

Pugh's
Matrimonial Proceedings
Before Magistrates

Fourth Edition

J. B. Horsman



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Fourth edition

J. Basil Horsman, OBE

Solicitor

Clerk to the Wigan Justices

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Matrimonial Proceedings before Magistrates

Preface

The fourth edition of this work bears the name of Leslie Pugh but not the imprint of his authorship. He was responsible for the first edition when the Matrimonial Proceedings (Magistrates' Courts) Act 1960 introduced substantial changes in the law, and for the next two editions, but died in February 1978 having started the preparatory work for the present edition. He understood the needs of the practitioner, both of the advocate advising his client and preparing his case, and the justices' clerk helping the magistrates through their judicial duties and attending to his own administrative and accountancy responsibilities. It was his aim that each of them should have a statement of the law which was comprehensive and sufficient for practical needs without constant reference to other sources. His good judgment and meticulous care ensured the success of his work.

Since the third edition was published in 1973 there have been three major developments. In the Domestic Proceedings and Magistrates' Courts Act 1978 Parliament has re-written the law concerning proceedings between wife and husband in the magistrates' courts, in the Magistrates' Courts Act 1980 the machinery which gives life and effect to that law has been re-written, and there has been a substantial body of subsidiary legislation implementing reciprocal facilities between countries to which the Maintenance Orders (Reciprocal Enforcement) Act 1972 could be extended. Each of those events has necessitated much change of detail. The general pattern of presentation of the law is unchanged, but the provisions relating to the registration of orders and the facilities for reciprocal enforcement have been collected and presented in the new Part V. Substantial portions of the work have been re-written.

For the last decade the magistrates' courts have been labouring under difficulties in their family jurisdiction. In 1969 Parliament substantially changed the law relating to divorce but failed at that time to reflect those changes in the law administered in the magistrates' courts. Divorce has been made more easily available, and changed attitudes have made it generally inexpensive and more socially acceptable, but the jurisdiction and practice of the magistrates' court has remained based upon the subsistence of a marriage and, to some extent, on legal principles that had been discarded in relation to the divorce court. Parliament has aimed in the 1978 Act to bring the law and practice of the divorce and magistrates' courts closer together and has also made some remedies available in the latter which were formerly available only in the former. The opportunity has been taken to bring some aspects of guardianship and affiliation law into line so as to remove anomalies. In recent years there has been a marked reduction in the work of the magistrates' domestic courts. It remains to be seen whether the new Act makes any

significant difference to the distribution of domestic proceedings between the two courts.

The Domestic Proceedings and Magistrates' Courts Act 1978 makes many changes which will affect the day-to-day operation of the law. The most significant changes are the reduction of the special status of adultery (from being in itself a ground for an order or a defence to the making of an order to the status of conduct to be considered in the same way as any other conduct), the introduction of family protection orders, power to permit access as between a child and grandparent, and the power to prohibit the removal of a child from the country. Each has its counterpart in the divorce court, but in each case Parliament has for good reason deliberately created differences between the two systems of obtaining relief. Those differences could constitute traps for an unwary practitioner who has interests in both jurisdictions. The 1978 Act has codified the principles that have been developed by case law as to the matters to be taken into consideration in deciding the amount of a maintenance order. The principles are unchanged, but those matters are now statutorily defined in some detail. By contrast the more important matter of the grounds upon which the jurisdiction rests for the making of that order is dealt with very briefly. As before, the court which has to make a judicial decision whether a ground has been established for the making of an order is left to interpret a broadly-stated law. Case law will continue to bear the principal burden of interpretation. So far as it remains relevant, the courts will continue to rely on the substantial and well-developed body of case law. The author's problem is to distinguish between the relevant and the obsolete, and although much of the growth has been cut from this edition much has been left until its continuing relevance can be judged in the light of experience.

It remains the law that the parties' conduct may be considered in relation to the questions whether upon any proved ground a maintenance order should be made, and if so for what amount. In the report on which this Act was based, the Law Commission recognised that it would offend the sense of justice of magistrates and litigants alike if conduct could not be relevant both to liability and to amount. The aspect which remains open for exploration is the degree of gravity of that conduct which justifies any change in the amount of the order. The statute has not gone as far as some relatively recent case law. Parliament has enacted without qualification that conduct may be taken into account: the higher courts have applied an interpretation which discounts conduct unless it is 'obvious and gross' or 'grave and weighty'. Such phrases have not been written into the statute, so for practical purposes the law remains capable of development and new interpretation.

The grounds upon which an order may be made (sometimes referred to by the short, easy and wrong term 'matrimonial offences') have been simplified, but in the magistrates' courts as in the divorce court they remain part of the law, and will probably continue to be used more than the new provisions of sections 6 and 7. Thus the whole body of case law relating to desertion, including what is readily understood by the term constructive desertion, is as relevant as under the repealed law. Judicial interpretation will show whether 'failure to provide reasonable maintenance' means anything other than the interpretation which Sir George Baker P applied to 'wilful neglect to provide reasonable maintenance' in *Brannan v Brannan* (1973). Under

sections 6 and 7 a maintenance order may be made without reference to grounds for an order, but it remains a feature of practice in the magistrates' court that no maintenance order may be made unless evidence is given. Sections 6 and 7 do not create a 'consent order'.

The power to make a declaratory non-cohabitation clause, which was criticised for failing to achieve results for which it was not designed, has been abolished so far as new orders are concerned. The need for such orders had become obsolete because other changes in the law have recognised the right of a married woman to live apart from her husband if she so wishes. The new power to make personal protection orders and domestic exclusion orders meets a newly-acknowledged need, though there are limitations when those powers are compared with the divorce court's powers under the Domestic Violence and Matrimonial Proceedings Act 1976. A personal protection order made by magistrates, for instance, deals only with violence, threats of violence and incitement to violence, and does not extend to 'molestation', and an exclusion order must relate to a whole house and not to a specified portion of the matrimonial home. A change of substantial significance is that the Act's provisions on these matters bring certain domestic disputes within the scope of police duties.

The Act does nothing to remove one difference in relation to orders for custody of and access to a child. It is clear from section 15 that under the Domestic Proceedings and Magistrates' Courts Act 1978 the welfare of the child is the first and paramount consideration, and no other consideration is specified by the Act. Under section 9 (1) of the Guardianship of Minors Act 1971 there is similar provision that the welfare of the minor is the first and paramount consideration, but the court is also required to have regard to the conduct and wishes of the mother and father. Recent cases have not stressed that distinction, and it is not easy to assess the weight it should be given.

Rules supplementing the Act have produced two matters of practical importance. The far-reaching decision that, in appropriate circumstances, a child's maintenance order may be payable to the child himself so that advantage may be taken of taxation benefits, has created the necessity to neutralise the disadvantages which such an order creates. Provision is made enabling the person with whom the child has his home to manage the new order on the child's behalf (using that phrase to indicate the ability to collect payments and give receipts therefor, to enforce the order, apply for variation, etc., or answer proceedings for variation on the child's behalf). Areas of uncertainty remain, such as the resolution of a dispute in the event of the child wishing to undertake the management of his own order. A rule has been made prescribing the method of appropriation of a sum of money paid in respect of several orders where the payer does not specify the allocation, so that the amount of arrears under each person's order can be stated with the certainty which is needed for enforcement purposes. It has been reported that the rule as to the allocation of payments under several orders is to be amended to simplify the accounting when the order is payable through a justices' clerk, and to simplify the calculation of arrears, but details had not been published at the time of going to press.

The second innovation is a rule which requires that in a limited class of case the court must formulate its reasons in writing before announcing the

decision and, consequently, before any intimation is received that any party is considering an appeal. To do justice to itself, the magistrates' court will wish to devote to that process the same care that it has given to the preparation of a statement of reasons for appeal purposes after the decision has been announced. The statement has to define the matters in dispute and give an account of the justices' reasoning, and there has been criticism of statements which were inadequate to explain those matters, so it seems likely that courts will have to consider adjourning the announcement of their decisions to give themselves adequate time for compliance with this rule.

It must be emphasised that the law, procedures and practice introduced by the 1978 Act are peculiar to that Act and do not in general apply to orders made and still in force under the Matrimonial Proceedings (Magistrates' Courts) Act 1960. An order under the earlier Act remains in force under that Act, and the innovations of the 1978 Act cannot (with two main exceptions mentioned in Schedule 1) be incorporated into it. All other legislation associated with an order under the 1960 Act likewise remains in force for that purpose so long as the order subsists. We suspect that many readers will take the precaution of preserving the third edition of this work as a reference source. It may be needed for that purpose for many years.

It is to be regretted that the whole of the Act has not been brought into force at one time. Parts relating to domestic court panels, family protection orders and (to some extent) access between child and grandparent were brought into operation in 1979. The main body of the Act operates from 1 February 1981, but provisions relating to custodianship orders remain ineffectual and special transitional provisions have been made. Since Parliament has not implemented Part II of the Children Act 1975 under which the custodianship order is created, transitional provisions have been necessary to delay some of the effects of section 8 of the Domestic Proceedings and Magistrates' Courts Act.

Two small points may be mentioned. The 1978 Act is equally applicable to both spouses, but to avoid tedious repetition in this book the alternatives such as wife/husband and he/she have not been used in full unless the context requires precision. The 1978 Act also refers to the parties to a marriage by the terms applicant and respondent though the Magistrates' Courts Act, which must be invoked to give effect to the 1978 Act, uses the terms complainant and defendant. In relation to spouses in proceedings under the 1978 Act the pairs of terms may be regarded as interchangeable, but to avoid confusion the familiar terms complainant and defendant have been used.

This edition incorporates the Magistrates' Courts Act 1980 which superseded the Magistrates' Courts Act 1952 with effect from 6 July 1981. The Magistrates' Courts Rules 1981 were received too late for inclusion but in most respects they are in identical terms to the superseded Rules. Part VIII on p. 795, below, shows the numbering and derivation of the new Rules and includes the new text where there has been a substantial alteration. The publishers' intention to bring this work up to date by the issue of a supplement will be widely welcomed. Practitioners will be glad to have a reminder of new statute law and new decisions under the new Act.

In the matter of reciprocal enforcement of maintenance liabilities between the United Kingdom and other countries, the Maintenance Orders (Reciprocal Enforcement) Act 1972 provided the opportunity for much subsidiary

legislation, and in the years following 1973 many orders and regulations have been made. Since each code of procedure must of necessity be acceptable to and agreed with the oversea country concerned, it has been necessary to create a variety of procedural codes. They are responsible for many additional pages in this work. There is no short cut. The system which is tailor-made to suit the needs of, say, New Zealand will not be satisfactory for the Irish Republic, the state of Kentucky or the territory of Upper Volta. They are reproduced in full in Part VII of this work.

It is my very great pleasure to acknowledge assistance I have had in the preparation of this book. The Home Office is the government department principally concerned in these matters, and staff there have been most helpful. I have valued their ready and patient cooperation. Mr Philip Dodd, clerk to the Manchester City Justices, has spared time from his many and heavy responsibilities to read the proofs and offer comments. I am very grateful for many shrewd observations and helpful suggestions he has offered. The remaining errors are my own work. Leslie Pugh and I greatly appreciated the communications we received concerning the earlier editions, and I gratefully acknowledge the contribution that has been made in that way to the fourth edition.

J. Basil Horsman

Wigan
June 1981

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