objection was taken to an adoption petition by petitioners one of whom was a legitimate parent of the child. In B and B, Spouses, Petitioners[41] an adoption order was made in favour of a husband and wife in respect of a child who was the legitimate daughter of the female petitioner. No opinions were delivered. Eleven years later in I and I, Spouses, Petitioners[42] an adoption order was made in fundamentally similar circumstances. Lord Cooper L.P. felt unable to reach a different conclusion, since the decision in the earlier case "has stood on the books for [eleven] years".[43] The implication may be that he would have preferred to reach a different decision. This issue therefore has not been analysed judicially.

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38 20 & 21 Geo. 5, c.37.

39 1950 S.L.T. (Sh. Ct.) 3 at p.3. per Sheriff-substitute Kermack.

40 Idem.

41 1936 S.C. 256.

42 1947 S.C. 485.

43 Ibid. at p.485.

26.13 It should be noted that these three decisions were made under the Adoption of Children (Scotland) Act 1930. That Act, just like the English Act of 1926,[44] said nothing about petitions or applications by one or more parents. The legislation was probably not designed for that purpose. This seems implicit from the comment during the Parliamentary debate on the Bill in 1925 that the object of the legislation was "to give to children who are denied the advantages of the normal family life with their parents a home life and a family life as near the real thing as nature will allow".[45] The generality of the early legislation thus left competent petitions by one or more parents. It was only Sheriff-substitute Kermack's view of policy or principle which enabled him to dismiss a petition by the child's legitimate parents.[46] On the other hand, it is not possible to be certain but the making of an order in favour of spouses one of whom was a legitimate parent of the child[47] was presumably based on the absence of any suggestion in the Act that it could not be made.

26.14 There are obvious differences between the two situations. In one case[48] adoptive relationships are substituted for legitimate relationships. In the other situation[49] that is true of one petitioner only and in the case of the other petitioner an adoptive relationship is being created where no legal relationship previously existed. Whether this distinction

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44 Adoption of Children Act 1926 (16 & 17 Geo. 5, c.29).

45 (1925) 182 H.C. Deb. 5s. col. 1726 (Mr Hurst).

46 M and M - Petitioners 1950 S.L.T. (Sh. Ct.) 3.

47 As in B and B, Spouses, Petitioners 1936 S.C. 256 and I. and I, Spouses, Petitioners 1947 S.C. 485.

48 Where both legitimate parents petition to adopt.

49 When one legitimate parent petitions along with his or her spouse.

points to a difference of policy is not now in issue for the situation brought about by these decisions has been recognised, in part at least, by subsequent legislation. Sections 1 and 2 of the Adoption Act 1950[50] clarified this point in the first instance. Section 1(3) of the 1958 Act re-enacted the 1950 Act provisions by authorising the adoption of an infant by the mother or father of the infant, either alone or jointly with his or her spouse.[51] This would apply prima facie to the legitimate parent of the child. It applies also, of course, to the mother of an illegitimate child.[52]

26.15 The making of an adoption order in favour of a parent of the child is contemplated by section 9(1)(a) of the Children Act 1975 but that provision is qualified by section 11(3) which provides that an order shall not be made in favour of the mother or father of the child alone unless the court is satisfied that the other natural parent is dead or cannot be found or that there is some other reason justifying the exclusion of the other natural parent.[53] In other words, such an order is now to be treated as exceptional, requiring very strong reasons to support it. This indicates

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50 14 Geo. 6, c. 26.

51 It is vital that joint petitioners are married: Adoption Act 1958, s.1(2); Children Act 1975, s.10(1); Adoption Act 1976, s.4(1). The early legislation was not specific. But Sheriff-substitute Kermack reached the same conclusion on policy grounds in two cases under the 1930 Act: see E Petitioner (1948) 65 Sh. Ct. Rep. 8 and JS - Petitioner 1950 S.L.T. (Sh. Ct.) 3.

52 In re D (an infant) [1959] 1 Q.B. 229.

53 See also Adoption Act 1976, ss.13(1)(a) and 15(3).

a shift in policy. Subject to that qualification, the position has in effect remained unchanged since the enactment of the early legislation on adoption. Parliament has merely clarified the position. The only questionable area is an adoption petition by both parents of their legitimate child. This has not been provided for by statute and presumably remains incompetent on the ground of principle or policy.[54]

26.16 The structure of the legislation enables orders to be made on the application of a parent. No indication was given in the earlier Acts when such an adoption would be appropriate.[55] This seems to have been deliberate, for the Hurst Committee took the view that such matters should be left to the court in terms of the welfare requirement.[56] In effect this is what has happened. The Houghton-Stockdale Committee however looked at these issues in greater detail.[57] It is perhaps worth looking at the views expressed in that report before considering the ways in which the courts have handled their functions. Judicial attitudes to the concept of welfare are likely to remain as important under the 1975 Act, for section 11(3), although indicative of a change in policy, has enacted a shift of emphasis rather than a new principle.

26.17 According to the 1966 survey[58] twenty nine per cent of adoptions were by parents, mostly by a parent and step-

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54 M and M, Petitioners 1950 S.L.T. (Sh. Ct.) 3.

55 Other than by reference to the statutory welfare requirement.

56 Hurst Report, p.47.

57 Houghton-Stockdale Report, chapter 5.

58 Grey and Blunden, A Survey of Adoption in Great Britain (London, H.M.S.O., 1971).

parent, a few by the parent alone.[59] A clear trend was identified: an increasing number of adoptions by parent and step-parent.[60] This suggests that the adoption concept was being extended beyond what had been originally contemplated. Indeed the Houghton-Stockdale Report suggested that such adoptions to some extent distorted the actual relationship between parent and child with the consequence that the child's welfare might be prejudiced rather than benefited by the change.[61] The arguments differ, depending upon whether the parent is the sole adopter or is adopting along with his or her spouse. The committee concluded however that adoption by a parent alone might in exceptional circumstances be for the child's welfare.[62] This has become the qualification enacted in section 11(3) of the 1975 Act.[63]

26.18 In relation to adoption by a parent and step-parent together, the committee suggested that extended guardianship would afford adequate protection for step-parents and that in return they should no longer be allowed to adopt.[64] This attracted overwhelming opposition for various reasons.[65] The committee nevertheless retained their view that "guardianship will be more appropriate in most cases".[66]

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59 Houghton-Stockdale Report, para. 97.

60 Ibid., paras. 97 and 103.

61 Ibid., paras. 100, 101 and 105.

62 Ibid., para. 102.

63 See generally chapter 31.

64 Houghton-Stockdale Report, paras. 106 and 107.

65 Ibid., para. 108.

66 Ibid., para. 109.

They therefore recommended a compromise solution that on the application of a step-parent for adoption of a child of his or her spouse the court should first consider whether guardianship would be more appropriate.[67]

26.19 This has been enacted in sections 37(1)[68] and 53(1)[69] of the 1975 Act. There is no change of principle. It is merely a procedural device to extend the options available to the court. It is nevertheless an important power. It enables the court to make an order for which no specific application was made. A solution which commends itself to the court may thus be imposed upon those who think otherwise. The object and the criterion, of course, are the same; namely, the welfare of the child.[70] The substantial principles in relation to adoption by a parent or by a parent and a step-parent remain unchanged. The new provisions are adjective only but they indicate a marginal difference of approach and a shift of emphasis in relation to step-parental and parental applications respectively.

26.20 Similar policy considerations apply to applications by grandparents and other relatives.[71] There has never been any real doubt about their competency. But just as in the case of parental applications, the courts have resolved the

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67 Idem.

68 For England and Wales.

69 For Scotland.

70 Chapter 45.

71 They comprised 5 per cent of the total in 1966: Houghton-Stockdale Report, para. 97.

issues in terms of welfare, but welfare on a general basis rather than a personal basis. The arguments relating to competency in these cases tend to merge with those concerning policy and general welfare. It is thus difficult to distinguish competency from expediency. The advantage of having a legal status, of being brought up in the family of actual birth or of the family name are placed against concealing illegitimacy, using the adoption process for questionable ends or destroying links with one parent. The court is given little or no assistance under either the 1958 Act or the 1975 Act.

(c) Adoption by parents of their illegitimate children

(i) Competency

26.21 Public attitudes to illegitimacy have undergone some changes in recent years. The law has also modified its approach.[72] This may have influenced the views of the courts towards the adoption of illegitimate children by their parents. The Scottish courts early on decided that both parents could adopt their own illegitimate child[73] and that

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72 See e.g. Family Law Reform Act 1969 (1969 c.46), PartII; Succession (Scotland) Act 1964 (1964 c.41) as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (1968 c.70); Legitimacy Act 1959 (7 & 8 Eliz. 2, c.73), s.3 as re-enacted in s.14 of the Guardianship of Minors Act 1971 (1971 c.3); Illegitimate Children (Scotland) Act 1930 (20 & 21 Geo. 5, c.33), s.2. It is interesting that the Scottish reforms generally preceded those for England and Wales.

73 H and H, Petitioners 1948 S.L.T. (Sh. Ct.) 37.

an unmarried parent could adopt his or her own illegitimate child.[74] The reasons for this surprisingly progressive view were, it will be seen, rather unusual. It was not until 1959[75] in England that the Court of Appeal was finally reported to have confirmed[76] the competency of adoption of an illegitimate child by one of his parents, although orders had been made in these circumstances on a number of occasions by lower courts.[77]

26.22 The Scottish decisions on competency were argued basically in terms of status.[78] In A and B Petitioners[79] a married couple petitioned to adopt the female petitioner's illegitimate child. Her husband was not the child's father. Sheriff-substitute Hamilton regarded the petition as expedient but incompetent. In his view no alteration in the status of the child or of his mother would be brought about by an adoption order. As he expressed it:-

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74 D, Petitioner 1938 S.C. 223.

75 In re D, an infant [1959] 1 Q.B. 229.

76 The Court of Appeal had reached the same conclusion in 1957 in an unreported decision: see In re D, an infant [1959] 1 Q.B. 229 at pp.233 and 236.

77 Apparently 87 orders in favour of mothers of illegitimate children had been made by 1959: In re D, an infant [1959] 1 Q.B. 229 at p.236.

78 Cf. In re D, an infant [1959] 1 Q.B. 229 decided under the Adoption Act 1950 which had by then clarified the position. The Court of Appeal in that case needed to do no more than rely upon the provisions of the Act: see [1959] 1 Q.B. 229 at p. 235 per Lord Denning. But in Re E (P) (an infant)[1969] 1 All E.R. 323 the Court of Appeal took the view that the creation of a recognised status for an illegitimate child was a clear advantage as a matter of expediency rather than competency.

79 1932 S.L.T. (Sh. Ct.) 37.

> "... the only right granted by the statute to parents as regards their own children, legitimate or illegitimate, is that of surrendering certain rights and duties towards them in accordance with section 5 [of the Scottish Act of 1930]. I do not think that the statute confers on them the right of acquiring new or adjusted rights and duties towards their own offspring". [80]

Sheriff Irvine on appeal however did envisage a change of status sufficient to support a petition by a parent in relation to her own illegitimate child. He based his argument on the common law doctrine that an illegitimate child was filius nullius:-

> "There exists at present no legal relation between the petitioner B [the mother] and the child here in question. Between an illegitimate child and its parents there is no legal relationship [81] ... In the present case, therefore, the adoption order sought by the petitioners will have the effect, inter alia, of creating a legal relationship between the female petitioner and the child, between whom there now exists no legal relationship whatever." [82]

Statute has to a considerable extent eroded the common law doctrine of filius nullius. [83] Although it may no longer be accurate to suggest that there is no legal relationship between parent and illegitimate child, it may be warranted to conclude that adoption will create a different relationship between these persons rather than a completely new relationship. [84] Thus Sheriff Irvine's thesis holds good on the basis of a change in status rather than the creation of a new status.

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80 Ibid. at p.38 per Sheriff-substitute Hamilton.

81 He quoted from Clarke v Carfin Coal Co.(1891) 18 Rettie (H.L.) 63.

82 1932 S.L.T. (Sh. Ct.) 37 at p.39 per Sheriff Irvine.

83 By virtue principally of the 1968 and 1969 reforms noted in n. 72 to para. 26.21.

84 See generally Children Act 1975, Sched.2; Adoption Act 1976, Part IV.

26.23 Similar doctrinal difficulties were experienced by Sheriff-substitute Duncan in H and H, Petitioners.[85] The circumstances there were more complex than in A and B, Petitioners[86] and in the later case the petitioners were the natural parents of the illegitimate child.[87] "At first sight," the judge suggested, "it certainly seems anomalous that natural parents should adopt their own child. Fundamentally, the conception of adoption involves the displacement of the natural parents by the adopting parents, the rights and obligations of the former being transferred to the latter."[88] He did not see it as a purpose of the legislation to provide a means for legitimising children or facilitating a change of name. He was influenced by the case of D, Petitioner[89] but his reasoning reflects more Sheriff Irvine's arguments in A and B, Petitioners.[90] Sheriff-substitute Duncan could see no displacement of the natural parents or divestiture of their rights and obligations but "there would be the vesting or creation of new ones".[91] Thus the acquisition by adoption of new rights was sufficient to render such a petition competent.

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85 1948 S.L.T. (Sh. Ct.) 37.

86 1932 S.L.T. (Sh. Ct.) 37. There was some dispute about the child's paternity in the later case.

87 Cf. the earlier case where only the mother was related to the child.

88 1948 S.L.T. (Sh. Ct.) 37 at p.38 per Sheriff-substitute Duncan. This would be consistent with the policy of the legislature in 1926 and 1930.

89 1938 S.C. 223 where no opinions were given.

90 1932 S.L.T. (Sh. Ct.) 37.

91 1948 S.L.T. (Sh. Ct.) 37 at p.38 per Sheriff-substitute Duncan.

26.24 These arguments clearly are based on a change of status in consequence of adoption. There can therefore be no reason why one of the parents of an illegitimate child cannot adopt that child, as in D, Petitioner.[92] In that case the Court of Session reached its decision without giving any opinion. Equally, it may be suggested, there is no reason why a legitimate child could not be adopted by his parents, contrary, of course, to the view of Sheriff-substitute Kermack in M and M, Petitioners.[93] This comment is founded on the proposition that there is a difference in status between an adopted child and a legitimate child.[94] These two conditions are being assimilated by statute but there will remain at least a minimal distinction unless the relationship between adopted child and parent and legitimate child and parent are precisely identical.[95]

26.25 The practical outcome of the opinions experienced in A and B, Petitioners[96] and H and H, Petitioners[97] could have been affected by the doctrine of legitimation per subsequens matrimonium. In M and M, - Petitioners,[98] it will be recalled,[99] the child whom Sheriff-substitute Kermack

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92 1938 S.C. 223.

93 1950 S.L.T. (Sh. Ct.) 3.

94 There is a fortiori a difference in status between an adopted child and an illegitimate child.

95 Which they are not and probably never will be: see paras. 7, 8 and 10 of Sched. 1 to and paras. 1(3) and (4), 2 and 4 of Sched. 2 to the Children Act 1975.

96 1932 S.L.T. (Sh. Ct.) 37.

97 1948 S.L.T. (Sh. Ct.) 37.

98 1950 S.L.T. (Sh. Ct.) 3.

99 Para. 26.11.

decided could not be adopted by her parents, was rendered legitimate only by the parents' later marriage. This did not happen in H and H, Petitioners[1] because the child had been conceived in adultery. This impediment to legitimation[2] has now been removed.[3] The scope for parents seeking to adopt their illegitimate children has been accordingly reduced. On the other hand the scope for parents seeking to adopt their legitimate[4] children has been correspondingly increased. It is however questionable how far this will be so, partly as a consequence of M and M, Petitioners[5] and partly because it has been emphasised frequently over recent years that adoption does not render an illegitimate child legitimate.[6] It simply changes his status from illegitimacy to the statutory condition of adoption. Thus adoption as a means to conceal illegitimacy is less likely to be effective.[7]

26.26 There is one final point of significance in relation to legitimation. Under the 1968 Act[8] it is open to any party concerned to apply to the court to have the adoption order revoked when a person adopted by his father or mother before the commencement of the Act was legitimated by virtue of section 4. This carries the manifest implication that the mother or father of an illegitimate child may adopt that

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1 1948 S.L.T. (Sh. Ct.) 37.

2 See e.g. Kerr v Martin (1840) 2 Dunlop 752.

3 Legitimation (Scotland) Act 1968 (1968 c.22) s.1: see also s.4.

4 Or more precisely in these circumstances their "legitimated" children.

5 1950 S.L.T. (Sh. Ct.) 3.

6 E.g. In re D, an infant [1959] 1 Q.B. 229 at p.236 per Lord Denning.

7 It simply does not do so legally.

8 Legitimation (Scotland) Act 1968,s.6(1); see also para.1(2) of Sched. 2 to the Children Act 1975 which exempts from the consequences of adoption the possibility of subsequent legitimation.

child. It probably extends also to the mother and father[9] of the child. Thus Parliament has recognised the judicial attitude to the adoption legislation. The second point is that this provision suggests that legitimation may be of greater advantage to the illegitimate child than adoption. It is a matter of circumstances in the individual case but the existence of the power tends to reinforce the artificial and somewhat strained character of adoption as a means of displacing illegitimacy.

(ii) Expediency

26.27 Expediency or the practical question whether an adoption order will be for the welfare of the child is a much less technical issue. Status may be relevant at this stage of the process as well as a justification of competency. Indeed the English cases look at status and the other arguments in the context of expediency rather than competency. If status is relevant in this way, it means simply that a recognised legal relationship is better than none or that a more acceptable legal relationship is better than a less acceptable one.[10] In A - Petitioners[11] for example, Sheriff-substitute Prain suggested that adoption was preferable to illegitimacy. He concluded that "it is very desirable that such a child [an illegitimate child] should have the legally recognised status and the acknowledged place in society which is obtained by means of an adoption order."[12]

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9 I.e. applying jointly.

10 On social grounds.

11 1958 S.L.T. (Sh. Ct.) 61.

12 Ibid., at p.62.

26.28 The creation of a new status or the alteration of an existing condition has also influenced the courts in England. In In re D, an Infant[13] Lord Denning seems to have been impressed by the argument that an adoption order would in itself create advantages for an illegitimate child merely by virtue of the potential proprietorial consequences[14] of the order. A similar attitude was articulated ten years later by Harman L.J. and supported by more explicit reasoning. In Re E (P) (an infant)[15] the mother of an illegitimate child and her husband sought to adopt her child. The child's father opposed the application,[16] on the ground that he wished to continue his relationship with the child. This found no favour with Harman L.J. :-

> "It does not seem to him to matter that the child will remain a bastard. The effect of the Adoption Act 1958 is to remove that stigma, so far as it can be removed, and to give children in that unfortunate position a fresh start in life without the slur attaching to their origin. I cannot help thinking that so solid an advantage certainly ought not to be thrown away in order that the father may have the pleasure of seeing the child and dandling him on his knee 2 hours a week on Sunday morning before he goes off to play football."[17]

This comes close to asserting that anything is better for the child than remaining illegitimate. A similar child-orientated approach had earlier been evinced by Roxburgh J.[18]

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13 [1959] 1 Q.B. 229.

14 I.e. succession rights.

15 [1969] 1 All E.R. 323.

16 By bringing custody proceedings which were subsequently heard together with the adoption application. A putative father's consent is not required for an adoption order.

17 [1969] 1 All E.R. 323 at p. 324 per Harman L.J.

18 Re C S C (an infant) [1960] 1 All E.R. 711.

who unambiguously related it to the child's welfare. He pointed out that "... it is always important to consider, in connection with the welfare of the child, whether legitimation is not to be preferred to adoption."[19] These various comments are certainly consistent with the welfare requirement in the legislation, although they treat welfare on the general basis of policy rather than as an individual criterion applicable to the child in question. The general policy is applied, admittedly, not as a rule but only in relation to individual circumstances. Thus the spirit of the requirement is satisfied.

26.29 On a more practical level than legal status, merely living in a natural family may be an advantage. In A and B, Petitioners[20] Sheriff Irvine relied to some extent upon each of these considerations, that is, status as well as the actual relationship:-

> "An arrangement between the mother of an illegitimate child and her husband that the child should live in family with, and be brought up by, the mother and her husband was described by the Lord President (Kinross) in Kerrigan v Hall[21] as a 'most natural and proper' arrangement. The making of an adoption order under the Act of 1930 will have the effect that the child here in question will not merely de facto live with the petitioners, but will live with them as de iure a member of the family, standing to them, in the various respects set out in the Act, in the position of a child born to them in lawful wedlock".[22]

Similarly in K and K, Petitioners[23] the natural relationship between the petitioner and the child took precedence over

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19 Ibid. at p.714.

20 1932 S.L.T. (Sh. Ct.) 37.

21 (1903) 4 Fraser 10.

22 1932 S.L.T. (Sh. Ct.) 37 at p.40 per Sheriff Irvine.

23 1950 S.L.T. (Sh. Ct.) 2.

the health risks inherent in living with the mother's husband.[24]

26.30 On the other hand, where the petitioning parent has been divorced or indeed separated, an adoption will effectively terminate the rights of the child's other parent.[25] In that situation there will be a break in part of the natural relationship. Adoption will continue the natural relationship only between the child and one parent. This was discussed in the Houghton-Stockdale Report in the context of welfare[26] and gave rise to what has become section 11(3) of the Children Act 1975.[27] The legal status of any step-parent will depend on whether the adopting parent's spouse also seeks an adoption order. In Z v Z[28] little attention regrettably was paid to these relevant aspects of the case.

26.31 But the overall position is clear : the court is forced to decide in such circumstances which relationship, if not status, is to be preferred. There will always be an element of continuity in the person of the petitioning parent. The ancillary but important issue is whether not so much the adoption order but rather consequences of an order will be for the welfare of the child; that is,

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24 Who had suffered from tuberculosis.

25 Unless they are pro tanto preserved by means of a condition attached to the order.

26 Houghton-Stockdale Report, paras. 100 and 101.

27 Ibid., para. 102.

28 1954 S.L.T. (Sh. Ct.) 47.

the destruction of the existing relationship between the child and the petitioner's spouse or the person with whom the petitioner is cohabiting.[29] This has been looked at in terms of welfare and the welfare requirement. Such an approach does not introduce an alternative to making an adoption order. It allows welfare to be considered in the light of additional considerations, namely the consequences of an order. The enactment of sections 37(1) and 53(1) of the 1975 Act[30] introduces in prescribed circumstances an alternative decision to granting the application for adoption. Welfare clearly plays a part in reaching that decision[31] but its function is different from the part played by it under section 3 of the 1975 Act.[32] That apart, although the scheme of the 1975 Act is more flexible than the welfare requirement in section 7(1)(b) of the 1958 Act, the issues will, it is suggested, remain the same; namely the consequences and hence desirability of continuing, destroying or creating relationships, legal or social, between the child and his parent or parents.

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29 Such a person could not petition for adoption along with the petitioning parent with whom he or she is cohabiting, for joint applicants must be married; 1958 Act s.1c2): 1975 Act, s.10(1); 1976 Act, s.14(1). Nor could the person with whom the child's mother is merely cohabiting, even if he were the child's father, petition for adoption of their child. It would be contrary to public policy : see J S - Petitioner 1950 S.L.T. (Sh. Ct.) 3. That does not necessarily end the question, for the petitioning parent may be the sole petitioner but the child would nevertheless live in the family so created. That is a matter determinable in terms of the child's welfare.

30 I.e. where a custodianship or custody order would be more appropriate than an adoption order.

31 Para. 26.19.

32 Indeed s.3 probably does not apply to s.37(1) or s.53(1).

26.32 An alternative approach to these problems in the welfare context would be to rely upon the preservation of the status quo and, in effect, to make the status quo the legal condition of the parties, so far as possible. In Petition C,[33] for example, when both parents applied to adopt their illegitimate child, the actual relationship between the parties would continue even if no adoption were made. Sheriff-substitute Kermack felt constrained in these circumstances to make an order. Similarly in H and H, Petitioners[34] and K and K, Petitioners[35] attention was paid to the continuity of the actual relationship between petitioners and child even if no order were to be made. The courts thus place considerable weight upon the actual relationships between the persons affected, perhaps even greater weight than that accorded to the question of legal status.

26.33 The remaining consideration discussed by the courts is the benefit of the adopter's name accruing to the child on adoption. Normally there will be no problem.[36] In Mrs C. CN or CL - Petitioner,[37] however, only the child's mother applied for an adoption order. She proposed to give to the child the surname of her deceased husband who was not the child's father nor had he applied to adopt him. The child had no legal claim to that name and before

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33 (1944) 60 Sh. Ct. Rep. 61.

34 1948 S.L.T. (Sh. Ct.) 37.

35 1950 S.L.T. (Sh. Ct.) 2.

36 The child will simply take the surname of the adopter or adopters.

37 1951 S.L.T. (Sh. Ct.) 83.

granting the petition Sheriff-substitute Kermack obtained the agreement of the deceased husband's family to the use of their family name. The problem of the child's name is a matter of importance to the persons involved[38] and these safeguards purport to protect the interests in question.

26.34 The courts thus take a fairly wide view of the substantive aspect of the welfare requirement. The desirability of a recognised legal status; the benefits of living in the natural family; a general disinclination to change the status quo; the preference for a family name; all these considerations may lead to the making of an order in favour of the child's parent. They do not necessarily lead to the same conclusion. The principal objection to such an order is that adoption is being used for a potentially unacceptable purpose, to conceal the stigma of the child's illegitimate birth.[39] But where such a purpose is bona fide,[40] it has been accepted as an argument in favour of granting rather than refusing an order. The purpose of the petition is in practice a rather insignificant consideration.[41] The courts are readily prepared to make an order in favour of the parents of the child provided that the petition fulfils the formal requirements, including the welfare requirement, and is genuine. Thus adoptions by parents are not intrinsically

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38 In the sense that it is a public intimation of relationship and status. See also the importance of name in relation to custody.

39 K and K, Petitioners 1950 S.L.T. (Sh. Ct.) 2; In re D, an infant (Lambeth County Court) and In re S, an infant (Kingston-upon-Thames County Court) both referred to in the Court of Appeal's judgment in In re D, an infant [1959] 1 Q.B. 229.

40 K and K, Petitioners 1950 S.L.T. (Sh. Ct.) 2 at p. per Sheriff substitute Garrett.

41 Sometimes the purpose may be significant: see e.g. Re A(an infant) [1963] 1 All E.R. 531.

different from any other kind of adoption. The courts prefer to make an order rather than refuse one and can usually find some reasonable justification for so doing in terms of welfare. It is an example of the interpretational discretion built into the concept. Once an application reaches the court, there are in practice few grounds to justify its refusal.

(d) Adoption by grandparents

(i) Introduction

26.35 Adoption by natural parents tends to have been analysed largely in terms of the creation of a new status and the continuity of an existing relationship.[42] Adoption by non-parental relatives, including grandparents, although it involves these two considerations, has been approached differently. The competency of such adoptions has never been questioned. In England the proper approach has been stated to be that "they should be regarded as exceptional and made with great caution."[43] This restriction finds no authority in the legislation. Nor is it typical of the reported decisions of the Scottish bench.[44] It operates therefore in England as a judicial gloss upon the legislation and it indicates clearly a sort of presumption against making an order in favour of the child's grandparents upon whom there rests a heavier onus than in the case of other applicants.

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42 I.e. judicially as well as in this chapter.

43 In re D X (an infant)[1949] 1 Ch. 320 at p.321 per Vaisey J.

44 Which tends to look at these applications as it considers all others.

The justification for this view rests, at least technically, upon the welfare requirement.[45] But that requirement is related rather to the circumstances of the individual case than to an issue of principle. A different but consistent approach would be to treat grandparental adoptions as contrary to public policy.[46] This would suggest incompetency rather than mere inexpediency but the contrary view has been judicially expressed.[47] This approach also lacks statutory sanction.

26.36 These various views reflect an attitude to adoption which may have prevailed in 1926. The concept of adoption has probably undergone some change over the years, more as a social rather than a legal institution. The law however has been sufficiently flexible to accomodate these changes in social attitudes. Occasionally the older views re-appear. Sheriff-substitute Murray, for example, in deciding that an adoption by the grandparents of a twelve year old boy while his mother was still alive and on hand was contrary to public policy relied upon his conception of the purpose of adoption, namely "to provide a home and a stable background for a child who has no home and no parents or blood relations to look after him".[48] This is quite consistent with the reason given in In re D X (An Infant)[49] for erecting the barrier of exceptional circumstances against grandparental adoptions. "Normally, an adoption presupposes

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45 Since prima facie, it would be argued, an adoption order in favour of a grandparent would not be for the welfare of the child.

46 Mr and Mrs A B, Petitioners (1962) 78 Sh. Ct. Rep. 148.

47 Ibid. at p.150 per Sheriff-substitute Murray.

48 Ibid. at p.149.

49 [1949] 1 Ch. 320.

a complete and final separation between the child and its natural parents."[50] This will be strictly impossible to achieve unless the child's natural parents are dead.[51]

(ii) Continuity of relationship

26.37 The principle in adoption of discontinuing any relationship between the child and the natural parents is an important one. It applies, theoretically at least, except where one or indeed each of the petitioners is a parent of the child.[52] The Scottish courts have paid some attention to it in the context of adoption by grandparents and other relatives. It has however been given greater analytical prominence by the English courts. The principle may also be relevant outwith the context of grandparental applications. It may even relate to the desirability of discontinuing the relationship between the child and one of his natural parents when he is proposed to be adopted by the other parent. It is thus worth pausing at this stage to examine this principle generally before returning later to consider specifically grandparental applications.

26.38 One of the grounds upon which the county council appealed against the adoption order in In re G (DM) (An Infant)[53] was that the child would have constant contact with her mother.[54] For that reason, it was alleged, it would not be for the child's welfare.[55] A number of other issues were

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50 Ibid. at p.321 per Vaisey J.

51 As in Mrs D - Petitioner 1951 S.L.T. (Sh. Ct.) 19.

52 Where ex hypothesi the existing physical relationship between parent and child must continue.

53 [1962] 2 All E.R. 546.

54 In that case neither adopter was a parent of the child.

55 [1962] 2 All E.R. 546 at pp. 548 and 549.

raised in Pennycuick J.'s judgment but he left no doubt about the desirability of separation. Commenting on the "importance to an adopted infant of complete severance from its natural parents",[56] he remarked that the various administrative agencies regarded "such severance as a primary[57] consideration."[58] He described the legal position as follows:-

> "... it is normally desirable that the adopted infant should be completely cut off from its natural mother; but there is no mandatory requirement of this nature in the Adoption Act 1958, and it would be impossible for me, consistently with the terms of the Act and with authority, to attempt to lay down any fixed rule on this point".[59]

26.39 This is unquestionably so. But it would be equally justifiable, it is suggested, to add that, where in the individual case the evidence was to the effect that an order would not be for the child's welfare because of continuing contact with a parent, the court would have no alternative but to refuse an order.[60] It would be more a matter of discretion under the Children Act 1975 or the Adoption Act 1976. In any event it could be decided only in the light of the

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56 Ibid. at p.550 per Pennycuick J.

57 I.e. presumably "primary" in relation to the child's welfare rather than the whole process.

58 [1962] 2 All E.R. 546 at p.550 per Pennycuick J.

59 Idem.

60 I.e. in implementation of the welfare requirement in section 7(1)(b).

circumstances of each case. There is thus no general rule. Nor does the court have an unlimited discretion, for satisfaction of the welfare requirement operated in practice as a restraint upon the exercise of the general discretion, [61] and the later legislation restricts the discretion in terms of the primacy of welfare principle.

26.40 Continuing contact with a parent after adoption arises not only when one of the petitioners is one of the child's parents. [62] In In re G (D M) (An Infant), [63] for example, the adopters were the child's foster-parents and there was likely to be a continuing relationship between the child's mother and the adopters, for they had lived in the same house from time to time. [64] Re B (MF) (An Infant); re D (an Infant) [65] was also an example of foster-parents applying to adopt their foster-children. The circumstances were more extreme than in the earlier case, for the applicants took the view that it would be desirable for the children to remain in contact not only with their natural parents but also with their natural sister. [66]

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61 Paras. 25.59 and 25.60.

62 It can arise when a child's grandparents or other relatives attempt to adopt him. Indeed this was the opportunity for Vaisey J. in In re D X (An Infant) [1949] 1 Ch. 320 to create an evidential barrier to grandparents adoptions: see paras. 26.35 and 26.36.

63 [1962] 2 All E.R. 546.

64 Ibid. at pp. 547 and 548.

65 [1972] 1 All E.R. 898.

66 Ibid. at p.900.

The county council and the county court thought otherwise.[67] But the Court of Appeal endorsed Pennycuick J.'s approach, regarded the circumstances before them as exceptional, concluded that contact between the children and their natural sister, in particular, would be for their good and therefore made an adoption order.[68]

26.41 A variation on the same theme arose in Re J (a minor) (adoption order: conditions)[69] but in a more unusual and acute form. The mother of an illegitimate child and her husband applied to adopt the child. The child had for a considerable period regularly visited his father but these visits stopped when the mother and her husband decided that they were having a serious effect on the child. The father involved himself in the adoption proposals[70] by instituting wardship proceedings. It was eventually suggested that the most effective way to secure the father's proposed access, if expedient, was by way of a condition attached to the adoption order.[71]

26.42 The immediate question however is the judicial attitude to continuing the relationship between the child and his father after adoption. Rees J. expressed himself in words different from but scarcely consistent with the attitudes already examined. He concluded:-

> "...the general rule which forbids contact between an adopted child and his natural parents may be disregarded in an exceptional case when a court is satisfied that by so doing the welfare of the child may be best promoted".[72]

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67 Ibid. at p.899.

68 Ibid. at pp.899 and 900.

69 [1973] Fam.106.

70 Not, of course, in the adoption process.

71 [1973] Fam.106 at p.113.

72 Ibid. at p. 115.

Two criticisms may be made of this approach. First, Rees J. has elevated the status of the principle to that of a general "rule". Pennycuick J. and Salmon L.J. both discounted the existence of a rule whether "fixed"[73] or "hard and fast".[74] The only rule then relevant, albeit in the form of a requirement, was the welfare requirement in section 7(1)(b) of the 1958 Act. Given its discretionary nature, it was a matter for decision only in the circumstances of the individual case. It could not be a "general rule".

26.43 The second criticism is this: having established a general rule, Rees J. found it necessary to find circumstances in which it could be disregarded. He did so by reference to the exceptional case where the child's welfare would be best promoted.[75] This is a formula familiar in general terms to the Parliamentary draftsman.[76] It may well be appropriate as a matter of policy. But it has not been enacted by the legislature in this context nor is it consistent with the welfare requirement in section 7(1)(b) of the 1958 Act or the welfare function in section 3 of the 1975 Act. Rees J., it would seem, went much further than either Pennycuick J. or Salmon L.J. in his approach to the

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73 Re G (D M) An infant)[1962] 2 All E.R. 546 at p.550 per Pennycuick J.

74 Re B (M F) (an infant); Re D (an infant)[1972] 1 All E.R. 898 at p.900 per Salmon L.J.

75 [1973] Fam. at p.115per Rees J.

76 It is usually expressed e.g. "where the court is satisfied that to do so will be in the best interests of the child".

principle of separation between parent and child on adoption. It is suggested that his attitude is difficult to justify under the legislation.

26.44 The Houghton-Stockdale Committee looked at some of these issues. The general theme of their discussion tended to support the attitude that grandparental and similar adoptions should be regarded as quite exceptional.[77] Guardianship, they suggested, would be the appropriate method of protecting the interests involved:[78] hence the provisions of sections 37(1) and 53(1) of the Children Act 1975.[79] This does not however alter the principles governing the making of adoption orders. Even with the 1975 Act amendments the substantive law of adoption remains broadly drafted, with a considerable amount of interpretational discretion built into the provisons and with little guidance given to the administrative bodies or the courts on matters of principle or policy. It is thus likely that the courts will continue to operate as they have done in the past. Examples of approach and attitude under the earlier legislation have not therefore become redundant.

26.45 It makes little difference to grandparental adoptions whether the child is legitimate or illegitimate.[80] The possibility of concealing a condition of illegitimacy

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77 Houghton-Stockdale Report, paras. 111 to 114.

78 Ibid., para. 114.

79 Even although they do not enact exactly as the Report suggested.

80 Of the ten reported cases discussed here, four relate to illegitimate children and six to legitimate children. Nothing however directly turns on the child's status.

seems to carry weight only in exceptional circumstances now.[81] One of the two areas of principal concern to the courts is that in the case of grandparental adoption the child will be adopted by someone with whom he already has a formal if not an actual relationship in a context in which the relationship with his parents will be converted from legal to actual. Although this indicates, quite properly, a question of status, the real problem is the principle already discussed in general terms, namely the possibility of a continuing relationship between parent and child when there ought in principle to be a discontinuation of it.

26.46 Although the courts lay considerable emphasis upon the undesirability of contact between parent and child after adoption, they recognise the almost inevitable opportunity for such contact in grandparental adoptions and normally can find justification for making an order from other sources. In In re D X (An Infant),[82] for example, a simple and straightforward petition by grandparents, an order was made despite "the risk of grave psychological strain and emotional disturbance"[83] for a very tenuous reason, namely, that Vaisey J. could "rely with confidence on the good sense and good judgment of the adopters to handle the situation as it develops with wisdom and discretion".[84] In Mr and Mrs L H - Petitioners[85] Sheriff-substitute Kermack declined to

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81 Mr and Mrs A B, Petitioners (1962) 78 Sh. Ct. Rep. 148; C D, Petitioners 1963 S.L.T. (Sh. Ct.) 7.

82 [1949] 1 Ch. 320.

83 Ibid. at p. 321 per Vaisey J.

84 Idem.

85 1951 S.L.T. (Sh. Ct.) 46.

make an order until it had become clear, as it eventually did, that there was in effect no relationship between the child and her parents which could create problems for the future. On the other hand an order was refused by Sheriff-substitute Lockhart in C D, Petitioners[86] because there was no real possibility that the child's mother would not continue to live separately from her parents, the petitioning grandparents. Contact between the child and her mother was undesirable and in the circumstances almost inevitable. The conclusion reached by the judge was reinforced by what he regarded as the petitioners' motives, namely, the removal of the stigma of the child's illegitimacy. That decision was therefore based upon at least two factors pointing in the same direction.

26.47 The position was slightly different in TF and HF - Petitioners.[87] There was apparently nothing on the face of the petition or of the report of the curator ad litem to suggest that the child's mother, then residing with the petitioners, would be setting up home somewhere else and "be thereby separated from the child as she ought to be, in the interests of them both".[88] Later information indicated that the mother of the child had to work and that it was anticipated she would be leaving her parents' house soon thereafter.[89] The objection on the ground of continuous

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86 1963 S.L.T. (Sh. Ct.) 7.

87 1949 S.L.T. (Sh. Ct.) 48.

88 Ibid. at p.48 per Sheriff-substitute Hamilton: he relied upon In re D X [1949] 1 Ch. 320.

89 Ibid. at p.49.

contact between parent and child was thus met. This is a factor, of a clearly restrictive nature, which the courts take seriously in the context of the welfare requirement. But in most cases there seem to be circumstances or at least arguments which would point to a different conclusion and thus attract the sympathetic attention of the court.

(iii) Age differentials

26.48 The second aspect of concern to the courts in the case of grandparental adoption is the inevitable age differential between child and petitioner. This is important in itself[90] and also for its consequences. In T F and H F, Petitioners[91] the difference in age between child and grandfather was fifty-nine years; in G D, Petitioners[92] the child was five and the grandparents sixty-four and sixty; in Mrs D - Petitioner[93] the difference between grandson and grandmother was fifty seven. In each case however there were counterbalancing considerations which offset the age problem and an order was made.

26.49 The principal consequence of the age differential lies in the termination of the parental alimentary obligation and its substitution by the similar obligation exigible from the adoptive parents. This was not an issue in Mrs D - Petitioner[94] for the child's parents were dead.

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90 It would create an abnormal and almost unnatural age gap of about forty years and often fifty or more.

91 1949 S.L.T. (Sh. Ct.) 48.

92 1950 S.L.T. (Sh. Ct.) 34.

93 1951 S.L.T. (Sh. Ct.) 19.

94 Idem.

The cause of concern is the possibility that the adoptive parents may die before the child is in a position to secure his own financial integrity. This is possible also in the case of natural parents but it is less likely in view of the age differences. In T F and H F - Petitioners[95] Sheriff-substitute Hamilton was unable to secure the child's financial position other than to note that the child's father had not honoured his alimentary obligations towards his child anyway[96] and that the child would be looked after by other adult members of the family in the event of the grand-parents' death.[97]

26.50 The situation in G D, Petitioners[98] was somewhat different. The father whose child was legitimate seemed to retain an interest in the child and was happy to co-operate. His wife had died. He was, in addition, in good employment and thus able to assist. The suggestion was put[99] that the order should be made conditional[1] upon the father providing a sum of money to be lodged in a bank as a reserve fund against future needs. The judge[2] took the view that this was competent. It was conceived in the

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95 1949 S.L.T. (Sh. Ct.) 48.

96 Ibid. at p.48.

97 Ibid. at p.49.

98 1950 S.L.T. (Sh. Ct.) 34.

99 By the curator ad litem.

1 Conditions may be imposed under s.7(3) of the Adoption Act 1958, s.8(7) of the Children Act 1975 and s.12(6) of the Adoption Act 1976.

2 Sheriff-substitute Kermack.

child's interests, not as a penalty against the father. The child would be in no worse position financially than if an adoption order had not been granted. This seems a simple and effective solution to the problem. It demonstrates the flexibility of the legislation.

(iv) Financial security

26.51 Financial security has concerned the court in a rather different context. Although in G and G, Petitioners[3] Sheriff-substitute Kermack couched his judgment partly in terms of the child's interests, he seems, at least implicitly, to have been influenced by considerations of public policy. The problem was that the petitioners were "through no fault of their own, dependent on public relief" and "apparently likely to remain so".[4] He refused to make an order largely for the following reasons:-

> "Such a state of affairs does not indicate that it would be in the child's best interests to be adopted by them. Nor do I think it is in the public interest that in such circumstances the mother should be relieved of her parental and financial responsibilities."[5]

This somewhat negative argument is understandable in the circumstances but it seems to indicate a certain priority being afforded to the public interest at the expense of the child's interest. Indeed it is perhaps questionable whether the public interest is relevant in discussing whether the order will be for the child's welfare. It may be relevant in exercise of the court's general discretion but probably not otherwise.[6] In any event the source of financial support could be important from two points of view: those of the child's interest and of public generally.

26.52 The public interest is as a matter of public policy rather than as a balance against the child's interest an issue of

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3 (1945) 61 Sh. Ct. Rep. 66.

4 Idem.

5 Ibid. at p. 67.

6 Para. 26.10.

significance for the courts. But there are few instances when an order is refused for reasons of policy alone. More often the public interest in the petitioner's motives and circumstances is weighed against the child's welfare, although this is difficult to justify in terms of the 1958 Act welfare requirement. Such an approach may even be inconsistent with section 3 of the Children Act 1975. These issues apart, although the personal attitudes and motives of the petitioning grandparents have been taken into consideration, they never seem to have determined the decision in any reported case. In G D, Petitioners[7], for example, the removal of the stigma of illegitimacy was not viewed sympathetically by Sheriff-substitute Lockhart and certainly contributed to the refusal of the application. On the other hand in Mr and Mrs L H, Petitioners[8] the entirely selfish motives of the parents in agreeing to the proposed adoption by the petitioner did not result in the refusal of an adoption order, although the parents' motives were undoubtedly inconsistent with the judge's view of the object of the legislation[9]. Other factors however influenced the court in deciding that an order should be made.[10]

26.53 Grandparental adoptions thus fit into the general pattern. Once their competency is clear beyond question,[11] the decision turns upon the welfare requirement[12]

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7 1963 S.L.T. (Sh. Ct.) 7.

8 1951 S.L.T. (Sh. Ct.) 46.

9 I.e. to provide a home for children lacking parents or adequate parents. On the other hand, it could be argued, parents prepared to give up their children are "inadequate" by virtue of their irresponsibility.

10 Para. 26.46.

11 It has never seriously been suggested that grandparental applications are incompetent.

12 In the sense already indicated that some advantage will accrue to the child from the making of an order: see e.g. in relation to grandparental applications Mr and Mrs H - Petitioners 1951 S.L.T. (Sh. Ct.) 17.

or the residual discretion of the court.[13] Matters personal to the child, to his welfare and to the parents and grandparents are the substance of the decision. Welfare is a matter of fact and for that reason the attitudes of the individual judge are crucial to the decision. Thus from the legal point of view, it is vital to ensure compliance with the minimum of legal regulation and control which exists, that the approach laid down by Parliament is strictly observed.

(e) Adoption by other relatives

26.54 The issues raised by applications for adoption by relatives other than parents and grandparents are not altogether different from those affecting these types of adoption. The fulfilment of the statutory welfare requirement involves considerations personal to the child, matters of general policy and public interest. Of the various issues which arose in E O - Petitioner[14] two of the ancillary aspects were particularly relevant. The mother of two small girls was dead. Their father intended to remarry. His sister, who lived in family with them, applied to adopt the two girls. The two presently relevant aspects of Sheriff-substitute Hamilton's views were not necessary for his decision but they were clearly consistent with it. He would support the principle, it seems, that the relationship between adopted children and their natural parents should be discontinued on adoption.

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13 When the child's interests as so determined may properly be balanced against other considerations, e.g. the public interest, the parents' interest.

14 1951 S.L.T. (Sh. Ct.) 11.

As he argued, for father, children and adoptive parent to live together, even until further accommodation could be obtained, would be "quite unnatural and wrong".[15] His reason in substance was the distortion of the natural relationship between the parties and the consequent confusion for the children. He seemed to be giving effect to the statutory welfare requirement, although reference was made to the decision in Re D X[16] which introduced in the form of a presumption against grandparental adoptions a new dimension not enacted by Parliament.[17] His conclusion was:-

> "Because of the close association between the petitioner and the children and the father; since the same state is to continue for at least some time were the order granted; and because I could not affirm it would be in the interests of the children to grant the order now, I would be bound to refuse the petition on this ground also."[18]

26.55 The second ancillary argument put forward by Sheriff-substitute Hamilton pointed to a different conclusion. In his view the motives of the parent in agreeing to the adoption would not justify the refusal of an order otherwise in the interests of the child. In the case in question the father was prepared to have his children adopted so that he could marry again. His proposed second wife apparently did not want to be involved with them. This use of adoption legislation was not one "which should be encouraged".[19] The character of the adoption as an adoption of convenience did not, once it was accepted as bona fide, change the justification of the order for the welfare of the child. A consistent attitude to motives was adopted in the two other reported applications by relatives.[20] Ultimately the test would seem to be bona fides, a concept of significance only in the light of individual circumstances and as such replete with discretion in application.

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15 Ibid., at p.12 per Sheriff-substitute Hamilton.
16 [1949] Ch. 320. 17 Para. 26.36.
18 1951 S.L.T. (Sh. Ct.) 11 at p.13 per Sheriff-substitute Hamilton.
19 Idem.
20 Mrs. B - Petitioner 1952 S.L.T. (Sh. Ct.) 48; Mr and Mrs L, Petitioners 1965 S.L.T. (Sh. Ct.) 66.

(f) Other adoptions

26.56 There has never been any doubt that an adopted child may be the subject of a subsequent adoption order in the normal way. The competency of such an order was explicitly recognised in section 1(4) of the Adoption Act 1958 and now in section 8(8) of the Childrer Act 1975 and section 12(7) of the Adoption Act 1976. It makes no difference in which jurisdiction the first adoption order was made.[21] The courts do not however approve of these procedures being used to enable children or their relatives to "switch" parents at will.[22]

26.57 Two other sets of circumstances have caused problems for the courts.[23] In neither case has the legislation provided a solution. The court was thus forced to treat the issues as matters of policy. In the first case[24] the child proposed to be adopted had been forisfamiliated. He had never been brought up by the petitioners jointly. Sheriff-substitute Kermack however expressed the view that, as "a minor in this position ... is allowed to choose his own curators and if he chooses to appoint his mother's husband"[25], he could see no objection to the forisfamiliated child being adopted by his mother and step-father. The child was illegitimate and the consequence of an adoption order would be to conceal that status. That objective was regarded as bona fide in the circumstances.[26] There was thus no reason why an adoption order should not be made. There is nothing exceptional in the attitude and approach of the judge.[27]

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21 E and E, Spouses, Petitioners 1939 165.

22 Mrs B, Petitioner 1952 S.L.T. (Sh. Ct.) 48.

23 Where a forisfamiliated child was the subject of a petition; and where the petitioner was the cohabitee of the child's mother.

24 W, Petitioners (1945) 61 Sh. Ct. Rep. 130.

25 Idem.

26 Thus rendering the motive acceptable.

27 Indeed it is quite consistent with the theme of this chapter.

26.58 That is true also of E, Petitioner[28]. The child was proposed to be adopted by the man with whom the mother was cohabiting. This was regarded by Sheriff-substitute Kermack as contra bonos mores[29]. Moreover it was "highly undesirable as severing such legal ties as the child has with his mother, however little these may appear to be worth"[30]. Nor could he see any advantage flowing to the child from an adoption order. The positon would probably have been different if the petitioner and the child's mother had been married and had jointly applied to adopt the child. The mother however had earlier married a third party who had subsequently disappeared. There were in addition technical difficulties about a divorce and indeed in relation to the child's paternity. Moreover if the mother had not been intending to remain in association with the child, some of the judge's concern would have been unjustified. The whole situation was at best confused. It is clear nevertheless that such an adoption did not find favour largely on moral grounds.

Section 4 - Conclusion

26.59 The adoption legislation contains very few formal requirements for the exercise of the power to make an adoption order. Several of the provisons are empowering rather than restrictive. But the most important restrictive provision, at least under the earlier legislation, was the welfare requirement in section 7(1)(b) of the 1958 Act. Thus the

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28 (1948) 65 Sh. Ct. Rep. 8.

29 Ibid. at p.9.

30 Ibid. at p.9.

way was open, in the context of competency, to make an order once the formal requirements had been satisfied. Even the principal limiting condition, the statutory welfare requirement, was flexible in content and subject to discretion in interpretation. Welfare has been treated as a matter of fact, determinable only in the circumstances of the individual case. The function of the court was thus, potentially at least, very wide. In practice it has been more limited.

26.60 It might reasonably have been expected that the courts would have used the welfare requirement as the principal limiting factor in practice. Technically this would have been wholly consistent with the 1958 Act. The courts have tended however to approach section 7(1)(b) of the 1958 Act less rigidly than its structure would indicate. Welfare has become less of a restrictive condition sine qua non the order may be made, more of a consideration to which attention must be paid by the court as if part of an administrative process. The satisfaction of the welfare requirement, it has been suggested, was strictly a judicial function. Under the 1958 Act the discretion to make an order was unregulated. But in practice the welfare requirement has been treated as a method of governing the exercise of that discretion.

26.61 The repeal of the welfare requirement and the enactment of section 3 of the 1975 Act have reduced welfare technically to the status of a consideration, albeit of primary importance, in an administrative process. This is what a number of the reported cases suggest that the courts have been doing under the 1958 and earlier Acts. In this sense the 1975 Act has probably enacted what to a large extent

was current practice. But the consequence is to afford less statutory protection to the welfare of the child. Welfare is no longer a prerequisite to an adoption order. It has become very much more a matter of discretion. The potential risk to the child's welfare is probably greater to the extent that the protection of that welfare is administrative rather than legal. The quality of administrative protection depends for its effectiveness upon the quality of the administrative body, here the court. The process may be used imaginatively or in blinkered fashion either to the child's advantage or to his detriment.

26.62 Although the courts have not on the whole used the welfare requirement in the way Parliament may strictly have enacted, they have on the other hand created other restrictive devices to restrain over-zealous petitioners. They have done so largely in terms of policy and related arguments.[31] Attempts have been made to create fundamental principles essential to the conception of adoption and to test the circumstances of the individual case against these criteria. Such criteria are general and quite unrelated to the needs of the individual child or parent:[32] for example, the desirability of having a legally recognised status or, an ancillary matter, of the use of a family name. One consequence of this policy would be to enable a child to be brought up in his own natural family, protected where possible by a legal status. This would not distort the natural relationship. Thus the assimilation, so far as possible, of the natural and legal condition of the child may itself prove to be a general advantage to the child. The courts in

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31 The structure of this chapter bears witness to this.

32 For that reason they cannot consistently with the legislation be afforded the status of rules. In any case reasons may exist to justify disregarding the principles so created.

this sense look for generalities rather than the "intangibles" of individual welfare as the basis for their decisions. This strictly extra-statutory approach tends to the making rather than the refusing of adoption orders.

26.63 On the other hand, where adoption would distort the natural relationship, it has not been encouraged. Adoption, it has commonly been stated judicially, requires a cessation of the relationship between child and parent. The only exception is where a parent is adopting his own child. The alternative would have been for Parliament to have declared parental adoptions incompetent.[33] This appears to be the principal reason why the courts have created an evidential barrier to adoptions by grandparents and other relatives. In such cases physical separation of parent and child is unlikely, except where the parent is dead, and the courts are accordingly eager to find further justification in support of such an adoption.

26.64 The other restriction built into the adoption process by the judiciary is an examination of the motives of the relevant parties. Earlier dicta suggested that the use of adoption as a means to conceal the stigma of an illegitimate relationship or to enable selfish parents to get rid of an unwanted child was at best questionable. Attitudes seem to have changed and such purposes have been accepted provided they are genuine and bona fide. To punish a child for whom adoption was desirable merely as a result of questionable parental motives seems, it is suggested, to place undue emphasis on the parents at the possible expense of the child in a way scarcely consistent with what has been conceived as the underlying policy of the legislation.

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33 It is difficult to foresee this happening now. Such adoptions may have been beyond the contemplation of Parliament in 1926 but their early acceptance by the Scottish courts indicates that the adoptio legislation was sufficiently general and lacking in prescription that it could easily and almost imperceptibly be adapted to changing social mores. This is one of the few advantages of the generality of such legislation.

26.65 This restriction has been modified to support the child-oriented basis of adoption. The other judicially created restrictions, namely the need for a status and the avoidance of a distorted relationship, seem to have been created unambiguously in the interests of the child and only marginally and even perhaps consequentially to the advantage of the parents. The courts thus seem keen to observe the spirit and policy of the legislation by doing what is best for the child. In the process, however commendable, they have perhaps distorted the precise provisions of the legislation, which, if given effect as enacted, would probably have achieved the purpose of the legislation without resort to dubious interpretation. The 1975 Act enacts what is strictly a more flexible approach and to that extent endorses the irregular approach of some courts. Thus, although the statutory framework has been amended, the actual practice of the courts may not change.

CHAPTER 27

THE SIGNIFICANCE OF PARENTAL CONSENT OR AGREEMENT.[1]

Section 1 - Introduction

27.1 Of the various threshold requirements in relation to adoption the simplest in conception is the need for parental agreement.[2] There are few interpretational difficulties. The real problems arise over the judicial power to dispense with agreement.[3] The welfare requirement was clearly intended to protect the interests of the child. The parental agreement requirement is equally clearly a device for securing the parents' interests. It is a matter for the parents in the first instance to decide how they view their relationship with their child. The only qualification, of course, is the dispensation power.

27.2 The overall scheme of the legislation is a balance of the various interests: on the one hand, the child's interests through the various welfare requirements[4] and the primacy of welfare principle; on the other hand, the parents' position, protected by the agreement requirement, may be characterised more as a right, subject to forfeiture, rather than as a mere interest. Thus the balance is tipped rather in favour of the parents. The interests are at least not equally balanced.

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1 The word "agreement" superseded "consent" in the Children Act 1975 (1975c.72) and will be used unless the context requires otherwise.

2 Including where appropriate the agreement of the guardian.

3 Chapters 28 to 30.

4 In Scotland, if the child is a minor, his or her consent is also required: Adoption Act 1958 (7 Eliz., 2, c.5), s. 4(1); Children Act 1975, s. 8(6).

27.3 The need for parental consent or agreement has been enacted in each Act since 1926.[5] The pattern and structure of the consent or agreement and dispensation provisions have remained much the same. The grounds for dispensation have been modified over the years but their nature has remained unchanged. The consent or agreement provisions were changed for the first time in 1975. The 1975 Act however amended the procedures for rather than the substance of agreement in a way which may have been intended to reduce the bias which otherwise existed in favour of the parents.[6]

Section 2 - The development of the requirement

27.4 The significance of parental consent and hence of parental rights and interests was debated quite vigorously by the Parliamentarians of 1926. Those supporting the proposed adoption legislation were emphatic in the need to obtain parental consent. They were however prompted by differing reasons. Some were motivated by the desirability of protecting the parents' interests. Sir Henry Cantley, for example, regarded adoption as "a voluntary parting by the natural parents with the child to the new parents, who voluntarily undertake to stand in that position."[7] This emphasis on the voluntary nature of adoption, from the point of view of both

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5 Adoption of Children Act 1926 (16 & 17 Geo. 5, c. 29), s. 2(3); Adoption of Children (Scotland) Act 1930 (20 & 21 Geo. 5, c.37), s. 2(3); Adoption Act 1950 (14 Geo. 6, c. 26); s. 2(4)(a); Adoption Act 1958, s. 4(1)(a); Children Act 1975, s.12(1)(b)(i); Adoption Act 1976 (1976 c.36), s. 16 (1)(b)(i).

6 Paras. 27.1 and 27.2.

7 (1926) 192 H.C. Deb. 5s. col. 974 (Sir Henry Cantley).

sets of parents, apart from discounting the mandatory nature of the process from the child's point of view, pointed unhesitatingly to his conclusion:-

> "I totally disagree with the view that the adoption of a child should be forced on unwilling parents because it may be of some moral turpitude. That is a totally different principle, which is already provided for in law ... if it ever got to be known that this Adoption Act was to be used as a means by which possession of their children should be forced from parents, it would make the administration of the Act much more difficult and its success much less certain." [8]

This strongly parent-orientated view may be contrasted with the comment that "It is important in considering the welfare of the child when the court is deciding to sanction its adoption, that the consent of all those interested in keeping the child in its natural family should be duly obtained and registered." [9] The meaning of this comment is not beyond doubt but it appears at least to create a link between parental consent and the child's welfare. It may even implicitly suggest that the need for parental consent was justified partly in terms of the child's welfare. In other words, the consent requirement was in the interests not only of the parent but also of the child.

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8 Ibid., cols 974 and 975.

9 (1925) 182 H.C. Deb. 5s. col. 1728 (Mr. Hurst).

27.5 Most of the 1926 Parliamentarians however seem to have taken a less extreme stand than these comments would suggest. They recognised the need to protect both the child and the parent and at the same time the desirability of a degree of flexibility so that the parent would not be in a position to monopolise the decision on what would be best for the child. Their concern was thus directed not to the consent requirement but to the power to dispense with consent. Indicative of this attitu de is the view that "very great care indeed"[10] should be exercised in deciding what grounds should be available for judicial dispensation with consent. Such a view has been reflected subsequently in the courts.[11]

27.6 It has never been seriously suggested since the enactment of the first adoption statutes that parental consent or agreement should not be an essential requirement. It is, the argument would run, fundamental to the whole conception of adoption. Without it adoption would alter its character. The Hurst Report emphasised the importance of consent and the procedures for obtaining it.[12] The Houghton-Stockdale Committee accepted these views. "There appear to be no grounds for departure from the two basic principles in the existing law: that adoption should normally be possible only with parental consent; and that it should be open to a court

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10 (1926) 192 H.C. Deb. 5s. col. 958 (Mr. Thurtle).

11 Chapters 28 to 31.

12 Hurst Report, pp. 24 and 25.

to dispense with consent on certain specified grounds."[13] The committee were however concerned with the mechanics of the consent procedure, from the point of view both of the parent and of the child. It could cause strain, confusion, indecisiveness and uncertainty for the mother.[14] The child's welfare could be at risk pending decisions on his future.[15] Relinquishment procedures were thus devised and recommended as a way of avoiding some of the consequences of the existing system.[16] Thus parental consent or agreement has become perhaps even more important in the light of sections 12 and 14 of the 1975 Act, both as a matter of principle and in the context of the procedures for freeing a child for adoption. To the extent that the procedures are designed to ensure that the parent in truth agrees to the adoption of the child in full knowledge of the circumstances, consequences and implications of the decision, they emphasise the importance in principle of the requirement.

Section 3 - The provisions of the Acts

27.7 The nature of the consent requirement in the Adoption Act 1958 is clear. Section 4(1)(a) provides that, subject to section 5 of the Act, an adoption order shall not be made in any case except with the consent of every person who is a parent or guardian of the infant. Section 5 contains the dispensation power. Thus no order can be made without the

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13 Houghton-Stockdale Report, para 168.
14 Idem.
15 Ibid., para. 169.
16 Ibid., paras. 173 to 183. See also Fisher D.E., "Adoption and the Courts: An Examination of the 1972 Report" 1973 S.L.T. (News) 145 at pp. 145 to 148.

appropriate consent or without dispensation, however much an order might otherwise be for the child's benefit.[17] It is thus a threshold requirement.

27.8 Obtaining the necessary consent is not an automatic process. Section 7(1)(a) of the 1958 Act supports the consent requirement by insisting that the court shall become involved in the process. The position of the court in relation to the consent requirement is precisely identical to its position in relation to the welfare requirement. The judicial function in relation to the consent requirement however is spelled out in greater detail, for it is for the court to be satisfied that the consenting person understands in effect the implications and consequences of his or her decision. Normally the court will simply accept the evidence of consent prescribed in section 6 of the Act. To that extent the judicial function is largely formal but difficulties may arise in marginal cases.

27.9 It is perhaps understandable that the court's attitude to the consent requirement should in practice be more formal than its approach to the welfare requirements. Is not the court entitled to assume prima facie that the consent of a person sui iuris given in accordance with the prescribed procedures is valid and binding? On the other hand the court

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17 This has frequently been stated in passing by the courts.

would probably hesitate to assume that an adoption order would be for the welfare of the child merely because the formalities had been satisfied. The reason may well be that the child, not being sui iuris, is not regarded as being in a position to decide for himself. In this sense the judicial function in relation to the consent requirement may reasonably be treated as formal, but in relation to the welfare requirement this would be more difficult to justify. Perhaps Parliament erred in treating consent and welfare in the same way in section 7(1) of the 1958 Act. But in practice the courts have to some extent involved themselves more in the substance of the welfare requirement than in the substance of the consent requirement, although in doing so they may have distorted the strict approach laid down by Parliament. The courts on the other hand have been greatly involved in the dispensation process.

27.10 A clear pattern emerges. The consent requirement is by statute divided into two elements: the threshold requirement and the discretionary power of dispensation. The welfare requirement, though wholly intact in the legislation of 1958, operated partly as a threshold requirement and partly as a discretionary exercise.[18] It is understandable why this inconsistency with the legislation had arisen. The provisions of the Children Act 1975, on the other hand, probably reflect this practice but in a sense they weaken the judicial approach

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18 Paras. 25.59 and 25.60.

to welfare.[19]

27.11 So far as consent or agreement is concerned the pattern of the 1975 Act is fundamentally the same as that of the 1958 Act. Parental agreement remains a threshold requirement. The need for such agreement may be dispensed with[20] along lines similar to those in the 1958 Act.[21] The introduction of the provisions whereby a child may be freed for adoption[22] create new procedures but they do not, it is suggested, interfere with the basic structure of the process requiring agreement.

27.12 The 1975 Act does not contain so precise an agreement requirement as section 4(1)(a) of the 1958 Act. However section 12(1)(b) of the 1975 Act and section 16(1)(b) of the 1976 Act confer a function upon the court similar to that created by section 7(1)(a) of the 1958 Act. The introductory phrase in the later Acts reflects the impediment created by the consent requirement in section 4(1)(a) of the 1958 Act. The final outcome is for present purposes the same: a threshold requirement to which is attached a power of dispensation.

27.13 Section 12(1)(a) of the 1975 and section 16(1)(a) of the 1976 Act naturally find no counterpart in the 1958 Act. They merely anticipate the procedures for freeing the child for adoption in sections 14 and 18 respectively. The criteria for

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19 Para. 25.7.
20 Children Act 1975, s. 12(1)(b)(ii); Adoption Act 1976, s. 16(1)(b)(ii).
21 The 1975 Act contains one ground additional to those in the 1958 Act, namely serious ill-treatment of the child: ibid., ss. 12(2)(f) and 16(2)(f).
22 Ibid., ss. 14 and 18.

a judicial order freeing a child for adoption are almost precisely those on which the court must be satisfied for the purposes of sections 12(1)(b) and 16(1)(b), the fundamental agreement requirement.[23] Thus neither the judicial function nor the substantive grounds for the implementation of that function are affected whether the court is being satisfied in terms of sections 12(1)(b) or 16(1)(b) or freeing the child for adoption under sections 14(1) or 18(1). The only difference is that the latter decision comes earlier in the adoption process than the former:[24] hence it is procedural not substantive.

27.14 This is supported by a further argument. The consent requirement in the 1958 Act is mandatory. The dispensation power under that Act is discretionary.[25] This is also true of the later equivalent provisions.[26] What is significant is that the decision to free a child for adoption is not discretionary.[27] Once the criteria or more accurately the threshold requirements have been established, it becomes mandatory for such an order to be made.[28] The court has thus no substantive decision to make. It merely ensures that agreement has been given as required or should be dispensed with: that is exactly the function under section 7(1)(a) of the 1958 Act, section 12(1)(b) of the 1975 Act and section 16(1)(b) of the 1976 Act. The safeguard from the parental point of view is that no application to free a

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23 The principal difference is that agreement relates to the adoption order, while the freeing procedures relate to any adoption order.

24 Which is what was intended: see the Houghton-Stockdale Report, para. 170. The proposal has not been supported unanimously: see e.g. Triseliotis, p. 133.

25 Paras. 31.1 and 31.2.

26 S. 12(1)(b)(ii) of the 1975 Act and s. 16(1)(b)(ii) of the 1976 Act use the word "should"; s. 5(1) of the 1958 Act used the word "may". The difference is grammatical only.

27 Children Act 1975, s. 14(1); Adoption Act 1976, s. 18(1).

28 I.e. ignoring for present purposes the decision whether to dispense with agreement.

a child for adoption shall be made without parental consent or, in effect, a request for dispensation with agreement.[29] The new procedure thus merely assists in ensuring that the consent or agreement has been given not only formally but also substantively, either sooner or later as the case may be. It protects the parent's rights and, arguably, through them the child's interest.[30]

27.15 Although the fundamental structure of this requirement remains the same in the 1958, 1975 and 1976 Acts, the procedures introduced by the 1975 Act will affect the way in which the system operates. Whether to use the new procedures will be largely a matter for the parents in question.[31] It is likely that only those parents who are more or less totally committed to allowing their child to be adopted will use the new facility. Few parents may be so committed.[32] Even those parents who do consent to the child being freed for adoption may apply to the court for the order to be revoked.[33] In that sense no parental decision is irrevocable until the adoption order has been made.[34]

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29 Children Act 1975, s. 14(2); Adoption Act 1976, s. 18(2).

30 As intended by the Houghton-Stockdale Committee: see their Report, para.169.

31 The existing procedures have not been revoked. On the contrary they have been strengthened by the appointment of a "reporting officer": see s. 20(1)(b) of the 1975 Act s. 65(1)(b) of the 1976 Act and the Houghton-Stockdale Report, paras. 175 and 176.

32 It is quite impossible to foresee what will happen: these comments, like any others at this stage, are mere guesses. Parental attitudes have however been analysed under the present system: see Triseliotis, pp. 123 to 125.

33 Children Act 1975, s. 16; Adoption Act 1976, s.20.

34 As at present.

Although the provisions of the 1958 Act will not apply, the fundamental philosophy underlying them remains relevant under the 1975 and 1976 Acts, despite procedural and ancillary modifications. Thus the judicial experience of the 1958 Act, particularly in relation to the function of welfare, will remain valuable not only for the 1958 Act system but also for an understanding of the 1975 and 1976 Acts procedures.

Section 4 - Judicial attitudes to the requirement

(a) General issues

(i) The interests protected by the requirement

27.16 Most of the problems about the requirement coming before the courts have been relatively simple issues of interpretation and construction. However to solve these problems has sometimes involved an examination of the wider aspects of the legislation. Such an examination affords an indication of judicial insight on these broader issues.

27.17 The need for parental consent or agreement has been justified judicially on at least two separate grounds: the gravity of the decision for the parents and the consequences of an adoption order for all concerned. In In re Hollyman[35] Lord Greene M.R. emphasised the necessity of parental consent under the legislation. The particular issue before him was the revocability of consent prior to the making of an order. He

35 (1945) 61 T.L.R. 229.

argued:-

> "The depriving of a parent of all parental rights is a serious matter, and one on which a parent may very well feel one thing at one moment and another thing at another."[36]

His conclusion was that a consent was operative only at the time the order was made and therefore revocable until then. This view, consistently with the statute, gives considerable weight to the parent's rights, but not necessarily at the expense of the child.[37] The child, in any event, is unlikely to be unaffected by any such decision. Questions of parental consent and the welfare of the child are in this context inextricably linked together.

27.18 An entirely consistent attitude was adopted in Scotland a year later in a slightly different context. In B and B, Petitioners[38] the mother of an illegitimate child had given her formal consent to the adoption. It transpired however that she wished to see her daughter, the adopters and the adoptive home. Her purpose, regarded as "laudable"[39] by those concerned, was to be satisfied that her agreement to the adoption was in the child's interests. The technical issue was whether, after formally consenting, the mother retained a right of access to or contact with the child. Sheriff-substitute Duncan argued along lines

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36 Ibid., at p. 229.
37 E.g. the interests of the parents and of the child may coincide.
38 1946 S.L.T. (Sh. Ct.) 36.
39 Ibid. at p. 38.

similar to those used by Lord Greene M.R. in the English case: in effect, that the parent-child relationship was not terminated until the adoption order had been made.[40] The giving of formal consent is thus not final; nor is it sufficient to break the relationship.

27.19 These arguments underly the procedures in the 1975 and 1976 Acts for freeing a child for adoption. The effect of such an order is to vest the parental functions in the adoption agency,[41] thus terminating the parent-child relationship. If the giving of consent or agreement were the final juristic act of adoption, the new procedures would have been unnecessary. But the law, in this country at least, has adhered strongly to the philosophy that only a judicial act can terminate the natural parent-child relationship and create an adoptive relationship in its place. In the case in question Sheriff-substitute Duncan declined to make an order until the mother had had an opportunity of seeing her daughter. In fact she visited the adoptive home, was perfectly satisfied and an order was subsequently made.[42] This demonstrates clearly how the consent requirement can operate in the interests of the parent and of the child.

27.20 The only authority referred to by Sheriff-substitute Duncan in his opinion in that case was H and H - Petitioners,[43] in which an admittedly different issue was raised, namely the

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40 Idem.

41 Children Act 1975, s. 14(6); Adoption Act 1976, s. 18(5).

42 1946 S.L.T. (Sh. Ct.) 36 at p. 38.

43 1944 S.C. 347.

validity of the consent of a parent unaware of the identity of the adopters. This matter was argued largely in terms of the welfare and interests of the child. To do so, the Court of Session came under an obligation to postulate a nexus between parental consent and the position of the child. Lord Cooper L.J.-C.[44] did so as follows:-

> "The provisions of the Act,[45] and particularly sections 2(3) and 3(a), indicate in our view that the requirement of consent of the natural parent was laid down for two purposes, viz: (a) to ensure his or her full assent to the relinquishment of parental privileges, and (b) as an added safeguard for the welfare of the child."[46]

Disclosure of the identity of the adopters was not regarded as necessary to achieve these purposes. Lord Normand L.P. took a similar view but expressed it slightly differently." ... this requirement, "he said," is conceived both in the interest of the natural parent ... and in the interest of the child."[47] This is less precise than Lord Cooper's formulation and thus more susceptible to flexible interpretation and application.

27.21 The Scottish courts, at least on the basis of the reported decisions, appear to have taken a wider view of the nature and purpose of the consent requirement than their English counterparts. Prima facie the requirement safeguards the position of the person whose consent or agreement is

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44 On behalf of himself, Lord Mackay and Lord Jamieson.

45 Adoption of Children (Scotland) Act 1930.

46 1944 S.C. 347 at p. 351 per Lord Cooper L.J.-C.

47 Ibid. at p. 351 per Lord Normand L.P.

required. It would therefore be for that person to decide whether to take account of the child's position.[48] There is nothing in the Act to require a parent to do that. A parent-orientated approach may be permissible in these circumstances. On the other hand, once the courts have indicated that part of the purpose of the requirement is to safeguard the welfare of the child, however this may be done, a new dimension has been introduced and the parent will presumably come under an obligation to take a view balancing the two interests stated to be relevant. In practice this will become important in the context of dispensation. The difference of approach to the requirement as between the English and Scottish courts[49] may indicate why the two jurisdictions at one stage approached differently the power to dispense with consent on the ground of the unreasonable withholding of consent by the parent.

27.22 There can be little doubt that the making of an adoption order is a vital decision for the parent whose rights are being terminated and also for the child whose status is being altered. The other justification for the need of parental consent or agreement, the consequences of the order, is partly an expression of the same philosophy. This idea recurs from time to time in judicial dicta on adoption generally.

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48 Cf. the function of welfare in deciding whether consent is being unreasonably withheld.

49 Which itself may be based upon the recognition of different underlying principles.

One such view is that of Jenkins L.J. in W v W,[50] not a case of adoption at all[51] but one closely affected by the idea of adoption:-

> "The adoption of a child under the Adoption of Children Act 1926 ... is a solemn act which involves a representation to the court in the case of joint adopters that the joint adopters are husband and wife. On that representation and on proper evidence as to the means, respectability and responsibility of the spouses and the stability of their home the court will make an order which transfers the adopted child from the legal protection of its natural parents to the legal protection of its statutory parents, as the adopters by force of the order in effect become. There is a representation by them to the court expressly of the existence, and impliedly of the validity, of the marriage, and, acting on that representation, the court makes an order which irretrievably alters the status of the adopted child. More than that, the rights of the natural parents or parent are by force of the order put an end to, and the consent of the natural parents or parent of the child is in ordinary circumstances a necessary preliminary to the order."[52]

Despite its stylistic inelegance, that comment clearly expresses that the drastic consequences of an adoption form at least one reason for requiring parental consent or agreement.

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50 [1952] 1 AllE.R. 858.

51 It considered whether adoption of a child amounted to approbation by the husband of a marriage otherwise null on the ground of the wife's inability to consummate it.

52 [1952] 1 AllE.R. 858 at p. 864 per Jenkins L.J.

(ii) The interest of the putative father

27.23 The consent or agreement requirement in the adoption legislation has always been couched in general terms: it simply refers to "every person who is a parent or guardian of the infant"[53] or "each parent or guardian of the child."[54] There is nothing specific in the legislation to indicate whether the consent or agreement of the father of an illegitimate child is required. It is now quite clear however that the father of an illegitimate child is not a parent for the purposes of the legislation.[55] But in some circumstances he may be entitled to receive notice of the proposal to adopt.[56] It is open to the putative father of an illegitimate child to apply for custody of the child[57] but neither the existence of that power nor an subsequent award of custody made any difference to his position under the earlier adoption legislation.[58] However under section 107(1) of the Children Act 1975 and section 73(1) of the Adoption Act 1976, the father of an illegitimate child with custody under the relevant legislation is treated as a "guardian" whose consent will therefore be necessary under sections 12(1)(b) and 16(1)(b) respectively. For this purpose, therefore, a putative father with a judicial award of custody is equated with the father of a legitimate child. Thus neither relationship nor custody alone is the foundation of the requirement in the 1975

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53 Adoption Act 1958, s. 4(1)(a).
54 Children Act 1975, s. 12(1)(b); Adoption Act 1976, s. 16(1)(b).
55 In re M, An Infant [1955] 2 Q.B. 478; A v B 1955 S.C. 378.
56 Bevan, p. 336; Clarke Hall & Morrison, p. 1031; Houghton-Stockdale Report, para. 192.
57 Illegitimate Children (Scotland) Act 1930 (20 & 21 Geo. 5, c. 33) s.2(1); Guardianship of Minors Act 1971 (1971 c.3), s. 14 re-enacting the Legitimacy Act 1959 (7 & 8 Eliz. 2, c. 73), s. 3.
58 See particularly A v B 1955 S.C. 378 at pp. 386 and 387 per Lord Clyde L.P.

and 1976 Acts. That is true also of the earlier legislation. The reasoning of the judges in the cases which decided that the putative father was not a parent whose consent was required indicates why this is so.

27.24 This issue was determined almost simultaneously in England and Scotland.[59] The adoption legislation was in this context the same in both countries but related legislation then differed.[60] In 1955 the putative father had a right to apply for custody in Scotland but not in England. In the event, that had no bearing upon the outcome.[61] What is remarkable is the analogous reasoning of the various judges. The arguments were based partly upon the structure of the legislation and the possibly distinctive treatment of legitimate and illegitimate children and partly upon the nature and consequences of adoption in relation to the putative father. The relevant point is the last one.

27.25 Briefly this is the argument. A putative father has no rights in relation to his illegitimate child. Adoption involves a transfer of rights. The putative father has none capable of transfer. He has no interest supported by rights to which consent can be related. He thus falls outwith the scope of the consent requirement. Lord Clyde L.P. commented in the

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59 On 6 July 1955 by the Court of Appeal and on 22 July 1955 by the Court of Session.

60 I.e. the statutory powers of the putative father to apply for custody.

61 A v B 1955 S.C. 378 at pp. 386 and 387 per Lord Clyde L.P.

Scottish case:-

> "The granting of an adoption order involves ... the final and irrevocable severance of any mutual rights and obligations between the adopted child and its original parents ... and the legislature therefore requires either consent by the father and mother or else reasonable grounds for dispensing with that consent before these rights are finally severed. But the same requirements do not necessarily apply to the case of an illegitimate child and its father, who has not such rights."[62]

A few relevant sentences from the judgment of Romer L.J. in the English Court of Appeal crystallise the whole argument:-

> "... the consents referred to in section 2(4)(a) of the Act[63] are ... essentially linked with the transfer of rights which results from an adoption order ... The father of a bastard ... has under our law no rights in respect of it at all ... I am of opinion therefore that a father is not deprived by section 10 of the Act, on the adoption of his natural child, of any rights, for he has no rights upon which the section could operate."[64]

The issue thus turns upon rights: not relationship nor custody. But the rights themselves flow from either a relationship, in the case of a legitimate parent, or custody, when a putative father is deemed to be a guardian in consequence of having judicial custody.[65]

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62 A v B 1955 S.C. 378 at pp. 384 and 385.

63 Adoption Act 1950.

64 In re M, An Infant [1955] 2 Q.B. 479 at pp. 494 and 495.

65 Para. 27.23.

27.26 This rationalisation is understandable. But if the putative father were to be benefited with substantive rights, either co-extensive with or even less than those of a legitimate parent, the position would presumably be different. In the Scottish case[66] it was argued that the putative father's power to apply for custody was enough to bring him within the application of the consent requirement. This was rejected because no right was conferred, merely a power to seek the judicial conferment of rights.[67] The subsequent extension of "guardian"[68] to include a putative father vested with judicial custody seems to endorse these views. Such a person has substantive rights, although not a recognisable legal relationship, which will be determined on adoption. It seems reasonable, as Parliament has concluded, to require his consent or agreement. The Houghton-Stockdale Report did not recommend this change. Nor did it recommend that a putative father with no further qualification should have his consent required. Thus, unless the general position of the putative father changes, it is unlikely that the consent or agreement provisions will now be changed.

(b) Specific issues

27.27 The judicial attitude to the position of the putative father in the adoption process, if it is to be regarded as a special as well as a general issue, may be characterised in two

66 A v B 1955 S.C. 378.

67 Ibid. at p. 386 per Lord Clyde L.P. and at pp. 389 and 390 per Lord Sorn.

68 Children Act 1975, s. 107(1); Adoption Act 1976, s. 72(1).

ways: a strict regard for the statutory provisions coupled with a desire to give effect to the underlying policy of adoption when the legislation is silent or flexible. This is true also of the other special issues which have arisen. There seems little doubt, for example, that in the case of an adopted child who is the subject of a second adoption application the consent of the natural parents is not required[69] while that of the adoptive parents is essential.[70]

27.28 Considering the importance attached to consent, recognised by the nature of the process and by the statutory formalities of the evidence of consent, it is not surprising that the need for strict compliance with these statutory formalities has been emphasised.[71] Indeed in Re B (An Infant)[72] Lord Evershed M.R. went almost so far as to say that the parent must be given every opportunity of presenting her case to the court irrespective of technical compliance with the formalities. In that case an adoption order was set aside when the mother's whereabouts, originally unknown, came to the knowledge of the court in such a way that her consent should not have been dispensed with nor should an order have been made. Thus the courts are perhaps concerned to see not only strict compliance with the Act but also implementation of its basic policies.

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69 F. Petitioner 1939 S.C. 166.

70 In re R M, An Infant [1941] W.N. 244.

71 E.g. Mr. and Mrs O, Petitioners 1950 S.L.T. (Sh. Ct.) 64.

72 [1958] 1 Q.B. 12.

27.29 These particular rules tend to emphasise the parents' interests. The inherent revocability of consent until an adoption order is made[73] and the continuity of the parent-child relationship until then[74] suggest likewise. The introduction of new procedures for freeing the child for adoption does not alter this aspect of the legislation. Their introduction merely brings about the possibility of the irrevocability of consent without judicial sanction and of the final termination of the natural parents' interest at an earlier stage of the proceedings. It does not change the circumstances in which the decisions giving rise to these consequences are taken. The new procedures have been designed partly to safeguard the parents' position and partly as a protection for the child. The tendency therefore is to pay more attention to the interests of the child in the process.

27.30 The interests of the parents and the child were also taken into account by the Scottish courts in deciding whether knowledge of the identity of the adopters was necessary to the granting of a valid consent by the parents. Although the matter has now been overtaken by legislation[75] consistent with the decision of the Scottish courts, the reasoning of the court remains valid and may be applicable in a different context. The majority of the judges in H and H, Spouses,

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73 In re Hollyman (1945) 61 T.L.R. 229.

74 B and B, Petitioners 1946 S.L.T. (Sh. Ct.) 36.

75 Since 1949.

Petitioners[76] took the view that disclosure of the petitioners' identity "might be prejudicial to the welfare and best interests of the child."[77] However that may be,[78] that argument would be of no avail, unless the child's interests were of some relevance to the consent requirement. The court concluded that the consent requirement involved the child's interest. The way was thus open to decide that disclosure of identity was not an indispensable pre-requisite of a valid consent. Such a consent would nevertheless require information to be made available to the natural parents about the adoptive home so that they could properly decide whether to consent. The channel of communication for this purpose, at least according to Lord Normand L.P., was the curator ad litem who thus "for the purpose of protecting the welfare of the child, should communicate with the mother, and, unless it is wholly impracticable, should see her and give her all the information which she may require about the character and circumstances of the adopters and their home, short of information which may disclose their identity, and, having done so and having explained the nature and effect of the adoption, should allow the mother to decide whether to give her consent ..."[79] This approach is a clear attempt to compromise between the parents' interest and the child's interest, thus ensuring that the parents' consent is genuine

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76 1944 S.C. 347.

77 Ibid. at p. 351 per Lord Cooper L.J.-C., Lords Mackay and Jamieson.

78 The court did not reveal the source of its knowledge.

79 1944 S.C. 347 at p. 352 per Lord Normand L.P.

and effective and at the same time that the interest of the child is not prejudiced.

27.31 Lord Moncrieff found this approach unacceptable. His opinion reflected a different attitude to parental functions. He indicated that "the parent cannot in fulfilment of his natural obligation delegate to a third party the definite parental duty of himself choosing on behalf of the child the alternative home to which it is to be sent."[80] Moreover he could find nothing in the legislation which he could construe "as directed to relax the primary natural obligation of a parent himself to consider anxiously and personally how far he will consent to any identified and particular transfer of his parental rights, and any particular and identified delegation of his parental duties."[81] The main point of distinction between Lord Moncrieff and his colleagues was that, while he treated the child's interest as co-extensive with or at least dependent upon that of the parent, the other judges saw the child's interest generally and in terms of the legislation as separate from and wholly independent of the parent's position. The court thus argued in terms of interests not rights. Recognition of the child's interest was sufficient to change the approach from being parent-dominated to one of balance. That step, it is suggested, was vital.

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80 Ibid. at p. 353 per Lord Moncrieff.

81 Ibid. at p. 354 per Lord Moncrieff.

27.32 In H and H, Spouses, Petitioners[82] the mother did not produce a written consent in the statutory form. She proposed to complete a declaration setting out that she did not want to know the petitioner's identity. There was however a specific adoption to which the declaration would relate. Concealment of identity has since been regulated by statute in two different ways. Consent or agreement may be given by the parent without his or her knowing the identity of the adopters.[83] That is a decision for the parent. Similarly the serial number system enables consent to be given without disclosing the adopters' identity.[84] This applies however at the option of the adopters. In either case there is a proposal to adopt a specific child.

27.33 On the other hand general consents have been stated to be invalid.[85] In Re Carroll (No. 2)[86] the mother gave her consent to adoption by completing a blank form. Slesser L.J. stated:-

> "It is scarcely necessary to point out that the form of consent which has already been given by the mother with the name of the applicant absent is a nullity. It is clear from s. 2(3)[87] that parental consent can only be given to a specific adoption by a named adopter."[88]

This suggests that the form of consent must be signed by the parent with the names of the adopters included. If this is so,

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82 1944 S.C. 347.
83 Adoption Act 1958, s. 4(2); Children Act 1975, s. 12(1)(b)(i); Adoption Act 1976, s. 16(1)(b)(i).
84 Adoption (Juvenile Court) Rules 1959 (S.I. 1959 No. 504), r.2; Adoption(County Court) Rules 1959 (S.I. 1959 No. 480), r.2.
85 Bevan, p. 340; Clarke Hall & Morrison, p. 1038; Josling, p. 22.
86 [1931] 1 K.B. 317. 87 Adoption of Children Act 1926.
88 [1931] 1 K.B. 317 at p. 361.

the statutory provisions enabling the identity of the adopters to be concealed operate to modify this comment. The textbooks nevertheless maintain that general consents are invalid[89] and, in giving consent, "a specific applicant for adoption must be in mind."[90] This is probably so, for in Y Z - Petitioners[91] a consent signed before the petition was presented was regarded as a nullity. The reason was quite clear:-

> "... the terms of section 4(1) of the Adoption Act 1950 require that the person in whose favour the order is to be made shall be named in the form of consent or distinguished therein in the prescribed manner. The effect of that section appears to me clearly to nullify any consent granted at a stage when no adoptive parents have been found."[92]

Section 4(1) of the 1958 Act and even more clearly section 12(1)(b)(i) of the 1975 Act and section 16(1)(b)(i) of the 1976 Act suggest that consent must indeed be granted in relation to a specific adoption, which can only mean specific adopters. But the foregoing comment[93] indicates only the test that a specific adoption has been proposed; not, in other words, the mere possibility of an adoption. That distinction should in most cases be capable of establishment. Moreover, although the dictum refers to named adopters or the serial number system, it

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89 Para. 27.33 n. 85. 90 Bevan, p. 340.
91 1954 S.L.T. (Sh. Ct.) 98.
92 Ibid. at p. 98 per Sheriff-substitute Middleton.
93 By Sheriff-substitute Middleton.

does not require the consenting parent to be familiar with the adopters' identity. There is thus a reconcilable distinction between the legitimate concealment of identity and the need for consent to a specific adoption. Their reconciliation is however rather strained. The foundation of the distinction is probably a recognition of the interest of the child distinct from that of the parent.

Section 5 - The consent of the minor.

27.34 Most of the evidence in support of the recognition of the independent interest of the child comes from the Scottish courts. This is rather surprising because section 4(1) of the 1958 Act and section 8(6) of the 1975 Act require in Scotland the consent of the child who is a minor. The English courts unaided by the legislature may thus have been reasonably expected to have promoted the child's independent interest more enthusiastically than their Scottish counterparts.

27.35 The minor's consent requirement, clearly a threshold requirement, is a recognition not only of the minor's independent interest but also of the conferment of statutory rights. The minor in Scotland has always had the benefit of a more substantial status than the pupil. In this the law of Scotland contrasts with that of England. The need for the minor's consent would appear to be a reflection of the minor's established status in Scots law. The pupil in Scotland and the infant in England are otherwise treated in the same way; consideration must be given to his wishes, having regard to the

child's age and understanding, in the context of the general welfare requirement.[94]

27.36 The minor's consent is in principle indispensable. He has a right of veto over any proposed adoption. This was absolute until 1966 when power was conferred upon the court to dispense with the minor's consent where "he is incapable of giving consent to the making of the order."[95] In a sense this is a technicality only, intended to circumvent the decision in B and B, Spouses, Petitioners.[96] To that extent the principle of indispensability has been preserved.

27.37 The consent requirement itself is clear and unequivocal. No difficulties have arisen on that account. Section 6 of the 1958 Act however did not apply to the consent of a minor. The only regulation governing the minor's consent is the statutory form which requires the minor to state that he understands the "nature and effect" of the order.[97] The only problems which have arisen for judicial determination relate to an incapacity to understand the decision required and to the information necessary to reach a valid decision. Mere consent is thus not enough. It must be valid in the light of the criteria implied by the courts.

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94 Adoption Act 1958, s. 7(2); Children Act 1975, s. 3; Adoption Act 1976, s. 6.

95 Adoption Act 1958, s. 5(5) added by s. 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (1966 c. 19).

96 1965 S.C. 44.

97 Form B appended to the Act of Sederunt (Adoption of Children) 1959.

27.38 In B and B, Spouses, Petitioners[98] a girl aged thirteen actually signed the document of consent but a medical certificate indicated that she was mentally retarded and unable to understand the circumstances of the adoption. She could therefore not properly sign the form of consent. The form was ineffective. There was no power to dispense with her consent. An adoption order, otherwise acceptable, could not be made. The 1966 Act amendment[99] was passed to remedy this technical defect in the legislation.

27.39 The other problem has been resolved judicially without recourse to Parliament. The question is how much information should be made available to the child to enable him to come to an effective decision. The disclosure of certain information could, it has been argued, be detrimental to the child. In A, Petitioner[1] the court insisted that the whole circumstances narrated in the petition, including the child's illegitimate birth, should be disclosed to the child, then aged nineteen. The child and the adopter had lived together for seventeen years and the child was ignorant of his illegitimate background. The statutory provisions were thus strictly applied, without regard to the impact upon the child of disclosure.

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98 1965 S.C. 44.

99 Para.27.36 n.95.

1 1936 S.C. 255.

27.40 Two attempts were made to obviate this approach. The petitioners in McD and McD, Petitioners[2] were reluctant to disclose to the child the truth about her circumstances. She was aged twelve and had been with the petitioners since she was ten days old. No consent was lodged but a request was made to dispense with her consent. In a very sympathetic opinion Sheriff-substitute Duncan reluctantly refused the petition because no consent had been lodged nor could it be dispensed with. He commented:-

> "... the general purpose of the statute is remedial and ... no unnecessary barriers ought to be erected to impede desirable adoptions. One can well envisage circumstances - and they may exist here - in which possible adopters would regard the price of revelation to a child as too high a price to pay for its adoption."[3]

In other words, interpretational discretion does not go so far as to permit a change in the clear and unambiguous terms of a statute.

27.41 The adopting parents' tactic in A - Petitioners[4] proved more successful. The girl, then aged eighteen, had been in their care almost since her birth. She did not know that she was illegitimate. She gave a formal consent to the adoption, which proved acceptable to Sheriff-substitute Middleton.

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2 (1948) 65 Sh. Ct. Rep. 42.

3 Ibid. at p. 44 per Sheriff-substitute Duncan.

4 1953 S.L.T. (Sh. Ct.) 45.

In his view the decision in A, Petitioner[5] in 1936 did not lay down a general rule; it merely declared a practice of having the minor informed of the facts of his parentage before his consent was accepted. it was not therefore invariable. The proper test was whether all the facts likely to affect the giving of consent had been made available. That clearly introduces an element of discretion in applying the test to the circumstances of each case. In the case before him, he argued, illegitimacy could not have any effect on an adoption order and was thus not likely to affect the giving of consent. This child knew enough to give a valid consent. An order was made.

27.42 An apparently straightforward and simple statutory requirement has thus been interpreted in a way difficult to criticise but with the effect and probably the intention of protecting the child from any unfortunate consequences which may have arisen from disclosure of the whole circumstances. It operates as a very substantial amendment to the approach adopted by the Court of Session in 1936. The consent requirement is a statutory right given to the minor but its exercise has been modified in, at least this case, by judicial interference on the inarticulated ground of the child's interest.

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5 1936 S.C. 255.

CHAPTER 28

DISPENSATION: THE OBJECTIVE GROUNDS

Section 1 - Introduction

28.1 The requirement of parental agreement to the proposed adoption is vital to protect the interests of the parent.[1] The policy of achieving the desirable balance between the interests of the parent and those of the child is reached by exercising the power to dispense with parental agreement.[2] Such a power has been included in each Act since 1926.[3] The grounds of dispensation have been either general[4] or more precisely and objectively drafted. The objective grounds have varied from Act to Act in matters of detail but their general nature has remained the same.

28.2 The earlier legislation distinguished between the consent of a parent and that of a person liable to contribute to the support of the child.[5] There is no longer any such distinction.[6] Indeed there was no exact uniformity between the first English and Scottish Acts. The Scottish Act of 1930 included parental neglect[7] as a ground of dispensation in addition to those found in the English Act.[8] But neglect was extended to England after the amendments of 1949.[9] Since then the two jurisdictions have been the same. The 1958 Act

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1 In practice consent or agreement has proved to be a problem in only a very small number of cases, particularly where the application follows not upon a direct placement by an agency but as a consequence of an existing foster parent-child relationship: see e.g. Triseliotis, p. 122.

2 Paras. 27.1 and 27.2.

3 Adoption of Children Act 1926 (16 & 17 Geo. 5, c. 29), s. 2(3); Adoption of Children (Scotland) Act 1930 (20 & 21 Geo. 5, c. 37), s. 2(3); Adoption Act 1950 (14 Geo., 6, c. 26), s. 3(1); Adoption Act 1958 (7 Eliz., 2, c. 5), s. 5(1) and (2); Children Act 1975 (1975 c. 72), s.12(1)(b)(ii); Adoption Act 1976 (1976 c. 36), s. 16(1)(b)(ii).

4 They are considered in Chapters 29 and 30.

5 I.e. the Acts of 1926, 1930 and 1950.

6 The current approach began in 1958.

7 1930 Act, s.2(3). 8 1926 Act, s.2(3). 9 1950 Act, s.3(1)(a).

abolished the distinction between the parent and any other person.[10] Otherwise the grounds have remained the same until the introduction in 1975 of serious ill-treatment of the child.[11]

28.3 Apart from the general ground of the unreasonable withholding of agreement,[12] there are now seven sets of circumstances[13] in which agreement may be dispensed with:-

(a) where the parent or guardian cannot be found;[14]

(b) where he is incapable of giving agreement;[15]

(c) where he has persistently failed without reasonable cause to discharge the parental duties in relation to the child;[16]

(d) where he has abandoned the child;[17]

(e) where he has neglected the child;[18]

(f) where he has persistently ill-treated the child;[19]

(g) where he has seriously ill-treated the child[20] but only if the rehabilitation of the child within the household of the parent or guardian is unlikely.[21]

Each of these sets of circumstances bears directly or indirectly upon the welfare of the child. The first two are merely a reflection of an existing state of affairs. Any

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10 1958 Act, s. 5(1) and (2).
11 1975 Act, s. 12(2)(f) and (5). This was recommended in the Houghton-Stockdale Report, para. 219.
12 1975 Act, s. 12(2)(b); 1976 Act, s. 16(2)(b).
13 This analysis does not follow exactly the form of the legislation.
14 1975 Act, s. 12(2)(a); 1976 Act, s. 16(2)(a).
15 Idem. 16 1975 Act, s. 12(2)(c); 1976 Act, s. 16(2)(c).
17 Ibid., ss. 12(2)(d) and 16(2)(d). 18 Idem.
19 1975 Act, s. 12(2)(e); 1976 Act, s. 16(2)(e).
20 Ibid., ss. 12(2)(f) and 16(2)(f).
21 Ibid., ss. 12(5) and 16(5).

problems are likely to be issues of fact. The other five on the other hand clearly disclose an element of parental fault the application of which involves an element of judgment on the part of the court. This pattern is conceptually similar to the threshold requirements built into the child care legislation:[22] a system of static and dynamic circumstances prescribed for interference with parental rights. Indeed, some of the grounds are substantively similar: for example, abandonment, neglect or ill-treatment. They are also a feature of the legislation which uses the criminal sanction to protect children from defaulting parents.[23] The common ground, of course, is relative objectivity in identifying parental behaviour sufficient to authorise official or judicial interference with parental rights.[24]

28.4 Satisfaction of any one of these threshold requirements is of itself no consequence for the child or the parents. It merely enables the court to exercise its discretion on the question of dispensation.[25] Welfare is treated at most only negatively by the the threshold requirements. The impetus of the requirements is parental incapacity or fault; clearly not the welfare of the child. The role of welfare in the overall dispensation process has been a matter of concern ever since 1926[26] but it was not until 1975 that welfare was specifically introduced as a part of the discretionary process

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22 Chapters 14 and 15. 23 Chapter 11.
24 A similar pattern emerges in relation to custody, whether in terms of the relevant legislation or otherwise: chapters 39 to 43.
25 Re G (An Infant) [1963] 2 Q.B. 73 at p. 88 per Ormerod L.J.
26 Both to Parliament and the courts. It has also attracted the attention of official committees of inquiry.

of dispensation.[27] Whether this will make any difference remains to be seen.

28.5 The threshold requirements do not seek to balance the interests of the child and of the parents in the dispensation. Such a balance can be struck only at the discretionary stage. Since 1926 the policy, but not the law, seem to have been to preserve this overall balance. The attitude of the courts however has been to analyse dispensation almost solely in terms of the consent or agreement requirement. This is understandable. But judicial reluctance to accept the burden of exercising a discretion has perhaps allowed the achievement of this balanced approach to go by default. This difficulty has probably been exacerbated by the general lack of attention paid by the courts to the welfare requirement.[28] The effect of this attitude to the legislation has been to ensure that parents are not deprived of their relationship with their children against their will except for very good reasons. The recurring theme has been that children of poor parents should not, as it were, be enticed away by wealthy adopters.[29] That might be so if the welfare of the child were the sole ground or perhaps even the paramount consideration in the dispensation process. But such a provision has never been enacted by Parliament. The way in which the discretion of dispensation is exercised will be considered later.[30]

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27 Children Act 1975, s. 3. 28 Chapter 25.
29 See e.g. (1926) 192 H.C. Deb. 5s. col. 958 (Mr. Thurtle); In re Adoption Act 1950, In re K (An Infant) [1953] 1 Q.B. 117 at p. 130 per Jenkins L.J.
30 Paras. 31.1 to 31.5.

Section 2 - The judicial approach to the grounds

(a) General[31]

28.6 Although there is a clear but unstated link between the welfare of the child and the objective threshold requirements, it is of legal consequence only to the extent that it forms part of the rationalisation of the courts. Since the legislation until 1975 was silent on the questions of welfare, apart from the now redundant welfare requirement, it could at most form an aspect of the underlying policy of the legislation as conceived by the courts. As such it takes on a discretionary quality, either in terms of interpretation or as an element of substance.

28.7 There may be other underlying policies attractive to the court in the individual case. For example, in Mr and Mrs O - Petitioners[32] Sheriff-substitute Kermack placed great importance upon the policy of the legislation in relation to consent when he was asked to dispense with consent on the ground that the mother could not be found.[33] On the other hand, in In re R (adoption)[34], also a case of a parent who could not be found, Buckley J. concluded that section 5 of the 1958 Act was designed to enable an adoption order to be made where to be unable to do so by reason of lack of consent would be

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31 See Bevan, pp. 341, 342 and 349 to 351; Cretney, pp. 352, 353 and 358.
32 1950 S.L.T. (Sh. Ct.) 64.
33 In terms of section 3(1)(c) of the Adoption Act 1949 (12,13 and 14 Geo. 6, c. 98).
34 [1966] 3 All E.R. 613.

"harsh or unjust."[35] That comment could not strictly be justified in terms of the statutory phraseology but it probably indicates one aspect of the policy of the legislature. The concept of fault, presumably parental fault,[36] was the factor common to all the grounds of dispensation which appealed to Ormerod L.J. in Re G (An Infant).[37] These views indicate different policy considerations underlying the legislation.

28.8 The courts have from time to time been faced with requests to dispense with consent on one or other of the grounds under present consideration and it is possible to identify the ways in which the concept of parental fault has been treated. The grounds of abandonment, neglect and ill-treatment are clearly indicative of parental fault. Although they were contained in the same paragraph in the earlier legislation,[38] there is no reason to suppose that they do not constitute three separate grounds. The courts have not however conspicuously distinguished their disparate elements.

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35 Ibid. at p. 616.

36 I.e. blameworthy conduct on the part of the parent affecting the child. This excludes conduct of a purely matrimonial character. Cf. Re F (An Infant) [1970] 1 AllE.R. 344 where at p. 349 Sachs L.J. commented that the dereliction of duty in that case, the strangulation of the mother by the father, "far from falling short of what is normally envisaged in s. 5(1)(a), greatly exceeds it in gravity - even if it does not ... fall within the four corners of the words used in that subsection." That case was not an adoption petition and the issue in question, though relevant, arose only obliquely.

37 [1963] 2 Q.B. 73.

38 E.g. Adoption Act 1958, s. 5(1)(a).

(b) Abandonment

28.9 The concept of abandonment has already been examined in relation to section 1 of the Children and Young Persons Act 1933[39] and its Scottish counterpart[40] and in relation to section 1 of the Children Act 1948[41] and its Scottish counterpart.[42] It will later be considered in the context of sections 1 and 3 of the Custody of Children Act 1891.[43] Indeed in the adoption case of Watson v Nikolaisen[44] Lord Goddard C.J. took account not only of those provisions but also of section 27 of the Offences against the Person Act 1861.[45] He expressed the overall view that "abandonment means abandonment that would have rendered her liable to the criminal law."[46] However, the view implicit in his judgment was that Lord Dunedin L.P.'s interpretation in Mitchell v Wright[47] of abandonment in section 3 of the 1891 Act was relevant to abandonment as a ground for dispensing with parental consent to adoption. The Chief Justice probably attached less weight to the strictly criminal legislation.

28.10 In Watson v Nikolaisen[48] the mother of the child sought to be adopted had completed a form of written consent. For a purely technical reason[49] the adopters did not apply for an adoption order until they had had care and possession of the child for about eighteen months. At no stage was there any contact between the mother and her child. Just before the

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39 23 & 24 Geo. 5, c. 12. 40 Paras. 11.24 to 11.27.
41 11 & 12 Geo. 6, c. 43. 42 Paras. 14.17 to 14.19.
43 54 & 55 Vict., s. 3. See paras. 38.42 to 38.47.
44 [1955] 2 Q.B. 286. 45 24 & 25 Vict., c. 100.
46 [1955] 2 Q.B. 286 at p. 295 per Lord Goddard C.J.
47 (1905) 7 Fraser 568: see para. 38.43.
48 [1955] 2 Q.B. 286.
49 Related to the jurisdiction of the magistrates.

hearing the mother withdrew her consent. In determining that the mother had not abandoned her child for the purposes of section 3(1)(a) of the Adoption Act 1950 Lord Goddard C.J. commented that "she was not leaving the child to her fate; she was giving it over to people who desired to adopt her and in whom she had confidence."[50] That last phrase seems very significant, for it may be that Lord Goddard would have reached a different conclusion if the adopters had not been friends of the mother. There may conveivably be a distinction, for the purposes of abandonment, between anonymous adopters and those having the personal "confidence" of the parent.

28.11 Lord Goddard concluded with the following interesting observation:-

> " ... unless and until an adoption order was made, and it never was, the respondent had not only not parted with all her rights in the child, but had certainly not divested herself of her responsibility towards the child as the child's parent. She may have thought that she had rid herself both of her child and all the responsibilities to the child, but in that she was mistaken." [51]

If that approach is correct, it is questionable whether "abandonment" is meaningful as a ground for dispensing with consent. According to that view, a child cannot effectively

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50 [1955] 2 Q.B. 286 at p. 295.

51 Ibid. at pp. 295 and 296.

be abandoned until an adoption order has been finally made. It is difficult to believe that Parliament would have intended that. The approach illustrated by these two extracts from Lord Goddard's judgment thus clearly indicates a view of abandonment taken entirely from the parent's angle. The child is largely ignored. This may well be a reflection of the phraseology of the statute: where the [parent] has abandoned the infant [child]. The logical question is: has the parent abandoned the child? The parent is clearly the subject and the child the object. If the question had been, is the infant in a state of abandonment or has the child been abandoned? the approach may been somewhat different. The emphasis and the point of view would have changed, purely in consequence of the structure of the sentence.

28.12 The other view adopted by Lord Goddard in that case was, of course, to equate abandonment as a ground for dispensing with consent with abandonment giving rise to criminal liability.[52] The same approach was adopted by Pennycuick J. in In re P (Infants).[53] It is not surprising that there was no conclusion of abandonment in that case, for there was a more substantial continuity of relationship there than in Watson v Nikolaisen.[54] The criminal liability test of abandonment was

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52 Para. 28.10.
53 [1962] 3 All E.R. 789.
54 [1955] 2 Q.B. 286.

also impliedly given effect by Buckley J. in the rather unusual circumstances of In re R (Adoption)[55], the "refugee" case. A young man of about twenty travelled to England as a refugee from a totalitarian country and took up residence with the ultimate adopters. His parents had apparently adopted a passive and indifferent attitude to his departure. According to Buckley J. this amounted to an abdication of their role as parents but not to abandonment.[56] This emphasises the positive conduct needed to qualify as abandonment under section 5(1)(a) of the 1958 Act. A more negative lack of concern is not enough.

28.13 The assimilation of abandonment in the adoption legislation to criminal abandonment is, it is suggested, questionable. In the first place the statutory phraseology is different. The adoption legislation talks simply of "abandoned." Section 1 of the Children and Young Persons Act 1933 includes "wilful" and the likelihood of suffering or injury and section 27 of the Offences against the Person Act 1861 requires that it shall be "unlawful" abandonment, coupled with danger to life or actual or likely permanent injury to health. The criminal statutes would appear to contemplate parental misconduct of a very reprehensible and probably deliberate character. Their purpose, of course, is an ex post facto imposition of a penalty upon a parent or other similar

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55 [1966] 3 All E.R. 613.

56 Ibid. at p. 616.

person. In the adoption legislation the welfare of the child plays a much more significant and intrinsically different role.[57] It is thus suggested that there is little, either in the terminology or the policy of the legislation, to justify a similarity of interpretation of the word "abandon".

28.14 There may arugably be a closer affinity between adoption and custody legislation than between adoption legislation and provisions which are fundamentally criminal. It may therefore be easier to justify construing "abandon" in the adoption legislation in the same way as in sections 1 and 3 of the Custody of Children Act 1891. But even the nature of adoption and custodial proceedings differs considerably. The relevance and significance of welfare developed considerably between 1891 and 1926.[58] For these reasons it is not surprising that the style of children's legislation changed in some respects. These arguments indicate how rash it may be to follow an interpretation placed upon a single word in different legislation which applied to proceedings in many respects alien to those now in question and which was enacted during a rather unique era in legal history founded upon different social values.

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57 In terms either of the redundant welfare requirement or the primacy of welfare principle.

58 Paras. 41.1 to 41.3.

(c) Neglect and ill-treatment

28.15 These criticisms may well disclose some of the reasons why the grounds for dispensing with parental consent now under consideration have not proved particularly popular.[59] Although the discussion so far has centred upon abandonment, the same comments probably also apply to two other grounds, namely neglect and persistent ill-treatment. In two of the cases already considered in relation to abandonment[60] it was also alleged that the parent may have neglected or persistently ill-treated the child. These suggestions were disposed of so quickly that no judicial analysis of these concepts in this context is available. It was however suggested by Plowman J. in an unreported case[61] that "neglect" in section 5(1)(a) of the 1958 Act meant the same as neglect rendering a parent liable under criminal law.[62] This does not advance the argument at all and the comments directed against the judicial approaches to abandonment probably also apply to these two other grounds.

(d) Failure to discharge parental duties

28.16 These grounds may have suffered from an attempt to be too specific. Precision may well be justified, and indeed desirable, in criminal legislation but adoption and custody may require a different statutory technique. Failure to discharge parental duties without reasonable cause, the ground of dispensatio

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59 Most reported cases have been decided on the ground so far ignored, namely the unreasonable withholding of consent or agreement.

60 AB, Petitioners 1959 S.L.T. (Sh. Ct.) 49 and In re P (Infants) [1962] 3 All E.R. 789.

61 In re W (Spinster) An Infant, 17 July 1962, referred to in In re P (Infants) [1962] 3 All E.R. 789.

62 A reflection of the views of Lord Goddard C.J. in relation to abandonment.

set out in section 12(2)(c) of the Children Act 1975 is less specific than abandonment, neglect or ill-treatment but at the same time less general than unreasonable withholding of agreement. It has not been a popular ground of dispensation but there is more logic and sense in the way the courts have handled it.

28.17 One of the statutory predecessors of the current provision, section 3(2)(b) of the Adoption Act 1950, was couched in slightly more positive terms than persistent failure without reasonable cause to discharge parental duties to the child.[63] The 1950 Act provision however is indicative of the policy governing the process of dispensation. It was available only in relation to a person liable by virtue of an order or agreement to contribute to the maintenance of the child. The circumstances were persistent neglect and refusal so to contribute. The power in the earlier Acts[64] was available when the person in question had "persistently neglected or refused to contribute" to the child's aliment.[65] In AB, Petitioners[66] the father[67] had not paid aliment for the preceding two years but according to Sheriff-substitute Young he had not persistently neglected or

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63 Perhaps because it was not related to a parent or guardian.
64 Adoption of Children Act 1926, s. 2(3); Adoption of Children (Scotland) Act 1930, s. 2(3).
65 It was less clear in those Acts whether this power was available in relation to a parent.
66 1959 S.L.T. (Sh. Ct.) 49.
67 Whose liability arose not because of his paternal status but because he was liable in terms of a judicial decree to pay aliment for the child.

refused to contribute to the child's aliment. The judge accepted the father's excuse that he stopped paying on receiving intimation of possible adoption proceedings.[68] To accept this excuse seems barely consistent with the provision of the Act. The threshold requirement is clear, direct and objective. There would seem little doubt in fact that the father had persistently refused to pay aliment. His own motives or reasons would seem to be irrelevant on any interpretation of section 3(2)(a). This interpretation would also be in accord with the policy of the legislation. This case thus is a further example of parent-orientated interpretation of legislation, possibly contrary to its clear meaning.

28.18 There have fortunately been some attempts in England to analyse this ground of dispensation. The existence or otherwise of the ground is a matter of fact but in In re P (Infants)[69] Pennycuick J. attempted to describe the nature of the obligations or duties contemplated by the Act.[70] He was guided to some extent by the narrower provisions of the earlier legislation:-

> "The new subsection[71] is in very much wider terms than the paragraph which I have just

68 1959 S.L.T. (Sh. Ct.) 49 at p. 49.
69 [1962] 3 All E.R. 789.
70 The use of the word "duties" in the 1975 and 1976 Acts would not seem to be covered by the definition of "the parental rights and duties" in sections 85(1) and 89(1) of the 1975 Act. In any event the definition does not apply in Scotland.
71 He was referring to the 1958 Act.

> read from the Act of 1950. Subsection (2) ... refers to the obligations of a parent with no qualifications; and it seems to me that in this subsection 'obligations of a parent' must include first the natural and moral duty of a parent to show affection, care and interest towards his child; and second, as well, the common law or statutory duty of a parent to maintain his child in the financial or economic sense."[72]

The inclusion of natural and moral obligations, particularly those of the kind described, indicates the generality of the concept of welfare contemplated by these provisions of the adoption legislation. Such an interpretation is wholly in accord with a child-orientated view of adoption. Indeed on the basis of this view of section 5(2) of the 1958 Act, the three specific grounds of dispensation may have become otiose. It would be reasonable to argue that abandonment, neglect and ill-treatment would imply a breach of the natural and moral duty of a parent to show affection, care and interest towards his child.

28.19 An approach of similar breadth but of different direction was apparently advocated by Diplock L.J. and subsequently approved by Lord Denning. In In re M (An Infant)[73], which regrettably does not appear to have been fully reported;[74]

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72 [1962] 3 AllE.R. 789 at pp. 793 and 794.
73 (1965) 109 Sol. Jo. 574.
74 That report represent only a digested summary of the case.

a young mother decided initially to have her illegitimate child adopted. After confiding in her parents, it was decided to keep the child in the family. Consent to adoption was then withdrawn. There have been numerous cases argued in relation to this problem.[75] In that case however the Court of Appeal concluded that the mother had not persistently failed without reasonable cause to discharge her parental obligations as she had not shown "callous or self-indulgent indifference" with regard to the "welfare of the child". Such a test may also be indicative of abandonment or neglect or even ill-treatment. In any event, given the absence of a full report, the case adds little to the analysis of the ground.

28.20 There seems to have been no detailed analysis of this ground until 1973. Although, for example, it was given effect in Re B (An Infant)[76], the views of Pennycuick J. in In re P (Infants)[77] were simply quoted with approval and applied by Goff J.[78] The satisfaction of the threshold requirements in section 4(2) of the 1958 Act was a relatively minor aspect of that case, particularly in light of the very clear evidence of a lack of a relationship between parent and child. The child's father was Spanish and resided in Spain. Goff J. rehearsed all the indicia of a lack of a relationship and concluded:-

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75 Chapters 29 and 30 passim.

76 [1967] 3 AllE.R. 629.

77 [1962] 3 AllE.R. 789 at pp. 793 and 794: see para. 28.18.

78 [1967] 3 AllE.R. 629 at p. 635.

> "It is all symptomatic of complete neglect, and he has not once written to the child or sent her a present. I suggested in argument that it was fair to say that he had washed his hand of her and I still think that that is the fair and only inference." [79]

These comments would also seem to comprehend the grounds set out in section 5(1), particularly abandonment and neglect. This would reinforce the earlier conclusion[80] that the three specific grounds in section 5(1) have become almost obsolete in view of the interpretation which has been placed upon section 5(2). In the earlier case of Re G (T J) (An Infant)[81] Ormerod L.J. had suggested that the judicial approach in coming to a decision on the requirements in both subsections (1) and (2) of section 5 of the 1958 Act was to look for parental "fault".[82] There is thus a fairly strong current of authority in favour of this wider approach to section 5.

(e) The case of R in 1973

28.21 The most recent case, however, while purporting to apply the doctrine indicated in the earlier authorities, seems to have added some qualifications which detract to some extent from the child-orientated approach of some of those earlier cases. Re D (Minors) (adoption by parent)[83] was an appeal to the

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79 Idem.

80 Para. 28.8.

81 [1963] 2 Q.B. 73.

82 Ibid., at p. 88 per Ormerod L.J.

83 [1973] Fam. 209.

Family Divisional Court from a decision of the justices who granted an adoption order after dispensing with the consent of the father for persistent failure without reasonable cause to discharge the obligations of a parent. The justices appear[84] to have applied the criteria stated by Pennycuick J. in In re P (Infants)[85]. It is always a matter of decision in the light of the particular circumstances and facts of each individual case whether the relevant criteria have been satisfied or not. For that reason it is conceivable to interpret the facts of Re D[86] not as a persistent failure to discharge parental obligations but as an unsuccessful attempt to sustain a relationship with the children. The father arguably took what reasonable steps he could to continue and sustain his relationship with the children. Sir George Baker P. did not use that stratagem in his judgment. It is nevertheless put forward as a feasible view of the facts. The President preferred to amplify the criteria set forth by Pennycuick J. According to the President:-

> "Whether a father has persistently failed to discharge the obligations is, of course, a question of fact and degree, but any court which has the task of deciding this issue must keep firmly in mind that 'an adoption order .. is an order of the most serious description' (per Lord Goddard C.J. in Hitchcock v WB)[87] and that

84 Ibid. at p. 212 per Sir George Baker P.
85 [1962] 3 All E.R. 789.
86 [1973] Fam. 209.
87 [1952] 2 Q.B. 561 at p. 568.

> the failure envisaged by the subsection must be of such gravity, so complete, so convincingly proved, that there can be no advantage to the child in keeping continuous contact with the natural parent, who has so abrogated his duties that he for his part should be deprived of his own child against his wishes."[88]

He also noted with approval the earlier authorities to the effect that the parents conduct should qualify as "culpable."[89] There would seem little doubt that culpability is relevant. The President however went on to imply that culpability should be "to a high degree."[90] This would be consistent with the Diplock approach,[91] also quoted with approval.

28.22 The interpretation thus placed upon section 5(2) by Sir George Baker P. probably makes it more difficult for adopters to satisfy the court that the statutory requirements have been fulfilled. The reference to the degree of gravity of the parental misconduct makes the test more onerous. The absence of any advantage to the child in sustaining a parental relationship introduces a general concept of welfare which is not a requirement of the statute. This introduction is perhaps doubly insidious as it operates to inhibit rather than promote one of the policies of the legislation.[92] Finally the reference to "abrogation of duties" and "deprivation of the child" are symptomatic of an approach founded upon a view of parental rights not of the welfare of the child.

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88 [1973] Fam. 209 at p. 214.
89 Ibid., at p. 215.
90 Idem.
91 Para. 28.19.
92 The promotion of the welfare of the child.

28.23 The President also referred to the nature of an adoption order as a further justification for his views.[93] Undoubtedly such an order is a "most serious" decision for a child and for his parents. But Parliament has provided a complicated procedure and a detailed set of substantive requirements to achieve a decision which it is hoped will balance the competing interests involved. Reference was made to the welfare of the child being "a requisite consideration"[94] under section 7(1)(b) of the 1958 Act, in support of the court's decision. Certainly no adoption order could then be made unless it was for the welfare of the child[95] but there was no statutory warrant to introduce that requirement at the stage of dispensation with consent. Perhaps it could be argued that in the circumstances of Re D[96] an adoption order would not have been for the welfare of the child. If so, no order could have been made. But that is altogether different from introducing welfare directly into section 5(2). That is in effect what the President did when he suggested that the failure should be "of such gravity ... that there can be no advantage to the child"[97] in continuing a parental relationship. In other words, if there was any advantage accruing to the child from the parental relationship, the parent would not be failing persistently to discharge his parental obligations. On that basis, it is suggested, the statute has become distorted.

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93 [1973] Fam. 209 at p. 214: para. 28.21.
94 Ibid. at p. 216.
95 Adoption Act 1958, s. 7(1)(b).
96 [1973] Fam. 209.
97 Ibid. at p. 214: para. 28.21.

28.24 Sir George Baker P. also considered Hitchcock v WB.[98] In that case the adopters had sought to have parental consent dispensed with on the grounds that it was being unreasonably withheld. The interpretation of that ground has caused much difficulty[99] and one of the problems has been the relevance and significance of the welfare of the child. It is suggested however that a decision under section 5(1)(b) of the 1958 Act is unlikely to be of any direct assistance or relevance to a construction of section 5(2) of the Act, even although it is the same Act, for the structure and basis of the two provisions are fundamentally different. The arguments thus relied upon by Sir George Baker P. to justify the qualification added by him to the criteria enunciated by Pennycuick J. would seem to lack cogency. In particular they postulate a parent-biased approach rather than the more child-orientated views of Pennycuick J. That, it is suggested, is contrary to the direction which the law generally is tending to follow.

28.25 One of the other points upon which the decision in Re D[1] turned was the "persistent" quality of the alleged failure. This issue had not been directly considered before. The President applied the ordinary dictionary meaning of "permanent."[2] Hollings J. took a similar view:-

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98 [1952] 2 Q.B. 561.
99 Chapters 29 and 30.
1 [1973] Fam. 209.
2 Ibid. at pp. 214 and 215.

> "... when, as here, the father has, over a number of years during cohabitation and the lifetime of the children apparently discharged his parental obligations and the failure relied on occurs substantially during the period covering cessation of cohabitation and the divorce of the parties, the father thereafter seeking renewed contact with his children, such failure may be properly described as temporary; it has not the quality of permanence or rather, apparent permanence, which is suggested by the word "persistent."[3]

On the face of it, there is no reason to reject this line of interpretation. It simply reinforces the earlier conclusion that the absence of a viable and continuing relationship at the instance of the parent is the foundation of this ground.

28.26 It is suggested that welfare as such is not directly relevant to the ground of persistent failure to discharge parental obligations. A concept of welfare may be the essence of or justification for parental obligations, whether legal, moral or social, but otherwise it plays no part. The principal difficulties so far have been the meaning of "persistent" and the nature of the "obligations"; both of which have been judicially analysed. The absence of "reasonable cause" does not seem to have caused any judicial difficulty. In Re D[4], for example, Sir George Baker P. succeeded in avoiding that particular problem.[5] It would seem however that, apart

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3 Ibid. at p. 217.
4 [1973] Fam. 209.
5 Ibid. at p. 214.

from actual absence or physical impossibility, failure to discharge parental obligations could scarcely be regarded as reasonable. Any reasonable cause for such a failure is likely to be inspired by considerations extraneous to the parent-child relationship. Circumstances may thus exist to justify such a parental failure but they are likely to be exceptional.

(f) Absence and incapacity

28.27 Absence and incapacity are in a sense a justification for parental failure. But they may also constitute an aspect of parental failure, for under section 12(2)(a) of the 1975 Act and section 16(2)(a) of the 1976 Act, the court is empowered to dispense with consent where the person whose consent is required "cannot be found or is incapable of giving agreement." It is thus clearly reasonable to dispense with consent for these reasons. Parliament has enacted so. But there may be another reason: not to do so might be "harsh or unjust"[6] in the sense that otherwise an adoption order would be refused for a mere technicality.

28.28 Dispensation with consent however, even on these grounds, is a matter of importance and the power to dispense with the appropriate consent should be considered against the background of the consent or agreement requirement and of the statutory formalities relating to it.[7] Despite these comments

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6 An aspect of the policy of dispensation acknowledged by Buckley J. in In re R (Adoption) [1966] 3 AllE.R. at p. 616.

7 Mr. and Mrs O - Petitioners 1950 S.L.T. (Sh. Ct.) 64.

the judge in Mr. and Mrs O - Petitioners[8] took a fairly flexible view of the powers available to him when he decided that the date for determining whether it was impossible to find the parent was a question of individual circumstances. To justify that conclusion he identified a discretion in the statute. His decision, although probably correct in substance, lacked technical integrity, for there was no relevant discretion in the Act.

28.29 A similarly well-intentioned urge to come to a substantially right decision may be found in the judgment of Salmon L.J. in Re F (R) (An Infant)[9]. A mother's consent had been dispensed with on the ground that she could not be found. Within three months of the order the mother learned of what had happened and sought leave to appeal out of time. This was unhesitatingly granted. Salmon L.J. took the view that the child's future required knowledge of the mother's attitude for "the future of a little child ... is much too important to depend on any esoteric points of law or practice."[10] He saw the welfare of the child, therefore, not entirely from the point of view of the child but as the consequence of balancing the interests of the child and of the parent.

28.30 The only case which has considered the substance of these grounds is In re R (Adoption)[11], the refugee child case.

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8 Idem.
9 [1970] 1 Q.B. 385.
10 Ibid., at p. 389. He also pointed out that questions of dispensation should not be decided on affidavit evidence: ibid. at p. 390.
11 [1966] 3 All E.R. 613.

The child's parents were found not to have abandoned the child[12] but it was established for the purposes of section 5(1)(b) of the 1958 Act that they could not be found and were incapable of consenting. According to Buckley J. the general policy of the provision was to "cover any case in which for any reason it was impossible to obtain consent",[13] for example, if it were impossible to communicate either physically or mentally with the parent. Such a test would have enabled a dispensation in the circumstances of that case. It was not however necessary to rely on general policy. The word "find" seems to imply a hope or at least the possibility of success. Buckley J. took up a similar argument:-

> "If the circumstances are such that by no practical means can such a person be so communicated with, so that there is no practical means of securing his consent, then, in my judgment, he "cannot be found' within the meaning of section 5."[14]

That test was positively applied to the refugee child's parents who had remained in their homeland. But even if that ground had not been proved, the child's parents were also "incapable" of consenting, for they could not consent to something of which they were ignorant and could not be made aware.[15] Buckley J. thus had no doubt about his power to dispense with the consent of the child's parents. The threshold requirement had been clearly met.

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12 Para. 28.12.
13 [1966] 3 All E.R. 613 at p. 616.
14 Idem.
15 Ibid., at p. 617.

Section 3 - Conclusion

28.31 It is perhaps strange that Parliament should have at the same time enacted on the one hand several fairly specific grounds of dispensation and on the other hand a very broad ground, particularly since the specific grounds disclosed no genus which could later be used to restrict the general ground. Although the welfare of the child appeared nowhere in the legislative provisions, the welfare of the child would clearly be affected by their application and construction. It is not unexpected that the welfare of the child should have been introduced as an element in the ground of unreasonable withholding of agreement.[16] But what appears to have happened in relation to the other grounds is not the direct introduction of welfare but the unarticulated influence of underlying policies which have prompted the interpretation of the legislation in one direction or another.

28.32 There is no clear trend. The earlier approach of Lord Goddard C.J.,[17] influenced by the criminal legislation on abandonment, was narrow. It was also parent-biased. Although the relevance of the criminal analogy is questionable, a parent-biased interpretation was clearly within the contemplation of the legislation. Even so, it tended, as a matter of degree, to favour the parent at the expense of the child and to that extent it upset any balance between the two which the legislature

16 Chapters 29 and 30.

17 Watson v Nikolaisen [1955] 2 Q.B. 286.

may have intended. Pennycuick J.,[18] on the other hand, treated parental obligations and duties so widely that his approach tended to promote the interests of the child at the expense of the parental position. Sir George Baker P.[19] to some extent attempted a compromise between these extreme positions but the qualifications which he added seem in effect to have forced the legal approach back to that adopted earlier by Lord Goddard. If there is a trend, which is doubtful, the courts are more likely to adopt a parent rather than a child-biased approach. This demonstrates how difficult it is to achieve a legal balance between competing interests, particularly when the criteria have been identified with purported precision. Against this background it is easy to see why the courts have paid practically no attention to the discretionary element of the dispensation process, for the issue tends to have been resolved at the threshold stage.[20]

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18 In re P (Infants) [1962] 3 All E.R. 789.

19 Re D (Minors) (Adoption by parent) [1973] Fam. 209.

20 This is only one situation in which the courts have eschewed to exercise a substantive discretion.

CHAPTER 29.

DISPENSATION : UNREASONABLE WITHHOLDING : BEFORE 1971

Section 1 - Introduction

29.1 The paucity of reported cases on the objective grounds of dispensation with agreement has probably been brought about as much by the interpretational and applicational difficulties described in the previous chapter as by the flexibility of the ground of unreasonable withholding of agreement. There has always been in the legislation one general or flexible ground of dispensation. Although the objective grounds have changed little since 1926,[1] the general ground was substantially restricted in 1949.

29.2 The dispensation power in the English and Scottish Acts of 1926 and 1930 was enacted as a series of alternatives, the ultimate being:-

> "or, being a person liable to contribute to the support of the infant [child],[2] either has persistently neglected or refused to contribute to such support or is a person[3] whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with."

The grammatical structure of the whole provision and the punctuation of this element both suggest that the liability

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1 Paras. 28.1 to 28.3.

2 The 1930 Scottish Act referred to "child"; the subsequent joint legislation to "infant"; the current legislation now again refers to "child".

3 Adoption of Children Act 1926 (16 & 17 Geo. 5, c.29), s.2(3); Adoption of Children (Scotland) Act 1930 (20 & 21 Geo. 5, c.37), s.2(3).

to contribute to the child's support qualifies the grounds of neglect or refusal and the general ground of expediency of dispensation. This literary interpretation was however rejected by Lord Goddard C.J. in H v H[4] for reasons which were in effect matters of policy. Dispensation was thus available in the case of any and every parental consent required by the Act. This was impliedly the view of Sheriff-substitute MacKinnon in the earlier case of Winchester v Cuthbert.[5] Whatever the application of the power, there can be no doubt that an extremely wide discretion was conferred upon the court. The only restriction upon the exercise of the power was the reference to "all the circumstances of the case."[6] The courts however seem to have taken the view that the child's interests were to predominate in that decision.[7] There was, of course, no statutory warrant to adopt that attitude. Equally there was nothing in the Acts to prevent such an approach. As Devlin J. commented obiter:-

> "That[8] gives an absolute discretion and, in exercising their powers under a section so worded, the justices would no doubt be right in regarding as the matter of paramount importance the welfare of the child."[9]

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4 [1947] K.B. 463.

5 (1939) 55 Sh. Ct. Rep. 261 at p.262 where he effectively omitted the controversial words from his narration of the provision.

6 Although technically a restriction, it emphasised the wide scope of the power.

7 Winchester v Cuthbert (1939) 55 Sh. Ct. Rep. 261; D and D, Petitioners (1945) 61 Sh. Ct. Rep. 65; K, Petitioner 1949 S.C. 140.

8 I.e. the general ground in the 1926 Act.

9 Hitchcock v W B [1952] 2 Q.B. 561 at p.571 per Devlin J.

Sheriff-substitute Young somewhat later rehearsed a similar view in A B and C B v X's Curator.[10] The judges in the few reported decisions under the early legislation seem to have exercised their discretion accordingly.[11] The consequence of this approach is clear. It would be open to the court ultimately to dispense with consent merely because to do so would be of advantage to the child. This is contrary to what the policy of Parliament in 1926 seems to have been. The Hurst Committee thought likewise, for they characterised the judicial approach as "somewhat unexpected."[12]

29.3 It was against this general background that in 1949[13] Parliament substituted the ground of unreasonable withholding of consent as a reason for dispensation. This ground has remained constant in each succeeding Act.[14] The basic approach of the courts to the ground has also remained relatively constant. They have taken the view that welfare is relevant but the meaning rather than the function of the welfare of the child has undergone judicial modification over the years. That somewhat subtle change has proved to be a matter of considerable significance.

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10 1963 S.C. 124 at p.128.

11 I.e. Winchester v Cuthbert (1939) 55 Sh. Ct. Rep. 261; D and D, Petitioners (1945) 61 Sh. Ct. Rep. 65; K, Petitioner 1949 S.C. 140; H v H [1947] K.B. 463.

12 Hurst Report, p.29. The committee were commenting more directly on the way the courts had interpreted the application of the power rather than on its exercise.

13 Adoption of Children Act 1949 (12, 13 & 14 Geo. 6, c.98), s.3 (1) (c), later consolidated in the Adoption Act 1950 (14 Geo. 6, c.26), s.3(1)(c).

14 Adoption Act 1958 (7 Eliz. 2, c.5), s.5(1)(b); Children Act 1975 (1975 c.72), s.12(2)(b); Adoption Act 1976 1976 c.36), s.16(2)(b).

Section 2 - The structure and policy of the legislation

(a) Policy

29.4 The making of an adoption order involves the fulfilment of the prescribed threshold requirements, including formerly the welfare and now only the agreement requirements, followed by the exercise of a discretion, unlimited under the older legislation but now restricted in terms of section 3 of the Children Act 1975.[15] The same general pattern applies to the decision whether to dispense with agreement.[16] This is so, even although the dispensation decision is part of the agreement requirement which is itself part of the making of the adoption order. The welfare requirement, of course, acted to some extent in practice as a restraint upon the exercise of the discretion to make an order.[17] The welfare requirement has always been irrelevant to the dispensation process. The analogy ends there. The primacy of welfare principle now constrains the exercise of the discretion whether to dispense with agreement.

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15 In England section 6 of the Adoption Act 1976.

16 I.e. the fulfilment of one or other of the grounds of dispensation (the threshold requirements) followed by the exercise of the power to dispense. This aspect of the structure of the legislation has been judicially mentioned only once: "The court, therefore, must find, first, whether the parent is at fault in any of the matters set out in s.5(1) and (2) [of the Adoption Act 1958]. If so satisfied about all or any of them then the court has a discretion to decide whether, in the circumstances of the particular case, the consent requirement should be dispensed with:" Re G (an infant) [1963] 2 Q.B. 73 at p.88 per Ormerod L.J.

17 Paras. 25.59 and 25.60.

29.5 Little attention has been paid to the discretionary element in the dispensation process probably because welfare has been introduced into the conception of unreasonable withholding of agreement. This means that the welfare of the child will normally be discussed judicially in the narrower rather than the wider context. Since agreement and dispensation are inextricably related, welfare cannot for this purpose be divorced from parental agreement. Moreover there is a difference between the questions: is a parent unreasonably withholding his or her agreement and should agreement be dispensed with. The answer to the first question is largely if not entirely parent-orientated. The second question almost inevitably raises wider issues beyond the attitude of the parent. If a balance of interests were the objective of the process, it would have been easier to achieve at the stage of the exercise of the discretion. On the other hand, it could be argued, dispensation is not intended to achieve a balance of interests. It is a reflection only of parental attitudes. If so, the courts should perhaps have hesitated to introduce welfare into the decision.[18] Arguably, therefore, it would have been more sensible to have discussed welfare at the discretionary stage rather than at the threshold stage. But that has not happened.

29.6 The Hurst Committee made a rather interesting comment on this aspect when they were discussing the introduction of the substitute general ground for dispensation.[19] In their view:-

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18 Eekelaar, p.196, seems to imply a similar conclusion.

19 I.e. unreasonable withholding of consent or agreement in place of the general ground in the 1926 and 1930 Acts.

> "We believe that it was expected that the new power to dispense with consent on the ground that consent was unreasonably withheld would tend to focus the attention of courts on the welfare of the child when they were considering whether they were able to dispense with the consent of a parent". [20]

Apart from emphasising the distinction between the threshold and discretionary stages of the dispensation process,[21] this comment supports the view that a decision whether agreement is being unreasonably withheld cannot be taken without considering the welfare of the child. What appears to be at issue is how welfare is to be taken into account. They continued:-

> "Two recent judgments,[22] in cases where parents whose consent had been dispensed with successfully appealed against adoption orders, indicate that the wording selected was not apt for that purpose, and indeed some witnesses expressed the view that the discretion apparently given by the introduction of the words 'unreasonably withheld' had been entirely removed by these judgments. Others were of opinion that an adequate discretionary power remained, but it seems clear that in the present state of case law the question to which the courts must direct their attention is whether the parent is maintaining an attitude which it is unreasonable for him as a parent to hold, and not primarily whether the child's welfare is likely to be promoted more by the grant of an adoption order than by refusal of an adoption order..." [23]

The committee in this extract appears to have been advocating a welfare-orientated approach to dispensation rather than an examination of the parents' attitude to the adoption. If their

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20 Hurst Report, pp.29 and 30.

21 As a consequence of the use of the words "able to dispense" in the last lines of the quotation.

22 Presumably Hitchcock v W B [1952] 2Q.B.561 and In re K, (an infant) [1953] 1Q.B.117.

23 Hurst Report, p.30.

description of the approach adopted by the courts is correct,[24] their criticism of it seems to be based on the very use of the words "unreasonably withheld". They confer upon the court an interpretational discretion in the sense earlier discussed.[25] Implicit in their comment is the view that interpretational discretion is insufficient if the question is to be "whether the child's welfare is likely to be promoted more by the grant of an adoption order without the parents' consent than by refusal of an adoption".[26] They would perhaps have preferred a substantive discretion[27] based to some extent on welfare.

29.7 If the court declines to make an order dispensing with agreement,[28] no adoption order, of course, can be made. Whether it would be easier to solve the problem posed by the committee by distinguishing between the threshold and the discretionary stages of the dispensation process or by dealing with both issues together is not clear. Of the two solutions suggested by the committee one was to give primary or paramount importance to welfare in dispensing with consent.[29] Arguments were presented[30] to indicate that, although such a formula was appropriate in inter-parental custody disputes, it was not suitable for the adoption process. Overall,

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24 I.e. as an examination of the parents' attitude. This is probably a correct description of the courts' approach.

25 Para. 1.38.

26 Hurst Report, p.30.

27 I.e. Whether to dispense with consent once the threshold requirements have been satisfied.

28 Always assuming that the parent does not agree.

29 Hurst Report, p.30.

30 Ibid., p.31.

therefore, the Hurst Committee preferred to restrict the grounds of dispensation to circumstances in which the parent by his conduct or attitudes had forfeited his right to refuse his consent or agreement to the adoption.[31] Welfare would probably be irrelevant in an examination of these grounds.

29.8 The Hurst Committee did not for obvious reasons discuss these issues in terms of the threshold and discretionary stages of the process. Their conclusions however indicate such a distinction or at least the usefulness of such a distinction: particularly the desirability of a fairly strict, objectively ascertainable and fundamentally justiciable set of criteria followed by a widely drawn discretion limited, if at all, by reference to the welfare of the child. This technique would not prevent a decision on adoption being based ultimately on a balance of interests. The balance would be achieved at different stages of the total process. Indeed, the overall objective of the Hurst Committee seems to have been to achieve a balance between the interests of the parents and of the child in the adoption process as a whole, perhaps weighted to some extent in favour of the child.[32] The difficulty is to create an appropriate statutory scheme giving effect to these policies.

29.9 These issues were debated by the Houghton-Stockdale Committee[33] with as much concern as the Hurst Committee, although the Houghton-Stockdale Committee had the questionable benefit

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31 Idem. See also Eekelaar, p.196.

32 Hurst Report, pp. 1 and 4.

33 Houghton-Stockdale Report, paras. 204 to 218.

of the 1971 House of Lords pronouncements. In the event the committee recommended a solution remarkable for its similarity to one of the alternatives considered but rejected by the Hurst Committee,[34] namely that welfare should be afforded primary consideration in deciding whether a parent was reasonably withholding consent or agreement.[35] Section 3 of the Children Act 1975 has given effect to that recommendation. The approach to dispensation has thus not changed. But the significance of welfare within that approach has been modified. Moreover it seems to have been accepted on all hands that the method of incprporating welfare within the dispensation process is not through a substantive discretion but by means of the interpretational discretion built into the expression "unreasonably withholding". Tradition thus has been preferred to novel solutions. For that reason the existing case law on "unreasonable withholding" remains important as the foundation upon which section 3 of the Children Act 1975 has been built. Current learning cannot therefore be discarded.

29.10 Although such matters of policy as these are not normally relevant in construing the relevant statutory provisions, they unquestionably assist in an understanding of the legislation. The judges may well be influenced by these matters without any formal acknowledgment or recognition being accorded to them. It is nevertheless important, before

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34 Para. 29.7.

35 Houghton-Stockdale Report, para. 218.

examining the cases, to consider the precise phraseology of the provisons.

(b) The statutory text

29.11 Section 5(1)(b) of the Adoption Act 1958 enabled the court to dispense with the consent of a parent or guardian if satisfied that the person in question "is withholding his consent unreasonably". The grammatical structure of the provision is not insignificant. The parent or guardian, the only persons referred to in the provision, is the subject and consent is the object of the verb. Emphasis was thus laid upon the person whose consent was allegedly dispensable. The Act gave no further indication of what was meant by this provision or how a decision should be reached. Section 5(3) of the Act, which merely declared that subsequent withdrawal of consent due to ignorance of the applicants' identity was to be treated as unreasonable, added nothing to the conception.

29.12 Section 12(2)(b) of the Children Act 1975 and section 16(2)(b) of the Adoption Act 1976 enable dispensation when the parent or guardian "is withholding his agreement unreasonably".[36] The substitution of "agreement" for "consent" is technical only.[37] Section 3 of the 1975 Act and section 6 of the 1976 Act place a duty upon the court to "have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood".[38] This duty applies "in reaching any decision relating to the adoption of a child".

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36 The grammatical structure is thus the same as for section 5(1)(b) of the 1958 Act.

37 Para. 27.1.

38 Paras. 25.8 to 25.19.

What does this mean? Is it as wide as it would appear, so as to include a decision whether agreement is being unreasonably withheld?[39] The Houghton-Stockdale Committee recommended that[40] this formula should be applied to unreasonable withholding.[41] Parliament probably thought likewise. But a majority of the Court of Appeal in England has decided otherwise.[42] Stamp L.J. argued that section 3 of the 1978 Act was not relevant in determining whether any of the objective grounds of dispensation had been satisfied. Nor, therefore, could it be relevant to the ground of unreasonable withholding. As he expressed it:-

> "I take the view that [the words in section 3] do not comprehend a decision whether the court has or has not got jurisdiction to make an adoption order under s.12 of the 1975 Act. Although the first consideration is the need to safeguard and promote the welfare of the child other considerations remain, and among those will be found in s.12 when it comes into force, the prohibitions which are clearly overriding provisions to be observed and which preclude the court from making an order in the circumstances there set out."[43]

This effectively acknowledges the distinction between the threshold requirements and the discretionary stage, while discounting the peculiarly flexible nature of the ground of unreasonable withholding. But it is probably not what Parliament intended.

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39 Such a decision is not a decision on adoption, although it would seem to "relate" to the adoption of a child.

40 Houghton-Stockdale Report, para. 218.

41 Paras. 30 to 30.

42 Re P (an infant) (adoption : parental consent) [1977] 1 All E.R. 182. Cf. In re B (an Infant) (Adoption) : Parental Consent [1976] Fam. 161.

43 Ibid. at p.186 per Stamp L.J.

29.13 What effect do sections 3 and 6 have in general? It should be noted first that the duty is to have regard to all the circumstances, of which the welfare of the child is presumably only one. This probably reflects the law[44] in the cases decided prior to the commencement of section 3 of the 1975 Act. Even so, the 1975 Act has probably taken the matter further. It relates not to the welfare of the child but to the need, now at least recognised if not established by statute,[45] to safeguard and promote the child's welfare. This is a positive need and probably extends the substance of welfare beyond its contemplation by the judges under the 1958 Act. Finally, this welfare need is to be given "first consideration".[46] Prima facie this indicates a certain priority in a sitaution in which a balance is to be achieved but a balance nevertheless weighted in favour of this particular need. This view would appear to indicate a fundamental change in the legal context of decisions relating to adoption. But any such change does not affect the ground of unreasonable withholding of agreement.[47] That construction of the Act effectively integrates section 3 of the 1975 Act with the interpretation placed by the courts upon the earlier legislation. Section 3 of the 1975 Act cannot therefore be applied in isolation from the earlier legislation or from the way in which it has been interpreted. This of course is frequently true, particularly in this area of the law.

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44 Paras. 30.49 to 30.64.

45 Welfare is not normally treated so positively as this.

46 Generally see para. 25.18.

47 Re P (an infant) (Adoption : parental consent) [1977] 1 All E.R. 182. See also paras. 30.72 to 30.74.

Section 3 - The judicial approach

(a) Introduction

29.14 The courts in both England and Scotland have had to contend with unreasonable withholding of consent or agreement as a ground for dispensation since 1949 in a number of complicated cases. There is, it is suggested, a fundamental consistency, if not unity, of approach but there are clear marginal difficulties. Some commentators have discerned varying trends over the years.[48] Bevan, for example, has indicated[49] that the watershed was the judgment of Lord Denning M.R. in Re L (an infant)[50] in 1962. The Court of Appeal there "moved away from a presumption of reasonableness and clearly laid down an objective test for determining whether the parent's attitude is reasonable."[51] It also "indicated a willingness to pay more attention to the child's welfare".[52] The propositions could not readily be denied but there are, it is suggested, other more forceful trends. The child's welfare has always been a matter of relevance in this context. A new dimension to the substance of welfare was added later. The law underwent no change. The courts took no new initiative. They did not pay more attention to welfare. They were forced, as a consequence of an imaginative use of the adversary system,

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48 E.g. Bevan, pp.342 to 348; Cretney, pp.353 to 358; Eekelaar, pp.194 to 196.

49 Bevan, p.344.

50 (1962) 106 Sol. Jo. 611.

51 Bevan, p.344.

52 Idem.

to consider welfare in a much enlarged sense.[53] It has come about as a result of the inherent flexibility of the conception of welfare. This process began about 1964 in England[54] and culminated in the House of Lords in 1971.[55]

29.15 Cretney's penetrating analysis has pursued a different course. Its strength lies in the notion that the welfare of the child is relevant only in a very oblique fashion. The test is "the attitude of the natural parent to his [the child's] welfare."[56] The importance of that view is emphasised, it is suggested, by the expanded meaning of welfare. Alone among the English commentators Cretney devoted some attention to the Scottish case which reached the House of Lords in 1971.[57] He commented: "It is difficult to believe that this decision ... would have been taken in the years before Re W."[58][59] This may be true, but the Scottish courts have made a significant and original contribution to the law of adoption. Dispensation on the ground of unreasonable withholding is no exception. A consideration of some of the earlier Scottish cases demonstrates that the affirmation of the Court of Session by the House of Lords in 1971 was not so surprising as Cretney may have thought.[60]

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53 As a consequence of the presentation of evidence on the child's emotional and psychological welfare as distinct from his material welfare. The judicial attitude to the ways of acquiring knowledge and obtaining information is a matter of vital importance in determining the function of welfare and the role of the court. This aspect is considered later: see para. 44.50.

54 Re C(L) (an infant)[1965] 2 Q.B. 449.

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

56 Cretney, p.355.

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

58 I.e. Re W (an infant) [1971] A.C. 682.

59 Cretney, pp. 357 and 358.

60 Paras. 29.52 to 29.56.

(b) General principles

29.16 The construction placed by the courts upon "unreasonable withholding" has been affected by general views concerning adoption, parental consent or agreement, the position of the child and the relationship between these various factors. Some are derived from the legislation;[61] some from earlier judgments;[62] and some from the courts' impression of the policy of the legislation:[63] others, perhaps, have been created out of the judicial imagination. Whatever their source, they have had an impact. Some have already been examined in the earlier discussion of agreement.[64]

29.17 Considerable emphasis has been placed by the courts from time to time on the importance for the parent of the decisions of the court to dispense with agreement and to make an adoption order. Their importance could not reasonably be denied. An adoption order terminates one legal relationship and creates another. The view of Lord Goddard C.J. is typical:-

> "...by an adoption order a child is removed once and for all and entirely from the parent. That is an extremely serious matter, but a parent, a father, for instance, who may have met with misfortune - whether by his own fault or otherwise - may still be by no means a bad father. He may be a man who is devoted to his children. If he is neglectful of his children there are plenty of proceedings now by which he may be made to perform his parental duties or his children may be placed in the care and protection of the local authority." [65]

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61 E.g. the need for consent or agreement, the consequences of an adoption order.

62 E.g. the revocability of consent until an adoption order is made.

63 I.e. the parent-orientated approach to the issue of unreasonable withholding.

64 Paras. 27.16 to 27.22.

65 Hitchcock v W B [1952] 2 Q.B. 561 at p. 569.

There is no reference there to the effect of the decision on the child, apart from the formal termination of his relationship with his parent. The decision, it is suggested, is as important for the child as it is for the parent, perhaps more so. Lord Goddard C.J. would not necessarily have denied that as a general proposition but probably would, on the other hand, have denied its relevance to the decision whether the parent was withholding his consent or agreement unreasonably. His is a narrow[66] but clearly not an absurd view of the legislation. The 1958 Act gave no real indication of the meaning of "unreasonable withholding" and the word "unreasonable" is notoriously difficult to define and apply in any case.

29.18 The foundation of Lord Goddard C.J.'s view is clear. There are other ways in which an unfit parent can be forced to meet his responsibilities or ultimately he will be deprived of some of his rights and as a consequence exonerated of his related liabilities. Adoption is the only way whereby a parent loses all his rights, which means in effect his whole relationship with his child. Consent or agreement is the method of securing the parent's interest; the child's interest is protected otherwise.[67] There is no need, the argument would run, to relate one to the other.

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66 See e.g. Blom-Cooper L.J. "Adoption Applications and Parental Responsibility" (1957) 20 M.L.R. 473.

67 E.g. the welfare requirement: not now.

29.19 The example used by the Chief Justice to illustrate his argument was the possibility of state intervention.[68] There are other ways, however, of dealing with allegedly unfit parents.[69] Much of the discussion on the policy of the adoption legislation, both in the courts and in Parliament, has centred around the distinction between adoption and custody and the consequential different functions of welfare in each process. Some of the most authoritative pronouncements to that effect may be found in the judgments given in the House of Lords in J v C.[70] Lord MacDermott argued that "... wardship orders as to custody and adoption orders are so different in concept, nature and legal consequences that one cannot validly argue from either of these jurisdictions to the other."[71] Lord Upjohn's comment was perhaps even stronger: "An adoption order, if made, is the antithesis of an order made in wardship proceedings."[72] During the Lords' debates on the Children Bill in 1975 Lord Hailsham expressed the same theme when he argued that, while the principle of the paramountcy of welfare applied to "care and control, custody and guardianship, it cannot be equally true of adoption."[73] This line of

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68 Under the official care legislation.

69 E.g. custody proceedings, wardship proceedings, voluntary delegation. It depends precisely upon how the problem arises.

70 [1970] A.C. 668.

71 Ibid. at p.714 per Lord MacDermott

72 Ibid. at p. 719 per Lord Upjohn.

73 (1975) 356 H.L. Deb. 5s. col.33 (Lord Hailsham).

argument has prevailed as a matter of policy in both the courts and Parliament ever since the introduction in 1949 of the unreasonable withholding of consent as a ground of dispensation.[74] Indeed in 1975 Parliament was invited on a number of occasions to apply the paramountcy of welfare principle to adoption both generally and in the immediate context but on each occasion they declined.[75] Thus, despite strong exhortations to the contrary, the traditionally recognised distinctions between adoption and custody orders are still acknowledged and disputes in relation to adoption proceedings are not resolved by reference to the paramountcy of welfare principle.[76]

29.20 That proposition, it is suggested, is generally true. The rather interesting approach of the Court of Appeal in 1958 in Re D (an infant),[77] which appears at first to modify that general propostion, in effect supports it obliquely by confirming the welfare approach in a closely related but different context. The circumstances were rather unusual. The consent of the illegitimate child's putative father was required because a maintenance order had been obtained against him by the child's mother.[78]

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74 See also Re W. (infants) [1965] 3 All E.R. 231 at p. 246 per Cross J.

75 Para. 25.15.

76 This does not mean that welfare is not in some ways relevant to deciding whether agreement is being unreasonably withheld.

77 [1958] 1 All E.R. 427.

78 Under s. 2(4) of the Adoption Act 1950.

His consent was required therefore not as a parent. Moreover, being only the child's putative father, he had no substantial rights to lose on the making of an adoption order. Different considerations thus applied in deciding whether he was withholding his consent unreasonably. It was more a contest between two third parties with no legal relationship than one between a parent with vested rights and a third party applicant for adoption. Lord Evershed M.R. concluded that "... the primary test at any rate (without putting it any higher) of the right order to make is that of the welfare of the infant".[79] He did not apply the paramountcy of welfare principle, although he hinted unambiguously at that test. There can be no doubt whatever that he adopted an approach fundamentally different from the one specified by Lord Goddard C.J.[80] and followed by Jenkins L.J.[81]

29.21 These various authorities clearly indicate that in view of the differences between adoption and custody any decison whether agreement is being withheld unreasonably is not to be determined by the paramountcy of welfare principle. This approach almost necessarily involves a process likely to be weighted more heavily in favour of the parent, even assuming the child's interest is of some relevance. Three other principles well established by the earlier precedents point in the same direction. They

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79 [1958] 1 All E.R. 427 at p.430 per Lord Evershed M.R.

80 Hitchcock v W B [1952] 2 Q.B. 561.

81 In re K (an infant) [1953] 1 Q.B. 117.

follow on, almost automatically, from the policy established by the foregoing arguments. To that extent they are merely illustrations of that policy. Jenkins L.J. is largely responsible for their articulation. His views are founded upon a presumption extracted from that policy without further substantiation:-

> "Prima facie it would seem reasonable to me for any parent to withhold his or her consent to an order thus completely and irrevocably destroying the parental relationship. One can imagine cases short of such misconduct or dereliction of duty as is mentioned in section 3(1)(a) in which a parent's withholding of consent to an adoption might properly be held to be unreasonable, but, such cases must, in our view, be exceptional." [82]

This acknowledges that the ground of unreasonable withholding is not eiusdem generis as the other grounds described as "misconduct or dereliction of duty". Even so, Jenkins L.J. has created a presumption of parental reasonableness coupled with the need for exceptional circumstances to justify a decision against the parent. Neither of these comments is justified in terms of the legislation.

29.22 The other two general rules make it equally difficult to succeed in satisfying the court that consent or agreement has been withheld unreasonably. In the case of In re K (an infant)[83] the child proposed to be adopted had been placed with foster parents by the local authority some time earlier than the subsequent application by the foster parents to adopt. This situation often gives rise to problems. The mother signed a form of consent but later

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82 Ibid. at pp. 129 and 130 per Jenkins L.J.

83 [1953] 1 Q.B. 117.

withdrew it. These facts elicited judicial comment on two important matters:-

> "... such withholding of a parent's consent cannot be held unreasonable merely because she has in circumstances such as those of the present case placed the child in the care of foster-parents, without in any sense abandoning it, but on the contrary contributing towards its support and visiting it from time to time." [84]

Delegation of the parental function pro tanto is thus not unreasonable, certainly where there is no failure to perform the relevant parental duties. This was one of the issues which particularly concerned the Houghton-Stockdale Committee[85] but the statutory result has been not to confer any new rights upon foster parents but to restrict pending a judicial decision the rights of the natural parents.[86] Their reactions indicate the strength of Jenkins L.J.'s position. That position is almost entirely parent-orientated.

29.23 The other issue considered by Jenkins L.J. was the withdrawal of the mother's consent. There is no doubt that the giving of consent is inherently revocable,[87] whether or not a form of consent has been signed. Once it has been withdrawn, the question naturally becomes one of dispensation.[88] According to the Lord Justice withholding of consent is not

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84 Ibid. at p.130 per Jenkins L.J.

85 Houghton-Stockdale Report, chapter 7.

86 See section 34A of the Adoption Act 1958 inserted by section 29 of the Children Act 1975, giving effect to the Committee's recommendation in para. 166 of their Report. See also Freeman, note on section 29 of the 1975 Act.

87 Para. 27.17.

88 There is thus no difference between withholding or withdrawing consent.

unreasonable "merely because a documentary consent under section 4 of the Act has been given by the parent and subsequently withdrawn..."[89] This too is an aspect of the policy propounded by the Court of Appeal. It is therefore manifest that the ground of unreasonable withholding has been construed in support not only of parental interests but also of parental rights as such.

29.24 None of these cases, in the context so far analysed,[90] has identified any substantive rules for determining whether consent or agreement is being withheld unreasonably. This is not surprising, for the legislation and the judicial interpretation of it merely postulate the structural context in which the courts are to approach the decision. There is considerable interpretational discretion inherent in the expression "unreasonable withholding", particularly in comparison with the other grounds for dispensation with consent. This flexibility is no doubt designed to give the court the maximum opportunity to determine the issue in the light of the individual circumstances of each case.[91] The courts have not been slow to avail themselves of that opportunity.[92]

29.25 There are two aspects of this flexibility. First of all, no decision can be reached without looking at all the circumstances of the case. In other words,

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89 [1953] 1 Q.B. 117 at p.131 per Jenkins L.J.

90 It is unlikely that later analysis will require this proposition to be modified.

91 To some extent this is another example of the "individualised" concept of dealing with the parent-child relationship: see paras. 3.29 and 18.12.

92 Cf. their general reluctance to exercise a substantive discretion on the merits of the individual case.

there is no automatic solution, determinable by the application of clear rules. The doctrine of precedent is thus of very limited significance.[93] In Hitchcock v W B[94] for instance, Lord Goddard C.J. declined "to lay down in general terms what would amount to the unreasonable withholding of consent."[95] To do so would, in his view, "be a most dangerous thing to do ... for circumstances in this life are so various."[96] Such a wide statement perhaps indicates not only an interpretational but also a substantive discretion. Technically, it is not a substantive discretion, either in terms of the legislation or taking into account the judicial approach adopted over the years. But the two types of discretion may tend to assimilation in practice.

29.26 What this flexibility means in practice is nevertheless quite clear. "All one could do was to decide each case according to its particular facts, with the guidance of such broad principles as could be derived from the authorities."[97] These broad principles, it is suggested, merely set the legal context of the decision. To select one factor, not necessarily welfare, as the foundation for the decision, without in fact ignoring the other considerations but excluding them from the rationalisation, would be

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93 As it is generally in this area of the law: see paras. 43.4 to 43.6.

94 [1952] 2 Q.B. 561.

95 Ibid. at p. 571 per Lord Goddard C.J.

96 Idem.

97 Re Adoption Act 1950 [1958] The Times, 29 July per Jenkins L.J. who was also quoted by Roxburgh J. in Re C S C [1960] 1 All E.R. 711 at p.712.

dangerous and lay the decision open to challenge for that reason.[98] The self-same decision may ultimately be reached but technically it is the rationalisation of the decision which is vital. Hence it is "safer to base the decision on the totality of the evidence and on all the relevant factors."[99]

29.27 Other judges, including at least one Scottish judge, have instructed a similar approach. In deciding whether a parent's decision to withold consent was unreasonable, the proper approach in Lord Sorn's view was inter alia to "have regard to the whole circumstances".[1] Later in the House of Lords Lord Hailsham L.C. agreed.[2] First of all he said: "... the court must have regard to the totality of the evidence."[3] He later amended it to read: "All the same it is to the totality of the relevant circumstances that the court should look ..."[4] This duty is not so simple as it might appear at first. A consideration of the "relevant" circumstances implies a determination of which circumstances are relevant. That itself raises the question of the function of the consent or agreement requirement and of the dispensation power: again a subjective matter. The duty also assumes the availability of all the relevant evidence and circumstances. Achieving

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98 See para. 18.24.

99 Re C (L)(an infant) [1965] 2 Q.B. 449 at p. 468 per Pearson L.J.

1 A B and C B, Petitioners 1963 S.C. 124 at p. 138 per Lord Sorn.

2 Re W (an infant) [1971] A.C. 682 at p. 699.

3 Ibid. at p. 700 per Lord Hailsham L.C.

4 Idem. Emphasis added.

this is a difficult matter, but one nevertheless of significance in the whole process.[5] The Lord Chancellor however explained in more detail what he meant but in so doing he avoided these two problems:-

> "...it is extremely dangerous merely because a factor weighs little or nothing in the circumstances of the particular case, or of most particular cases, to argue from that, that it should not be 'put into the scales' at all, or that because a totality of inconclusive factors taken individually weigh little, to weigh them collectively is, as it were, to add nought to nought and produce a digit."[6]

The duty to examine the totality of the circumstances thus appears to be intended to produce a result which is not only substantively justifiable but also technically accurate. This duty is now explicit on the face of section 3 of the Children Act 1975.[7] The existence of such a duty either imposed by statute or inferred by construction affects the juristic nature of the decision.[8]

29.28 The second aspect of the flexibility under discussion also helps to characterise the nature of the decision to dispense with consent or agreement on this ground. In Re W (an infant)[9] the Lord Chancellor, arguing that the

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5 Paras. 45.4 to 45.40.

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

7 In England section 6 of the Adoption Act 1976.

8 It requires the balance approach.

9 [1971] A.C. 682.

word "reasonable" connotes an objective test,[10] said:

> "And, be it observed, 'reasonableness' or 'unreasonableness' where either word is employed in English law, is normally a question of fact and degree, and not a question of law, so long as there is evidence to support the finding of the court."[11]

Certainly whether a decision is reasonable or not is not a question of law but the validity of the decision depends in part upon satisfaction of the legal context in which it is made. It also depends for its validity, it is suggested, upon an interpretation and application of the facts. But "reasonableness", in the present context at least, is not simply a question of fact and degree. It is rather a conclusion drawn from facts and circumstances and having clear legal consequences.[12] Once the conclusion has been reached, it becomes in one sense a fact. But for present purposes the decision is a juristic act founded upon facts rather than a fact itself. Lord Hailsham L.C.'s comment does not make this entirely clear. If he is talking of the facts giving rise to a decision, he is probably correct. But if he is referring to the nature of the decision, it is less clear. Facts are an integral part of the process. Reasonableness, on the other hand, is the standard applicable to the parental decision to withhold consent or agreement. In that sense, reasonablenesss, although part of the process, stands outside the process. It is external to rather than an integral part of the decision-making process. This aspect of flexibility is not, it is suggested, of merely

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10 Which it probably is.

11 [1971] A.C. 682 at p.699 per Lord Hailsham L.C.

12 In this context, the decision to withhold consent.

metaphysical concern. If reasonableness is the standard against which conduct is to be evaluated, the question is justiciable. On the other hand if it is one fact among many, the issue is rather the making of an administrative choice. It is, however, not possible at this stage to reach a conclusion on the nature of the process.[13] Further aspects of the judicial approach to this ground of dispensation still require to be considered.

(c) The attitudes and conduct of the parents

29.29 If the question is whether a parent's decision to withhold consent or agreement is reasonable, it would be difficult to deny the relevance of that person's attitudes and behaviour. Writing of Hitchock v W B[14], Bevan has said: ".... in exercising its power of dispensation on this ground the court must primarily concern itself with the attitude of the parent...."[15] This accurately describes to some extent the judicial attitude to the ground in question, although Bevan appears to have extrapolated the test to exercising the power of dispensation from determining the existence of the power. Parental attitude can be identified in a limited number of ways: either by accepting the parent's statement of his own views or by inferring his attitude from his conduct. Attitude and behaviour are likely in practice to merge into one single test.

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13 But see paras. 30.48 to 30.64.

14 [1952] 2 Q.B. 561.

15 Bevan, p.343.

29.30 A number of judges have tended to take a fairly subjective view of the parent's attitude. Lord Goddard C.J.,for example, placed considerable weight upon "an honest desire to remain the parent of his child."[16] This was also reflected in the judgments of Pennycuick J. in In re P (Infants)[17] and Danckwerts L.J. in In re B(S) (An Infant).[18] But Pearson L.J. was more positive in his view:-

> ".... the primary consideration ought to be the reasonableness of the mother's attitude in relation to the child rather than other persons concerned."[19]

These comments, although they set the context of the decision, are not particularly helpful in indicating how the parent's attitud should be identified.

29.31 One of the most helpful analyses, on the other hand, is that of Devlin J. in the earlier case of Hitchcock v W B.[20] He emphasised moreover that questions of attitude cannot really be separated from the conduct of the parent. Devlin J. argued, firstly, that the ground of unreasonable withholding should be construed with reference to the other grounds.[21] Only some of them involve an element of parental

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

17 [1962] 3 All E.R. 789.

18 (1966) 64 L.G.R. 431.

19 Re C(L) (An Infant) [1965] 2 Q.B. 449 at p. 465 per Pearson L.J.

20 [1952] 2 Q.B. 561.

21 Ibid. at p. 572. Technically, the eiusdem generis rule could not apply, as there was no genus. The non-conforming grounds are those in section 5(1)(b) of the Adoption Act 1958 and section 12(2)(a) and (b) of the Children Act 1975. Nor is there any general provision limited in terms of a genus. If Devlin J. were relying upon an interpretational maximum, it would probably be noscitur a sociis.

misconduct.[22] His argument continued:-

> "In my judgment the test is this: Is the attitude of a father, as a father, in refusing consent, unreasonable? ... [After discussing welfare] ... The test which has to be directly applied is an inquiry into the attitude of the father ... That being so, there are two questions which fall to be asked. The first and obvious one is: Is consent being refused whimsically or arbitrarily or not in good faith? Because if so, a fortiori it would be unreasonable ... But once it is established that he wants his child, that he is fit to be a father, and that he can support his child, it seems to me prima facie that it is impossible to say that a decision not to have his child adopted is unreasonable."[23]

These three criteria described by Devlin J., namely a genuine desire to have the child, paternal fitness and ability to support the child, fall precisely within the formula of disqualification identified earlier by him.[24] The child's interests are of no concern to these criteria. The approach is therefore wholly parent-orientated. To that extent the subjective attitude of the parent is relevant but that is clearly subject to a consideration of the parent's conduct, not only in itself but also as indicating the genuine quality or otherwise of the parent's apparent attitude.

29.32 Devlin J. added, by way of a postcript to the preceding quotation, the comment: "The test is exactly the same as one would apply to the action of a father in any other circumstances, not necessarily in relation to adoption".[25]

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22 I.e. the grounds in section 5(1) (a) of the 1958 Act and section 12(2)(c) to (f) of the 1975 Act.

23 [1952] 2 Q.B. 561 at p.572 per Devlin J.

24 Idem.

25 Idem.

That is true if the question is whether a parent has forfeited his rights or interest in the child. That may on occasion be the sole issue for determination.[26] It merely implies satisfaction of the test for discounting the parent's locus. It has no relevance, it is suggested, once the process widens into deciding what as a consequence should be decided, either to dispense with consent or to make an adoption order. In other words the forfeiture approach is analogous to the satisfaction of statutory threshold requirements. Once they have been satisfied, the way is open at the discretionary stage to come to a decision involving choice.

29.33 This interpretation of Devlin J.'s approach, it is suggested, is fortified by his comments on the alleged necessity to provide a home for the child.[27] This is quite different from the three criteria specified by the judge. The need relates to the child and is independent of parental attitudes and capabilities. In rejecting any absolute need to provide a home, Devlin J. argued:-

> "The provision of a home might be an overriding consideration if the test were the welfare of the child, but if the test is the reasonableness of the father it is not enough that he is not in a position to say immediately and definitely that he can provide a home or disclose his plans for providing a home. The prima facie conclusion can, of course, be displaced, but the burden of so displacing it lies on those who assert that the refusal is unreasonable." [28]

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26 E.g. where the answer is negative.

27 Hitchcock v W B [1952] 2 Q.B. 561 at p. 573.

28 Ibid. at p. 573 per Devlin J.

This must be read, of course, in the light of his earlier comment. If it can be proved that the father cannot support his child, that would go part of the way[29] to establishing that his refusal to consent or agree is unreasonable. Thus, where he is unable in any circumstances to provide a home for his child, that would probably be enough to prove lack of support. What was important for Devlin J. was the father's permanent incapacity to provide a home, not his mere temporary failure to do so. If, as he said, welfare were the test, the position would be quite different.

29.34 The test postulated by Devlin J. was twofold: genuineness of intention plus a capacity to fulfil the appropriate parental obligations. They were intended to be dependent and inter-related. This is wholly consistent with his analysis, including his opinion that the ground of unreasonable withholding should be construed in the context of the other grounds:[30] namely that something approaching disqualifying behaviour was the basis for dispensation. It is thus not simply a question of parental attitude, although some judges appear to have given that impression.[31] Nor, on the other hand, is it simply misconduct. Yet on at least one occasion the test has been characterised as "fault".[32] Emphasis also has been placed upon "conduct".[33] Certain of the grounds of

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29 Because ability to support the child was only one of the three criteria described by Devlin J.

30 Para. 29.31.

31 Paras. 29.17 and 29.21.

32 Re G (an infant) [1963] 2 Q.B. 73 at p.88 per Ormerod L.J.

33 Re C(L)(An Infant) [1965] 2 Q.B. 449 at p.469 per Pearson L.J.

dispensation involve culpability; for example, neglect and ill-treatment. Others do not imply fault; including incapacity and absence. All of them involve disqualifying circumstances. For these reasons, it is suggested, Devlin J.'s analysis is coherent and consistent.

(d) The role of welfare

29.35 None of the preceding discussion takes account of the part played by welfare in deciding whether the parent is withholding his consent or agreement unreasonably. Yet most of the cases discuss welfare. It is important here to distinguish two decisions: the determination of the court whether the parent is withholding consent or agreement unreasonably and the decision of the parent not to consent or agree. According to Devlin J. at least,[34] welfare is not the test whether consent or agreement is being withheld unreasonably. It may however form an integral part of the decision not to consent or agree and thus colour the quality of that decision judged against the standard of reasonableness.

29.36 It has never been stated categorically by the courts that welfare is not relevant to the process in some way or another. Nor have they denied that the welfare of the child may be the test of reasonableness. It does therefore play a part. What role it plays will be discussed in the following paragraphs. Some of the earlier English judgments[35]

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34 Hitchock v W B [1952] 2 Q.B. 561 at p.571.

35 E.g. Hitchcock v W B [1952] 2 Q.B. 561; In re K (an infant) [1953] 1 Q.B. 117; Re Adoption Act 1950 [1958] The Times, 29 July.

pursued a very negative course by postulating what did not amount to unreasonable withholding. A different and more constructive approach was adopted in 1952 by Devlin J.[36] and later in 1962 by the Court of Session.[37] This appears largely to have been bypassed by the English courts until the House of Lords became involved in 1971.

29.37 The clearest example of the negative approach is the statement of Lord Goddard C.J. in Hitchcock v W B:[38] "... the mere fact that an adoption order will be for the benefit of the child does not answer the question whether consent is being unreasonably withheld."[39] The same view was advocated by Jenkins L.J. in In re K (An Infant)[40] but in a later judgment the Lord Justice added the qualification that "that did not mean that that possible element in a case should be wholly ignored."[41] Neither judge took these issues any further.

29.38 The same qualification had been recognised earlier by Devlin J. in Hitchcock v W B[42] but his argument was more constructive than that of either Lord Goddard C.J. or Jenkins L.J. "No doubt," said Devlin J., "the welfare of the child is of importance because a father who had no regard for the welfare of his child in reaching such a decision is not

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36 Hitchcock v W B [1952] 2 Q.B. 561.

37 A B and C B Petitioners 1963 S.C. 124.

38 [1952] 2 Q.B. 561.

39 Ibid. at p.571 per Lord Goddard C.J.

40 [1953] 1 Q.B. 117 at p.130 per Jenkins L.J.

41 Re Adoption Act 1950 [1958] The Times, 29 July.

42 [1952] 2 Q.B. 561.

reasonable, but it is no longer the test."[43] This clarifies the matter considerably. Welfare is obviously not the test of whether consent or agreement is being withheld unreasonably. The standard against which refusal to consent or agree must be judged is reasonableness but in applying that standard or test the welfare of the child may be a matter of importance. In this sense a parent may be expected to consider the welfare of his child in deciding whether to refuse consent or agreement to adoption. The court does not decide whether to refuse consent or agreement. That is reserved to the parent. The court must be satisfied only that the parent's decision was reasonable. So much is clear from the judgment of Devlin J. On the other hand the role of welfare appears to have been largely ignored by Lord Goddard C.J. and Jenkins L.J.

29.39 The Devlin thesis seems to have fallen into abeyance for a decade or so. Emphasis during that period appears to have been placed upon the negative approach of the Chief Justice. Indeed in 1957, writing of Hitchcock v W B[44] Blom-Cooper suggested:-

> "The tenor of this judgment, emphasising as it does the total deprivation of the rights of the natural parents, precludes the court from having regard to the obvious benefits that an adoption order may confer upon the child." [45]

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43 Ibid. at p.572 per Devlin J. He was contrasting the ground of unreasonable withholding with the general discretion under the earlier legislation. See para. 29.2 : hence the reference to welfare no longer being the test.

44 [1952] 2 Q.B. 561.

45 Blom-Cooper L.J., "Adoption Applications and Parental Responsibility" (1957) 20 M.L.R. 473 at p.477.

This, it is suggested, is a wholly justifiable comment.[46] It clearly envisages that the court is not entitled to make a choice; namely, to decide whether an adoption order would be desirable for the child or indeed to exercise any substantive discretion. The test, in other words, is not the welfare of the child. Devlin J. did not, of course, explain how the Divisional Court conceived the nature of the judicial function in this regard. But the implication clearly was that the function was adjudicative rather than executive. In other words, the juridical nature of "unreasonable withholding" is a threshold requirement. There was no suggestion of discretion except interpretational discretion.

29.40 These comments are as justified in relation to the Devlin thesis as they are in the context of the remarks of Lord Goddard C.J. Both contemplate a negative and adjudicative approach.[47] The Devlin view is, as it has been suggested,[48] more constructive because he envisaged a role for welfare in the process: not, of course, as the test of reasonableness but as a factor which a parent may reasonably be expected to take into consideration in deciding whether to consent or agree to an adoption. Since this view was expounded in one of the first cases on the ground of unreasonable withholding, it is rather surprising that it proved to be so insignificant for a decade or so thereafter.

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46 This point is examined further at paras. 30.9 to 30.17.

47 If it is true of the Devlin thesis, it is true a fortiori of the Goddard approach.

48 Para. 29.38.

29.41 The subsequent development of the Devlin doctrine is interesting for itself, in relation to future trends and also as a point of departure for the concept of welfare in a different direction. The integration of the welfare concept into the ground of unreasonable withholding has from time to time been attributed[49] to Lord Denning M.R. in Re L (an infant)[50]. His view, now taken as authoritative,[51] provides, after having declared that welfare was "not the sole consideration"[52]:-

> "But I must say that in considering whether she is reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is better for the child. Her anguish of mind is quite understandable; but still it may be unreasonable for her to withhold consent. We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case."[53]

This view is fundamentally no different from the Devlin thesis. The welfare of the child is relevant in the context of a choice. The choice here is the parental decision to consent or agree or not. The court has at this stage no power to come to a decision on the basis of choice. The judicial function is merely to apply to the parent's decision the statutory standard of reasonableness, including giving appropriate consideration to welfare. But it is the parent's duty, as the courts have clearly stated, to look at welfare;

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49 E.g. Bevan, p. 344; Houghton-Stockdale Report, para. 211.

50 (1962) 106 Sol. Jo. 611.

51 Re W (an infant) [1971] A.C. 682 at p. 698 per Lord Hailsham L.C.

52 Cf. welfare as the sole consideration.

53 (1962) 106 Sol. Jo. 611.

that is no part of their function. Such discretion as there is, from the parental or judicial point of view, exists only in relation to the interpretation and application of the standard of reasonableness imposed upon the parent.

29.42 Once the distinctive functions of the court and of the parent have been recognised, it becomes a matter of application. This naturally will reflect the peculiar circumstances of each case. Inconsistencies of approach should nevertheless not arise. At first sight certain judicial views may seem to be inconsistent but the general principles will on closer analysis often be found sufficient to accommodate the several views. Some English judicial dicta may be considered in this light. In Re W (infants),[54] for instance, Cross J. agreed entirely with the Hitchcock[55] decision. In his opinion:-

> "... the fact that the judge may think that a child would be 'better off' if he ceased to be the child of his natural parents and became the child of someone else is not, in itself, a sufficient ground for holding that a parent is acting unreasonably in refusing his consent to the adoption." [56]

Indeed, it could be argued, the judge's view of what is best for the child is not only not a sufficient but also an irrelevant ground in so deciding. The reason is that the judge's view of welfare has no part to play in his adjudicative role. This, it would seem, is implicit in Cross J.'s judgment, for he suggested, without any reference to the judge or his views,

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54 [1965] 3 All E.R. 231.

55 Hitchcock v W B [1952] 2 Q.B. 561.

56 [1965] 3 All E.R. 231 at pp. 246 and 247 per Cross J.

that "in some circumstances a parent may well not be acting 'unreasonably' in refusing his consent to an adoption order even though it must be obvious to everyone, and is indeed obvious to the parent, that it would be 'better' for the child to be adopted."[57] Welfare is thus relevant in the choice context, if at all. Even if it is relevant, it may not be important.

29.43 In that case Cross J. came to the conclusion that the father had withheld his consent unreasonably and consequently his consent could and should be dispensed with. The formulation of his reasons for reaching the first conclusion indicates precisely the approach which he postulated. The father, he thought, was "failing to face these two facts."[58] In other words, the father, not the court, had ignored two considerations which a reasonable parent, in the judicial application of the standard of reasonableness, would have included. The two facts were: firstly, the father's own responsibility for what had transpired; secondly, "that to prolong the agony, which is what refusal of an adoption order would mean, would be sheer cruelty to the children."[59] Both considerations, it is suggested, are examples of parental disqualifying circumstances which are the essence of the grounds for dispensation. The character of parental "blame" is self-evident. "Cruelty to the children" is different.

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57 Ibid. at p. 247 per Cross J.

58 Ibid. at p. 248 per Cross J.

59 Idem.

29.44 Cruelty is, in the first place, analogous to some of the other grounds for dispensation,[60] in that the decision or conduct of a parent detrimental to the child may not achieve the standard of reasonableness. The ground of "unreasonable withholding" leaves open the details of the standard of reasonableness; the other grounds merely prescribe that standard objectively. The word "detrimental" indicates that welfare operates negatively, not as it would in a choice context. Cross J. was saying in effect that it would be contrary to the welfare of the child for the father to withhold his consent. It could therefore be unreasonable and indeed it was held to be unreasonable in conjunction with the other fact.

29.45 To the father was given the choice of consenting or not, on whatever grounds he selected. Cross J. did not ask the question: is it better for the child to remain with the applicants for adoption or to be returned to his parents? If he had, welfare presumably would have been the paramount consideration or the positive objective of the decision.[61] He was concerned only with the question: is the parental withholding of consent against the child's interests. This is extending what he said from "cruelty" to "welfare". Whether that is justified will be examined later.[62] What is presently important is that welfare has been regarded as relevant, but in the negative sense only; that is, as the

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60 E.g. neglect, ill-treatment.

61 A theme examined later: see paras. 30.18 to 30.27.

62 Para. 29.58.

effect on the child of the parental decision or, in other words, as an example of parental disqualifying circumstances. The court may therefore use welfare to protect the child's existing interest but not promote his future well-being.

29.46 The same theme, it is suggested, underlies the judgments in different ways of Pearson and Diplock L.JJ. in Re C(L)(An Infant).[63] The approach of Pearson L.J. may be enunciated in four propositions:-

1. The court is not concerned "with, in itself, the question which course would be in the best interests of the child."[64] This unequivocally dissociates the court from issues of choice. The words "in itself" are also important. They indicate that a decision based upon choice is determinable in terms of the child's best interests alone. This is probably correct. These words also suggest that the child's interests may play a part in another context but probably not in isolation from other considerations. This would be true of the negative function of welfare.

2. It is not enough that "in the interest of the child, it would be better that the child should remain with the foster parents, or that the child should be taken by the mother."[65] Choice is again discounted by that proposition.

3. The second proposition is "not strictly a relevant consideration by itself."[66] This simply reinforces this analysis of the first proposition to the extent that welfare

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63 [1965] 2 Q.B. 449.

64 Ibid. at p.461 per Pearson L.J.

65 Idem.

66 Idem.

is not the basis of choice, for there is no choice.

4. "What is relevant is the mother's attitude to questions concerning the welfare of the child."[67] This does not indicate the relationship between the welfare of the child and the attitude of the mother. Although it perhaps implies that welfare is secondary to the mother's attitude, that is probably not precisely what Pearson L.J. intended. In a later passage he conceded that "it may be right ... that the primary consideration ought to be the reasonableness of the mother's attitude in relation to the child rather than other persons concerned." He continued: "I would think it right that it is primarily the welfare of the child that the wife should have in mind; ..."[68] The effect of her decision on other persons was a matter for consideration. This appears to be the only occasion, before 1971 at least, on which a judge was prepared to qualify how much weight should be afforded to the welfare of the child. Arguably even this comment requires each case to be decided in the light of its own circumstances. But it places a heavier burden upon the parent in most cases, for it is almost inconceivable that a parental decision to consent or agree or to withhold consent or agreement could be neutral in its effect on the welfare of the child.

29.47 Diplock L.J., on the other hand, did not concern himself with questions of weight or balance. He seems to have applied a single criterion: the effect on the welfare

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67 Idem.

68 Ibid. at p. 465 per Pearson L.J.

of the child of the decision not to consent. He did not appear to say whether this was the only test but the clear implication is that it was the sole consideration. In reaching this conclusion, considerable attention was paid to the other grounds for dispensing with consent or agreement.[69] From them he deduced a generic ground[70] of dispensation which he applied also to the ground of unreasonable withholding. In his words:-

> "In considering whether the consent is being unreasonably withheld a similar test, in my view, has to be applied; Does the withholding of consent by the parent show a callous or self-indulgent indifference to the welfare of the child?" [71]

The court does not thereby substitute its view for that of the parent. It merely applies the standard of reasonableness. In applying that standard the effect of the parental decision on the welfare of the child, a negative but protective function of welfare, is the only factor specified. Whether this necessarily excludes other factors depends, to some extent, upon the view taken of the substance of welfare, a matter considered later.[72] Diplock L.J.'s view, however, together with those of Pearson L.J., Cross J., Lord Denning M.R. and Devlin J., forms a fundamentally coherent, consistent and technically sound basis for deciding whether consent or agreement has been withheld unreasonably.

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69 Ibid. at pp.470 and 471per Diplock L.J.

70 He did not rely upon the technical maxim of interpretation known as the eiusdem generis rule.

71 [1965] 2 Q.B. 449 at p. 471 per Diplock L.J.

72 Paras. 29.57 to 29.66.

Section 4 - The position in Scotland

29.48 Identical statutory provisions have effect in Scotland. There are no obvious differences of principle in either of the two systems which could have any bearing upon dispensation with consent or agreement. It is a creation of statute and the attitude of the courts has been restricted to an interpretation of only two words. A similarity of approach would therefore be expected. What is interesting is that one Scottish judge[73] articulated the role of welfare in a very precise and penetrating fashion after the pronouncements of Devlin J. but before those of Pearson and Diplock L.JJ. which are themselves, it is suggested, more illuminating than those of Lord Denning M.R. despite the authority subsequently afforded to the latter's dicta.

29.49 The earlier Scottish decisions introduced no new dimension to the meaning of unreasonable withholding. Indeed in Y Z - Petitioners[74] Sheriff-substitute Middleton could not resist the reasoning of Jenkins L.J. in In re K (an Infant)[75]; Lord Clyde L.P.[76] and Sheriff-substitute Prain[77] were content

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73 Lord Sorn in A B and C B Petitioners 1963 S.C. 124 at p. 138.

74 1954 S.L.T. (Sh. Ct.) 98.

75 [1953] 1 Q.B. 117.

76 A B and C B, Petitioners 1963 S.C. 124 at pp. 135 to 137.

77 X v Y 1967 S.L.T. (Sh. Ct.) 87. Sheriff-substitute Prain at p.88 drew attention to an alleged practical difficulty in requiring attention to the child's welfare. He said: "...when the petitioners are to remain anonymous, there is a certain artificiality in seeking to determine whether the natural mother is acting reasonably in withholding her consent. She can never see to assess for herself, the prospects, favourable or unfavourable, which the adoption offers to her child ..." This comment implies that the mother must choose on the basis of welfare whether the child would be better with her or with the adopters. A positive role of welfare in that sense, it is suggested, is not what most judges have envisaged. The test tends to be whether the parent has disqualified himself. That involves looking at the effect upon the welfare of the child of the prima facie disqualifying circumstances. The artificiality to which he refers is thus founded upon a misconception of the role of welfare.

to follow the dicta of Lord Denning M.R. in In re L (an infant);[78] finally, in C v D[79] Sheriff Walker simply accepted the principles stated by Lord Clyde L.P. and Lord Sorn in the earlier Court of Session decisions.[80] In that case the Lord President had summed up the English authorities in these words and applied them to Scotland:-

> "Although the welfare of the child is not in any of these cases regarded as the exclusive, or indeed the main, consideration in judging the reasonableness of the refusal, it is recognised in all of them as a consideration which, along with others, must be taken into account."[81]

This is probably an accurate but somewhat unhelpful summation.

29.50 One of the issues in the English cases which has not yet been analysed, the substance of welfare,[82] has a very considerable bearing upon the significance of the role played by welfare in the establishment of the ground of unreasonable withholding. Cross J., for example, talked of cruelty to children in this context.[83] The earlier discussion of this approach extended to conduct "detrimental" to the child.[84] The ultimate question is whether detriment to any aspect of the welfare of the child is a matter to be taken into consideration by a reasonable parent in deciding whether to consent or agree or not. Both Sheriff-substitute Middleton and Lord Sorn went some way in this direction.

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78 (1962) 106 Sol. Jo. 611.

79 1968 S.L.T. (Sh. Ct.) 39.

80 A B and C B, Petitioners 1963 S.C. 124.

81 Ibid. at p. 136 per Lord Clyde L.P.

82 See paras. 29.57 to 29.66.

83 Para. 29.44.

84 Paras. 29.16 to 29.22.

29.51 Having discussed the approach recommended by Jenkins L.J.,[85] the Sheriff-substitute, after noting that each case must depend upon its circumstances, suggested:-

> "... unless the alternative to adoption would be likely to result in actual harm to the child, nothing short of the conduct or neglect set out in section 3(1)(a) or (b) will suffice."[86]

This is, obviously, a restrictive interpretation and would clearly attract the criticism heaped upon the judgment in Hitchcock v W B[87] by Blom-Cooper.[88] It implies that only actual harm to the child brought about by a refusal to consent by the parent will render that refusal unreasonable. The judge referred, of course, to "the alternative to adoption". That is perhaps too wide. Perhaps he meant "the refusal to consent", which for present purposes is the same issue. On that basis, his view is worthy of examination. But Sheriff-substitute Middleton did not specify the nature of the harm required. Nor can it be implied from the facts of the case with any confidence.

29.52 This aspect of the problem was however taken further by Lord Sorn.[89] His description of the process is so valuable that it warrants detailed consideration. There are three parts to his analysis: the approach; the consequences of the approach; and examples of these consequences.

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85 In re K (An Infant) [1953] 1 Q.B. 117.

86 Y Z - Petitioners 1954 S.L.T. (Sh. Ct.) 98 at p. 98 per Sheriff-substitute Middleton.

87 [1952] 2 Q.B. 561.

88 Blom-Cooper L.J. "Adoption Applications and Parental Responsibility" (1957) 20 M.L.R. 473 at p. 477: see para. 29.39.

89 A B and C B, Petitioners 1963 S.C. 124.

(i) The approach of Lord Sorn

"The proper way to approach the question", he said, "is to look at the matter from the point of view of the parent and, having regard to the whole circumstances, to ask whether the parent's decision to withhold consent was an unreasonable decision for the parent to have made."[90] Clearly that is a parent-orientated process. Given the phraseology of the statutory provision, this seems inevitable. The question posed by the learned judge falls precisely within the terms of the legislation as it represents little more than a paraphrase of it. The need to look at the whole circumstances has been imported by Lord Sorn but, assuming that the circumstances are related to the context of the parent's decision, this duty is implicit in the process. It is, in any event, well precedented.[91]

(ii) The consequences of the approach

29.53 Lord Sorn went on to explain the way in which that approach would operate. "... it is apparent that consideration of the welfare of the child may enter into the question of what the parent's decision ought to be; not by way of considering whether the would-be adopters have more advantages to offer than the parent, but in other ways."[92] This proposition clearly indicates the relevance of welfare. But it was not relevant as the basis of a choice between two environments for the child, that of the natural parent

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90 Ibid. at p. 138.

91 A matter of frequent judicial comment.

92 1963 S.C. 124 at p. 138 per Lord Sorn.

contrasted with that of the adoptive parent. Nor was the suitability of alternative homes the issue. But Lord Sorn did not explain in positive terms the function of welfare.

(iii) Examples of these consequences

29.54 The part played by welfare in the sense contemplated by Lord Sorn was identified by these illustrations. "If, for example, the parent was a person unfit to discharge the duties of parenthood, or if for some other reason it would be harmful for the child to be left under the control of its parent, this would point to the withholding of consent being unreasonable on account of the child's welfare. Then again, in a case where, owing to vacillation, or procrastination, on the part of the parent, the child had been with the would-be adopters for a long time, so that a mutual bond had developed, a reasonable parent would have to consider, among other things, the effect of removal on the welfare of the child. And, no doubt, a reasonable parent would also give some thought to the effect of removal on the would-be adopters."[93]

29.55 There are two significant features of these examples. The initial consideration in each case is the conduct of the parent. In the first example, Lord Sorn talked, in effect, of parental fitness or in terms similar to the other objective grounds for dispensation.[94] That conception of disqualifying circumstances involves a direct

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93 Idem.

94 But Lord Sorn did not create a generic class.

relationship between parental conduct and its effect on the child. The second example, on the other hand, indicated an indirect nexus between parental conduct and its effect on the child. In other words, a further causal factor was introduced between such conduct and effect. In the second example, the intermediate factor was the bond of affection between the child and the adopters. The recognition of this aspect of welfare does not create a new or different approach to unreasonable withholding or a new or different role for welfare. The novelty is the extended substance of welfare.[95]

29.56 The second feature of these examples is the impact of the parental conduct upon the welfare of the child. In both instances Lord Sorn spoke in terms of the welfare of the child: quite generally. Some of the earlier cases had hesitated to accept the generality of welfare as the point of impact for the child, although the trend over the years had been towards a generalised conception of welfare. This is entirely consistent with the recognition of the extended substance of welfare and is part of the same overall trend. Lord Sorn did not at any stage, however, indicate how the welfare of the child should be balanced against any other relevant considerations. But there can be no doubt that in his view other considerations could be relevant.[96] No further elaboration on matters of weight or

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95 This aspect is further examined in paras. 29.57 to 29.66.

96 E.g. as a consequence of his directive "having regard to the whole circumstances" and his reference to the effect on the adopters of the removal of the child from them.

balance is possible in the light of Lord Sorn's comments. Nevertheless his analysis is particularly helpful in attributing to welfare its logical role in the statutory process.

Section 5 - The substance of welfare

29.57 The statutory provisions relating to dispensation and the grounds for dispensation under the legislation prior to 1975 made no reference whatever to welfare. Its relevance in this context is a creation of the judiciary. The legislation is thus of no assistance in identifying the meaning of welfare. The judicial treatment of welfare in this context probably reflects trends in relation to the meaning of welfare in other areas.[97] It is, naturally, impossible to generalise on the substance of welfare, since it will inevitably depend upon individual circumstances.[98] Nevertheless a clear pattern of development emerges.

29.58 The earlier cases seem to have interpreted welfare rather narrowly, in terms of physical and material well-being. Even Devlin J. in Hitchcock v W B[99] restricted welfare to "the provision of a home".[1] As late as 1965 Cross J. was talking in terms of "cruelty".[2] In L v M[3] Lord Goddard C.J. more or less discounted any need to look at welfare in greater detail than necessary to be reassured that the

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97 Para. 44.4.

98 As a consequence of the interpretational discretion built into the word.

99 [1952] 2 Q.B. 561.

1 Ibid. at p. 573.

2 Re W (infants) [1965] 3 All E.R. 231 at p. 248.

3 (1955) 120 J.P. & L.G.R. Rep. 27.

child's physical integrity would not be prejudiced. In his words: "The child was being well looked after by her mother and will continue to be looked after by her. There is therefore no question of the welfare of the child."[4] The case was rather unusual for present purposes, for the application for adoption was made by the child's mother and her second husband. It was thus more of an inter-parental dispute than one between natural and foster parents. In any event the earlier cases demonstrate a restricted and unimaginative view of welfare. The decisions turned to a large extent on questions of attitude. They are largely subjective. The judges have not been wholly responsible for this, since they have had to rely upon information provided by the parties and thereafter to interpret it in the light of their own experience. About 1962 or 1963 different considerations affecting the welfare of the child began to be made available to the courts, partly no doubt in response to changing psychological doctrine.[5] Some judges were not slow to make use of this information.

29.59 In In Re L (An Infant),[6] a typical case of a mother unable to decide whether to consent after the child had been placed for adoption some considerable time before, the court took into consideration the psychological and physical harm which could follow if the child were removed from the adoptive home, one providing love and security. There was evidence to that effect. That was the context which prompted Lord Denning M.R. to conclude that "a reasonable

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4 Ibid. at p. 29 per Lord Goddard C.J.

5 See paras. 44.46 to 44.50.

6 (1962) 106 Sol. Jo. 611.

mother surely gives great weight to what is better for the child."[7] About the same time Lord Sorn in the Court of Session felt constrained to reach a similar conclusion.[8] Where attachment existed between the adopters and the child, a reasonable parent would in effect consider whether to refuse consent and so prevent the adoption would disrupt the attachment so formed.[9] The importance of this view of the meaning of welfare lies not so much in the recognition of the significance of psychological welfare but rather in its source. A judge may come to a reasonable decision from his own experience on the mundane details of welfare: for example, accommodation, health, financial viability, the effects of cruelty, ill-treatment, neglect. They are fairly straightforward matters, involving little more than an objective assessment of the circumstances. They imply, in particular, a prediction for the future deduced from the events of the past.

29.60 It is clearly open to judges to discuss more subjective aspects of welfare, as, for example, the social implications of established circumstances. The so-called stigma attached to illegitimacy, the impact of a parent's adultery upon the child, the desirability of parental access to the child: these and similar matters are the subject of frequent comment by the judges. Reliance is placed no doubt, in coming to conclusions on these matters,

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7 Ibid. per Lord Denning M.R.

8 A B and C B, Petitioners 1963 S.C. 124 at pp. 137 and 138.

9 That is a paraphrase of what Lord Sorn said.

on their own personalities, background and experience. The judiciary however has not normally been tempted to consider the more complicated aspects of these matters, even although they may turn out to be more important. Complexity may have been introduced as a consequence of the expansion of scientifically established knowledge, especially in the field of child psychology.[10] Even the mundane aspects of welfare may be affected by these scientific advances and a completely new prospect thereby opened up. The tendency of the courts may therefore be to look at the implications as well as the mere appearance of facts, circumstances and events. The establishment of relationships, their viability, their quality, the likelihood of their interruption or termination: these are the aspects of welfare of growing importance. They are not necessarily within the experience or the expertise of the judiciary. Nevertheless they are probably founded upon the facts, circumstances and events which are within the framework of the judicial process. It is thus not surprising that there may be at times a conflict between the interpretation placed upon these facts, circumstances and events by the judges and the views of the medical and para-medical experts.[11] Psychological evidence has not been rejected by the judges and to that extent the meaning of welfare has been expanded.

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10 See para. 44.46.

11 E.g. even Pearson L.J., who was not unsympathetic to the introduction of medical evidence, commented: " ...[in the case of strong medical evidence] there is some risk of the decision, in cases of this kind, being taken out of the hands of the court and put into the hands of the medical profession, which of course is not right, because it is meant to be the courts which decide these questions": Re C(L) (An Infant) [1965] 2 Q.B. 449 at pp. 469 and 470 per Pearson L.J.

29.61 The foundation laid by Lord Denning M.R. and Lord Sorn was used to advantage, where appropriate, in later cases. Much naturally depends upon the evidence adduced. The difficulty is to qualify the risks of psychological harm to the child. The courts are reluctant to act upon general and unspecific psychological theory. Information in the form of a prediction in relation to a particular child is important. As Ormerod L.J. is stated to have said:-

> "...the doctor said that it could have a severe adverse influence on the development of the child, but he could not say what effect moving the child would have on this particular child and could not give a better answer than that it might have an adverse effect." [12]

It was, in other words, "pure speculation" rather than convincing evidence. The risk of psychological harm was in that case, where the evidence was weak, a possible disadvantage for the child which could be accepted by a reasonable parent.

29.62 On the other hand, in Re C(L)(An Infant)[13] "strong evidence" was advanced that there was a "severe risk of serious psychological happenings to this child if she were moved from the foster parents".[14] The trial judge would apparently have decided that to withhold consent in such circumstances would be unreasonable but the Court of Appeal took the precaution of pointing to other considerations indicating the same conclusion.[15] The courts thus seem

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12 Re W unreported: see Re C(L)(An Infant) [1965] 2 Q.B. 449 at p.466 per Pearson L.J.

13 [1965] 2 Q.B. 449.

14 Ibid. at p. 468 per Pearson L.J.

15 The Court of Appeal did not say that the trial judge was wrong in deciding on the medical evidence alone: idem.

reluctant to look at the psychological aspects of welfare in isolation. This is quite justified in light of the self-imposed mandate to look at all the circumstances of the case.[16] But it gives to the court a simple method of avoiding the implications of the specialist evidence. The flexibility of welfare thus enables its substance to be expanded or restricted according to the inclinations of the individual judge. The personal experience, background and predilections of the judges may therefore continue to play an unarticulated part in the whole process of deciding whether consent or agreement is being unreasonably withheld.

29.63 A good example is the judgment of the Court of Appeal in In re B (S)(An Infant).[17] The very young parents of an illegitimate child decided to have her adopted. Ten days after the birth the child was placed with the adopters where she thereafter remained. In January 1966 the mother signed a formal consent and the adopters made application to adopt. In March she withdrew her consent, indicating that she wanted her child back. The following month, three days before the hearing, the mother and putative father became engaged. It was her intention to work during the day to supplement her fiance's income and her daughter would be cared for by the child's maternal grandmother during the day. The putative father also wanted his fiancee to have the child. Medical evidence was introduced to the effect

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16 I.e. self-imposed under the early legislation. Cf. section 3 of the Children Act 1975.

17 (1966) 64 L.G.R. 431.

that, if there was a transfer of parental care, the child might suffer emotional disturbance. The county court judge held that the mother had acted unreasonably in withholding her consent, dispensed with consent and made an adoption order. The Court of Appeal reversed his decisions.

29.64 Sellers and Danckwerts L.JJ. analysed the issues consistently, even if they differed in emphasis on matters of detail. Both Lords Justice took a sympathetic view of the attitudes and intentions of the natural parents. This, supplemented by their own experience and by principles of child welfare, prompted them to support the parents, despite the "admirable position" of the adopters from the point of view of welfare. According to Sellers L.J. the court was required to look at the matter "through the eyes of the mother, as she ought to look at it in relation to all the circumstances of this case".[18] Despite this, and notwithstanding the unfortunate way in which the medical evidence was presented,[19] the medical report was treated as not very convincing. The risk of disturbance on a change of parental care was not so "grave" as to upset other considerations. In the words of Sellers L.J.:-

> "...unless the risk was very great, it would be going too far to say that that ought to have influenced the mind of this mother, - or a reasonable mother - and made it unreasonable for her to withhold her consent. Prima facie the child should be with the mother, and, as it happens here, there is also the hope that it will be with the father too ... One asks oneself, are there strong factors to defeat this view? I do not find in this case that there are".[20]

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18 Ibid. at p.435 per Sellers L.J.

19 The medical report was received late and the mother had little time to examine it.

20 (1966) 64 L.G.R. 431 at pp.436 and 437 per Sellers L.J.

His first proposition, dealing with the consequences of the risk, seems unexceptionable, to the extent that the risk of psychological harm to the child is merely one among the large number of relevant circumstances. Seller L.J. however impliedly rejected this qualification when he went on to afford a special position to the desirability of a direct relationship between the child and the parent. There is no statutory direction to that effect. Nor is it consistent with the duty, developed largely by the courts as a consequence of the scheme of the legislation, firstly to look at all the circumstances and then to take into consideration the consequences of the parental decision for the welfare of the child.

29.65 The medical evidence also failed to impress Danckwerts L.J. He did not, on the other hand, create presumptions in favour of parental care. Nature nevertheless influenced his reasoning, although it did not prevent him from looking at the totality of the evidence. In his view:-

> "Nature has a strange way of creating affection for a child in a mother, even though the mother beforehand has been apprehensive and unwilling to bring up the child herself. In those circumstances, the fact that the mother wants her child, that she is going to be married to the natural parent and incidentally (and it is a matter of some importance, it seems, to me) that such a marriage will make the child legitimate, are all features which in my opinion should have the greatest force."[21]

This represents a blend of personal circumstances colouring the attitude of a reasonable parent. The conclusion however was influenced by the judge's view of "nature". That was

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21 Ibid. at p. 439 per Danckwerts L.J.

presumably a reflection of his own personality, background and experience.

29.66 Thus both Sellers and Danckwerts L.JJ. treated medical evidence as admissible but regarded it as rather unimportant. It could not be argued that this amounted to a failure to implement their statutory duty as explained by earlier judicial pronouncements. Their attitudes nevertheless indicate the inherent flexibility of the meaning of welfare, in which psychological and similar aspects may well in appropriate circumstances play a part, at times insignificant but also perhaps vital. Such a conclusion could not have even been suggested fifteen or twenty years ago.