A REPORT BY JUSTICE

Parental Rights & Duties and Custody Suits

CHAIRMAN OF COMMITTEE
GERALD GODFREY, Q.C.

A STEVENS Publication

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PREFACE

THIS committee was constituted in July 1972. The subject we were asked to consider was described as "Parental Rights and Custody Suits." We were told that, within this general context, we could write our own terms of reference. This was just as well: at our first meeting we found ourselves unanimously of the opinion that our own title, referring as it did only to parental rights and not to parental duties, simply would not do. We resolved, before proceeding any further, that our title should be amended to refer to parental duties as well as to parental rights.

Although throughout this Report we have used the expression "Children's Ombudsman," we are in no way wedded to this title, and "Children's Advocate," "Children's Proctor" or other suitable titles would serve just as well.

We wish to record our thanks to our secretary, Clive Morrick, and to Sana Shtasel for her valuable assistance in preparing the final draft of the Report.

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[NOTE: In the interests of economy all footnotes, whether textual extensions or references, have been grouped together after the Appendix and the Selected Bibliography.]

INTRODUCTION

1. We have considered the law and practice relating to parental rights and duties, and to custody suits, both in this country and elsewhere.[1] We have been struck by the overall similarity, in most of the jurisdictions we have looked at, of basic principles and of the direction in which in all of them law reform is moving.[2] Accordingly, we will specifically note only features which are important to changes in the English system; we will not catalogue foreign provisions in detail.

2. We have kept, more or less, within this frame of reference. We have resisted the temptation (not without regret) to take as our subject the reform of family law in general and the law relating to children in particular. A comprehensive report on this subject is badly needed. In this field one problem impinges upon another. It is unsatisfactory, and in any case almost impossible to deal with any one problem, or even series of problems, in isolation. It complicates matters further that on nearly every problem there are (as is usual with any controversial subject) as many differing views held as there are people expressing them. The whole subject is of such difficulty and, we think, of such importance as to warrant the appointment by the Secretaries of State for Social Services and for Home Affairs of a Departmental Committee to consider it. Such a Committee would have the usual and necessary facilities to commission research and take evidence before making recommendations. (It would be possible to refer the subject not to a Departmental Committee but to the Law Commission, which is already working on various aspects of family law. However, we think the subject is large and has too many social implications for this course to be really satisfactory. The other alternative, a Royal Commission, is in our view too unwieldly (although such a Commission has been constituted in Canada).)

3. The trouble, of course, is that it takes a long time for such a Committee to produce its report. And then, all too often, its recommendations end up not on the statute book but in a pigeon hole. This risk is increased when, as is usual and would certainly be the case with this subject, the implementation of the recommendations would at once invite controversy, take up Parliamentary time, and cost money. In our field, for example, there is now the Report of the Departmental Committee on the Adoption of Children. This Committee was appointed on July 21, 1969. It produced a Working Paper in 1970 and submitted its Report on July 24, 1972 (the "Stockdale Report," Cmnd. 5107, published in October 1972). There is also the Report of the Departmental Committee on One-Parent Families. This Committee was appointed on November 6, 1969. It submitted its Report on March 2, 1974 (the "Finer Report," Cmnd. 5629, published in July 1974). Neither of those Reports has yet led to enacted legislation.

We are uncomfortably aware that we have hardly distinguished ourselves by the time we have taken to produce our own Report. We do not apologise, for we think we were right not to complete the formulation of our own views without taking into account the Stockdale Report (especially its recommendations on guardianship and fostering) and the Finer Report (especially its recommendations on the Family Court). We wanted to consider also the provisions of the Children Bill (especially its provisions for the representation of children in legal proceedings), first presented to Parliament early last year by Dr. David Owen, M.P., as a Private Member's Bill (and now, with these provisions unhappily emasculated, introduced as a Government Bill); and the conclusions of the Committee of Inquiry into the case of Maria Colwell, appointed on July 13, 1973, whose Report (the "Field-Fisher Report") was submitted to the Secretary of State for Social Services in April 1974 although not published until September 1974.

4. But it is now high time something was actually done for those children (all too many) who are suffering and will continue to suffer acute distress, and worse, which they could be spared. Since the submission of the Field-Fisher Report, administrative action to improve co-ordination of social and other services has been taken; and the recommendations contained in the Stockdale Report are, with some amendments, now included in the Children Bill. Our own report, then, is intended to generate and stimulate further thinking, as well as to make specific recommendations which have commended themselves to us and which we would like to see carried into effect. Although it will produce no immediate results, for the first of these *we recommend that*:

> A Departmental Committee be appointed by the Secretaries of State for Social Services and for Home Affairs to review family law in general and the law relating to children in particular and to consider what changes in law, procedure and practice are desirable; but that its deliberations should not be permitted to delay reforms which may recommend themselves for implementation before those deliberations are concluded.

5. The subject "parental rights and duties" and the subject "custody suits" may, we think, be conveniently treated as separate subjects for the purposes of this report. They do, however, have at least one thing in common (apart from the fact that "custody" is, to the extent mentioned later, a "parental right"). Each of them has given rise to considerable public disquiet, manifested particularly in news items and articles in the press, documentaries on television, the formation of pressure groups with differing views, and conference upon conference of various experts in various disciplines concerned with the welfare of children.

6. As to parental rights and duties, the fact is that the nature of the relationship between parent and child is being subjected to increasingly critical analysis. The legal relationship between wife and husband has already largely been transformed into a partnership between equals (although there are some serious exceptions in the fiscal and welfare law fields). It is hardly recognisable as the relationship it was 50 years ago. Men and women now stand more or less equal before the law. (We appreciate fully that in this instance the law may well be in the van of social progress; there are many homes in which in many ways the husband treats the wife as his inferior, not his equal, and some in which the wife still accepts this as proper.) Of course, this transformation is neither total nor absolute. In the social and economic spheres, rather than the legal, women are still too often considered and treated as second-class citizens. This problem also is now the subject of proposed legislation. But the work of women's liberation is by no means complete.

7. While the work of women's liberation remains in progress, there is now to be heard the voice (increasingly less still and small) of children's liberation; children have rights. Although English law does not anywhere define or catalogue them, the United Nations General Assembly has adopted a "Declaration on the Rights of the Child," so this is no mere "lunatic fringe" phenomenon. Increasingly commentators and reformers are calling for the codification of children's rights in some legal form or another.[3] The children's legislation of the past 20 years is liberally spattered with the phrase "parental rights"; but looking forward we hope that concept will soon be characterised as "Elizabethan" in the same way as the concept of "marital rights" is now described as "Victorian": with the same connotation of disapproval for an old-fashioned and undesirable relic. As the old social order changes, giving place to the new, there is inevitably uncertainty: and uncertainty breeds disquiet.

8. As to custody suits, the disquiet is perhaps more obvious. There are several types of custody case, discussed below in paragraph 57, but two in particular have rightly given cause for concern. First, there is the contest which develops between biological parents (sometimes more attractively, but in this context too emotively, called "natural parents") on the one hand and substitute parents on the other, often with a hapless local authority caught in the cross-fire. Second, there is the contest which develops between parents themselves when one takes the child out of the country and refuses to bring him back. (Here and below we use the masculine pronoun for convenience.) These cases, unlike custody suits generally, are not always considered behind closed doors. For one reason or another, some of them come to be fought in the glare of publicity. When this occurs, the result often seems to the public, and often is, highly unsatisfactory. The public sees for itself that the result is in fact totally unacceptable from the point of view of the child and is inconsistent with his welfare.

9. We now proceed separately to our consideration, first of parental rights and duties, and then of custody suits, with an eye to seeing what might be done to alleviate or even eradicate much of the distress to which we have referred.

Chapter 1

Parental Rights and Duties

10. What are "parental rights"? Although the term is often used and the concept is apparently well enough understood to be the subject of litigation, hardly anybody has attempted to define the *legal* interest, if there is one, of a parent in his child. What is it? How should it be protected? There is no statutory definition of the expression in our own or any other jurisdiction with which we are familiar, nor are we aware of any judicial attempt to formulate one. Attempts *have* been made to clarify various elements of these "rights."[4] Sachs L.J. has said: "In . . . [child protective] . . . statutes one finds scattered, sometimes with and sometimes without definitions, words and phrases such as 'care, control, custody, actual custody, legal custody, guardian, legal guardian and possession.' In the end, so far as comprehensibility is concerned, one finds that this voluminous and well-intentioned legislation has created a bureaucrat's paradise and a citizen's nightmare."[5]

11. The concept presents considerable jurisprudential difficulties of a technical nature which lie outside the scope of this Report. It is enough for present purposes to say the "rights" referred to are those arising naturally out of the relationship between parent and child. Ill-defined in number and content, these "rights" can generally be ascertained as legal rights only by reference to the curbs which the law imposes on the exercise of parental authority. A "parental right" is the right to do that which the law does not prohibit. What is clear, historically, is that these "rights," so-called, have been attenuated more and more as time went by as a result of increasing social concern for the well-being of children.

12. At common law, the father's legal right to the "custody" of his legitimate child was almost absolute. The father, not the court, was the arbiter of what was, and what was not, for the child's welfare. The court treated as sacred the right of the father to bring up his own child in his own way. "It was only in exceptional cases, where there was a risk of serious physical or moral harm to the child due to the father's cruelty or to gross corruption of the child resulting from his profligacy, that his right was liable to be forfeited."[6] Feudal concepts of "ownership" permeated the family sphere and the father's interest in the "custody" of his children was essentially a right of property. Despite the growth of the wardship jurisdiction of the Court of Chancery, exercised on behalf of the Crown as *parens patriae*, it was not until attitudes began (very slowly) to change and statute intervened to give minimal rights to the mother (at first, only the right to be heard) that the welfare principle as we would now understand it began to develop. Legislation, beginning timorously in the nineteenth

century, increasingly strengthened the "rights" of the mother's simultaneously weakening the "rights of the father, and eventually emphasising regard for the child's welfare at the expense of both. The natural culmination of this process, reflecting society's concern for the protection of its young members, was the expressed declaration in section 1 of the Guardianship of Infants Act 1925, re-enacted in the Guardianship of Minors Act 1971, that in the determination of questions of (among other things) "custody or upbringing" the child's welfare is to be regarded as "the first and paramount" consideration.[8]

13. Accordingly, where the exercise of "parental rights" is called into question in legal proceedings, the issue will be decided upon the welfare principle; that is, upon the ground that the welfare of the child is the "first and paramount consideration." As Lord MacDermott has put it (and we respectfully agree with the analysis) this means "... more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think [these words] connote a process whereby, when all relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed."[9]

14. There are now, it seems, only two existing exceptions to this rule. First, until legislation enacting the recommendations of the Stockdale Report as to unreasonable withholding of consent is passed[10] parents (not including "putative" fathers) currently have the "right" to refuse consent to adoption.[11] A refusal can be overridden, however, on the basis of several strictly defined grounds; in particular if consent is "unreasonably withheld."[12] It is now settled that reasonable parents must consider the child's welfare so that failure to do so will be a relevant factor in the determination of "reasonableness."[13] But it is not yet the law that the child's welfare shall be the first consideration in this connection. Secondly, the person with "care and control" of a child under 16 is permitted to refuse consent to a blood test performed upon that child for the sake of determining paternity.[14]

15. In truth, then, the concept of "parental rights" is now devoid of much real legal content. The law supports the existing social order. This dictates in this and most other countries, that children are best brought up in a stable family. The regulation of family life requires the beneficent exercise of parental authority, and the "rights" of children give rise to correlative parental duties. The concept of "parental rights," however, is really a chimera. It is at last, when the two concepts conflict, yielding pride of place to the concept of children's welfare; the courts have recognised this (the public, we suspect, is ambivalent about it). "We like to think that we are getting away from the conception of 'rights of parents' into the field where everything is related to the welfare of the children."[15] "Parental rights" generally have been described as "technical and often illusory."[16] "Right" to access visits has been referred to as "a basic right in the child rather than a basic right in the parent."[17] Parliament has recently qualified its use of the term, referring to parental "rights and authority" in the Guardianship Act 1973, rather than merely to "rights." The law recognises that "the rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to the issue." While these concerns can be "... capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases," the parental rights remain "qualified" and not "absolute" and "... there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations."[18] We for our part would like to see use of the proprietorial expression "parental rights" abandoned altogether. Parents have duties and they have and must have the necessary authority to perform those duties properly; that is enough. Accordingly, *we recommend that*:

> In the framing of future children's legislation, references to "parental duties" should be used where possible in place of references to "parental rights," and the existing children's legislation should be codified as soon as possible with references amended accordingly.

16. We wish to note here that, regardless of the definition of "parental rights" or the abandonment of the term, certain "parents" are virtually deprived at present of any legal recognition of this human interest in "their" children. These are fathers of illegitimate children and foster parents. Section 1 of the Guardianship Act 1973, equating the "rights and authority" of the mother and father regarding among other things "custody" and "upbringing," is expressly limited by subsection (7) to the parents of legitimate children, and only the consent of the mother is required to the adoption of her illegitimate child.[19] Foster parents derive their authority to care for the child from the child's biological parents (where the child is placed privately) or from the local authority and have no legal standing in relation to the child. Section 9 of the Guardianship of Minors Act 1971 gives only the child's mother or father the legal standing to apply for "custody" or "access"; foster parents can obtain a custody order only through wardship proceedings. And where the child has been placed with the foster parents by the local authority wardship proceedings are in practice unlikely to help much. The local authority is itself severely limited, although not rendered helpless, by section 1 (3) of the Children Act 1948 which binds it to restore a child to his

biological parents upon demand. We will refer again to this problem in our discussion of custody suits and make specific recommendations thereunder.[20] (The Stockdale Report considered this situation and suggested useful changes.) Because foster parents are currently in legal limbo excessive weight is in practice too often given to the supposed " rights " of the biological parents, without sufficient consideration of the welfare of the child and of the potentially disastrous consequences for him. The Field-Fisher Report proves the point with depressing clarity.

17. Whether the concept of " parental rights " is abandoned or not, the fact remains that there are a number of incidents or spheres of influence in the relationship between parent and child recognised by the law which do require consideration. We will list these as follows:

(1) Custody
(2) Maintenance, care, and upbringing
(3) Education
(4) Religion
(5) Health
(6) Discipline
(7) Appointment of a guardian
(8) Services
(9) Property
(10) Legal representation.

These are not exclusive; the " right " to visit; the " right " to confer on him his name, nationality, and domicile; the " right " to consent to marriage; the " right " to veto a passport application; all of these have been advanced as, possibly, " parental rights." For our part, we think these are either encompassed by the spheres of influence listed above, or else so limited by judicial interpretation as in no sense to qualify as " rights " at all.

(1) *Custody*

18. This rather unattractive word (which now usually connotes incarceration by force, as in the expression " remanded in custody ") has been used to describe various and sometimes even contradictory aspects of the parent-child relationship. In the result, the concept almost defies definition. But it repays analysis. There are two common usages which need to be carefully distinguished, one narrow, the other broad. In its narrow sense the term " custody " refers to the " right " physically to control the child, *i.e.* to have the child's physical presence under the control of the " custodian." This limited " right " is often, confusingly, referred to as " care and control." (The confusion is serious, because the main use of the expression " care and custody " is to distinguish the limited " right " of physical control from the wider " bundle of rights " comprehended when the term " custody " is used not to denote physical control but in the wider

sense we go on to mention.) In its wider sense, "custody " is used as the equivalent of " guardianship," expressing the sum of the incidents in the relationship of a natural or legal guardian with the person and property of the child. " Such guardianship embraces a ' bundle of rights ' or to be more exact, ' a bundle of powers ' . . . includ[ing] power to control education, the choice of religion, and the administration of the infant's property. They include entitlement to veto the issue of a passport and to withhold consent to marriage. They include, also, both the personal power physically to control the infant until the years of discretion and the right (originally only if some property was concerned) to apply to the courts to exercise the powers of the Crown as *parens patriae*. It is thus clear that somewhat confusingly one of the powers conferred by custody in its wide meaning is custody in its limited meaning, namely, such personal power of physical control as a parent or guardian may have." [21] In this Report, we use the term in its narrow, but really more natural, sense, *i.e.* to express " care and control." (" Guardianship " sufficiently comprehends the wider meaning and is the term used in the Stockdale Report (see paragraph 123) to include all the incidents of " custody " other than the right to consent to adoption.) We find the whole question of terminology in this field extremely troublesome. At one point in our own deliberations we adopted substitute phraseology. (We changed " custody " to " guardianship," " care and control " to " care," and " access " to " visit.") We note, wryly, that where the original Private Member's Bill provided for " guardianship " orders the Children Bill in its present form provides for " custodianship " orders (it makes a few other but only faltering steps to clarify other concepts as well). Other jurisdictions, notably West Germany, Switzerland and Texas, are also searching for more adequate terminology. (As we note at paragraph 92, *post*, in Texas a child may find himself entrusted, like an area of outstanding natural beauty perhaps, to the tender mercies of a " managing conservator "; the problem is not easy of solution.)

19. The problem is, moreover, acute; there are real difficulties in the practical application of these terms. Until the Guardianship Act 1973, it was possible for certain courts to make a " split " order under the Matrimonial Proceedings and Property Act 1970 or the Guardianship of Minors Act 1971. It was not uncommon to grant " care and control " to one parent, leaving " custody " with the other, thereby allowing the " non-custodial " parent to have a " voice " in the child's upbringing. But the Act of 1973 vests " custody " in both parents equally. Therefore, orders are now being made for " joint custody " with " care and control " to one parent. Obviously, defining the boundaries of an individual parent's authority is impossible using this language. To explain to an ordinary parent the differences between " custody " and " care and control " has often proved a task beyond the skill of those of us who practise in this field. We are ourselves

hopelessly divided over the best possible alternative terminology and *therefore we recommend that*:

> The Departmental Committee, the constitution of which we have recommended in paragraph 4 above, should study the problem of "custody" terminology and, in the interests of clarity, propose precisely defined terms for future use.

20. We pass with relief to the substance of the matter. We accept, of course, that biological parents are usually the proper persons to have "custody" of their children. This is *not* the same thing as a "right" to custody. In some cases, the biological parents are not the proper persons to whom to entrust the welfare of their child. In those instances, which may arise for any number of reasons and regardless of whether parental "fault" can be attributed, the "custody" of the child is best entrusted to others. However, as the Stockdale Report puts it: "The welfare of the child is best secured within his own family, *if he can be brought up in a stable and happy environment.*" [22] In the context of adoption, it was their view that a single parent might well be the best "custodian," particularly with help from social services. In all instances, the child's welfare is to be considered paramount, and the Stockdale Report in effect recommends dispensing with parental consent to adoption when withholding consent could conflict with the welfare principle.[23] Similarly, in one particularly stimulating piece of work on the reform of the law relating to children,[24] the authors have expressed preference for parental custody, assuming that their guidelines for the promotion of child welfare are adequately followed. After expressing their opinion that the law must make the child's needs paramount, the authors observe: "To safeguard the right of parents to raise their children as they see fit, free of government intervention except in cases of neglect and abandonment, is to safeguard each child's need for continuity. This preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship as that between parent and child." [24] We are, on the whole, inclined to agree, although the concept of "minimum state intervention" is not one to which all of us would subscribe. Accordingly, *we recommend that*:

> The biological parents, or either one of them, should have custody (care and control) of their children when the child's welfare is so best served; in all cases, however, the child's welfare must remain the first and paramount consideration.

21. If this recommendation is accepted, we see little room left for any substantive "right" to custody. We appreciate that, if taken to extremes, this apparently radical view could lead to ridiculous conclusions; theoretically, any wealthy couple could come out of the blue, offer a home to the children of parents materially less well-off, and seek to persuade a court or tribunal that it would be in the best

interests of the child if its custody was entrusted to them. But of course on no test would or could it be decided that it would be for the child's welfare to be dealt with in this way.[25] In practice, we reiterate, children are in most cases naturally best brought up by their biological parents in their own family. We do not see our proposals as constituting any dangerous threat to this fundamental rule of our social order.

22. We also appreciate that our society now includes families of different cultures, with different family values and structures. Some of them attribute particular importance to the position of the father, or to the strength of the family bond. These considerations are relevant in assessing which "custodian" might in a particular case best serve the child's welfare.

23. The "right" to "access" (another unattractive word: we much prefer the term "visit") is sometimes considered a separate "parental right," sometimes a constituent of that of "custody." Having subjugated the concept of "parental rights" to the welfare principle generally we think that principle should be applied to the question of visits, too. We do believe that a child's well-being is enhanced by maintaining, if possible, positive relationships with both his parents despite a breakdown in their relationship with each other, and, accordingly, that the child should receive visits from and make visits to the "non-custodial" parent unless his interests dictate otherwise. (At least one commentator has argued that "greater independent weight" should be attached to the "right" to visit than to the "right" to custody.[26]) We know of one American jurisdiction which has specifically adopted this principle.[27] However, we recognise that without parental co-operation these visits can be detrimental, not beneficial, to the child. Unfortunately, after the making of an order in a custody suit, the adults concerned often develop polarised attitudes; both towards each other and towards the child. Difficulties over place and timing develop; each parent speaks disparagingly of the other to the child. The whole set-up is liable to cause him to suffer. The law is really helpless in these situations and this fact must be accepted. The problem is one of attitudes, not law enforcement. Although some argue that it is better to stop visits totally in the event of tension developing, so as to protect the child, we doubt whether this counsel of despair really contributes constructively to a long-term solution, although we do not doubt that in some cases there are some parents the excision of whom from the child's life could only be for the child's welfare. We believe that guidance and assistance are the best solution, particularly when given in on-going form.

We recommend that:

> Whenever an order is made in a custody suit, it should be the duty of the Children's Ombudsman (whose constitution we recommend at paragraph 89 *post*) to see the parties, to explain to them the necessity for adopting constructive attitudes, and to

offer continued assistance and support; follow-up care should be provided in an effort to help the adults concerned resolve their problems for themselves.

We have settled the draft of a proposed Visiting Code for parents (no doubt capable of improvement). We set this out in the Appendix, and *we recommend that*:

> The Visiting Code be given to all parents at the conclusion of custody suits, to supplement the work of the "Children's Ombudsman," that visits should not be treated as a "parental right" but that they should be denied if and only if they work to the detriment of the child.

(2) *Maintenance, care and upbringing*

24. As we have indicated, we consider it to be the natural right and duty of biological parents in their children's own best interests to bring up their children in their own home and country, so that the home and country of the children will be the home and country of the parents. Parents have power, of course, to change a child's domicile or nationality by changing their own and making the appropriate applications. As long as the family tie is maintained by so doing, the home and country of the child remaining those of the parents, this is undoubtedly in the child's best interests. But the court will consider the child's welfare, and need for continuity, when the family tie is broken and there arises a conflict between parents of different nationalities.[28] This duty involves a number of matters some of which are specifically dealt with below. Speaking generally, however, we think the upbringing of a child requires his parents (biological or otherwise) to care for his life and health, to provide for his maintenance (which includes his education, under the Guardianship of Minors Act 1971, s. 20 (2)), and to stimulate the development of his emotional, social, intellectual, and physical capacities to the best advantage; in the end to turn him out of the nest fit to take his place as a responsible and participating member of the community. It is at this point that society becomes directly interested in the whole process. The parental function must be exercised in the interest of the child and with his welfare treated as the first and paramount consideration; if the parents fail, society has a right to intervene and order that other provision be made for the suitable upbringing of the child.

25. Specifically, parents have a statutory duty, under the Children and Young Persons Act 1933, s. 1, to maintain their children. This duty exists in almost every country, although the obligation varies as to its derivation and as to the person upon whom it is imposed, *i.e.* both parents jointly or merely the father. Maintenance is an obligation imposed on both parents equally in all the jurisdictions we have looked at on this point (France, West Germany, Switzerland, Denmark, Norway, Sweden, Poland, Hungary, and California). It is worth noting particularly that in Sweden, the obligation (which

extends to step-parents) continues as a conditional obligation not just until the age of majority but throughout the child's life. The obligation arises when the child is in need *and* the parent can pay.[29] In all common law jurisdictions, the obligation to maintain is enforceable by law, and "wilful neglect" is a punishable offence. In England, the Guardianship of Minors Act 1971, the Family Law Reform Act 1969, the Matrimonial Proceedings (Magistrates' Courts) Act 1960, and the Matrimonial Causes Act 1973 all provide for maintenance orders for children of various ages in various situations. (We note that the Law Commission has made suggestions for harmonisation of the legislation so that the inherent discrimination in the summary jurisdiction, which is in practice used by only one section of society, might be alleviated.[30] It is beyond the scope of this Report to assess the Law Commission's recommendations, although we are in general agreement with its proposals for "Orders in Respect of Children" so far as these proposals go. We express regret that the Law Commission recommended merely an across-the-board application of the law rather than substantive changes, and that it has not expressly recommended that the welfare of the children should be the first, let alone the paramount, consideration in the resolution of matrimonial disputes in magistrates' courts.)

26. There is room for improvement in the law relating to maintenance of dependent children. It is still possible (although the Law Commission is considering this, too) to avoid the operation of the Inheritance (Family Provision) Act 1938 as amended which precludes a parent from disinheriting his minor children altogether, but allows *inter vivos* dispositions which can swallow up the estate and effectively do the same thing. The obligation towards illegitimate children is also unsatisfactory. The Guardianship of Minors Act 1971, s. 14, precludes maintenance orders being made in favour of illegitimate children under that Act (as does the Family Reform Act 1969, s. 6). The Law Commission has recommended that magistrates' courts should have the same powers to make orders for the maintenance of illegitimate children with established paternity as it has in respect of legitimate children.[31] *We recommend that*:

> Given the statutory duty of a parent to maintain his minor child, the law should be amended to ensure so far as practicable that this occurs in fact, both for legitimate and illegitimate children, and with uniformity regardless of jurisdiction; and that further consideration be given to what amendments in the law would achieve this object.

27. Turning over the coin and looking at the other side of it, we find that in many countries, children have a reciprocal maintenance obligation in relation to their parents.[32] The duty is usually made conditional upon the parent being in actual need. France and Switzerland have included such a conditional duty of children in their laws for many years.

28. Some of us feel that adult children in our country (which has broadly similar family structures) should have a duty to maintain their indigent parents, who should not be left to be supported, if it can be avoided, by the welfare state. The argument is that family ties would be strengthened and that social benefits would accordingly accrue; the misery caused when old people are abandoned by their children is particularly noted. Others of us, recalling that no child *asks* to be born, feel that this is an impracticable attempt to change a longstanding cultural trend; that the law cannot effectively be used as an attempt to strengthen family ties; and that the proposal in effect might work disproportionately among children of the family. Accordingly, *we recommend that*:

> The Departmental Committee the constitution of which we have recommended in paragraph 4 above should give further consideration (with reference to law and practice in other jurisdictions with family structures similar to our own) to the question whether the law should impose on adult children a duty to maintain their indigent parents.

29. As indicated above, we believe that if parents fail in the performance of their duties of care and upbringing then society has a right and an obligation to intervene on the child's behalf. However, such intervention must be based on weighty (but not too narrowly defined) grounds.[33] It is of the utmost importance that children should not be left at risk with parents who are "unfit" to care for them, in the sense that they are rejecting them and subjecting them to abuse (emotional or physical or both). However, no child's upbringing is perfect. All parents have difficulties. There are degrees of inadequacy and instability. Substitute care (especially institutional care) is bound in most cases to be an inadequate and unsatisfactory last resort. Regardless of material deficiencies in the parent-child relationship or a home environment less stable than would be ideal, to remove a child from a situation he knows and place him in substitute care with a family or institution perhaps quite distant from people and places familiar to him is to disrupt his psychological balance and sense of continuity far more than do unsatisfactory conditions at home. All the psychiatric evidence indicates that it may be a greater risk, and ultimately more damaging to a child, to place him in substitute care than to leave him with loving parents (it is the love that matters) even if to some degree they are inadequate and even unstable. "In general, even 'neglected' children do best if they remain in their own home; therefore every effort should be made to treat problem families while the children remain in their own homes."[34] A duty to provide necessary supportive aid as in this situation is laid on local authorities by section 1 of the Children and Young Persons Act 1963 but rarely discharged. *We recommend that*:

> Greater efforts be made to provide such supportive assistance that children can be left in their own homes when their psychological and emotional well-being so require.

30. We also urge that any allegations of parental "unfitness" be tested by a judicial tribunal of the character to which we refer in our treatment of custody suits below. In the interests of the child, these issues should not be determined in the absence of separate legal representation for both the child and the parents. We are suggesting only that the loving parents mentioned above, quite probably themselves inarticulate, should be able effectively to urge the considerations we have set out above upon the tribunal. We do *not* suggest that these considerations should in all cases prevail. We would, however, emphasise again the difference between the parent who psychologically or physically abuses the child (the former often precedes the latter in practice) and the parent who, through poverty, ignorance, illness, or some such cause cannot "cope" but has a loving relationship with his child. In the latter case, "the first and paramount consideration" should be to avoid disruption of the family. It is quite wrong, therefore, and contrary to the welfare principle, that proceedings concerning the case of children should be prosecuted by a public authority against the parents in a one-sided battle. There must be a proper opportunity for the parents to be heard. In at least two jurisdictions in the United States, the law insists on the provision of court-appointed counsel remunerated at public expense in "neglect" proceedings: " . . . Since the state is the adversary . . . there is a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel."[35] The Children Bill makes provision for representation of parents in proceedings under the Children and Young Persons Act 1969. We welcome this, but it is not enough. *We recommend that*:

> In all proceedings affecting the care of children, parents should have the right to separate legal representation.

31. We also believe, strongly, in the necessity of separate legal representation of children in all contested adoption, guardianship, and custody proceedings affecting them. We greatly regret the excision from the Children Bill in its present form of the provisions contained in this respect when the Bill was originally introduced as a Private Member's Bill. We agree with Foster and Freed in their assertion (in their "Bill of Rights for Children") that children are persons under law, parties to the proceeding, and entitled to separate legal representation and protection in care proceedings.[36] *We recommend that*:

> In all proceedings relating to the welfare of a child, the law should provide that the child be made a party to the proceedings and be entitled to separate legal representation, to be paid for out of central funds or otherwise as may appear to the court to be just.

32. We would finally add, in this context, that a child should be brought up in the surname he is given at or near birth. This is *not* a right of the lawful father to have his children have his surname, but rather it is a reflection of the child's need for continuity and secure self-identity. A mother's remarriage and desire to adhere to social convention by having all her children bear the same name is no adequate reason to cause disruption to the child's life. (Even in refusing to allow a change of name, however, the courts appear to have based their decisions on the notion, not of the child's welfare nor even of "parental rights" generally but of the *father's* parental right in particular.[37]) We do not mean, of course, to exclude the possibility of exceptions where a change of name is certainly for the child's welfare. It *may*, sometimes, be right that a child should adopt his mother's new surname. And ". . . one can imagine cases in which it might be in the interests of a child to cease to be known by a particular name, perhaps because of some particularly unhappy association which that name might have acquired or possibly to comply with some condition contained in some trust document." [38] But it *is* only where the child would benefit by a change of name that it should be permitted; the welfare principle must prevail. No parental "right" to have a child bear a given name, or to change that name at will, should be recognised. *We recommend that*:

> Neither parent should be at liberty to change the child's name without the consent of a judicial tribunal.

(3) *Education*

33. Parents (and "every person who has actual custody of the child") have a duty imposed on them by statute to secure secular education for their child.[39] Society has assumed the responsibility of providing the means; the duty of the parents is to use them or provide an alternative. As we have already mentioned in paragraph 24 above, education is included in "maintenance" under the Guardianship of Minors Act 1971, s. 20 (2). Criminal sanctions can be imposed under the Education Act 1944, s. 39, or care proceedings begun under the Children and Young Persons Act 1969, s. 1 (2) (*e*), if the parents fail to perform this duty. (A problem arises in the case of children who have attained 16 and are receiving full-time instruction at a university, college, school or other educational establishment; we think their parents should be bound to maintain these children unless it would be unreasonable in all the circumstances to expect them to do so.) Parents often assert a "right" to determine the *manner* in which their child is to be educated, as a correlative to society's duty to provide for the child's education. This "right" is regarded as an element of "custody" in its wider sense. But if the right exists, it can derive only from a parent's status as a citizen; parents as parents have no "right" to determine the means in which society will exercise its duty. Accordingly, the assertion is far too sweeping: parents have a "right" under the Education Act 1944, s. 76; but only to have their wishes considered. That the choice they would prefer is not available does not excuse them from performance of their duty. Of course, education in either the public or private sector is permissible, and parents have freedom to choose between the two. Choice in education, however, is open to the same ironic comment, levelled at the law, about its accessibility being similar to that enjoyed by visitors to the Ritz Hotel. Whether or not this particular "right" to choose between private and public education should continue to subsist is a political question outside the scope of this Report. But conflicts over education do arise between parents, and between biological parents and foster parents. For these cases, *we recommend that*:

> In case of conflict over educational choice, the welfare principle should apply, and the court should uphold that choice which it considers to be in the child's best interests.

(4) *Religion*

34. The direction of a child's religious education (a term we use to include education according to the tenets of one sect of the same religion rather than another sect) is not subject to the same interference by society as the direction of his secular education. There is no duty imposed on parents in this connection. In the exercise of their parental authority, parents are free to give their children such religious education as they choose. The Children Act 1948, ss. 1 (3) (*b*) and 14 (2) (*c*), and the Children and Young Persons Act 1969, s. 24 (3), require the local authority to ensure that children in voluntary care, or those in care under an order of the court, respectively, are raised in the same persuasion as they would be if the children were not in care. In cases of conflict between biological parents, or between biological parents and foster parents, the court decides the dispute on the welfare principle.[40] It will not adjudicate upon the merits of differing religious beliefs; but it will decide whether a child should be brought up in one religion rather than another. In making this decision, the court will take account of the child's needs (depending on his age) the formulation of his own beliefs, and his need for continuity. (The court will however make a value judgment to this extent; it will intervene to prevent the propagation of notions conducive to antisocial, immoral or illegal behaviour offered under the guise of religious teaching.) We agree that the correct approach is to resolve conflicts about religion by reference to the welfare principle. A special problem, however, arises when a child is too young to have formed definitive beliefs of his own, but is caught in an emotive struggle between biological and foster parents. An example is Maria Colwell's case; her biological mother used the religious question as one of the grounds for supporting revocation of the care order. The social worker involved perceived this as a means of maintaining control, more than as a concern over Maria's religious upbringing, particularly given the mother's ambivalence about the

faith of her other children.[41] Since Maria had no established personal preference, the court could not decide that one religion would be " better " for her than another. In such a case the court will usually opt for the preference of the biological parent. A better approach would be based on a child's greater needs for stability and continuity, and the religious issue should be dealt with dispassionately with these considerations in mind. We note the particular importance of this problem in adoption: parents currently can make their consent to adoption subject to requirements about religious education.[42] Recommendation 55 of the Stockdale Report (see paragraphs 228 to 230) advises that this should cease to be a parental prerogative. In this, we strongly concur, and we would commend this approach generally. Parents have no " right " to enforce their own religious choice upon the child when this is inconsistent with his psychological needs. *We recommend that*:

> The recommendations of the Stockdale Report on religion should be adopted, and extended to voluntary and court-ordered care situations; religion should cease to be available for use as a lever in cases of conflict, and courts should look to the stability of the child's environment rather than to parental prerogative in instances where the child has no articulated preference.

35. When a child has formed particular beliefs, regardless of age, we think it should be regarded as an abuse of parental authority to force contrary beliefs upon him. The court, applying the welfare principle, would, we believe, agree.[43] We recognise that parents to whom their religion is of transcendental importance will be gravely distressed by their child's choice of an alternative. We also recognise that people of all ages (but particularly the impressionable young person) can make " way-out " choices in this field which they will abandon later. Nevertheless, children, if old enough to form religious beliefs, have a right to be regarded as persons with minds of their own. And " . . . the minds of children are capable at a very early age of receiving strong impressions on matters of religion. . . ." [44] It cannot be in a child's best interests to force his parents' religion upon him when he subscribes to differing dictates. We think that our proposed " Children's Ombudsman " (see paragraph 89, *post*) is the appropriate person to whom conflicts on religious matters between child and parent should in the first instance be referred. Accordingly, *we recommend that*:

> The parents of a child should have no " right " to dictate a choice of religion for him against his will. The " Children's Ombudsman " should handle conflicts between child and parents in religious matters, by conciliation if possible but by court action if necessary.

(5) *Health*

36. Clearly, parents have a duty to look after the health of their child, particularly to secure medical treatment for him if he is sick

or suffers injury. Problems arise, however, when parents hold unorthodox views about medical treatment. One such case is that of parents who believe, for religious reasons, that no medical treatment, or no orthodox medical treatment, is required in a given case, and who therefore withhold the benefit of such treatment from their child. While recognising that new medical discoveries are constantly replacing current practices, we feel the welfare principle must be applied according to currently accepted medical standards. Parents have no right to deprive their children of the benefits of accepted medical science; rather, they have a duty to ensure that they receive it. (In extreme cases, parental failure in this duty will lead to care proceedings.) Accordingly, *we recommend that*:

> The law should clearly provide that any physician who with due skill and care treats a sick or injured child in accordance with his clinical judgment has acted lawfully whether or not the child or his parents have consented to the treatment.

37. A second problem arises in relation to consent to surgical operations. In the child's own interests, the right to give this consent must rest with his parents, subject as above to the duty of the doctor to act in accordance with his clinical judgment. It should be noted that under the Family Law Reform Act 1969, s. 8, the parental prerogative in this connection ends when the child attains 16, when the child himself can consent to surgical, medical, or dental attention which would previously have required parental authorisation. (However, section 8 (3) suggests that a parental consent prevails over a minor's refusal of consent.)

38. At the moment, it is unclear what the legal position is with regard to preventive medicine: vaccination, inoculation, immunisation, and the like. Orthodox medicine would commend those procedures, but a parent is under no duty to provide them. The law does appear to sanction the parental prerogative in administering or not administering such voluntary measures. We think that this is right, but we recommend clarification of the legal position in the event of emergencies, for example, outbreaks of infectious or contagious diseases, whether or not of epidemic proportions. The welfare principle should apply, and in such a situation these normally voluntary measures should be equated with medical treatment for existing sickness or injury.

39. We turn to a very thorny problem. It has been suggested that a right to medical care and treatment inheres in children as an individual interest, separate in certain instances from any parental involvement.[45] For sensitive problems, for example, pregnancy, contraceptive and abortion information, drug abuse, or emotional disturbance, which a child feels emotionally unable to discuss with his parents, or in situations where the family is no longer intact, should the usual requirement for parental consent be suspended? Parents are responsible for their children; naturally and rightly, they

want to control or at the very least to influence their children's behaviour. On the other hand, no notion of a proprietary interest in parents can be permitted to work to the detriment of the children. (In the exceptionally sensitive circumstances we have mentioned, confidentiality, excluding the parents, can be essential.) But will society accept that the interests of the child, coupled with the concerns of public health and welfare, should together outweigh any claim of parental authority? "Statutory authority is needed to permit on the part of the professional counselling, medical care and treatment, without parental consent, if the procedure is for the benefit of the minor, and it would be unreasonable to withhold consent."[46] Indeed, it would be, but we have misgivings. Many parents will be outraged at the idea of their child receiving advice or treatment, most particularly in those sensitive areas, without their knowledge or consent. And we are aware that damage can be done by the few black sheep among doctors who abuse their professional position (especially in connection with abortion and drugs). Children need protection from these far more than they do from "strict" parents. Further, there is the question of age; we realise that a child of 12 cannot be governed by the same rules as a child of 16. But we are of the opinion that establishing an arbitrary age at which a child becomes emancipated in this respect is impossible. The exigencies of the situation and the welfare principle should determine whether parental consent should be dispensed with, not the age of the child involved. The whole problem needs further consideration and therefore *we recommend that*:

> The Departmental Committee the constitution of which we have recommended in paragraph 4 above should consider whether the law should permit medical and psychiatric professionals to dispense with the usual requirement of parental consent when the welfare of the child and of society would thereby be best served.

(6) *Discipline*

40. Parents have a duty to society to control their children; failure to do so may result in a care order being made under the Children and Young Persons Act 1969, s. 1 (2) (*d*). The implementation of this duty gives rise to some more very thorny problems, particularly the extent to which, if at all, the parents may use physical force upon the person of the child. The duty is imposed on parents in the interests of society in general. It is questionable whether it is or should be imposed on them in the interests of their children in particular; and it is questionable whether the authority to bring up a child carries with it a "right" to use physical force (whether in the form of assault or constraint) in so doing. There are some who would hold that such use is never justified. This is an extreme view; it is the fact that society sanctions the use of physical force in the upbringing of children, even though the offer of such force by one adult to another would be actionable. However, there are fortunately limits

and exceptions to society's approbation of the use of force in the upbringing of children.

41. Society does not believe in the use of "excessive" force in the name of discipline. And, as the nature (and alarmingly high incidence) of child abuse becomes better known and understood, society's ideas of what *is* "excessive" in the context of correction are being appropriately modified. The degree of physical force which is acceptable now is less than it was in the past; much less is seen or heard of the cane or the leather belt. The "cry for help" explanation of child abuse is still frequently accepted; it is no longer answered, however, at the expense of the child, as there once was a danger it would be, by exposing the child, or taking the risk of exposing him, to further abuse. (Too high a price can be paid in the interests of "keeping the family together.") It is, we fervently hope, unlikely that in future an abused child will be sent back to suffer further abuse. The authorities now offer supportive services designed to avoid this. Unfortunately, as the Field-Fisher Report demonstrated, co-ordination among such services can be unsatisfactory. To some extent, administrative failure was responsible for what happened to Maria Colwell; she was hardly a child unknown to the machinery established to protect her.[47] Social agencies have appeared incapable of detecting the psychological abuse which often precedes the use of excessive physical force, and physicians have appeared incapable of noting (admittedly, in some cases, almost imperceptible) signs of violence as indicia of child abuse, rather than of accident or disciplinary action. Public concern has been aroused but no infallible answer to the problem has been found; we hope the Field-Fisher Report will bring about a change in attitudes, and stimulate increased effort towards its resolution.

42. We recognise that young children are by no means always amenable to reason and that parents are only human. To us, the idea of physical force perpetrated by a parent against his child is unattractive. Despite our inclination to recommend that such force be forbidden (both at home and at school) we realise that the chances of either acceptance or enforcement of such a proposal are small; and in any event we ourselves would not be so unrealistic (and so hypocritical) as to suggest that a parent should never, ever, smack the bottom of an obstreperous youngster. Still, the problem is important, and we believe society has a duty to handle it significantly better than it currently does.

43. We think our proposed "Children's Ombudsman" (see paragraph 89, *post*) could provide a social recourse for the child who considers himself ill-treated: a person to whom the child can complain. He (again, we use the masculine pronoun for convenience) would be responsible not only for the resolution of such problems, either by conciliation or court action, but for co-ordination of social services provided to protect and/or benefit a child. Accordingly, the

"Children's Ombudsman" could receive complaints from third parties as well as children, an important function since children at risk will often be too young or too frightened to speak in their own behalf. The "Children's Ombudsman" could then personally direct all investigative and remedial efforts. The Field-Fisher Report, we think, reveals the need for such one person to perform this function. The neighbours' reports in Maria Colwell's case too often went unheeded or unexamined, and the various people involved lost track of their individual responsibilities [48] in the shuffle.

44. We envisage the "Children's Ombudsman" as a lawyer with special training and qualifications in child care work. He would be an officer in the Family Court system which we propose in our discussion of custody suits; see paragraph 89, *post*. (Specific recommendations about the office are included in that section of this report; see paragraph 91, *post*.)

45. We hope that careful and serious consideration will be given to this proposal. Some such reform is urgently necessary. We refer again to the movement away from treating children as chattels, and towards the treatment of children as persons, with resulting curbs imposed on the parental prerogative (see paragraph 12, *ante*). In past years and past civilisations, fathers were accorded powers of life and death over their children. No one, anywhere, would dream of justifying that now. And in our own civilisation, it is less than a century ago since the judges were emphatically refusing to interfere with any father's treatment of his own children except in the case of most serious misconduct; no one would dream of justifying that now, either. Yet continued cases of child abuse seem to undercut society's articulated concern; and society includes, plainly, too many adults whose attitudes need changing. The vital point is that something must be done to protect children from suffering, and from the risk of suffering, in their own homes, before it is too late. Criminal sanctions against parents are quite ineffective after the damage is done. Even as we try to define "excessive" force in philosophical discussions of the role of discipline in proper child rearing (and eventually move, perhaps, towards outlawing physical force altogether), we have a duty not just to wring our hands but to provide at least a stopgap solution. Parents have no right to beat their children into submission; only a duty to society to keep them under control. Accordingly, *we recommend that*:

> The office of the "Children's Ombudsman" should be used as a clearing-house for complaints and as a protective service for children at risk of violence.

(7) *Appointment of guardian*

46. This aspect of parental authority has been dealt with by recent legislation, notably the Guardianship of Minors Act 1971 ("the Act"). We think we need say no more than that we concur with

section 4 of the Act: every parent has, and should have, the right to appoint any person to be guardian of his children after his own death. Under section 3 of the Act, that guardian would serve jointly with the surviving parent or, alternatively, with any guardian appointed by that parent. In the absence of such appointment, the surviving parent serves alone. Because many parents fail to take advantage of this right, in practice "custody" generally vests in the surviving parent alone.

47. By section 6 of the Act (replacing section 6 of the Guardianship of Infants Act 1886), the High Court has discretionary powers to remove a guardian and to appoint a substitute; the test is the welfare of the minor.

48. Problems can and do arise, even where parents live together happily until one of them dies. The situation is even more unsatisfactory where, after a breakdown in the relationship of the parents with each other "custody" or "care and control" is entrusted by agreement or by order to one parent who subsequently dies. Pursuant to section 3 of the Act, the survivor becomes guardian (even though, perhaps, already found unsuitable). He may serve either jointly with a guardian appointed by the deceased parent, or, far more frequently, alone.

49. The real problem in both situations arises from the absence of any person who can or will invoke the powers of the court. When no guardian has been appointed by the deceased parent, the only person having rights and duties is the surviving parent, who cannot be expected to institute proceedings against himself. Therefore *we recommend*:

> On the death of a parent, who at the time of death was either not cohabiting with the other parent, or who had an order for "custody" made in his favour, the child's "custody" should automatically vest in the "Children's Ombudsman." The Family Court, on his application, should then cause the child's circumstances to be investigated, for the purpose of making an original or revised custody order.

50. The "Children's Ombudsman" should not be regarded as *functus officio* after an order has been made; he should be constantly aware of the child's situation, and prepared to refer the question of "custody" to the family court whenever the welfare of the child calls or may call for a change (*e.g.* on the remarriage of the widow or widower).

51. A second solution, although less effective, would be the education of the public, who, generally speaking, know next to nothing about the existing rights of a parent to appoint a guardian. We have a society in which people have been taught to take advantage of the law. They should make wills, not merely to dispose of their assets,

but also in appropriate cases to appoint guardians for their minor children. Solicitors and legal advice centres should be encouraged to advise their clients accordingly, and forms of wills now available "over the counter" should be revised. To conclude the matter of guardianship, as an alternative to the recommendation made in paragraph 49, *ante, we recommend that*:

> After careful consideration, and, where appropriate, consultation with each other, parents should appoint a testamentary guardian to ensure their children's continued well-being after their own death.

(8) *Services*

52. At present, parents have a common law right to their children's services and deprivation of such services through the tortious acts of another is actionable. This "right" grew out of a presumed master-servant relationship between parent and child; it was enforceable only against those who wrongfully disturbed this relationship, and never against the child himself.[49] We believe this right is anachronistic and ought to be abolished. We would add, however, that we believe parents can reasonably expect their child to perform routine household chores, appropriate to his age and health. This kind of minimal assistance is outside the scope of an action for loss of services. It would, perhaps, more appropriately be covered by a new action allowing a parent to recover reasonable expenses for tortious injury to a dependent child.[50]

(9) *Property*

53. In keeping with our belief that children are persons under the law and entitled to the appropriate rights and protections, we believe that a child's property is his own. His parents have no right to it. However, most of us are of the opinion that the income from a child's property should be available to his parents for his maintenance. A court order would be necessary to authorise this. *We recommend that*:

> The law should enable parents and guardians to apply to the family court (see paragraph 89, *post*) for orders of this nature.

(We do not discuss here income already payable to a parent or guardian under the provisions of a trust instrument or under section 31 of the Trustee Act 1925.)

(10) *Legal representation*

54. Parents have a duty to act as "next friends" or "guardians *ad litem*" of their minor children in legal proceedings in their behalf. We agree with this policy when the interests of parent and child coincide. However, we do not believe parents are the right people to represent their child's interests in proceedings in which their own "fitness" is challenged, or in proceedings which have become

necessary because they are unable to decide "custody" questions between themselves. We believe that in any proceedings where the child or his rights might be adversely affected by the decision in the proceedings and when he has a direct personal interest at stake, he must be considered an indispensable party to the proceedings, with the right to separate legal advice and representation.[51]

55. The Children Bill, when first introduced as a Private Member's Bill, confronted this problem squarely. The important question is whether *all* matters require separate representation of the child. The original Bill provided for separate representation of the child in certain specified proceedings (including contested adoption, custody or guardianship proceedings) and required the court to consider the child's need for such representation in *all* proceedings relating to him. We support the provisions of the original Bill and *we recommend* their implementation; we regard this omission from the Bill in its present form as a serious mistake; we hope Parliament will be persuaded to remedy it. (As we have already indicated in paragraph 31, *ante*, we think that separate legal representation of the child is not only necessary in contested custody suits but in all other proceedings affecting his welfare.)

56. In concluding this chapter of our Report, we wish to reiterate our basic premise. Parents have duties (rather than rights) for the performance of which they can be held to account. Although in all cases efforts should be made to keep the family unit intact, and to provide supportive services rather than remove the child from his home, we must in future be guided by the needs of the child and the dictates of his well-being. (We have paid only lip service to this guideline for far too long, in deference to presumed "parental rights" and out of emotional concern for "deprived" parents.) The welfare of the child must be paramount, even if that sometimes works hardly upon "unimpeachable" parents; we must avoid causing damage to "unimpeachable" children. Our discussion of custody suits and the recommendations therein are based upon these principles.

Chapter 2

Custody Suits

57. The term "custody suits" usually connotes legal proceedings in which the main question to be decided is with whom the child, the subject of the proceedings, is to live. (As we have indicated above, a subsidiary question of "access" often arises.) These proceedings are of three general varieties: (1) those between the child's biological parents, arising after a breakdown in their relationship with each other, and sometimes involving the "kidnapping" of the child; (2) those between the child's biological parent(s) and his foster parents, the so-called "tug-of-love" conflicts (sometimes showing as little "love" as was shown by one of the parties concerned in the custody suit recorded in 1 Kings 3, 16 to 28) which have generated so much public attention and private tragedy; and (3) those between biological parent and local authority, usually over a question of parental "fitness." Although the factual questions, and the nature of the conflict, differ from case to case, the needs of the child are constant, and the guidelines, if there are any, to be used in determining the question of his custody will be applicable generally.

58. We will consider the principles on which custody suits should be decided: the nature of the tribunal which should decide them: and the procedure which the tribunal ought to follow (in this connection, we will examine, in further detail, the question of representation for the child).

The principles

59. The law requires in terms that in determining custody suits the child's welfare is to be "the first and paramount consideration." [52] We emphasise that to us "paramount" means a consideration which prevails over all others, however weighty those others may be (a simple definition which might usefully be accepted as a basic principle). This, however, is not enough. The law provides the decision-maker with no guidelines for assessing a child's well-being; it offers no "checklist" of established psychological needs to assist the decision-maker to judge which alternative (when a choice is available) is most conducive to the child's welfare. Consequently, each case is left to be decided in a vacuum. Decisions are subjective based on the attitudes of a particular judge, and often influenced by the subjective evaluation of a social worker. This process is further influenced by the fact that social workers operate in a legal-social system which fosters the presumption that magistrates, at least, will return a child to the biological parent once the parent's "fitness" is proved, unless that course is clearly shown not to be in the best interests of the child.[53] "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." [54] Although the Matrimonial Causes Act 1973 does declare, in the limited context of divorce, that no decree shall be made absolute until the court is satisfied with the arrangements made for the welfare of the children, there are again no standards for assessing "satisfaction." (And it is sufficient if the court is satisfied merely that the arrangements "are the best that can be devised in the circumstances.") [55]

60. We think this haphazard approach merits serious reconsideration. The lives of children are at stake. We bear in mind that reliance on "general rules" or guidelines can do more harm than good. A century ago, the "general rule" was that a child's welfare was best served by being brought up by his father. A decade ago, the "general rule" shifted in favour of the mother. Now, neither of these "general rules" would command general acceptance. Nor should they. However, the law has not replaced them with more up-to-date guidelines, despite our ever-increasing understanding of a child's emotional and psychological needs. Can it, and should it, do so? We believe it can and should. If the welfare of the child, and not the myth of "parental rights," is really to be "paramount," then we think the law should be prepared to accept the guidance of experts in the field of child welfare (just as it would accept such guidance for physiological determinations) particularly if the expert evidence all points in the same direction; as in fact we are satisfied, after careful consideration, that it does.

61. We accept a core premise of modern psychoanalytic theory: every child "needs unbroken continuity of affectionate and stimulating relationships with an adult." [56] We are also willing to accept a rather less obvious proposition which needs to be more widely appreciated and more clearly understood: "children have no psychological conception of relationship by blood-tie until quite late in their development. . . . What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached." [57] What this means in the legal context is that recognition of the relationships established by a child with foster parents, and a frank evaluation of the significance to the child of his relationship with his biological parent(s) is essential. The fact that a biological parent previously unable to care for his child in due course becomes "fit" to resume care of the child from whom he has been separated should not automatically give him a "right" to demand the child's return to him. Case studies have demonstrated the trauma inflicted upon children even briefly separated from their mothers in the absence of an adequate substitute [58]: and experience has equally demonstrated the trauma inflicted upon children forced to return to biological parents, who, for whatever reason, have ceased to be "psychological" parents.[59] It is true that in later years some children separated in early life from their biological parents become interested

in, even obsessed with, their own origins. But in dealing with immediate problems courts must understand that the "presumption of parental preference" (*i.e.* for a biological parent) is meaningless when the child has developed a satisfactory parent-child relationship with substitute parents. The law must recognise that an enactment which gives biological parents a "right" to remove their child from such substitutes [60] cannot simultaneously force the child to accept the situation. "The forcible interruption of the relationship, besides causing distress to the fostering adults, is reacted to by the child with emotional distress and a setback of ongoing development. Such reactions do not differ from those caused by separation from, or death of, natural or adoptive parents." [61] Goldstein, Freud and Solnit suggest rules, designed to achieve final and unconditional decisions in custody suits, more drastic than some of us are willing to accept. However, we agree that the law must safeguard the child's need for continuity of relationship and make decisions in custody suits accordingly.

62. We therefore reject *any* "general rule" which favours mother over father, or biological parent over substitute parent. We believe that since, ultimately, the law cannot control the actual development of personal relationships, it should at least pay heed to such expert predictions as can be made about the *probable* development of such relationships. With these considerations in mind, guidelines might be formulated which would do more good than harm, and which would afford real assistance to those whose task it is to arrive at the best (or least unsatisfactory) placement decision in any given case. We accept the standard of Goldstein, Freud and Solnit that "placements should provide the least detrimental available alternative for safeguarding the child's growth and development." [62] *We recommend* the following "general rule":

> The welfare of any child the subject of a custody suit, or care proceedings, is best served by whatever decision will minimise the risk of his suffering (or suffering further) injury, whether emotional, psychological or physical.

63. Our suggestion depends on what we believe to be the facts, namely that there is now wide general acceptance among child psychiatrists and psychologists as to what the risks are and how they can be minimised. As indicated above, we would stress the maintenance of continuity in a child's physical and emotional environment as the primary factor. Unnecessary disruption and long periods of instability, while adults battle for "victory" in the contest over custody guarantee the child untold suffering. The risks are magnified the longer the uncertainty continues, of course subject to the child's age and maturity. We therefore accept another of the standards suggested by Goldstein, Freud and Solnit; placement decisions should reflect a child's sense of time, which greatly differs from that of an adult.[63] Decision makers must aim at restoring stability to existing

relationships or replacing those with new ones, within a period of time which will not irreparably harm the child by running over the limit of his capacity to endure loss and uncertainty.[64] The "wrong" decision, arrived at quickly, may well do less damage to the child than the "right" decision arrived at after months (or, disgracefully, years) of litigation.

64. These psychological necessities dictate an essential principle. We refer to the need for speed in determining custody suits, a concern to which lip service, but little more, is paid. It is useless to recommend that questions affecting the welfare of children should be referred to the court unless the court is ready, willing, and able to act promptly, and to ensure that those who practise before it do so too. If the court procrastinates, whether because of excessive caseloads, lack of resources, or any other reason, and does not accommodate the child's urgent needs, then the delay will do more harm than good. So much so that it might well prove better, simply because of the delay, to leave the *status quo* unchanged, although a better decision could have been arrived at if only it had been arrived at in time. Even if the lag is fostered by the best of intentions (the preparation of a welfare report or the considered assessment of alternatives between which it is difficult to choose) the benefits derived will be offset by irreparable psychological injury if it extends beyond the child's capacity to cope. For this reason, *we recommend that*:

> Custody suits should be given precedence over all other business of the court to which their determination is entrusted, and should be decided before any other issue in dispute between the same parties.

(We think it quite wrong to decide questions of divorce, separation, property, and maintenance wthout *first* deciding what is to happen to the children involved. With the exception of California, all the foreign jurisdictions we have looked at followed this more enlightened approach, at least in the granting of divorces. In Norway, disputes over the matrimonial home and maintenance are resolved only after custody has been decided. If the child's welfare is truly to be "the first and paramount concern," there can be no other approach.)

65. At this juncture we should mention our conviction that the available body of psychiatric knowledge concerning child welfare should be familiar to all those involved in custody suits, practitioners and decision makers alike. We feel a change in legal education is called for and *we recommend that*:

> Consideration should be given by the responsible authorities to the best ways of including training in the basic medical and social knowledge of child care and development as part of the Family Law syllabus for all practitioners who are to be concerned with custody suits.

(Post-graduate training is not in our view sufficient; this knowledge is needed at the basic level.)

66. We have referred above to the predicament of foster parents. They have little or no standing before the law. Specifically we are concerned about the plight of their foster children, caught in the vicissitudes of such an uncertain relationship. Having recommended abrogation of the entire concept of "parental rights," we appreciate that we cannot consistently recommend "rights" for foster parents. Still, since they are subject to the same duties as biological parents and have assumed all responsibilities of care and control,[65] we believe they are "entitled" to a voice when the child's custody is in dispute. That suggestion reflects our belief that it is in the interests of the child to accord this "right" to his foster parents. If the guidelines mentioned above are followed, it may be there will prove to be more cases in which it will be held that foster parents should retain custody of the child, and fewer in which it will hold that the child should be returned to his biological parents. At least, the experience and relationship of the foster parents with the child will be properly considered by the tribunal deciding placement; at present such tribunals often seem concerned with the "fitness" or otherwise of biological parent(s), from whom the child may have been long separated and with whom the child may never have had any continuous relationship.

67. As mentioned at paragraph 16, *ante*, foster parents (other than those of children privately fostered) derive all authority *vis-à-vis* the child from the local authority, which is bound by section 1 (3) of the Children Act 1948 to restore a child voluntarily in their care to the (biological) parent or legal guardian upon demand. The foster parents' position is even weaker if the child is subject to a care order and the local authority has "parental rights" over the child. Since the Guardianship of Minors Act 1971 does not grant standing to foster parents to apply for a custody order (although "putative" fathers of illegitimate children have such standing), their only recourse if they desire to keep the child is to institute wardship proceedings. This is often a futile procedure, given their position in relation to the local authority. As the Field-Fisher Report summarised the situation: "The present position in law seems to be that although the Chancery [now the Family] Division has the jurisdiction to intervene where a child is in the care of a local authority it will not exercise it by substituting its discretion for that of the local authority if the latter is carrying out its statutory duty properly. If, of course, for any reason it was falling short of that, then intervention is possible." [66]

68. These are intolerable circumstances, given the child's need for continuity of care. Although foster parents understand that placements are temporary, and may sign a "boarding out" agreement allowing the child to be removed upon request, their intellectual

comprehension of the legal position cannot rule the emotional bonds which may develop. From the *child's* point of view (looking to this and not to the emotions of *either* set of parents caught in the so-called "tug-of-love" conflict) it may and indeed probably will cause him serious damage to disrupt the only parent-child tie he has ever known. That he is biologically born of others or that his placement is legally "temporary" mean nothing to him: on the contrary, his foster parents may be the only persons who have ever filled his psychological needs, and may mean everything to him. This is obviously not true in every foster care situation. Not all foster parents are "ideal" parent substitutes. Indeed, "ideal" foster parents are supposed to be willing to encourage a transfer back to the biological parents [67] and to do everything possible to maintain existing relationships between the child and absent parent. However, in the cases where the biological tie has been severed, it may be that, no matter on what basis it started, there comes a time when a foster or other substitute placement can no longer be considered "temporary." [68] If the *foster* parent-child relationship evinces all the psychological and emotional elements implied in a normal "*biological* parent-child relationship," functioning happily and effectively, then in keeping with the continuity guideline and regardless of the fact that the biological parents may be "unimpeachable" parents the law should accord the foster parent-child relationship legal recognition and protection.[69]

69. Certainly this is not the present state of affairs, although the Children Bill, if enacted in its present form, will do much in the direction indicated in paragraphs 66–69, *ante*. The Field-Fisher Report, quoted specifically above,[70] emphasised that the social workers involved with Maria Colwell operated in a frame of reference which drastically limited their range of options. Given the strong presumption that the court would revoke a care order merely on proof of parental "fitness," the child-care workers did not make unfettered judgments regarding Maria Colwell's welfare, but rather tried to cope with the inevitable. It is beyond the scope of this Report to appraise the conclusions drawn in that one. Nevertheless, we think that the situation needs immediate improvement: the courts (and the social services) must feel free to express a preference as between foster parents and biological parents according to their view of the child's needs.

70. We have found no statutory time limit in any system we have examined after which foster parents acquire "guardianship" rights. In all systems, however, long-term fostering is likely to weaken the biological parents' chances of recovering custody of their child. The Stockdale Report recommended that foster parents should be permitted to apply for a "guardianship order" if the child had been in their care for not less than twelve months continuously. In this context, a "guardianship order" is similar to a "custody order";

it would "differ from an adoption order in that it would not be irrevocable, would not permanently extinguish parental rights, would not alter the child's relationship to the members of his natural family or extinguish his right to inherit from them. The natural parents would still be the parents in law, although their parental rights would be suspended." [71] Although the order would be revocable this procedure would give foster parents a legal status and independence from the local authority, while securing to some extent their relationship with the child. The Stockdale Report envisaged that most such orders would be made with the agreement of the biological parent, although such consent would not be necessary.[72] The Report envisages that a biological parent might prefer this arrangement to the finality of adoption.[73] The Children Bill in its present form incorporates provisions in Part II for the making of "custodianship" orders; these provisions, broadly speaking, follow the Stockdale Report's recommendations in relation to "guardianship orders."

71. We support these provisions of the Children Bill, although we disagree with the imposition of the arbitrary time limits which it lays down. Court orders must be made with regard to the child's sense of time, not some "reasonable" period from the parental perspective. Beyond the immediate context of the "custodianship" order, we fully support this kind of thinking, demonstrating as it does a move away from a presumption of parental rights and toward a truer consideration of the welfare of the child. Courts must not be willing to revoke care orders merely on proof of "fitness" advanced on behalf of the biological parents, but only on showing that the child would benefit by revocation of the order. Social service administrators must be able clearly to evaluate the child's needs, without pressure from legal assumptions in favour of the biological parents. *We recommend that*:

> Tribunals should give critical evaluation to the child's relationship with foster parents as well as to that with biological parents; substitute parents should be able to apply for a "custodianship" type of order at any time, and placement will be decided according to the continuity guideline, without initial preference for the "blood-tie."

72. We are disturbed by the fact that foster parents are currently excluded from the hearing of an application for revocation of a care order relating to their foster child. The child's welfare demands that the foster parents should be heard before a placement decision is made. In the case of Maria Colwell, her foster parents "were not told the date of the hearing, and were not present; nor were they told the result. They had no right in law to be notified as they were not 'parties' to the proceedings, and unless needed as witnesses by a party no right to give evidence." [74] We believe not only that foster parents are entitled to more compassionate treatment, given

their considerable involvement, but also that the interests of the child demands representation of their position, by welfare report or personal appearance. *We recommend that*:

> In the interests of the child foster parents be given notice of the hearing of an application for revocation of a care order and a right to be heard, if the welfare of the child so requires it, in the proceedings.

73. We would add a final word regarding the other unrepresented party: fathers of illegitimate children. Putative fathers do have the right to apply for "custody" under section 14 of the Guardianship of Minors Act 1971, although they have no right to withhold consent to an adoption under section 5 of the Adoption Act 1958.[75] The Stockdale Report recommends in relation to adoption that the putative father's interest be finally determined in any "relinquishment" proceedings (proceedings for transfer of the mother's "parental rights" to an adoption agency).[76] The Children Bill in its present form contains no provision for the putative father's interests to be considered at all, even if his identity is known, and he has been involved in the child's upbringing and maintenance, nor are the putative father's interests considered when the child is taken into care under section 1 of the Children Act 1948. He has no right to be heard at care proceedings and no means (except the remedy, unlikely to help him, of instituting wardship proceedings) of obtaining access to the child while in care.

74. We do not wish to improve the position of the putative father and give him the right to remove the child from care under section 1 (3) because, as we will state in paragraph 76, we are concerned to limit this parental "right." However, there is a clear distinction between the parental "right" to take such a step, which must be subordinated to the welfare of the child, and the parental "right" to be heard in court on the question of his child's custody. We reject the distinction which is drawn between the father of a legitimate child and the father of an illegitimate child under the 1948 Act, the latter having no right of appeal against a local authority's decision to keep his child in care.

75. Recently, a Divisional Court of the Queen's Bench Division declared that the putative father's right to apply for custody under the Guardianship of Minors Act 1971 remains unimpaired by the assumption of the mother's "parental rights" by the local authority under section 2 of the Children Act 1948.[77] While we applaud this decision, it seems to be out of line with the trend of earlier authority and we would like to see the putative father's right to be heard when his child is in care clearly established. This right should vest in a parent regardless of his status. Here we must add that nothing in this recommendation is intended to detract from the principle that the onus lies on the father, if he wishes to be heard, to seek a hearing

in court. It is not for the court or social workers to seek him out; this can cause endless delay harmful to the child. We are seeking to assist only those putative fathers who have taken an active interest in their children.

76. We think the current situation is discriminatory and unreasonable; to a child, his father is his father, whether he be born legitimate or not. *We recommend that*:

> Fathers of illegitimate children who have been concerned in their upbringing and maintenance should be given notice of care proceedings affecting their children; a right to be heard at such proceedings; and a right to apply to the court for visitation privileges when the child is in the care of a local authority.

77. Having said this, we think it appropriate to mention a particular "parental right" which has led to difficulties in connection with custody suits. We refer to the "right," or supposed right, of parents to remove a child from the care of others and take him back into their own care.[78] This "right" was the subject of a number of recommendations made in the Stockdale Report. The concern is to protect children living in what may conveniently be called "substitute care" from the disruption which parents can cause simply by "claiming" their child.

78. This can happen in any case of a child in substitute care, with three main exceptions: first, where the child is already protected by a care order or other order of the court; second, where the child, as a protected child, is already the subject of adoption proceedings; and third, where the local authority has "assumed parental rights" over him under section 2 of the Children Act 1948. The Stockdale Report made three recommendations of direct relevance. First, it recommended that the law should require 28 days' notice of removal of a child who has been in the care of a local authority for one year or more, and that during this period of notice it should not be possible to remove the child without the permission of the authority.[79] Second, it recommended that local authorities should have discretion to assume parental rights, not just on the grounds mentioned in section 2 of the Children Act 1948, but in the case of any child who has been in their care for three years.[80] Third, it recommended that where foster parents who have cared for a child for five years or more apply for an adoption or guardianship order, the biological parents should not be able to remove the child before the hearing without the leave of the court.[81] These recommendations are implemented in the Children Bill (clauses 46, 47 and 34 respectively; clause 34 specifies a period of three years in place of the period of five years recommended in the Stockdale Report).

79. The Stockdale Report's recommendations and the Children Bill involve a number of time limits, intended to balance the "claims" of biological parents against the "claims" of others; for example,

foster parents. These time limits may have to be accepted as the price of getting the legislation through; but it *is* important to note that the time limits are those thought to be reasonable from the point of view of the *adults* involved. The Stockdale Report takes no account of what time limits, if any, should be considered reasonable from the point of view of the *child*. We do not suggest that they were altogether unaware of the child's perspective of time. Plainly they were aware of this problem, but, as we have indicated above, the essential point is that a child's sense of time is different from an adult's and differs at differing ages. We appreciate the inconvenience of not having any time limits in the legislation, but in our view they are unacceptable in principle. To a young child a few days may seem like eternity, and a brief separation can do grave psychological damage. Strictly limited, however, time limits are tolerable; indeed, unavoidable. By way of compromise of a number of differing views, *we recommend that*:

> In case of dispute, no child over six months old who has been in substitute care for more than four weeks should be removed from that care without the consent of the court.

(We appreciate that there may be cases for which exceptions to this rule ought to be made, but we have found ourselves unable to spell out these exceptions in detail.)

80. In an ideal world, it would be best for the law to provide that even in the absence of dispute no child should be removed from substitute care without the consent of the court, provided the court follows our recommendation above and acts quickly. (Sometimes foster parents and local authorities take the line of least resistance despite their own misgivings, and the child suffers as a result of some step taken which an independent agency would recognise as detrimental to the child's best interests.) To recommend this, however, would be to ignore the impossibility of making available the resources of finance and trained staff, that would be necessary, and we therefore refrain from so doing at this time. We hope it might one day prove practicable for the law so to provide.

81. Returning to general principles, we would like to see some statutory guidelines laid down particularly for the benefit of the lower courts to supplement the rule that the welfare of the child is the first and paramount consideration in all custody cases. The court should be directed to consider a number of specific matters relevant to the issue, for example, the length of time for which the child has been in the care of one or other of the parties; the alternative home and day-to-day caring arrangements each party can offer; whether there is or is likely to be a step-parent and whether that person's relationship with the child has been ascertained; whether the child has ever been placed in substitute care; and so on.

82. If the court has a duty to consider a wide-ranging category of

specific matters relevant to the child's welfare, this may help to ensure that crucial evidence is not overlooked, deliberately left out, or under-valued.

83. For those wary of the imposition of guidelines on those who have to take the decisions, we would add in closing that all such cases will still be decided on their own facts. Indeed, they must be. Each child's circumstances must be individually assessed, and predictions made in that context as to which alternative or choice will best promote his welfare. This is the *raison d'être* of custody suits.

84. However, we think an appreciation of the overriding importance of promoting a child's psychological and emotional well-being, coupled with an understanding of how this can best be achieved, would be a great leap forward in this field. If our suggestions had guided those concerned with the cases which caused the public disquiet mentioned in paragraph 7 of this Report, most, if not all, would have had, at least, less unhappy endings. Our suggestions, we appreciate, run counter to the concept of "parental rights," and it may be society is not ready for this. If not, it ought to be. Otherwise we fear that society will pay the price of its unwillingness to learn from experience: it will pay that price in the form of children damaged not only by those responsible for their upbringing (which the law can rarely prevent) but also by the law itself, in its refusal to put the real "rights" of children before the mythical "rights" of their parents.

The tribunal

85. At present, jurisdiction over custody suits is vested in a number of different courts under a number of different statutes. Expertise varies from court to court, as do rules and procedures and remedies available. The Guardianship of Minors Act 1971 permits the Family Division of the High Court, county courts, or magistrates' courts to make orders about custody or visits upon application of the mother or father. The Matrimonial Proceedings (Magistrates' Courts) Act 1960 grants powers in relation to children in conjunction with the matrimonial jurisdiction of magistrates' courts. Custody orders can be made to run until a child is 16 and magistrates may, in exceptional circumstances, commit a child to the care of a local authority. The High Court and county courts may make orders with regard to custody and care and control in proceedings for decrees of nullity of marriage, divorce or judicial separation under the Matrimonial Proceedings and Property Act 1970: the relevant provisions may now be found in the Matrimonial Causes Act 1973. As noted above at paragraph 25, the powers of the separate jurisdictions are disparate and discriminatory, since only the lowest socio-economic classes use the "police courts," the other classes preferring the "divorce" jurisdiction.[82] This confusion, and its inbred inequities, gives rise to a need for unity. "Unity implies the need to rationalise the structure

and manpower arrangements of the courts which grant matrimonial remedies, to abolish the double standard through the reform of the substantive matrimonial law, and to establish uniformity of procedures."[83]

86. In several of our recommendations above, we have mentioned a tribunal in which all jurisdiction over custody suits and related matters would be vested. There is a wide disparity of views over the direction in which law reform should go. The Law Commission in its Working Paper No. 53 sought only to harmonise the law in the summary and superior jurisdictions; the Finer Report recommended a "thoroughly unified system of matrimonial law applied through an institutional system which reflects that unity."[84] Our own thinking as to such a system was moving on lines which, as we found on its publication, were very similar to those mapped out in the Finer Report. We are therefore content broadly to support its recommendations for the constitution of what is really required: a "family court."

87. Before noting the essential features of our family court we should clarify its jurisdiction. In other systems, most of them in the United States, the family court absorbs all areas of family stress. It has both civil and criminal jurisdiction, and therefore handles all family problems in either sphere: juvenile delinquency, matrimonial problems, guardianship and custody disputes, domestic assaults, child neglect and cruelty, adoption, affiliation. The Finer Report's recommendation, however, is to limit the family court here to a purely civil jurisdiction. It takes the view that matrimonial disputes and other areas of family distress need to be handled with special sensitivity, and that a court devoted to the solution of problems in these areas must be untainted by any connection with the resolution of criminal cases. Despite the fact that juvenile delinquency is considered a problem of family law, the Finer Report expresses a preference for keeping that jurisdiction in the juvenile court so as to maintain the "undiluted civil jurisdiction" of the family court.[85] The Finer Report does note, however, a problem with care proceedings under the Children and Young Persons Act 1969, currently held in juvenile courts.[86] The conditions required by Part I of the Act to be found before the court makes a care order are normally those associated with family breakdown, presumptively vesting jurisdiction in the family court. Section 1 (2) (*f*) of the Act, however (which cannot apply to a child under 10), permits such an order if the child or young person is "guilty of an offence, excluding homicide." To transfer this jurisdiction to the family court would be to involve it in investigations and findings of delinquent behaviour, thereby muddying its waters. The Finer Report found "no neat solution" for this problem and left it alone.[87]

88. We ourselves find it very difficult to decide whether the inclusion of juvenile delinquency in the new jurisdiction would be desirable. Rather than leave juvenile delinquency entirely to the jurisdiction

of magistrates' courts and shift it lock, stock and barrel to the family court, we suggest a middle ground. Because we are persuaded that to as great an extent as possible *all* cases involving children should be heard in the family court, *we recommend that*:

> There should be a two-stage review for juvenile delinquency cases. All such cases should arise in the family court. Those clearly outside the family sphere should then be referred to the juvenile court.

As for the problem of care proceedings, juvenile court magistrates have long been aware of the contradictory nature of the punitive and remedial aspects of their work. Because, "care proceedings are civil proceedings," [88] we have a strong preference towards their removal from the juvenile court. Therefore, *we recommend that*:

> With the possible exception of cases arising under section 1 (2) (*f*), care proceedings under all other sections of Part I of the Children and Young Persons Act 1969 should be placed within the jurisdiction of the family court.

We have borne in mind that even where children are concerned, there is nothing for it but to leave to the criminal law that which is its proper province. If a husband assaults his wife or a father batters his baby, the wrong done to society is at least as great as if he assaults someone else's wife or batters someone else's baby. Indeed, it is a great pity that the police (who can provide, and sometimes do provide, a quick and effective first-line social service) have too frequently failed in the past to intervene in this sort of situation on the plea that the matter is purely "domestic." Not that we blame them. They have instinctively, perhaps explicitly, felt the difficulty we grapple with now. Our view is this: if a parent or a child commits a criminal offence he must be dealt with according to the criminal law, unless there is some manifest reason to the contrary. He should, obviously, not be allowed to plead marriage, or parenthood or childhood, as some sort of defence. What is necessary is that the law should articulate precisely what falls within the ambit of the criminal jurisdiction. Apart from anything else, a parent or child accused of a criminal offence and who wishes to deny the accusation is entitled to a proper trial and verdict, and should not be deprived of these because the offence is in some way connected with his status as a parent or a child. Once it is recognised that the problem to be dealt with does not involve a criminal offence then its solution should not involve the assistance of anything or anyone connected with the criminal jurisdiction. If, however, the problem *does* involve a criminal offence, then its solution may, but need not necessarily, involve that assistance. In a doubtful case, we think the family court should decide the question; but an accused person who wants to be tried in a criminal court should have the right to demand it.

89. As to the structure of the family court, we are content to adopt the Finer Report's recommendations as our own. So far as is relevant

for our purposes, these were (with one exception, our recommendation of the constitution of a "Children's Ombudsman") as follow, and *we recommend that*:

(a) There should be constituted a new institution of the character described below, to be known as the "family court," to which the task of deciding custody suits would be entrusted. The family court must be of high status. (We reiterate here that high quality is essential to the success of the venture, and, more important, to assure the welfare of the children involved.)
(b) The family court would be a judicial institution (reflecting the fact that the problems before it, including custody suits, should be determined by people trained impartially to evaluate conflicting arguments); the bench must be of high calibre and properly qualified to evaluate social problems in their legal setting.
(c) The family court would be a unified institution in a system of family law which applied a uniform set of legal rules according to clearly understood principles.
(d) The family court would be staffed by professional judges and magistrates with special qualifications, experience or interest in the work. All of these, including the professional judges, would have suitable training so as to span the disciplines of law and the relevant applied social sciences.
(e) The family court would have two tiers: the Family Division of the High Court would remain in being as the top tier of the family court and as its link with the rest of the higher judicial system. The local branches of the court, comprising the first tier, would be drawn from the county court judges and the local bench of magistrates. (There might be an intermediate tier between the local tier and the top tier handling appeals on questions of fact, including differences of opinion between social workers or other experts; this procedure is somewhat complex and may be unnecessary.)
(f) Custody suits would be dealt with by a court constituted of a professional judge and two magistrates, not all of the same sex.
(g) Custody suits would be heard in the buildings used by the county court (or, when appropriate, the High Court) rather than in magistrates' court buildings. (This is in keeping with our desire that the family court should be free of all association with what are thought of as the "police courts.")
(h) The family court would include among its staff a new officer, having training in both law and applied social sciences. Among other things, his duty would be to act as overseer of children's interests in custody suits. We have referred to him already in our report as the "Children's Ombudsman."

90. We will now elaborate upon the last recommendation made above. A factor which has oppressed us in considering the broad subject of children's welfare in our society is the fragmentation of

responsibility for children in trouble or at risk. As the Field-Fisher Report demonstrated, numerous people may be involved: the child; the biological parents; the foster parents; concerned third parties such as neighbours; the N.S.P.C.C.; the local authority's social services; general practitioners and hospital services; the school; the police; the probation service; the lawyers; and the courts. No doubt there are others we have not mentioned. Nowhere are all these people necessarily in touch with each other. Someone gets missed.

91. The role we envisage for the Children's Ombudsman includes that of a clearing agency, one branch at each family court. Everyone would know of his existence and would be expected to report to him. All relevant information would end up under one hand. He would have the power to request a welfare report whenever he thought it necessary. On behalf of a child the subject of a custody suit, he would act as the child's spokesman and would have the duty of instructing solicitors and counsel to represent the child's interests so that the interests of the child might be separately represented to the court independently of the adults and local or other authorities concerned. (He would have the power to do so in other legal proceedings as well.) As the child's spokesman, it would be his particular duty to ensure that the views of any child able to express them, verbally or otherwise, were ascertained in the absence of the parents or other adult "custodian" and then made known to the tribunal. He would be responsible to the Lord Chancellor (the traditional delegate of the Crown as *parens patriae*).

92. We find unfortunate the decision in *H.* v. *H.*,[89] where the Court of Appeal held that judges cannot grant promises of confidentiality to children they meet in chambers. As the Field-Fisher Report indicates, children rarely have the opportunity to communicate privately with social service workers or other people in authority concerned about their welfare.[90] Often, however, the child himself, even when quite young, can articulate what is in his own best interests; at least he can make it clear to a trained person where he believes he will be loved and secure. Foreign systems vary widely in their willingness to listen to the child. We will give a few examples. In Norway, children over 12 are interviewed "as a rule." In California, the judge's authority is purely discretionary. In West Germany, consideration is currently being given to a proposal giving the positive preference of a child over 14 full implementation, unless that preference is held to be against his own best interests. In Texas, a child over 14 is permitted to choose his own "managing conservator" (a position similar to "guardian") subject to court approval.[91] Regardless, however, of whether the court actually hears the *child*, it is absolutely necessary that his *views* be ascertained and represented. The Children's Ombudsman would, of course, act as the link between the child on the one hand and his solicitor and counsel on the other hand.

93. We appreciate that the idea of such an authority for children is novel, in this country at any rate. In other countries, notably the Scandinavian and East European countries, there do exist varying forms of children's authority intended to fulfil the sort of function we have described. No doubt, if the idea were accepted, a great deal more thought would have to be given to the detailed operation of the office, and we appreciate that it would be impossible to carry it into effect without the provision of trained personnel and considerable funds. We have, nonetheless, thought it right to offer the idea for consideration. In our opinion, it affords by far the best hope of avoiding those tragedies affecting children which have led to so much concern and which are now known to be only the tip of the iceberg.

94. We would add a further recommendation. A large number of fully trained social workers are required to care for the growing numbers of known child abuse cases. We appreciate that in the present economic climate it would be over-optimistic to expect the provision of sufficient funds to obtain increased professional staff. Yet the need is urgent. The Field-Fisher Report mentions the extent of the work load (which seems to have been excessive) handled by Maria Colwell's social worker, and this situation is reported by social workers the country over. A useful step to prevent further deterioration of the position would be the establishment of offices in London and other urban areas under the direction of the Children's Ombudsman (*not* the local authority social services departments). To him, *all* known and suspected cases of infant or child abuse would be required by law to be reported. Accordingly, *we recommend*:

> The establishment of such local offices under the direction of the Children's Ombudsman, performing a similar "clearing agency" function in child abuse cases as they would perform for children involved in custody suits.

95. In any case where an abused child is returned to his home, and pending the availability of more professional workers, a voluntary worker should be attached to the family to act as an informal but legally responsible caretaker of the child's welfare. This voluntary worker (perhaps of the kind now used by the Inner London Education Authority on its care committees) would have to keep in regular touch with the child through weekly or monthly visits, as the circumstances warranted. This contact would mitigate the present serious shortage of fully qualified welfare workers able to visit children and their families on a frequent and regular basis.

96. This regular contact with the child at risk would best be carried out on behalf of the Children's Ombudsman, rather than under the supervision of the local authority, whose welfare workers need the confidence of their adult clients and sometimes identify with them. The "caretakers" should not be officers of the courts, but would

work in conjunction with them as well as with the local authority social service departments. Ideally, each caretaker would be assigned to no more than two homes, and thus might provide a closer relationship with the child than is presently possible. Any circumstances which appeared to call for intervention would be referred to the Children's Ombudsman.

97. It is important to realise that there are already hundreds of such "caretakers" in the London area alone, working as Care Committee visitors. From this group (their recruitment should be stepped up) we hope there would be some suitable candidates willing and capable to bear the added responsibility of a legally supervised position; marriage guidance counsellors would also be suitable people to use in this role. A "caretaker" programme could be developed quite rapidly, if the idea proved attractive.

98. Given the fact that children at risk cannot wait for Committee Reports (especially those which involve expenditure from central funds) to wend their way through long processes of consultation and budgetary approval, we think this recommendation very important. It does no good to consider a child's welfare paramount in the court-room without some real support outside it. The problem of on-going care is acute. At worst, its absence leads to tragedy; at best, it relegates numbers of children to continued instability and uncertainty. *We recommend that*:

> Voluntary "caretakers," responsible to the Children's Ombudsman, be assigned to any child who has suffered known ill-treatment, for the purpose of providing regular visits and continuous supervision and assistance.

The procedure

99. The most important point here is one we have made frequently throughout this Report; representation for the child is essential. We reiterate again the need for extensive education in child development and applied social sciences in conjunction with legal training, and that the standard of legal expertise must be high. When a child's welfare is in the balance, there is no room for incompetence. In any custody suit, whether parents are "battling" against each other or against the state, the interests of the child cannot be presumed to coincide with those of either disputant. Because a child has a direct personal interest in the proceedings and his rights may be adversely affected by it, he needs the help of a lawyer (instructed by a competent spokesman) whose only goal is adequate representation of his interests.[92] Further, in all custody suits every lawyer (not just the child's) should have the paramountcy of the child's welfare fixed firmly in his mind. We recognise that the claims of the client must weigh heavily with the lawyers acting for the adults concerned. But they must observe complete fairness and frankness between themselves, avoiding the tactical and strategic ploys which play an

important part in the war-game of ordinary litigation (see further paragraph 101 *post*). We also insist that a child is a person and requires independent and expert representation as a matter of right; we applaud the trenchant observation made in the United States Supreme Court upholding this right: "The condition of being a boy does not justify a Kangaroo Court."[93]

100. We believe that such representation is needed in *any* legal proceedings where the child's welfare is under consideration, not merely in custody suits. We have recommended that in the first instance that representation should be provided by the Children's Ombudsman, whose duty it will be to instruct solicitors (and, if necessary, counsel). Alternatively (and particularly pending the establishment of the Children's Ombudsman), it might be the court, after private interview with the child. In no case should it be the local authority or other social service agency; although their reports are important to an informed decision (and indeed we believe that no custody change should occur without a welfare inquiry) they are bound to adhere to administrative policy and to preconceptions about the legal system, and cannot be objectively impartial about the child's need for further representation. The Official Solicitor, who has a wealth of experience, should act as the child's representative in the top tier of the family court, and would instruct counsel when necessary as is his present practice. In other cases, the Children's Ombudsman would use solicitors in private practice willing and qualified to undertake the work; we have indicated above our belief that such qualifications in the relevant approved social sciences would be an integral part of the professional training of such solicitors (see paragraph 65, *ante*). In this context, we would add that lawyers, like the courts, must for reasons which must (we hope) be by now glaringly obvious, give custody suits priority over other work and, if legal aid is required, obtain emergency certificates immediately. Given better training, and a new sensitivity to a child's sense of time, this should follow as a matter of course. At the moment, however, practitioners too often deal with these matters in the ordinary course of business; or, worse, put them on one side if they are unfamiliar with the work or consider it difficult or unremunerative. We also reiterate (see the views we express in paragraph 30, *ante*), that parents too should be separately represented, particularly when the contest is between themselves on the one hand and the local authority on the other. To summarise, *we recommend that*:

> In all cases where a child's welfare is under consideration, the child should be separately represented. The Children's Ombudsman should bear the responsibility of instructing solicitors and counsel in the family court; and all cases should be handled with the urgency they deserve according to the *child's* sense of time.

101. A less important but much debated question is whether the family court should adopt an inquisitorial, as distinct from an accusatorial or adversary, system of procedure. The short answer is "a mixture of both"; we do not think the two are mutually exclusive. The Finer Report expresses the same conclusion.[94] Ordinary civil litigation follows the adversary system. It can be characterised as a clearly defined war-game, played according to well-settled rules, with a "winner" and a "loser," and the court acting as referee. The parties themselves define the issues and choose the evidence to be presented. The court has no independent right to collect information. The inquisitorial system, on the other hand, enables the court to control the case more effectively and to act as an investigative agency, informing *itself* of the facts and circumstances crucial to a just determination of the suit. (The court already has a duty of sorts to "satisfy" itself about the arrangements for the children of the marriage in its divorce jurisdiction.[95]) But in our opinion the court should *not* become an investigative agency. It should be an impartial legal tribunal, divorced from the ancillary services it calls upon for assistance. It will hear evidence tested by cross-examination, and will treat custody suits as the proper subject of judicial process. However, it will not hesitate to call for any material information, be it by way of expert assessment or social welfare inquiry. We believe, too, that any party, including (through his representative) the child, should be able to require a welfare report without a court order, which would then be available to all the parties unless the court decides otherwise. In all cases, such a report will be available to the parties' lawyers. In this way, we hope the attitude of practitioners will shift from competitive to co-operative. The attitude of the court, and the attitudes of those who practice in it, must be that all concerned are working together to arrive at whatever decision is in the best interests of the child, the most important party. The only "winner" should be the child. *We recommend that*:

> Proceedings in the family court should follow the general rules of civil procedure; the court must be free to obtain all information it thinks necessary, but should remain an impartial judicial arbiter.

102. One other aspect of the existing procedure in custody suits which calls for review is its apparent inefficiency in dealing with "kidnap" cases, especially those involving a foreign element. Cases in which a child is taken by one of his parents to a foreign country without the consent of the other parent and, sometimes, in defiance of a court order, have caused much concern. We think our proposals above should remove some of the difficulties. The separate representation of the child in the family court is the best protection against such errors as, for example, a failure to seek a stay of execution pending an appeal (such an error was the root cause of the difficulty in one much-publicised case). But we have certain other reforms to suggest as well. *We recommend that*:

(a) The police should be charged with the duty of assisting to trace and recover all kidnapped children. (They sometimes do this voluntarily, as in the case of wards of court,[96] but more often refuse on the grounds that the matter is "domestic.")
(b) Passports should not bear the name of or be issued to a child without the written consent of both his parents (or, if one of them has an order for sole custody, of that parent) or an order of the court.
(c) The United Kingdom should adopt the 1961 Hague Convention concerning the Powers of Authorities and the Law applicable in Respect of the Protection of Infants.

103. The most important provision of the Hague Convention was that disputes relating to children should be decided by the country of the child's "habitual residence,"[97] subject to intervention by the State of the child's nationality when necessary.[98] Because English law is founded on the welfare principle, which takes precedence over comity, this country is unable to ratify the Convention. The English court will consider the courts of the country of "ordinary residence" as having "pre-eminent jurisdiction." But it *will* accept jurisdiction, and it *may* exercise it if the child (1) is present in England; (2) is ordinarily resident in England; or (3) is a British subject.[99] Accordingly, an English court can and sometimes will make an order which conflicts with a foreign court order. We believe all countries should adopt the welfare principle; but in cases involving a foreign element, this principle should be relaxed in favour of adoption of the Hague Convention. International comity so demands and the practical implications should be minimal given the similarity of basic principles and tendencies in foreign jurisdictions towards reform already noted in paragraph 1, *ante*.

104. Finally we would like to improve the effectiveness of the procedure available in custody disputes to prevent the child from being spirited out of the jurisdiction of the English courts. The procedure is simple; it consists of the issue of an Originating Summons in the Family Division of the High Court the effect of which is to make the child a ward of court. The fact that the child has been made a ward can be communicated by telephone to the Home Office which will, on request, "block" the ports, including the airports. If the child is a citizen of the United Kingdom and Colonies, the Passport Office can also be informed and requested not to issue a new passport to the child or include him on anyone else's. If the child is a citizen of a foreign country, the country's Embassy in London can also be informed and requested to refrain from issuing a new passport to the child. The procedure itself is probably as effective as the nature of the problem permits.

105. However, it is not enough, because of what is sometimes called the "Irish Gap," *i.e.* the fact that there is no passport control between England and Eire. (There is also no passport control between England

and Scotland, and conflicts of jurisdiction between these two countries sometimes arise, but in the case of Eire the problem is accentuated by the fact that it is a foreign country.) The presence of foreign Embassies in Dublin greatly facilitates travel out of Eire.

106. We appreciate that the introduction of passport control between England and Eire would carry with it important implications outside the scope of this report.

107. There would, however be another way of tackling the problem, namely by agreement (such as one which exists between France and Belgium) among the various jurisdictions to be found within the British Isles. *We recommend that*:

Diplomatic effort be directed to the formulation of an agreement among the jurisdictions within the British Isles to the effect that:

(a) wardship proceedings commenced within any one jurisdiction can be deemed to be proceedings commenced in all the other jurisdictions (so that there would be no necessity to commence further originating proceedings in, for instance, Eire or Scotland); and

(b) the "kidnapped" child be returned forthwith to the jurisdiction of the proceedings first in time.

CONCLUSION

108. We recognise that some of our recommendations may not command immediate and general acceptance. Although we believe society is moving away from the concept of "parental rights" towards the concept of "children's rights," it is still at an early stage of the journey. The process needs to be given a greater sense of urgency; what is needed is a change in attitudes, supported by the law. Society voices concern for the welfare of children and professes to give that principle legal priority; but it has not been willing to introduce the steps necessary to implement the principle in practice. We have had too many words and too little action. No doubt all social reforms must take their place in the queue marked "Priorities." But the children of today are the parents of tomorrow. Those who order the queue will, we hope, reflect on the sort of society for which they will be responsible if they fail to make the needs of children their "first and paramount consideration."

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. That a Departmental Committee be appointed by the Secretaries of State for Social Services and for Home Affairs to review family law in general and the law relating to children in particular, and to consider what changes in law, procedure and practice are desirable; but that its deliberations should not be permitted to delay reforms which may commend themselves for implementation before those deliberations are concluded (para. 4).

2. In the framing of future children's legislation, references to "parental duties" should be used where possible in place of references to "parental rights." Legislation should be codified as soon as possible with references amended accordingly (para. 15).

3. The Departmental Committee, the constitution of which we have recommended in paragraph 4, should study the problem of "custody" terminology and, in the interests of clarity, propose precisely defined terms for future use (para. 19).

4. The biological parents, or either one of them, should have custody (care and control) of their children when the child's welfare is so best served. In all cases, however, the child's welfare must remain the first and paramount consideration (para. 20).

5. Whenever an order is made in a custody suit, it should be the duty of the Children's Ombudsman (whose constitution we recommended in para. 89) to see the parties, to explain to them the necessity for adopting constructive attitudes, and to offer continued assistance and support; follow-up care should be provided in an effort to help the adults concerned resolve their problems for themselves (para. 23).

6. The Visiting Code (see the Appendix) should be given to all parents at the conclusion of custody suits, to supplement the work of the Children's Ombudsman; that visits should *not* be treated as a "parental right," but that they should be denied if and only if they work to the detriment of the child (para. 23).

7. Given the statutory duty of a parent to maintain his minor child, the law should be amended to ensure so far as practicable that this occurs in fact, both for legitimate and illegitimate children, and with uniformity regardless of jurisdiction; and that further consideration be given to what amendments in the law would achieve this object (para. 26).

8. The Departmental Committee, the constitution of which we have recommended in paragraph 4, should give further consideration (with reference to law and practice in other jurisdictions with family

structures similar to our own) to the question whether the law should impose on adult children a duty to maintain their indigent parents (para. 28).

9. Greater efforts should be made to provide such supportive assistance that children can be left in their own homes when their psychological and emotional well-being so require.

10. In all proceedings affecting the care of children, parents should have the right to separate legal representation (para. 30).

11. In all proceedings relating to the welfare of a child the law should provide that the child be made a party to the proceedings and be entitled to separate legal representation, to be paid for out of central funds or otherwise as may appear to the court to be just (para. 31).

12. Neither parent should be at liberty to change the child's name without the consent of a judicial tribunal (para. 32).

13. In cases of conflict over educational choice, the welfare principle should apply and the court should uphold that choice which it considers to be in the child's best interests (para. 33).

14. The recommendations of the Stockdale Report on religion should be adopted and extended to voluntary and court-order care situations; religion should cease to be available for use as a lever in cases of conflict and courts should look to the stability of the child's environment rather than to parental prerogative in instances where the child has no articulated preference (para. 34).

15. The parents of a child should have no " right " to dictate a choice of religion for him against his will. The Children's Ombudsman should handle conflicts between child and parent on religious matters by conciliation if possible but by court action if necessary (para. 35).

16. The law should clearly provide that any physician who with due skill and care treats a sick or injured child in accordance with his clinical judgment has acted lawfully whether or not the child or his parents have consented to the treatment (para. 36).

17. The Departmental Committee, the constitution of which we have recommended in para. 4, should consider whether the law should permit medical and psychiatric professionals to dispense with the usual requirement of parental consent when the welfare of the child and of society would thereby be best served (para. 39).

18. The office of the Children's Ombudsman should be used as a clearinghouse for complaints and as a protective service for children at risk of violence (para. 45).

19. On the death of a parent, who at the time of death was either not cohabiting with the other parent or who had an order for " custody," the child's " custody " should automatically vest in the Children's Ombudsman; the family court, on his application, should then cause the child's circumstances to be investigated for the purpose of making an original or revised custody order (para. 49).

20. Alternatively after careful consideration and where appropriate consultation with each other, parents should appoint a testamentary guardian to ensure their children's continued well-being after their own death (para. 51).

21. The common law right to children's services ought to be abolished (para. 52).

22. The law should enable parents and guardians to apply to the family court for an order permitting the income of a child's property to be applied for the maintenance of the child (para. 53).

23. The provisions of the Children Bill (in its original form) relating to the separate legal representation of children should be adopted (para. 55).

24. It should be accepted as a " general rule " that the welfare of any child who is the subject of a custody suit, or care proceedings, is best served by whatever decision will minimise the risk of his suffering (or suffering further) injury, whether emotional, psychological or physical (para. 62).

25. Custody suits should be given precedence over all other business of the court to which their determination is entrusted, and should be decided before any other issue in dispute between the same parties (para. 64).

26. Consideration should be given by the responsible authorities to the best ways of including training in the basic medical and social knowledge of child care and development as part of the Family Law syllabus for all practitioners who are to be concerned with custody suits (para. 65).

27. Tribunals should give critical evaluation to the child's relationship with foster parents as well as to that with biological parents; substitute parents should be able to apply for a " custodianship " type of order at any time, and placement will be decided according to the continuity guideline, without initial preference for the " bloodtie " (para. 71).

28. In the interests of the child, foster parents should be given notice of the hearing of an application for revocation of care order and a right to be heard, if the welfare of the child so requires it, in the proceedings (para. 72).

29. Fathers of illegitimate children who have been concerned in their upbringing and maintenance should be given notice of care proceedings affecting their children; a right to be heard at such

proceedings; and a right to apply to the court for visiting privileges when the child is in the care of a local authority (para. 76).

30. In cases of dispute, no child over six months old who has been in substitute care for more than four weeks should be removed from that care without the consent of the court (para. 79).

31. There should be established a new "family court" (for specific recommendations on its composition see para. 89, *ante*) including, as a new officer, the "Children's Ombudsman" to whom we have referred.

32. There should be established local "caretaking" offices under the direction of the Children's Ombudsman (para. 94).

33. Voluntary "caretakers," responsible to the Children's Ombudsman, should be assigned to any child who has suffered known ill treatment, for the purpose of providing regular visits and continuous supervision and assistance (para. 98).

34. In all cases where a child's welfare is under consideration, the child should be separately represented. The Children's Ombudsman should bear the responsibility of instructing solicitors and counsel in the family court; and all cases should be handled with the urgency they deserve according to the child's sense of time (para. 100).

35. Proceedings in the family court should follow the general rules of civil procedure. The court must be free to obtain all information it thinks necessary, but should remain an impartial judicial arbiter (para. 101).

36. In kidnap cases:

(a) the police should be charged with the duty of assisting to trace and recover all kidnapped children;
(b) passports should not bear the name of or be issued to a child without the written consent of both his parents (or if one of them has an order for sole custody, of that parent) or an order of the court;
(c) the United Kingdom should adopt the 1961 Hague Convention concerning the Powers of Authorities and the Law applicable in Respect of the Protection of Infants (para. 102).

37. Diplomatic effort should be directed to the formulation of an agreement among the jurisdictions within the Brtish Isles to the effect that:

(a) Wardship proceedings commenced within any one jurisdiction should be deemed to be proceedings commenced in all the other jurisdictions (so that there would be no necessity to commence further originating proceedings in, for instance, Eire or Scotland); and
(b) The "kidnapped" child should be returned forthwith to the jurisdiction of the proceedings first in time (para. 107).

APPENDIX

Proposed Visiting Code

Needs of children

All young children NEED to have the opportunity to love and be loved by both parents, in security. They NEED to be able to enjoy parental love without tension, and without being made to feel guilty through the jealousy or demands of either or both parents. A balanced and stable love relationship with both parents is the best introduction to the formation of relationships with their contemporaries of both sexes.

Children of estranged, separated and divorced parents particularly NEED to be able to enjoy both parents without seductive or hostile pressures by either, without questioning, devaluation, smear or recrimination by either parent, and without disturbing the normal rhythms of life or being made conspicuous among other children.

Children NEED to see their estranged parents behaving towards each other if not with warmth and understanding, then at least with courtesy and consideration. Their most important NEED in this connection is that both parents accept that visits are primarily the right of the child and not that of the parent.

Needs of estranged, separated and divorced parents

Both parents NEED to feel secure in their children's love, and to be able to receive love and express their own without competition. To be with their children only in public places is not enough. All parents NEED opportunities to relate to their children in the more intimate scenes of life and when their children are in trouble.

Both parents NEED to be able to look to the future and perhaps to form new relationships of their own that can include, in appropriate ways, the children of their broken marriage.

Some common misconceptions

When children are unhappy or disturbed by parental visits, the parents with care and the visiting parents commonly come to conflicting conclusions about the causes. For example:

	Parents with care	*Visiting parents*
1.	That children's anxiety about parental visits, unwillingness to go, and attempts to refuse are due to:	
	fear, dislike of, or anger with the visiting parents.	indoctrination by, or the children's need to curry favour with, the parents with care.

2. That children's eagerness to go with the visiting parents is due to:

the visiting parents' bribery, promises and "spoiling."	the children's eagerness to see them and to get away from the parents with care.

3. That children's hostility and rudeness to the visiting parents when with the latter is due to:

fear or dislike of, or anger with, the visiting parent.	indoctrination by the parent with care.

4. That children's unwillingness to part from the visiting parents is due to:

bribery and spoiling by the visiting parent.	love for and desire to stay with them the visiting parent.

5. That children's rudeness, hostility, sleep disturbances, etc. on return are due to:

indoctrination and bribery by the visiting parent.	dislike of, or anger with the parent with care, or fear of recrimination because of enjoyment of the visit.

6. That the remedy for these difficulties is:

to reduce or deny access.	to obtain care of the children themselves.

Any or all of these conclusions are likely to be false, though, of course, they may be true sometimes. When children spend nearly all their time in the care of one parent on whom they depend for food and pleasure and all the solid satisfactions of childhood, and for daily help in petty troubles, this parent will probably be paramount in their regard.

Visiting parents may have no more than three or four hours each week in which to influence their children; often they are allowed to be with them only in public places. Many visiting parents feel constrained to compete with the parent with care by giving lavish presents and making promises out of their power to keep.

In such circumstances the influence of visiting parents is weak in comparison with that of parents with care; and it follows that disturbances in the children are more likely to result from the attitudes to the visits of the parent with care than from the conduct of the visiting parent. Reduction of access may be followed by less visible disturbance, but it is not reasonable to suppose that reduction will help to resolve problems arising out of children's need to love both parents; the contrary is more likely.

How can childrens' needs be supplied?

1. The children's need to feel that both parents approve of the visit can be supplied, partially at least, by customarily arranging the handover and return from parent to parent with a few minutes conversation, a cup of tea or whatever may be helpful. Parents with care would be wise to try to share in the children's pleasure from the visit.

2. Visiting parents should ideally have a home to which to take the children. Parks, restaurants, cinemas and visits to the seaside are not the staple fare of parent-child relationships. Wherever possible, short staying access should be allowed to provide the intimacy lacking in day visits; but obviously in the case of very young children in the care of their mother, this is impracticable unless an appropriate mother-figure is available in the other home.

Pre-school children

In principle, visits should be frequent (but not more often than weekly), usually for half a day and should include a major meal. Some children can enjoy whole-day visits and where conditions are suitable overnight stays, say, one or two nights at one or two monthly intervals, can be beneficial. The children's response is the best guide.

Complete regularity of day and time each week can interfere with children's normal social lives and tie down both parents unnecessarily. It is better to vary the day, provided the children understand why. Generous parental attitudes about variations and absences, and also occasional unexpected "treats" (which should be fixed in advance by the parents) can do a lot of good all round.

Older children

In principle, visits can be less frequent, perhaps less than once a week unless the children ask for more. Visits should last all day, with appropriate meals. Staying access is important. An unvarying weekly time for the visit can seriously interfere with school children's normal lives, deprive them of social opportunities and also make them conspicuous.

Many school children, and their parents, prefer not to have regular day visits but to arrange, say, a long weekend a month, with week-long staying access during Christmas and Easter school holidays and a fortnight or more in the summer. It is usually a good idea to arrange some more casual day visits or relatively unplanned excursions (cleared in advance with the parent with care).

Where children are at boarding school the plan of visiting during term time and holiday stays need thinking out as a whole, in consultation with the children, who must always be told in advance the reasons for any change of plan, or telephoned personally in the event of an unforeseen problem.

REMEMBER that to those (many) children who want nothing other

than to live happily with both parents, parental visits can be recurrent reminders of their unhappiness.

Parents who love their children will be at great pains to give their children as much happiness and as little pain as possible in connection with the visits.

Some important DON'TS for parents

(a) DON'T make standing arrangements inconvenient to any party so that there is a " built-in " strain.

(b) DON'T be rigidly regular—always the same day and time each week can easily become a bind.

(c) DON'T forget the children's private lives—*e.g.* a favourite weekly " telly " programme, other children's birthday parties, etc.

(d) DON'T have a pre-school child taken out of its usual home too frequently—visiting more frequently than weekly, if desired by the child, may well be better arranged at the child's home.

(e) DON'T carp or criticise before, during or after access visits—the child may be hurt.

(f) DON'T force the visiting parent to rely on tea-shops, the park and the cinema—this soon becomes trying for both parties and may lead the parent to bribe and promise pies in the sky.

(g) DON'T regularly arrange for the hand-over and return of the child to be undertaken by a third party, for example, a grandparent or other relative, or a universal aunt or solicitor's clerk. A civil and courteous exchange, even if very brief, between estranged, separated or divorced parents can be very valuable to the child, who needs to be able to love both parents without feeling guilty.

(h) DON'T send anybody as a bodyguard or spy on staying visits; this defeats the main object of the stay and injects dangerous tension into the visit. This is not to say that a person should not be present, if this be the wish of both parents—and the child.

(j) DON'T try to bribe the child with presents or promises; although they may accept them, children will usually see through the reason for them and no one will benefit.

ABOVE ALL, remember that access visits are for the good of the child and are not a parental right; that perceptible acrimony between parents may ruin the visit for the child, and that sensitive children may well feel humiliated at being apparently the cause of fights between the two people they love most.

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MISCELLANEOUS

The Ninth Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, 1961.

NOTES

[1] In our quest for information from foreign jurisdictions, we made heavy demands on personal friends and contacts abroad. We are indebted to them for their extreme kindness and thoroughness in complying with our requests. We wish to thank and gratefully acknowledge the help we receive from: Mademoiselle Mauricette Craffe of the Centre National de la Recherche Scientifique, Paris; Professor Dieter Giesen, Free University of Berlin; Professor Aidan R. Gough, University of Santa Clara and formerly Executive Director of the California Governor's Commission on the Family; Professor Samuel Stoljar, Australian National University at Canberra; Maria Stypulkowska, Polish lawyer; Karin Bruzelius, Head of Division, Ministry of Justice, Norway; and Judge I. M. Pedersen, Court of Appeal, East Denmark. (We should add, returning home, our thanks to the Official Solicitor, Mr. Norman Turner, and to Her Honour Judge Jean Graham Hall, both of whom, in their private capacities, gave us much assistance.)

[2] The jurisdictions with which we became to some extent familiar, either through personal contact or published material, are France, West Germany, Switzerland, Denmark, Norway, Sweden, Poland, Hungary, and in the United States, California and Texas.

[3] See, for example, Foster, H. and Freed, D., " A Bill of Rights for Children " (1972) VI *Family Law Quarterly*, No. 4, p. 345; *Children's Rights: Towards The Liberation of The Child* (Panther, 1972); the National Council for Civil Liberties discussion papers: " Children Have Rights " (1971); Advisory Centre for Education, a draft " Charter for Children's Rights," *Where ?*, Apr. 1971; Christine Sachs, " Children's Rights," essay in *Fundamental Rights* (1973), edited by Lasok *et al.*

[4] See, for example, Sachs L.J., defining " custody " in *Hewer* v. *Bryant* [1970] 1 Q.B. 357, 371–373.

[5] *Ibid.* p. 371.

[6] H. K. Bevan, *The Law Relating to Children* (1973), p. 257. See also J. C. Hall, " The Waning of Parental Rights " [1972B] C.L.J. 248 and J. M. Eekelaar, " What Are Parental Rights?" (1973) 89 L.Q.R. 210.

[7] Custody of Infants Acts 1839, 1873; Matrimonial Causes Acts 1857, 1878; Guardianship of Infants Acts 1886, 1891.

[8] S. 1 of the Guardianship of Minors Act 1971 provides: " Where in any proceedings before any court (whether or not a court as defined in s. 15 of this Act)—(*a*) the custody or upbringing of a minor; or (*b*) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question, the court, in deciding that question, *shall regard the welfare of the minor as the first and paramount consideration*, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such

custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father." (Emphasis added.)

[9] *J.* v. *C.* [1970] A.C. 668, 710–711.

[10] Paras. 18, 218.

[11] Adoption Act 1958, s. 4.

[12] *Ibid.* s. 5 (1) (*b*).

[13] *Re W.* [1971] A.C. 682.

[14] Family Law Reform Act 1969, s. 21 (3).

[15] Sir George Baker, President of the Family Division, reported in *The Times*, June 19, 1974.

[16] Latey J., *Y.* v. *Y.* [1973] Fam. 147, 153.

[17] Wrangham J., *M.* v. *M.* [1973] 2 All E.R. 81, 85.

[18] Lord MacDermott in *J.* v. *C.* [1970] A.C. 668 at p. 715.

[19] *Re M.* [1957] 2 Q.B. 479.

[20] See the Field-Fisher Report, para. 229, and paras. 67 to 71, *post*, for further discussion of this problem.

[21] Sachs L.J. in *Hewer* v. *Bryant* [1970] 1 Q.B. 357, 373.

[22] Para. 15; emphasis added.

[23] *Ibid.* paras. 18 and 218.

[24] Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* (1973), pp. 7–8.

[25] In that area of trust law relevant to the welfare of children, the Court of Appeal has already demonstrated an admirable ability to distinguish between the material and non-material well-being of the child. In *Re Weston's Settlements* [1969] 1 Ch. 223 Lord Denning M.R. (refusing to sanction the removal of a trust to Jersey, for tax purposes) said: " But I think it is necessary to add this third proposition: (iii) The court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit. There are many things in life more worth while than money. One of these things is to be brought up in this our England, which is still ' the envy of less happier lands.' I do not believe it is for the benefit of children to be uprooted from England and transported to another country simply to avoid tax." Nor do we believe it is for the benefit of children to be " uprooted " at all, either to enhance their material well-being or to give effect to some mythical " parental right."

[26] Eekelaar (1973) 89 L.Q.R. 210, 219, *ante*. See for another view *Goldstein, Freud and Solnit, ante*, at p. 38; they believe the decision should be left solely to the " custodial " parent, so that the court could not intervene to enforce a visitation order.

[27] Texas Family Code, s. 14.03 (*c*), 1973.

[28] In *Re L.* [1974] 1 W.L.R. 250 at p. 264, Buckley L.J. said, " . . . to take a child from his native land, to remove him to another country where his native tongue was not spoken, to divorce him from the social customs and contacts to which he had been accustomed, to interrupt his education and subject him to a foreign system of education, were all examples of acts certain to be psychologically disturbing, particularly

at a time when his family life was also disrupted." We entirely agree with this approach.

[29] Parental Rights and Duties, Including Guardianship, UN Report 1968, pp. 50 *et seq.* (the " UN Report ").

[30] Law Commission Working Paper No. 53, Family Law: Matrimonial Proceedings in Magistrates' Courts.

[31] *Ibid.* paras. 162–163.

[32] The UN Report, pp. 61 *et seq.*

[33] The sorts of consideration we think relevant are discussed at para. 81, *post.*

[34] Wald, *General Principles for Volume One on Child Neglect,* Standard 1, 3.

[35] *Cleaver* v. *Wilcox,* 40 U.S.L.W. 2658, 2659 (1972): *Re Ella R. B.,* 30 N.Y. 2d 352, 285 N.E. 2d 288, 290, 334 N.Y.S. 2d 133, 136 (1972). We would add that even in the case of uncontested applications, representation of all " parties " is required to avoid the acceptance of unchallenged testimony which may produce a result detrimental to the child (see the Field-Fisher Report, para. 68). The Children Bill's provisions in this respect are welcome.

[36] *Foster and Freed, ante,* p. 345.

[37] See *Re T.* [1963] Ch. 238; *Re D.* [1973] Fam. 209.

[38] Buckley J. in *Re T.* [1963] Ch. 238, 242.

[39] Education Act 1944, s. 36.

[40] See *J.* v. *C., ante,* note 9.

[41] The Field-Fisher Report, para. 22.

[42] Adoption Act 1958, s. 4 (2).

[43] See *Stourton* v. *Stourton* (1857) 8 De G.M. & G. 760 (the child, only 9, was interviewed by the Lords Justice).

[44] *Ibid.* p. 772.

[45] *Foster and Freed, ante,* pp. 358–364.

[46] *Ibid.* p. 364.

[47] See particularly the conclusions of the Field-Fisher Report at paras. 240–246.

[48] The Field-Fisher Report, para. 152.

[49] See *Bevan, ante,* pp. 451–452.

[50] This recommendation was not adopted in the Law Reform (Miscellaneous Provisions) Act 1970, although considered before the Act was passed.

[51] This definition of the child's " indispensability " as a party echoes that of Goldstein, Freud and Solnit, *ante,* at p. 65.

[52] See note 8, *ante.*

[53] The Field-Fisher Report; the majority and minority opinions concur at paras. 42 and 314 respectively.

[54] *Ibid.,* para. 314.

[55] Matrimonial Causes Act 1973, s. 41 (1) (*b*) (i).

[56] *Goldstein, Freud and Solnit, ante.,* p. 6.

[57] *Ibid.* pp. 12–13.

[58] Robertson, J. and J., " Young Children in Brief Separation, A Fresh Look," (1971) 26 *The Psychoanalytic Study of the Child* 264.

[59] Note the condition of Maria Colwell, described in the Field-Fisher Report at paras. 45 *et seq.*, she resisted the visits before the return, ran away after the return, and even began fantasising about her foster parents.

[60] The Children Act 1948, s. 1 (3).

[61] *Goldstein, Freud and Solnit, ante.,* p. 27.

[62] *Ibid.* p. 53.

[63] *Ibid.* p. 40.

[64] See the Robertson study, noted at note 7, *ante,* and those of Anna Freud and Dorothy Burlingham, " Infants Without Families: Reports on the Hampstead Nurseries," *The Writings of Anna Freud* (New York, 1973), Vol. III.

[65] See *Bevan, ante,* p. 375.

[66] The Field-Fisher Report, para. 229.

[67] *Ibid.* para. 17.

[68] *Goldstein, Freud and Solnit, ante,* p. 39.

[69] The courts at present tend to start with the proposition that unimpeachable parents have initial " rights," regardless of whether there has been long term fostering.

[70] See note 2, *ante,* and accompanying text.

[71] The Stockdale Report, para. 123.

[72] *Ibid.* para. 125.

[73] *Ibid.* para. 126.

[74] The Field-Fisher Report, para. 69.

[75] See the Stockdale Report, para. 192.

[76] *Ibid.* para. 195.

[77] *R.* v. *Oxford City Justices* [1974] 2 All E.R. 356.

[78] This " right " derives from section 1 (3) of the Children Act 1948.

[79] The Stockdale Report, para. 152.

[80] *Ibid.* para. 156.

[81] *Ibid.* para. 164.

[82] Law Commission Working Paper No. 53, para. 18; The Finer Report, para. 4.286.

[83] The Finer Report, para. 4.341.

[84] *Ibid.* para. 4.278.

[85] *Ibid.* para. 4.362.

[86] *Ibid.* para. 4.363.

[87] *Ibid.*

[88] *Court Guide on the Children and Young Persons Act* 1969, published by the Home Office.

[89] [1974] 1 All E.R. 1145.

[90] The Field-Fisher Report, para. 209 *et seq.*

[91] Information obtained from various sources acknowledged in note 1, *ante;* Texas Family Code, s. 14.07 (1973).

[92] *Goldstein, Freud and Solnit, ante*, pp. 65–66; *Foster and Freed, ante*, pp. 353–354.
[93] *Re Gault*, 387 U.S. 1, 28 (1967).
[94] The Finer Report, para. 4.405.
[95] Matrimonial Causes Act 1973, s. 41.
[96] See *The Times*, Nov. 28, 1973.
[97] Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants (1961), Art. 1.
[98] *Ibid.*, Art. 4 (1).
[99] See *Re P. (G. E.) (An Infant)* [1965] Ch. 568.

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