Guide to the Family Law Act 1996

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Foreword

The Family Law Act 1996 will provide the framework for divorce and separation, for mediation and for disputes involving domestic violence for many years to come.

It will be up to the family lawyers to ensure that the Act lives up to its principles in supporting marriage and, if divorce or separation are inevitable, then in concluding the arrangements with minimum distress to the parties and their children and promoting a good continuing relationship. Any risk of violence is to be removed or diminished so far as is practicable. It will be important to understand and promote the opportunities for marriage guidance and mediation and to work co-operatively with the professionals working in those fields.

Above all, it will be necessary to understand the framework of the Act in order to assist clients through the new process and help them to achieve their objectives. This book will prove an invaluable guide to practitioners in understanding how the new Act compares with the old and acting as a springboard to effective practice under a new and challenging regime for Family Law.

RICHARD SAX
London
September 1996

Richard Sax is a Partner in the family law department of Manches and Co. He is a past Chairman of the Solicitors' Family Law Association and a member of the Law Society's Family Law Committee. He sits as a Deputy District Judge at the Principal Registry of the Family Division. He is secretary/treasurer of the European Chapter of the International Academy of Matrimonial Lawyers. He lectures and contributes to the media widely. He is joint co-author of 'Know How for Family Lawyers' published by Longmans, and joint general editor of Butterworths' Family Law Service.

Author's note

There is so much in the Family Law Act 1996 that is sensible, practical and a logical development of earlier reforms (and which is also in tune with contemporary social and legal philosophy) that one wonders why so much largely unproductive fuss was made when it was going through Parliament. However, it does suffer from flaws, ambiguities, and a great deal of diffuse and imprecise language: one of the most startling commentaries is the view of the Lord Chancellor's Department that the reintroduction of conduct, *inter alia,* in s 25(2)(g) of the Matrimonial Causes Act 1973 (which is thoughtfully buried deep in a Schedule), would have an effect which could be described as 'neutral'. Family practitioners currently put out to grass may well wonder if they will be able to return to remunerative employment.

Conversely, it remains controversial that, as far as the actual ground goes, we shall now finally have no fault divorce (and no fault legal separation, since the two remedies are to be assimilated in all except their final result on marital status). They are now to be called divorce or separation orders, rather than decrees, and to be granted on the basis of no more than a statement of marital breakdown and a period for reflection and consideration during which all arrangements for the post divorce (or separation) future, for both the parties and their children, if any, are normally to be finalised *before* the order is made. Although the Act imports an improved protection in a new hardship bar which permits successful resistance to a divorce order on the basis of hardship of any kind, either to the resistant spouse or to a child of the family, there were clear signs in the House of Commons debate that this is still going to upset some people. One Honourable Member, actually a practitioner from Devon, read out a distressing letter from a constituent who obviously felt that no fault divorce with no opportunity to make amends was even worse than the present system where the law recognises the subjective feelings of a petitioner as to what he feels to be unreasonable. Another Honourable Member felt that 'the contract of marriage will become an empty one ... there will be no rights and duties, no standards of behaviour, no commitment ... Under the proposed new law marriage will be terminable with less formality than, for example, the ending of a lease or the hiring of a car …'. Ruth Deech, Principal of St Anne's College, Oxford, a well known family lawyer who was a young Law Commission researcher at the time of the Divorce Reform Act 1969, has also written of her concern about our adoption of no fault divorce when several of the North American States who adopted it a generation ago now want to revert to their former systems.

Richard Sax, taking time off from his lectures on the Act for the Law Society, made an important point in his Foreword (for which I thank him, together with his other invaluable help in the rapid production of this brief introductory Guide). He feels that it will be up to family lawyers at least to maintain standards in supporting marriage and, if breakdown is irreparable, in cooperating with professionals in marriage guidance and mediation in bringing the marriage to an end with the minimum distress to the family as a whole, and in the interests of promoting an

ongoing post divorce quality relationship between divorced parents *inter se*, and between them and their children. To a great extent these principles are already reflected in the work of the Solicitors Family Law Association and their members. It is to be hoped that mediators will in turn recognise the importance of working within a legal framework, as pointed out by Lord Meston, QC, who monitored the Act for the Family Law Bar Association, in the second reading debate in the House of Lords.

It would have been good to have had longer than the publishers allowed to consider the total impact of such an innovative statute, but I look forward to a more comprehensive edition of this Guide when the promised regulations and new rules of court are available. Meanwhile we can only await with impatience the early implementation sometime in 1997 of the codification of the law of domestic violence in Part IV.

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Introduction to the Family Law Act 1996

Background

The Family Law Act 1996 finally completed its stormy passage through Parliament on 27 June this year and received the royal assent on 4 July. While *none* of it will be in force for a year (when the consolidation of the law of domestic violence in Part IV of the Act is expected to be implemented) and the remainder of the Act is not expected to be effective until as far ahead as 1999, the changes it will make in the law of divorce and separation are so radical that they cannot be ignored for even some part of the lengthy period before the new provisions become operative. Of course academics and social commentators are always glad of new legislation to analyse and assess, but in the case of this Act the greater shock may be to practitioners, because the Act not only changes the substantive law but foreshadows new and innovative procedural rules, and for the first time in the history of divorce and separation requires lawyers to interact extensively with other professionals, notably mediators who, though not previously completely unknown in divorce, are now to assume a greatly enhanced role. Marriage counselling, which has always played rather a token role in the divorce drama, is also to be relaunched and introduced officially into the new package.

Further, as if all these practical changes were not enough, those in the substantive law are even more far reaching. While it is true that the ground for divorce is now to be finally free of fault (something to which earlier reforms paid lip service but never achieved) conduct is now apparently back on the scene, potentially in a form which we have not seen for many years. Moreover, precisely how much conduct will now influence decisions is not clear from the Act, and may require further elucidation through case law rather than any guide from the regulations and rules of court still to be made which may illuminate other grey areas.

Thus while lawyers may at first worry that their livelihood is threatened by the introduction (not to mention the *funding*) of mediation and marriage counselling as an alternative to either matrimonial litigation or out of court settlement negotiated by them, the reality may be that the renewed role of conduct in both child and financial issues will give the Act a new subtitle: suggestions include the 'Family Practitioners Welfare Act'!

This was certainly not the intention behind the new legislation, which was based on two thoughtful Law Commission reports, each with a draft Bill annexed,

ie *Looking to the Future: Mediation and the Ground for Divorce*, (Law Comm 192 of 1990) and *Domestic Violence and Occupation of the Family Home* (Law Comm 207 of 1992), and on the strong view of both lawyers (academics *and* practitioners) and public opinion that previous reforms had been insufficient to achieve a civilised dissolution of marriages which had broken down, and that they were also inappropriate to reflect the contemporary philosophy that both the commitment of marriage and the social importance of the intact family unit should be encouraged and supported wherever possible. Further, a strong feeling emerged from some reported cases in the superior courts which deplored the wastefulness of parties fighting over limited resources on legal aid, and running up bills which far exceeded the value of the assets disputed. Lawyers, not the parties, were cast as the villains here, and a widely held view formed to the effect that something should be done to staunch this haemorrhage of both public funds and the parties' own money – because whatever the result, the loser drained the former and the winner also lost out through the application of the statutory charge under s 16(6) of the Legal Aid Act 1988 to property recovered or preserved in the suit. Cynics were not slow to note, however, that the Lord Chancellor was probably only too glad to seize the opportunity to slash the legal aid budget by promoting mediation at a fraction of legal aid bills for divorce. Indeed, when the Family Law Act 1996 finally reached its second reading, comments were still being made in the debate in the House of Lords about legislation 'driven by Treasury urgency to cut the legal aid budget' (*Hansard* vol 567 p 700, 30 November 1995).

It was also felt that there should be changes to bring the divorce and separation process closer to the welfare philosophy in the Children Act 1969, so that the future of children after their parents' divorce should be more closely controlled, and perhaps divorce even *prevented* in some cases.

When it comes into force, the Act will therefore further update the progress made by the Divorce Reform Act 1969 and the Matrimonial Causes Act 1973 (which tried to introduce technical no fault divorce by making irretrievable breakdown the ground, but fudged the issue by retaining fault as *evidence* of such breakdown). The alternatives of both consensual and non-consensual separation, so revolutionary when first introduced in that last round of reform now more than 20 years ago, are in the 1996 Act themselves replaced, along with the traditional matrimonial faults of adultery, behaviour and desertion, by unilateral notification of marital breakdown. The new Act retains the absolute bar on initiating divorce proceedings (and thus makes a gesture at discouraging precipitate suits) within the first year from the date of the marriage, as became settled practice after the Matrimonial Causes Act 1973 was amended to enact this in 1984. It will also broadly retain the existing ancillary relief scheme, which largely still dates from 1973 subject to the important 1984 amendment which provided the 'clean break', promptly abolishing the routine concept of the 'meal ticket for life' for dependent spouses – usually wives – who *could* work but often chose not to. However, an important change is that under the new Act ancillary relief will, in all but exceptional cases, be required to be settled *before* a divorce order is granted and not, as often happens now, be permitted to drag on, sometimes long after decree absolute.

There is no doubt that in consolidating the law of domestic violence the Act has made that section of the law easier to use. The effect of the new divorce and separation provisions, including the encouragement of mediation and counselling, and of the other services – eg general marriage counselling, perhaps at crisis points in married people's lives so as to prevent preventable divorce – and above all the funding of them are not, however, as clear, and in the absence of a crystal ball in which to view the future when regulations under the Act and new rules of court will have been made, it may be that many a practitioner, even on a cursory reading of the Act, will advise clients contemplating matrimonial proceedings to take speedy advantage of the existing law, which may have imperfections but which does have the great merit of having been tried and tested over some years so that it is possible to advise on outcomes with a reasonable degree of certainty. The only disadvantage of following this course is that it may preclude the obsessively honest client from waiting to obtain a divorce or separation which is *truly* based on no fault, being the product of the unilateral or consensual statement of marital breakdown, which is the really radical change contemplated by the Act for the millennium and beyond. Although the present system which requires either separation or technical fault (whether or not that in fact imports moral blame, which it most often does not) has served well enough for two and a half decades, debates in Parliament about whether no fault divorce should be allowed at all show that this does still matter keenly to some people. As Lord Craigmyle put it at the second reading in the House of Lords ' "No fault" is the fault line': *Hansard* vol 567 p 717, 30 November 1995.

The scheme of the Act

The new law of domestic violence is now to be found in Part IV. Parts I and II contain the new law of divorce and separation and provide for marriage counselling and marriage support services, Part II provides for mediation and Part V for separate representation for children. The Schedules dot the 'i's and cross the 't's, amending in particular the existing law of ancillary relief and the Children Act, and Schedule 10 provides a comprehensive table of repeals. There is much new terminology, even in Part IV, which, besides consolidating the existing law of domestic violence, has taken the opportunity to clarify and extend the law to provide a comprehensive and coherent set of rules.

Relationship with the previous law

The Act has 67 sections, 10 schedules and 98 (A4) pages, as compared with the Matrimonial Causes Act 1973 which has 55 sections, three schedules and 60 pages. Schedule 8's minor and consequential amendments impact on 33 Acts, and Schedule 10 repeals provisions of 19 statutes, although confusingly only two acts (The Domestic Violence and Matrimonial Proceedings Act 1976 and the Matrimonial Homes Act 1983) are wholly repealed. Broadly, the statutes containing previous law where there are other major repeals are the Matrimonial Causes Act 1973, (ss 1-7, ie the existing law of divorce and some affecting judicial separation) and the Domestic

Proceedings and Magistrates' Courts Act 1978 (ss 16–18, ie the domestic violence provisions and part of s 1, the section providing the grounds for maintenance orders to be made during the continuance of marriage).

My annotations of the individual sections of the Act indicate modifications of existing law as opposed to restatement, where applicable, but the diffuse layout of the Act and the speed at which this Guide has had to be written have precluded detailed analysis at this stage, especially as in some cases that will not be possible until the subordinate legislation and new rules of court are available. By the time they are, and a second expanded edition of the Guide is feasible, commentators will have had leisure to discover new faults and opportunity to refine their dissatisfaction with the drafting and to express it more vocally.

The ethos of the Act

The Act does not simply provide a change in the grounds for divorce or separation and new proceedings by which these two remedies may be obtained; it attempts to change not only the way in which marriage is regarded, but the whole approach to divorce or legal separation, and only incidentally to those two goals provides a new system for effecting divorce and separation. For this reason Part I of the Act, which comprises the whole of section 1, is devoted to a statement in support of the institution of marriage in general, and failing success in that to the achievement of relatively painless divorce for both adults and children, to the support of family relationships in the divorced family and to the control and containment of both domestic violence and escalating legal costs. After this optimistic statement of intent was inserted Lord Irvine expressly drew the House of Lords' attention to the fact that the new system would at least make divorce more difficult as compared with the existing provisions in the Matrimonial Causes Act 1973, the ease of which for obtaining a decree he compared to 'receiving a driving licence': *Hansard* vol 568 p 278, 11 January 1996.

Whether Part I will have any real impact is anybody's guess. It has been fashionable to doubt it, and suspicions have been voiced that here is only another rhetoric-reality gap. Baroness Young drew attention in the second reading to Ruth Deech's paper *Divorce Dissent* (Centre for Policy Studies, paper No 136, 1994), which had commented that every time the law of divorce is reformed the divorce rate goes up: *Hansard*, vol 567 p 730, 30 November. It seems that at the time of the Matrimonial Causes Act 1937 the annual divorce rate went up from 6,000 to 10,000. After the Divorce Reform Act in 1969 the figures rose from 70,000 to 111,000 by 1971. No wonder Baroness Young asks of the latest reform 'Will it buttress marriage?' (*Hansard* vol 567 p 732, 30 November).

The new framework

The new system will work through the following stages:

(1) Information meeting

The party seeking a divorce *must* attend a Divorce Information Meeting which will normally be at least three months before initiating the process to obtain a divorce. Both parties *may* attend either the same or a different information meeting, but it will not be essential except for the party wishing to initiate proceedings, unless the other party wishes to make or contest any application in relation to either child or financial matters in those proceedings. Thus, in practice both parties may need to attend information meetings and in any event it will normally not be possible for the party seeking the divorce or separation to pass to the next stage unless that party *has* attended such a meeting at least three months previously. At the information meeting, which will be on a one to one basis, (and not as once ludicrously proposed, apparently in all seriousness, on a group basis!) there will be encouragement to attend marriage guidance, and an information pack will be handed out through which it is sought to inform those seeking divorce of some of the crucial matters which they should be aware of before embarking on the process. There is to be a personal element in the information meeting, however, in that it will actually be conducted by someone who is qualified and appointed and has no financial or other interest in any marital proceedings between the parties. The information meeting is one of the aspects of the process which we as yet know least about in that it will be the subject of regulations yet to be made, but three important points will be laboured at this stage: the intended role of mediation in the divorce process, the availability and value of marriage counselling, and (via emphasis on the importance to be attached to the welfare, wishes and feelings of children and on how the parties may acquire a better understanding of ways in which children can be helped to cope with the breakdown of the marriage) the Children Act approach to ongoing parenting despite the break up of the family.

The information meeting, although hyped up as a valuable innovation, will probably not go beyond what a good matrimonial solicitor has been telling his clients for years, a point made by Lord Mishcon at the House of Lords second reading of the Bill: *Hansard* vol 568 p 940, 23 January 1996. The difference may be that now in theory at least *all* those embarking on divorce will get this information, in a combined oral and written format through the pre-prepared materials pack which is envisaged as being distributed at the session.

(2) Statement of marital breakdown

One or both of the parties will then file a statement of marital breakdown. This will not contain anything further than a bald statement of the fact of the breakdown and must confirm the maker(s)' awareness of the purpose of the period for reflection and consideration and of their wish to make arrangements for the future. Such a

statement cannot be filed until at least one year after the marriage ceremony, irrespective of whether the order sought is for divorce or separation. When made the 'statement' formally marks the commencement of the divorce or separation process and triggers the period in which financial orders may be sought, agreed or made. If there is any question of a stay of proceedings in other jurisdictions, the statement will also mark the start of proceedings here. The statement must be served on the other party before the process can properly pass to the next stage.

(3) Period for reflection and consideration

Fourteen days later there will begin a nine month period for reflection and consideration during which the parties are expected to reflect on whether the marriage can be saved and if it cannot to make arrangement for the future. This period can be *extended* by a further six months, ie to 15 months in total, subject to there being at least one child of the family under 16, on the application of the party who did not make the statement of breakdown (although if there has been domestic violence and an exclusion or non-molestation order is in force or where there would be significant detriment to the welfare of a child this extension will not be available). The period for reflection and consideration can be *frozen* at any time for a period of up to 18 months by the parties giving a joint notice to the court that they are attempting a reconciliation and require further time. Time will then stop running until the court is notified, this time by only one of the parties, that the reconciliation attempt has failed, whereupon time will recommence until the end of the period is reached.

(4) Arrangements for the future

The arrangements mentioned in (3) above, which broadly correspond to the existing ancillary relief settlement, must be approved by the court. As now, there can be a court order, by consent or after a contested hearing, or a negotiated agreement, or a simple declaration by the parties that they have made their financial arrangements. One party may declare and notify this declaration to the other, that there are no significant assets and that he or she therefore does not intend to make a financial application, and unless this is not disputed by the other such a declaration will be sufficient to satisfy the requirement as to 'arrangements for the future'. The provision to the court of one of the documents mentioned in s 9(2) or one of the exemptions from providing it mentioned in s 9(7) is absolutely essential for the arrangements for the future stage to be completed so that the order stage may be reached.

(5) Divorce or separation order

If the court is satisfied (or if it is not and one of the exceptions in Schedule 1 applies) it will then make a divorce or separation order. Broadly, the exceptions in the schedule cover the situation where it is not the fault of the party applying for

the divorce or separation order that financial arrangements have not been concluded because that party has done all that he or she could to reach agreement, ie has complied with all court requirements but the other party has not, either deliberately or through personal ill health, disability or injury, or because of similar problems suffered by a child, or because there is a domestic violence injunction in force or the other party could not be contacted. In the cases of either the ill health etc or the domestic violence exemptions it must also be significantly detrimental to the welfare of any child or seriously prejudicial to the applicant if the order were not made.

In all cases the requirements of s 11 of the Act as to proper post divorce arrangements for the children of the family (ie under the heavily reinforced version of s 41 of the Matrimonial Causes Act 1973 which s 11 amends) must already have been complied with. Further, there must not be in existence any order preventing divorce under s 10 of the Act.

The timetable

The divorce or separation order may be obtained at its quickest in a little over a year, although that will be nearly two years after the celebration of the marriage since there is a bar on filing a statement of marital breakdown within a year of the marriage ceremony.

The normal timetable will therefore be:

(1) Information meeting: followed by three months to digest the information.

(2) Statement of marital breakdown: followed by 14 days prior to the commencement of the period for reflection and consideration.

(3) Period for reflection and consideration: nine months during which arrangements for the future must usually be made.

(4) Divorce or separation order if everything in order: effective immediately. Total 12 months and 14 days.

Alternative periods possible:

(5) Extension of period for reflection and consideration by six months if required and conditions satisfied. Total 18 months and 14 days.

(6) Delay of one year after the end of the period for reflection and consideration possible before applying for divorce or separation order (called the 'lapse period'). Total 24 months and 14 days, or the existing statement of marital breakdown lapses and a new one must be made.

(7) *Either* period for reflection and consideration *or* lapse period *or both* frozen for up to 18 months for each for attempts at reconciliation. Total 42 months 14

days if only one such period of maximum freezing of the process *or* 58 months 14 days if both the 18 months maximum periods are claimed.

New provisions to ensure the welfare of children after divorce

The Act has provided an opportunity to strengthen and extend existing, somewhat tenuous powers to safeguard the welfare of children after divorce. This follows the general feeling, summed up by the Bishop of Worcester in the House of Lords debate on the second reading that we should 'put the family at the centre of attention' (*Hansard* vol 567 p 716, 30 November 1995) and is effected by building on to the existing s 41 of the Matrimonial Causes Act 1973 in order to bring children in the divorce process closer to the position under the Children Act 1989 where their welfare is paramount. Broadly, the new provisions enable a divorce or separation order to be refused if the welfare of any child or children is not catered for, and permits the court to take into account in deciding whether to approve post divorce arrangements not only parents' conduct in relation to the child's upbringing and the general principle that a child's welfare is best served by a good continuing relationship with his parents, but any risk that might be inherent in proposed arrangements for his upbringing. The presumption in favour of contact is an important point since it emerged in the House of Commons debate on the Bill that 800,000 children have no contact with their natural father and 50% of all children in divorce lose contact within three years: Weekly *Hansard* Issue no 1722 p 444 *et seq*, 24 April 1996.

The new section actually imports some of the now familiar wording of s 1(3) of the Children Act 1989 and adds to matters to which the court shall have regard in making an order, and was actually finalised at a late stage in the House of Commons after replacing an earlier amendment to s 41. For the first time it imports a statutory presumption in favour of parental contact. However, it is felt that these changes may lead to profuse litigation, especially as the Act also permits the Lord Chancellor to provide by regulations for separate representation by a guardian *ad litem* for children in private Act proceedings.

A new hardship bar

The existing provisions which enable spouses opposed to divorce to prevent the grant of a decree or to delay the final dissolution of the marriage are much extended. Such a 'hardship bar' now applies to all divorces (not just to those where financial hardship can be shown if a divorce is granted on unilateral application after five years separation as at present) and the hardship to be shown may be based on any ground, including religious objections, and including for the first time any ground connected with a child of the family.

Marriage guidance

It was clear from the debates that there was cross party support for marriage guidance. There is an Inter Departmental Working Party on Family and Marriage which has issued a consultation paper seeking ideas as to how early intervention to support marriage and the family can be achieved, and the Lord Chancellor's Department Minister in the Commons has promised that this will be his highest priority in seeking to head off family and marriage breakdown. The Parliamentary debates emphasised the importance of counselling *before* a marriage reached crisis point and while the Act does contain in s 22 a power for the Lord Chancellor to fund marriage support services in general terms (although he has to have Treasury permission to do so!) it is s 23 which impacts upon the new system by providing that the Legal Aid Board may fund marriage guidance (although not at the same time as funding representation) to those persons who would qualify for legal aid, and provided that the marriage counsellor believes that it would be suitable to the particular case. While early prevention may have a role to play in the better management of marriage breakdown, it is obviously this latter role for marriage guidance at a time when the marriage is already in crisis, and when a decision must be made as to whether it can be saved, which will be most crucial to practitioners. Indeed, in the House of Commons Sir Edward Heath drew attention to the important distinction between dealing with the problem of the incidence of broken marriages and dealing with the consequences. He took the view that preventing a high incidence of marriage breakdown was the responsibility of the church and educational and social organisations, who could help people to realise what the requirements of marriage are. He emphatically rejected any idea that marriage should be made more difficult either to contract or to dissolve, despite evidence that several North American States which had gone over to consensual divorce now wanted to revert to fault based divorce, commenting that while there were probably still many things for us to learn from the Americans he did not think that morality was one of them! (Weekly *Hansard* Issue No 1722, p 444 *et seq*.)

Thus marriage guidance will now obviously play a leading part in the new divorce process and the limitation by mutual exclusion of legally aided marriage guidance and representation at the same time may have crucial consequences for practitioners advising clients, particularly as in the House of Lords Lord Irvine made the point that *representation* is still important despite the tribute which must be paid to other skills to be introduced into the new system, although he was not at that point actually thinking of marriage guidance counsellors but of mediators: *Hansard* vol 567 p 716.

Mediation

Like marriage guidance, this is to be provided on a funded basis, by the Legal Aid Board. Mediation is not to be granted unless it appears to be suitable to the case. There is to be a Code of Practice which must keep the possibility of reconciliation under review throughout the mediation, and inform clients about the availability of independent legal advice.

Mediation is to be offered at an early stage in the new process, ie immediately on receipt by the court of the statement of marital breakdown. This will be done by invitation to the party filing the Statement to attend a meeting with a mediator to explore whether advantage can be taken of the facility. The court will be able to adjourn proceedings for mediation to be tried. Initially, there will be a report back to the court after the date offered for the meeting with the mediator so that the court may be informed whether the appointment was kept and whether mediation will be used.

It remains to be seen whether the introduction of mediation will be a success story. While debate in the House of Commons rumbled on to the effect that 'it is better to have mediation than to have lawyers arguing about costs', in the House of Lords it was recognised that success depends very much on the qualities and background experience and training of the mediator. Lord Meston, QC, himself a family practitioner at the Bar, made the obvious point that skilled mediation costs money and involves a clear understanding of the legal framework: *Hansard* vol 567 p 769, 30 November 1995.

Legal aid

Legal aid is recognised as important and it is emphasised in the Act that the parties should continue to be entitled to legal aid. However, the introduction of marriage counselling and mediation places some limitations on its availability for *representation* when it is also required for marriage counselling and/or mediation in relation to the same parties. A party will first have to attend a meeting with a mediator to determine whether mediation is suitable as an alternative to taking proceedings, in particular whether mediation would involve any risk of violence or other harm (a term which includes all sorts of advantages that might be taken by one party over the other), and *then* the Legal Aid Board will take the results of that investigation into account when deciding whether legal aid should be available for representation instead. As far as marriage counselling goes, legal aid cannot be used for representation while funded marriage counselling is going on.

Responsibilities of legal representatives

A further swipe at lawyers appears in the rules to be made to require family practitioners to inform their clients about marriage support services and mediation, and to certify that they have done so! A more useful requirement is that practitioners are to be obliged to point out that the parties should consider the child's welfare, wishes and feelings, although members of the Solicitors' Family Law Association routinely do this anyway, and the Law Society has already advised all solicitors that they should do this whether or not they are actually members of the SFLA.

Jurisdiction

There are no changes in jurisdiction and applications for a stay of other proceedings can be made in the usual way after the process has begun, this being defined as at the point where the statement of marital breakdown is filed. Regulations are expected to be made to bypass the requirement to have attended the information meeting three months previously where injunctions or other emergency relief is necessary.

Ancillary relief

The Act has taken the opportunity afforded to make some changes to the existing law found in the Matrimonial Causes Act 1973 by amending the existing law to permit and require ancillary relief now normally to be settled *before* the grant of a divorce or separation order. There is a new s 21 of the 1973 Act to redefine the types of order which can be made and the new regime of orders in relation to divorce and separation is contained in new ss 22A and 23A. However, a radical change is that s 25(2)(g) of the 1973 Act is now altered to *expand* the existing definition, which we have all become used to, of conduct which is 'inequitable to disregard' and to insert the words 'whatever the nature of the conduct and whether it occurred during the marriage or after the separation of the parties, or (as the case may be) dissolution or annulment of the marriage'. This is clearly a fundamental change although it is equally unclear what the extent of that change will be. Thus no useful comment can be made, except perhaps to advise any client who may be affected by such a change to initiate and complete proceedings under the existing law, which is certain rather than wait to find out!

Pensions

The Act did make a further contribution to the pension splitting crusade, although it was more in the nature of a statement of principle than an effective change of the law. The section included in the Act (s 16) which might have permitted pension splitting is in fact ineffective because it is not linked to s 24 of the Matrimonial Causes Act 1973 which gives the court power to make property adjustment orders. The inclusion of this statement of principle was wrung from the Government *inter alia* by the aggressive perseverance of Paul Boateng who made it clear that the Bill would founder unless the vital issue of pension concerns was addressed. However, protesting loudly about the amount of work which had to be done, including in amending extensive legislation, in order to pave the way for pension splitting, and the desirability of wide consultation with interested bodies, after which the matter should again be voted on by Parliament, the Government conceded an immediate Green Paper, which has since been issued, a White Paper in the winter and legislation later in the decade with implementation around the turn of the century.

Transitional arrangements

When Parts I-III of the Act come into force there are to be transitional arrangements which will permit those who have already been living apart to proceed more quickly than would otherwise be the case, counting their existing separation towards the new timetable. Evidence of separation will have to be produced, and the transitional period is defined as the period of two years beginning with the day on which s 3 of the Act (which implements the new system of divorce and separation orders) comes into force. This will probably be in 1999. Proceedings which are already on foot on that day will continue under the present system until spent, because nothing in Part II of the Act affects these.

Domestic violence

Part IV is the least controversial part of the Act. It simply codifies and improves the existing law of domestic violence for which practitioners have been hopefully, but not very patiently, waiting for some time. It makes some logical and clarifying changes. All the various orders which can be granted under the existing law are now called respectively Occupation or Non-molestation orders, depending on whether they are exclusion or merely personal protection orders, and they can now protect a wider class of persons than before. These persons are now all called 'associated persons', are defined in s 62(3) and include relatives and persons who have lived together in the same household otherwise than on a merely commercial basis as well as existing and former spouses, fiancé(e)s and cohabitees (who are incidentally now called in the Act 'cohabitants'). Rights of occupation of the home are now called 'Matrimonial Home Rights' and these rights are extended to spouses not entitled to occupy a home but who are in occupation, and also give, with leave of the court, rights to those who are neither entitled to occupy nor in occupation. As a result there are consequential amendments to conveyancing procedures and the registration of charges.

There is also a new provision whereby domestic violence proceedings can be brought on behalf of victims by third parties, eg the police.

In this codified domestic violence section, the overall philosophy of the Act in seeking to support the institution of marriage is again reflected in the requirement that in considering whether an occupation order or an order requiring payment of outgoings in respect of a home on any party, the court must take into account the fact that cohabitants have not seen fit to give each other the commitment of marriage! This reflects the reasons for the initial failure in the Autumn of 1995 of the original draft Bill much as proposed by the Law Commission's Report *Domestic Violence and the Occupation of the Family Home* (Law Com No 207). The final version of the new Bill as contained in Part IV was rejigged to give marked preference to spouses and to make clear the distinction between them and cohabitants. Part IV also distinguishes between 'entitled' and 'non-entitled' applicants for orders. The reason for this distinction is because of the restriction on property rights imposed when an occupation order is granted, which will clearly be felt more keenly by

someone with a legal right to occupy the property than by one who has none. Sections 33–38 therefore set out a menu of orders which may be made depending on whether the parties have 'matrimonial home rights' or not, or whether they are 'associated' in some other way.

Children Act 1989

The Act has also taken the opportunity to make a useful amendment to the Children Act 1989 to permit an exclusion order to be made against a suspected child abuser, when the court makes either an emergency protection order or an interim care order under the public law part of the Children Act. This corrects a former irritating anomaly whereby the child had to be removed from the home and the suspected abuser could stay there.

Implementation of the Family Law Act 1966

The newly codified law of domestic violence is expected to come into force in the autumn of 1997.

The new law of divorce and separation is not expected to be in force until 1999. The reason for this is that there is still a good deal of infrastructure to be developed, including pilot schemes to be run and evaluated in connection with the radical innovations of information meetings and mediation. There is to be an Advisory Board to assist the Lord Chancellor in working towards implementation.

Family Law Act 1996

Family Law Act 1996

CHAPTER 27

ARRANGEMENT OF SECTIONS

PART I

PRINCIPLES OF PARTS II AND III

PART II

DIVORCE AND SEPARATION

Court orders

Marital breakdown

Reflection and consideration

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Supplementary

PART V

SUPPLEMENTAL

SCHEDULES:

ELIZABETH II

Family Law Act 1996

1996 CHAPTER 27

An Act to make provision with respect to: divorce and separation; legal aid in connection with mediation in disputes relating to family matters; proceedings in cases where marriages have broken down; rights of occupation of certain domestic premises; prevention of molestation; the inclusion in certain orders under the Children Act 1989 of provisions about the occupation of a dwelling-house; the transfer of tenancies between spouses and persons who have lived together as husband and wife; and for connected purposes. [4th July 1996]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

PRINCIPLES OF PARTS II AND III

1. The general principles underlying Parts II and III

The court and any person, in exercising functions under or in consequence of Parts II and III, shall have regard to the following general principles—

(a) that the institution of marriage is to be supported;

(b) that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage;

(c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end—

(i) with minimum distress to the parties and to the children affected;

(ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and

(iii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end; and

(d) that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished.

General. This section, which comprises the whole of Part I of the Act, expressly states in statutory form the philosophy behind the fundamental changes in the law of divorce and judicial separation which are made in Parts II and III. In a nutshell these measures completely change the approach, basis and procedure for both divorce and judicial separation (in Part II), extend legal aid to mediation in family matters (Part III) and even permit funded marriage guidance as an early

alternative to entering into the divorce or separation process at all: Part II, ss 22 and 23. The basic idea is that the institution of marriage should be supported, but where marriages cannot be saved and therefore should be dissolved, this should be achieved with the minimum distress to both the parties and their children, so as to encourage the best possible ongoing relationships within the family, and without incurring unreasonable costs At the same time any risk of violence to any party should as far as possible be prevented or reduced. (Part IV of the Act consolidates and extends the law of domestic violence and various provisions throughout the Act contemplate special arrangements where violence might otherwise result.)

Quite simply, this is the biggest change in the law since the first Matrimonial Causes Act 1857 gave the then new Divorce Court power to pass full decrees of divorce *a vinculo matrimonio*, in lieu of the former church jurisdiction *a mensa et thoro.* This was, prior to 1857, the only possible method of terminating a marriage other than the expensive secular alternative of obtaining a full decree of divorce by Act of Parliament, which was in essence a privilege for top people started by Henry VIII when he divorced Catherine of Aragon in 1533, afterwards followed in succeeding centuries by a handful of dissatisfied spouses, mostly peers.

The new Act is certainly a much greater change than that brought about by the Divorce Reform Act 1969, which was meant to achieve some of the goals set out in Part I of the 1996 Act, and for the most part failed dismally, although criticism of the present law is often exaggerated: practitioners may find that they like the new law a good deal less than the old, and academics and other deep thinkers will inevitably find fault with both the underlying concepts, once they are examined in detail and followed in practice, and the results which they will produce. However perfection is for Paradise, and unless this Act is abandoned, either wholly or in part(s), before it ever comes into force (as has happened with some other radical legislation produced under the current Government) Part I will inevitably now shape the future of the law of divorce and separation and take it in an entirely new direction.

Background. The philosophy expressed in s 1(a) to (d) reflects the conclusions of the Law Commission's 1990 Report (Law Comm No 192) 'Family Law and the Ground for Divorce' which referred to the 'widespread concern about the current prevalence of divorce in this country and the consequences which this can have for the couple concerned and for their children': *ibid*, para 1.1. The Report went on to identify the principal faults in the existing law, in particular focusing on the fact that its fault based system provoked unnecessary hostility and bitterness (para 2.16), that it therefore does nothing to save the marriage (para 2.17) and that this makes things even worse for the children (para 2.19).

In making their recommendations, the Commission made reference to a number or research studies, such as the papers of the Law Society Family Law Committee 'A Better Way Out' (1979) and 'A Better Way Out Reviewed' (1982), academic studies such as Davis and Murch's 'Grounds for Divorce' (1988) and their own 1988 Discussion Paper on the ground for divorce 'Facing the Future' (Law Comm No 170) which critically examined the current law and practice and the options for reform. They also referred to the responses they had received to Law Comm 170 and to the views of the general public which they had attempted to obtain through commissioning a public opinion survey from Public Attitudes Surveys Ltd.

Mandatory effect of s 1. However, s 1 of the Act goes far beyond merely reflecting this extensive background, which is familiar to both specialist practitioners and academics teaching Family Law, in that in using the wording 'The Court and any person ... *shall have regard* ... ' (author's italics) the Act for the first time imposes a mandatory statutory duty on the Court and on everyone involved in the divorce and judicial separation process to observe the principles set out in the section, which thus have the force of law, as in the case of the principles set out in ss 1(1), 1(2) and 1(5) and the statutory checklist in s 1(3) of the Children Act 1989.

Thus while most judges and practitioners have probably for some time now imported the *spirit* of the s 1 principles into their work (and in the case of practitioners the Law Society has recommended that *all* divorce solicitors, whether or not members of the Solicitors Family Law

Association, should observe the spirit of that Association's Code of Practice) and the spirit of the Children Act has occasionally impacted onto divorce proceedings, there will now be an obligation to apply s 1 in any proceedings 'under or in consequence of Parts II and III' ie not only in divorce proceedings as such but in, for example, any ancillary relief proceedings that may be necessary because the parties are unable to resolve matters on an agreed basis.

There was no such 'philosophy' section in the Matrimonial Causes Act 1973, nor even in the Matrimonial and Family Proceedings Act 1984, to which s 25A of the Matrimonial Causes Act 1973 owes its origin, and which amended s 25 of the Matrimonial Causes Act 1973 to introduce the clean break and with it the radical concept of the abolition of the 'meal ticket for life', which was probably the last fundamental change of philosophy governing the Court's powers to make orders on divorce.

PART II

DIVORCE AND SEPARATION

Court orders

2. Divorce and separation

(1) The court may—

(a) by making an order (to be known as a divorce order), dissolve a marriage; or

(b) by making an order (to be known as a separation order), provide for the separation of the parties to a marriage.

(2) Any such order comes into force on being made.

(3) A separation order remains in force—

(a) while the marriage continues; or

(b) until cancelled by the court on the joint application of the parties.

General. Section 2 is a fundamental change from the existing position under s 2 of the Matrimonial Causes Act 1973 and the Family Proceedings Rules 1991, whereby for divorce based on irretrievable breakdown evidenced by one of the Five Facts (of adultery, behaviour, desertion, two years separation with consent of the respondent or five years separation, the latter with no respondent's consent necessary) there are two decrees (decree *nisi*, pronounced when it is established that the petitioner is entitled to a decree dissolving the marriage, and decree absolute after a further period, which is six weeks from decree *nisi* if the decree absolute is applied for by the petitioner and a further three months, ie four and a half months in all if it is the respondent who applies). On the other hand, for judicial separation, currently obtained pursuant to s 17 of the Matrimonial Causes Act 1973, there is already only one decree, ie of formal separation based on judicial determination of one of the Facts as for divorce, without, however, the need also to prove irretrievable breakdown of the marriage.

Terminology. The change of terminology, from 'decree' to 'order', and from 'judicial separation' to 'separation order', is also significant and owes its origin to the recommendations of the Law Commission in Law Comm No 192 (paras 5.4 and 5.6). The underlying reason for this was the consideration of the terminology of divorce and separation by the Law Commission, following the Booth Report on Matrimonial Causes Procedure in 1985. This committee observed that the current form of divorce petition 'introduces an accusatory tone to the proceedings' at the outset. The very word 'petition' relates back to the ecclesiastical origins of divorce prior to the first Matrimonial Causes Act in 1957, and the Committee felt that the use of the words 'petitioner' and 'respondent' adds to the impression that there must be a guilty and an innocent party. They

therefore considered that change to a more neutral terminology would reflect and reinforce the fundamental change from a concept of fault based divorce to one truly based on irretrievable breakdown (para 5.2). In fact the Booth Committee had nothing to say about the use of the word 'decree', but the Commission felt that it was an inappropriate word if the remainder of the terminology was to be changed.

Thus it was not a big step for the Commission to consider that divorces should be 'sought' (not 'prayed for' as in contemporary petitions). Wherever possible they considered that spouses should be referred to as 'the husband' and 'the wife' (rather than petitioner and respondent, as they are now) and that changes should be made in the layout of documents used in the suit (thus entitling them 'In the matter of the marriage of ... ' rather than using a heading similar to that in other civil litigation cases) and that cases should be referred to as eg 'Smith *and* Smith' rather than *Smith v Smith* as happens now (para 5.3).

Assimilation of divorce and separation proceedings. A further consequence of the section is that the provisions set out in ss 2(1)(a) and 2(1)(b) foreshadow the integration of divorce and separation as separate but alternative remedies, the grounds and procedures for which are to be assimilated. This single system again follows the recommendations of Law Comm 192, which considered abolishing judicial separation altogether, but on reflection recommended its retention, and moreover retention with a uniform procedure for obtaining *either* a divorce or a separation order, in each case based on the ground of irretrievable breakdown of marriage (which is not currently the ground of judicial separation (paras 4.16 and 4.18). The rationale behind this approach is that it gives the parties an ultimate choice of remedy based on the same ground, namely that the marriage is beyond saving, but that they do not have to make a decision as to which one when initiating proceedings and that there might be good reasons for their ultimately preferring one or the other, such as an unresolvable pension or other problem which requires that the technical status of marriage be preserved.

The only difference in result where the parties obtain a separation as opposed to a divorce order under s 2(3) will be, as now, that neither of them can remarry, because the order will not change the marital status, just as now a decree of judicial separation does not, but for all practical purposes the marriage will be officially over, ie the parties need no longer cohabit and property will descend on both testate and inteste succession as if the surviving spouse were dead.

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3. Circumstances in which orders are made

(1) If an application for a divorce order or for a separation order is made to the court under this section by one or both of the parties to a marriage, the court shall make the order applied for if (but only if)—

(a) the marriage has broken down irretrievably;

(b) the requirements of section 8 about information meetings are satisfied;

(c) the requirements of section 9 about the parties' arrangements for the future are satisfied; and

(d) the application has not been withdrawn.

(2) A divorce order may not be made if an order preventing divorce is in force under section 10.

(3) If the court is considering an application for a divorce order and an application for a separation order in respect of the same marriage it shall proceed as if it were considering only the application for a divorce order unless—

(a) an order preventing divorce is in force with respect to the marriage;

(b) the court makes an order preventing divorce; or

(c) section 7(6) or (13) applies.

[For a complete understanding of the detail of this section, reference should also be made to ss 8, 9, 10 and 7(6) and (13).]

General. This is the section which fundamentally changes the existing law of divorce and judicial separation. It should be noted that the integrated approach to divorce and separation, foreshadowed in the Law Commission's Report Law Comm 192, is evident in the wording 'If an application for a divorce or separation order is made ... the Court shall grant the order applied for ...'.

The new law on the ground for divorce. Section 3(1) sets out the basic position. Either a divorce or a separation order will be made when the parties have followed the new procedure for obtaining one of the orders envisaged in s 2(1). This new procedure contemplates that a simple statement of marital breakdown will be filed by one or both parties, that this may not be done until at least three months after they have received prescribed information about the divorce process and its consequences from a person who has no financial or other interest in the proposed divorce, but that once the statement has been filed, and during the ensuing period for reflection and consideration, all necessary financial and practical arrangements for the future have been made, *and* the application has not been withdrawn, the divorce or separation order will be made *without further enquiry into the sufficiency of the statement of marital breakdown*. The period for reflection and consideration is not to be a mere passage of time but to be actively used in the manner suggested, and is generally to last a further nine months, making the average period to obtain a divorce now about a year.

This sweeps away ss 1 and 2 of the Matrimonial Causes Act 1973 (which are repealed by Schedule 10) so that neither fault nor separation will need to be proved. Section 3 says nothing about where or how the parties should live during the period for reflection and consideration, thus also sweeping away all the concerns under the current system as to whether the parties are living in one household or two, and whether, therefore, desertion under s 1(2)(b) of the Matrimonial Causes Act 1973 or separation one of the existing separation Facts provided by s 1(2)(d) or (e) can be proved, nor whether such cohabitation has any effect on the continuing validity of adultery or behaviour for a petition. Cases such as *Mouncer v Mouncer* [1972] 1 All ER 289, *Hopes v Hopes* [1948] 2 All ER 920 and *Bartram v Bartram* [1949] 2 All ER 270 will be instantly irrelevant.

These provisions again reflect the recommendations of the Law Commission in Law Comm 192, which indicated that removal of the necessity to allege fault, or for the parties to separate, would be likely to promote reconciliation where that was possible and, where reconciliation was not possible, it would at least foster a more constructive attitude towards the children's future and therefore reduce the damage suffered through prolonged periods of hostility and uncertainty: paras 3.31 and 3.32. This may be said to be a significant practical improvement which is likely to benefit considerable numbers of applicants, since the requirement for separation and cessation of cohabitation has *always* disadvantaged impecunious women who could not afford to move out of the matrimonial home – though Mrs Bartram in the case mentioned above obtained a divorce on the basis that she was living apart despite being unable to move out, by the simple expedient of treating her husband as a lodger whom she cordially disliked!

Orders preventing divorce. Section 3(2) precludes a divorce order (but not a separation order) being made if there is in force an order 'preventing divorce' (see further below at section 10). In brief this replaces both the existing *defence* under s 5 of the Matrimonial Causes Act 1973 of exceptional financial or other hardship (which can prevent a divorce decree being granted at all if the ground is made out) and also the *delaying power* pursuant to s 10 of the same Act (which can hold up decree absolute, but not prevent the grant of decree *nisi*) under the existing law. Clearly no divorce order can be granted under the new law until such an order preventing divorce is lifted, though in the context of the new system, whereby pursuant to s 3(1)(c) all the arrangements

for the future must generally be in place before either a divorce or separation order can be made, s 3(2) may be more useful in stopping precipitate divorce in appropriate cases than an inconvenient irritant in those where a speedy order is required.

Relationship between divorce and separation orders. Section 3(3) contemplates a situation where divorce and separation orders are simultaneously sought in respect of the same marriage (a possibility since a statement of marital breakdown may be made by either party or by both). The section sensibly provides that of the two it is the divorce application which will be effective unless there is some good reason not to grant a divorce order, eg where there is an order preventing divorce already in force or one is made by the court considering the instant application, or if it is too early for the parties to apply for divorce (see s 7(6)) or if the period for reflection and consideration has been extended (see s 7(13)).

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4. Conversion of separation order into divorce order

(1) A separation order which is made before the second anniversary of the marriage may not be converted into a divorce order under this section until after that anniversary.

(2) A separation order may not be converted into a divorce order under this section at any time while—

(a) an order preventing divorce is in force under section 10; or

(b) subsection (4) applies.

(3) Otherwise, if a separation order is in force and an application for a divorce order—

(a) is made under this section by either or both of the parties to the marriage, and

(b) is not withdrawn,

the court shall grant the application once the requirements of section 11 have been satisfied.

(4) Subject to subsection (5), this subsection applies if—

(a) there is a child of the family who is under the age of sixteen when the application under this section is made; or

(b) the application under this section is made by one party and the other party applies to the court, before the end of such period as may be prescribed by rules of court, for time for further reflection.

(5) Subsection (4)—

(a) does not apply if, at the time when the application under this section is made, there is an occupation order or a non-molestation order in force in favour of the applicant, or of a child of the family, made against the other party;

(b) does not apply if the court is satisfied that delaying the making of a divorce order would be significantly detrimental to the welfare of any child of the family;

(c) ceases to apply—

(i) at the end of the period of six months beginning with the end of the period for reflection and consideration by reference to which the separation order was made; or

(ii) if earlier, on there ceasing to be any children of the family to whom subsection (4)(a) applied.

General. This section continues the integrated approach to divorce and separation by enabling a separation order to be converted into a divorce order pursuant to s 4(3). This is subject only to s 11 in respect of the welfare of children (for the detailed provisions of s 11 see below at that section). However, ss 4(1) and 4(2) preserve the current position under the Matrimonial Causes Act 1973 s 3 whereby the divorce process is not to be initiated prior to the expiration of one year since the celebration of the marriage.

The Act does *not* however preserve the present judicial separation position whereby pursuant to s 17(1) of the 1973 Act a decree of judicial separation *may* be both applied for and *granted* at any time during the first year of marriage and then (pursuant to s 4 of the 1973 Act) subsequently used as evidence to obtain a decree of divorce, providing there is also evidence from the petitioner, once the year from the celebration of the marriage is up. The new integrated approach to divorce and separation means that *neither* a divorce nor a separation order may be *obtained* during the first year of marriage, although a statement of marital breakdown may be made and a separation order obtained at the end of the minimum period of reflection and consideration, ie this will now be at least one year after the marriage, once the three month lapse from attending the initial information meeting is allowed for on top of the period for reflection and consideration. This in a way re-enacts s 3 of the Matrimonial Causes Act 1973, although the effect is significantly different in that it will now take at least 12 months from the date of the ceremony to obtain even a *separation* order, and if the the statement of marital breakdown is initially made with a view to a subsequent conversion to a divorce order pursuant to s 4(3) of the new Act the initial statement of marital breakdown made within a year of the marriage will be defective for the purpose of obtaining a divorce order. The rationale behind this is clear for the purpose of continuing to prevent divorces within one year of the marriage but what has in fact happened is that it is now not possible to obtain a divorce for at least *two years after the marriage*, and not possible to obtain even a separation order for a good year longer than before.

Section 4 of the 1996 Act, however, improves on the former procedure under s 4 of the 1973 Act (which is repealed) by permitting *direct* conversion of the separation order to a divorce order, rather than requiring a new set of proceedings in which the first decree had only the status of evidence in a fresh suit for divorce.

Effect of the section. The result is therefore twofold.

First. the ultimate divorce order under the new law will be more slowly obtained than any contemporary decree of divorce which is based on a decree of judicial separation obtained immediately after the marriage and converted into a decree of divorce as soon as the parties have been married a year. If a petition is currently lodged for judicial separation based on eg adultery and a decree obtained within a few weeks, which is then the basis of a divorce petition as soon as a year and a day has passed since the marriage ceremony, the parties could expect to be divorced in perhaps 15 to 16 months However, the new law requires a *total minimum period of two years* from the celebration of the marriage, since s 4(1) expressly provides that a 'separation order which is made before the second anniversary of the marriage may not be converted into a divorce order under this section until after that anniversary'. The Law Commission considered this in para 5.84 of Law Comm 192 and concluded that it would work no real hardship and might even prevent some hasty (and therefore potentially risky) remarriages.

Secondly, duplication of proceedings (and the attendant costs) are obviated, since the simplified process of conversion does not require separate divorce proceedings to be started.

Restrictions on conversion. The basic position described above is of course the simple position contemplated by s 4(3). There may be other bars to immediate conversion of a separation to a divorce order.

First, the section again refers to the s 10 order preventing divorce (for which see further below at s 10) which is the Act's replacement for the current 'defence or delay' provisions contained respectively in ss 5 and 10 of the Matrimonial Causes Act 1973, and any such order will of course

have the effect of temporarily delaying or more permanently precluding a divorce order unless and until the underlying reason for which the Court made the order is satisfactorily addressed.

Secondly, section 4(4) contemplates two further bars to converting a separation order into a divorce, namely either or both of the following: (i) if there is a child under 16 when the conversion application is made; or (ii) if the party not making the conversion application applies to the court for an extension of the period of reflection and consideration. However, by s 4(5), s.4(4) does not apply in cases involving domestic violence where there is either an occupation or non-molestation order in force in favour of either the applicant or a child of the family or if the Court is satisfied that any delay in making the divorce order would be significantly detrimental to the welfare of any child of the family.

These are important provisions designed to protect school age children and parties who do not want to be stampeded into divorce.

Domestic violence. It should be noted that Part IV of the Act codifies the law of domestic violence, creating 'occupation' and 'non-molestation' orders obtainable in all courts dispensing family law, and which are to replace the ouster/exclusion and personal protection/non-molestation orders variously granted by the relevant courts under the Domestic Violence Act 1976, the Matrimonial Homes Act 1983 and ss 16–18 of the Domestic Proceedings and Magistrates Courts Act 1978 which are all repealed by Schedule 10.

The object of restricting conversion of a separation to a divorce order in cases where there were school age children or where one party wanted further time to reflect, but permitting a prompt divorce order where there was domestic violence, again stems from Law Comm 192, which while in favour of integrating divorce and separation procedures, did not wish to provide a back door route to a quicker divorce than could be obtained by the parties waiting for the necessary year from the ceremony to apply for a divorce order and then going through the necessary year to obtain that order: para 4.17, but equally recognised that in domestic violence cases a divorce order should often be granted as soon as possible.

In a nutshell, while the Law Commission recognised that there was no inherent virtue in making it more difficult for parties with children to divorce than those without, as they considered that this would only focus bitterness on children and might 'amount to denial that childless marriage was real marriage', and while they were at the same time in favour of prolonging the period where this would be for the children's benefit: para 5.28, they equally recognised that 'a wife who is regularly subjected to violence and abuse from her husband needs rescuing from her marriage, not pressure to return to it'.

Temporary nature of s 4(4) bar. However, it should be noted that the s 4(4) bar on conversion of separation orders ceases to apply at all six months after the end of the period for reflection and consideration on the basis of which the separation order was made, or earlier if meanwhile the children under 16 to whom s 4(4)(a) applied reach their 16th birthday.

Marital breakdown

5. Marital breakdown

(1) A marriage is to be taken to have broken down irretrievably if (but only if)—

(a) a statement has been made by one (or both) of the parties that the maker of the statement (or each of them) believes that the marriage has broken down;

(b) the statement complies with the requirements of section 6;

(c) the period for reflection and consideration fixed by section 7 has ended; and

(d) the application under section 3 is accompanied by a declaration by the party making the application that—

(i) having reflected on the breakdown, and

(ii) having considered the requirements of this Part as to the parties' arrangements for the future,

the applicant believes that the marriage cannot be saved.

(2) The statement and the application under section 3 do not have to be made by the same party.

(3) An application may not be made under section 3 by reference to a particular statement if—-

(a) the parties have jointly given notice (in accordance with rules of court) withdrawing the statement; or

(b) a period of one year ('the specified period') has passed since the end of the period for reflection and consideration.

(4) Any period during which an order preventing divorce is in force is not to count towards the specified period mentioned in subsection (3)(b).

(5) Subsection (6) applies if, before the end of the specified period, the parties jointly give notice to the court that they are attempting reconciliation but require additional time.

(6) The specified period-—

(a) stops running on the day on which the notice is received by the court; but

(b) resumes running on the day on which either of the parties gives notice to the court that the attempted reconciliation has been unsuccessful.

(7) If the specified period is interrupted by a continuous period of more than 18 months, any application by either of the parties for a divorce order or for a separation order must be by reference to a new statement received by the court at any time after the end of the 18 months.

(8) The Lord Chancellor may by order amend subsection (3)(b) by varying the specified period.

General. This section sets out the circumstances in which a marriage is taken to have broken down irretrievably. This replaces the current position under s 1(4) of the Matrimonial Causes Act 1973 whereby the Court must presume such irretrievable breakdown if one of the five Facts in s 1(2) of that Act is proved and the Court has no reason to believe that the marriage has not broken down.

The new requirements are merely

- the statement made by one or both parties;
- its complying with s 6 (as to which see below at s 6 but the gist of the matter is that the parties understand what the statement and the subsequent period for reflection and consideration are for, as contemplated by Law Com 192 paras 5.18 and 5.19);
- the period for reflection and consideration is over (see s.7 below but the basic period is nine months, beginning 14 days after filing of the statement of breakdown at Court, unless extended);
- the application for a s 3 order is accompanied by a formal statement that the applicant believes, having reflected on the breakdown and having considered the requirements of Part II of the Act in respect of the parties' arrangements for the future, that the marriage cannot be saved.

Effect of the section. This replaces in its entirety the current divorce and judicial separation process which is presently regulated by the Family Proceedings Rules 1991, including petitions, the Special Procedure and all the rules which require activation of the ancillary relief procedure only subsequent to decree *nisi*, with ancillary relief orders only coming into force on decree absolute. Moreover, it should be noted that by s 5(2) the party making application for the divorce or separation order need not be the same as the one who made the statement of marital breakdown. This is in accordance with the recommendations of Law Comm No 192 paras 5.10 and 5.11 which contemplated either joint or sole statements as a means of allowing divorce by agreement where both parties were unanimous about the fact of marriage breakdown, and constitutes a complete abandonment of the present pejorative adversarial system.

Section 5(3) further provides that the parties must not have withdrawn the statement and that no more than one year (called by s 5(3)(b) 'the specified period') should have passed since the end of the period for reflection and consideration. This will effect a fundamental change from the present system whereby either much more than one year often elapses between decree *nisi* and decree absolute, or the decree absolute is obtained but the financial matters drag on for many years since there is no particular pressure to resolve them once the decree absolute has been obtained. This is usually because it has simply taken a long time to resolve financial matters which under the present law cannot even come before the court before decree *nisi* and in practice they cannot be adjudicated upon, if not successfully negotiated and agreed, until very much later, since an appointment for a contested hearing before a District Judge will not be available until the parties can say that they are ready for trial.

At present, therefore, although a divorce suit may be finalised by either petitioner or respondent applying for a decree absolute (the former six weeks from decree *nisi* and the latter four and a half months from decree *nisi* if the petitioner has not meanwhile applied) and decrees absolute are often applied for without financial matters (or those concerning children) being finalised beforehand, often they are not unless one party or other wants to remarry. This is because the dissolution of the marriage and loss of the married status may in fact prejudice the resolution of financial matters since the change of status may preclude options that would otherwise have been available to creative financial advisers. After one year's delay, it is currently provided by the Family Proceedings Rules that an affidavit be filed explaining the delay, but in practice it is often some years before the financial arrangements are finalised.

All that will now change. When Parts II and III come into force, not only must all arrangements for the future usually be in place before a divorce or separation order can be made, but unless any of the exceptions in Schedule 1 apply (see below at Schedule 1) or there is an amendment of the one year period now allowed (after the period for reflection) in which a divorce or separation order is to be applied for (ie the s 5(3)(b) 'specified period') and s 5(8) permits the Lord Chancellor to make such an amendment, the parties will now have to work to a timetable and complete both their financial and other arrangements and their divorce or separation within a maximum period. However, this is not as draconian a change as it seems at first sight since although in theory the maximum period is the period for reflection and consideration plus the specified period, both of these periods can be extended in various ways and the absolute maximum might be as much as five years!

The normal position will therefore be that the parties will, in the absence of a Schedule 1 exemption, have nine months, unless extended to 15 by an application from one party for more time or if there are children under 16, or unless *interrupted* for up to 18 months on the request of both parties because they are attempting a reconciliation : see s 7. This is plus the one further year contemplated by s 5(3)(b) unless that is also interrupted for up to 18 months by a request by both parties because they are attempting a reconciliation: see s 5(5). In theory therefore a couple *may* take as much as five years over their divorce (or separation) if they wish to pull out all the stops, but if they are not agreed on using both the 18 month reconciliation delays the normal maximum will be 21 months (nine months period for reflection and consideration plus one year 'specified period') or two and a half years if there is a child under 16 so as to extend the nine

months reflection and consideration to 15. However, s 7(12) (see below at s 7) will apply to prevent the normal nine month period for reflection and consideration being extended by an extra six months where there is a domestic violence order in force. Nevertheless, this complex framework of exemptions and extensions provides undesirable scope for spiteful spouses and unscrupulous lawyers, although the flexibility was no doubt well meant.

The Law Commission clearly had some such finite approach in mind when considering the length of the minimum period for reflection and consideration, in respect of which they considered that an overall period of 12 months (which is what the Act proposes, taking into account the three which must elapse after attending the information meeting) '... should be sufficient time to enable all but the most difficult and complex matters to be decided': para 5.27. However, the new law considerably extends the possibilities for delay and compares with a current average procedural period of seven months for all divorces.

Reconciliation attempts under this section. Sections 5(5) and 5(6) provide for periods of up to 18 months to be disregarded in relation to the year following the end of the period for reflection and consideration if the parties are attempting a reconciliation but need additional time. The parties may stop the clock in this way simply by *jointly* giving notice to the Court, and restart it in the same way by one of them notifying the court that the reconciliation attempt has failed. If the parties require more than 18 months *at this stage* they must file a new statement of marital breakdown, ie begin all over again: s 5(7). Bearing in mind that they could also have had an 18 month halt during the period for reflection and consideration, pursuant to s 7(7) and (8), this must be fair enough.

Obviously any period in which there is in force an order preventing divorce will not count towards the crucial year (called in the act the 'specified period' but already referred to by some commentators the 'lapse period') which follows the end of the period for reflection and consideration: s 5(4).

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6. Statement of marital breakdown

(1) A statement under section 5(1)(a) is to be known as a statement of marital breakdown; but in this Part it is generally referred to as 'a statement'.

(2) If a statement is made by one party it must also state that that party—

(a) is aware of the purpose of the period for reflection and consideration as described in section 7; and

(b) wishes to make arrangements for the future.

(3) If a statement is made by both parties it must also state that each of them—

(a) is aware of the purpose of the period for reflection and consideration as described in section 7; and

(b) wishes to make arrangements for the future.

(4) A statement must be given to the court in accordance with the requirements of rules made under section 12.

(5) A statement must also satisfy any other requirements imposed by rules made under that section.

(6) A statement made at a time when the circumstances of the case include any of those mentioned in subsection (7) is ineffective for the purposes of this Part.

(7) The circumstances are—

(a) that a statement has previously been made with respect to the marriage and it is, or will become, possible—

(i) for an application for a divorce order, or

(ii) for an application for a separation order, to be made by reference to the previous statement;

(b) that such an application has been made in relation to the marriage and has not been withdrawn;

(c) that a separation order is in force.

General. This section details the format for the statement of marital breakdown. Pursuant to ss 6(4) and 6(5) the precise form of the statement awaits the Lord Chancellor's decision under s 12(1): see below, which will enable the legal stationers to produce pre-printed forms under licence as in the case of the contemporary petitions and other forms used under the Family Proceedings Rules 1991. Alternatively, it may be that while the *contents* may be specified, as is the case with the contemporary petition which is regulated by the Family Proceedings Rules 1991 Schedule 2, but where no precise *form* is laid down, practitioners will draft their own in accordance with the new rules, but given the simplicity of the concept, a printed form along the lines of those used for s 8 Children Act applications is much more likely.

Background. Whether the statement is made by one party or by both, pursuant to ss 6(2) and 6(3) it must state that both are aware of the purpose of the period for reflection and consideration. This follows the Law Commission's recommendation in Law Comm 192 paras 5.18, 5.19, 5. 25 and particularly 5.26 that 'it should be distinguished from a purely passive period, during which the parties might merely wait out the legally required time without any clear objective and without any real attempt to focus on the dramatic changes which will occur if and when the divorce does actually happen': para 5.26.

Sections 6(6) and 6(7) preclude successive statements being made where one has already been made and is still in force (and therefore ultimately available for a divorce or separation order to be made by reference to it) or where a separation order is already in force.

Reflection and consideration

7. Period for reflection and consideration

(1) Where a statement has been made, a period for the parties—

(a) to reflect on whether the marriage can be saved and to have an opportunity to effect a reconciliation, and

(b) to consider what arrangements should be made for the future, must pass before an application for a divorce order or for a separation order may be made by reference to that statement.

(2) That period is to be known as the period for reflection and consideration.

(3) The period for reflection and consideration is nine months beginning with the fourteenth day after the day on which the statement is received by the court.

(4) Where—

(a) the statement has been made by one party,

(b) rules made under section 12 require the court to serve a copy of the statement on the other party, and

(c) failure to comply with the rules causes inordinate delay in service,

the court may, on the application of that other party, extend the period for reflection and consideration.

(5) An extension under subsection (4) may be for any period not exceeding the time between—

(a) the beginning of the period for reflection and consideration; and

(b) the time when service is effected.

(6) A statement which is made before the first anniversary of the marriage to which it relates is ineffective for the purposes of any application for a divorce order.

(7) Subsection (8) applies if, at any time during the period for reflection and consideration, the parties jointly give notice to the court that they are attempting a reconciliation but require additional time.

(8) The period for reflection and consideration—

(a) stops running on the day on which the notice is received by the court; but

(b) resumes running on the day on which either of the parties gives notice to the court that the attempted reconciliation has been unsuccessful.

(9) If the period for reflection and consideration is interrupted under subsection (8) by a continuous period of more than 18 months, any application by either of the parties for a divorce order or for a separation order must be by reference to a new statement received by the court at any time after the end of the 18 months.

(10) Where an application for a divorce order is made by one party, subsection (13) applies if—

(a) the other party applies to the court, within the prescribed period, for time for further reflection; and

(b) the requirements of section 9 (except any imposed under section 9(3)) are satisfied.

(11) Where any application for a divorce order is made, subsection (13) also applies if there is a child of the family who is under the age of sixteen when the application is made.

(12) Subsection (13) does not apply if—

(a) at the time when the application for a divorce order is made, there is an occupation order or a non-molestation order in force in favour of the applicant, or of a child of the family, made against the other party; or

(b) the court is satisfied that delaying the making of a divorce order would be significantly detrimental to the welfare of any child of the family.

(13) If this subsection applies, the period for reflection and consideration is extended by a period of six months, but—

(a) only in relation to the application for a divorce order in respect of which the application under subsection (10) was made; and

(b) without invalidating that application for a divorce order.

(14) A period for reflection and consideration which is extended under subsection (13), and which has not otherwise come to an end, comes to an end on there ceasing to be any children of the family to whom subsection (11) applied.

General. This section defines the period for reflection and consideration, explains its purpose, ie that it is a period for the parties to reflect on whether the marriage can be saved, to have an

opportunity to effect a reconciliation if one is possible and – on the basis that the divorce goes ahead – to consider what arrangements should be made for the future.

Effect of the section. This programme sets the basic period at nine months beginning 14 days after the statement of marital breakdown is received by the court: s 7(1), (2) and (3). However, by ss 7 (10), (11) and (13) this period may be extended by six months if the party who has not made the statement of marital breakdown requests it, or if there is a child under 16, and by s 7(4) the period may also be extended where the statement has been made by one party (rather than by the parties jointly) and there has been a delay in serving the statement on the other; this will be provided for in accordance with the rules of court to be made under s 12. By s 7(5) this extension may not exceed the period of actual delay in service after the period for reflection and consideration began.

It should be noted that if an extension of six months is required under s 7(10) application must be made within the 'prescribed period', which period will presumably be specified by rules of court, as specifically mentioned in other contexts elsewhere in the Act eg s 8(13) and Schedule 1. As in the case of extension of the 'specified period' under s 5, the extra six months will not be available if there is a domestic violence order in force or if the court is satisfied that delaying the divorce order would be significantly detrimental to any child of the family: s 7(12).

Interruption of the period for reflection and consideration. By ss 7(7) and 7(8) the period may *interrupted* (ie stopped from running in the same way as the specified period under s 5) by joint notification by the parties that they require further time to attempt to effect a reconciliation, in which case (as in the case of joint application for this purpose during the year following the end of the period of reflection and consideration under s 5(5)) there can be a halt in the programme of up to 18 months by the parties simply making joint application to the court, and the timetable will be restarted by either party notifying the court (as under s 5(6) in relation to suspending the period for reflection and consideration) that the reconciliation has failed.

By s 7(9), just as under s 5(7) in relation to the 'specified period', more than 18 months extra time for reconciliation attempts will fatally interrupt the period for reflection and consideration, the parties will have forfeited their opportunity to proceed on the basis of their existing statement of marital breakdown and must start again.

Prohibition on statements within the first years of marriage. It should be noted that buried in the middle of s 7 (at s 7(6)) is the prohibition on any attempt to make a statement of marital breakdown during the first year of marriage except for the purpose of a separation order. As already mentioned above at s 4, this does not so much re-enact s 3 of the Matrimonial Causes Act 1973 (which is repealed) as effectively add a year in each case to the period for obtaining either a divorce or a separation order under the existing law. Basically it will now take at least two years from the celebration of the marriage to obtain a divorce (instead of an existing minimum of about 15 months if the parties are determined from the start and their documentation well prepared) and also at least two years even for a separation order (instead of perhaps three for a contemporary judicial separation).

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8. Attendance at information meetings

(1) The requirements about information meetings are as follows.

(2) A party making a statement must (except in prescribed circumstances) have attended an information meeting not less than three months before making the statement.

(3) Different information meetings must be arranged with respect to different marriages.

(4) In the case of a statement made by both parties, the parties may attend separate meetings or the same meeting.

(5) Where one party has made a statement, the other party must (except in prescribed circumstances) attend an information meeting before—

(a) making any application to the court—

(i) with respect to a child of the family; or

(ii) of a prescribed description relating to property or financial matters; or

(b) contesting any such application.

(6) In this section 'information meeting' means a meeting organised, in accordance with prescribed provisions for the purpose—

(a) of providing, in accordance with prescribed provisions, relevant information to the party or parties attending about matters which may arise in connection with the provisions of, or made under, this Part or Part III; and

(b) of giving the party or parties attending the information meeting the opportunity of having a meeting with a marriage counsellor and of encouraging that party or those parties to attend that meeting.

(7) An information meeting must be conducted by a person who—

(a) is qualified and appointed in accordance with prescribed provisions; and

(b) will have no financial or other interest in any marital proceedings between the parties.

(8) Regulations made under this section may, in particular, make provision—

(a) about the places and times at which information meetings are to be held;

(b) for written information to be given to persons attending them;

(c) for the giving of information to parties (otherwise than at information meetings) in cases in which the requirement to attend such meetings does not apply;

(d) for information of a prescribed kind to be given only with the approval of the Lord Chancellor or only by a person or by persons approved by him; and

(e) for information to be given, in prescribed circumstances, only with the approval of the Lord Chancellor or only by a person, or by persons, approved by him.

(9) Regulations made under subsection (6) must, in particular, make provision with respect to the giving of information about—

(a) marriage counselling and other marriage support services;

(b) the importance to be attached to the welfare, wishes and feelings of children;

(c) how the parties may acquire a better understanding of the ways in which children can be helped to cope with the breakdown of a marriage;

(d) the nature of the financial questions that may arise on divorce or separation, and services which are available to help the parties;

(e) protection available against violence, and how to obtain support and assistance;

(f) mediation;

(g) the availability to each of the parties of independent legal advice and representation;

(h) the principles of legal aid and where the parties can get advice about obtaining legal aid;

(i) the divorce and separation process.

(10) Before making any regulations under subsection (6), the Lord Chancellor must consult such persons concerned with the provision of relevant information as he considers appropriate.

(11) A meeting with a marriage counsellor arranged under this section—

(a) must be held in accordance with prescribed provisions; and

(b) must be with a person qualified and appointed in accordance with prescribed provisions.

(12) A person who would not be required to make any contribution towards mediation provided for him under Part IIIA of the Legal Aid Act 1988 shall not be required to make any contribution towards the cost of a meeting with a marriage counsellor arranged for him under this section.

(13) In this section 'prescribed' means prescribed by regulations made by the Lord Chancellor.

General. This section explains the role and content of information meetings This again owes its origins to Law Comm 192 although the section is enacted to require a slightly different scheme of things from that initially envisaged by the Law Commission. In para 5.19 of Law Comm 192 they envisaged that an information pack would be dispensed by the court where the statement of marital breakdown was lodged and that this should be done only on filing of the statement. However the Act requires information meetings, except in prescribed cases (a category which the Lord Chancellor has yet to define). By s 8(2) these are to take place at least three months before the statement is lodged.

It was apparently envisaged at some stage that the meetings would be public and communal (a resourcing decision presumably which caused much mirth when the implications were thought through)! but it is now expressly provided by s 8(3) that a meeting may deal with only one marriage at a time.

The section requires both parties to attend a meeting, but not necessarily the same one. The party actually making the statement of marital breakdown must attend a meeting before lodging the statement, and it would appear from s 8(5) that where the statement is made unilaterally the other party cannot ('except in prescribed circumstances') make or contest any application in relation to children or money or property without first attending an information meeting. It is not clear if this is meant to inhibit or will in any other way affect proceedings under s 8 of the Children Act 1989 which are technically independent of divorce, but it is thought that urgent applications will be entertained on the undertaking of a party to attend a meeting within a specified period.

Section 8(6) defines the 'information meeting' intended and explains its purpose, which is broadly to explain to the parties the meaning and effect of Parts II and III of the Act, and of matters which may arise in connection with them, and at the same time introducing the parties to the idea of counselling and encouraging them to give it a try.

Background. The scheme is obviously very much inspired by para 5.19 of the Law Commission's Report and although no mention is made in this section of the requirement envisaged in para 5.20 of that Report that the parties' legal advisors should inform them of 'other services and make referrals as appropriate', s 12 (2) reserves the Lord Chancellor's rights to make rules requiring them to do so. It is obvious that in making this recommendation the Law Commission wanted to seize the opportunity lost under s 6(1) of the Matrimonial Causes Act 1973 to make solicitors proactive in encouraging reconciliations for their clients The omission of any such requirement in this section is probably a good thing, since the Solicitors' Family Law Association (SFLA) Code is already performing as useful a service as solicitors really can in this respect, that is to say so far as conciliation and mediation go, which is about as far as solicitors can promote reconciliation as such; obviously reconciliation may well not be in their clients' interest, since good legal advice and reconciliation may be mutually exclusive in certain cases. It remains to be seen what the Lord Chancellor will see fit to do by way of rules made under s 12.

Sections 8(7) and 8(8) very much reflect the Law Commission's original idea that the parties should receive a cocktail of useful practical information in a face to face interview with 'a senior official' whose role was, however, seen only as to impart information and in no way to give advice, let alone in any way to adjudicate on the particular case, 'because to do so would be to reintroduce the inquiry into the past which is the major objection to the present law and to confuse the distinct functions of the various professions and services involved': para 5.18.

Although the two subsections contemplate face to face meetings, the Law Commission's idea that there should be a written information pack has been preserved in s 8(8)(b). The resultant mix of live interpersonal involvement of a person 'qualified and appointed in accordance with prescribed provisions' and who has 'no financial or other interest in any marital proceedings between the parties' is probably a good one, since this mix is very much the format of the contemporary seminar or business meeting with a blend of talk and pre-printed handouts, the overall effect of which can be tailored to the receptivity (or lack of it) of the audience and refined if it is not working well on their level. Not only does the provision of the pack avoid the inevitable questions and interruptions if essential information is to be imparted, but it also enables outline information to be given in digestible form which will conveniently lead into the reading contained in the pack. Various bodies, including the SFLA, have already indicated that they would like to contribute to the content and composition of the pack. Section 8(8)(d) requires all such input to be cleared by the Lord Chancellor.

The requirement that those conducting information meetings should have no interest in the parties' actual or potential marital proceedings obviously excludes solicitors practising, or whose partners practise, family law, a provision which initially did not please many solicitors who felt that they had for years been informally performing a public service such as is now contemplated by the Act. This was especially so as much of the advance publicity for the Act emphasised the Lord Chancellor's desire to get matrimonial proceedings out of the hands of 'expensive' lawyers and into those of mediators whose hourly rate is a fraction of the average solicitor's. While one sympathises with the Lord Chancellor as a minister responsible for costly legal aid, decrying lawyers in general terms may not in fact be entirely in the public's long term interests. This is especially so where lawyers have to charge more at a later date to resolve problems that need not have arisen if they had been involved earlier.

The role of independent legal advice. However, the profession was somewhat mollified when an amendment was made to the original Bill to require by s 8(9)(g) that those who conduct information meetings (ie manifestly not practising family lawyers) should point out the availability of independent legal advice and representation.

This is probably doubly important for two reasons.

(1) The public has for some years been conducting its own *divorce suits*, either being advised by solicitors under the Green Form and then themselves pushing the paper as litigants in person, or else conducting the entire *divorce* proceedings themselves with the aid of a commercially produced DIY guide available from high street stationers, or even on the basis of the very clear explanatory notes and leaflets obtainable from court offices, which may often be supplemented by kindly assistance from clerks in the court offices. Indeed, the public's able mastery of these practical skills has been a source of considerable annoyance to law students on vocational finals courses, who have hitherto always been able to make a fuss about the difficulty of learning to draft pleadings (practitioner drafting not being a skill with which they were familiar at University) as they have for some time no longer had any excuse for such cowardice when it seemed that every other ordinary member of the public could do it with the aid of a simple template!

    However, despite their past track record, 'the public' may find the new system a little more difficult because divorce is now going to be *quite different*. For one thing people will probably not realise that the new system contemplates that, if they abandon lawyers for mediation *without* legal advice, they would do *very much more* on their own to obtain

a divorce or separation order than simply pushing a little paper under the guidance of a solicitor, the DIY pack or the court leaflets, since all financial and child matters are now to be resolved *before* the divorce order is obtained and not afterwards. Since most of the contemporary divorce suit litigants in person, once the actual divorce suit is over, usually immediately obtain legal aid, or instruct solicitors privately if necessary, for ancillary relief and child matters, however confident they felt about obtaining the divorce decree, it is important that they are *not now misled* into thinking that they can necessarily manage the whole process under the new system with a mediator alone, since it is the major criticism of mediation (other than in those schemes which provide joint lawyer and non-lawyer mediation) that deals are struck without full information being obtained about the resources available and without even a working knowledge of a party's entitlement in law.

'The public' is now, more than ever, likely to need protection from a sense of false confidence that they and non-lawyer mediators together will be able to do everything necessary without recourse to lawyers, and this is especially so because of the inaccurate hype often given to the changes by the media. As a result of this, 'the public' which is now only to be faced with a simple statement of marital breakdown (having in the past had to achieve a pass grade in behaviour particulars for a petition!) may well feel that it can manage the new law *without* the 'expensive' lawyers, but as every lawyer knows (in litigation generally and in matrimonial proceedings in particular) penny wise can often mean pound foolish! The public clearly *needs* information about the availability of legal advice and even more important *representation*, since one must stress that *both* are important and may be equally valuable in a divorce situation, whatever platitudes it is fashionable to mouth about the value of separating divorce from its current legal context. People must therefore be allowed to make up their own minds in each individual case as to whether they should obtain legal advice and/or representation and if necessary must be helped to do so.

The result may be that some lawyers' fees may have to become more competitive and if the information pack is to be of any use in this respect it should contain some sufficiently frank and useful information on this point rather than resorting to the coy disclaimers which usually mask so-called fee structures! Lawyers, and in particular solicitors, who have direct contact with the public which the Bar in general does not, must therefore not neglect their professional role in making clear the availability of their services to the public, who must be allowed to know that these services genuinely exist and continue to do so for the good reason that trained advocates (who will usually include in their advocacy skills a mastery of the art of negotiation) justify their commercial viability by their expertise in being able to say on behalf of their clients everything that those clients could say for themselves if *they* had the requisite knowledge and skill. It is because clients generally do *not* have those skills or that knowledge (and in particular a sound knowledge of the law of ancillary relief will still be required) that they need lawyers.

(2) The second reason for the importance of informing the public of the availability of legal advice and representation is that the actual changes made by the Act have received much inaccurate coverage in the Press, as a result of which the public have probably obtained a number of misconceptions, not least that divorce is now *easy*. Nothing could be further from the truth. Apart from the fact that all practical financial and child matters must be settled in accordance with s 3(1)(c) before the divorce or separation order is made, the Act is full of pitfalls for the unwary.

Potential sources of litigation. To give only one example under this fruitful heading, s 8(9)(b) refers to the importance to be attached to the welfare, wishes and feelings of children in their parents' divorce, the precise effect of which is not spelled out in the Act. However, s 11, which now both partially repeals and extends s 41 of the Matrimonial Causes Act 1973, which it therefore very much strengthens overall, makes it clear that children's wishes and feelings are now to be

taken into account, which they were not under s 41 in any of its incarnations (since the present s 41 has already been rejigged for the purposes of the Children Act 1989 at the time that that Act came into force). Section 11 will impose new interpretational demands which cannot be less important than the task of judges who hear contested applications under s 8 of the Children Act. Moreover, s 11(3) expressly states that in deciding whether the the court might need to exercise any of its powers under the Children Act in respect of any child of the family, the welfare of the child shall be paramount, yet nowhere in Part II (or for that matter in any other part of the Act) is 'welfare' defined. The solution propounded by Wilson J in the case of *Re M (Contact: Welfare Test)* [1995] 1 FLR 274, CA, was that the way to ascertain what was for a child's welfare was to go through the s 1(3) checklist in the Children Act, not an uncomplex matter. Most child law specialists who devote their professional lives to the interpretation and application of the Children Act would be affronted by the suggestion that parents could overnight automatically manage to handle these complex matters of law without independent advice, especially in view of the prevalence of children already seeking separate representation in s 8 order proceedings and the difficulties that that gives rise to: see eg *Re C (Residence:Child's Application for Leave)* [1995] 1 FLR 927.

Additionally, the new s 41 as extended by the Family Law Act introduces completely new considerations – the conduct of the parties in relation to the upbringing of the child, the general principal that, in the absence of evidence to the contrary, the welfare of the child is best served by the child having regular contact with those who have parental responsibility for him, and with other members of his family (what is the effect of this on the 'implacable hostility' cases?), and any risk to the child attributable to the arrangements for his care and upbringing (to what extent does this widen previous case law in relation to the s 1(3) checklist and how should 'risk' be interpreted? How does the decision in *Re H (Minors) (Child Abuse: Threshold conditions)* (1995) *The Times* 15 December, HL affect this provision?)

This is obviously too large a subject to go into here, but the scope for interaction between the Children Act 1989 and s 11 (especially s 11 (4)(a) and (b)) will, far from wrestling matrimonial proceedings from the supposedly unworthy clutches of 'expensive' lawyers, probably be sufficient to save the Family Law Bar from ruin, much as the Variation of Trusts Act 1958 brought new life to a near corpse in Chancery!

A further source of litigation is likely to be s 10 (the new hardship provisions) which will replace the relatively toothless 'protection' for reluctant respondents in ss 5 and 10 of the Matrimonial Causes Act 1973. Section 10 is likely to be particularly fruitful in generating litigation because it reintroduces the concept of conduct which has not for some time been a live issue unless either inequitable to disregard within the meaning of s 25(2)(g) of the Matrimonial Causes Act 1973 or in some way harmful to a child or contraindicated in Children Act proceedings. If conduct is once again to be relevant, then especially in conjunction with s 1 (which states the philosophy of the Act as supportive of marriage in an apparently harmless way, but which in this context may only fuel arguments in favour of making orders preventing divorce where hardship can be shown by the objector) s 10 may be instrumental in returning a further supply of redundant family lawyers to the profession to deal with the giant mushroom which will probably result.

Other problems raised by the section. To return to the text of s 8, ss 11 and 12 clearly import resource problems which may affect the date of implementation of the new process, as presently obtaining an appointment with a marriage guidance counsellor is in any case difficult and subject to delay because demand much exceeds supply. However, as by s 8(12) this is now to be free to those who qualify for legal aid, the resource implications are likely to multiply out of control. There was cross party support for marriage counselling in Parliament (see for example *Weekly Hansard*, 17 June 1996, issue 1729, p 536 *et seq*) where much emphasis was placed on counselling *before* the marriage entered crisis including possibly at various potential crisis stages such as around the birth of the first child, and an inter departmental working party consultation paper was issued on 17 June, so it may well be that the whole issue of marriage counselling as referred to in the Act will become part of a much larger overall scheme. However, the fact remains (on which

Dame Jill Knight put her finger during the debate) that at the moment there is a serious resource problem (currently involving a year's delay in some cases to see a counsellor) and that this can only get worse if further demands are placed on it.

Clearly this section is one which is heavily dependent on the regulations to be made.

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9. Arrangements for the future

(1) The requirements as to the parties' arrangements for the future are as follows.

(2) One of the following must be produced to the court—

(a) a court order (made by consent or otherwise) dealing with their financial arrangements;

(b) a negotiated agreement as to their financial arrangements;

(c) a declaration by both parties that they have made their financial arrangements;

(d) a declaration by one of the parties (to which no objection has been notified to the court by the other party) that—

(i) he has no significant assets and does not intend to make an application for financial provision;

(ii) he believes that the other party has no significant assets and does not intend to make an application for financial provision; and

(iii)there are therefore no financial arrangements to be made.

(3) If the parties—

(a) were married to each other in accordance with usages of a kind mentioned in section 26(1) of the Marriage Act 1949 (marriages which may be solemnized on authority of superintendent registrar's certificate), and

(b) are required to co-operate if the marriage is to be dissolved in accordance with those usages,

the court may, on the application of either party, direct that there must also be produced to the court a declaration by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages.

(4) A direction under subsection (3)—

(a) may be given only if the court is satisfied that in all the circumstances of the case it is just and reasonable to give it; and

(b) may be revoked by the court at any time.

(5) The requirements of section 11 must have been satisfied.

(6) Schedule I supplements the provisions of this section.

(7) If the court is satisfied, on an application made by one of the parties after the end of the period for reflection and consideration, that the circumstances of the case are—

(a) those set out in paragraph I of Schedule 1,

(b) those set out in paragraph 2 of that Schedule,

(c) those set out in paragraph 3 of that Schedule, or

(d) those set out in paragraph 4 of that Schedule,

it may make a divorce order or a separation order even though the requirements of subsection (2) have not been satisfied.

(8) If the parties' arrangements for the future include a division of pension assets or rights under section 25B of the 1973 Act or section 10 of the Family Law (Scotland) Act 1985, any declaration under subsection (2) must be a statutory declaration.

General. This is the section which sets out what financial arrangements will be considered to be acceptable before a divorce or separation order can be granted under s 3(1)(c). As mentioned s 3(1)(c) changes the present position whereby ancillary relief is not dealt with until after decree *nisi* of divorce (or the single decree in the case of judicial separation) has been granted, and now requires all such matters to have been settled as part of the arrangements for the future before a divorce or separation order is granted.

Effect of the section. As at present, any type of formal arrangement, in or out of court, is acceptable, as it would be now if s 10 or s 5 of the Matrimonial Causes Act 1973 applied (the latter to negate a defence to preclude divorce, the former to hold up a decree absolute in respect of a marriage already the subject of a decree *nisi*). No approval of financial arrangement is of course currently necessary unless one of these sections, or s 41 of the 1973 Act, where there are children of the family, is relevant to the case (although s 41 only applies where financial arrangements are so wholly unsatisfactory that the District Judge can be shocked into making the triple based direction necessary to delay decree absolute under that section).

Section 9(1)(d) caters for the situation where the parties have no significant assets and in requiring confirmation of this dots the 'i's and crosses the 't's in a commendable manner, which was presumably thought necessary in view of the big step of requiring financial arrangements to be completed before a divorce or separation order was granted.

Exemptions. Section 9(7) provides exceptional means of obtaining a divorce or separation order despite the lack of complete financial arrangements in four cases set out in Schedule 1. These provisions to some extent resemble the court's contemporary powers under s 10(4)(b) of the Matrimonial Causes Act 1973 (whereby the court may accept an undertaking, which case law has indicated should be precise, as to what provision will be made by a spouse for the other party to the marriage) but are more extensive and detailed. The four types of case are: (i) where the other party has delayed or is obstructive or for other reasons beyond one party's control sufficient information is not available, (ii) where agreement has not been reached because of ill health or accident to either of the parties or a child of the family, where this is likely to remain the case for the foreseeable future and it would be significantly detrimental to the welfare of a child or seriously prejudicial to the applicant, (iii) where the other party to the marriage has proved to be uncontactable, and (iv) where there is a domestic violence order in force in favour of the applicant and agreement is not likely to be reached in the foreseeable future, and with the same requirement as in the second case of significant detriment to the welfare of a child or serious prejudice to the applicant.

In all cases the *applicant* must have taken all reasonably practical steps to reach agreement. Moreover, in all cases s 11 (the new version of s 41 of the Matrimonial Causes Act 1973) in connection with the court's satisfaction as to the children's welfare (see below at s 11 for the detail here) must have been complied with.

It should be noted that if the parties' arrangements contain any division of pension assets the s 9(2) declaration must be a statutory declaration.

Section 9(3) refers to marriages solemnised under superintendant registrar's certificate in registered buildings according to such forms and ceremonies as the persons to be married see fit to adopt; s 26(1) of the Marriage Act 1949 permits these marriages in the case of certain sects which have their own religious or other observances to comply with in respect of marriages, eg the Society of Friends (the Quakers), persons professing the Jewish religion who marry according to the usages of the Jews, and housebound persons. The rationale behind this provision is that if the court were unable (upon the application of either party) to require evidence that the persons involved had co-operated in taking such steps as were necessary to dissolve the marriage in relation

to those particular usages, one party might, because of the peculiarities of that sect, be unable to remarry despite the civil divorce order granted by the court. It appears that this provision has cured a long standing grievance in respect of at least one such usage covered by s 26 of the 1949 Act, ie persons professing the Jewish religion, since the grant of a civil decree of divorce did not permit wives in that particular category to obtain a religious divorce without the co-operation of their husbands It is obviously fair that if such marriages are contracted under the auspices of the Marriage Act 1949 they should also be capable of being effectively dissolved in the same manner as other marriages valid in English civil law.

Orders preventing divorce

10. Hardship orders preventing divorce

(1) If an application for a divorce order has been made by one of the parties to a marriage, the court may, on the application of the other party, order that the marriage is not to be dissolved.

(2) Such an order (an 'order preventing divorce') may be made only if the court is satisfied—

(a) that dissolution of the marriage would result in substantial financial or other hardship to the other party or to a child of the family; and

(b) that it would be wrong in all the circumstances (including the conduct of the parties and the interests of any child of the family) for the marriage to be dissolved.

(3) If an application for the cancellation of an order preventing divorce is made by one or both of the parties, the court shall cancel the order unless it is still satisfied—

(a) that dissolution of the marriage would result in substantial financial or other hardship to the party in whose favour the order was made or to a child of the family; and

(b) that it would be wrong, in all the circumstances (including the conduct of the parties and the interests of any child of the family), for the marriage to be dissolved.

(4) If an order preventing a divorce is cancelled, the court may make a divorce order in respect of the marriage only if an application is made under section 3 or 4(3) after the cancellation.

(5) An order preventing divorce may include conditions which must be satisfied before an application for cancellation may be made under subsection (3).

(6) In this section 'hardship' includes the loss of a chance to obtain future benefit (as well as the loss of an existing benefit).

General. This is the new hardship section which is to replace s 5 of the Matrimonial Causes Act 1973 which is repealed. Whereas s 5 has always provided at best a nuisance value and at worst proved to be something of a paper tiger, s 10 has teeth. The problem with s 5 (which provided a defence preventing a decree being granted if grave financial or other hardship could be shown by a blameless spouse divorced after five years separation) was first that it only applied to divorces under s 1(2)(e) of the 1973 Act and furthermore where it could also be shown that it would be wrong in all the circumstances to dissolve the marriage, and secondly that while financial hardship could sometimes be shown, the only 'other hardship' generally advanced was religious or social. This, as shown by the case law, never had much success since the hardship alleged usually arose

out of the separation rather than from dissolution of the marriage and in a world where divorce now tends to be accepted even ethnic minorities from obscure and backward sects have usually failed to make out the defence. See eg *Rukat v Rukat* [1975] 3 All ER 45 (Sicilian Catholics) and *Balraj v Balraj* (1981) 11 Fam 110 (non-Westernised Hindus). The only successful cases tended therefore to be those involving financial hardship where the respondent husband was unable to compensate an elderly petitioner wife for loss of pension rights, eg *Julian v Julian* (1972) 116 SJ 763 (insufficient compensation available for loss of rights under a police pension).

Effect of the section. By the new provisions in s 10(1) the court may make an order preventing divorce if there is substantial hardship to the other party or to a *child of the family* (author's italics). The introduction of hardship to a child of the family is itself a big improvement, since this was not generally taken into account under the old s 5, although there was the case of *Lee v Lee* (1973) 117 SJ 616, which took into account financial hardship as it would impact on a very sick child, and the new provision is obviously significant in the light of the findings of the Exeter study of the damage done to children by divorce (the Exeter Family Study, Family Breakdown and its Impact on Children by Cockett and Triff, 1994). Even greater is the extension of the hardship bar now to all divorces. In theory, although the spectre of conduct has reappeared in the Act, and s 10(2)(b) still requires that 'it would be wrong in all the circumstances (including the conduct of the parties and the interests of any child of the family) for the marriage to be dissolved', which seems to suggest that only 'innocent' parties need apply, this bar could perhaps nevertheless now be invoked by an adulterous spouse, which is logical in that for the past 25 years we have been claiming that adultery is a symptom of marriage breakdown rather than a cause, but not reflecting this in the previous law under s 5 of the 1973 which did not apply where any fault could be alleged. Moreover, an application can now be made on behalf of a child, presumably irrespective of the shortcomings of the child's parent!

Bearing in mind that the whole issue of conduct has been somewhat dormant of late, due to s 25(2)(g) of the 1973 Act which has been interpreted in two decades of case law as meaning that only the most outrageous behaviour stood a chance of qualifying as 'conduct', the resultant rejoicing in family practitioner circles must be expected to have a direct effect on the annual champagne sales figures, which already this summer showed their greatest increase since the conspicuous consumption of the eighties. Someone is clearly celebrating the promise of more work for creative lawyers provided by this section.

Where the court does make an order preventing divorce, then unless and until that order is subsequently lifted (if necessary subject to conditions, which may be imposed by s 10(5)), that will be the end of any dissolution of the marriage, and although a separation order may be granted, that order may not be converted into a divorce under s 4(3) until the order preventing divorce is cancelled: s 10(4). The combined effect of s 10(2)(b) (concerning applications for an order preventing divorce) and s 10(3)(b) (concerning the court's grounds for refusing to lift the order – namely that s 10(2)(b) still applies) must be the best news in years for the specialist family law advocate, because persuasive advocacy, whether written or oral, and a firm grasp of previously redundant case law from which to argue by analogy, is at the very heart of the professional advocate's work. It does seem here that there will be difficulty in balancing the mutually exclusive principles of supporting the institution of marriage pursuant to s 1(a) of the Act and ending a marriage which has broken down with minimum distress pursuant to s 1(c), if the hardship bar is to be taken seriously when blameless spouses do not wish to be divorced, and parliamentary debates made it clear that such spouses' feelings *will* be taken into account in accordance with the Government assurance in the House of Commons on 25 March 1996.

Loss of future benefit. This leaves out of account s 10(6) which permits 'hardship' to be demonstrated by the loss of a future benefit (as well as of an existing benefit) which may well enable lawyers to argue considerably to extend the class of potential losses beyond those currently accepted as available resources within the meaning of s 25 (2)(a) of the 1973 Act. Lawyers will have to examine carefully the relationship between any condition that might be imposed so that the order preventing divorce be lifted with the contemporary ancillary relief philosophy (which

is regularly demonstrated in decided millionaire cases) that ancillary relief orders for applicant spouses should seek to meet their reasonable needs rather than any direct proportion of the richer spouse's assets. Clearly a blameless spouse who does not remain married to a richer one if a divorce order is obtained is able to demonstrate loss of the opportunity to continue to receive a share, albeit vicariously, of whatever the richer spouse has for as long as they remain married, culminating usually in inheriting a substantial portion of that richer spouse's estate, increased as it is likely to be over the years by other augmentations, since regardless of the temperature of their relationship rich spouses who do not, for whatever reason, divorce their other half do in practice continue to meet large bills and make available valuable resources (eg the jet to attend a dental appointment in America in preference to one in Knightsbridge, as Mrs Dart claimed only this summer) on an ongoing basis. What is at stake here is an ongoing lifestyle which is not at the moment generally adequately provided for in making an order based on 'needs', even at the rate of Harrods bills rather than the local suburban high street's. The same problem used to arise before the philosophy of the Child Support Act raised children's maintenance figures in making adequate provision for children once the mother remarried and the former husband was no longer maintaining the mother whose maintenance supported the roof element. The subsection is obviously yet another opportunity for creative advocacy.

Wording. It should be noted that the wording of the section includes the term 'substantial' financial or other hardship, instead of the 'grave' hardship contemplated by Matrimonial Causes Act 1973 s 5. This must further assist spouses seeking to establish the hardship bar under the new law. However, an amendment to the Act was defeated which sought to recognise a deeply held religious belief that marriage was indissoluble as 'hardship', so it is difficult to foresee how religious objections as such may now be interpreted.

Welfare of children

11. Welfare of children

(1) In any proceedings for a divorce order or a separation order, the court shall consider—

(a) whether there are any children of the family to whom this section applies; and

(b) where there are any such children, whether (in the light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare) it should exercise any of its powers under the Children Act 1989 with respect to any of them.

(2) Where, in any case to which this section applies, it appears to the court that—

(a) the circumstances of the case require it, or are likely to require it, to exercise any of its powers under the Children Act 1989 with respect to any such child;

(b) it is not in a position to exercise the power, or (as the case may be) those powers, without giving further consideration to the case; and

(c) there are exceptional circumstances which make it desirable in the interests of the child that the court should give a direction under this section,

it may direct that the divorce order or separation order is not to be made until the court orders otherwise.

(3) In deciding whether the circumstances are as mentioned in subsection (2)(a), the court shall treat the welfare of the child as paramount.

(4) In making that decision, the court shall also have particular regard, on the evidence before it, to—

(a) the wishes and feelings of the child considered in the light of his age and understanding and the circumstances in which those wishes were expressed;

(b) the conduct of the parties in relation to the upbringing of the child;

(c) the general principle that, in the absence of evidence to the contrary, the welfare of the child will be best served by—

(i) his having regular contact with those who have parental responsibility for him and with other members of his family; and

(ii) the maintenance of as good a continuing relationship with his parents as is possible; and

(d) any risk to the child attributable to—

(i) where the person with whom the child will reside is living or proposes to live;

(ii) any person with whom that person is living or with whom he proposes to live; or

(iii)any other arrangements for his care and upbringing.

(5) This section applies to—

(a) any child of the family who has not reached the age of sixteen at the date when the court considers the case in accordance with the requirements of this section; and

(b) any child of the family who has reached that age at that date and in relation to whom the court directs that this section shall apply.

General. This section greatly strengthens s 41 of the Matrimonial Causes Act 1973 which it partially repeals and then extends, although it might have been tidier to repeal the whole section and start again.

Effect of the section. subsections 11(1), 11(2) and 11(5) are identical with the existing subsections 41(1), 41(2) and 41(3) of the 1973 Act which owe their present form to the Children Act 1989. subsections 41(1),(2) and (3) have seldom been invoked by the Court since successive judges have taken the view that Parliament only intended the power to *delay decree absolute* under these provisions to be used very sparingly and only if the *cumulative* tests in the subsections were satisfied. There was however never any power to *prevent* divorce altogether pursuant to *this* section, as *was* the effect of the *pre-Children Act* s 41.

Now the clock has been turned right back and either a divorce, or even a separation order, may be refused if s 11 requirements have not been complied with.

It is s 11(4) which is crucial as it imposes a duty on the court 'on the evidence before it' in making their decision under s 11(2)(a) (which if not resolved in favour of the arrangements proposed by the applicant will potentially prove the watershed of further disaster) to take account of four points which again should create a plentiful supply of work for lawyers:

- by s 11(4)(a) the wishes and feelings of the child considered in the light of his age and understanding and the circumstances in which those wishes were expressed;
- by s 11(4)(b) the conduct of the parties in relation to the upbringing of the child;
- by s 11(4)(c) the contact principle;
- by s 11(4)(d) any risk to the child attributable to the arrangements for his care and upbringing, which will inevitably lead back, *inter alia*, to the first three points.

The first, although in a slightly different form in s 1(3)(a) of the Children Act 1989, has already accumulated a good deal of case law in relation to the Children Act statutory checklist.

This is far too complex a topic to deal with in detail here, but the latest position seems to be that although there appears to be no statutory provision requiring the courts to be pro-active in ascertaining a suitable child's wishes and feelings, judges are considered to be abdicating their responsibility if they do not listen to sensible mature children whose wishes and feelings are made clear, see eg *Re W (Minors) (Residence Order)* (1992) *The Times* 3 March, CA, and *Re P (a Minor) (Education: Child's Views)* [1992] 1 FLR 316, CA. With the increased prevalence of children wishing to be separately represented this is bound to lead to another growth area in family work.

The second again introduces conduct, this time in the much more complex context of conduct towards children. Obviously this provision has some relation to s 1(3) (f) of the Children Act ('How capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs') but must also have some relevance to the accumulation of case law on the subject where individual solutions have often ignored 'conduct' eg of mothers in leaving young children whom they then succeeded in retrieving from blameless and conscientious fathers who had stepped into the breach, on the basis that the welfare of the child, which is paramount, dictated that the child should nevertheless be with the parent who had decamped. Again more work for family practitioners!

The third embarks on the sea of discord occasioned by the continuing supply of contact problems, although this subsection seems to go firmly for a statutory presumption of contact, which has been somewhat called into question in recent years with the spate of implacable hostility cases, but which received a boost from the strong line taken by the President of the Family Division in 1994 in the case of *Re W (A Minor)(Contact)* [1994] 2 FLR 441 where he held, *inter alia*, that 'Contact with a parent was a fundamental right of a child, save in wholly exceptional circumstances'. Wholly exceptional circumstances will nevertheless still be likely to cover the implacable hostility cases where contact may be said to be contrary to the child's welfare, despite the fact that that is because of the attitude of one parent, and the overall effect of the subsection may only be definitely to shift the presumption back in favour of the applicant parent, whereas following the test propounded by Wilson J in *Re M (Contact: Welfare Test)* [1995] 1 FLR 274, CA, it seemed that parents actually had to show that contact was for the child's welfare.

The fourth point returns to the s 1(3) checklist, and in connection with risk in particular to cases such as *Scott v Scott* [1986] Fam Law 301 and S*tephenson v Stephenson* [1985] FLR 1140 which have long established that the court obviously does not like a child to be in a household with a parent's new partner who is criminal or violent. Other contemporary contra-indications would obviously be drugs or overt sex, or the possibility of child abuse. The subsection obviously also requires reference to the entire s 1(3) checklist in connection with arrangements for the child's care and upbringing.

The overall objective of s 11 is to provide a bridge between divorce procedures and those of the Children Act 1989. The prescribed forms will no doubt make provision for the evidence which is before the court and this must inevitably lead to an expansion or replacement of the existing form of Statement of Arrangements. Again this must increase work for the practitioner and it may be that when new rules of court are made pursuant to s 12 we shall return to the pre-1991 practice of s 41 hearings, at least in all cases where such potential bones of contention need to be examined in detail. At present, if both parents sign the form of Statement of Arrangements for the Children, most District Judges simply do not interfere unless there are glaring problems evident on the face of the form.

Supplementary

12. Lord Chancellor's rules

(1) The Lord Chancellor may make rules—

(a) as to the form in which a statement is to be made and what information must accompany it;

(b) requiring the person making the statement to state whether or not, since satisfying the requirements of section 8, he has made any attempt at reconciliation;

(c) as to the way in which a statement is to be given to the court;

(d) requiring a copy of a statement made by one party to be served by the court on the other party;

(e) as to circumstances in which such service may be dispensed with or may be effected otherwise than by delivery to the party;

(f) requiring a party who has made a statement to provide the court with information about the arrangements that need to be made in consequence of the breakdown;

(g) as to the time, manner and (where attendance in person is required) place at which such information is to be given;

(h) where a statement has been made, requiring either or both of the parties—

(i) to prepare and produce such other documents, and

(ii) to attend in person at such places and for such purposes,

as may be specified;

(i) as to the information and assistance which is to be given to the parties and the way in which it is to be given;

(j) requiring the parties to be given, in such manner as may be specified, copies of such statements and other documents as may be specified.

(2) The Lord Chancellor may make rules requiring a person who is the legal representative of a party to a marriage with respect to which a statement has been, or is proposed to be, made—

(a) to inform that party, at such time or times as may be specified—

(i) about the availability to the parties of marriage support services;

(ii) about the availability to them of mediation; and

(iii) where there are children of the family, that in relation to the arrangements to be made for any child the parties should consider the child's welfare, wishes and feelings;

(b) to give that party, at such time or times as may be specified, names and addresses of persons qualified to help—

(i) to effect a reconciliation; or

(ii) in connection with mediation; and

(c) to certify, at such time or times as may be specified—-

(i) whether he has complied with the provision made in the rules by virtue of paragraphs (a) and (b);

(ii) whether he has discussed with that party any of the matters mentioned in paragraph (a) or the possibility of reconciliation; and

(iii) which, if any, of those matters they have discussed.

(3) In subsections (1) and (2) 'specified' means determined under or described in the rules.

(4) This section does not affect any power to make rules of court for the purposes of this Act.

General. This section enables the Lord Chancellor to make the necessary new rules to effect the new process contemplated by ss 1–11.

Effect of the section. The section is only remarkable in that s 12(2)(a) and (b) specifically require lawyers (ie primarily solicitors, since the Bar does not usually represent clients without intermediate instructions from a solicitor, although direct access from foreign lawyers is possible in a family law matter) to inform their clients about the availability of marriage support services and mediation and, in relation to arrangements to be made for the children, about the necessity to consider the children's welfare, wishes and feelings Further they are to furnish clients with addresses to enable them to avail themselves of such marriage support and mediation services.

Moreover, by s 12(2)(c) the legal representative (again presumably a solicitor) of a party making a statement of marital breakdown must now also certify his compliance with paragraphs (a) and (b) and must also *certify* whether he has discussed marriage support, mediation or consideration of the children's welfare, and if so which ones.

This goes somewhat further than s 6(1) of the Matrimonial Causes Act 1973 but *still* does not require any information to be given as to what the *result* of such discussion was (which was always a criticism of s 6(1) which is repealed by the Family Law Act 1996).

Resolution of disputes

13. Directions with respect to mediation

(1) After the court has received a statement, it may give a direction requiring each party to attend a meeting arranged in accordance with the direction for the purpose—

(a) of enabling an explanation to be given of the facilities available to the parties for mediation in relation to disputes between them; and

(b) of providing an opportunity for each party to agree to take advantage of those facilities.

(2) A direction may be given at any time, including in the course of proceedings connected with the breakdown of the marriage (as to which see section 25).

(3) A direction may be given on the application of either of the parties or on the initiative of the court.

(4) The parties are to be required to attend the same meeting unless—

(a) one of them asks, or both of them ask, for separate meetings; or

(b) the court considers separate meetings to be more appropriate.

(5) A direction shall—

(a) specify a person chosen by the court (with that person's agreement) to arrange and conduct the meeting or meetings; and

(b) require such person as may be specified in the direction to produce to the court, at such time as the court may direct, a report stating—

(i) whether the parties have complied with the direction; and

(ii) if they have, whether they have agreed to take part in any mediation.

General. This section permits the Court in any marital proceedings (which are defined by s 25) to give a *direction* (ie as in other sensitive marital contexts, such as blood and DNA testing, not an *order*) requiring each party to attend a meeting to receive information about mediation facilities

available to resolve any dispute between them in relation to their marriage, so as to provide an opportunity for the parties to agree to take advantage of such facilities, and is one of the more controversial provisions of the Act.

Effect of the section. It will be observed from s 13(5) that the wording of the section in theory does not permit or encourage any coercion in this respect (since compulsory mediation is a contradiction in terms) although a report is required as to whether the parties have kept the appointment and whether they have or have not agreed to use mediation, but it is clear that refusal to consider mediation may have repercussions in a legal aid context, see below at Part III.

The role of mediation. Mediation may be directed at any time and either of the court's own initiative or on the application of either party. Normally the parties will, it seems, be expected to attend the same mediation information meeting, but may be directed to separate meetings where appropriate. This is all very much in the Woolf spirit currently sweeping through litigation as a whole and mediation is of course in theory (and has proved in various small scale schemes in practice to be) particularly suitable in general terms to marital disputes. However, it remains to be seen how it will work if widely used under the Act, especially where mediators do not have a legal background at least to degree level, since the most perfectly mediated 'deal' is obviously not going to work if it is unfair in terms of legal entitlement under the law or where it involves solutions which cannot be translated into legal terms, and there have already been instances of such 'solutions' being presented to lawyers in a form which no court would order.

Indeed there is a strong case for using trained mediators with a legal background since if they are not legally qualified, all mediators will need training in basic child law and the law of ancillary relief. Perhaps such work would be a good opportunity for those who qualify on Legal Practice or Bar Vocational Courses but are unable to find training contracts or pupillages, or simply those law graduates who decide not to go onto either of the legal professional vocational courses at all. It may be that such candidates, if otherwise suitable as mediators, could obtain some priority for a mediation training place since they would clearly be valuable recruits to the new system. A problem is of course the additional cost, since reputable lawyer mediator courses (such as that run by the SFLA) last several days as they are comprehensive and are expensive, besides which there is a a large mismatch in the demand for places and those actually available.

Obviously, much will depend on the nature of the mediation services provided – where the service is provided by a single lawyer-mediator, or by two mediators (one lawyer and one non-lawyer), there is likely to be a much greater chance of overall success without subsequent technical problems than where a non-lawyer mediator (or two non-lawyer mediators) are involved, unless there is adequate legal training provided to non-lawyer mediators However, it should be noted that an advantage of using a single mediator is that whereas one solicitor still could not possibly act for both parties under the new law (although this is both possible and indeed the norm where a divorce or separation is agreed in other European countries) a single mediator *can* do so.

Curiously, there is no definition in the Act of mediation (except in relation to legal aid in s 26) which is strange, given its central role in the new process. However, there was evidence in the Government's White Paper (*Looking to the future, mediation and the grounds for divorce*, Cm 2799 of 1995) that couples want to divorce decently, and that mediation offers them this opportunity: para 5.22. Moreover, the White Paper seemed to indicate that when weighed up overall, the advantages overcame the disadvantages: para 5.11. Nevertheless, the thread of domestic violence protection running through the new process must not be forgotten and it must always be remembered that mediation may be an opportunity for a stronger party to bully a weaker one, and that this may mean it is difficult to protect a weaker party in mediation from 'other harm' even if violence as such can be avoided: see s 29 below re funding for mediation if that can take place 'without ... fear of violence or other harm' which underlines the importance of the meeting contemplated by s 13.

Background. Law Comm 192 recognises that neither marital breakdown nor divorce is solely or even predominantly, but only incidentally, a legal process, prior to or alongside which people

need to adapt socially and psychologically: para 3.29. However, there does appear to be a danger that mediation is already widely regarded outside the legal profession as a new 'cure all'. It is for this reason that where non-lawyer mediators are used, first their training must include some knowledge of ancillary relief and child law, and secondly their clients must be reminded that legal services exist to advise them independently of the suitability of any mediated solution they are contemplating. There is further concern that mediators' lack of financial expertise may be a handicap where complex accounts must be perused, a problem which has already led to unsatisfactory outcomes in pilot schemes. For this reason the regulations to be made under s 8(6) to meet the obligation under s 8(9)(g) to impart information about the availability of legal advice and *representation* is so important.

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14. Adjournments

(1) The court's power to adjourn any proceedings connected with the breakdown of a marriage includes power to adjourn—

(a) for the purpose of allowing the parties to comply with a direction under section 13; or

(b) for the purpose of enabling disputes to be resolved amicably.

(2) In determining whether to adjourn for either purpose, the court shall have regard in particular to the need to protect the interests of any child of the family.

(3) If the court adjourns any proceedings connected with the breakdown of a marriage for either purpose, the period of the adjournment must not exceed the maximum period prescribed by rules of court.

(4) Unless the only purpose of the adjournment is to allow the parties to comply with a direction under section 13, the court shall order one or both of them to produce to the court a report as to—-

(a) whether they have taken part in mediation during the adjournment;

(b) whether, as a result, any agreement has been reached between them;

(c) the extent to which any dispute between them has been resolved as a result of any such agreement;

(d) the need for further mediation; and

(e) how likely it is that further mediation will be successful.

General. This section permits adjournment of marital proceedings for various purposes but it is clearly aimed at encouraging and facilitating mediation. There has been power to adjourn in previous divorce statutes but it remains to be seen whether this one will be used more than previously.

Effect of the section. Despite the wide power to adjourn, section 14(4) nevertheless appear to attempt to keep the momentum going since, except when the adjournment is for mediation, the court is to have power to order that there should be a report on progress. Clearly this will be further particularised in new rules of court which are to prescribe maximum periods.

Financial provision

15. Financial arrangements

(1) Schedule 2 amends the 1973 Act.

(2) The main object of Schedule 2 is—

(a) to provide that, in the case of divorce or separation, an order about financial provision may be made under that Act before a divorce order or separation order is made; but

(b) to retain (with minor changes) the position under that Act where marriages are annulled.

(3) Schedule 2 also makes minor and consequential amendments of the 1973 Act connected with the changes mentioned in subsection (1).

General. This section enacts the new position with regard to ancillary relief orders, *viz* that they will normally be made, as part of the arrangements for the future contemplated by s 3(1)(c) before any order for divorce or separation is made, though the nullity position is different.

Effect of the section. For the detailed effect of the section see Schedule 2 below.

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16. Division of pension rights: England and Wales

(1) The Matrimonial Causes Act 1973 is amended as follows.

(2) In section 25B (benefits under a pension scheme on divorce, etc), in subsection (2), after paragraph (b), insert—

'(c) in particular, where the court determines to make such an order, whether the order should provide for the accrued rights of the party with pension rights ('the pension rights') to be divided between that party and the other party in such a way as to reduce the pension rights of the party with those rights and to create pension rights for the other party.'

(3) After subsection (7) of that section, add—

'(8) If a pensions adjustment order under subsection (2)(c) above is made, the pension rights shall be reduced and pension rights of the other party shall be created in the prescribed manner with benefits payable on prescribed conditions, except that the court shall not have the power—

(a) to require the trustees or managers of the scheme to provide benefits under their own scheme if they are able and willing to create the rights for the other party by making a transfer payment to another scheme and the trustees and managers of that other scheme are able and willing to accept such a payment and to create those rights: or

(b) to require the trustees or managers of the scheme to make a transfer to another scheme—

(i) if the scheme is an unfunded scheme (unless the trustees or managers are able and willing to make such a transfer payment); or

(ii) in prescribed circumstances.

(9) No pensions adjustment order may be made under subsection (2)(c) above—

(a) if the scheme is a scheme of a prescribed type, or

(b) in prescribed circumstances, or

(c) insofar as it would affect benefits of a prescribed type.'

(4) In section 25D (pensions: supplementary), insert—-

(a) in subsection (2)—

(i) at the end of paragraph (a), the words 'or prescribe the rights of the other party under the pension scheme.'; and

(ii) after paragraph (a), the following paragraph—

'(aa) make such consequential modifications of any enactment or subordinate legislation as appear to the Lord Chancellor necessary or expedient to give effect to the provisions of section 25B; and an order under this paragraph may make provision applying generally in relation to enactments and subordinate legislation of a description specified in the order,';

(b) in subsection (4), in the appropriate place in alphabetical order, the following entries—

''funded scheme' means a scheme under which the benefits are provided for by setting aside resources related to the value of the members' rights as they accrue (and 'unfunded scheme' shall be construed accordingly);

'subordinate legislation' has the same meaning as in the Interpretation Act 1978;'; and

(c) after subsection (4), the following subsection—

'(4A) Other expressions used in section 25B above shall be construed in accordance with section 124 (interpretation of Part 1) of the Pensions Act 1995.'

General. This section amends the new ss 25B–D of the Matrimonial Causes Act 1973 (which were inserted by s 166 of the Pensions Act 1995 and which introduced '*pension earmarking*' ie making orders so that when a spouse's pension becomes payable all or part of its benefits go to the other spouse) and this latest amendment was introduced to permit the actual pension splitting which would have been preferred by many in 1995 but which the government then opposed. (For those unfamiliar with the lightening changes proposed and made in this area over a relatively short time scale, s 25B places a duty on the court to examine the pension positions of the parties and to consider whether an order relating to that pension scheme should be made. Sections 25B–25D then give the Court the power to impose an attachment order on the trustees or insurers who will pay the pension once it comes into effect, and there is also a power to order a spouse who is a member of a scheme to exercise any right of nomination so as to give the other spouse all or part of any lump sum payable on death. Those 1995 amendments did not therefore permit '*pension splitting*'.) Earmarking was finally introduced when the 1995 provisions came into force on 1 July 1996.

Effect of the section. The section as it stands is defective in finally achieving pension splitting since the words are not linked to s 24 of the Matrimonial Causes Act 1973 which gives the court the power to make orders, but to the earmarking provisions inserted by the Pensions Act 1995. The section nevertheless remains in the Act to indicate that as a matter of principle the government accepts pension splitting. A promised Green Paper has already been produced and a White Paper promised for the winter is expected early in 1997. However, legislation is unlikely until around the millennium.

Background. The rationale behind such an apparently illogical step as to leave the provisions in the Act without giving the court the power necessary to effect them is clear from the Parliamentary debates: see the *Weekly Hansard* Issue 1729 p 536 *et seq* for 17 June 1996 where the Under

Secretary of State explained that the precise detail should be the subject of a Green Paper and then a White Paper and legislation which could be debated in the usual way so as to examine all the issues and detail after proper consultation, and to put in place the right regulations to implement the principle outlined. This would, he said, enable the fundamental issues, such as the purpose and operation and tax treatment of pension schemes, to be considered in the light of property rights, tax positions and civil justice generally, and this was important because of the implications for employers, pension scheme managers, other scheme members, actuaries, lawyers, individuals and the public finances. It was further felt that the provisions which have survived in the section were not sufficiently transparent and that further primary legislation might be required, for example because a one and a half page list of statutes would need to be looked at, and the Under Secretary stuck to this in the face of assurances from the Opposition that there would be no Family Law Act unless the government recognised the vital nature of pension concerns.

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17. Division of pension assets: Scotland

Section 10 of the Family Law (Scotland) Act 1985 (sharing of value of matrimonial property) is amended as follows—

(a) in subsection (5) at the end of paragraph (b), insert ‘, and

(b) in the assets in respect of which either party has accrued rights to benefits under a pension scheme’; and

(c) after subsection (5) insert —

‘(5A) In the case of an unfunded pension scheme, the court may not make an order which would allow assets to be removed from the scheme earlier than would otherwise have been the case.’.

This section deals with Scottish law.

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18. Grounds for financial provision orders in magistrates’ courts

(1) In section 1 of the Domestic Proceedings and Magistrates’ Courts Act 1978, omit paragraphs (c) and (d) (which provide for behaviour and desertion to be grounds on which an application for a financial provision order may be made).

(2) In section 7(1) of that Act (powers of magistrates’ court where spouses are living apart by agreement), omit ‘neither party having deserted the other’.

General. This section moves on from divorce and separation to financial provision in the magistrates’ courts.

Background. The section gives effect to the Law Commission’s recommendations about financial orders under the Domestic Proceedings and Magistrates’ Courts Act 1978, namely that the grounds for making financial provision in the magistrates’ court (now called the Family Proceedings Court) should be brought into line with the changes in the law of divorce and separation. This required deletion of paragraphs (c) and (d) of s 1 of the Domestic Proceedings and Magistrates’ Courts Act 1978 and also a consequential change in s 7 which enables orders to be made where the parties are living apart by agreement without either being in desertion. Clearly as desertion under s 1(2)(c) of the Magistrates’ Courts Act 1973 has been abolished any reference to desertion in s 7(1) needs to be removed from this section too: Law Comm 192 paras 4.20-4.28.

Jurisdiction and commencement of proceedings

19. Jurisdiction in relation to divorce and separation

(1) In this section 'the court's jurisdiction' means—

(a) the jurisdiction of the court under this Part to entertain marital proceedings; and

(b) any other jurisdiction conferred on the court under this Part, or any other enactment, in consequence of the making of a statement.

(2) The court's jurisdiction is exercisable only if—

(a) at least one of the parties was domiciled in England and Wales on the statement date;

(b) at least one of the parties was habitually resident in England and Wales throughout the period of one year ending with the statement date; or

(c) nullity proceedings are pending in relation to the marriage when the marital proceedings commence.

(3) Subsection (4) applies if—

(a) a separation order is in force; or

(b) an order preventing divorce has been cancelled.

(4) The court—

(a) continues to have jurisdiction to entertain an application made by reference to the order referred to in subsection (3); and

(b) may exercise any other jurisdiction which is conferred on it in consequence of such an application.

(5) Schedule 3 amends Schedule I to the Domicile and Matrimonial Proceedings Act 1973 (orders to stay proceedings where there are proceedings in other jurisdictions).

(6) The court's jurisdiction is exercisable subject to any order for a stay under Schedule I to that Act.

(7) In this section—

'nullity proceedings' means proceedings in respect of which the court has jurisdiction under section 5(3) of the Domicile and Matrimonial Proceedings Act 1973; and

'statement date' means the date on which the relevant statement was received by the court.

General. This is the section which gives the Court jurisdiction to entertain divorce and separation suits under the new law.

Effect of the section. The section does not repeat s 5 of the Domicile and Matrimonial Proceedings Act 1973 but substantially re-enacts it. By Schedule 3 of the Family Law Act 1996, Schedule 1 of the Domicile and Matrimonial Proceedings Act 1973 in respect of stay of proceedings, where there are proceedings in other jurisdictions, is amended (see Schedule 3 below). Applications for a stay can be made in accordance with the provisions set out in Schedule 3, and it is believed that regulations will enable the normal three month period between the information meeting and the statement of marital breakdown (see ss 8(2) and (8)) to be bypassed in the case of injunction proceedings or other emergency relief being required.

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20. Time when proceedings for divorce or separation begin

(1) The receipt by the court of a statement is to be treated as the commencement of proceedings.

(2) The proceedings are to be known as marital proceedings.

(3) Marital proceedings are also—

(a) separation proceedings, if an application for a separation order has been made under section 3 by reference to the statement and not withdrawn;

(b) divorce proceedings, if an application for a divorce order has been made under section 3 by reference to the statement and not withdrawn.

(4) Marital proceedings are to be treated as being both divorce proceedings and separation proceedings at any time when no application by reference to the statement, either for a divorce order or for a separation order, is outstanding.

(5) Proceedings which are commenced by the making of an application under section 4(3) are also marital proceedings and divorce proceedings.

(6) Marital proceedings come to an end—

(a) on the making of a separation order;

(b) on the making of a divorce order;

(c) on the withdrawal of the statement by a notice in accordance with section 5(3)(a);

(d) at the end of the specified period mentioned in section 5(3)(b), if no application under section 3 by reference to the statement is outstanding;

(e) on the withdrawal of all such applications which are outstanding at the end of that period;

(f) on the withdrawal of an application under section 4(3).

General. This section defines the commencement and end of of proceedings, the former of which will be important in relation to eg s 19 and stays of proceedings and financial arrangements to comply with s 9 (which cannot be commenced until the marital proceedings have commenced), and the latter in relation to other matters, such as whether the court has jurisdiction to make orders under the Children Act 1989 of its own motion, which it can only do when 'family proceedings', (including 'marital proceedings' under the 1996 Act) are continuing. It continues the integrated approach to divorce and separation: s 20(4).

Effect of the section. The section provides that proceedings commence when the statement under s 5 is received and that the proceedings (which need not now at the outset necessarily choose between divorce and separation) be called 'marital proceedings': s 20(2). However, s 20(3)(a) and (b) enable them also to be called 'divorce proceedings' or 'separation proceedings' if a choice is made at the initial stage.

By s 20(5) application under s 4(3) to convert a separation order into a divorce order is also to be treated as marital proceedings.

Section 20(6) provides expressly for marital proceedings to end either when the divorce or separation order is made, or when a statement is withdrawn jointly by the parties under s 5(3)(a), at the end of the 'specified period' under s 5(3)(b) if no application is then outstanding, or on the withdrawal of an application under s 4(3) to convert a separation order into a divorce order.

Intestacy

21. Intestacy: effect of separation

Where—

(a) a separation order is in force, and

(b) while the parties to the marriage remain separated, one of them dies intestate as respects any real or personal property,

that property devolves as if the other had died before the intestacy occurred.

This section expressly provides that when a separation order is in force and the parties are still separated and one dies, that party's estate devolves as though the other had already died. This preserves the existing rule.

Marriage support services

22. Funding for marriage support services

(1) The Lord Chancellor may, with the approval of the Treasury, make grants in connection with—

(a) the provision of marriage support services;

(b) research into the causes of marital breakdown;

(c) research into ways of preventing marital breakdown.

(2) Any grant under this section may be made subject to such conditions as the Lord Chancellor considers appropriate.

(3) In exercising his power to make grants in connection with the provision of marriage support services, the Lord Chancellor is to have regard, in particular, to the desirability of services of that kind being available when they are first needed.

General. This section attempts to enable the Lord Chancellor to provide funding for marriage guidance, research into the causes of marital breakdown and the ways of preventing it.

Effect of the section. It should be noted that this section is enabling and not mandatory and that the Lord Chancellor is referred to the 'approval of the Treasury'. Section 20(3) attempts to draw to the Lord Chancellor's attention the implications of even implementing the Act! It attempts to secure provision of adequate funding at that time, but although the other subsections of s 22 use the word 'may' and are therefore discretionary, even 'is to have regard' is a less common mandatory form of expression than the usual statutory mandatory word 'shall'. One can only watch this space with interest.

Background. This reflects the perceived urgency of immediate marriage counselling on a breakup, because of the sharply reduced prospects of success where there is any delay.

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23. Provision of marriage counselling

(1) The Lord Chancellor or a person appointed by him may secure the provision, in accordance with regulations made by the Lord Chancellor, of marriage counselling.

(2) Marriage counselling may only be provided under this section at a time when a period for reflection and consideration—

(a) is running in relation to the marriage; or

(b) is interrupted under section 7(8) (but not for a continuous period of more than 18 months).

(3) Marriage counselling may only be provided under this section for persons who would not be required to make any contribution towards the cost of mediation provided for them under Part IIIA of the Legal Aid Act 1988.

(4) Persons for whom marriage counselling is provided under this section are not to be required to make any contribution towards the cost of the counselling.

(5) Marriage counselling is only to be provided under this section if it appears to the marriage counsellor to be suitable in all the circumstances.

(6) Regulations under subsection (1) may—

(a) make provision about the way in which marriage counselling is to be provided; and

(b) prescribe circumstances in which the provision of marriage counselling is to be subject to the approval of the Lord Chancellor.

(7) A contract entered into for the purposes of subsection (1) by a person appointed under that subsection must include such provision as the Lord Chancellor may direct.

(8) If the person appointed under subsection (I) is the Legal Aid Board, the powers conferred on the Board by or under the Legal Aid Act 1988 shall be exercisable for the purposes of this section as they are exercisable for the purposes of that Act.

(9) In section 15 of the Legal Aid Act 1988 (availability of, and payment for, representation under Part IV of the Act), after subsection (3H) insert—

'(3I) A person may be refused representation for the purposes of any proceedings if—

(a) the proceedings are marital proceedings within the meaning of Part II of the Family Law Act 1996; and

(b) he is being provided with marriage counselling under section 23 of that Act in relation to the marriage.'

General. The tone of s 23 is similarly enabling and discretionary.

Effect of the section. By ss 23(1) and 23(8) it seems that the Legal Aid Board may provide the service with consequential implications under s 23(9) which seems to make marriage counselling and representation mutually exclusive, at least at the time that an assisted person is funded for one or the other, and s 23(9) achieves this by inserting a new subsection (3I) after subsection (3H) into the Legal Aid Act 1988 s 15. Section 23(3), however, permits funding of marriage counselling (to those entitled to legal aid and with no contribution) for mediation, although s 23(5) requires that the case be 'suitable in all the circumstances'. Section 25(6) and (7) make it clear that regulations when made will play a significant part in the implementation of this section.

Interpretation

24. Interpretation of Part II etc

(1) In this Part—

'the 1973 Act' means the Matrimonial Causes Act 1973;

'child of the family' and 'the court' have the same meaning as in the 1973 Act;

'divorce order' has the meaning given in section 2(1)(a);

'divorce proceedings' is to be read with section 20;

'marital proceedings' has the meaning given in section 20;

'non-molestation order' has the meaning given by section 42(1);

'occupation order' has the meaning given by section 39;

'order preventing divorce' has the meaning given in section 10(2);

'party', in relation to a marriage, means one of the parties to the marriage;

'period for reflection and consideration' has the meaning given in section 7;

'separation order' has the meaning given in section 2(1)(b);

'separation proceedings' is to be read with section 20;

'statement' means a statement of marital breakdown;

'statement of marital breakdown' has the meaning given in section 6(1).

(2) For the purposes of this Part, references to the withdrawal of an application are references, in relation to an application made jointly by both parties, to its withdrawal by a notice given, in accordance with rules of court—

(a) jointly by both parties; or

(b) separately by each of them.

(3) Where only one party gives such a notice of withdrawal, in relation to a joint application, the application shall be treated as if it had been made by the other party alone.

This section is largely self explanatory as it is the definition section. Section 24(2) and (3) dots the 'i's and crosses the 't's in relation to the withdrawal of statements.

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25. Connected proceedings

(1) For the purposes of this Part, proceedings are connected with the breakdown of a marriage if they fall within subsection (2) and, at the time of the proceedings—

(a) a statement has been received by the court with respect to the marriage and it is or may become possible for an application for a divorce order or separation order to be made by reference to that statement;

(b) such an application in relation to the marriage has been made and not withdrawn; or

(c) a divorce order has been made, or a separation order is in force, in relation to the marriage.

(2) The proceedings are any under Parts I to V of the Children Act 1989 with respect to a child of the family or any proceedings resulting from an application—

(a) for, or for the cancellation of, an order preventing divorce in relation to the marriage;

(b) by either party to the marriage for an order under Part IV;

(c) for the exercise, in relation to a party to the marriage or child of the family, of any of the court's powers under Part II of the 1973 Act;

(d) made otherwise to the court with respect to, or in connection with, any proceedings connected with the breakdown of the marriage.

This section defines connected proceedings and as might be expected includes any Children Act 1989 proceedings, any proceedings applying for an order preventing divorce, a domestic violence order under Part IV of the Act, proceedings under Part II of the Matrimonial Causes Act 1973 or any other court application with respect to the breakdown of the marriage, either where a statement is current or an order has been made.

PART III

LEGAL AID FOR MEDIATION IN FAMILY MATTERS

26. Legal aid for mediation in family matters

(1) In the Legal Aid Act 1988 insert, after section 13—

'PART IIIA

MEDIATION

Scope of this Part

13A.—(1) This Part applies to mediation in disputes relating to family matters.

(2) 'Family matters' means matters which are governed by English law and in relation to which any question has arisen, or may arise—

(a) under any provision of—

(i) the 1973 Act;

(ii) the Domestic Proceedings and Magistrates' Courts Act 1978;

(iii) Parts I to V of the Children Act 1989;

(iv) Parts II and IV of the Family Law Act 1996; or

(v) any other enactment prescribed;

(b) under any prescribed jurisdiction of a prescribed court or tribunal; or

(c) under any prescribed rule of law.

(3) Regulations may restrict this Part to mediation in disputes of any prescribed description.

(4) The power to—

(a) make regulations under subsection (2), or

(b) revoke any regulations made under subsection (3),

is exercisable only with the consent of the Treasury.'

(2) In section 2 of the 1988 Act, after subsection (3), insert—

'(3A) 'Mediation' means mediation to which Part IIIA of this Act applies; and includes steps taken by a mediator in any case—

(a) in determining whether to embark on mediation;

(b) in preparing for mediation; and

(c) in making any assessment under that Part.'

(3) In section 43 of the 1988 Act, after the definition of 'legal representative' insert—

''mediator' means a person with whom the Board contracts for the provision of mediation by any person.'

General. This section commences Part III of the Act, comprising ss 26–29 inclusive, which provide for mediation in family matters covered by the Act to be available on legal aid.

Effect of the section. The section inserts a new Part IIIA into the Legal Aid Act 1988. By the new s 13(2) of that Act these 'family matters' are now widely defined, though by s 13A(3) the class may be restricted and by s 13(4) the powers to make regulations is exercisable only with the consent of the Treasury. The section inserts a new s 2(3A) into the Legal Aid Act 1988 to allow legal aid to cover the initial stages of mediation, including the stage of whether to undertake mediation at all and to prepare for it, as well as actually to make an assessment.

The section also defines a mediator as a person with whom the board enters into a contract for the provision of mediation and inserts this definition into s 43 if the 1988 Act.

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27. Provision and availability of mediation

After section 13A of the 1988 Act, insert—

'Provision and availability of mediation

13B.—(1) The Board may secure the provision of availability of mediation under this Part.

(2) If mediation is provided under this Part, it is to be available to any person whose financial resources are such as, under regulations, make him eligible for mediation.

(3) A person is not to be granted mediation in relation to any dispute unless mediation appears to the mediator suitable to the dispute and the parties and all the circumstances.

(4) A grant of mediation under this Part may be amended, withdrawn or revoked.

(5) The power conferred by subsection (1) shall be exercised in accordance with any directions given by the Lord Chancellor.

(6) Any contract entered into by the Board for the provision of mediation under this Part must require the mediator to comply with a code of practice.

(7) The code must require the mediator to have arrangements designed to ensure—

(a) that parties participate in mediation only if willing and not influenced by fear of violence or other harm;

(b) that cases where either party may be influenced by fear of violence or other harm are identified as soon as possible;

(c) that the possibility of reconciliation is kept under review throughout mediation; and

(d) that each party is informed about the availability of independent legal advice.

(8) Where there are one or more children of the family, the code must also require the mediator to have arrangements designed to ensure that the parties are encouraged to consider—

(a) the welfare, wishes and feelings of each child; and

(b) whether and to what extent each child should be given the opportunity to express his or her wishes and feelings in the mediation.

(9) A contract entered into by the Board for the provision of mediation under this Part must also include such other provision as the Lord Chancellor may direct the Board to include.

(10) Directions under this section may apply generally to contracts, or to contracts of any description, entered into by the Board, but shall not be made with respect to any particular contract.'

General. The section continues the theme of the provision and availability of mediation. The Legal Aid Board is to enter into contracts to provide mediation and to require a Code of Conduct to be observed by mediators: s 27(6).

Effect of the section. The section inserts a new s 13B into the 1988 Act.

A new s 13B(3) provides that legal aid may be withdrawn for mediation or the legal aid granted may be amended or revoked. Basically there will be restrictions about the grant of legal aid unless the party concerned has attended a meeting with a mediator: s 29 below.

By ss 13B(6) and 13B(7) observance of a Code of Practice is to be required of mediators and s 13B(7) specifically addresses arrangements that must be made to ensure that parties can participate only if willing, and not if intimidated through fear of violence 'or other harm', such cases to be identified as early as possible: s 13B(7)(b).

By the new s 13(B)(7)(d) the possibility of reconciliation is to be kept under review: s 27(7).

Lawyers will rejoice that by s 13B(7)(d) there is to be an obligation in the Code that parties are kept informed of the availability of independent legal advice.

By s 13B(8) the Code must also address the arrangements to ensure that the parties consider the welfare, wishes and feelings of each child and whether and to what extent children should have an opportunity to express their feelings in the mediation.

Section 27(9) gives the Lord Chancellor power to add such other provisions as he desires the Board to include! Clearly we await such further provisions in order to assess the future regime.

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28. Payment for mediation

(1) After section 13B of the 1988 Act, insert—

'Payment for mediation under this Part

13C.—(1) Except as provided by this section, the legally assisted person is not to be required to pay for mediation provided under this Part.

(2) Subsection (3) applies if the financial resources of a legally assisted person are such as, under regulations, make him liable to make a contribution.

(3) The legally assisted person is to pay to the Board in respect of the costs of providing the mediation, a contribution of such amount as is determined or fixed by or under the regulations.

(4) If the total contribution made by a person in respect of any mediation exceeds the Board's liability on his account, the excess shall be repaid to him.

(5) Regulations may provide that, where—

(a) mediation under this Part is made available to a legally assisted person, and

(b) property is recovered or preserved for the legally assisted person as a result of the mediation,

a sum equal to the Board's liability on the legally assisted person's account is, except so far as the regulations otherwise provide, to be a first charge on the property in favour of the Board.

(6) Regulations under subsection (5) may, in particular, make provision—

(a) as to circumstances in which property is to be taken to have been, or not to have been, recovered or preserved; and

(b) as to circumstances in which the recovery or preservation of property is to be taken to be, or not to be, the result of any mediation.

(7) For the purposes of subsection (5), the nature of the property and where it is situated is immaterial.

(8) The power to make regulations under section 34(2)(f) and (8) is exercisable in relation to any charge created under subsection (5) as it is exercisable in relation to the charge created by section 16.

(9) For the purposes of subsections (4) and (5), the Board's liability on any person's account in relation to any mediation is the aggregate amount of—

(a) the sums paid or payable by the Board on his account for the mediation, determined in accordance with subsection (10);

(b) any sums paid or payable in respect of its net liability on his account, determined in accordance with subsection (11) and the regulations—

(i) in respect of any proceedings, and

(ii) for any advice or assistance under Part III in connection with the proceedings or any matter to which the proceedings relate,

so far as the proceedings relate to any matter to which the mediation relates; and

(c) any sums paid or payable in respect of its net liability on his account, determined in accordance with the regulations, for any other advice or assistance under Part III in connection with the mediation or any matter to which the mediation relates.

(10) For the purposes of subsection (9)(a), the sums paid or payable by the Board on any person's account for any mediation are—

(a) sums determined under the contract between the Board and the mediator as payable by the Board on that person's account for the mediation; or

(b) if the contract does not differentiate between such sums and sums payable on any other person's account or for any other mediation, such part of the remuneration payable under the contract as may be specified in writing by the Board.

(11) For the purposes of subsection (9)(b), the Board's net liability on any person's account in relation to any proceedings is its net liability on his account under section 16(9)(a) and (b) in relation to the proceedings.'

(2) In section 16(9), after paragraph (b) insert 'and

'(c) if and to the extent that regulations so provide, any sums paid or payable in respect of the Board's liability on the legally assisted person's account in relation to any mediation in connection with any matter to which those proceedings relate.'

(3) At the end of section 16, insert—

'(11) For the purposes of subsection (9)(c) above, the Board's liability on any person's account in relation to any mediation is its liability on his account under section 13C(9)(a) and (c) above in relation to the mediation.'

General. This section makes provision, similar to those already existing for legal aid, for a contributory funding system to defray the costs of mediation, including such familiar detail as that any excess of contribution by the assisted person shall be repaid to that person if the contribution exceeds the Board's liability and that regulations shall be made to ensure that there shall be a charge on property recovered or preserved. Old friends will be recognised here: ss 28(5) and 28(6).

Effect of the section. Basically new regulations are to be made to bring mediation within the compass of the Legal Aid Act 1988. It should be noted that by s 28(7) the location and nature of any property recovered or preserved is immaterial, which repeats s 16(7) of the 1988 Act, but not of course the remainder of that subsection in relation to compromises or settlements since mediation is designed to produce precisely such a result.

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29. Mediation and civil legal aid

In section 15 of the 1988 Act, after subsection (3E) insert—

'(3F) A person shall not be granted representation for the purposes of proceedings relating to family matters, unless he has attended a meeting with a mediator—

(a) to determine—-

(i) whether mediation appears suitable to the dispute and the parties and all the circumstances, and

(ii) in particular, whether mediation could take place without either party being influenced by fear of violence or other harm; and

(b) if mediation does appear suitable, to help the person applying for representation to decide whether instead to apply for mediation.

(3G) Subsection (3F) does not apply—

(a) in relation to proceedings under—

(i) Part IV of the Family Law Act 1996;

(ii) section 37 of the Matrimonial Causes Act 1973;

(iii) Part IV or V of the Children Act 1989;

(b) in relation to proceedings of any other description that may be prescribed; or

(c) in such circumstances as may be prescribed.

(3H) So far as proceedings relate to family matters, the Board, in determining under subsection (3)(a) whether, in relation to the proceedings, it is reasonable that a person should be granted representation under this Part—

(a) must have regard to whether and to what extent recourse to mediation would be a suitable alternative to taking the proceedings; and

(b) must for that purpose have regard to the outcome of the meeting held under subsection (3F) and to any assessment made for the purposes of section 13B(3).'

General. This section restricts the availability of civil legal aid unless the mediation suitability session contemplated by s 13 is attended to determine suitability of the case for mediation and in particular whether this can be achieved without fear of violence or other harm.

Effect of the section. The object of the section is achieved by inserting a new subsection (3F) into s 15 of the Legal Aid Act 1988.

This section obviously does not apply to domestic violence (Part IV of the Act), to proceedings for orders under s 37 of the Matrimonial Causes Act 1973 or to those for public law orders under the Children Act 1989, and in other proceedings or circumstances to be prescribed: Legal Aid Act 1988 s 15(3G).

By a new s 15(3H) the Legal Aid Board is obliged to consider, before refusing civil legal aid, to what extent mediation would be a suitable alternative and by a new s 15(3H)(b) must have regard to the outcome of the s 15(3F) meeting.

PART IV

FAMILY HOMES AND DOMESTIC VIOLENCE

Rights to occupy matrimonial home

30. Rights concerning matrimonial home where one spouse has no estate, etc

(1) This section applies if—

(a) one spouse is entitled to occupy a dwelling-house by virtue of—

(i) a beneficial estate or interest or contract; or

(ii) any enactment giving that spouse the right to remain in occupation; and

(b) the other spouse is not so entitled.

(2) Subject to the provisions of this Part, the spouse not so entitled has the following rights ('matrimonial home rights')—

(a) if in occupation, a right not to be evicted or excluded from the dwelling-house or any part of it by the other spouse except with the leave of the court given by an order under section 33;

(b) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling-house.

(3) If a spouse is entitled under this section to occupy a dwelling-house or any part of a dwelling-house, any payment or tender made or other thing done by that spouse in or towards satisfaction of any liability of the other spouse in respect of rent, mortgage payments or other outgoings affecting the dwelling-house is, whether or not it is made or done in pursuance of an order under section 40, as good as if made or done by the other spouse.

(4) A spouse's occupation by virtue of this section—

(a) is to be treated, for the purposes of the Rent (Agriculture) Act 1976 and the Rent Act 1977 (other than Part V and sections 103 to 106 of that Act), as occupation by the other spouse as the other spouse's residence, and

(b) if the spouse occupies the dwelling-house as that spouse's only or principal home, is to be treated, for the purposes of the Housing Act 1985 and Part I of the Housing Act 1988, as occupation by the other spouse as the other spouse's only or principal home.

(5) If a spouse ('the first spouse')—

(a) is entitled under this section to occupy a dwelling-house or any part of a dwelling-house, and

(b) makes any payment in or towards satisfaction of any liability of the other spouse ('the second spouse') in respect of mortgage payments affecting the dwelling-house,

the person to whom the payment is made may treat it as having been made by the second spouse, but the fact that that person has treated any such payment as having been so made does not affect any claim of the first spouse against the second spouse to an interest in the dwelling-house by virtue of the payment.

(6) If a spouse is entitled under this section to occupy a dwelling-house or part of a dwelling-house by reason of an interest of the other spouse under a trust, all the provisions of subsections (3) to (5) apply in relation to the trustees as they apply in relation to the other spouse.

(7) This section does not apply to a dwelling-house which has at no time been, and which was at no time intended by the spouses to be, a matrimonial home of theirs.

(8) A spouse's matrimonial home rights continue—

(a) only so long as the marriage subsists, except to the extent that an order under section 33(5) otherwise provides; and

(b) only so long as the other spouse is entitled as mentioned in subsection (1) to occupy the dwelling-house, except where provision is made by section 31 for those rights to be a charge on an estate or interest in the dwelling-house.

(9) It is hereby declared that a spouse—

(a) who has an equitable interest in a dwelling-house or in its proceeds of sale, but

(b) is not a spouse in whom there is vested (whether solely or as joint tenant) a legal estate in fee simple or a legal term of years absolute in the dwelling-house,

is to be treated, only for the purpose of determining whether he has matrimonial home rights, as not being entitled to occupy the dwelling-house by virtue of that interest.

General. This section begins Part IV of the Act which consolidates and extends the law of domestic violence. Part IV provides a single set of civil remedies to deal with domestic violence and the occupation of the family home. Those already familiar with the Domestic Violence and Matrimonial Proceedings Act 1976 (hereinafter referred to as the Domestic Violence Act), ss 16–18 of the Domestic Proceedings and Magistrates Courts Act 1978 and the Matrimonial Homes Act 1983, all of which Part IV repeals, will find old friends here, but often with a welcome makeover to

bring them up to date. Unfortunately the layout of Part IV is not as logical as most of the changes themselves, and reference should be made to the Introduction at the beginning of this Guide for a more coherent outline of the new position. However, basically, most things that practitioners have been saying for years about the former set of remedies (which are however still current law until, probably, Autumn 1997) have now been addressed. Commentary on Part IV of the Act is limited in the interests of giving more space to PartsI–III, since the changes are (despite ill informed comment in the Press) for the most part more obviously necessary and overdue in a civilised society than radical.

Effect of the section. The section sets out matrimonial home rights much as they were in s 1 of the Matrimonial Homes Act 1983 which the Act repeals in total, but instead of 'rights of occupation' the parties now have 'matrimonial home rights' which describe their statutory right to occupy the home: s 30(2), though some of the old s 1 has found its way into s 31.

It should be noted that s 30(7) provides a right of occupation of a property purchased as a home but not yet moved into, but obviously *excludes* investment property.

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31. Effect of matrimonial home rights as charge on dwelling-house

(1) Subsections (2) and (3) apply if, at any time during a marriage, one spouse is entitled to occupy a dwelling-house by virtue of a beneficial estate or interest.

(2) The other spouse's matrimonial home rights are a charge on the estate or interest.

(3) The charge created by subsection (2) has the same priority as if it were an equitable interest created at whichever is the latest of the following dates—

(a) the date on which the spouse so entitled acquires the estate or interest;

(b) the date of the marriage; and

(c) 1st January 1968 (the commencement date of the Matrimonial Homes Act 1967).

(4) Subsections (5) and (6) apply if, at any time when a spouse's matrimonial home rights are a charge on an interest of the other spouse under a trust, there are, apart from either of the spouses, no persons, living or unborn, who are or could become beneficiaries under the trust.

(5) The rights are a charge also on the estate or interest of the trustees for the other spouse.

(6) The charge created by subsection (5) has the same priority as if it were an equitable interest created (under powers overriding the trusts) on the date when it arises.

(7) In determining for the purposes of subsection (4) whether there are any persons who are not, but could become, beneficiaries under the trust, there is to be disregarded any potential exercise of a general power of appointment exercisable by either or both of the spouses alone (whether or not the exercise of it requires the consent of another person).

(8) Even though a spouse's matrimonial home rights are a charge on an estate or interest in the dwelling-house, those rights are brought to an end by—

(a) the death of the other spouse, or

(b) the termination (otherwise than by death) of the marriage, unless the court directs otherwise by an order made under section 33(5).

(9) If—

(a) a spouse's matrimonial home rights are a charge on an estate or interest in the dwelling-house, and

(b) that estate or interest is surrendered to merge in some other estate or interest expectant on it in such circumstances that, but for the merger, the person taking the estate or interest would be bound by the charge,

the surrender has effect subject to the charge and the persons thereafter entitled to the other estate or interest are, for so long as the estate or interest surrendered would have endured if not so surrendered, to be treated for all purposes of this Part as deriving title to the other estate or interest under the other spouse or, as the case may be, under the trustees for the other spouse, by virtue of the surrender.

(10) If the title to the legal estate by virtue of which a spouse is entitled to occupy a dwelling-house (including any legal estate held by trustees for that spouse) is registered under the Land Registration Act 1925 or any enactment replaced by that Act—

(a) registration of a land charge affecting the dwelling-house by virtue of this Part is to be effected by registering a notice under that Act; and

(b) a spouse's matrimonial home rights are not an overriding interest within the meaning of that Act affecting the dwelling-house even though the spouse is in actual occupation of the dwelling-house.

(11) A spouse's matrimonial home rights (whether or not constituting a charge) do not entitle that spouse to lodge a caution under section 54 of the Land Registration Act 1925.

(12) If—

(a) a spouse's matrimonial home rights are a charge on the estate of the other spouse or of trustees of the other spouse, and

(b) that estate is the subject of a mortgage,

then if, after the date of the creation of the mortgage ('the first mortgage'), the charge is registered under section 2 of the Land Charges Act 1972, the charge is, for the purposes of section 94 of the Law of Property Act 1925 (which regulates the rights of mortgagees to make further advances ranking in priority to subsequent mortgages), to be deemed to be a mortgage subsequent in date to the first mortgage.

(13) It is hereby declared that a charge under subsection (2) or (5) is not registrable under subsection (10) or under section 2 of the Land Charges Act 1972 unless it is a charge on a legal estate.

General. This section rewrites s 2 of the 1983 Act.

Effect of the section. Basically the amendments are of a conveyancing nature, but s 31(8) should be noted which permits an order under s 33(5) directing that the matrimonial home rights of a party shall not terminate with the marriage.

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32. Further provisions relating to matrimonial home rights

Schedule 4 re-enacts with consequential amendments and minor modifications provisions of the Matrimonial Homes Act 1983.

For commentary on this section see below at Schedule 4.

Occupation orders

33. Occupation orders where applicant has estate or interest etc or has matrimonial home rights

(1) If—

(a) a person ('the person entitled')—

(i) is entitled to occupy a dwelling-house by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation, or

(ii) has matrimonial home rights in relation to a dwelling-house, and

(b) the dwelling-house—

(i) is or at any time has been the home of the person entitled and of another person with whom he is associated, or

(ii) was at any time intended by the person entitled and any such other person to be their home,

the person entitled may apply to the court for an order containing any of the provisions specified in subsections (3), (4) and (5).

(2) If an agreement to marry is terminated, no application under this section may be made by virtue of section 62(3)(e) by reference to that agreement after the end of the period of three years beginning with the day on which it is terminated.

(3) An order under this section may—

(a) enforce the applicant's entitlement to remain in occupation as against the other person ('the respondent');

(b) require the respondent to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house;

(c) regulate the occupation of the dwelling-house by either or both parties;

(d) if the respondent is entitled as mentioned in subsection (1)(a)(i), prohibit, suspend or restrict the exercise by him of his right to occupy the dwelling-house;

(e) if the respondent has matrimonial home rights in relation to the dwelling-house and the applicant is the other spouse, restrict or terminate those rights;

(f) require the respondent to leave the dwelling-house or part of the dwelling-house; or

(g) exclude the respondent from a defined area in which the dwelling-house is included.

(4) An order under this section may declare that the applicant is entitled as mentioned in subsection (1)(a)(i) or has matrimonial home rights.

(5) If the applicant has matrimonial home rights and the respondent is the other spouse, an order under this section made during the marriage may provide that those rights are not brought to an end by—

(a) the death of the other spouse; or

(b) the termination (otherwise than by death) of the marriage.

(6) In deciding whether to exercise its powers under subsection (3) and (if so) in what manner, the court shall have regard to all the circumstances including—

(a) the housing needs and housing resources of each of the parties and of any relevant child;

(b) the financial resources of each of the parties;

(c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3), on the health, safety or well-being of the parties and of any relevant child; and

(d) the conduct of the parties in relation to each other and otherwise.

(7) If it appears to the court that the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent if an order under this section containing one or more of the provisions mentioned in subsection (3) is not made, the court shall make the order unless it appears to it that—

(a) the respondent or any relevant child is likely to suffer significant harm if the order is made; and

(b) the harm likely to be suffered by the respondent or child in that event is as great as, or greater than, the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the order is not made.

(8) The court may exercise its powers under subsection (5) in any case where it considers that in all the circumstances it is just and reasonable to do so.

(9) An order under this section—

(a) may not be made after the death of either of the parties mentioned in subsection (I); and

(b) except in the case of an order made by virtue of subsection (5)(a), ceases to have effect on the death of either party.

(10) An order under this section may, in so far as it has continuing effect, be made for a specified period, until the occurrence of a specified event or until further order.

General. This section creates the 'occupation orders' which are central to the new system of protection from domestic violence, and which will replace the orders in relation to occupation of the home available under the present legislation. However, the orders are not actually called 'occupation orders' in this section and nor are they actually defined until s 39 (see below). The available orders vary according to whether the applicant is entitled to occupy the home either under the general law or because of matrimonial home rights but will entitle the applicant to apply for an order in relation to the home against anyone with whom the applicant is associated: s 33(1).

Effect of the section. This section rewrites and extends those parts of s 1 of the 1983 Act which declared the range of the court's powers in regulating the occupation of the home and re-enacts the s 1(3) criteria from the 1983 Act. By s 31(7) these criteria are now subject to a balance of harm test which means the court must make an order if the applicant or a child will suffer greater harm than the respondent if the order is not made.

By s 33(2) an application must be made by a former fiancé(e) within three years of the termination of the engagement.

This is the section under which to apply if the applicant is 'entitled', married to the respondent or divorced but retaining matrimonial home rights by order of the court.

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34. Effect of order under s 33 where rights are charge on dwelling-house

(l) If a spouse's matrimonial home rights are a charge on the estate or interest of the other spouse or of trustees for the other spouse—

(a) an order under section 33 against the other spouse has, except so far as a contrary intention appears, the same effect against persons deriving title under the other spouse or under the trustees and affected by the charge; and

(b) sections 33(1), (3), (4) and (10) and 30(3) to (6) apply in relation to any person deriving title under the other spouse or under the trustees and affected by the charge as they apply in relation to the other spouse.

(2) The court may make an order under section 33 by virtue of subsection (l)(b) if it considers that in all the circumstances it is just and reasonable to do so.

This section makes s 33 orders binding on third parties including trustees for the other spouse.

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35. One former spouse with no existing right to occupy

(1) This section applies if—

(a) one former spouse is entitled to occupy a dwelling-house by virtue of a beneficial estate or interest or contract, or by virtue of any enactment giving him the right to remain in occupation;

(b) the other former spouse is not so entitled; and

(c) the dwelling-house was at any time their matrimonial home or was at any time intended by them to be their matrimonial home.

(2) The former spouse not so entitled may apply to the court for an order under this section against the other former spouse ('the respondent').

(3) If the applicant is in occupation, an order under this section must contain provision—

(a) giving the applicant the right not to be evicted or excluded from the dwelling-house or any part of it by the respondent for the period specified in the order; and

(b) prohibiting the respondent from evicting or excluding the applicant during that period.

(4) If the applicant is not in occupation, an order under this section must contain provision—

(a) giving the applicant the right to enter into and occupy the dwelling-house for the period specified in the order; and

(b) requiring the respondent to permit the exercise of that right.

(5) An order under this section may also—

(a) regulate the occupation of the dwelling-house by either or both of the parties;

(b) prohibit, suspend or restrict the exercise by the respondent of his right to occupy the dwelling-house;

(c) require the respondent to leave the dwelling-house or part of the dwelling-house; or

(d) exclude the respondent from a defined area in which the dwelling-house is included.

(6) In deciding whether to make an order under this section containing provision of the kind mentioned in subsection (3) or (4) and (if so) in what manner, the court shall have regard to all the circumstances including—

(a) the housing needs and housing resources of each of the parties and of any relevant child;

(b) the financial resources of each of the parties;

(c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3) or (4), on the health, safety or well-being of the parties and of any relevant child;

(d) the conduct of the parties in relation to each other and otherwise;

(e) the length of time that has elapsed since the parties ceased to live together;

(f) the length of time that has elapsed since the marriage was dissolved or annulled; and

(g) the existence of any pending proceedings between the parties—

(i) for an order under section 23A or 24 of the Matrimonial Causes Act 1973 (property adjustment orders in connection with divorce proceedings etc);

(ii) for an order under paragraph 1(2)(d) or (e) of Schedule l to the Children Act 1989 (orders for financial relief against parents); or

(iii)relating to the legal or beneficial ownership of the dwelling-house.

(7) In deciding whether to exercise its power to include one or more of the provisions referred to in subsection (5) ('a subsection (5) provision') and (if so) in what manner, the court shall have regard to all the circumstances including the matters mentioned in subsection (6)(a) to (e).

(8) If the court decides to make an order under this section and it appears to it that, if the order does not include a subsection (5) provision, the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent, the court shall include the subsection (5) provision in the order unless it appears to the court that—

(a) the respondent or any relevant child is likely to suffer significant harm if the provision is included in the order; and

(b) the harm likely to be suffered by the respondent or child in that event is as great as or greater than the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included.

(9) An order under this section—

(a) may not be made after the death of either of the former spouses; and

(b) ceases to have effect on the death of either of them.

(10) An order under this section must be limited so as to have effect for a specified period not exceeding six months, but may be extended on one or more occasions for a further specified period not exceeding six months.

(11) A former spouse who has an equitable interest in the dwelling-house or in the proceeds of sale of the dwelling-house but in whom there is not vested (whether solely or as joint tenant) a legal estate in fee simple or a legal term of years absolute in the dwelling-house is to be treated (but only for the purpose of determining whether he is eligible to apply under this section) as not being entitled to occupy the dwelling-house by virtue of that interest.

(12) Subsection (11) does not prejudice any right of such a former spouse to apply for an order under section 33.

(13) So long as an order under this section remains in force, subsections (3) to (6) of section 30 apply in relation to the applicant—

(a) as if he were the spouse entitled to occupy the dwelling-house by virtue of that section; and

(b) as if the respondent were the other spouse.

General. This section makes an important change in permitting a non-owning former spouse to apply to the court for an occupation order of the former matrimonial home whether or not at that time in occupation.

Effect of the section. The section makes a fairly fundamental change in the law. Before granting matrimonial home rights the court must consider the usual criteria plus three extra points in relation only to ex-spouses, *viz*, how long it is since the parties lived together, how long it is since the marriage was dissolved or annulled, and what property proceedings are pending between the parties: s 35(6)(e) to (g) inclusive. The balance of harm test again applies. Such an order is said to be only for six months and cannot last after the death of either party: s 35(9) and (10). However by s 35(10) the order is renewable on more than one occasion!

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36. One cohabitant or former cohabitant with an existing right to occupy

(1) This section applies if—

(a) one cohabitant or former cohabitant is entitled to occupy a dwelling-house by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation;

(b) the other cohabitant or former cohabitant is not so entitled; and

(c) that dwelling-house is the home in which they live together as husband and wife or a home in which they at any time so lived together or intended so to live together.

(2) The cohabitant or former cohabitant not so entitled may apply to the court for an order under this section against the other cohabitant or former cohabitant ('the respondent').

(3) If the applicant is in occupation, an order under this section must contain provision—

(a) giving the applicant the right not to be evicted or excluded from the dwelling-house or any part of it by the respondent for the period specified in the order; and

(b) prohibiting the respondent from evicting or excluding the applicant during that period.

(4) If the applicant is not in occupation, an order under this section must contain provision—

(a) giving the applicant the right to enter into and occupy the dwelling-house for the period specified in the order; and

(b) requiring the respondent to permit the exercise of that right.

(5) An order under this section may also—

(a) regulate the occupation of the dwelling-house by either or both of the parties;

(b) prohibit, suspend or restrict the exercise by the respondent of his right to occupy the dwelling-house;

(c) require the respondent to leave the dwelling-house or part of the dwelling-house; or

(d) exclude the respondent from a defined area in which the dwelling-house is included.

(6) In deciding whether to make an order under this section containing provision of the kind mentioned in subsection (3) or (4) and (if so) in what manner, the court shall have regard to all the circumstances including—

(a) the housing needs and housing resources of each of the parties and of any relevant child;

(b) the financial resources of each of the parties;

(c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3) or (4), on the health, safety or well-being of the parties and of any relevant child;

(d) the conduct of the parties in relation to each other and otherwise;

(e) the nature of the parties' relationship;

(f) the length of time during which they have lived together as husband and wife;

(g) whether there are or have been any children who are children of both parties or for whom both parties have or have had parental responsibility;

(h) the length of time that has elapsed since the parties ceased to live together; and

(i) the existence of any pending proceedings between the parties—

(i) for an order under paragraph I (2)(d) or (e) of Schedule I to the Children Act 1989 (orders for financial relief against parents); or

(ii) relating to the legal or beneficial ownership of the dwelling-house.

(7) In deciding whether to exercise its powers to include one or more of the provisions referred to in subsection (5) ('a subsection (5) provision') and (if so) in what manner, the court shall have regard to all the circumstances including—

(a) the matters mentioned in subsection (6)(a) to (d); and

(b) the questions mentioned in subsection (8).

(8) The questions are—

(a) whether the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent if the subsection (5) provision is not included in the order; and

(b) whether the harm likely to be suffered by the respondent or child if the provision is included is as great as or greater than the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included.

(9) An order under this section—

(a) may not be made after the death of either of the parties; and

(b) ceases to have effect on the death of either of them.

(10) An order under this section must be limited so as to have effect for a specified period not exceeding six months, but may be extended on one occasion for a further specified period not exceeding six months.

(11) A person who has an equitable interest in the dwelling-house or in the proceeds of sale of the dwelling-house but in whom there is not vested (whether solely or as joint tenant) a legal estate in fee simple or a legal term of years absolute in the dwelling-house is to be treated (but only for the purpose of determining whether he is eligible to apply under this section) as not being entitled to occupy the dwelling-house by virtue of that interest.

(12) Subsection (11) does not prejudice any right of such a person to apply for an order under section 33.

(13) So long as the order remains in force, subsections (3) to (6) of section 30 apply in relation to the applicant—

(a) as if he were a spouse entitled to occupy the dwelling-house by virtue of that section; and

(b) as if the respondent were the other spouse.

General. This section provides similar protection for ex-cohabitants.

Effect of the section. There are some differences between the position of the ex-spouse and the ex-cohabitant. The extra considerations to be taken into account in respect of ex-cohabitants include the nature of their relationship, how long they cohabited and how long ago that was, whether there have been any children of the relationship or for whom the parties have or had parental responsibility and whether there are any pending property proceedings: s 36(6)(e) to (i) inclusive. In addition, unlike ex-spouses, ex-cohabitants cannot claim a duty on the part of the court to make the order if the balance of harm test is otherwise in their favour: s 36(8) cf s 35(8) where the wording imposes such a duty, and they can have the order, if made, renewed only for one six month period: s 36(10).

Section 41 will also be relevant to orders under this section.

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37. Neither spouse entitled to occupy

(1) This section applies if—

(a) one spouse or former spouse and the other spouse or former spouse occupy a dwelling-house which is or was the matrimonial home; but

(b) neither of them is entitled to remain in occupation—

(i) by virtue of a beneficial estate or interest or contract; or

(ii) by virtue of any enactment giving him the right to remain in occupation.

(2) Either of the parties may apply to the court for an order against the other under this section.

(3) An order under this section may—

(a) require the respondent to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house;

(b) regulate the occupation of the dwelling-house by either or both of the spouses;

(c) require the respondent to leave the dwelling-house or part of the dwelling-house; or

(d) exclude the respondent from a defined area in which the dwelling-house is included.

(4) Subsections (6) and (7) of section 33 apply to the exercise by the court of its powers under this section as they apply to the exercise by the court of its powers under subsection (3) of that section.

(5) An order under this section must be limited so as to have effect for a specified period not exceeding six months, but may be extended on one or more occasions for a further specified period not exceeding six months.

General. This section regulates the rights of spouses or ex-spouses where neither is entitled to occupy.

Effect of the section. This order will only affect the parties themselves and not bind third parties who are entitled to occupy the property. The balance of harm test applies and there may be a duty on the court to impose the order, which may be for six months renewable.

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38. Neither cohabitant or former cohabitant entitled to occupy

(1) This section applies if—

(a) one cohabitant or former cohabitant and the other cohabitant or former cohabitant occupy a dwelling-house which is the home in which they live or lived together as husband and wife; but

(b) neither of them is entitled to remain in occupation—

(i) by virtue of a beneficial estate or interest or contract; or

(ii) by virtue of any enactment giving him the right to remain in occupation.

(2) Either of the parties may apply to the court for an order against the other under this section.

(3) An order under this section may—

(a) require the respondent to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house;

(b) regulate the occupation of the dwelling-house by either or both of the parties;

(c) require the respondent to leave the dwelling-house or part of the dwelling-house; or

(d) exclude the respondent from a defined area in which the dwelling-house is included.

(4) In deciding whether to exercise its powers to include one or more of the provisions referred to in subsection (3) ('a subsection (3) provision') and (if so) in what manner, the court shall have regard to all the circumstances including—

(a) the housing needs and housing resources of each of the parties and of any relevant child;

(b) the financial resources of each of the parties;

(c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3), on the health, safety or well-being of the parties and of any relevant child;

(d) the conduct of the parties in relation to each other and otherwise; and

(e) the questions mentioned in subsection (5).

(5) The questions are—

(a) whether the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent if the subsection (3) provision is not included in the order; and

(b) whether the harm likely to be suffered by the respondent or child if the provision is included is as great as or greater than the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the provision is not included.

(6) An order under this section shall be limited so as to have effect for a specified period not exceeding six months, but may be extended on one occasion for a further specified period not exceeding six months.

General. This section provides similar rights for cohabitants and ex-cohabitants who are not entitled to occupy the property.

Effect of the section. The application works in the same way as under s 36, ie the balance of harm test applies but imposes no duty on the court: s 38(5) and a third party entitled to occupy the home will not be affected by the order which only affects the parties *inter se*. Section 41 will also be relevant to orders made under this section (see below).

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39. Supplementary provisions

(1) In this Part an 'occupation order' means an order under section 33, 35, 36, 37 or 38.

(2) An application for an occupation order may be made in other family proceedings or without any other family proceedings being instituted.

(3) If—

(a) an application for an occupation order is made under section 33, 35, 36, 37 or 38, and

(b) the court considers that it has no power to make the order under the section concerned, but that it has power to make an order under one of the other sections,

the court may make an order under that other section.

(4) The fact that a person has applied for an occupation order under sections 35 to 38, or that an occupation order has been made, does not affect the right of any person to claim a legal or equitable interest in any property in any subsequent proceedings (including subsequent proceedings under this Part).

General. This section defines occupation orders and enables application to be made for them either in other family proceedings or without other proceedings being instituted. It also disclaims any effect of any such application on any other proceedings.

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40. Additional provisions that may be included in certain occupation orders

(1) The court may on, or at any time after, making an occupation order under section 33, 35 or 36—

(a) impose on either party obligations as to—

(i) the repair and maintenance of the dwelling-house; or

(ii) the discharge of rent, mortgage payments or other outgoings affecting the dwelling-house;

(b) order a party occupying the dwelling-house or any part of it (including a party who is entitled to do so by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation) to make periodical payments to the other party in respect of the accommodation, if the other party would (but for the order) be entitled to occupy the dwelling-house by virtue of a beneficial estate or interest or contract or by virtue of any such enactment;

(c) grant either party possession or use of furniture or other contents of the dwelling-house;

(d) order either party to take reasonable care of any furniture or other contents of the dwelling-house;

(e) order either party to take reasonable steps to keep the dwelling-house and any furniture or other contents secure.

(2) In deciding whether and, if so, how to exercise its powers under this section, the court shall have regard to all the circumstances of the case including—

(a) the financial needs and financial resources of the parties; and

(b) the financial obligations which they have, or are likely to have in the foreseeable future, including financial obligations to each other and to any relevant child.

(3) An order under this section ceases to have effect when the occupation order to which it relates ceases to have effect.

General. This section permits ancillary orders to be made similar to those which could be made under the 1983 Act.

Effect of the section. The section permits orders under ss 33, 35 or 36 to include provisions requiring either party to repair and/or maintain the home, to pay rent or the mortgage or other outgoings, to take reasonable care of furniture or contents and to take reasonable care to keep the home and contents secure. The court may also order payment of rent to the party who is out of the home: s 40(1). The court must take certain financial considerations into account: s 40(2). Any of these orders will come to an end when the underlying occupation order ends.

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41. Additional considerations if parties are cohabitants or former cohabitants

(1) This section applies if the parties are cohabitants or former cohabitants.

(2) Where the court is required to consider the nature of the parties' relationship, it is to have regard to the fact that they have not given each other the commitment involved in marriage.

General. This section seeks to draw a line between the respective commitment of marriage and apparent lack of it in cohabitation and has been somewhat controversial.

Effect of the section. By s 41(1) the section applies to both cohabitants and former cohabitants The mandatory nature of s 41(2) requires the court to have regard to the fact that the parties have not given each other the commitment of marriage whenever they make any of the orders which may be made in relation to cohabitants or former cohabitants.

Background. The background to the inclusion of this provision was the Parliamentary debates which focused on the feeling of some members that marriage was not being given a high enough profile in the Act. For example, an attempt was made to introduce a clause to create a species of marriage which might be less vulnerable to the new law of divorce by the parties entering into a deed showing greater commitment to marriage by agreeing not to bring divorce proceedings Not surprisingly this clause was withdrawn because it was felt that it created a two tier style of marriage (which would create all sorts of embarrassment when people getting married did not, for whatever reason, want to sign such a deed!) Generally the passage of the Act through Parliament was attended by a good deal of well meant but misguided argument, much of it generated by ill informed journalistic campaigning. However, the set of provisions in Part IV which differentiate between the commitment of marriage and the lesser commitment of cohabitation reflects the philosophy set out in s 1 and the feeling that is evident in some quarters that it is time that formal family life was recognised as making a major contribution to stability for children and therefore to the general well-being of the nation.

Non-molestation orders

42. Non-molestation orders

(1) In this Part a 'non-molestation order' means an order containing either or both of the following provisions—

(a) provision prohibiting a person ('the respondent') from molesting another person who is associated with the respondent;

(b) provision prohibiting the respondent from molesting a relevant child.

(2) The court may make a non-molestation order—

(a) if an application for the order has been made (whether in other family proceedings or without any other family proceedings being instituted) by a person who is associated with the respondent; or

(b) if in any family proceedings to which the respondent is a party the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though no such application has been made.

(3) In subsection (2) 'family proceedings' includes proceedings in which the court has made an emergency protection order under section 44 of the Children Act 1989 which includes an exclusion requirement (as defined in section 44A(3) of that Act).

(4) Where an agreement to marry is terminated, no application under subsection (2)(a) may be made by virtue of section 62(3)(e) by reference to that agreement after the end of the period of three years beginning with the day on which it is terminated.

(5) In deciding whether to exercise its powers under this section and, if so, in what manner, the court shall have regard to all the circumstances including the need to secure the health, safety and well-being—

(a) of the applicant or, in a case falling within subsection (2)(b), the person for whose benefit the order would he made; and

(b) of any relevant child.

(6) A non-molestation order may be expressed so as to refer to molestation in general, to particular acts of molestation, or to both.

(7) A non-molestation order may be made for a specified period or until further order.

(8) A non-molestation order which is made in other family proceedings ceases to have effect if those proceedings are withdrawn or dismissed.

General. This section sets out the law on non-molestation orders, replacing in more specific form the provisions in the Domestic Violence Act 1976 and the Domestic Proceedings and Magistrates' Court Act 1978.

Effect of the section. The section retains the existing wide potential of a non-molestation order under the 1976 Act and also adds a gloss onto the existing case law on the subject, eg in expressly permitting an order now to be made to secure the health, safety or well-being of an applicant or any relevant child: s 42(5). The court can make the order of its own volition or on application, either independently or in other family proceedings, and it may be made against any associated person in relation to the applicant. Fiancé(e)s can apply within three years of the termination of their engagement: s 42(4), and by s 44 will have to produce specific evidence of an agreement to marry. By s 42(6) it seems that the order can restrain anything at all! If an order is made in other family proceedings however, it will come to an end with those proceedings: s 42(8).

Further provisions relating to occupation and non-molestation orders

43. Leave of court required for applications by children under sixteen

(1) A child under the age of sixteen may not apply for an occupation order or a non-molestation order except with the leave of the court.

(2) The court may grant leave for the purposes of subsection (1) only if it is satisfied that the child has sufficient understanding to make the proposed application for the occupation order or non-molestation order.

General. This section for the first time permits children under 16 to apply for orders.

Effect of the section. As would be expected leave is required, and will only be granted if the child has sufficient understanding: s 43(2).

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44. Evidence of agreement to marry

(1) Subject to subsection (2), the court shall not make an order under section 33 or 42 by virtue of section 62(3)(e) unless there is produced to it evidence in writing of the existence of the agreement to marry.

(2) Subsection (I) does not apply if the court is satisfied that the agreement to marry was evidenced by—

(a) the gift of an engagement ring by one party to the agreement to the other in contemplation of their marriage; or

(b) a ceremony entered into by the parties in the presence of one or more other persons assembled for the purpose of witnessing the ceremony.

General. This section merely spells out the evidence required of agreement to marry for the purposes of s 42. It will be noted that unless there is *written* evidence, alternative proof is quite restricted.

45. *Ex parte* orders

(1) The court may, in any case where it considers that it is just and convenient to do so, make an occupation order or a non-molestation order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court.

(2) In determining whether to exercise its powers under subsection (1), the court shall have regard to all the circumstances including—

(a) any risk of significant harm to the applicant or a relevant child, attributable to conduct of the respondent, if the order is not made immediately;

(b) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately; and

(c) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved—

(i) where the court is a magistrates' court, in effecting service of proceedings; or

(ii) in any other case, in effecting substituted service.

(3) If the court makes an order by virtue of subsection (1) it must afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing.

(4) If, at a full hearing, the court makes an occupation order (' the full order'), then—

(a) for the purposes of calculating the maximum period for which the full order may be made to have effect, the relevant section is to apply as if the period for which the full order will have effect began on the date on which the initial order first had effect; and

(b) the provisions of section 36(10) or 38(6) as to the extension of orders are to apply as if the full order and the initial order were a single order.

(5) In this section—

'full hearing' means a hearing of which notice has been given to all the parties in accordance with rules of court;

'initial order' means an occupation order made by virtue of subsection (I); and

'relevant section' means section 33(10), 35(10), 36(10), 37(5) or 38(6).

General. This section provides for *ex parte* orders to replace those currently available under the current legislation. It therefore seems that the former position where *ex parte* orders were certainly not routine is now overtaken by statutory provision.

Effect of the section. The section sweeps away all the irritating detail of the present position, but does not really make any changes as such in the current practice which permits in one way or

another an urgent application to be made where necessary. However, it does set out in comprehensive form the position as at present understood, namely that there are cases where emergency application is essential to avoid harm if the order is not made, but that the respondent should be given an opportunity to make representations as soon as possible. The section sets out the approach as based on justice and convenience and would appear to avoid the hair splitting which has previously attended argument as to whether an ouster or exclusion order could or should be made *ex parte*. Nevertheless the case law which holds that this is a draconian order will probably remain in the interpretation of the new section. Section 45(4) provides some detail as to how the period of exclusion should be calculated if an *ex parte* order is made.

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46. Undertakings

(1) In any case where the court has power to make an occupation order or non-molestation order, the court may accept an undertaking from any party to the proceedings.

(2) No power of arrest may be attached to any undertaking given under subsection (1).

(3) The court shall not accept an undertaking under subsection (1) in any case where apart from this section a power of arrest would be attached to the order.

(4) An undertaking given to a court under subsection (1) is enforceable as if it were an order of the court.

(5) This section has effect without prejudice to the powers of the High Court and the county court apart from this section.

General. This section deals with undertakings in lieu of orders.

Effect of the section. This section puts into statutory form the practice of accepting such undertakings and provides expressly that no power of arrest shall be attached to undertakings: s 46(2) which is the position currently understood on the authorities, and provides that an undertaking cannot be accepted if a power of arrest would be attached otherwise: s 46(3). The court must obviously, therefore, consider whether a power of arrest is required before deciding whether to accept an undertaking.

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47. Arrest for breach of order

(1) In this section 'a relevant order' means an occupation order or a non-molestation order.

(2) If—

(a) the court makes a relevant order; and

(b) it appears to the court that the respondent has used or threatened violence against the applicant or a relevant child,

it shall attach a power of arrest to one or more provisions of the order unless satisfied that in all the circumstances of the case the applicant or child will be adequately protected without such a power of arrest.

(3) Subsection (2) does not apply in any case where the relevant order is made by virtue of section 45(1), but in such a case the court may attach a power of arrest to one or more provisions of the order if it appears to it—

(a) that the respondent has used or threatened violence against the applicant or a relevant child; and

(b) that there is a risk of significant harm to the applicant or child, attributable to conduct of the respondent, if the power of arrest is not attached to those provisions immediately.

(4) If, by virtue of subsection (3), the court attaches a power of arrest to any provisions of a relevant order, it may provide that the power of arrest is to have effect for a shorter period than the other provisions of the order.

(5) Any period specified for the purposes of subsection (4) may be extended by the court (on one or more occasions) on an application to vary or discharge the relevant order.

(6) If, by virtue of subsection (2) or (3), a power of arrest is attached to certain provisions of an order, a constable may arrest without warrant a person whom he has reasonable cause for suspecting to be in breach of any such provision.

(7) If a power of arrest is attached under subsection (2) or (3) to certain provisions of the order and the respondent is arrested under subsection (6)—

(a) he must be brought before the relevant judicial authority within the period of 24 hours beginning at the time of his arrest; and

(b) if the matter is not then disposed of forthwith, the relevant judicial authority before whom he is brought may remand him.

In reckoning for the purposes of this subsection any period of 24 hours, no account is to be taken of Christmas Day, Good Friday or any Sunday.

(8) If the court has made a relevant order but—

(a) has not attached a power of arrest under subsection (2) or (3) to any provisions of the order, or

(b) has attached that power only to certain provisions of the order, then, if at any time the applicant considers that the respondent has failed to comply with the order, he may apply to the relevant judicial authority for the issue of a warrant for the arrest of the respondent.

(9) The relevant judicial authority shall not issue a warrant on an application under subsection (8) unless—

(a) the application is substantiated on oath; and

(b) the relevant judicial authority has reasonable grounds for believing that the respondent has failed to comply with the order.

(10) If a person is brought before a court by virtue of a warrant issued under subsection (9) and the court does not dispose of the matter forthwith, the court may remand him.

(11) Schedule 5 (which makes provision corresponding to that applying in magistrates' courts in civil cases under sections 128 and 129 of the Magistrates' Courts Act 1980) has effect in relation to the powers of the High Court and a county court to remand a person by virtue of this section.

(12) If a person remanded under this section is granted bail (whether in the High Court or a county court under Schedule 5 or in a magistrates' court under section 128 or 129 of the Magistrates' Courts Act 1980), he may be required by the relevant judicial authority to comply, before release on bail or later, with such requirements as appear to that authority to be necessary to secure that he does not interfere with witnesses or otherwise obstruct the course of justice.

General. This section enables a power of arrest to be attached to either a non-molestation or an occupation order and consolidates all the existing law which will now be available in every court dealing with domestic violence, and gives all those courts power to issue arrest warrants.

Effect of the section. The power of arrest is to be *mandatorily* attached to any order made where it appears that the respondent has used or threatened violence to the applicant or a relevant child unless that appears not to be necessary for their protection: s 47(2), and may be attached to one or more provisions of the order if violence has been used or threatened as above and it seems that significant harm will result unless it is: s 47(3). The power of arrest can be shorter than the duration of the order: s 47(4). This is presumably to deal with instant reaction to the order on the part of the respondent which may not last! Otherwise the power of arrest appears to be similar to that already in use pursuant to the existing law.

Background. Extending the use of the power of arrest stems from the Law Commission's view that extra protection should be provided where there has been violence or where violence has been threatened, unless the court was of the view that such swift enforcement was unlikely to be required. The Act is not very helpful as to how this new duty of the court will be interpreted.

48. Remand for medical examination and report

(1) If the relevant judicial authority has reason to consider that a medical report will be required, any power to remand a person under section 47(7)(b) or (10) may be exercised for the purpose of enabling a medical examination and report to be made.

(2) If such a power is so exercised, the adjournment must not be for more than 4 weeks at a time unless the relevant judicial authority remands the accused in custody.

(3) If the relevant judicial authority so remands the accused, the adjournment must not be for more than 3 weeks at a time.

(4) If there is reason to suspect that a person who has been arrested—

(a) under section 47(6), or

(b) under a warrant issued on an application made under section 47(8),

is suffering from mental illness or severe mental impairment, the relevant judicial authority has the same power to make an order under section 35 of the Mental Health Act 1983 (remand for report on accused's mental condition) as the Crown Court has under section 35 of the Act of 1983 in the case of an accused person within the meaning of that section.

General. This section merely permits remand for medical examination and report. There is further remand detail in Schedule 5. It originated in the obvious possibility that domestic violence contemnors are frequently motivated by obsessive behaviour especially in relation to the persons whom they harass and threaten, and that medical or psychiatric help may be required.

49. Variation and discharge of orders

(1) An occupation order or non-molestation order may be varied or discharged by the court on an application by—

(a) the respondent, or

(b) the person on whose application the order was made.

(2) In the case of a non-molestation order made by virtue of section 42(2)(b), the

order may be varied or discharged by the court even though no such application has been made.

(3) If a spouse's matrimonial home rights are a charge on the estate or interest of the other spouse or of trustees for the other spouse, an order under section 33 against the other spouse may also be varied or discharged by the court on an application by any person deriving title under the other spouse or under the trustees and affected by the charge.

(4) If, by virtue of section 47(3), a power of arrest has been attached to certain provisions of an occupation order or non-molestation order, the court may vary or discharge the order under subsection (1) in so far as it confers a power of arrest (whether or not any application has been made to vary or discharge any other provision of the order).

General. This section sets out how orders may be varied or discharged.

Effect of the section. Either the court or the parties may initiate variation or discharge of the order: s 49(1) but by s 49(3) if the order is a charge on the estate or interest of the other spouse or his trustees, any person deriving title by them may also apply to discharge it.

Enforcement powers of magistrates' courts

50. Power of magistrates' court to suspend execution of committal order

(1) If, under section 63(3) of the Magistrates' Courts Act 1980, a magistrates' court has power to commit a person to custody for breach of a relevant requirement, the court may by order direct that the execution of the order of committal is to be suspended for such period or on such terms and conditions as it may specify.

(2) In subsection (1) 'a relevant requirement' means—

(a) an occupation order or non-molestation order;

(b) an exclusion requirement included by virtue of section 38A of the Children Act 1989 in an interim care order made under section 38 of that Act; or

(c) an exclusion requirement included by virtue of section 44A of the Children Act 1989 in an emergency protection order under section 44 of that Act.

General. This section gives magistrates' courts power to suspend committal orders (ie for breach of domestic violence orders) upon such terms and conditions as they may specify.

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51. Power of magistrates' court to order hospital admission or guardianship

(1) A magistrates' court has the same power to make a hospital order or guardianship order under section 37 of the Mental Health Act 1983 or an interim hospital order under section 38 of that Act in the case of a person suffering from mental illness or severe mental impairment who could otherwise be committed to custody for breach of a relevant requirement as a magistrates' court has under those sections in the case of a person convicted of an offence punishable on summary conviction with imprisonment.

(2) In subsection (1) 'a relevant requirement' has the meaning given by section 50(2).

General: This section gives the magistrates a power to make hospital or guardianship orders for breach of domestic violence orders.

Interim care orders and emergency protection orders

52. Amendments of Children Act 1989

Schedule 6 makes amendments of the provisions of the Children Act 1989 relating to interim care orders and emergency protection orders.

For commentary on this section see Schedule 6.

Transfer of tenancies

53. Transfer of certain tenancies

Schedule 7 makes provision in relation to the transfer of certain tenancies on divorce etc or on separation of cohabitants.

For commentary on this section see Schedule 7.

Dwelling-house subject to mortgage

54. Dwelling-house subject to mortgage

(1) In determining for the purposes of this Part whether a person is entitled to occupy a dwelling-house by virtue of an estate or interest, any right to possession of the dwelling-house conferred on a mortgagee of the dwelling-house under or by virtue of his mortgage is to be disregarded.

(2) Subsection (1) applies whether or not the mortgagee is in possession.

(3) Where a person ('A') is entitled to occupy a dwelling-house by virtue of an estate or interest, a connected person does not by virtue of—

(a) any matrimonial home rights conferred by section 30, or

(b) any rights conferred by an order under section 35 or 36,

have any larger right against the mortgagee to occupy the dwelling-house than A has by virtue of his estate or interest and of any contract with the mortgagee.

(4) Subsection (3) does not apply, in the case of matrimonial home rights, if under section 31 those rights are a charge, affecting the mortgagee, on the estate or interest mortgaged.

(5) In this section 'connected person', in relation to any person, means that person's spouse, former spouse, cohabitant or former cohabitant.

General. This section permits a court to decide that an applicant has matrimonial home rights in relation to an estate or interest irrespective of whether the house is mortgaged and the mortgagee has a right to possession.

Effect of the section. The section does not however confer any larger rights on any connected person by virtue of an occupation order being made: s 54(3)

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55. Actions by mortgagees: joining connected persons as parties

(1) This section applies if a mortgagee of land which consists of or includes a dwelling-house brings an action in any court for the enforcement of his security.

(2) A connected person who is not already a party to the action is entitled to be made a party in the circumstances mentioned in subsection (3).

(3) The circumstances are that—

(a) the connected person is enabled by section 30(3) or (6) (or by section 30(3) or (6) as applied by section 35(13) or 36(13))7 to meet the mortgagor's liabilities under the mortgage;

(b) he has applied to the court before the action is finally disposed of in that court; and

(c) the court sees no special reason against his being made a party to the action and is satisfied—

(i) that he may be expected to make such payments or do such other things in or towards satisfaction of the mortgagor's liabilities or obligations as might affect the outcome of the proceedings; or

(ii) that the expectation of it should be considered under section 36 of the Administration of Justice Act 1970.

(4) In this section 'connected person' has the same meaning as in section 54.

General. This section deals with the relationship between any connected person in relation to a mortgagor of a dwelling-house and the mortgagee where the mortgagee brings an action to realise his security.

Effect of the section. As are spouses under s 1(5) of the Matrimonial Homes Act 1983, under the section a connected person is usually to be entitled to be made a party to a mortgagee's possession action: s 55(3).

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56. Actions by mortgagees: service of notice on certain persons

(1) This section applies if a mortgagee of land which consists, or substantially consists, of a dwelling-house brings an action for the enforcement of his security, and at the relevant time there is—

(a) in the case of unregistered land, a land charge of Class F registered against the person who is the estate owner at the relevant time or any person who, where the estate owner is a trustee, preceded him as trustee during the subsistence of the mortgage; or

(b) in the case of registered land, a subsisting registration of—

(i) a notice under section 31(10);

(ii) a notice under section 2(8) of the Matrimonial Homes Act 1983; or

(iii)a notice or caution under section 2(7) of the Matrimonial Homes Act 1967.

(2) If the person on whose behalf—

(a) the land charge is registered; or

(b) the notice or caution is entered,

is not a party to the action, the mortgagee must serve notice of the action on him.

(3) If—

(a) an official search has been made on behalf of the mortgagee which would disclose any land charge of Class F, notice or caution within subsection (1)(a) or (b);

(b) a certificate of the result of the search has been issued; and

(c) the action is commenced within the priority period,

the relevant time is the date of the certificate.

(4) In any other case the relevant time is the time when the action is commenced.

(5) The priority period is, for both registered and unregistered land, the period for which, in accordance with section 11(5) and (6) of the Land Charges Act 1972, a certificate on an official search operates in favour of a purchaser.

General. This section sets out the right of a person who has registered an occupation right to be served with proceedings, in the same ways as wives are currently entitled to be under s 8 of the 1983 Act.

Effect of the section. By section 56(2) the person on whose behalf any land charge is registered, or notice or caution is entered, is entitled to be served with proceedings for possession.

Jurisdiction and procedure etc

57. Jurisdiction of courts

(1) For the purposes of this Part 'the court' means the High Court, a county court or a magistrates' court.

(2) Subsection (1) is subject to the provision made by or under the following provisions of this section, to section 59 and to any express provision as to the jurisdiction of any court made by any other provision of this Part.

(3) The Lord Chancellor may by order specify proceedings under this Part which may only be commenced in—

(a) a specified level of court;

(b) a court which falls within a specified class of court; or

(c) a particular court determined in accordance with, or specified in, the order.

(4) The Lord Chancellor may by order specify circumstances in which specified proceedings under this Part may only be commenced in—

(a) a specified level of court;

(b) a court which falls within a specified class of court; or

(c) a particular court determined in accordance with, or specified in, the order.

(5) The Lord Chancellor may by order provide that in specified circumstances the whole, or any specified part of any specified proceedings under this Part is to be transferred to—

(a) a specified level of court;

(b) a court which falls within a specified class of court; or

(c) a particular court determined in accordance with, or specified in, the order.

(6) An order under subsection (5) may provide for the transfer to be made at any stage, or specified stage, of the proceedings and whether or not the proceedings, or any part of them, have already been transferred.

(7) An order under subsection (5) may make such provision as the Lord Chancellor thinks appropriate for excluding specified proceedings from the operation of section 38 or 39 of the Matrimonial and Family Proceedings Act 1984 (transfer of family proceedings) or any other enactment which would otherwise govern the transfer of those proceedings, or any part of them.

(8) For the purposes of subsections (3), (4) and (5), there are three levels of court—

(a) the High Court;

(b) any county court; and

(c) any magistrates' court.

(9) The Lord Chancellor may by order make provision for the principal registry of the Family Division of the High Court to be treated as if it were a county court for specified purposes of this Part, or of any provision made under this Part.

(10) Any order under subsection (9) may make such provision as the Lord Chancellor thinks expedient for the purpose of applying (with or without modifications) provisions which apply in relation to the procedure in county courts to the principal registry when it acts as if it were a county court.

(11) In this section 'specified' means specified by an order under this section.

General. This section sets out the jurisdiction of the courts in relation to Part IV.

Effect of the section. By s 57(3) and (4) the Lord Chancellor may specify any particular restrictions on commencing proceedings in one court or another.

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58. Contempt proceedings

The powers of the court in relation to contempt of court arising out of a person's failure to comply with an order under this Part may be exercised by the relevant judicial authority.

This section confirms the court's powers in relation to contempt by reason of failure to comply with any Part IV order.

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59. Magistrates' courts

(1) A magistrates' court shall not be competent to entertain any application, or make any order, involving any disputed question as to a party's entitlement to occupy any

property by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation, unless it is unnecessary to determine the question in order to deal with the application or make the order.

(2) A magistrates' court may decline jurisdiction in any proceedings under this Part if it considers that the case can more conveniently be dealt with by another court.

(3) The powers of a magistrates' court under section 63(2) of the Magistrates' Courts Act 1980 to suspend or rescind orders shall not apply in relation to any order made under this Part.

General. This section both enables the magistrates' courts to decline jurisdiction in any difficult case requiring them to decide questions of substantive property law and disables them from deciding such cases.

Effect of the section. By s 59(1) unless it is essential in order to make a domestic violence order, the magistrates are not to decide questions of property law. By s 59(2) they can decline jurisdiction if the case suggests such difficulty that it could better be decided elsewhere.

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60. Provision for third parties to act on behalf of victims of domestic violence

(1) Rules of court may provide for a prescribed person, or any person in a prescribed category, ('a representative') to act on behalf of another in relation to proceedings to which this Part applies.

(2) Rules made under this section may, in particular, authorise a representative to apply for an occupation order or for a non-molestation order for which the person on whose behalf the representative is acting could have applied.

(3) Rules made under this section may prescribe—

(a) conditions to be satisfied before a representative may make an application to the court on behalf of another; and

(b) considerations to be taken into account by the court in determining whether, and if so how, to exercise any of its powers under this Part when a representative is acting on behalf of another.

(4) Any rules made under this section may be made so as to have effect for a specified period and may make consequential or transitional provision with respect to the expiry of the specified period.

(5) Any such rules may be replaced by further rules made under this section.

General. This section permits rules to be made to allow third parties to bring domestic violence proceedings on behalf of victims of such violence.

Effect of the section. This section is new but it is intended, for example, that the police may bring such proceedings as representatives where victims do not themselves want to do so, which many do not despite the violence which they repeatedly suffer.

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61. Appeals

(1) An appeal shall lie to the High Court against—

(a) the making by a magistrates' court of any order under this Part, or

(b) any refusal by a magistrates' court to make such an order,

but no appeal shall lie against any exercise by a magistrates' court of the power conferred by section 59(2).

(2) On an appeal under this section, the High Court may make such orders as may be necessary to give effect to its determination of the appeal.

(3) Where an order is made under subsection (2), the High Court may also make such incidental or consequential orders as appear to it to be just.

(4) Any order of the High Court made on an appeal under this section (other than one directing that an application be re-heard by a magistrates' court) shall, for the purposes—

(a) of the enforcement of the order, and

(b) of any power to vary, revive or discharge orders,

be treated as if it were an order of the magistrates' court from which the appeal was brought and not an order of the High Court.

(5) The Lord Chancellor may by order make provision as to the circumstances in which appeals may be made against decisions taken by courts on questions arising in connection with the transfer, or proposed transfer, of proceedings by virtue of any order under section 57(5).

(6) Except to the extent provided for in any order made under subsection (5), no appeal may be made against any decision of a kind mentioned in that subsection.

General. This section provides for appeals.

Effect of the section. This section provides for appeals to the High Court from the magistrates (Family Proceedings Court): s 61(1) and by s 61(2) and (3) the High Court may determine the order to be made and make such consequential orders as are necessary.

The Lord Chancellor is to make provision as to appeals about transfers between levels of court under s 57(5).

General

62. Meaning of 'cohabitants', 'relevant child' and 'associated persons'

(1) For the purposes of this Part

(a) 'cohabitants' are a man and a woman who, although not married to each other, are living together as husband and wife; and

(b) 'former cohabitants' is to be read accordingly, but does not include cohabitants who have subsequently married each other.

(2) In this Part, 'relevant child', in relation to any proceedings under this Part, means—

(a) any child who is living with or might reasonably be expected to live with either party to the proceedings;

(b) any child in relation to whom an order under the Adoption Act 1976 or the Children Act 1989 is in question in the proceedings; and

(c) any other child whose interests the court considers relevant.

(3) For the purposes of this Part, a person is associated with another person if—

(a) they are or have been married to each other;

(b) they are cohabitants or former cohabitants;

(c) they live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder;

(d) they are relatives;

(e) they have agreed to marry one another (whether or not that agreement has been terminated);

(f) in relation to any child, they are both persons falling within subsection (4); or

(g) they are parties to the same family proceedings (other than proceedings under this Part).

(4) A person falls within this subsection in relation to a child if—

(a) he is a parent of the child; or

(b) he has or has had parental responsibility for the child.

(5) If a child has been adopted or has been freed for adoption by virtue of any of the enactments mentioned in section 16(1) of the Adoption Act 1976, two persons are also associated with each other for the purposes of this Part if—

(a) one is a natural parent of the child or a parent of such a natural parent; and

(b) the other is the child or any person—

(i) who has become a parent of the child by virtue of an adoption order or has applied for an adoption order, or

(ii) with whom the child has at any time been placed for adoption.

(6) A body corporate and another person are not, by virtue of subsection (3)(f) or (g), to be regarded for the purposes of this Part as associated with each other.

General. This is the general definition section.

Effect of the section. The section broadly preserves the existing meaning of cohabitant from the Domestic Violence Act 1976 . The section goes for the broadest definition of 'child' and does not of course restrict children to children of the family. The biggest change is the definition in s 62(3) of 'associated persons'. When this is read in connection with sections 33-38, it means that an associated person other than a spouse or ex-spouse or a cohabitant or ex-cohabitant may only apply for an occupation order where that person is already entitled to occupy the property. Such persons may of course apply for non-molestation orders.

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63. Interpretation of Part IV

(1) In this Part—

'adoption order' has the meaning given by section 72(1) of the Adoption Act 1976;

' associated', in relation to a person, is to be read with section 62(3) to (6);

'child' means a person under the age of eighteen years;

'cohabitant' and 'former cohabitant' have the meaning given by section 62(1);

'the court' is to be read with section 57;

'development' means physical, intellectual, emotional, social or behavioural development;

'dwelling-house' includes (subject to subsection (4))—

(a) any building or part of a building which is occupied as a dwelling,

(b) any caravan, house-boat or structure which is occupied as a dwelling,

and any yard, garden, garage or outhouse belonging to it and occupied with it;

'family proceedings' means any proceedings—

(a) under the inherent jurisdiction of the High Court in relation to children; or

(b) under the enactments mentioned in subsection (2);

'harm'—

(a) in relation to a person who has reached the age of eighteen years, means ill-treatment or the impairment of health; and

(b) in relation to a child, means ill-treatment or the impairment of health or development;

'health' includes physical or mental health;

'ill-treatment' includes forms of ill-treatment which are not physical and, in relation to a child, includes sexual abuse;

'matrimonial home rights' has the meaning given by section 30;

'mortgage', 'mortgagor' and 'mortgagee' have the same meaning as in the Law of Property Act 1925;

'mortgage payments' includes any payments which, under the terms of the mortgage, the mortgagor is required to make to any person;

'non-molestation order' has the meaning given by section 42(1);

'occupation order' has the meaning given by section 39;

'parental responsibility' has the same meaning as in the Children Act 1989;

'relative', in relation to a person, means—

(a) the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson or granddaughter of that person or of that person's spouse or former spouse; or

(b) the brother, sister, uncle, aunt, niece or nephew (whether of the full blood or of the half blood or by affinity) of that person or of that person's spouse or former spouse,

and includes, in relation to a person who is living or has lived with another person as husband and wife, any person who would fall within paragraph (a) or (b) if the parties were married to each other;

'relevant child', in relation to any proceedings under this Part, has the meaning given by section 62(2);

'the relevant judicial authority', in relation to any order under this Part, means—

(a) where the order was made by the High Court, a judge of that court;

(b) where the order was made by a county court, a judge or district judge of that or any other county court; or

(c) where the order was made by a magistrates' court, any magistrates' court.

(2) The enactments referred to in the definition of 'family proceedings' are—

(a) Part II;

(b) this Part;

(c) the Matrimonial Causes Act 1973;

(d) the Adoption Act 1976;

(e) the Domestic Proceedings and Magistrates' Courts Act 1978;

(f) Part III of the Matrimonial and Family Proceedings Act 1984;

(g) Parts I, II and IV of the Children Act 1989;

(h) section 30 of the Human Fertilisation and Embryology Act 1990.

(3) Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child.

(4) For the purposes of sections 31, 32, 53 and 54 and such other provisions of this Part (if any) as may be prescribed, this Part is to have effect as if paragraph (b) of the definition of 'dwelling-house' were omitted.

(5) It is hereby declared that this Part applies as between the parties to a marriage even though either of them is, or has at any time during the marriage been, married to more than one person.

General. This is the interpretation section and gives rise to no surprises as most of the meanings are either apparent from the Act itself or are the same as those in relation to other family statutes such as the Children Act 1989.

Effect of the section. Where reference is made to a particular statute the definition will be found therein eg parental responsibility in the Children Act 1989. Where the Act provides a new definition, that will of course supersede any existing definition to be found elsewhere, eg 'harm' which is here slightly different from the Children Act definition.

PART V

SUPPLEMENTAL

64. Provision for separate representation for children

(1) The Lord Chancellor may by regulations provide for the separate representation of children in proceedings in England and Wales which relate to any matter in respect of which a question has arisen, or may arise, under-—

(a) Part II;

(b) Part IV;

(c) the 1973 Act; or

(d) the Domestic Proceedings and Magistrates' Courts Act 1978.

(2) The regulations may provide for such representation only in specified circumstances.

General. This section deals with representation for children.

Effect of the section. The Lord Chancellor is to make regulations in this respect.

65. Rules, regulations and orders

(1) Any power to make rules, orders or regulations which is conferred by this Act is exercisable by statutory instrument.

(2) Any statutory instrument made under this Act may—

(a) contain such incidental, supplemental, consequential and transitional provision as the Lord Chancellor considers appropriate; and

(b) make different provision for different purposes.

(3) Any statutory instrument containing an order, rules or regulations made under this Act, other than an order made under section 5(8) or 67(3), shall be subject to annulment by a resolution of either House of Parliament.

(4) No order shall be made under section 5(8) unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament.

(5) This section does not apply to rules of court made, or any power to make rules of court, for the purposes of this Act.

General. This section provides that rules, orders and regulations are to be made by statutory instrument.

The effect of the section. by s 65(2) the Lord Chancellor is to decide the content of these statutory instruments, although any such statutory instrument, except any made under s 5(8) (in respect of the 'specified period') or s 67(3) (implementation of those parts of the Act not yet in force, ie all of them except ss 65 and 67), may be annulled by either House of Parliament. A draft of any order under s 5(8) is to be laid before and approved by resolution of each House. However, rules of court are not subject to the section: s 65(5).

66. Consequential amendments, transitional provisions and repeals

(1) Schedule 8 makes minor and consequential amendments.

(2) Schedule 9 provides for the making of other modifications consequential on provisions of this Act, makes transitional provisions and provides for savings.

(3) Schedule 10 repeals certain enactments.

For commentary on this section see Schedules 8 , 9 and 10.

67. Short title, commencement and extent

(1) This Act may be cited as the Family Law Act 1996.

(2) Section 65 and this section come into force on the passing of this Act.

(3) The other provisions of this Act come into force on such day as the Lord Chancellor may by order appoint; and different days may be appointed for different purposes.

(4) This Act, other than section 17, extends only to England and Wales, except that—

(a) in Schedule 8—

(i) the amendments of section 38 of the Family Law Act 1986 extend also to Northern Ireland;

(ii) the amendments of the Judicial Proceedings (Regulation of Reports) Act 1926 extend also to Scotland; and

(iii)the amendments of the Maintenance Orders Act 1950, the Civil Jurisdiction and Judgments Act 1982, the Finance Act 1985 and sections 42 and 51 of the Family Law Act 1986 extend also to both Northern Ireland and Scotland; and

(b) in Schedule 10, the repeal of section 2(1)(b) of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 extends also to Scotland.

This section provides for the commencement of the Act.

Effect of the section. The section provides that other than this section and s 65 no other sections are in force until implemented. Part IV is expected to come into force in the Autumn of 1997. The Lord Chancellor's Department are working towards the implementation of the rest of the Act in mid-1999, but there will be pilot schemes in relation to information and mediation first, with an Advisory Board to advise the Lord Chancellor on the implementation of the Act.

SCHEDULES

SCHEDULE I

ARRANGEMENTS FOR THE FUTURE

The first exemption

1. The circumstances referred to in section 9(7)(a) are that—

(a) the requirements of section 11 have been satisfied;

(b) the applicant has, during the period for reflection and consideration, taken such steps as are reasonably practicable to try to reach agreement about the parties' financial arrangements; and

(c) the applicant has made an application to the court for financial relief and has complied with all requirements of the court in relation to proceedings for financial relief but—

(i) the other party has delayed in complying with requirements of the court or has otherwise been obstructive; or

(ii) for reasons which are beyond the control of the applicant, or of the other party, the court has been prevented from obtaining the information which it requires to determine the financial position of the parties.

The second exemption

2. The circumstances referred to in section 9(7)(b) are that—

(a) the requirements of section 11 have been satisfied;

(b) the applicant has, during the period for reflection and consideration, taken such steps as are reasonably practicable to try to reach agreement about the parties' financial arrangements;

(c) because of—

(i) the ill health or disability of the applicant, the other party or a child of the family (whether physical or mental), or

(ii) an injury suffered by the applicant, the other party or a child of the family, the applicant has not been able to reach agreement with the other party about those arrangements and is unlikely to be able to do so in the foreseeable future; and

(d) a delay in making the order applied for under section 3—

(i) would be significantly detrimental to the welfare of any child of the family; or

(ii) would be seriously prejudicial to the applicant.

The third exemption

3. The circumstances referred to in section 9(7)(c) are that—

(a) the requirements of section 11 have been satisfied;

(b) the applicant has found it impossible to contact the other party; and

(c) as a result, it has been impossible for the applicant to reach agreement with the other party about their financial arrangements.

The fourth exemption

4. The circumstances referred to in section 9(7)(d) are that—

(a) the requirements of section 11 have been satisfied;

(b) an occupation order or a non-molestation order is in force in favour of the applicant or a child of the family, made against the other party;

(c) the applicant has, during the period for reflection and consideration, taken such steps as are reasonably practicable to try to reach agreement about the parties' financial arrangements;

(d) the applicant has not been able to reach agreement with the other party about those arrangements and is unlikely to be able to do so in the foreseeable future; and

(e) a delay in making the order applied for under section 3—

(i) would be significantly detrimental to the welfare of any child of the family; or

(ii) would be seriously prejudicial to the applicant.

Court orders and agreements

5.—(1) Section 9 is not to be read as requiring any order or agreement to have been carried into effect at the time when the court is considering whether arrangements for the future have been made by the parties.

(2) The fact that an appeal is pending against an order of the kind mentioned in section 9(2)(a) is to be disregarded.

Financial arrangements

6. In section 9 and this Schedule 'financial arrangements' has the same meaning as in section 34(2) of the 1973 Act.

Negotiated agreements

7. In section 9(2)(b) 'negotiated agreement' means a written agreement between the parties as to future arrangements—

(a) which has been reached as the result of mediation or any other form of negotiation involving a third party; and

(b) which satisfies such requirements as may be imposed by rules of court.

Declarations

8.—(1) Any declaration of a kind mentioned in section 9—

(a) must be in a prescribed form;

(b) must, in prescribed cases, be accompanied by such documents as may be prescribed; and

(c) must, in prescribed cases, satisfy such other requirements as may be prescribed.

(2) The validity of a divorce order or separation order made by reference to such a declaration is not to be affected by any inaccuracy in the declaration.

Interpretation

9. In this Schedule—

'financial relief' has such meaning as may be prescribed; and

'prescribed' means prescribed by rules of court.

The first four paragraphs of this Schedule have already been explained in relation to section 9 above. The remainder provides the fine detail in relation to s 9 financial arrangements, in particular providing that it is not actually necessary for the purposes of s 9 that any arrangement has yet been carried into effect (paragraph 5), defines negotiated agreements (paragraph 7) and specifies the form of any declarations (paragraph 8).

SCHEDULE 2

FINANCIAL PROVISION

Introductory

1. Part II of the 1973 Act (financial provision and property adjustment orders) is amended as follows.

The orders

2. For section 21 (definitions) substitute—

'Financial provision and property adjustment orders

21.—(1) For the purposes of this Act, a financial provision order is—

(a) an order that a party must make in favour of another person such periodical payments, for such term, as may be specified (a 'periodical payments order');

(b) an order that a party must, to the satisfaction of the court, secure in favour of another person such periodical payments, for such term, as may be specified (a 'secured periodical payments order');

(c) an order that a party must make a payment in favour of another person of such lump sum or sums as may be specified (an 'order for the payment of a lump sum').

(2) For the purposes of this Act, a property adjustment order is—

(a) an order that a party must transfer such of his or her property as may be specified in favour of the other party or a child of the family;

(b) an order that a settlement of such property of a party as may be specified must be made, to the satisfaction of the court, for the benefit of the other party and of the children of the family, or either or any of them;

(c) an order varying, for the benefit of the parties and of the children of the family, or either or any of them, any marriage settlement;

(d) an order extinguishing or reducing the interest of either of the parties under any marriage settlement.

(3) Subject to section 40 below, where an order of the court under this Part of this Act requires a party to make or secure a payment in favour of another person or to transfer property in favour of any person, that payment must be made or secured or that property transferred—

(a) if that other person is the other party to the marriage, to that other party; and

(b) if that other person is a child of the family, according to the terms of the order—

(i) to the child; or

(ii) to such other person as may be specified, for the benefit of that child.

(4) References in this section to the property of a party are references to any property to which that party is entitled either in possession or in reversion.

(5) Any power of the court under this Part of this Act to make such an order as is mentioned in subsection (2)(b) to (d) above is exercisable even though there are no children of the family.

(6) In this section—

'marriage settlement' means an ante-nuptial or postnuptial settlement made on the parties (including one made by will or codicil);

'party' means a party to a marriage; and

'specified' means specified in the order in question.'

Financial provision, divorce and separation

3. Insert, before section 23—

'Financial provision orders, divorce and separation

22A.—(1) On an application made under this section, the court may at the appropriate time make one or more financial provision orders in favour of—

(a) a party to the marriage to which the application relates; or

(b) any of the children of the family.

(2) The 'appropriate time' is any time—

(a) after a statement of marital breakdown has been received by the court and before any application for a divorce order or for a separation order is made to the court by reference to that statement;

(b) when an application for a divorce order or separation order has been made under section 3 of the 1996 Act and has not been withdrawn;

(c) when an application for a divorce order has been made under section 4 of the 1996 Act and has not been withdrawn;

(d) after a divorce order has been made;

(e) when a separation order is in force.

(3) The court may make—

(a) a combined order against the parties on one occasion;

(b) separate orders on different occasions;

(c) different orders in favour of different children;

(d) different orders from time to time in favour of the same child,

but may not make, in favour of the same party, more than one periodical payments order, or more than one order for payment of a lump sum, in relation to any marital proceedings, whether in the course of the proceedings or by reference to a divorce order or separation order made in the proceedings.

(4) If it would not otherwise be in a position to make a financial provision order in favour of a party or child of the family the court may make an interim periodical payments, order, an interim order for the payment of a lump sum or a series of such orders, in favour of that party or child.

(5) Any order for the payment of a lump sum made under this section may—

(a) provide for the payment of the lump sum by instalments of such amounts as may be specified in the order; and

(b) require the payment of the instalments to be secured to the satisfaction of the court.

(6) Nothing in subsection (5) above affects—

(a) the power of the court under this section to make an order for the payment of a lump sum; or

(b) the provisions of this Part of this Act as to the beginning of the term specified in any periodical payments order or secured periodical payments order.

(7) Subsection (8) below applies where the court—

(a) makes an order under this section ('the main order') for the payment of a lump sum; and

(b) directs—

(i) that payment of that sum, or any part of it, is to be deferred; or

(ii) that that sum, or any part of it, is to be paid by instalments.

(8) In such a case, the court may, on or at any time after making the main order, make an order ('the order for interest') for the amount deferred, or the instalments, to carry interest (at such rate as may be specified in the order for interest)—

(a) from such date, not earlier than the date of the main order, as may be so specified;

(b) until the date when the payment is due.

(9) This section is to be read subject to any restrictions imposed by this Act and to section 19 of the 1996 Act.

Restrictions affecting section 22A

22B.—(1) No financial provision order, other than an interim order, may be made under section 22A above so as to take effect before the making of a divorce order or separation order in relation to the marriage, unless the court is satisfied—

(a) that the circumstances of the case are exceptional; and

(b) that it would be just and reasonable for the order to be so made.

(2) Except in the case of an interim periodical payments order, the court may not make a financial provision order under section 22A above at any time while the period for reflection and consideration is interrupted under section 7(8) of the 1996 Act.

(3) No financial provision order may be made under section 22A above by reference to the making of a statement of marital breakdown if, by virtue of section 5(3) or 7(9) of the 1996 Act (lapse of divorce or separation process), it has ceased to be possible—

(a) for an application to be made by reference to that statement; or

(b) for an order to be made on such an application.

(4) No financial provision order may be made under section 22A after a divorce order has been made, or while a separation order is in force, except—

(a) in response to an application made before the divorce order or separation order was made; or

(b) on a subsequent application made with the leave of the court.'

(5) In this section, 'period for reflection and consideration' means the period fixed by section 7 of the 1996 Act.'

Financial provision: nullity of marriage

4. For section 23 substitute—

'Financial provision orders: nullity

23.—(1) On or after granting a decree of nullity of marriage (whether before or after the decree is made absolute), the court may, on an application made under this section, make one or more financial provision orders in favour of

(a) either party to the marriage; or

(b) any child of the family.

(2) Before granting a decree in any proceedings for nullity of marriage, the court may make against either or each of the parties to the marriage—

(a) an interim periodical payments order, an interim order for the payment of a lump sum, or a series of such orders, in favour of the other party;

(b) an interim periodical payments order, an interim order for the payment of a lump sum, a series of such orders or any one or more other financial provision orders in favour of each child of the family.

(3) Where any such proceedings are dismissed, the court may (either immediately or within a reasonable period after the dismissal) make any one or more financial provision orders in favour of each child of the family.

(4) An order under this section that a party to a marriage must pay a lump sum to the other party may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this section in his or her favour.

(5) An order under this section for the payment of a lump sum to or for the benefit of a child of the family may be made for the purpose of enabling any liabilities or expenses reasonably incurred by or for the benefit of that child before the making of an application for an order under this section in his favour to be met.

(6) An order under this section for the payment of a lump sum may—

(a) provide for the payment of that sum by instalments of such amount as may be specified in the order; and

(b) require the payment of the instalments to be secured to the satisfaction of the court.

(7) Nothing in subsections (4) to (6) above affects-—

(a) the power under subsection (1) above to make an order for the payment of a lump sum; or

(b) the provisions of this Act as to the beginning of the term specified in any periodical payments order or secured periodical payments order.

(8) The powers of the court under this section to make one or more financial provision orders are exercisable against each party to the marriage by the making of—

(a) a combined order on one occasion; or

(b) separate orders on different occasions,

but the court may not make more than one periodical payments order, or more than one order for payment of a lump sum, in favour of the same party.

(9) The powers of the court under this section so far as they consist in power to make one or more orders in favour of the children of the family—

(a) may be exercised differently in favour of different children; and

(b) except in the case of the power conferred by subsection (3) above, may be exercised from time to time in favour of the same child; and

(c) in the case of the power conferred by that subsection, if it is exercised by the making of a financial provision order of any kind in favour of a child, shall include power to make, from time to time, further financial provision orders of that or any other kind in favour of that child.

(10) Where an order is made under subsection (1) above in favour of a party to the marriage on or after the granting of a decree of nullity of marriage, neither the order nor any settlement made in pursuance of the order takes effect unless the decree has been made absolute.

(11) Subsection (10) above does not affect the power to give a direction under section 30 below for the settlement of an instrument by conveyancing counsel.

(12) Where the court—

(a) makes an order under this section ('the main order') for the payment of a lump sum; and

(b) directs—

(i) that payment of that sum or any part of it is to be deferred; or

(ii) that that sum or any part of it is to be paid by instalments,

it may, on or at any time after making the main order, make an order ('the order for interest') for the amount deferred or the instalments to carry interest at such rate as may be specified by the order for interest from such date, not earlier than the date of the main order, as may be so specified, until the date when payment of it is due.

(13) This section is to be read subject to any restrictions imposed by this Act.'

Property adjustment orders: divorce and separation

5. Insert, before section 2

'Property adjustment orders: divorce and separation.

23A.—(1) On an application made under this section, the court may, at any time mentioned in section 22A(2) above, make one or more property adjustment orders.

(2) If the court makes, in favour of the same party to the marriage, more than one property adjustment order in relation to any marital proceedings, whether in the course of the proceedings or by reference to a divorce order or separation order made in the proceedings, each order must fall within a different paragraph of section 21(2) above.

(3) The court shall exercise its powers under this section, so far as is practicable, by making on one occasion all such provision as can be made by way of one or more property adjustment orders in relation to the marriage as it thinks fit.

(4) Subsection (3) above does not affect section 31 or 31A below.

(5) This section is to be read subject to any restrictions imposed by this Act and to section 19 of the 1996 Act.

Restrictions affecting section 23A

23B.—(I) No property adjustment order may be made under section 23A above so as to take effect before the making of a divorce order or separation order in relation to the marriage unless the court is satisfied—

(a) that the circumstances of the case are exceptional; and

(b) that it would be just and reasonable for the order to be so made.

(2) The court may not make a property adjustment order under section 23A above at any time while the period for reflection and consideration is interrupted under section 7(8) of the 1996 Act.

(3) No property adjustment order may be made under section 23A above by virtue of the making of a statement of marital breakdown if, by virtue of section 5(3) or 7(5) of the 1996 Act (lapse of divorce or separation process), it has ceased to be possible—

(a) for an application to be made by reference to that statement; or

(b) for an order to be made on such an application.

(4) No property adjustment order may be made under section 23A above after a divorce order has been made, or while a separation order is in force, except—

(a) in response to an application made before the divorce order or separation order was made; or

(b) on a subsequent application made with the leave of the court.

(5) In this section, 'period for reflection and consideration' means the period fixed by section 7 of the 1996 Act.'

Property adjustment orders: nullity

6. For section 24, substitute—

'Property adjustment orders: nullity of marriage.

24.—(1) On or after granting a decree of nullity of marriage (whether before or after the decree is made absolute), the court may on an application made under this section, make one or more property adjustment orders in relation to the marriage.

(2) The court shall exercise its powers under this section, so far as is practicable, by making on one occasion all such provision as can be made by way of one or more property adjustment orders in relation to the marriage as it thinks fit.

(3) Subsection (2) above does not affect section 31 or 31A below.

(4) Where a property adjustment order is made under this section on or after the granting of a decree of nullity of marriage, neither the order nor any settlement made in pursuance of the order is to take effect unless the decree has been made absolute.

(5) That does not affect the power to give a direction under section 30 below for the settlement of an instrument by conveyancing counsel.

(6) This section is to be read subject to any restrictions imposed by this Act.'

Period of secured and unsecured payments orders

7.—(1) In section 28(1) (duration of a continuing financial provision order in favour of a party to a marriage), for paragraphs (a) and (b) substitute—

'(a) a term specified in the order which is to begin before the making of the order shall begin no earlier—

(i) where the order is made by virtue of section 22A(2)(a) or (b) above, unless sub-paragraph (ii) below applies, than the beginning of the day on which the statement of marital breakdown in question was received by the court;

(ii) where the order is made by virtue of section 22A(2)(b) above and the application for the divorce order was made following cancellation of an order preventing divorce under section 10 of the 1996 Act, than the date of the making of that application;

(iii) where the order is made by virtue of section 22A(2)(c) above, than the date of the making of the application for the divorce order; or

(iv) in any other case, than the date of the making of the application on which the order is made;

a term specified in a periodical payments order or secured periodical payments order shall be so defined as not to extend beyond—

(i) in the case of a periodical payments order, the death of the party by whom the payments are to be made; or

(ii) in either case, the death of the party in whose favour the order was made or the remarriage of that party following the making of a divorce order or decree of nullity.'

(2) In section 29 (duration of continuing financial provision order in favour of a child of the family) insert after subsection (1)—

'(1A) The term specified in a periodical payments order or secured periodical payments order made in favour of a child shall be such term as the court thinks fit.

(1B) If that term is to begin before the making of the order, it may do so no earlier than—

(a) in the case of an order made by virtue of section 22A(2)(a) or (b) above, except where paragraph (b) below applies, the beginning of the day on which the statement of marital breakdown in question was received by the court;

(b) in the case of an order made by virtue of section 22A(2)(b) above where the application for the divorce order was made following cancellation of an order preventing divorce under section 10 of the 1996 Act, the date of the making of that application;

(c) in the case of an order made by virtue of section 22A(2)(c) above, the date of the making of the application for the divorce order; or

(d) in any other case, the date of the making of the application on which the order is made.'

Variations etc following reconciliations

8. Insert after section 31—

'Variation etc following reconciliations

31A.—(1) Where, at a time before the making of a divorce order—

(a) an order ('a paragraph (a) order') for the payment of a lump sum has been made under section 22A above in favour of a party;

(b) such an order has been made in favour of a child of the family but the payment has not yet been made; or

(c) a property adjustment order ('a paragraph (c) order') has been made under section 23A above,

the court may, on an application made jointly by the parties to the marriage, vary or discharge the order.

(2) Where the court varies or discharges a paragraph (a) order, it may order the repayment of an amount equal to the whole or any part of the lump sum.

(3) Where the court varies or discharges a paragraph (c) order, it may (if the order has taken effect)—

(a) order any person to whom property was transferred in pursuance of the paragraph (c) order to transfer—

(i) the whole or any part of that property; or

(ii) the whole or any part of any property appearing to the court to represent that property, in favour of a party to the marriage or a child of the family; or

(b) vary any settlement to which the order relates in favour of any person or extinguish or reduce any person's interest under that settlement.

(4) Where the court acts under subsection (3) it may make such supplemental provision (including a further property adjustment order or an order for the payment of a lump sum) as it thinks appropriate in consequence of any transfer, variation, extinguishment or reduction to be made under paragraph (a) or (b) of that subsection.

(5) Sections 24A and 30 above apply for the purposes of this section as they apply where the court makes a property adjustment order under section 23A or 24 above.

(6) The court shall not make an order under subsection (2), (3) or (4) above unless it appears to it that there has been a reconciliation between the parties to the marriage.

(7) The court shall also not make an order under subsection (3) or (4) above unless it appears to it that the order will not prejudice the interests of—

(a) any child of the family; or

(b) any person who has acquired any right or interest in consequence of the paragraph (c) order and is not a party to the marriage or a child of the family.'

This Schedule amends Part II of the Matrimonial Causes Act 1973 (which provides for ancillary relief orders under the existing law).

It rewrites s 21 of that Act (the definition section in relation to financial orders that the court may at present make for periodical payments, secured periodical payments, lump sums and property adjustment) to facilitate the new financial provision arrangements which will be made as part of the new system of divorce and separation.

It then inserts a new s 22A enabling the court, when Part II of the Family Law Act 1966 comes into force, to make the orders specified in the rewritten s 21 at the 'appropriate time' ie as soon as the statement of marital breakdown has been received, rather than as now only after decree *nisi*: new s 22A(2). By the new s 22A(3) the court may make a combined order against the parties on one occasion, separate orders on different occasions, different orders in favour of different children and different orders from time to time in favour of the same child, but may not make in favour of the same party more than one periodical payments order or more than one order for a lump sum in relation to any marital proceedings.

The new s 22A(4) permits interim orders to be made in favour of a party or a child where necessary (ie where the court is not in a position to make the usual final order).

By the new s 22B the new orders do not take effect until the divorce or separation order is made.

The Schedule substitutes a new s 23, basically preserving the present position in regard to ancillary relief orders on nullity, which will continue to require two decrees as at present, and

otherwise bringing the menu of orders which may be made after a nullity decree into line with those which may be made before a divorce or separation order.

A new s 23A deals with the divorce and separation property adjustment position. The court may make one or more property adjustment orders under this section but each must fall within a different paragraph of s 21(2), ie a transfer of property or a settlement or a variation or an extinguishment of settlement. By s 23A(3) the court is to make all property adjustment orders on one occasion if practicable, and by s 23B there are restrictions on the making of orders under s 23A to prevent such orders being made when the period for reflection and consideration is interrupted under s 7(8) (ie when the clock is stopped for a reconciliation attempt): s 23B(2), or after the 'specified period' (also called the lapse period) in relation to either a divorce or a separation: s 23B(3), or to take effect before the divorce or separation order unless the case is exceptional or it would be just and reasonable to do so: s 23B(1).

A new s 24 deals with property adjustment orders on or after granting a nullity decree.

Paragraph 7 of the Schedule then makes consequential amendments to ss 28 and 29 to bring them into line with the new system of making financial orders after statement of marital breakdown rather than only after decree *nisi*.

Paragraph 8 inserts a new s 31A permitting variation of orders after reconciliations, including repayment where appropriate and where rights of third parties are not prejudiced.

SCHEDULE 3

STAY OF PROCEEDINGS

Introductory

1. Schedule I to the Domicile and Matrimonial Proceedings Act 1973 (which relates to the staying of matrimonial proceedings) is amended as follows.

Interpretation

2. In paragraph 1, for 'The following five paragraphs' substitute 'Paragraphs 2 to 6 below'.

3. For paragraph 2 substitute—

'2.—(1) ''Matrimonial proceedings' means—

(a) marital proceedings;

(b) proceedings for nullity of marriage;

(c) proceedings for a declaration as to the validity of a marriage of the petitioner; or

(d) proceedings for a declaration as to the subsistence of such a marriage.

(2) 'Marital proceedings' has the meaning given by section 20 of the Family Law Act 1996.

(3) 'Divorce proceedings' means marital proceedings that are divorce proceedings by virtue of that section.'

4. Insert, after paragraph 4

'4A. (1) 'Statement of marital breakdown' has the same meaning as in the Family Law Act 1996.

(2) 'Relevant statement' in relation to any marital proceedings, means—

(a) the statement of marital breakdown with which the proceedings commenced; or

(b) if the proceedings are for the conversion of a separation order into a divorce order under section 4 of the Family Law Act 1996, the statement of marital breakdown by reference to which the separation order was made.'

Duty to furnish particulars of concurrent proceedings

5. For paragraph 7 substitute—

'7.—(1) While marital proceedings are pending in the court with respect to a marriage, this paragraph applies

(a) to the party or parties to the marriage who made the relevant statement; and

(b) in prescribed circumstances where the statement was made by only one party, to the other party.

(2) While matrimonial proceedings of any other kind are pending in the court with respect to a marriage and the trial or first trial in those proceedings has not begun, this paragraph applies—

(a) to the petitioner; and

(b) if the respondent has included a prayer for relief in his answer, to the respondent.

(3) A person to whom this paragraph applies must give prescribed information about any proceedings which—

(a) he knows to be continuing in another jurisdiction; and

(b) are in respect of the marriage or capable of affecting its validity or subsistence.

(4) The information must be given in such manner, to such persons and on such occasions as may be prescribed.'

Obligatory stays in divorce cases

6.—(1) Paragraph 8 is amended as follows.

(2) For the words before paragraph (a) of sub-paragraph (I) substitute—

'(1) This paragraph applies where divorce proceedings are continuing in the court with respect to a marriage.

(2) Where it appears to the court, on the application of a party to the marriage'.

(3) In sub-paragraph (1), in the words after paragraph (d), for 'proceedings' substitute 'divorce proceedings'.

(4) For sub-paragraph (2) substitute—

'(3) The effect of such an order is that, while it is in force—

(a) no application for a divorce order in relation to the marriage may be made either by reference to the relevant statement or by reference to any subsequent statement of marital breakdown; and

(b) if such an application has been made, no divorce order may be made on

that application.'

Discretionary stays

7.—(1) Paragraph 9 is amended as follows.

(2) For sub-paragraph (1), substitute—

'(1) Sub-paragraph (1A) below applies where—

(a) marital proceedings are continuing in the court; or

(b) matrimonial proceedings of any other kind are continuing in the court, if the trial or first trial in the proceedings has not begun.

(1A) The court may make an order staying the proceedings if it appears to the court—

(a) that proceedings in respect of the marriage, or capable of affecting its validity or subsistence, are continuing in another jurisdiction; and

(b) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for proceedings in that jurisdiction to be disposed of before further steps are taken in the proceedings to which the order relates.'

(3) For sub-paragraph (3) substitute—

'(3) Where an application for a stay is pending under paragraph 8 above, the court shall not make an order under sub-paragraph (1A) staying marital proceedings in relation to the marriage.'

(4) In sub-paragraph 4, after 'pending in the court,' insert 'other than marital proceedings,'.

(5) After sub-paragraph (4), insert—

(5) The effect of an order under sub-paragraph (1A) for a stay of marital proceedings is that, while it is in force—

(a) no application for a divorce order or separation order in relation to the marriage may be made either by reference to the relevant statement or by reference to any subsequent statement of marital breakdown; and

(b) if such an application has been made, no divorce order or separation order shall be made on that application.'

Discharge of orders

8. In paragraph 10, for sub-paragraph (2), substitute—

'(1A) Where the court discharges an order staying any proceedings, it may direct that the whole or a specified part of any period while the order has been in force—

(a) is not to count towards any period specified in section 5(3) or 7(9) of the Family Law Act 1996; or

(b) is to count towards any such period only for specified purposes.

(2) Where the court discharges an order under paragraph 8 above, it shall not again make such an order in relation to the marriage except in a case where the obligation to do so arises under that paragraph following receipt by the court of a statement of marital breakdown after the discharge of the order.'

Ancillary matters

9.— (1) Paragraph 11 is amended as follows.

(2) For sub-paragraph (1) substitute—

'(1) Sub-paragraphs (2) and (3) below apply where a stay of marital proceedings or proceedings for nullity of marriage—

(a) has been imposed by reference to proceedings in a related jurisdiction for divorce, separation or nullity of marriage, and

(b) is in force.

(1A) In this paragraph—

''lump sum order', in relation to a stay, means an order—

(a) under section 22A or 23, 31 or 31A of the Matrimonial Causes Act 1973 which is an order for the payment of a lump sum for the purposes of Part II of that Act, or

(b) made in any equivalent circumstances under Schedule I to the Children Act 1989 and of a kind mentioned in paragraph 1 (2)(a) or (b) of that Schedule,

so far as it satisfies the condition mentioned in sub-paragraph (1C) below;

'the other proceedings', in relation to a stay, means the proceedings in another jurisdiction by reference to which the stay was imposed;

'relevant order', in relation to a stay, means—

(a) any financial provision order (including an interim order), other than a lump sum order;

(b) any order made in equivalent circumstances under Schedule I to the Children Act 1989 and of a kind mentioned in paragraph 1(2)(a) or (b) of that Schedule;

(c) any section 8 order under the Act of 1989; and

(d) except for the purposes of sub-paragraph (3) below, any order restraining a person from removing a child out of England and Wales or out of the care of another person,

so far as it satisfies the condition mentioned in sub-paragraph (1C) below.

(1C) The condition is that the order is, or (apart from this paragraph) could be, made in connection with the proceedings to which the stay applies.'

(3) In sub-paragraph (2)—

(a) for 'any proceedings are stayed' substitute 'this paragraph applies in relation to a stay';

(b) in paragraph (a), and in the first place in paragraph (c), omit 'in connection with the stayed proceedings'; and

(c) in paragraphs (b) and (c), for 'made in connection with the stayed proceedings' substitute 'already made'.

(4) In sub-paragraph (3)—-

(a) for 'any proceedings are stayed' substitute 'this paragraph applies in relation to a stay';

(b) in paragraph (a), for 'made in connection with the stayed proceedings' substitute 'already made';

(c) in paragraphs (b) and (c), omit 'in connection with the stayed proceedings'.

(5) In sub-paragraph (3A). for the words before 'any order made' substitute—

'Where a secured periodical payments order within the meaning of the Matrimonial Causes Act 1973—

(a) has been made under section 22A(1)(b) or 23(1)(b) or (2)(b) of that Act, but

(b) ceases to have effect by virtue of sub-paragraph (2) or (3) above,'.

(6) For sub-paragraph (4), substitute—

'(4) Nothing in sub-paragraphs (2) and (3) above affects any relevant order or lump sum order or any power to make such an order in so far as—

(a) where the stay applies to matrimonial proceedings other than marital proceedings, the order has been made or the power may be exercised following the receipt by the court of a statement of marital breakdown;

(b) where the stay is of marital proceedings, the order has been made or the power may be exercised in matrimonial proceedings of any other kind; or

(c) where the stay is of divorce proceedings only, the order has been made or the power may be exercised—

(i) in matrimonial proceedings which are not marital proceedings, or

(ii) in marital proceedings in which an application has been made for a separation order.'

(7) In sub-paragraph (5)(c), for the words from 'in connection' onwards substitute 'where a stay no longer applies'.

This Schedule amends Schedule 1 of the Domicile and Matrimonial Proceedings Act 1973 to reflect the changes made in matrimonial proceedings effected by the Family Law Act 1996, and requires the party who has made a statement of marital breakdown to furnish details of concurrent pending proceedings if any, and in prescribed circumstances extends this obligation to the party who has not made the statement. It also permits the court not to count any period while a stay has been in force towards any period specified in ss 5(3) or 7(9) of the Family Law Act.

SCHEDULE 4

PROVISIONS SUPPLEMENTARY TO SECTIONS 30 AND 31

Interpretation

1.—(1) In this Schedule—

(a) any reference to a solicitor includes a reference to a licensed conveyancer or a recognised body, and

(b) any reference to a person's solicitor includes a reference to a licensed conveyancer or recognised body acting for that person.

(2) In sub-paragraph (1)—

'licensed conveyancer' has the meaning given by section 11(2) of the Administration of Justice Act 1985;

'recognised body' means a body corporate for the time being recognised under section 9 (incorporated practices) or section 32 (provision of conveyancing by recognised bodies) of that Act.

Restriction on registration where spouse entitled to more than one charge

2. Where one spouse is entitled by virtue of section 31 to a registrable charge in respect of each of two or more dwelling-houses, only one of the charges to which that spouse is so entitled shall be registered under section 31(10) or under section 2 of the Land Charges Act 1972 at any one time, and if any of those charges is registered under either of those provisions the Chief Land Registrar, on being satisfied that any other of them is so registered, shall cancel the registration of the charge first registered.

Contract for sale of house affected by registered charge to include term requiring cancellation of registration before completion

3.—(1) Where one spouse is entitled by virtue of section 31 to a charge on an estate in a dwelling-house and the charge is registered under section 31(10) or section 2 of the Land Charges Act 1972, it shall be a term of any contract for the sale of that estate whereby the vendor agrees to give vacant possession of the dwelling-house on completion of the contract that the vendor will before such completion procure the cancellation of the registration of the charge at his expense.

(2) Sub-paragraph (1) shall not apply to any such contract made by a vendor who is entitled to sell the estate in the dwelling-house freed from any such charge.

(3) If, on the completion of such a contract as is referred to in sub-paragraph (1), there is delivered to the purchaser or his solicitor an application by the spouse entitled to the charge for the cancellation of the registration of that charge, the term of the contract for which sub-paragraph (1) provides shall be deemed to have been performed.

(4) This paragraph applies only if and so far as a contrary intention is not expressed in the contract.

(5) This paragraph shall apply to a contract for exchange as it applies to a contract for sale.

(6) This paragraph shall, with the necessary modifications, apply to a contract for the grant of a lease or underlease of a dwelling-house as it applies to a contract for the sale of an estate in a dwelling-house.

Cancellation of registration after termination of marriage, etc

4.—(1) Where a spouse's matrimonial home rights are a charge on an estate in the dwelling-house and the charge is registered under section 31(10) or under section 2 of the Land Charges Act 1972, the Chief Land Registrar shall, subject to sub-paragraph (2), cancel the registration of the charge if he is satisfied—

(a) by the production of a certificate or other sufficient evidence, that either spouse is dead; or

(b) by the production of an official copy of a decree or order of a court, that the marriage in question has been terminated otherwise than by death; or

(c) by the production of an order of the court, that the spouse's matrimonial home rights constituting the charge have been terminated by the order.

(2) Where—

(a) the marriage in question has been terminated by the death of the spouse entitled to an estate in the dwelling-house or otherwise than by death; and

(b) an order affecting the charge of the spouse not so entitled had been made under section 33(5),

then if, after the making of the order, registration of the charge was renewed or the charge registered in pursuance of sub-paragraph (3), the Chief Land Registrar shall not cancel the registration of the charge in accordance with sub-paragraph (1) unless he is also satisfied that the order has ceased to have effect.

(3) Where such an order has been made, then, for the purposes of sub-paragraph (2), the spouse entitled to the charge affected by the order may—

(a) if before the date of the order the charge was registered under section 31(10) or under section 2 of the Land Charges Act 1972, renew the registration of the charge; and

(b) if before the said date the charge was not so registered, register the charge under section 31(10) or under section 2 of the Land Charges Act 1972.

(4) Renewal of the registration of a charge in pursuance of sub-paragraph (3) shall be effected in such manner as may be prescribed, and an application for such renewal or for registration of a charge in pursuance of that sub-paragraph shall contain such particulars of any order affecting the charge made under section 33(5) as may be prescribed.

(5) The renewal in pursuance of sub-paragraph (3) of the registration of a charge shall not affect the priority of the charge.

(6) In this paragraph 'prescribed' means prescribed by rules made under section 16 of the Land Charges Act 1972 or section 144 of the Land Registration Act 1925, as the circumstances of the case require.

Release of matrimonial home rights

5.—(1) A spouse entitled to matrimonial home rights may by a release in writing release those rights or release them as respects part only of the dwelling-house affected by them.

(2) Where a contract is made for the sale of an estate or interest in a dwelling-house, or for the grant of a lease or underlease of a dwelling-house, being (in either case) a dwelling-house affected by a charge registered under section 31(10) or under section 2 of the Land Charges Act 1972, then, without prejudice to sub-paragraph (1), the matrimonial home rights constituting the charge shall be deemed to have been released on the happening of whichever of the following events first occurs—

(a) the delivery to the purchaser or lessee, as the case may be, or his solicitor on completion of the contract of an application by the spouse entitled to the charge for the cancellation of the registration of the charge; or

(b) the lodging of such an application at Her Majesty's Land Registry.

Postponement of priority of charge

6. A spouse entitled by virtue of section 31 to a charge on an estate or interest may agree in writing that any other charge on, or interest in, that estate or interest shall rank in priority to the charge to which that spouse is so entitled.

This Schedule provides the fine detail in relation to registration of matrimonial home rights, including conveyancing matters such as cancellation of any registration of such rights prior to sale of the property, cancellation of the rights on termination of marriage (or non-cancellation if an order has been made prolonging those rights under s 33(5)) and release of such matrimonial home rights.

SCHEDULE 5

POWERS OF HIGH COURT AND COUNTY COURT TO REMAND

Interpretation

1. In this Schedule 'the court' means the High Court or a county court and includes—

(a) in relation to the High Court, a judge of that court; and

(b) in relation to a county court, a judge or district judge of that court.

Remand in custody or on bail

2.—(1) Where a court has power to remand a person under section 47, the court may—

(a) remand him in custody, that is to say, commit him to custody to be brought before the court at the end of the period of remand or at such earlier time as the court may require; or

(b) remand him on bail—

(i) by taking from him a recognizance (with or without sureties) conditioned as provided in sub-paragraph (3), or

(ii) by fixing the amount of the recognizances with a view to their being taken subsequently in accordance with paragraph 4 and in the meantime committing the person to custody in accordance with paragraph (a).

(2) Where a person is brought before the court after remand, the court may further remand him.

(3) Where a person is remanded on bail under sub-paragraph (1), the court may direct that his recognizance be conditioned for his appearance—

(a) before that court at the end of the period of remand; or

(b) at every time and place to which during the course of the proceedings the hearing may from time to time be adjourned.

(4) Where a recognizance is conditioned for a person's appearance in accordance with sub-paragraph (1)(b), the fixing of any time for him next to appear shall be deemed to be a remand; but nothing in this sub-paragraph or sub-paragraph (3) shall deprive the court of power at any subsequent hearing to remand him afresh.

(5) Subject to paragraph 3, the court shall not remand a person under this paragraph for a period exceeding 8 clear days, except that—

(a) if the court remands him on bail, it may remand him for a longer period if he and the other party consent, and

(b) if the court adjourns a case under section 48(1), the court may remand him for the period of the adjournment.

(6) Where the court has power under this paragraph to remand a person in custody it may, if the remand is for a period not exceeding 3 clear days, commit him to the custody of a constable.

Further remand

3.—(1) If the court is satisfied that any person who has been remanded under paragraph 2 is unable by reason of illness or accident to appear or be brought before the court at the expiration of the period for which he was remanded, the court may, in his absence, remand him for a further time; and paragraph 2(5) shall not apply.

(2) Notwithstanding anything in paragraph 2(1), the power of the court under sub-paragraph (1) to remand a person on bail for a further time may be exercised by enlarging his recognizance and those of any sureties for him to a later time.

(3) Where a person remanded on bail under paragraph 2 is bound to appear before the court at any time and the court has no power to remand him under sub-paragraph (1), the court may in his absence enlarge his recognizance and those of any sureties for him to a later time; and the enlargement of his recognizance shall be deemed to be a further remand.

Postponement of taking of recognizance

4. Where under paragraph 2(1)(b)(ii) the court fixes the amount in which the principal and his sureties, if any, are to be bound, the recognizance may thereafter be taken by such person as may be prescribed by rules of court, and the same consequences shall follow as if it had been entered into before the court.

This Schedule deals with the powers of the court to remand a person who is in breach of a domestic violence order and has been arrested for that breach under s 47. Broadly these permit remand in custody or on bail by taking a recognisance, and the remand period will normally be eight days but may be longer if the person consents or for a medical report pursuant to s 48.

SCHEDULE 6

AMENDMENTS OF CHILDREN ACT 1989

1. After section 38 of the Children Act 1989 insert—

'Power to include exclusion requirement in interim care order

38A. —(1) Where—

(a) on being satisfied that there are reasonable grounds for believing that the circumstances with respect to a child are as mentioned in section 31(2)(a) and (b)(i), the court makes an interim care order with respect to a child; and

(b) the conditions mentioned in subsection (2) are satisfied,

the court may include an exclusion requirement in the interim care order.

(2) The conditions are—

(a) that there is reasonable cause to believe that, if a person ('the relevant person') is excluded from a dwelling-house in which the child lives, the child will cease to suffer, or cease to be likely to suffer, significant harm; and

(b) that another person living in the dwelling-house (whether a parent of the child or some other person)—

(i) is able and willing to give to the child the care which it would be reasonable to expect a parent to give him, and

(ii) consents to the inclusion of the exclusion requirement.

(3) For the purposes of this section an exclusion requirement is any one or more of the following—

(a) a provision requiring the relevant person to leave a dwelling-house in which he is living with the child;

(b) a provision prohibiting the relevant person from entering a dwelling-house in which the child lives; and

(c) a provision excluding the relevant person from a defined area in which a dwelling-house in which the child lives is situated.

(4) The court may provide that the exclusion requirement is to have effect for a shorter period than the other provisions of the interim care order.

(5) Where the court makes an interim care order containing an exclusion requirement, the court may attach a power of arrest to the exclusion requirement.

(6) Where the court attaches a power of arrest to an exclusion requirement of an interim care order, it may provide that the power of arrest is to have effect for a shorter period than the exclusion requirement.

(7) Any period specified for the purposes of subsection (4) or (6) may be extended by the court (on one or more occasions) on an application to vary or discharge the interim care order.

(8) Where a power of arrest is attached to an exclusion requirement of an interim care order by virtue of subsection (5), a constable may arrest without warrant any person whom he has reasonable cause to believe to be in breach of the requirement.

(9) Sections 47(7), (11) and (12) and 48 of, and Schedule 5 to, the Family Law Act 1996 shall have effect in relation to a person arrested under subsection (8) of this section as they have effect in relation to a person arrested under section 47(6) of that Act.

(10) If, while an interim care order containing an exclusion requirement is in force, the local authority have removed the child from the dwelling-house from which the relevant person is excluded to other accommodation for a continuous period of more than 24 hours, the interim care order shall cease to have effect in so far as it imposes the exclusion requirement.

Undertakings relating to interim care orders

38B.—(1) In any case where the court has power to include an exclusion requirement in an interim care order, the court may accept an undertaking from the relevant person.

(2) No power of arrest may be attached to any undertaking given under subsection (1).

(3) An undertaking given to a court under subsection (1)—

(a) shall be enforceable as if it were an order of the court; and

(b) shall cease to have effect if, while it is in force, the local authority have removed the child from the dwelling-house from which the relevant person is excluded to other accommodation for a continuous period of more than 24 hours.

(4) This section has effect without prejudice to the powers of the High Court and county court apart from this section.

(5) In this section 'exclusion requirement' and 'relevant person' have the same meaning as in section 38A.'

2. In section 39 of the Children Act 1989 (discharge and variation etc of care orders and supervision orders) after subsection (3) insert—

'(3A) On the application of a person who is not entitled to apply for the order to be discharged, but who is a person to whom an exclusion requirement contained in the order applies, an interim care order may be varied or discharged by the court in so far as it imposes the exclusion requirement.

(3B) Where a power of arrest has been attached to an exclusion requirement of an interim care order, the court may, on the application of any person entitled to apply for the discharge of the order so far as it imposes the exclusion requirement, vary or discharge the order in so far as it confers a power of arrest (whether or not any application has been made to vary or discharge any other provision of the order).'

3. After section 44 of the Children Act 1989 insert— 'Power to include exclusion requirement in emergency protection order.

44A.—(1) Where—

(a) on being satisfied as mentioned in section 44(1)(a), (b) or (c), the court makes an emergency protection order with respect to a child; and

(b) the conditions mentioned in subsection (2) are satisfied,

the court may include an exclusion requirement in the emergency protection order.

(2) The conditions are—

(a) that there is reasonable cause to believe that, if a person ('the relevant person') is excluded from a dwelling-house in which the child lives, then—

(i) in the case of an order made on the ground mentioned in section 44(1)(a), the child will not be likely to suffer significant harm, even though the child is not removed as mentioned in section 44(1)(a)(i) or does not remain as mentioned in section 44(1)(a)(ii), or

(ii) in the case of an order made on the ground mentioned in paragraph (b) or (c) of section 44(1), the enquiries referred to in that paragraph will cease to be frustrated, and

(b) that another person living in the dwelling-house (whether a parent of the child or some other person)—

(i) is able and willing to give to the child the care which it would be reasonable to expect a parent to give him, and

(ii) consents to the inclusion of the exclusion requirement.

(3) For the purposes of this section an exclusion requirement is any one or more of the following—

(a) a provision requiring the relevant person to leave a dwelling-house in which he is living with the child;

(b) a provision prohibiting the relevant person from entering a dwelling-house in which the child lives; and

(c) a provision excluding the relevant person from a defined area in which a dwelling-house in which the child lives is situated.

(4) The court may provide that the exclusion requirement is to have effect for a shorter period than the other provisions of the order.

(5) Where the court makes an emergency protection order containing an exclusion requirement, the court may attach a power of arrest to the exclusion requirement.

(6) Where the court attaches a power of arrest to an exclusion requirement of an emergency protection order, it may provide that the power of arrest is to have effect for a shorter period than the exclusion requirement.

(7) Any period specified for the purposes of subsection (4) or (6) may be extended by the court (on one or more occasions) on an application to vary or discharge the emergency protection order.

(8) Where a power of arrest is attached to an exclusion requirement of an emergency protection order by virtue of subsection (5), a constable may arrest without warrant any person whom he has reasonable cause to believe to be in breach of the requirement.

(9) Sections 47(7), (11) and (12) and 48 of, and Schedule 5 to, the Family Law Act 1996 shall have effect in relation to a person arrested under subsection (8) of this section as they have effect in relation to a person arrested under section 47(6) of that Act.

(10) If, while an emergency protection order containing an exclusion requirement is in force, the applicant has removed the child from the dwelling-house from which the relevant person is excluded to other accommodation for a continuous period of more than 24 hours, the order shall cease to have effect in so far as it imposes the exclusion requirement.

Undertakings relating to emergency protection orders.

44B.—(1) In any case where the court has power to include an exclusion requirement in an emergency protection order, the court may accept an undertaking from the relevant person.

(2) No power of arrest may be attached to any undertaking given under subsection (1).

(3) An undertaking given to a court under subsection (1)—

(a) shall be enforceable as if it were an order of the court; and

(b) shall cease to have effect if, while it is in force the applicant has removed the child from the dwelling-house from which the relevant person is excluded to other accommodation for a continuous period of more than 24 hours.

(4) This section has effect without prejudice to the powers of the High Court and

county court apart from this section.

(5) In this section 'exclusion requirement' and 'relevant person' have the same meaning as in section 44A.'

4. In section 45 of the Children Act 1989 (duration of emergency protection orders and other supplemental provisions), insert after subsection (8)—

'(8A) On the application of a person who is not entitled to apply for the order to be discharged, but who is a person to whom an exclusion requirement contained in the order applies, an emergency protection order may be varied or discharged by the court in so far as it imposes the exclusion requirement.

(8B) Where a power of arrest has been attached to an exclusion requirement of an emergency protection order, the court may, on the application of any person entitled to apply for the discharge of the order so far as it imposes the exclusion requirement, vary or discharge the order in so far as it confers a power of arrest (whether or not any application has been made to vary or discharge any other provision of the order).'

5. In section 105(1) of the Children Act 1989 (interpretation), after the definition of 'domestic premises', insert— 'dwelling-house' includes—

(a) any building or part of a building which is occupied as a dwelling;

(b) any caravan, house-boat or structure which is occupied as a dwelling; and any yard, garden, garage or outhouse belonging to it and occupied with it;'.

This Schedule makes an important amendment to the Children Act 1989 which permits the court to make an ouster order for the protection of children when they make an emergency protection order or an interim care order. This is significant since formerly if a suspected abuser could not be removed from the home the child could not remain and so had to be removed instead. The new power permits this unsatisfactory situation to be reversed. the Schedule makes the necessary consequential amendments to the Children Act ss 38 (by inserting new ss 38A and 38B), s 39 (new subsections (3A) and (3B), s 44 (new ss 44A and 44B), and s 45 (new subsections (8A) and (8B)). There is also a consequential amendment to s 105(1) of the Children Act to amend the definition of domestic premises.

SCHEDULE 7

TRANSFER OF CERTAIN TENANCIES ON DIVORCE ETC OR ON SEPARATION OF COHABITANTS

PART I

GENERAL

Interpretation

1. In this Schedule—

'cohabitant', except in paragraph 3, includes (where the context requires) former cohabitant;

'the court' does not include a magistrates' court,

'landlord' includes—

(a) any person from time to time deriving title under the original landlord; and

(b) in relation to any dwelling-house, any person other than the tenant who is, or (but for Part VII of the Rent Act 1977 or Part II of the Rent (Agriculture) Act 1976) would be, entitled to possession of the dwelling-house;

'Part II order' means an order under Part II of this Schedule;

'a relevant tenancy' means—

(a) a protected tenancy or statutory tenancy within the meaning of the Rent Act 1977;

(b) a statutory tenancy within the meaning of the Rent (Agriculture) Act 1976;

(c) a secure tenancy within the meaning of section 79 of the Housing Act 1985; or

(d) an assured tenancy or assured agricultural occupancy within the meaning of Part I of the Housing Act 1988;

'spouse', except in paragraph 2, includes (where the context requires) former spouse; and

'tenancy' includes sub-tenancy.

Cases in which the court may make an order

2.—(1) This paragraph applies if one spouse is entitled, either in his own right or jointly with the other spouse, to occupy a dwelling-house by virtue of a relevant tenancy.

(2) At any time when it has power to make a property adjustment order under section 23A (divorce or separation) or 24 (nullity) of the Matrimonial Causes Act 1973 with respect to the marriage, the court may make a Part II order.

3.—(1) This paragraph applies if one cohabitant is entitled, either in his own right or jointly with the other cohabitant, to occupy a dwelling-house by virtue of a relevant tenancy.

(2) If the cohabitants cease to live together as husband and wife, the court may make a Part II order.

4. The court shall not make a Part II order unless the dwelling-house is or was—

(a) in the case of spouses, a matrimonial home; or

(b) in the case of cohabitants, a home in which they lived together as husband and wife.

Matters to which the court must have regard

5. In determining whether to exercise its powers under Part II of this Schedule and, if so, in what manner, the court shall have regard to all the circumstances of the case including—

(a) the circumstances in which the tenancy was granted to either or both of the spouses or cohabitants or, as the case requires, the circumstances in which either or both of them became tenant under the tenancy;

(b) the matters mentioned in section 33(6)(a), (b) and (c) and, where the parties are cohabitants and only one of them is entitled to occupy the dwelling-house

by virtue of the relevant tenancy, the further matters mentioned in section 36(6)(e), (f), (g) and (h); and

(c) the suitability of the parties as tenants.

PART II

ORDERS THAT MAY BE MADE

References to entitlement to occupy

6. References in this Part of this Schedule to a spouse or a cohabitant being entitled to occupy a dwelling-house by virtue of a relevant tenancy apply whether that entitlement is in his own right or jointly with the other spouse or cohabitant.

Protected, secure or assured tenancy or assured agricultural occupancy

7.—(1) If a spouse or cohabitant is entitled to occupy the dwelling-house by virtue of a protected tenancy within the meaning of the Rent Act 1977, a secure tenancy within the meaning of the Housing Act 1985 or an assured tenancy or assured agricultural occupancy within the meaning of Part I of the Housing Act 1988, the court may by order direct that, as from such date as may be specified in the order, there shall, by virtue of the order and without further assurance, be transferred to, and vested in, the other spouse or cohabitant—

(a) the estate or interest which the spouse or cohabitant so entitled had in the dwelling-house immediately before that date by virtue of the lease or agreement creating the tenancy and any assignment of that lease or agreement, with all rights, privileges and appurtenances attaching to that estate or interest but subject to all covenants, obligations, liabilities and incumbrances to which it is subject; and

(b) where the spouse or cohabitant so entitled is an assignee of such lease or agreement, the liability of that spouse or cohabitant under any covenant of indemnity by the assignee express or implied in the assignment of the lease or agreement to that spouse or cohabitant.

(2) If an order is made under this paragraph, any liability or obligation to which the spouse or cohabitant so entitled is subject under any covenant having reference to the dwelling-house in the lease or agreement, being a liability or obligation falling due to be discharged or performed on or after the date so specified, shall not be enforceable against that spouse or cohabitant.

(3) If the spouse so entitled is a successor within the meaning of Part IV of the Housing Act 1985, his former spouse or former cohabitant (or, if a separation order is in force, his spouse) shall be deemed also to be a successor within the meaning of that Part.

(4) If the spouse or cohabitant so entitled is for the purpose of section 17 of the Housing Act 1988 a successor in relation to the tenancy or occupancy, his former spouse or former cohabitant (or, if a separation order is in force, his spouse) is to be deemed to be a successor in relation to the tenancy or occupancy for the purposes of that section.

(5) If the transfer under sub-paragraph (I) is of an assured agricultural occupancy, then, for the purposes of Chapter III of Part I of the Housing Act 1988—

(a) the agricultural worker condition is fulfilled with respect to the dwelling-house while the spouse or cohabitant to whom the assured agricultural occupancy

is transferred continues to be the occupier under that occupancy; and

(b) that condition is to be treated as so fulfilled by virtue of the same paragraph of Schedule 3 to the Housing Act 1988 as was applicable before the transfer.

(6) In this paragraph, references to a separation order being in force include references to there being a judicial separation in force.

Statutory tenancy within the meaning of the Rent Act 1977

8.—(1) This paragraph applies if the spouse or cohabitant is entitled to occupy the dwelling-house by virtue of a statutory tenancy within the meaning of the Rent Act 1977.

(2) The court may by order direct that, as from the date specified in the order—

(a) that spouse or cohabitant is to cease to be entitled to occupy the dwelling-house; and

(b) the other spouse or cohabitant is to be deemed to be the tenant or, as the case may be, the sole tenant under that statutory tenancy.

(3) The question whether the provisions of paragraphs 1 to 3, or (as the case may be) paragraphs 5 to 7 of Schedule I to the Rent Act 1977, as to the succession by the surviving spouse of a deceased tenant, or by a member of the deceased tenant's family, to the right to retain possession are capable of having effect in the event of the death of the person deemed by an order under this paragraph to be the tenant or sole tenant under the statutory tenancy is to be determined according as those provisions have or have not already had effect in relation to the statutory tenancy.

Statutory tenancy within the meaning of the Rent (Agriculture) Act 1976

9.—(1) This paragraph applies if the spouse or cohabitant is entitled to occupy the dwelling-house by virtue of a statutory tenancy within the meaning of the Rent (Agriculture) Act 1976.

(2) The court may by order direct that, as from such date as may be specified in the order—

(a) that spouse or cohabitant is to cease to be entitled to occupy the dwelling-house; and

(b) the other spouse or cohabitant is to be deemed to be the tenant or, as the case may be, the sole tenant under that statutory tenancy.

(3) A spouse or cohabitant who is deemed under this paragraph to be the tenant under a statutory tenancy is (within the meaning of that Act) a statutory tenant in his own right, or a statutory tenant by succession, according as the other spouse or cohabitant was a statutory tenant in his own right or a statutory tenant by succession.

PART III

SUPPLEMENTARY PROVISIONS

Compensation

10.—(1) If the court makes a Part II order, it may by the order direct the making of a payment by the spouse or cohabitant to whom the tenancy is transferred ('the transferee') to the other spouse or cohabitant ('the transferor').

(2) Without prejudice to that, the court may, on making an order by virtue of sub-paragraph (1) for the payment of a sum—

(a) direct that payment of that sum or any part of it is to be deferred until a specified date or until the occurrence of a specified event, or

(b) direct that that sum or any part of it is to be paid by instalments.

(3) Where an order has been made by virtue of sub-paragraph (1), the court may, on the application of the transferee or the transferor-—

(a) exercise its powers under sub-paragraph (2), or

(b) vary any direction previously given under that sub-paragraph,

at any time before the sum whose payment is required by the order is paid in full.

(4) In deciding whether to exercise its powers under this paragraph and, if so, in what manner, the court shall have regard to all the circumstances including—

(a) the financial loss that would otherwise be suffered by the transferor as a result of the order;

(b) the financial needs and financial resources of the parties; and

(c) the financial obligations which the parties have, or are likely to have in the foreseeable future, including financial obligations to each other and to any relevant child.

(5) The court shall not give any direction under sub-paragraph (2) unless it appears to it that immediate payment of the sum required by the order would cause the transferee financial hardship which is greater than any financial hardship that would be caused to the transferor if the direction were given.

Liabilities and obligations in respect of the dwelling-house

11.—(1) If the court makes a Part II order, it may by the order direct that both spouses or cohabitants are to be jointly and severally liable to discharge or perform any or all of the liabilities and obligations in respect of the dwelling-house (whether arising under the tenancy or otherwise) which—

(a) have at the date of the order fallen due to be discharged or performed by one only of them; or

(b) but for the direction, would before the date specified as the date on which the order is to take effect fall due to be discharged or performed by one only of them.

(2) If the court gives such a direction, it may further direct that either spouse or cohabitant is to be liable to indemnify the other in whole or in part against any payment made or expenses incurred by the other in discharging or performing any such liability or obligation.

Date when order made between spouses is to take effect

12.—(1) In the case of a decree of nullity of marriage, the date specified in a Part II order as the date on which the order is to take effect must not be earlier than the date on which the decree is made absolute.

(2) In the case of divorce proceedings or separation proceedings, the date specified in a Part II order as the date on which the order is to take effect is to be determined as if the court were making a property adjustment order under section 23A of the Matrimonial Causes Act 1973 (regard being had to the restrictions imposed by section 23B of that Act).

Remarriage of either spouse

13.—(1) If after the making of a divorce order or the grant of a decree annulling a marriage either spouse remarries, that spouse is not entitled to apply, by reference to the making of that order or the grant of that decree, for a Part II order.

(2) For the avoidance of doubt it is hereby declared that the reference in sub-paragraph (I) to remarriage includes a reference to a marriage which is by law void or voidable.

Rules of court

14.—(1) Rules of court shall be made requiring the court, before it makes an order under this Schedule, to give the landlord of the dwelling-house to which the order will relate an opportunity of being heard.

(2) Rules of court may provide that an application for a Part II order by reference to an order or decree may not, without the leave of the court by which that order was made or decree was granted, be made after the expiration of such period from the order or grant as may be prescribed by the rules.

Saving for other provisions of Act

15.—(1) If a spouse is entitled to occupy a dwelling-house by virtue of a tenancy, this Schedule does not affect the operation of sections 30 and 31 in relation to the other spouse's matrimonial home rights.

(2) If a spouse or cohabitant is entitled to occupy a dwelling-house by virtue of a tenancy, the court's powers to make orders under this Schedule are additional to those conferred by sections 33, 35 and 36.

This Schedule extends the transfer of tenancy powers in relation to spouses to cohabitants and former cohabitants.

SCHEDULE 8

MINOR AND CONSEQUENTIAL AMENDMENTS

PART I

AMENDMENTS CONNECTED WITH PART II

The Wills Act 1837 (c. 26)

1. In section 18A(1) of the Wills Act 1837 (effect of dissolution or annulment of marriage on wills), for 'a decree' substitute 'an order or decree'.

The Judicial Proceedings (Regulation of Reports) Act 1926 (c. 61)

2. In section l(l)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 (restriction on reporting) after 'in relation to' insert 'any proceedings under Part II of the Family Law Act 1996 or otherwise in relation to'.

The Maintenance Orders Act 1950 (c. 37)

3. In section 16 of the Maintenance Orders Act 1950 (orders to which Part II of that Act applies)—

(a) in subsection (2)(a)(i), for '23(1), (2) and (4)' substitute '22A, 23'; and

(b) in subsection (2)(c)(v), after 'Matrimonial Causes Act 1973' insert '(as that Act had effect immediately before the passing of the Family Law Act 1996)'.

The Matrimonial Causes Act 1973 (c. 18)

4. The 1973 Act is amended as follows.

5. In section 8 (intervention of Queen's Proctor)—

(a) for 'a petition for divorce' substitute 'proceedings for a divorce order';

(b) in subsection (1)(b), omit 'or before the decree nisi is made absolute'; and

(c) in subsection (2), for 'a decree nisi in any proceedings for divorce' substitute 'the making of a divorce order'.

6. For section 15 (application of provisions relating to divorce to nullity proceedings) substitute—

'Decrees of nullity to be decrees nisi

15. Every decree of nullity of marriage shall in the first instance be a decree nisi and shall not be made absolute before the end of six weeks from its grant unless—

(a) the High Court by general order from time to time fixes a shorter period; or

(b) in any particular case, the court in which the proceedings are for the time being pending from time to time by special order fixes a shorter period than the period otherwise applicable for the time being by virtue of this section.

Intervention of Queen's Proctor

15A.—(1) In the case of a petition for nullity of marriage—

(a) the court may, if it thinks fit, direct all necessary papers in the matter to be sent to the Queen's Proctor, who shall under the directions of the Attorney-General instruct counsel to argue before the court any question in relation to the matter which the court considers it necessary or expedient to have fully argued;

(b) any person may at any time during the progress of the proceedings or before the decree nisi is made absolute give information to the Queen's Proctor on any matter material to the due decision of the case, and the Queen's Proctor may thereupon take such steps as the Attorney-General considers necessary or expedient.

(2) If the Queen's Proctor intervenes or shows cause against a decree nisi in any proceedings for nullity of marriage, the court may make such order as may be just as to the payment by other parties to the proceedings of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of those parties by reason of his so doing.

(3) Subsection (3) of section 8 above applies in relation to this section as it applies in relation to that section.

Proceedings after decree nisi: general powers of the court

15B.—(1) Where a decree of nullity of marriage has been granted under this Act but not made absolute, then, without prejudice to section 15A above, any person (excluding a party to the proceedings other than the Queen's Proctor) may show cause why the decree should not be made absolute by reason of material facts not having been brought before the court; and in such a case the court may—

(a) notwithstanding anything in section 15 above (but subject to section 41 below) make the decree absolute; or

(b) rescind the decree; or

(c) require further inquiry; or

(d) otherwise deal with the case as it thinks fit.

(2) Where a decree of nullity of marriage has been granted under this Act and no application for it to be made absolute has been made by the party to whom it was granted, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom it was granted may make an application to the court, and on that application the court may exercise any of the powers mentioned in paragraphs (a) to (d) of subsection (I) above.'

7. In section 19(4) (application of provisions relating to divorce to proceedings under section 19)—

(a) for '1(5), 8 and 9' substitute '15, 15A and 15B'; and

(b) for 'divorce' in both places substitute 'nullity of marriage'.

8. In section 24A(I) (orders for sale of property), for 'section 23 or 24 of this Act' substitute 'any of sections 22A to 24 above'.

9.—(1) Section 25 (matters to which the court is to have regard) is amended as follows.

(2) In subsection (1), for 'section 23, 24 or 24A' substitute 'any of sections 22A to

24A'.

(3) In subsection (2)—

(a) for 'section 23(1)(a), (b) or (c)' substitute 'section 22A or 23 above to make a financial provision order in favour of a party to a marriage or the exercise of its powers under section 23A,';

(b) in paragraph (g), after 'parties' insert ', whatever the nature of the conduct and whether it occurred during the marriage or after the separation of the parties or (as the case may be) dissolution or annulment of the marriage,'; and

(c) in paragraph (h), omit 'in the case of proceedings for divorce or nullity of marriage,'.

(4) In subsection (3), for 'section 23(1)(d), (e) or (f), (2) or (4)' substitute 'section 22A or 23 above to make a financial provision order in favour of a child of the family or the exercise of its powers under section 23A,'.

(5) In subsection (4), for 'section 23(1)(d), (e) or (f), (2) or (4), 24 or 24A' substitute 'any of sections 22A to 24A'.

(6) After subsection (4) insert—

'(5) In relation to any power of the court to make an interim periodical payments order or an interim order for the payment of a lump sum, the preceding provisions of this section, in imposing any obligation on the court with respect to the matters to which it is to have regard, shall not require the court to do anything which would cause such a delay as would, in the opinion of the court, be inappropriate having regard—

(a) to any immediate need for an interim order;

(b) to the matters in relation to which it is practicable for the court to inquire before making an interim order; and

(c) to the ability of the court to have regard to any matter and to make appropriate adjustments when subsequently making a financial provision order which is not interim.'

10.—(1) Section 25A (requirement to consider need to provide for 'a clean break') is amended as follows.

(2) In subsection (1), for the words from the beginning to 'the marriage' substitute—

'If the court decides to exercise any of its powers under any of sections 22A to 24A above in favour of a party to a marriage (other than its power to make an interim periodical payments order or an interim order for the payment of a lump sum)'.

(3) In subsection (1), for 'the decree' substitute 'a divorce order or decree of nullity'.

(4) For subsection (3) substitute—

'(3) If the court—

(a) would have power under section 22A or 23 above to make a financial provision order in favour of a party to a marriage ('the first party'), but

(b) considers that no continuing obligation should be imposed on the other party to the marriage ('the second party') to make or secure periodical

payments in favour of the first party,

it may direct that the first party may not at any time after the direction takes effect, apply to the court for the making against the second party of any periodical payments order or secured periodical payments order and, if the first party has already applied to the court for the making of such an order, it may dismiss the application.

(3A) If the court—

(a) exercises, or has exercised, its power under section 22A at any time before making a divorce order; and

(b) gives a direction under subsection (3) above in respect of a periodical payments order or a secured periodical payments order,

it shall provide for the direction not to take effect until a divorce order is made.'

11. In each of sections 25B(2) and (3), 25C(I) and (3) and 25D(l)(a), (2)(a), (c) and (e) (benefits under a pension scheme on divorce, etc) for 'section 23' substitute 'section 22A or 23'.

12. In section 26(1) (commencement of proceedings for ancillary relief), for the words from the beginning to '22 above' substitute—

'(1) If a petition for nullity of marriage has been presented, then, subject to subsection (2) below, proceedings'.

13.—(1) Section 27 (financial provision orders etc in case of failure to provide proper maintenance) is amended as follows.

(2) In subsection (5)—

(a) after 'an order requiring the respondent' insert '—

(a) ; and

(b) at the end insert ', or

(b) to pay to the applicant such lump sum or sums as the court thinks reasonable.'

(3) For subsection (6) substitute—

'(6) Subject to the restrictions imposed by the following provisions of this Act, if on an application under this section the applicant satisfies the court of any ground mentioned in subsection (I) above, the court may make one or more financial provision orders against the respondent in favour of the applicant or a child of the family.'

(4) In subsection (7), for '(6)(c) or (f)' substitute '(6)'.

14.—(1) Section 28 (duration of continuing financial provision order in favour of a party to a marriage) is amended as follows.

(2) In subsection (1A), for the words from the beginning to 'nullity of marriage' substitute—

'(1A) At any time when—

(a) the court exercises, or has exercised, its power under section 22A or 23 above to make a financial provision order in favour of a party to a marriage;

(b) but for having exercised that power, the court would have power under one of those sections to make such an order; and

(c) an application for a divorce order or a petition for a decree of nullity of marriage is outstanding or has been granted in relation to the marriage,'.

(3) Insert, after subsection (1A)—

'(1B) If the court—

(a) exercises, or has exercised, its power under section 22A at any time before making a divorce order, and

(b) gives a direction under subsection (1A) above in respect of a periodical payments order or a secured periodical payments order,

it shall provide for the direction not to take effect until a divorce order is made.'

(4) In subsection (2), for the words from 'on or after' to 'nullity of marriage' substitute 'at such a time as is mentioned in subsection (1A)(c) above'.

(5) In subsection (3)—

(a) for 'a decree' substitute 'an order or decree'; and

(b) for 'that decree' substitute 'that order or decree'.

15. In section 29(1) (duration of a continuing financial provision order in favour of a child of the family), for 'under section 24(1)(a)' substitute 'such as is mentioned in section 21 (2)(a)'.

16.—(1) Section 31 (variation etc of orders) is amended as follows.

(2) In subsection (2)

(a) after 'following orders' insert 'under this Part of this Act';

(b) for paragraph (d) substitute—

'(d) an order for the payment of a lump sum in a case in which the payment is to be by instalments;';

(c) in paragraph (dd), for '23(1)(c)' substitute '21(1)(c)';

(d) after paragraph (dd) insert—

'(de) any other order for the payment of a lump sum, if it is made at a time when no divorce order has been made, and no separation order is in force, in relation to the marriage;';

(e) for paragraph (e) substitute—

'(e) any order under section 23A of a kind referred to in section 21(2)(b),(c) or (d) which is made on or after the making of a separation order;

(ea) any order under section 23A which is made at a time when no divorce order has been made, and no separation order is in force in relation to the marriage;'.

(3) In subsection (4)—

(a) for the words from 'for a settlement' to '24(1)(c) or (d)', substitute 'referred to in subsection (2)(e)'; and

(b) for paragraphs (a) and (b) substitute 'on an application for a divorce order in relation to the marriage'.

(4) After subsection (4) insert—

'(4A) In relation to an order which falls within subsection (2)(de) or (ea) above ('the subsection (2) order')—

(a) the powers conferred by this section may be exercised—

(i) only on an application made before the subsection (2) order has or, but for paragraph (b) below, would have taken effect; and

(ii) only if, at the time when the application is made, no divorce order has been made in relation to the marriage and no separation order has been so made since the subsection (2) order was made; and

(b) an application made in accordance with paragraph (a) above prevents the subsection (2) order from taking effect before the application has been dealt with.

(4B) No variation—

(a) of a financial provision order made under section 22A above, other than an interim order, or

(b) of a property adjustment order made under section 23A above,

shall be made so as to take effect before the making of a divorce order or separation order in relation to the marriage, unless the court is satisfied that the circumstances of the case are exceptional, and that it would be just and reasonable for the variation to be so made.'

(5) In subsection (5)—

(a) insert, at the beginning, 'Subject to subsections (7A) to (7F) below and without prejudice to any power exercisable by virtue of subsection (2)(d),(dd) or (e) above or otherwise than by virtue of this section,'; and

(b) for 'section 23', in each place, substitute 'section 22A or 23'.

(6) In subsection (7)(a)—

(a) for 'on or after' to 'consider' substitute 'in favour of a party to a marriage, the court shall, if the marriage has been dissolved or annulled, consider'; and

(b) after 'sufficient' insert '(in the light of any proposed exercise by the court, where the marriage has been dissolved, of its powers under subsection (7B) below)'.

(7) After subsection (7), insert—

'(7A) Subsection (7B) below applies where, after the dissolution of a marriage, the court—

(a) discharges a periodical payments order or secured periodical payments order made in favour of a party to the marriage; or

(b) varies such an order so that payments under the order are required to be made or secured only for such further period as is determined by the court.

(7B) The court has power, in addition to any power it has apart from this subsection, to make supplemental provision consisting of any of—

(a) an order for the payment of a lump sum in favour of a party to the marriage;

(b) one or more property adjustment orders in favour of a party to the marriage;

(c) a direction that the party in whose favour the original order discharged or varied was made is not entitled to make any further application for—

(i) a periodical payments or secured periodical payments order, or

(ii) an extension of the period to which the original order is limited

by any variation made by the court.

(7C) An order for the payment of a lump sum made under subsection (7B) above may—

(a) provide for the payment of that sum by instalments of such amount as may be specified in the order; and

(b) require the payment of the instalments to be secured to the satisfaction of the court.

(7D) Subsections (7) and (8) of section 22A above apply where the court makes an order for the payment of a lump sum under subsection (7B) above as they apply where it makes such an order under section 22A above.

(7E) If under subsection (7B) above the court makes more than one property adjustment order in favour of the same party to the marriage, each of those orders must fall within a different paragraph of section 21(2) above.

(7F) Sections 24A and 30 above apply where the court makes a property adjustment order under subsection (7B) above as they apply where it makes such an order under section 23A above.'

17. In section 32(1) (payment of certain arrears to be unenforceable), for the words from 'an order' to 'financial provision order' substitute 'any financial provision order under this Part of this Act or any interim order for maintenance'.

18. For section 33(2) (repayment of sums paid under certain orders) substitute—

'(2) This section applies to the following orders under this Part of this Act—

(a) any periodical payments order;

(b) any secured periodical payments order; and

(c) any interim order for maintenance, so far as it requires the making of periodical payments.'

19.—(1) Section 33A (consent orders) is amended as follows.

(2) In subsection (2), after 'applies', in the first place, insert '(subject, in the case of the powers of the court under section 31A above, to subsections (6) and (7) of that section)'.

(3) In subsection (3), in the definition of 'order for financial relief', for 'an order under any of sections 23, 24, 24A or 27 above' substitute 'any of the following orders under this Part of this Act, that is to say, any financial provision order, any property adjustment order, any order for the sale of property or any interim order for maintenance'.

20. In section 35 (alteration of maintenance agreements), after subsection (6), insert—

'(7) Subject to subsection (5) above, references in this Act to any such order as is mentioned in section 21 above shall not include references to any order under this section.'

21. In section 37(1) (avoidance of transactions intended to prevent or reduce financial relief), for '22, 23, 24, 27, 31 (except subsection (6))' substitute '22A to 24, 27, 31 (except subsection (6)), 31A'.

22. In section 47(2) (relief in cases of polygamous marriages)—

(a) in paragraph (a), after 'any' insert the words 'divorce order, any separation

order under the 1996 Act or any'; and

(b) in paragraph (d), after 'this Act' insert 'or the 1996 Act' and for 'such decree or order' substitute 'a statement of marital breakdown or any such order or decree'.

23. Omit section 49 (under which a person who is alleged to have committed adultery with a party to a marriage is required to be made a party to certain proceedings).

24.—(1) Section 52(1) (interpretation) is amended as follows.

(2) After 'In this Act', insert—

''the 1996 Act' means the Family Law Act 1996;'.

(3) After the definition of 'maintenance assessment' insert—

''statement of marital breakdown' has the same meaning as in the Family Law Act 1996.'

25. In section 52(2)(a), for 'with section 21 above' substitute '(subject to section 35(7) above) with section 21 above and—

(i) in the case of a financial provision order or periodical payments order, as including (except where the context otherwise requires) references to an interim periodical payments order under section 22A or 23 above; and

(ii) in the case of a financial provision order or order for the payment of a lump sum, as including (except where the context otherwise requires) references to an interim order for the payment of a lump sum under section 22A or 23 above;'.

The Domicile and Matrimonial Proceedings Act 1973 (c. 45)

26. For section 5(5) of the Domicile and Matrimonial Proceedings Act 1973 (jurisdiction in cases of change of domicile or habitual residence) substitute—

'(5) The court shall have jurisdiction to entertain proceedings for nullity of marriage (even though it would not otherwise have jurisdiction) at any time when marital proceedings, as defined by section 20 of the Family Law Act 1996, are pending in relation to the marriage.'

The Inheritance (Provision for Family and Dependants) Act 1975 (c. 63)

27.—(1) The Inheritance (Provision for Family and Dependants) Act 1975 (meaning of reasonable financial provision) is amended as follows.

(2) In section 1(2)(a), for the words from 'the marriage' to 'in force' substitute ', at the date of death, a separation order under the Family Law Act 1996 was in force in relation to the marriage'.

(3) In section 3(2) (matters to which the court is to have regard)—

(a) for 'decree of judicial separation' substitute 'separation order under the Family Law Act 1996'; and

(b) for 'a decree of divorce' substitute 'a divorce order'.

(4) In section 14 (provision where no financial relief was granted on divorce)—

(a) in subsection (1), for the words from 'a decree' to first 'granted' substitute 'a

divorce order or separation order has been made under the Family Law Act 1996 in relation to a marriage or a decree of nullity of marriage has been made absolute';

(b) in subsection (1)(a), for 'section 23' and 'section 24' substitute, respectively, 'section 22A or 23' and 'section 23A or 24';

(c) after paragraph (b), for the words from 'the decree of divorce' to the end substitute ', as the case may be, the divorce order or separation order had not been made or the decree of nullity had not been made absolute'; and

(d) in subsection (2), for 'decree of judicial separation' and 'the decree' substitute, respectively, 'separation order' and ' the order'.

(5) In section 15(1) (restriction imposed in divorce proceedings on applications under that Act), for the words from the beginning to 'thereafter' substitute—

'At any time when the court—

(a) has jurisdiction under section 23A or 24 of the Matrimonial Causes Act 1973 to make a property adjustment order in relation to a marriage; or

(b) would have such jurisdiction if either the jurisdiction had not already been exercised or an application for such an order were made with the leave of the court,'.

(6) In section 15, for subsections (2) to (4) substitute—

'(2) An order made under subsection (1) above with respect to any party to a marriage has effect in accordance with subsection (3) below at any time—

(a) after the marriage has been dissolved;

(b) after a decree of nullity has been made absolute in relation to the marriage; and

(c) while a separation order under the Family Law Act 1996 is in force in relation to the marriage and the separation is continuing.

(3) If at any time when an order made under subsection (1) above with respect to any party to a marriage has effect the other party to the marriage dies, the court shall not entertain any application made by the surviving party to the marriage for an order under section 2 of this Act.'

(7) In section 19(2)(b) (effect and duration of certain orders), for the words from 'the marriage' to 'in force' substitute ', at the date of death, a separation order under the Family Law Act 1996 was in force in relation to the marriage with the deceased'.

(8) In section 25 (interpretation), in the definition of 'former wife' and 'former husband', for 'a decree', in the first place, substitute 'an order or decree'.

The Domestic Proceedings and Magistrates' Courts Act 1978 (c. 22)

28.—(1) Section 28(1) of the Domestic Proceedings and Magistrates' Courts Act 1978 (powers of High Court in respect of orders under Part I) is amended as follows.

(2) After 'this Act' insert—

'(a) a statement of marital breakdown under section 5 of the Family Law Act 1996 with respect to the marriage has been received by the court but no application has been made under that Act by reference to that statement,

or

(3) For the words from 'then' to 'lump sum' substitute 'then, except in the case of an order for the payment of a lump sum. any court to which an application may be made under that Act by reference to that statement or, as the case may be,'.

The Housing Act 1980 (c. 51)

29. In section 54(2) of the Housing Act 1980 (prohibition of assignment of shorthold tenancy under that section) for 'section 24' substitute 'sections 23A or 24'.

The Supreme Court Act 1981 (c. 54)

30. In section 18 of the Supreme Court Act 1981 (restrictions on appeals to Court of Appeal), in paragraph (d) of subsection (I) omit 'divorce or' and after that paragraph insert—

'(dd) from a divorce order;'.

The Civil Jurisdiction and Judgments Act 1982 (c. 27)

31. In section 18(6)(a) of the Civil Jurisdiction and Judgments Act 1982 (decrees of judicial separation), for 'a decree' substitute 'an order or decree'.

The Matrimonial and Family Proceedings Act 1984 (c. 42)

32.—(1) The Matrimonial and Family Proceedings Act 1984 is amended as follows.

(2) In section 17(1) (financial relief in the case of overseas divorces etc), for the words from 'any' where it first occurs to the end substitute 'one or more orders each of which would, within the meaning of Part II of the 1973 Act, be a financial provision order in favour of a party to the marriage or child of the family or a property adjustment order in relation to the marriage.'

(3) For section 21(a) (provisions of the 1973 Act applied for the purposes of the powers to give relief in the case of overseas divorces etc) substitute—

'(a) section 22A(5) (provisions about lump sums in relation to divorce or separation);

(aa) section 23(4), (5) and (6) (provisions about lump sums in relation to annulment);'.

(4) In section 27 (interpretation), for the definition of 'property adjustment order', substitute—

''property adjustment order' and 'secured periodical payments order' mean any order which would be a property adjustment order or, as the case may be, secured periodical payments order within the meaning of Part II of the 1973 Act;'

(5) In section 32 (meaning of 'family business'), for the definition of 'matrimonial cause' substitute—

''matrimonial cause' means an action for nullity of marriage or any marital proceedings under the Family Law Act 1996;'.

The Finance Act 1985 (c. 54)

33. In section 83(1) of the Finance Act 1985 (stamp duty for transfers of property in connection with divorce etc)—

(a) after paragraph (b), insert—

'(bb) is executed in pursuance of an order of a court which is made at any time under section 22A, 23A or 24A of the Matrimonial Causes Act 1973, or'; and

(b) in paragraph (c), for 'or their judicial separation' substitute ', their judicial separation or the making of a separation order in respect of them'.

The Housing Act 1985 (c. 68)

34. In each of sections 39(1)(c), 88(2), 89(3), 90(3)(a), 91(3)(b), 99B(2)(e), 101(3)(c), 160(1)(c), 171B(4)(b)(i) of, and paragraph 1(2)(c) to, Schedule 6A of the Housing Act 198S (which refers to the 1973 Act), for 'section 24' substitute 'section 23A or 24'.

The Housing Associations Act 1985 (c. 69)

35. In paragraph 5(1)(c) of Schedule 2 to the Housing Associations Act 1985 (which refers to the 1973 Act), for 'section 24' substitute 'section 23A or 24'.

The Agricultural Holdings Act 1986 (c. 5)

36. In paragraph 1(3) of Schedule 6 to the Agricultural Holdings Act 1986 (spouse of close relative not to be treated as such when marriage subject to decree nisi etc), for the words from 'when' to the end substitute 'when a separation order or a divorce order under the Family Law Act 1996 is in force in relation to the relative's marriage or that marriage is the subject of a decree nisi of nullity.'

The Family Law Act 1986 (c. 55)

37.—(1) The Family Law Act 1986 is amended as follows.

(2) For section 2(1) and (2) (jurisdiction to make orders under section 1) substitute—

'(1) A court in England and Wales shall not have jurisdiction to make a section l(l)(a) order with respect to a child unless—

(a) the case falls within section 2A below; or

(b) in any other case, the condition in section 3 below is satisfied.'

(3) For section 2A(1) (jurisdiction in or in connection with matrimonial proceedings), substitute—

'(1) Subject to subsections (2) to (4) below, a case falls within this section for the purposes of the making of a section l(l)(a) order if that order is made—

(a) at a time when—

(i) a statement of marital breakdown under section 5 of the Family Law Act 1996 with respect to the marriage of the parents of the child concerned has been received by the court; and

(ii) it is or may become possible for an application for a divorce order or for a separation order to be made by reference to that statement; or

(b) at a time when an application in relation to that marriage for a divorce order, or for a separation order under the Act of 1996, has been made and not withdrawn.

(1A) A case also falls within this section for the purposes of the making of a

section 1 (1)(a) order if that order is made in or in connection with any proceedings for the nullity of the marriage of the parents of the child concerned and—

(a) those proceedings are continuing; or

(b) the order is made—

(i) immediately on the dismissal, after the beginning of the trial, of the proceedings; and

(ii) on an application made before the dismissal.'

(4) In section 2A(2), for the words from the beginning to 'judicial separation' substitute 'A case does not fall within this section if a separation order under the Family Law Act 1996 is in force in relation to the marriage of the parents of the child concerned if,'.

(5) In section 2A(3), for 'in which the other proceedings there referred to' substitute 'in Scotland, Northern Ireland or a specified dependent territory in which the proceedings for divorce or nullity'.

(6) In section 2A(4)—

(a) for 'in or in connection with matrimonial proceedings' substitute 'by virtue of the case falling within this section'; and

(b) for 'in or in connection with those proceedings' substitute 'by virtue of section 2(1)(a) of this Act'.

(7) In section 3 (child habitually resident or present in England and Wales), for 'section 2(2)' substitute 'section 2(1)(b)'.

(8) In section 6 (duration and variation of Part I orders), for subsections (3A) and (3B) substitute—

'(3A) Subsection (3) above does not apply if the Part I order was made in a case falling within section 2A of this Act.'

(9) In section 38 (restriction on removal of wards of court from the jurisdiction), insert after subsection (3)—

'(4) The reference in subsection (2) above to a time when proceedings for divorce or judicial separation are continuing in respect of a marriage in another part of the United Kingdom includes, in relation to any case in which England and Wales would be another part of the United Kingdom, any time when—

(a) a statement of marital breakdown under section 5 of the Family Law Act 1996 with respect to that marriage has been received by the court and it is or may become possible for an application for a divorce order or for a separation order to be made by reference to that statement; or

(b) an application in relation to that marriage for a divorce order, or for a separation order under the Act of 1996, has been made and not withdrawn.'

(10) In section 42(2) (times when divorce etc proceedings are to be treated as continuing for the purposes of certain restrictions on the removal of children from the jurisdiction), for the words from 'unless' to the end substitute 'be treated as continuing (irrespective of whether a divorce order, separation order or decree of nullity has been made—

(a) from the time when a statement of marital breakdown under section 5 of the Family Law Act 1996 with respect to the marriage is received by the court in England and Wales until such time as the court may designate or, if earlier, until the time when—

(i) the child concerned attains the age of eighteen; or

(ii) it ceases, by virtue of section 5(3) or 7(9) of that Act (lapse of divorce or separation process) to be possible for an application for a divorce order, or for a separation order, to be made by reference to that statement; and

(b) from the time when a petition for nullity is presented in relation to the marriage in England and Wales or a petition for divorce, judicial separation or nullity is presented in relation to the marriage in Northern Ireland or a specified dependent territory, until the time when—

(i) the child concerned attains the age of eighteen; or

(ii) if earlier, proceedings on the petition are dismissed.'

(11) In section 51(4) (definitions), after the definition of 'the relevant date' insert—

''judicial separation' includes a separation order under the Family Law Act 1996;'.

The Landlord and Tenant Act 1987 (c. 31)

38. In section 4(2)(c) of the Landlord and Tenant Act 1987 (which refers to the 1973 Act), for 'section 24' substitute 'section 23A, 24'.

The Legal Aid Act 1988 (c. 34)

39. In paragraph 5A of Part II of Schedule 2 to the Legal Aid Act 1988 (excepted proceedings)—

(a) for 'decree of divorce or judicial separation' substitute 'a divorce order or a separation order'; and

(b) in sub-paragraph (b) of that paragraph, for 'petition' substitute 'application'.

The Housing Act 1988 (c. S0)

40. In paragraph 4(1)(c) of Schedule 11 (which refers to the 1973 Act), for 'section 24' substitute 'section 23A or 24'.

The Children Act 1989 (c. 41)

41.—(1) The Children Act 1989 is amended as follows.

(2) In section 6(3A) (revocation or appointment of guardian) for paragraph (a) substitute—

'(a) a court of civil jurisdiction in England and Wales by order dissolves, or by decree annuls, a marriage, or'.

(3) In section 8(3) after 'means' insert '(subject to subsection (5))'.

(4) In section 8, insert after subsection (4)—

'(5) For the purposes of any reference in this Act to family proceedings, powers which under this Act are exercisable in family proceedings shall also be exercisable in relation to a child, without any such proceedings having been commenced or any application having been made to the court under this Act, if—

(a) a statement of marital breakdown under section 5 of the Family Law Act 1996 with respect to the marriage in relation to which that child is a child of the family has been received by the court; and

(b) it may, in due course, become possible for an application for a divorce

order or for a separation order to be made by reference to that statement.'

The Local Government and Housing Act 1989 (c. 42)

42. In section 124(3)(c) of the Local Government and Housing Act 1989 (which refers to the 1973 Act), for 'section 24' substitute 'section 23A or 24'.

Pensions Act 1995 (c. 26)

43. In section 166(4) of the Pensions Act 1995 (jurisdiction of the court under the Matrimonial Causes Act 1973 in respect of pensions to which that section applies) for 'section 23' substitute 'section 22A or 23'.

PART II

AMENDMENTS CONNECTED WITH PART III

The Legal Aid Act 1988 (c. 34)

44.—(1) The 1988 Act is amended as follows.

(2) In section 1, after 'III' insert 'IIIA'.

(3) In sections 1, 2(11), 3(2), 4(1), (2) and (4), 5(1) and (6), 6(2)(a) and (3)(a), 34(2)(c) and (d) and (11), 38(1) and (6) and 39(1) and (4)(a), after 'assistance', in each place, insert ', mediation'.

(4) In section 3(9), after paragraph (a) insert—

'(aa) the provision of mediation;'.

(5) In section 6, after subsection (3)(c) insert—

'(ca) any sum which is to be paid out of property on which it is charged under regulations under section 13C(5) below'.

(6) In section 15—

(a) in subsection (1), after '(3D)' insert 'and (3F)'; and

(b) in subsection (3D), after '(3)' insert 'and (3F)'.

(7) In section 16(9), leave out 'and' at the end of paragraph (a).

(8) In section 38—

(a) in subsection (I)(f), after 'legal representatives' insert 'or mediators'; and

(b) in subsection (6), after 'legal representative' insert 'or mediator'.

(9) In section 43—

(a) after ''assistance'' insert ', 'mediation'';

(b) after '(3)' insert ', (3A)'; and

(c) after the definition of 'financial resources' insert—

''family matters' has the meaning assigned by section 13A(2);'.

PART III

AMENDMENTS CONNECTED WITH PART IV

The Land Registration Act 1925 (c. 21)

45. In section 64 of the Land Registration Act 1925 (certificates to be produced and

noted on dealings) in subsection (5) for 'section 2(8) of the Matrimonial Homes Act 1983' substitute 'section 31 (10) of the Family Law Act 1996 and for 'rights of occupation' substitute 'matrimonial home rights''.

The Land Charges Act 1972 (c. 61)

46. In section 1(6A) of the Land Charges Act 1972 (cases where county court has jurisdiction to vacate registration) in paragraph (d)—

(a) after 'section 1 of the Matrimonial Homes Act 1983' insert 'or section 33 of the Family Law Act 1996'; and

(b) for 'that section' substitute 'either of those sections'.

47. In section 2(7) of that Act (Class F land charge) for 'Matrimonial Homes Act 1983' substitute 'Part IV of the Family Law Act 1996'.

The Land Compensation Act 1973 (c. 26)

48.—(1) Section 29A of the Land Compensation Act 1973 (spouses having statutory rights of occupation) is amended as follows.

(2) In subsection (1), for 'rights of occupation (within the meaning of the Matrimonial Homes Act 1983)' substitute 'matrimonial home rights (within the meaning of Part IV of the Family Law Act 1996)'.

(3) In subsection (2)(a), for 'rights of occupation' substitute 'matrimonial home rights'.

The Magistrates' Courts Act 1980 (c. 43)

49. In section 65(1) of the Magistrates' Courts Act 1980 (meaning of family proceedings) after paragraph (o) insert—

'(p) Part IV of the Family Law Act 1996;'.

The Contempt of Court Act 1981 (c. 49)

50. In Schedule 3 to the Contempt of Court Act 1981 (application of Magistrates' Courts Act 1980 to civil contempt proceedings), in paragraph 3 for the words from ''or, having been arrested' onwards substitute—

''or, having been arrested under section 47 of the Family Law Act 1996 in connection with the matter of the complaint, is at large after being remanded under subsection (7)(b) or (10) of that section.'

The Supreme Court Act 1981 (c. 54)

51. In Schedule I to the Supreme Court Act 1981 (distribution of business in High Court), in paragraph 3 (Family Division)—

(a) in paragraph (d), after 'matrimonial proceedings' insert 'or proceedings under Part IV of the Family Law Act 1996'; and

(b) in paragraph (f)(i), for 'Domestic Violence and Matrimonial Proceedings Act 1976' substitute 'Part IV of the Family Law Act 1996'.

The Matrimonial and Family Proceedings Act 1984 (c. 42)

52. For section 22 of the Matrimonial and Family Proceedings Act 1984 substitute—

'Powers of court in relation to certain tenancies of dwelling-houses.

22.—(1) This section applies if—

(a) an application is made by a party to a marriage for an order for financial relief; and

(b) one of the parties is entitled, either in his own right or jointly with the other party, to occupy a dwelling-house situated in England or Wales by virtue of a tenancy which is a relevant tenancy within the meaning of Schedule 7 to the Family Law Act 1996 (certain statutory tenancies).

(2) The court may make in relation to that dwelling-house any order which it could make under Part II of that Schedule if—

(a) a divorce order;

(b) a separation order; or

(c) a decree of nullity of marriage,

had been made or granted in England and Wales in respect of the marriage.

(3) The provisions of paragraphs 10, 11 and 14(1) in Part III of that Schedule apply in relation to any order under this section as they apply to any order under Part II of that Schedule.'

The Housing Act 1985 (c. 68)

53.—(1) Section 85 of the Housing Act 1985 (extended discretion of court in certain proceedings for possession) is amended as follows.

(2) In subsection (5)—

(a) in paragraph (a), for 'rights of occupation under the Matrimonial Homes Act 1983' substitute 'matrimonial home rights under Part IV of the Family Law Act 1996'; and

(b) for 'those rights of occupation' substitute 'those matrimonial home rights'.

(3) After subsection (5) insert—

'(5A) If proceedings are brought for possession of a dwelling-house which is let under a secure tenancy and—

(a) an order is in force under section 35 of the Family Law Act 1996 conferring rights on the former spouse of the tenant or an order is in force under section 36 of that Act conferring rights on a cohabitant or former cohabitant (within the meaning of that Act) of the tenant;

(b) the former spouse, cohabitant or former cohabitant is then in occupation of the dwelling-house; and

(c) the tenancy is terminated as a result of those proceedings,

the former spouse, cohabitant or former cohabitant shall, so long as he or she remains in occupation, have the same rights in relation to, or in connection with, any adjournment, stay, suspension or postponement in pursuance of this section as he or she would have if the rights conferred by the order referred to in paragraph (a) were not affected by the termination of the tenancy.'

54. In section 99B of that Act (persons qualifying for compensation for improvements) in subsection (2) for paragraph (f) substitute—

'(f) a spouse, former spouse, cohabitant or former cohabitant of the improving tenant to whom the tenancy has been transferred by an order made under Schedule I to the Matrimonial Homes Act 1983 or Schedule 7 to the Family Law Act 1996.'

55. In section 101 of that Act (rent not to be increased on account of tenant's improvements) in subsection (3) for paragraph (d) substitute—

'(d) a spouse, former spouse, cohabitant or former cohabitant of the tenant to whom the tenancy has been transferred by an order made under Schedule I to the Matrimonial Homes Act 1983 or Schedule 7 to the Family Law Act 1996.'

56. In section 171B of that Act (extent of preserved right to buy: qualifying persons and dwelling-houses) in subsection (4)(b)(ii) after 'Schedule 1 to the Matrimonial Homes Act 1983' insert 'or Schedule 7 to the Family Law Act 1996'.

The Insolvency Act 1986 (c. 45)

57.—(1) Section 336 of the Insolvency Act 1986 (rights of occupation etc of bankrupt's spouse) is amended as follows.

(2) In subsection (1), for 'rights of occupation under the Matrimonial Homes Act 1983' substitute 'matrimonial home rights under Part IV of the Family Law Act 1996'.

(3) In subsection (2)—

(a) for 'rights of occupation under the Act of 1983' substitute 'matrimonial home rights under the Act of 1996', and

(b) in paragraph (b), for 'under section I of that Act' substitute 'under section 33 of that Act'.

(4) In subsection (4), for 'section I of the Act of 1983' substitute 'section 33 of the Act of 1996' .

58.—(1) Section 337 of that Act is amended as follows.

(2) In subsection (2), for 'rights of occupation under the Matrimonial Homes Act 1983' substitute 'matrimonial home rights under Part IV of the Family Law Act 1996'.

(3) For subsection (3) substitute—

'(3) The Act of 1996 has effect, with the necessary modifications, as if—

(a) the rights conferred by paragraph (a) of subsection (2) were matrimonial home rights under that Act;

(b) any application for such leave as is mentioned in that paragraph were an application for an order under section 33 of that Act; and

(c) any charge under paragraph (b) of that subsection on the estate or interest of the trustee were a charge under that Act on the estate or interest of a spouse.'

(4) In subsections (4) and (5) for 'section 1 of the Act of 1983' substitute 'section 33 of the Act of 1996'.

The Housing Act 1988 (c. 50)

59.—(1) Section 9 of the Housing Act 1988 (extended discretion of court in possession claims) is amended as follows.

(2) In subsection (5)—-

(a) in paragraph (a), for 'rights of occupation under the Matrimonial Homes Act 1983' substitute 'matrimonial home rights under Part IV of the Family Law Act 1996', and

(b) for 'those rights of occupation' substitute 'those matrimonial home rights'.

(3) After subsection (5) insert—

'(5A) In any case where—

(a) at a time when proceedings are brought for possession of a dwelling-house let on an assured tenancy—

(i) an order is in force under section 35 of the Family Law Act 1996 conferring rights on the former spouse of the tenant, or

(ii) an order is in force under section 36 of that Act conferring rights on a cohabitant or former cohabitant (within the meaning of that Act) of the tenant,

(b) that cohabitant, former cohabitant or former spouse is then in occupation of the dwelling-house, and

(c) the assured tenancy is terminated as a result of those proceedings,

the cohabitant, former cohabitant or former spouse shall have the same rights in relation to, or in connection with, any such adjournment as is referred to in subsection (I) above or any such stay, suspension or postponement as is referred to in subsection (2) above as he or she would have if the rights conferred by the order referred to in paragraph (a) above were not affected by the termination of the tenancy.'

The Children Act 1989 (c. 41)

60.—(1) In section 8(4) of the Children Act 1989 (meaning of 'family proceedings' for purposes of that Act), omit paragraphs (c) and (f) and after paragraph (g) insert—

'(h) the Family Law Act 1996.'

(2) In Schedule 11 to that Act, in paragraph 6(a) (amendment of the Domestic Proceedings and Magistrates' Courts Act 1978), for 'sections 16(5)(c) and' substitute 'section'.

The Courts and Legal Services Act 1990 (c. 41)

61. In section 58 of the Courts and Legal Services Act 1990 (conditional fee agreements) in subsection (10), omit paragraphs (b) and (e) and immediately before the 'or' following paragraph (g) insert—

'(gg) Part IV of the Family Law Act 1996'.

This Schedule deals with minor and consequential amendments which are necessary as a result of the passage of the Act. For the most part these are self explanatory but it is worth noting the change made to s 25(2)(g) of the Matrimonial Causes Act 1973 in relation to conduct which the court is to take into account, along with the other s 25 considerations, when making ancillary relief orders. The amendment precedes the well known final words of the subsection 'if that conduct is such that it would in the opinion of the court be inequitable to disregard it' and s 25(2)(g) now reads 'the conduct of each of the parties, whatever the nature of the conduct and whether it occurred during the marriage or after the separation of the parties or (as the case may be) dissolution or annulment of the marriage if that conduct is such that it would be inequitable

to disregard it'. This will obviously permit much bad conduct around the time that the marriage is disintegrating to be brought up in, for example, acrimonious ancillary relief proceedings, and appears to turn back the clock dramatically, although the Lord Chancellor's Department apparently considers the amendment likely to be 'neutral'! Even if that ultimately proves to be the case, the resultant litigation should take a few more redundant lawyers off the parish since such matters have a nuisance value, not least in costs!

SCHEDULE 9

MODIFICATIONS, SAVING AND TRANSITIONAL

Transitional arrangements for those who have been living apart

1 .—(1) The Lord Chancellor may by order provide for the application of Part II to marital proceedings which—

(a) are begun during the transitional period, and

(b) relate to parties to a marriage who immediately before the beginning of that period were living apart,

subject to such modifications (which may include omissions) as may be prescribed.

(2) An order made under this paragraph may, in particular, make provision as to the evidence which a party who claims to have been living apart from the other party immediately before the beginning of the transitional period must produce to the court.

(3) In this paragraph—

'marital proceedings' has the same meaning as in section 24;

'prescribed' means prescribed by the order; and

'transitional period' means the period of two years beginning with the day on which section 3 is brought into force.'

Modifications of enactments etc

2.—(1) The Lord Chancellor may by order make such consequential modifications of any enactment or subordinate legislation as appear to him necessary or expedient in consequence of Part Il in respect of any reference (in whatever terms) to—

(a) a petition;

(b) the presentation of a petition;

(c) the petitioner or respondent in proceedings on a petition;

(d) proceedings on a petition;

(e) proceedings in connection with any proceedings on a petition;

(f) any other matrimonial proceedings;

(g) a decree; or

(h) findings of adultery in any proceedings.

(2) An order under sub-paragraph (1) may, in particular—

(a) make provision applying generally in relation to enactments and subordinate legislation of a description specified in the order;

(b) modify the effect of sub-paragraph (3) in relation to documents and agreements

of a description so specified.

(3) Otherwise a reference (in whatever terms) in any instrument or agreement to the presentation of a petition or to a decree has effect, in relation to any time after the coming into force of this paragraph—

(a) in the case of a reference to the presentation of a petition, as if it included a reference to the making of a statement; and

(b) in the case of a reference to a decree, as if it included a reference to a divorce order or (as the case may be) a separation order.

3. If an Act or subordinate legislation—

(a) refers to an enactment repealed or amended by or under this Act; and

(b) was passed or made before the repeal or amendment came into force, the Lord Chancellor may by order make such consequential modifications of any provision contained in the Act or subordinate legislation as appears to him necessary or expedient in respect of the reference.

Expressions used in paragraphs 2 and 3

4. In paragraphs 2 and 3—

'decree' means a decree of divorce (whether a decree nisi or a decree which has been made absolute) or a decree of judicial separation;

'instrument' includes any deed, will or other instrument or document;

'petition' means a petition for a decree of divorce or a petition for a decree of judicial separation; and

'subordinate legislation' has the same meaning as in the Interpretation Act 1978.

Proceedings under way

5.—(1) Except for paragraph 6 of this Schedule, nothing in any provision of Part II, Part I of Schedule 8 or Schedule 10—

(a) applies to, or affects—

(i) any decree granted before the coming into force of the provision;

(ii) any proceedings begun, by petition or otherwise, before that time; or

(iii) any decree granted in any such proceedings;

(b) affects the operation of—

(i) the 1973 Act,

(ii) any other enactment, or

(iii) any subordinate legislation,

in relation to any such proceedings or decree or to any proceedings in connection with any such proceedings or decree; or

(c) without prejudice to paragraph (b), affects any transitional provision having effect under Schedule I to the 1973 Act.

(2) In this paragraph, 'subordinate legislation' has the same meaning as in the Interpretation Act 1978.

6.—(1) Section 31 of the 1973 Act has effect as amended by this Act in relation to any order under Part Il of the 1973 Act made after the coming into force of the amendments.

(2) Subsections (7) to (7F) of that section also have effect as amended by this Act in relation to any order made before the coming into force of the amendments.

Interpretation

7. In paragraphs 8 to 15 'the 1983 Act' means the Matrimonial Homes Act 1983.

Pending applications for orders relating to occupation and molestation

8.—(1) In this paragraph and paragraph 10 'the existing enactments'

(a) the Domestic Violence and Matrimonial Proceedings Act 1976;

(b) sections 16 to 18 of the Domestic Proceedings and Magistrates' Courts Act 1978; and

(c) sections I and 9 of the 1983 Act.

(2) Nothing in Part IV, Part III of Schedule 8 or Schedule 10 affects any application for an order or injunction under any of the existing enactments which is pending immediately before the commencement of the repeal of that enactment.

Pending applications under Schedule I to the Matrimonial Homes Act 1983

9. Nothing in Part IV, Part III of Schedule 8 or Schedule 10 affects any application for an order under Schedule I to the 1983 Act which is pending immediately before the commencement of the repeal of that Schedule.

Existing orders relating to occupation and molestation

10.—(1) In this paragraph 'an existing order' means any order or injunction under any of the existing enactments which—

(a) is in force immediately before the commencement of the repeal of that enactment; or

(b) was made or granted after that commencement in proceedings brought before that commencement.

(2) Subject to sub-paragraphs (3) and (4), nothing in Part IV, Part III of Schedule 8 or Schedule 10—

(a) prevents an existing order from remaining in force; or

(b) affects the enforcement of an existing order.

(3) Nothing in Part IV, Part III of Schedule 8 or Schedule 10 affects any application to extend, vary or discharge an existing order, but the court may, if it thinks it just and reasonable to do so, treat the application as an application for an order under Part IV.

(4) The making of an order under Part IV between parties with respect to whom an existing order is in force discharges the existing order.

Matrimonial home rights

11.—(1) Any reference (however expressed) in any enactment, instrument or document (whether passed or made before or after the passing of this Act) to rights of occupation under, or within the meaning of, the 1983 Act shall be construed, so far as is required for continuing the effect of the instrument or document, as being or as the case requires including a reference to matrimonial home rights under, or within the meaning of, Part IV.

(2) Any reference (however expressed) in this Act or in any other enactment, instrument or document (including any enactment amended by Schedule 8) to matrimonial home rights under, or within the meaning of, Part IV shall be construed as including, in relation to times, circumstances and purposes before the commencement of sections 30 to 32, a reference to rights of occupation under, or within the meaning of, the 1983 Act.

12.—(1) Any reference (however expressed) in any enactment, instrument or document (whether passed or made before or after the passing of this Act) to registration under section 2(8) of the 1983 Act shall, in relation to any time after the commencement of sections 30 to 32, be construed as being or as the case requires including a reference to registration under section 31(10).

(2) Any reference (however expressed) in this Act or in any other enactment instrument or document (including any enactment amended by Schedule 8) to registration under section 31(10) shall be construed as including a reference to

(a) registration under section 2(7) of the Matrimonial Homes Act 1967 or section 2(8) of the 1983 Act, and

(b) registration by caution duly lodged under section 2(7) of the Matrimonial Homes Act 1967 before 14th February 1983 (the date of the commencement of section 4(2) of the Matrimonial Homes and Property Act 1981).

13. In sections 30 and 31 and Schedule 4—

(a) any reference to an order made under section 33 shall be construed as including a reference to an order made under section I of the 1983 Act, and

(b) any reference to an order made under section 33(5) shall be construed as including a reference to an order made under section I of the 1983 Act by virtue of section 2(4) of that Act.

14. Neither section 31(11) nor the repeal by the Matrimonial Homes and Property Act 1981 of the words 'or caution' in section 2(7) of the Matrimonial Homes Act 1967, affects any caution duly lodged as respects any estate or interest before 14th February 1983.

15. Nothing in this Schedule is to be taken to prejudice the operation of sections 16 and 17 of the Interpretation Act 1978 (which relate to the effect of repeals).

This Schedule provides transitional arrangements for those who have been living apart. By paragraph 1(1) the Lord Chancellor may by order provide for the Act to apply to proceedings which are begun during the transitional period or which relate to parties to a marriage who were living apart immediately before the transitional period. Paragraph 1(2) enables an order to be made specifying what evidence will be required of such a situation. The transitional period is defined by paragraph 1(3) as the two years beginning with the date on which s 3 is brought into force, and this is expected to be mid-1999.

However by paragraph 5 nothing is to affect any proceedings begun by petition or otherwise at any earlier date, nor any decree granted in such proceedings, nor the operation of the 1973 Act nor any subordinate or other legislation.

SCHEDULE 10

REPEALS

Chapter	Short title	Extent of repeal
1968 c. 63.	The Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968.	Section 2(1)(b).
1973 c. 18.	The Matrimonial Causes Act 1973.	Sections 1 to 7. In section 8(1)(b), the words 'or before the decree nisi is made absolute'. Sections 9 and 10. Sections 17 and 18. Section 20. Section 22. In section 24A(3), the words 'divorce or'. In section 25(2)(h), the words 'in the case of proceedings for divorce or nullity of marriage.' In section 28(1), the words from 'in', in the first place where it occurs, to 'nullity of marriage' in the first place where those words occur. In section 29(2), the words from 'may begin' to 'but' In section 30, the words 'divorce' and 'or judicial separation' In section 31, in subsection (2)(a), the words 'order for maintenance pending suit and any' In section 41, in subsection (1) the words 'divorce or' and 'or a decree of judicial separation' and in subsection (2) the words 'divorce or' and 'or that the decree of judicial separation is not to be granted.' Section 49. In section 52(2)(b), the words 'to orders for maintenance pending suit and', 'respectively' and 'section 22 and'. In Schedule 1, paragraph 8.

Chapter	Short title	Extent of repeal
1973 c. 45.	The Domicile and Matrimonial Proceedings Act 1973.	In section 5, in subsection (1), the words 'subject to section 6(3) and (4) of this 'Act' and, in paragraph (a), 'divorce, judicial separation or' and subsection (2). Section 6(3) and (4). In Schedule 1, in paragraph 11, in sub-paragraph (2)(a), in sub-paragraph (2)(c), in the first place where they occur, and in sub-paragraph (3)(b) and (c), the words in connection with the stayed proceedings'.
1976 c. 50.	The Domestic Violence and Matrimonial Proceedings Act 1976.	The whole Act.
1978 c. 22.	The Domestic Proceedings and Magistrates' Courts Act 1978.	In section 1, paragraphs (c) and (d) and the word 'or' preceding paragraph (c). In section 7(1), the words 'neither party having deserted the other'. Sections 16 to 18. Section 28(2). Section 63(3). In Schedule 2, paragraphs 38 and 53.
1980 c. 43.	The Magistrates' Courts Act 1980.	In Schedule 7, paragraph 159.
1981 c. 54.	The Supreme Court Act 1981.	In section 18(1)(d), the words words 'divorce or'.
1982 c. 53.	The Administration of Justice Act 1982.	Section 16.
1983 c. 19.	The Matrimonial Homes Act 1983.	The whole Act.
1984 c. 42.	The Matrimonial and Family Proceedings Act 1984.	Section 1. In section 21(f) the words 'except subsection (2)(e) and subsection (4)'. In section 27, the definition of 'secured periodical payments order'. In Schedule 1, paragraph 10.

Chapter	Short title	Extent of repeal
1985 c. 61.	The Administration of Justice Act 1985.	In section 34(2), paragraph (f) and word 'and' immediately preceding it. In Schedule 2, in paragraph 37, paragraph (e) and the word 'and' immediately preceding it.
1985 c. 71.	The Housing (Consequential Provisions) Act 1985.	In Schedule 2, paragraph 56.
1986 c. 53.	The Building Societies Act 1986.	In Schedule 21, paragraph 9(f)
1986 c. 55.	The Family Law Act 1986.	In Schedule 1, paragraph 27.
1988 c. 34.	The Legal Aid Act 1988.	In section 16(9), the word 'and' at the end of paragraph (a).
1988 c. 50.	The Housing Act 1988.	In Schedule 17, paragraphs 33 and 34.
1989 c. 41.	The Children Act 1989.	Section 8(4)(c) and (f). In Schedule 11, paragraph 6(b) In Schedule 13, paragraphs 33(1) and 65(1).
1990 c. 41.	The Courts and Legal Services Act 1990.	Section 58(10)(b) and (e). In Schedule 18, paragraph 21.
1995 c. 42.	The Private International Law (Miscellaneous Provisions) Act 1995.	In the Schedule, paragraph 3.