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THE FAMILY LAW ACT 1986 – A CRITIQUE

PROFESSOR NIGEL LOWE Director of the Centre for International Family Law Studies, Cardiff Law School

This article is based on a paper prepared by Professor Lowe for the UK Family Law Conference, London, 8–9 October 2001.

INTRODUCTION

The Family Law Act 1986 (the 1986 Act), which, by reason of s 42(1), applies to England and Wales, Scotland and Northern Ireland and, by the Family Law Act 1986 (Dependent Territories) Order 1991 (SI 1991/1723) (which defines the term 'dependent territory' for the purposes of the 1986 Act), pursuant to s 43, to the Isle of Man, essentially does two things. First, it provides for common rules of jurisdiction in respect of (essentially) private law applications concerning children throughout the UK and the Isle of Man. Secondly, it provides a system for the recognition and enforcement throughout the UK and Isle of Man of such orders (but note, there is nothing equivalent under this Act to recognising and enforcing 'rights of custody', as under the Hague Convention on the Civil Aspects of International Child Abduction 1980) made in any one part of the UK or dependent territory. The English and Scottish Law Commissions hoped that the former would minimise the risks of concurrent assumptions of jurisdiction by courts within the UK, while the latter would provide a simple procedure for the mutual recognition and enforcement of orders made within those rules (Law Com No 138 and Scot Law Com No 91, *Custody of Children: Jurisdiction and Enforcement within the United Kingdom* (HMSO, 1985), at paras 1.6 and 1.9). Although it will be readily conceded that the 1986 Act represented a vast improvement on the previous position (before the 1986 Act, orders made in one part of the UK were neither recognised nor enforceable in another part: see, for example, the discussion in Lowe and White *Wards of Court* (Butterworths, 1st edn, 1979), at pp 27–31 and in the second edition (Barry Rose, 1986), at paras 2–25 and 17–57), the object of this article is to draw attention to the Act's deficiencies. In particular it will be demonstrated that:

(1) it has not avoided concurrent assumption of jurisdiction; indeed, it will be shown that there are certain key flaws in the scheme that are almost bound to create conflict;
(2) the hierarchy of rules is based on an assumption that might now be challenged;
(3) the Act does not provide a simple procedure for mutual recognition and enforcement, but rather an unnecessarily complex and, from the families' point of view, disadvantageous system, which anyway is not worth the candle since it is so infrequently invoked; and
(4) the operation of the 1986 Act has become even more complicated following the implementation of the Brussels II Regulation (Council Regulation (EC) No 1347/2000 of 28 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses).

In short, this article seeks to make the case for saying that the 1986 Act is in urgent need of reform.

THE OVERALL APPLICATION OF THE ACT

Only applies to Part I orders

The application of the 1986 Act is confined to the jurisdiction to make and the subsequent recognition and enforcement of what are termed 'Part I orders'. So far as England and Wales is concerned, 'Part I orders' are defined by s 1(1)(a) to mean s 8 orders under the Children Act 1989, excluding variations or discharges (by reason of s 1(3)(a) it also includes existing custody orders made before the implementation of the Children Act 1989. The reason for excluding variations and discharges was the belief (see the Law Commissions, para 4.30) that: 'once a court has made a custodial order any power which it has to vary that order should remain exercisable notwithstanding that the original basis of jurisdiction to make a custody order no longer exists', which was, in any event, thought to reflect the then law in all three UK jurisdictions, but note the difference now in Scotland under the 1986 Act, see below). By s 1(1)(d) Part I orders also include orders made under the High Court's inherent jurisdiction giving care of the child to any person, or providing for contact with, or the education of the child, excluding variations or revocations of such orders (it also includes any existing order vesting care and control or access), but not, therefore, orders that simply protect the child (it does not, for example, apply to seek and find orders). A similar definition, s 1(1)(c) and (e), applies in Northern Ireland, namely orders made under Art 8 of the Children (Northern Ireland) Order 1995 and those under the Northern Ireland High Court's inherent jurisdiction, giving care of the child to any person or providing for contact with or the education of the child, but again, in each case excluding variations or discharges (by reason of s 1(3)(a) it also includes former 'custody orders' made before implementation of the Children (Northern Ireland) Order 1995). The provision applying to Scotland, s 1(1)(b), is more elaborate, but basically comprises orders with respect to residence, custody, care and control, contact or access, education and upbringing but, for reasons that are not clear, does not expressly exclude variations or discharges of such orders.

Although all 'Part I orders' relate to children, the definition of a 'child' varies according to the context. Hence, a 'child' for the general purposes of jurisdiction means, in England and Wales and Northern Ireland, a person under the age of 18, but, in Scotland, a person under the age of 16 (Family Law Act 1986, ss 7(a) (England and Wales), 24 (Northern Ireland) and 18(1) (Scotland)). In contrast, for the purposes of recognition and enforcement, in all cases a 'child' means a person under the age of 16 (ss 25(1) and 27(5): note also that the special rules relating to a child's habitual residence under s 41 (discussed below) only apply to children under the age of 16).

Channel Islands

Although there is power under s 43(2)(b) to extend the application of the 1986 Act to the Channel Islands, no such extension has yet been made. This means that orders made in one part of the UK or Isle of Man are neither recognisable nor enforceable in the Channel Islands (see, for example, *F v H* [2002] Fam Law 10, above), nor vice versa, although no doubt they would be treated with the greatest respect. Furthermore, since the Channel Islands are, nevertheless, regarded as part of the UK both for the purposes of the Hague Abduction Convention 1980 and the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children 1980, abductions to and from there must be dealt with as if they were with a non-Convention country. This is an unsatisfactory position that clearly needs to be attended to in any review of the operation of the 1986 Act.

The interrelationship with the Brussels II Regulation

Some initial observations

An added complication to the operation of the Family Law Act 1986 is the application of the so-called Brussels II Regulation, which came into force in March 2001. This Regulation provides a common set of jurisdictional rules to be applied in matrimonial proceedings and certain issues