

# Privatizing the Family: The Reform of Child Law

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The ideology of domestic privacy was for long dominant in England. In Victorian times the home was seen (in the words of John Ruskin)<sup>1</sup> as “the place of Peace; the shelter, not only from all injury, but from all terror, doubt and division . . . a vestal temple, a temple of the hearth watched over by Household Gods . . .”; and this image was perhaps reinforced by the fact that, within the temple, parents wielded tremendous power. They had inevitably given their children their genetic inheritance – in most cases possibly more important than any other patrimony – and parental power was a real and well recognised legal concept; a parent<sup>2</sup> had virtually complete control over his child’s upbringing and legally enforceable rights to his or her services.

However, the foundation of the National Society for the Prevention of Cruelty to Children in 1889,<sup>3</sup> and the well-publicised activities of Dr Barnado<sup>4</sup>, evidenced the sorry truth that cruelty and deprivation were all too often the reality for the Victorian child; and the twentieth century has seen the enactment of what has been aptly described as a “cascade of legislation”<sup>5</sup> designed to protect children but in reality sometimes proving itself to be no more than a “bureaucrat’s paradise and a citizen’s nightmare”.<sup>6</sup> In December 1988, the House of Lords began consideration of a major Children Bill intended to make the relevant statute law

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1. *Sesame and Lilies* (1865).

2. Usually the father to the exclusion of the mother. For the development of the law in respect of equalising parental rights over the century after the introduction of judicial divorce by the Matrimonial Causes Act 1857, see P. H. Pettit in *A Century of Family Law*, edited by R. H. Graveson and F. R. Crane (1957).

3. The Society was incorporated by Royal Charter in 1895.

4. See, e.g., *Barnado v. Ford* [1892] A.C. 326 (H.L.). For the background, see G. Wagner, *Barnado* (1979), 13. The repeal of the Custody of Children Act 1891 – enacted to prevent unmeritorious *habeas corpus* applications by parents seeking to enforce their legal rights against Barnado – to be effected by the Children Bill in 1989 (see below) has a certain symbolic importance.

5. *Hever v. Bryant* [1970] 1 Q.B. 357, 371

6. *Ibid.*,

simpler, more accessible to those who work with it and more comprehensible.<sup>7</sup> The Lord Chancellor rightly described the Bill as “the most comprehensive and far reaching reform of child law which has come before Parliament in living memory”.<sup>8</sup>

The object of this essay is not to give a detailed commentary on the Bill’s provisions – an undertaking which would be of little value not least because the Government has shown itself commendably ready to listen to reasoned comment on its proposals, so that substantial changes on points of detail may well take place during the parliamentary debates on the Bill – but rather to highlight some broad trends in the development of the law; and to seek to place the most recent changes in context. In particular, it is concerned with the underlying question of public policy: almost everyone would accept that there is a private realm of family life which the state cannot (or at least should not) seek to enter,<sup>9</sup> yet how is the boundary of that realm to be defined? How far is the state to be entitled to impose its own preferred standards and thereby restrict the traditional freedom of parents? And when we talk about the state in this context, through what medium do we envisage that it should act – is Central Government itself to be responsible, or is this another area in which Local Authorities are to be given effective power? In what circumstances do we think that such choices can and should be made – or at least open to review – by the courts?

### Private law and public policy

Lawyers tend to concentrate their attention on legislation which gives rise to litigation, or at least to dispute; and it is therefore not surprising that the indirect effect on legal doctrine of legislation which is primarily concerned to change social institutions is not usually given prominence by legal writers. And yet it is now something of a truism that the statute which has had the most dramatic impact on parental rights was the Education Act 1870. That Act ensured that virtually all children were compulsorily removed from the domestic circle and subjected for a substantial proportion of their waking hours to the powerful influence of their teachers. Classically it had been the family which was responsible for the socialization of children – taming their impulses and instilling values, skills, and desires necessary to run society<sup>10</sup> and this process inevitably conferred on the parents very wide freedom of choice between competing social and moral value systems. But since 1870, the family’s own influence in this respect has inevitably been reduced; and the power of the state and its agents correspondingly increased.

7. Official Report (H.L.) 6 December 1988, vol. 502, col. 488. The Bill (insofar as it is concerned with the private law of child custody) is based on the Law Commission’s Review of Child Law (Law Com. No. 172, 1988), and (in relation to changes in public law) on policy decisions set out in a White Paper (*The Law on Child Care and Family Services* (1987) Cmnd. 62) which were taken in the light of a thorough and extensive *Review of Child Care Law* (1985).

8. *Ibid.*

9. *Prince v. Massachusetts* (1944) 321 US 158, 166.

10. Skolnick, *Family in Transition* (1971).

In 1857 it seemed self evident that schools in New England should seek to inculcate the traditional protestant work ethic: “regularity, punctuality, constancy and industry” by means of a moral and religious instruction daily given.<sup>11</sup> More than a century later, the United Kingdom Parliament enacted legislation requiring head teachers to “determine measures” with a view to promoting (amongst other, no doubt equally laudable, objectives) “self-discipline and proper regard for authority.”<sup>12</sup> The same Act also requires that sex education be given in such a manner as to encourage pupils to have due regard to moral considerations and the value of family life<sup>13</sup> – and one looks in vain for a definition section which will explain what is meant by “family life” for this purpose.

The point is not, of course, whether any particular values espoused in schools are desirable or not. It is simply that the acceptance by the state of responsibility in this field inevitably sharply restricts what was at one time seen as a major role for the family, and as a justification for the concept of parental authority. Nevertheless, it must be accepted that state intervention in education and other matters vitally affecting the young raises questions which at least appear to be of a different order from those with which family lawyers have usually been concerned. Thus the private lawyer has traditionally been concerned with the question: “when can the state intervene in the affairs of a particular family?” rather than with the question “to what extent is the state entitled to insist that all children be subjected to a particular method of upbringing?”

The traditional view – now embodied in the Children and Young Persons Act 1969 – is that the state should only be entitled to intervene in the affairs of a particular family if certain, apparently restrictively defined, conditions – for example, that the child’s health is being avoidably impaired or neglected<sup>14</sup> – are satisfied to the satisfaction of a court of law.<sup>15</sup> Moreover, the court can only deprive the parent of his rights if that court, as a separate matter, is satisfied that the child is in need of care and control which he is unlikely to receive unless the court makes an order<sup>16</sup> and in any event the court – which must have regard to the child’s welfare<sup>17</sup> retains an ultimate discretion not to make any order.<sup>18</sup>

To this general rule, there has been one remarkable exception. It is that the

11. Massachusetts Superintendent of Schools, as quoted in J. M. Pherson, *Battle Cry of Freedom* (1988).

12. Education (No 2) Act 1986, s. 22.

13. Education (No 2) Act 1986, s. 46.

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

15. As the law now stands, a Local Authority may acquire parental rights over a child by the administrative process of passing a parental rights resolution; but the legislation (Child Care Act 1980, re-enacting provisions originating in the Poor Law and put into substantially their present form by the Children Act 1948) now effectively gives a parent a right of appeal: see *per* Lord Scarman, *Lewisham L.B.C. v. Lewisham Juvenile Court Justices* [1980] A.C. 273, 307.

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

17. Children and Young Persons Act 1933, s. 44(1).

18. *Re S (A Minor) (Care Order: Education)* [1978] Q.B. 120.

High Court has a statutory power<sup>19</sup> to commit a child to the care of a local authority if it considers that there are exceptional circumstances making it impracticable or undesirable for him to be or continue to be under the care of either of his parents or of any other individual. Moreover, it has been held<sup>20</sup> that the court has an inherent power to commit a ward of court to the care of the local authority whenever it considers that such a course of action would be in the child's best interests. Thus, the court directed that a 17 year old girl who had stolen jewellery from her mother, had her hair shaved, been tattooed, and had run away from home on a number of occasions "after some of which she returned very much the worse for drink and showing clear signs of having indulged in sexual intercourse" should be committed to care and that if appropriate the court could give directions that she be accommodated in secure accommodation – *i.e.* effectively completely deprived of her liberty.

It may be, however, that there is a second exception to the general principle that direct state intervention into family matters is only to be justified in exceptional circumstances. Divorce is, today, a common event affecting a significant proportion of all families; and yet the fact that divorce is contemplated is, under the law as it now stands, apparently considered of itself to be sufficient to justify state scrutiny of family parenting decisions.

The origin of the relevant legislation is to be found in the Report of the Denning Committee on Procedure in Matrimonial Causes which reported in 1947.<sup>21</sup> The Committee expressed the view that the welfare of children in divorce proceedings was being wrongly subordinated to the interests of divorcing parents; and in 1958<sup>22</sup> legislation was enacted designed to ensure that parents gave full consideration to their children's future welfare, and to make the court's control over the welfare of children more effective. Since the introduction of the so-called special procedure in divorce<sup>23</sup> it has been possible for husband and wife to divorce without even seeing any kind of judicial officer; but if there are children a judge – not a mere Registrar – will look into the proposed arrangements for their upbringing.<sup>24</sup>

The Children's Appointment system constitutes a major exception to the general philosophy underlying the modern law of divorce as clearly articulated by the Booth Committee on Matrimonial Causes Procedure.<sup>25</sup> This is that agreement between the parties as to the manner in which their marriage should be terminated

19. Family Law Reform Act 1969, s. 7. There are similar powers available to the court in divorce and guardianship proceedings, and in matrimonial proceedings in the Domestic Court.

20. *Re SW (A Minor) (Wardship: Jurisdiction)* [1986] 1 F.L.R. 24.

21. Final Report, Cmnd. 7024, para. 31.

22. The Matrimonial Proceedings (Children) Act 1958 gave effect to detailed recommendations of the Royal Commission on Marriage and Divorce, Cmnd. 9678.

23. For an account of the procedure, see S. M. Cretney, *Principles of Family Law* 4th ed. (1984), pp. 183-88, 391-92.

24. Matrimonial Causes Act 1973, s. 41.

25. *Report of the Matrimonial Causes Procedure Committee* (1985), para. 2.3.

and as to all other aspects of their affairs, far from being a bar to the grant of a decree, is now positively encouraged. Yet, the effect of the Children's Appointments system is that – however much the parents may be in accord about the future upbringing of their children – they are not to be allowed to give effect to that agreement unless the arrangements they propose have first been considered by a judge who, in practice, may have no professional or even personal knowledge of the upbringing of children, and who will usually lack any substantial body of factual evidence on the basis of which he might exercise his judgment.

There is thus at best an ambiguity about the judge's role in performing what is basically not an adjudicative function. Moreover, the making of the inquiry can be seen to smack of paternalism<sup>26</sup> and indeed unnecessarily to stigmatise those involved in divorce. The Booth Committee<sup>27</sup> clearly found the Children's Appointments system difficult to reconcile with the emphasis which the Committee placed on the desirability of bringing home to the parties their primary decision-making responsibility in relation to the arrangements which should be made for the children and other consequences of the marital breakdown; but nevertheless concluded that the matter was of such general importance that the relevant statutory provisions should not be repealed. The Committee contented itself with proposals for detailed changes intended to improve the operation of the Children's Appointments system. However, the Children Bill now accepts proposals made by the Law Commission which, in this as in other respects, mark a significant shift towards privatizing the consequences of family breakdown. The same philosophy can be seen in the provisions in the Children Bill relating to the ground for state intervention. Before examining the proposed changes in these two areas it is necessary to consider the question of the agency through which state power is exercised.

### **Child of the state – or of a local authority?**

It is a distinctive and important feature of English law that the primary responsibility for the provision of child care services rests on local authorities rather than on central government<sup>28</sup> and those responsibilities are in practice exercised through the agency of a Social Services Committee.<sup>29</sup> Central government exercises some control (financial and otherwise), and the Department of Health from time to time gives general guidance on the discharge of those responsibilities.

There are, no doubt, important advantages in this division of responsibility; but it has the inevitable consequence that ideology and practice – for example, on such fundamental issues as to the extent to which rehabilitation of the child with his birth parents should be pursued, or on the factors relevant to the selection of

26. *Report of the Matrimonial Causes Procedure Committee* (1985), para 3.2.

27. *Ibid.*, para. 2.24.

28. See S. M. Cretney, *supra* n.23, p. 484 and the sources there cited.

29. Local Authority Social Services Act 1970.

prospective adopters for a non-Caucasian child – may vary quite sharply between different parts of the country.

The effect of a care order under the legislation currently in force is to vest in the Authority the same powers and duties with respect to the child as his parent or guardian would have had.<sup>30</sup> To this general principle, there are certain exceptions: the authority has no power to give parental agreement to adoption (although it may *place* the child for adoption), nor may it change the child's religion. As a result of the decision of the House of Lords in *A. v. Liverpool C. C.*<sup>31</sup> the child's parents or guardians may not invoke the wardship procedure in an attempt to question the exercise of the statutory discretions. In effect, therefore, it will seem to many parents whose children have been taken into care under a care order that they have no effective procedure for questioning decisions – perhaps most clearly to place their child for adoption – which strike at the whole basis of their legal and factual relationship with the child. In contrast, had the child been in care as a result of an order made by the Wardship Court, no important decision relating to the child's future could be made by the authority without a hearing by a judge at which the parent would be entitled to put his or her case.

It is this perception which accounts for litigation such as that which resulted in the decision of the House of Lords in *Re D (A Minor)*.<sup>32</sup> A child had been born suffering from drug withdrawal symptoms resulting from his drug addict mother's deliberate and excessive taking of hard drugs during pregnancy. He needed (and received) intensive hospital care; and from the moment of his birth received the best possible care in hospital and from temporary foster parents. However, both the mother and father remained addicted to hard drugs. Although neither claimed to be at present fit persons to have the care of their child, the question whether the Local Authority had made out the grounds for a care order was fought up to the House of Lords. The parents argued that in fact throughout his life the child had been well treated; and that the legislation did not entitle the court to make an order merely because damage to the child's health or development was apprehended in the future. The House of Lords – not without some evident difficulty – held that the statutory condition was, on the facts, satisfied; whilst still asserting that no order could have been made merely on the basis of apprehension about risk to the child at a future time.

The true issue in this case was not whether the child should be in the care of his birth parents. It was simply whether he should be in the care of the Local Authority as the result of a care order made by magistrates under the Children and Young Persons Act 1969, or as the result of a committal order by the High Court in the exercise of its wardship jurisdiction. This was not a sterile procedural dispute. On the contrary, if the care order were allowed to stand the parents would

30. Child Care Act 1980, s. 10(1).

31. [1982] A.C. 363.

32. [1987] A.C. 317.

have no standing to contest a decision to place their child for adoption; whereas if the child were warded, they would always have the right to put their case to the wardship judge whenever an important decision fell to be made.

It is a major criticism of the present law that it places some parents who see themselves threatened by the exercise of Local Authority powers in such a weak position. It is true that they have the right to apply to a magistrates' court if a Local Authority decides to terminate their right of access to their child; it is true that they have the rights enjoyed by all affected by public law decisions to seek judicial review. But there is all the difference in the world between having to persuade the court that a Local Authority's decision is so unreasonable that no authority properly directing itself could reasonably have taken it – which is broadly speaking the test applied in judicial review – and having the whole issue examined at length from first principles by an experienced Family judge.

In some respects, therefore, the law as it now stands seems to place parents in a position of dependency and weakness: dependency in being required to leave decisions about the upbringing of their children to the discretion of the courts, weakness in questioning decisions taken by an all-powerful Local Authority social workers' bureaucracy. It is therefore appropriate to examine the likely impact in these areas of the Children Bill measures.

The Booth Committee<sup>33</sup> was the first official body to attack the culture of dependency in relation to the private law of parent and child: the primary decision-making responsibility should – in the Committee's view – rest with the spouses themselves<sup>34</sup> and their "continuing joint responsibility" should be emphasised.<sup>35</sup> The Law Commission's Report on Guardianship and Custody<sup>36</sup> is based on similar assumptions; and the substance<sup>37</sup> of the Commission's proposals is to be embodied in the new Children Act.

In passing, it may be noted that the new legislation also follows the Commission's advice that parental status should be defined in terms of "parental responsibility", so that, potentially misleading references to "parental" rights could be avoided.<sup>38</sup> Enthusiasm for this reformulation may be somewhat muted, however, when it is noted that the draftsman has defined this concept<sup>39</sup> as "all the rights . . . powers and authority which by law a parent of a child has in relation to a child and his property" – a definition which seems to mirror the definition of

33. *Report of the Matrimonial Causes Procedure Committee* (1985), para. 3.2.

34. *Ibid.*.

35. *Ibid.*, para. 2.24.

36. *Review of Child Law* (Law Com. No. 172, 1988).

37. There are many fascinating differences of detail between the provisions of the draft clauses annexed to the Law Commission's Report and the clauses of the Children Bill as introduced in the House of Lords: see, e.g., the Law Commission's assertion that the welfare of the child should be the "only" concern of the court, and the comparable provision of the Bill that welfare be the "paramount" consideration (a formulation which the Law Commission had said would do "nothing to resolve the earlier confusion": Law Com. No. 172, para. 3.14). See also the text to note 42., *infra*.

38. See *Review of Child Law* (Law Com. No. 172, 1988), para. 2.4 *et seq.*

39. Clause 3(1).

“parental rights and duties” originally contained in the Children Act 1975<sup>40</sup> and which so nearly led the courts astray in the Gillick case.<sup>41</sup>

### The new philosophy

Possibly the most fundamental manifestation of the substantial change of legislative approach is that the Bill directs the court not to make any order with respect to a child “unless it considers that doing so would be better for the child than making no order at all”<sup>42</sup> – wording which is perhaps not so emphatic as the Law Commission’s directive that no court should make an order unless to do so would be “the most effective way of safeguarding or promoting the child’s welfare”.<sup>43</sup> Possibly Ministers considered that the form of words favoured by the Law Commission made the very assumption – *i.e.* that it was reasonable to suppose that court orders could have such positive effects – which the Commission had been concerned to deny.

Another significant indication of the new philosophy is the compromise adopted in relation to the Children’s Appointments system. The new provisions are tucked away – inappropriately, but possibly wisely from the tactical point of view – amongst the “minor amendments” in Schedule 8 of the Children Bill.<sup>44</sup> Parents are still to be required to give details of the arrangements which are to be made for the children, and the form whereby this is to be done is to be “improved”.<sup>45</sup> The court is then to consider – in the light of the general preference for non-intervention already stated – whether it should exercise its powers to make an order relating to the child; but it is only to be in “exceptional circumstances” that it is to withhold the making absolute of the parents’ divorce.<sup>46</sup> In this as in many other respects, much will depend on the terms of Regulations to be made under enabling powers contained in the primary legislation; but it seems reasonable to suppose that the Children’s Appointments system as we now know it will disappear.

It is also worth noting that the new legislation greatly extends the powers of parents to make private contracts regulating their legal position in relation to

40. S. 85(1); see now Interpretation Act 1978, s. 5 and Sched. 1.

41. *Gillick v. West Norfolk and Wisbech Area Health Authority* [1985] 2 F.L.R. 738 (CA), particularly *per* Parker L.J. at p. 743, *et seq.* It can be argued that the Childrens Bill as drafted fails to give sufficient weight to the significance of the House of Lord’s decision in the *Gillick* case – which can broadly be summarised as establishing the general principle that a child has the right to take his own decisions, to the exclusion of his parents’ involvement, if he has sufficient understanding of the issues involved.

42. Clause 1(4). (This and all other references to the Children Bill are to the text as ordered by the House of Commons on 23 November, 1988 to be printed; and as debated on Second Reading in the House of Lords on 6 December.

43. Clause 1(7) of the Draft Bill in Appendix 1 to the Law Commission’s Review of Child Law (Law Com. No. 172, 1988).

44. Para. 19. It will be interesting to see how much parliamentary attention will be given to this provision: it is sometimes found that Scheduled provisions escape substantial scrutiny and comment in debate.

45. The detailed policy to which this provision gives effect is fully explained in the Law Commission’s *Review of Child Law*, *supra* n. 43, para. 3.10.

46. Matrimonial Causes Act 1973 as it would be amended by Children Act 1989 Sched. 8, para. 19.



children. The most striking example of this trend is in relation to illegitimate children.<sup>47</sup> The father of an illegitimate child has, under the existing law, no parental rights; but (under provisions of the Family Law Reform Act 1987<sup>48</sup> which have not yet been brought into force) the court would have power to confer on him full parental status. Under the new legislation, it will be possible for mother and father to achieve the same result by private (albeit formal) agreement<sup>49</sup> – a significant departure from the view taken by the Law Commission in 1982<sup>50</sup> under the influence of serious concern then felt about the pressures to which possibly vulnerable mothers might be subjected.

The new legislation is however somewhat half-hearted in its commitment to the ideology of private ordering in this sensitive area: it seems that any such agreement will have to be “made in a prescribed form”, and “checked by a county court” in “a simple paper procedure with a small standard fee”.<sup>51</sup> There must be some risk that this formality will become an empty and meaningless ritual; and only time will tell how effective such a check will prove to be in practice.

The Children Bill contains two groups of provisions which undoubtedly shift the balance of power between parent and state, although the extent and even perhaps the precise direction of that shift may seem to some to be a matter of some doubt.

### Care orders

First, the old specific grounds for the making of care orders are replaced by new – and perhaps more open-textured – grounds. It is provided<sup>52</sup> that the court may only make a care order if it is satisfied

- “(a) that the child concerned has suffered significant harm, or is likely to suffer such harm; and
- (b) that the harm, or likelihood of harm, is attributable to –
  - (i) the standard of care given to the child, or likely to be given to the child if the order were not made, being below that which it would be reasonable to expect the parent of a similar child to give to him; or
  - (ii) the child’s being beyond parental control.”

47. It seems clear that, notwithstanding the Law Commission’s expressed wish to avoid attaching labels to children born outside marriage (Second *Report on Illegitimacy*, Law Com. No 157, para. 2.5), the classification of “legitimate” and “illegitimate” is still correct, and its continued use inevitable. Thus, the terms “legitimate” and “illegitimate” are used no less than thirteen times in the short explanatory note annexed to the first commencement order made under the Family Reform Act 1987: see S.I. 425/1988. The writer sees no reason to conceal his view that it would have been less unsatisfactory had the Law Commission adhered to the proposal made in its First *Report on Illegitimacy* (Law Com. No 118, 1982, para 4.51), whereby the terms “marital” and “non-marital” would have been embodied in the statute book in order to avoid any need to continue to use the expression “illegitimate” with its connotations of unlawfulness and illegality.

48. S. 4.

49. Clause 4.

50. Law Com. No. 118, 1982, para. 4.39.

51. Law Com. No. 172, 1988, para. 2.19.

52. Clause 26 (2).

It is clear that the new provisions will enable the court to make an order on the basis of (well-founded) apprehension of harm to the child. There should be no repetition of *Re D (A Minor)*.<sup>53</sup> There should be less need for Local Authorities to wish to invoke wardship (and in fact, as we shall see, their ability to do so will under the proposed legislation be severely restricted). But the new provisions will inevitably spawn much litigation. The question of whether the evidence is such as to justify a finding of “likely harm” may cause difficulties, and – perhaps more important – cases are likely to be more protracted in order to permit examination and cross-examination of witnesses. Moreover, it does not require much imagination to envisage strenuous legal argument about the interpretation to be given to such expressions as a “similar” child, or indeed as to the aspects of parenting and personality which are properly to be taken into account in deciding on the reasonableness or otherwise of the expectation of standards of care.

For these and other reasons, the fact that it will be possible to bring proceedings in the County Court and High Court as well as before Magistrates is much to be welcomed – although once again much is to be left to Rules yet to be made (and, in practice, unlikely to receive much effective Parliamentary scrutiny). These rules may stipulate that (for example) specified classes of proceedings may be initiated only in county courts or magistrates’ courts; and the Lord Chancellor has indicated that care proceedings will normally have to be initiated in magistrates’ courts, but that there is to be a power to transfer cases to higher courts if appropriate.<sup>54</sup> At the time of writing, however, no indication has been given of the procedure for deciding on the appropriateness of a transfer; and the level at which such a decision is to be taken is obviously crucially important.

The second major change made by the legislation in this context is severely to restrict the availability of the wardship jurisdiction to Local Authorities. In the first place, Local Authorities are debarred from invoking the wardship jurisdiction without leave of the court, which may only be given in narrowly defined circumstances.<sup>55</sup> Secondly, care orders are only to be made if the statutory condition set out above is made out: it will no longer be sufficient for the court in divorce or other proceedings to be satisfied that there are “exceptional circumstances”.<sup>56</sup>

53. [1987] A.C. 317.

54. See Official Report (H.L.) Vol. 502, col. 494 (*per* the Lord Chancellor). The relevant powers are contained in Clause 69(2) of the Bill, notwithstanding the somewhat delphic remarks of the Lord Chancellor on the subject (contrast Official Report (H.L.) Vol. 502, col. 495 with Official Report (H.L.) Vol. 502, col. 537-38). Prospects for a truly unified Family Court in the sense in which that term has been used by many advocates for the concept seem to have receded almost to vanishing point. If anything, the Bill seems greatly to enhance the involvement of the magistrates in children cases – a result which would not have been consistent with the views expressed in what is still the most powerfully argued case for a unified Family Court – the *Report of the (Finer) Committee on One-Parent Families*, Cmnd. 5629, 1974.

55. Clause 8(2).

56. *Supra*.

These provisions are controversial; and it may be that they will not survive in their pristine form. In particular, the provisions as drafted seem likely to increase the proportion of cases in which children are effectively subject to the very wide discretions of Local Authorities rather than to discretion of the wardship court, exercised after a full and careful hearing. Moreover, there is a danger that insofar as such decisions can be questioned in judicial proceedings, the only forum available will be the lowest court in the judicial hierarchy – the Magistrates, who may not always have the resources (human and otherwise) to deal with the burden of work likely to be involved.

However, there seems certain to be informed and influential opposition to the proposals as drafted; and the cynical may suspect that the original version has been drafted in a deliberately (and it may even be thought provocatively) extreme way so as to permit concessions to be made during the Bill's passage through Parliament – although it seems unlikely that those concessions will extend to allowing the wardship procedure to be used as extensively as some judges experienced in family work would have wished.<sup>57</sup> The extent to which the provisions restricting the availability of wardship will effectively shift the balance between parents and state, however, depends in part on the interpretation given by the Courts to the care order conditions and in part on the allocation of cases to different levels of the judicial hierarchy.

### **Controlling the Local Authority**

The most striking feature of the wardship proposals is that those Authorities who would wish to entrust sensitive and difficult issues to the wardship court will no longer be able to do so. In that respect, therefore, the legislation extends the powers of local authorities – paradoxically to a greater extent than some Authorities would have wished.

However, the new legislation does also contain a number of important provisions – more consistent with what had been generally assumed to be its underlying philosophy – designed to strike a better balance between the need to protect children from harm and the need to allow aggrieved parents some effective means of challenging Local Authority decisions.

#### *(i) No more parental rights resolutions*

First, the Parental Rights resolution procedure is to be abolished. Not only does this mean that all decisions vesting parental authority in a Local Authority will have to be taken by a court, it also means that the mere fact that a child has been in Local Authority care for three years will no longer by itself enable the Authority to step into the parents' shoes.<sup>58</sup> This and other related provisions must be regarded

57. See, e.g., *per Latey J*, *R. v. London Borough of Newham, Ex parte McL.* (note) [1988] 1 F.L.R. 416. The proposals contained in the Bill also seem difficult to reconcile with the recommendations of the *Report of the Inquiry into Child Abuse in Cleveland 1987*, *Cmnd.* 412, 1988 – see particularly at para. 16.57-65.

58. *Cf.* the provisions of Child Care Act 1980, s. 3(1)(d) (originally enacted by the Children Act 1975).

as diminishing the power of the state to intervene in what a Local Authority believes to be a child's best interests – little more than a decade after such provisions were considered necessary to avoid children being left unnecessarily to drift in Local Authority care.

*(ii) Restricting place of safety orders*

Secondly, the powers of Local Authorities to remove children from their parents under Place of Safety Orders will be limited: such orders will not be capable of enduring for more than eight days (with the possibility of extension for one further seven day period); and parents will have improved rights of access and challenge in the courts.<sup>59</sup>

*(iii) Presumption of reasonable access to child in care*

Thirdly, the legislation embodies the principle that a Local Authority must allow a parent "reasonable contact" with his child. The court will be able to specify the details of the contact. Conversely, the court may permit the Authority to refuse contact if "it is necessary to do so in order to safeguard or promote the child's welfare."<sup>60</sup> It will be noted that the word "necessary" is a strong one: presumably the authority would have to be prepared to justify its wish to terminate contact as a preliminary to an adoption placement, and this might not always be easy to do.

**Conclusion**

The proposed legislation is of potentially great significance in redefining the limits of state intervention in the private domain of family life, although it will be some time before its significance in this respect can be adequately assessed – not least because in some respects it seems to adopt somewhat inconsistent philosophies. However, the Bill is certainly to be welcomed at the technical level of simplifying and rationalising the statute book.

59. See the provisions of Part V of the Children Bill. The use of place of safety orders was much highlighted by the events in Cleveland in 1987, for which reference should be made to the *Report of the Inquiry into Child Abuse in Cleveland 1987*, Cmnd. 412, 1988. The impact of those events on opinion and legislative policy would require (and merit) separate and extended treatment.

60. Clause 29.