

THE CONCEPT OF FAMILY COURTS

IN SOUTH AFRICA

by

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PREFACE

Pleas for the introduction of family courts in South Africa have been made frequently in recent years in the press, on television and in journal articles. Enthusiastic support for the family court concept has often been accompanied by a misconception as to the true nature and function of a family court. On the other hand, the idea of a family court is also often branded as being too revolutionary and socialistic a concept for it to be accepted as part of the South African judicial scene.

It is hoped that this work will help to dispel some of the misconceptions at both ends of this broad spectrum of opinion on family courts.

As inestimable debt of gratitude is owed to my wife, Lenore, for her constant encouragement of, and support for, my endeavours and to my sons, Lawrence and Craig, for their patience.

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PERIODICAL PUBLICATIONS AND MODE OF CITATION

Ad LR	The Adelaide Law Review.
AJ	Acta Juridica.
ALJ	Australian Law Journal.
Am Journ Comp Law	American Journal of Comparative Law.
Anglo-AM LR	Anglo-American Law Review.
Aust Child Fam Welfare	Australian Child Family Welfare.
Aust Journ Social Issues ..	Australian Journal of Social Issues.
BML	Businessman's Law.
Br Journ Criminology	British Journal of Criminology.
Br Journ Sociology	British Journal of Sociology.
Calif LR	California Law Review.
Camb LJ	Cambridge Law Journal.
Can BJ	Canadian Bar Journal.
CILSA	Comparative and International Law Journal of Southern Africa.
CLP	Current Legal Problems.
Cod	Codicillus.
Concil Cts Rev	Conciliation Courts Review.
Conn BJ	Connecticut Bar Journal.
CPC	Crime Punishment and Correction.
Crim LR	Criminal Law Review.
DJ	De Jure.
DR	De Rebus (formerly De Rebus Procuratoriis).
Duke LJ	Duke Law Journal.
Fam Coordinator	The Family Coordinator (Journal of Education Counselling and Services of the National Council on Family Relations).
Fam Law	Family Law.
Fam LQ	Family Law Quarterly.

Fed LR	Federal Law Review.
ICLQ	International and Comparative Law Quarterly.
J Fam Law	Journal of Family Law.
JP	Justice of the Peace.
J Public Law	Journal of Public Law.
Journ of Divorce	Journal of Divorce.
Journ Law Soc Scotland ...	Journal of Law Society of Scotland.
Kansas LR	Kansas Law Review.
Law and Contemp Problems .	Law and Contemporary Problems.
Law Teacher	The Law Teacher.
Minn LR	Minnesota Law Review.
Miss LR	Missouri Law Review.
MLR	Modern Law Review.
Monash LR	Monash Law Review.
Natal Univ LR	Natal University Law Review.
NILQ	Northern Ireland Law Quarterly.
NLJ	New Law Journal.
North Dak LR	North Dakota Law Review.
NPPA Journ	National Probation and Parole Association Journal.
NYULR	New York University Law Review.
NZLJ	New Zealand Law Journal.
Public Law	Public Law.
RLJ	Rhodesian Law Journal.
SALJ	South African Law Journal.
SLT	Scottish Law Times.
Spec Juris	Speculum Juris.
THR-HR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg.
TSAR	Tydskrif vir die Suid-Afrikaanse Reg.

Tulane LR	Tulane Law Review.
UBCLR	University of British Columbia Law Review.
Univ Chicago LR	University of Chicago Law Review.
Univ Pitts LR	University of Pittsburgh Law Review.
Univ Tas LR	University of Tasmania Law Review.
Univ Tor LJ	University of Toronto Law Journal.
Univ WALR	University of Western Australia Law Review.
Vanderbilt LR	Vanderbilt Law Review.
Yale LJ	Yale Law Journal.

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SUMMARY

South African family law is at the cross-roads of its development. In recent times important changes have been effected to the substantive family law, particularly the divorce laws, and the appointment of the Hoexter Commission of Inquiry heralds the restructuring of our courts with the faint possibility of the introduction of a family court system.

In one's research on family courts one is immediately struck by the widely differing definitions of a family court. In effect, a family court means what one wants it to mean. It is, accordingly, not surprising that at one end of the scale there are those who regard the establishment of a family court as the panacea of all our social ills such as the unacceptably high divorce rate, battered and neglected children as well as battered and abandoned wives. At the other end of the scale there are those who regard the concept of a family court as being too revolutionary for the South African judicial scene. This work attempts to steer a course midway between these two extremes. In this regard, an examination and assessment of the structure and philosophy of three different examples of family courts has been undertaken; viz the Los Angeles Conciliation Court, the Family Court of the First Judicial Circuit of Hawaii, and the Family Court of Australia.

Family courts have their origin in the American juvenile court movement. Numerous countries and states have adapted the American system of family courts to their own particular needs. This, in itself, however, is not a good enough reason for similar development to take place in South Africa. The justification for the establishment of a family court in South Africa has to be convincingly argued on other grounds. It is believed that such grounds do exist. For example, the bitterness, distress and humiliation of the divorce action of yester-year is still very much part of the modern divorce proceeding; there is an inability to give adequate expression to the best interests of the many thousands of children of divorce; there is a lack of appreciation and awareness of the contribution that modern psychology, psychiatry and social work can make to the resolution of the many problems of

family law; existing court procedures are cumbersome, unwieldy and costly; and jurisdiction over family law matters is unnecessarily split up amongst the various courts of our country. The proposal for a family court in South Africa is seen as an attempt to remedy these problems and, accordingly, the following definition of a family court is proffered:

'A family court may be defined as a supreme court of law having jurisdiction over all family law matters which are to be adjudicated upon in an informal and confidential manner so that emphasis may be placed on the resolution of problems rather than the settlement of disputes.'

The establishment of a family court is not, however, capable of easy achievement. Difficulties and obstacles would have to be overcome and, not least of all, there would have to be an adjustment of attitude towards the resolution of the many problems that are being experienced in the field of family law.

CHAPTER ONE

INTRODUCTION

1. Purpose of Thesis

It may be broadly stated that the two-fold purpose of this thesis is:

- (a) to examine the concept of family courts in certain countries of the Western World; and
- (b) to consider, in the light of the experience in those countries, whether the family court system would be a viable proposition in the South African context.

Insofar as the second purpose is concerned, it must be conceded at the outset that the main emphasis will lie on an attempt to show that for any meaningful changes to be effected to South African family law, especially to the divorce laws,¹⁾ very serious consideration will have to be given to the establishment of family courts.

2. The Need to Examine the Family Court System in South Africa

The need to examine the family court system is, in the main, motivated by a number of considerations, some of which may be briefly stated as follows:

- (a) it is trite that we are now living in an age of specialisation. The family court system is essentially designed to utilize the specialist skills of various experts in the legal, social, mental (and even spiritual)²⁾ fields;
- (b) the behavioural sciences, as a discipline, have been firmly established as a recognized force.³⁾ One cannot continue for much longer to ignore the meaningful role that behavioural scientists have to play in the field of family law;

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- 1) The Divorce Act, 70 of 1979, which came into force on 1.7.1979, has effected a number of radical and far-reaching changes to the South African divorce laws which will be dealt with below at Chap 5.
 - 2) As to the spiritual or religious problems that may be encountered in the marriage relationship see, for example, Vermaak 1965 (1) SA 341 (T); Hill 1969 (3) SA 544 (R AD); Holland 1975 (3) SA 553 (AD).
 - 3) See generally the Golden Jubilee Report Vols 1 - 4 (1974).

(c) society has, over the past centuries, been the unfortunate 'punchbag' in the conflict between Church and State over the right to make and administer the laws governing the problems of society that fall within the realm of family law - more specifically, such problems that fall within the area of divorce law. In this regard it is pertinent to remind ourselves of the various phases in the development of the marriage and divorce laws.¹⁾ Marriage was initially seen as a contract between two families though, later, it came to be regarded as a private contract between the two parties concerned with the result that divorce by mutual consent gradually became possible.²⁾ Under the influence of Church dogma, however, the marriage contract was elevated to the status of a sacrament so that divorce came to be abolished. But the secularization of the marriage laws became inevitable in view of the Church's abortive attempt to spell out 'in minute detail... [the] circumstances in which a man-woman relationship was indissoluble in the sense of rendering every other sex relationship of one of the partners non-marital and thus sinful.'³⁾ This secularization gathered momentum during the period of the Protestant Reformation,⁴⁾ the effect of which was that divorce a vinculo was again permitted but only on the grounds of adultery and malicious desertion.⁵⁾

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- 1) For a brief historical survey of the South African marriage and divorce laws see Hahlo Husband and Wife 1-14. For general surveys of the historical evolution of the law of marriage and divorce see International Encyclopedia (Max Rheinstein) 3-19; Glendon 304-320. For the position in the United States see Clark 32-35. As to the historical development in England see Jackson 7-77; Rayden 1-15.
 - 2) Cf van Leeuwen Commentaries 119 who cites Seneca as deploring 'the corruption of morals, as several women no longer counted the years by the consuls but by the number of their divorced husbands.' In the Civil Law divorce was initially granted on the ground of adultery. Later on, a divorce could be obtained on the ground of 'disagreement or discord.'
 - 3) Max Rheinstein International Encyclopedia 6.
 - 4) As Rheinstein International Encyclopedia 7 puts it: 'The door was opened for increasing secularization /of the marriage laws/ when Christian tradition was subjected to the critique of Enlightenment.'
 - 5) Brouwer 2.33.7. The secularization of the marriage and divorce laws in England proceeded at a slower pace. Until 1857 a private Act of Parliament was required before a marriage could be dissolved. The Divorce and Matrimonial Causes Act of 1857 (20 and 21 Vict. c85) permitted divorce in a very discriminatory way; ie on the ground of adultery on the part of the wife, but on the ground of adultery plus incest, or bigamy, or rape, or sodomy, or cruelty, or desertion on the part of the husband.

The main result of the secularization of the marriage and divorce laws was that the administration of these laws fell exclusively onto the shoulders of the lawyer - the judge, the advocate, the attorney, the magistrate and other lesser officials principally concerned with the administration of justice. The lawyer now takes it upon himself to be involved in the various fields of human conflict experienced in the breakdown of marriage - fields in which the lawyer is more often than not neither qualified nor experienced. The stage has now surely been reached when it may be asked whether the time has not arrived for the specialist to be encouraged to play a more meaningful role in the administration, at least, of family law in South Africa;

(d) in the application of his assumed right to administer family law, the lawyer has seen fit, with the connivance of the legislature, to create a court structure which is unwieldy and badly designed to encourage the specialist to play his proper role in the administration of family law. The personnel of the presently constituted court structure occupy positions of widely differing status and rank, requiring different qualifications and experience. Multiple jurisdictions have been created and there is a discernible lack of consistency in the approach of the various courts of differing jurisdictions to the same or similar family law problems.

In order to justify the need to examine the concept of family courts in South Africa it is proposed to focus attention on the origin of the family court movement in the United States of America, after which three varied examples of family courts will be described and briefly evaluated.

CHAPTER TWO

THE ORIGIN OF FAMILY COURTS

Family courts have their origin in the American juvenile court system which was introduced at the end of the last century. The first State to adopt the juvenile court system was Illinois.¹⁾ The philosophy behind the establishment of the juvenile court system is explained by Fortas J in Kent v United States²⁾ as follows:

'The theory of the ... Juvenile Court ... is rooted in social welfare philosophy rather than in the Corpus Juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is parens patriae rather than prosecuting attorney and judge.'

It is clear that the establishment of the juvenile court system has led to a 'wedding of the legal science and some of the other social sciences.'³⁾

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- 1) See the judgments of Fortas J in Kent v United States 383 US 542 (1966) 542 - 554 and Re Gault 387 US 1 (1967) 14 - 17. For excellent short historical surveys of the juvenile court movement in Illinois see Nicholas 'History, Philosophy and Procedures of Juvenile Courts' (1961) 1 J Fam Law 151, and Parker 'The Juvenile Court Movement: The Illinois Experience' (1976) 26 Univ Tor LJ 253. See also Brown 'The Legal Background to the Family Court' 1966 Br Journ of Criminology 139.
 - 2) 383 US 542 (1966) 554 - 555.
 - 3) Per Alexander 'Legal Science and the Social Sciences: The Family Court' (1956) 21 Miss LR 105, 106. The writer (at 105) quotes Pound as having publicly stated that 'it was the establishment of the juvenile court movement that was the most forward-looking development in Anglo-American jurisprudence since Magna Charta.' Cf Alexander 'What is a Family Court Anyway?' (1952) 26 Conn BJ 243.

In recent years it has been seriously doubted in America whether the juvenile court system has achieved, or is capable of achieving, its full potential.¹⁾ Thus, for example, Fortas J in Kent's case²⁾ stated that:

'While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts ... lack the personnel, facilities and techniques to perform adequately as representatives of the State in a parens patriae capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child gets the worst of both worlds; he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children.'

So also in the case of Re Gault³⁾ the same judge had the following to say:

'The early conception of the juvenile court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition; and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help to save him from a downward career. Then, as now, goodwill and compassion were admirably prevalent. But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness - in short, the essentials of due process - may be a more impressive and more

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- 1) This would account for the initial lukewarm reception that family courts generally received.
 - 2) 383 US 542 (1966) 555-556.
 - 3) 387 US 1 (1967) 26.

therapeutic attitude so far as the juvenile is concerned.¹⁾

Although the above comments are particularly apposite to the criminal functions of a juvenile court,²⁾ it must be pointed out that further serious criticisms can be levelled at the American system. For present purposes, these are best summed up by Dyson and Dyson³⁾ as follows:

'The therapeutic promises of juvenile court theory are often belied by the realities with which juvenile courts deal. Many courts lack trained probation officers and competent specialized judges. Dispositional alternatives may be limited by serious inadequacies in local community resources. Probation services may be permitted to deteriorate into 'mere watchful supervision or routine reporting' because of heavy probation caseloads. The broad powers given judges to act in the best interests of children are often abused, notably in the areas of prolonged detention of children and lax treatment of procedural rights.'

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- 1) For a trenchant criticism of the juvenile court system see Paulsen 'Juvenile Courts, Family Courts and the Poor Man' (1966) 54 Calif LR 694 esp 713 - 716. The writer, however, does conclude by suggesting that to abandon the juvenile court system is not the correct approach since juvenile courts have it in their capacity to 'avoid harsh regimens of treatment' (716) which would otherwise not be possible if children were dealt with as adult criminals. See also Kay 'A Family Court: The California Proposal' (1968) 56 Calif LR 1203. See generally Allen 43 - 61.
 - 2) Juvenile courts in America have both a criminal and a civil jurisdiction to deal with neglected children and children in need of care: Paulsen supra n 1 at 699 - 701; Dyson and Dyson 512. It may be mentioned in parenthesis that the Children's Court in South Africa (which was first created by the Children's Act, 33 of 1960), unlike the American Juvenile Court, has no jurisdiction to try juvenile criminal offenders. Juvenile criminal offenders are ordinarily dealt with by the criminal courts except that s 254 of the Criminal Procedure Act, 51 of 1977, permits any criminal court to refer any person under the age of 18 years to the Children's Court to be dealt with as a child allegedly in need of care: see below at Chap 8 (Minors) where this procedure is fully dealt with.
 - 3) At 514.

Despite the criticisms that have been levelled at the American juvenile court system it still continues to flourish there, as well as in other countries. In the words of Alexander¹⁾ 'the fact remains that by its wedding of legal science and some of the other social sciences, the [juvenile] court has been able to point the way, and grow and develop.'

It is this phenomenon of linking legal science with the social sciences (medicine, psychology, psychiatry, social work, religion, sociology, education etc) that is also a characteristic feature of a family court. The first American family court was established in Cincinnati, Ohio, in 1914 and its official title was the 'Division of Domestic Relations of the Court of Common Pleas'.²⁾ The transition from juvenile court to family court can be seen as a natural one taking in its stride the idea that inasmuch as the proper treatment of the delinquent child involves the whole family, so also 'delinquency, child neglect and matrimonial difficulties may be simply different facets of a larger family problem.'³⁾ In short, the Cincinnati court was the first family court to acquire an integrated jurisdiction over both divorce and problems of juvenile delinquency.

The idea of an integrated jurisdiction over divorce and juvenile delinquency spread to other States and family courts in one form or another are to be found in most American States. The term 'family court'⁴⁾ is used consistently throughout this thesis for the sake of convenience though, in reality, two types of court structure have evolved. These are best described by Payne⁵⁾ as follows:

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- 1) 'Legal Science and the Social Sciences: The Family Court' (1956) 21 Miss LR 105, 106.
 - 2) Alexander 'What is a Family Court Anyway?' (1952) 26 Conn BJ 243, 250-252; Chute 'Divorce and the Family Court' (1953) 18 Law and Contemp Problems 49, 51-52; Alexander 'Legal Science and the Social Sciences: The Family Court.' (1956) 21 Miss LR 105, 106.
 - 3) Brown 'The Legal Background to the Family Court' 1966 Br Journ of Criminology 139, 140.
 - 4) Other terms frequently encountered are 'conciliation courts' and 'courts of domestic relations.'
 - 5) At 423-424.

'First, Family Courts have been established with an extensive, but not comprehensive, jurisdiction in matrimonial and familial proceedings, and these courts provide specialized investigatory facilities in an attempt to provide to a greater or lesser degree counselling and conciliation services. In the event that counselling and conciliation services provide no solution, a trial takes place before the judge in order to secure a disposition of the conflicting or competing claims. The second type of court is the Conciliation Court that is established as a department or division of the Superior Court. Inter-spousal conciliation proceedings are instituted in the Conciliation Court and, if ineffectual, the issues are referred to the trial division of the Superior Court for judicial determination and disposition. The judge of the Conciliation Court, unlike the judge in the Family Court, discharges [a] supervisory and supportive role in promoting conciliation between the spouses.'

Quite apart from the two types of court structure just described there would also appear to be no consistency in the application of the ideas and philosophy behind the family court movement,¹⁾ presumably because each family court seeks to take account of local conditions and requirements. Differences in court structure are particularly noticeable in the jurisdiction of the various family courts.²⁾ For example, in their comprehensive analysis of the Family Courts of Hawaii, Rhode Island and New York Dyson and Dyson³⁾ list a number of essential differences in the jurisdiction of each of these courts. Thus, New York has no jurisdiction over divorce and annulment cases whereas the Family Courts of Rhode Island and Hawaii do. The New York Family Court shares jurisdiction with the ordinary criminal courts

1) Dyson and Dyson 517.

2) It would be beyond the scope of this thesis to list all the family courts in the United States with a view to indicating the differences in the jurisdiction of each. These differences are highlighted in the descriptions of the Los Angeles Conciliation Court and the Family Courts of Hawaii and Australia given below in Chap 3.

3) At 525-531. For a brief description of other family courts see Foster 'Conciliation and Counselling in the Courts in Family Law Cases' (1966) 41 NYUL 351.

over delinquent children: it also has concurrent jurisdiction with the State Supreme Court over maintenance and child custody cases. This inevitably gives rise to jurisdictional disputes. The New York Family Court does, however, have jurisdiction over adoptions and the committal of mentally ill persons to institutions. By way of contrast, the Family Court of Hawaii has exclusive jurisdiction over all matters affecting children. This also applies to criminal cases except where the family court waives its jurisdiction in certain cases in respect of children between 18 and 21 years. The Family Court of Rhode Island also has exclusive jurisdiction over children except in the case of guardianship disputes. In Hawaii the Family Court would appear to have complete jurisdiction over adult cases such as maintenance, divorce, paternity, annulment and the committal of mentally ill persons. The position seems to be the same in Rhode Island except that the Family Court there has not jurisdiction over mentally ill persons or in respect of offences alleged to have been committed by parents against their children.

Notwithstanding the fact that a 'family court means different things to different people'¹⁾ the general idea of family courts has spread to other continents. Thus, for example, family courts are to be found as far afield as Japan, Taiwan, Australia and Canada. In 1974 the Finer Report²⁾ recommended the establishment of such courts in England as a matter of urgency and independently of, and in advance of, any change in the English matrimonial and family law.³⁾ It is

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- 1) Corbett and King 'The Family Court of Hawaii' (1968) 2 Fam LQ 32, 35.
 - 2) The committee responsible for the Report on One-Parent Families sat under the chairmanship of the late Sir Morris Finer who was once described as 'a lawyer with sociological training' - per Sir Jocelyn Simon PC in the 1970 Riddell lecture entitled 'Recent Developments in the Matrimonial Law' and which is cited by Rayden 3227, 3239.
 - 3) This recommendation, although it has been accepted in principle, has yet to be implemented in England, mainly because of the parlous economic situation in which it finds itself today: Glendon 201 and see the editorial comments in (1975) 125 NLJ 53 and (1979) 129 NLJ 305; Freeman 'When Marriage Fails - Some Legal Responses to Marriage Breakdown' 1978 CLP 109, 110.

also pertinent to note that Canada and Australia are common law countries which operate under a cumbersome federal constitutional framework. Accordingly, there is, from the South African standpoint, much of value that can be gleaned from the family court experiences of these countries.

CHAPTER THREE

EXAMPLES OF FAMILY COURTS IN ACTION

1. Introduction

In South Africa, there is a dearth of literature in the legal journals and periodicals on the subject of family courts.¹⁾ Such comment as there is, is generally characterised by its brevity and lack of clarity such as a failure to indicate precisely what is meant by a family court. As has been pointed out above,²⁾ 'a family court means different things to different people.' It is, accordingly, clear that for any meaningful suggestions to be made regarding family courts in the South African context, there must first be an understanding of the family court system in other countries. With this end in mind, it is proposed to examine the Conciliation Court of Los Angeles, the Family Court of the First Circuit of Hawaii and the Family Court of Australia.

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- 1) The only references to family courts in South African legal journals and periodicals are Labuschagne 'Kindermishandeling: 'n Juridiese Perspektief' 1976 DJ 189, 210-211; Labuschagne 'Strafregtelike Aanspreeklikheid van Kinders' (1978) 3 TSAR 250, 267; Rosen 'The Need for a Counselling Service for Parents on Divorce' (1978) 95 SALJ 117; Barnard 'Enkele Opmerkings oor die Voorgestelde Nuwe Suid-Afrikaanse Egskeidingsreg' (1978) 41 THR-HR 263, 272-274; Barnard 'Nog 'n Stap Nader aan 'n Nuwe Egskeidingsreg' 1979 DR 11. See also the Golden Jubilee Report (1974) Vol 111 at 81 for the plea for a family court by Magistrate Fourie. Pleas for the establishment of family courts in South Africa have also come from other quarters such as the South African National Council for Child and Family Welfare, the Women's Legal Status Committee, Members of Parliament (Eastern Province Herald, Tuesday 16.5.1978), religious organizations, social welfare and marriage guidance societies. The South African Law Commission in its Divorce Report (1978) refers, not insignificantly to 'a strong feeling in favour of family courts' (§ 13.1), but hastens to add 'that those in favour of family courts have a rather vague idea of what the character and modus operandi of such courts should be.' See also Barnard Thesis (1979) 437 and Barnard (Divorce) 86-88.
- 2) See above 9 n 1.

The choice as to which family courts to examine is purely an arbitrary one but among the factors motivating the choice made are:

(a) with regard to the Conciliation Court of Los Angeles, this is one of the older and more firmly established family courts in the United States and its particular strength lies in its conciliation services. It is certainly one of the best known family courts outside of the United States and much has been written about it. It is an example of the second type of family court structure described by Payne¹⁾ and it is the prototype of subsequently established family courts in the United States and elsewhere;²⁾

(b) with regard to the Family Court of the First Judicial Circuit of Hawaii, which was established in July 1966, the founders sought, after much inquiry, to overcome the jurisdictional difficulties experienced by older and more established family courts by modelling itself on the Standard Family Court Act of 1959.³⁾ This Act is the product of the American National Probation and Parole Association,⁴⁾ which co-operated in this venture with the National Council of Juvenile Court Judges and the United States Children's Bureau. This so-called Act

- 1) At 423-424: see above 7-8.
- 2) 1977 Conciliation Court Report 6. According to Elkin Position Paper 40 n 16 there are 16 conciliation courts in the various counties of California which represent about 75% of California's population. There are 14 conciliation courts in other States in America as well as in Canada /see the Directory of conciliation courts in (1978) 16 Concil Cts Rev 50-567. The conciliation court movement has also influenced family law legislation in Australia, New Zealand and Japan.
- 3) The full text of this Act, and a commentary thereon, is to be found in (1959) 5 NPPA Journ 99-160.
- 4) Now superseded by the National Council on Children and Youth. See also Evavold 'Family Courts in North Dakota' (1968-69) 45 North Dak LR 281, 286-287.

has no legislative force and has been produced to serve only as a draft model or guide. Its draftsmen believe that it contains all the characteristics of a true family court in that it makes provision for an integrated jurisdiction, an investigatory staff and counsellors trained in social work.¹⁾ Apart from being modelled on the Standard Family Court Act, the Hawaii Family Court is an excellent example of the first type of family court structure described by Payne²⁾;

(c) with regard to the Australian Family Court, which was established in January 1976, this is one of the most recently established in a Commonwealth country. Apart from the fact that it operates under a federal constitutional framework, Australia, like South Africa, covers a vast and sparse area. The Australian endeavour to bring the family court within the reach of all sections of the population scattered over such wide areas is, accordingly, of significance to South Africa. The Australian population, like South Africa's, is largely cosmopolitan.

1) Dyson and Dyson 517.

2) At 423-424: see above at 8.

2. The Conciliation Court of Los Angeles.¹⁾

A. Background and Purpose

In 1939 the California Code of Civil Procedure was amended to enable any county in California to establish a conciliation court. The county of Los Angeles was the first to take advantage of this and in the same year it established its Conciliation Court which is described as a 'special department of the Superior Court system of Los Angeles.'²⁾

- 1) The writer is indebted to Meyer Elkin, the former director of Family Counselling Services of the Los Angeles Conciliation Court, who is now in private practice in Beverley Hills, California, for much of the material and information upon which this account of the Conciliation Court is based. As far as possible, however, the writer has relied on the official annual Conciliation Court reports. A comprehensive description of the Los Angeles Conciliation Court is given by Elkin 'Family Law Reform: California's Constructive Break with Legal Tradition' (1971) 9 Concil Cts Rev 1, 10-12 /cited in extenso by Payne 428-435/. For further descriptions of the Conciliation Court see Howard 'Matrimonial Conciliation' (1962) 36 ALJ 148; Foster 'Conciliation and Counselling in the Courts in Family Law Cases' (1966) 41 NYULR 351, 364-367; Finlay 'Family Courts - Gimmick or Panacea?' (1967) 43 ALJ 602, 603-603; Reagh 'The Need for a Comprehensive Family Court System' (1970) 5 UBCLR 13, 22-24; Maddi 'The Effect of Conciliation Court Proceedings on Petitions for Dissolution of Marriage' (1973-74) 13 J Fam Law 495, 553-566; Elkin 'Conciliation Courts: The Reintegration of Disintegrating Families' (1973) 22 Fam Coordinator 63; Manchester and Whetton 'Marital Conciliation in England and Wales' (1974) 23 ICLQ 339, 363-366.
- 2) Elkin 'Conciliation Courts: The Reintegration of Disintegrating Families' (1973) 22 Fam Coordinator 63.

Collectively, the provisions governing the Conciliation Court are known as Conciliation Court Law.¹⁾

According to section 1730 of the Code of Civil Procedure the purpose of the Los Angeles Conciliation Court is given a legal definition; namely,

'To protect the rights of children and to promote the public welfare by preserving, promoting and protecting family life and the institution of matrimony, and to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies.'²⁾

The establishment of the Los Angeles Conciliation Court met with little initial success and it was not greeted with much enthusiasm by either the judiciary or practising members of the legal profession, or even by members of the public. The turning point in its development was reached in 1954 when Judge Louis H. Burke was appointed the presiding judge. Prior to that, no professionally trained marriage counsellors had been employed by the court. Judge Burke soon realized that the lack of trained and experienced personnel tended to destroy the whole purpose of conciliation courts. Largely as a result of his endeavours conciliation court personnel now require 'a minimum of a Master's degree in one of the behavioural sciences, and at least 5 years post-Master's degree supervised clinical counseling experience of a diverse nature.'³⁾ The conciliation court personnel are under the supervision and control of a Director of Family Counseling Services.⁴⁾ The result of Burke's efforts is that most of the counsellors have at least a Master's

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- 1) Elkin supra 14 n 2. The relevant provisions of the California Code of Civil Procedure are ss 1730-1772.
 - 2) 1974 Conciliation Court Report 1. This is also the stated purpose of other conciliation courts such as those in Nebraska and Montana: 1977 Nebraska Conciliation Court Report 4.
 - 3) Elkin supra 14 n 2 at 67.
 - 4) The present director of Family Counseling Services is Hugh McIsaac who succeeded Meyer Eklin in 1977. Elkin had served in this capacity for 22 years.

degree and some of them even have Ph D degrees.¹⁾

That Judge Burke had some measure of success with the employment of better trained and qualified personnel seems to be supported by the statistical data for the period 1954-1959. Thus, Judge Burke was able to report²⁾ that for this period reconciliations were effected in 3581 cases, which is a success rate of 45%. The number of children involved in the 3581 cases amounted to over 7700 children.³⁾ Furthermore, the legal profession itself has now recognized the value of the work of the Conciliation Court in that about 50% of the matters dealt with by the Conciliation Court were initially referred to the court by attorneys who felt 'that there was no real cause for divorce.'⁴⁾

(B) Legislative Changes Enhancing the Status of the Los Angeles Conciliation Court

The functions and status of the Conciliation Court were enhanced by two innovative pieces of legislation in 1970; namely, the Family Law Act of 1970, and the amendment to section 4101 of the California Code of Civil Procedure which introduced pre-marital counselling.

(i) The Family Law Act, 1970⁵⁾

This Act abolished the erstwhile fault-orientated grounds for divorce and substituted therefor 'irreconcilable differences which have

- 1) Immediately prior to 1976 there were 16 counsellors on the staff of the Conciliation Court: 1976 Conciliation Court Report 1. Owing to a serious financial crisis the number of counsellors was reduced to 8. Although 1976 was a crisis year in the history of the Los Angeles Conciliation Court it must be stressed that this must not be seen as an 'anti conciliation court move.' The position has, however, again improved and there are presently 11 counsellors, plus 4 part-time 'interns' doing similar work: 1977 Conciliation Court Report 3.
- 2) Burke 'The Role of Conciliation in Divorce Cases' (1961) 1 J Fam Law 209
- 3) Burke op cit 212.
- 4) Burke op cit 210; Elkin 'Conciliation Courts: The Reintegration of Disintegrating Families' (1973) 22 Fam Coordinator 63.
- 5) For the events leading up to the promulgation of the Family Law Act of 1970 and the effects thereof see 1977 Conciliation Court Report 10-12. The account that follows is largely based on that given in this Report.

caused the irremediable breakdown of the marriage as being the sole ground upon which a marriage could be dissolved. At the same time the word 'divorce' was replaced by the words 'dissolution of marriage.' Not only were the fault orientated grounds for divorce abolished, but it was also provided that no evidence of specific acts of matrimonial misconduct could be led in any matrimonial action as this would be 'improper and inadmissible.' Two exceptions, however, are permitted to this rule; namely,

- (a) where the custody of the child of the marriage is in issue and evidence of misconduct is relevant to that issue; and,
- (b) where the court considers it is necessary for such evidence to be led to establish the existence of irreconcilable differences.¹⁾

(ii) Pre-marital Counselling.²⁾

Section 4101 of the California Code of Civil Procedure has the effect of fostering even further the co-operation that exists between the Law, on the one hand, and the behavioural and social scientists, on the other hand. Section 4101 empowers the Superior Courts of California

1) The Family Law Act also effected major changes to the law of maintenance (or alimony - which is referred to in the Act as 'spousal support.') The sole criterion upon which maintenance will be ordered to either spouse is the need of the claimant spouse and the ability of the paying spouse to pay. With this criterion in mind the court, in awarding maintenance, is enjoined to have regard to the duration of the marriage, and the ability of the supported spouse to engage in gainful employment without interfering with or prejudicing the interests of the children in the custody of such spouse. With a view to giving proper effect to the interests of minor children, the court is empowered to grant the custody of such children to any of the following, in the following order of preference: (a) to either parent, or (b) to any person(s) in whose home the child has been living in a wholesome and stable environment, or (c) to any person(s) deemed by the court to be suitable and able to provide adequate and proper care and guidance to the child. But before the court can make an order under (b) or (c), it must first find as a fact that it would be detrimental to the child's best interests to place it in the custody of either of the parents. The final significant change to be effected by the Family Law Act was that upon the dissolution of a marriage all the community property (including community debts) are to be divided equally: the court is given no discretion in the matter.

2) S 4101 of the California Code of Civil Procedure. Elkin 'Premarital Counseling of Minors: The Los Angeles Experience' (1977) 26 Fam Coordinator 429.

to require the pre-marital counselling of any couple wishing to marry if either party is under the age of 18 years and if the court considers that such counselling is necessary.

The full text of section 4101, which is cited by Elkin¹⁾, reads as follows:

'(a) Any unmarried person of the age of 18 years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage.

(b) Any person under the age of 18 is capable of consenting to and consummating marriage if each of the following documents is filed with the clerk issuing the marriage license ...

(1) The consent in writing of the parents of each person who is under age, or of one of such parents, or of his or her guardian.

(2) After such showing as the Superior Court may require, an order of such court granting permission to such underage person to marry.

(c) As part of the order under subdivision (b), the court shall require the parties to such prospective marriage of a person under the age of 18 years to participate in pre-marital counseling concerning social, economic, and personal responsibilities incident to marriage, if it deems such counseling necessary. Such parties shall not be required, without their consent, to confer with counsellors provided by religious organizations of any denomination. In determining whether to order the parties to participate in such pre-marital counseling, the court shall consider among other factors, the ability of the parties to pay for the counseling.'²⁾

1) Supra 17 n 2.

2) Paragraph (c) of s 4101 seems to give the court a discretion as to whether to order pre-marital counselling. The Los Angeles Superior Court has, however, interpreted this paragraph to mean that the onus is on the parties to prove that pre-marital counselling is not necessary and that a failure to discharge that burden means that the court is left with no option but to order pre-marital counselling: Elkin supra 17 n 2.

The pre-marital counselling procedure is fully described in the 1977 Conciliation Court Report¹⁾ as follows:

1. Upon contacting the Marriage License Bureau, the couple is advised in writing about all the requirements for obtaining a marriage license, including the pre-marital counseling requirement. This information is contained in a pamphlet entitled 'A Message to Minors Needing Judicial Consent to Obtain a Marriage License.' ... This pamphlet is part of a 'Kit' handed to all minor couples at the Marriage License Bureau. The 'Kit' also includes a 'List of Pre-marital Counseling Services' for couples who need help in locating a qualified pre-marital counseling service ... In addition, the 'Kit' contains an 'Application for Order Consenting and for Granting Permission to Marry.' This is a confidential questionnaire developed by the Conciliation Court and is designed for research purposes. The questions ask for background information regarding the couple and the parents. All questionnaires are returned to the Conciliation Court by the Marriage License Bureau and are stored in the Conciliation Court for research purposes. Attached to each questionnaire is a letter from the counselor who provided the pre-marital counseling.
2. After obtaining the pre-marital counseling, the parties are required to obtain a written statement on the counselor's letterhead verifying the counseling.²⁾
3. Parties return to the Marriage License Bureau with all necessary documents including the counselor's letter.
4. If the judge grants consent,³⁾ the parties are then eligible

1) At 8-9. Cf Appendix 'C' below at 340.

2) The number of pre-marital counselling interviews in the years 1974 to 1977 were as follows:

<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>
2268	2467	2053	1692

In 1977 members of the clergy were responsible for 68,8% of the interviews conducted: 1977 Conciliation Court Report 9.

3) In 1977 consent was granted in 86,7% of the cases, denied in 8,6% of the cases, while 15,2% of the cases were postponed (deferred): 1977 Conciliation Court Report 9.

to obtain a marriage license.'

In his comprehensive review of section 4101 Elkin¹⁾ sets out what he considers to be the main purposes of pre-marital counselling, namely,

- '1. It is not the purpose of such counseling to talk a couple out of marriage;
2. To assist the couple to assess their emotional, economic, and social readiness for marriage;
3. To provide them with the opportunity to further evaluate the decision to marry at this time;
4. To enhance a couple's ability to establish the kind of marriage relationship that will help them grow as individuals, as well as a family;
5. To begin a dialogue that will continue for life;
6. To stimulate a system of communication which will encompass communication with self, communication with each other, and communication with the community;
7. To familiarize the couple with the nature of marriage as well as the realities, responsibilities and problems common to most marriages;
8. To explore the motivation of the parties to marry now;
9. When indicated, to discuss alternatives to marrying now. To create an awareness that there are alternatives;
10. To create an awareness of the strengths and weaknesses the couple brings into the marriage and their potential for coping with the weaknesses;
11. To explore and clarify their role expectations of each other;
12. To explore and evaluate their decision making process;
13. When indicated, to make appropriate referrals for whatever help the couple needs;

1) 'Premarital Counseling for Minors: The Los Angeles Experience' (1977) 26 Fam Coordinator 429, 437-438. Cf Appendix 'C' below.

14. To provide sex information that seems relevant to the couple's needs;
15. To explore any special circumstances surrounding the marriage, such as racial / ethnic differences, religious differences, pregnancy, physical and emotional handicaps, parental pressure etc;
16. To build a relationship of trust and confidence between counselor and the couple so that the couple will think in terms of getting help after the marriage, if such help is necessary.¹⁾

(C) Jurisdiction

With the above background in mind it is easier to appreciate the services offered by the Conciliation Court. Broadly speaking, these fall into three basic categories; namely,

- (i) pre-marital counselling;
- (ii) reconciliation counselling, separation counselling (where reconciliation is not possible) and custody / access counselling;
- (iii) post-dissolution counselling, especially in respect of custody / access disputes.²⁾

With regard to the Conciliation Court's acquisition of jurisdiction, section 1760 of the Code of Civil Procedure provides that -

'Whenever any controversy exists between the spouses which may, unless a reconciliation is achieved, result in the dissolution or annulment of the marriage or in the disruption of the household, and there is any minor child of the spouses or of either of them whose welfare might be affected thereby, the Conciliation Court shall have jurisdiction over the controversy and over the parties thereto and all persons having any relation to the controversy ...'

Accordingly, the Conciliation Court may acquire its jurisdiction in

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- 1) An evaluation of the Los Angeles pre-marital counselling procedure is undertaken below at 96-97 and 110.
 - 2) Post-dissolution counselling is dealt with below at 31-33.

any one of the following ways:

- (i) where the Superior Court itself has referred a matter to the Conciliation Court: ie a matter in which minor children are involved and where it appears to the Superior Court that there is a reasonable possibility of a reconciliation being effected;¹⁾
- (ii) where the parties are engaged in any proceedings against each other under the Family Law Act of 1970 and they have responded to an invitation by the Conciliation Court to use its services;²⁾
- (iii) where either or both of the parties are referred to the Conciliation Court by their attorneys;³⁾

- 1) S 1771 Code of Civil Procedure. This accounts for about 20% of the 'Petitions for Conciliation': Elkin 'Conciliation Courts: The Reintegration of Disintegrated Families' (1973) Fam Coordinator 63, 68.
- 2) The Family Law Act provides for the completion and filing by the petitioner of a confidential questionnaire at the same time that proceedings are initiated for the dissolution of a marriage. Provision is also made for the respondent to complete and submit a confidential questionnaire. The questionnaire is filed in the Conciliation Court and its purpose is two-fold: (i) it enables the conciliation court counsellor to determine the viability of the marriage and, (ii), it enables the Conciliation Court itself to determine which families might respond to an invitation to make use of the services offered by the court. Among the various questions asked is: 'Would you like counseling?' A positive answer immediately results in a letter from the presiding judge of the Conciliation Court enclosing a blank 'Petition for Conciliation', together with an invitation to utilize the court's services. This procedure accounts for about 20% of the annual total of petitions filed: Elkin ibid.
- 3) In former years the legal profession was reluctant to use the services of the Conciliation Court on the ground that they constituted a 'meddling' in their cases. There was also the suspicion that this would have an adverse affect on attorneys' fees. This feeling of antipathy has, however, proved to be unfounded since it has been shown that clients who have become reconciled are either able or more willing to pay the attorneys' fees incurred. Furthermore, happily reconciled clients are more likely to return to their attorneys with further legal work, such as drafting of wills. In any event, even if reconciliation proves unlikely or unsuccessful, the parties concerned will more than likely return to their attorneys. The position now is that by far the largest source of referral to the Conciliation Court is the legal profession itself; ie about 50% of the annual total of petitions filed: Elkin ibid.

- (iv) where either or both of the parties are referred to the Conciliation Court by members of the clergy, doctors, other family service agencies, or even friends.¹⁾

In short, it would not be incorrect to say that the Conciliation Court's services are available to anyone who walks in off the street and asks for them. It is not even necessary for any matrimonial action to be pending between the spouses and neither do there have to be any minor children involved. But where there are no minor children involved the Conciliation Court's jurisdiction would appear to be limited to those cases where application for assistance has been made (as opposed to an invitation to use the court's services), and then only if the work of the court in cases involving minors is not 'seriously impeded'.²⁾

(D) Counselling Procedure and Pleadings.³⁾

Proceedings are initiated in the Conciliation Court by the filing of a 'Petition for Conciliation' which is a form provided for by the Code of Civil Procedure. The petition, which is accompanied by an affidavit, sets out general information regarding the parties involved and their background. The petition can only be filed by either of the parties to the matrimonial dispute and it is done voluntarily without any pressure being brought to bear upon the parties. In this way the Conciliation Court is able to devote its resources to those marriages where one or both of the parties desire counselling. There are no filing fees or charges for services rendered by the Conciliation Court.

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- 1) This method of reference accounts for about 10% of the 'Petitions for Conciliation' Elkin ibid.
- 2) Howard 'Matrimonial Conciliation' (1962) 36 ALJ 148, 149. About 12% of the 'Petitions for Conciliation' are filed by couples without children: Elkin 'Conciliation Courts: The Reintegration of Disintegrated Families' (1973) 22 Fam Coordinator 63, 65.
- 3) See the references cited above at 14 n 1.

If urgent or immediate interim relief is sought, this must be mentioned in the accompanying affidavit. If the court is satisfied as to the substance of the allegations made,¹⁾ it will immediately grant the interim relief sought.²⁾

Where a petition has been filed then neither party may commence action for the dissolution or nullity of the marriage, or for maintenance, for a period of 30 days from the filing of the petition. This, however, only applies where proceedings between the parties have not yet actually commenced. But where proceedings between the parties have already been commenced then the filing of the petition will be no bar to further proceedings.³⁾

As soon as the petition has been filed a date, time and place is fixed for the 'hearing of the petition'. As Elkin⁴⁾ points out

'An effort is made to schedule the conference (hearing) as quickly as possible since these clients are usually at a point of crisis. The need to wait for counseling can be harmful to both parties.'

The respondent is then notified by means of an informal letter to attend the conference at the appointed date, time and place. Should it be necessary, however, a citation (summons) may be issued to compel the respondent's attendance. The reasoning behind the issue of the citation is explained by Elkin⁵⁾ as follows:

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- 1) Eg the threatened removal of children, or the disposal of money or property, or interference with the marital relationship.
 - 2) Burke 'The Role of Conciliation in Divorce Cases' (1961) 1 J Fam Law 209, 215.
 - 3) Burke op cit 220.
 - 4) 'Conciliation Courts: The Reintegration of Disintegrated Families' (1973) 22 Fam Coordinator 63, 64.
 - 5) 'Short Contact Counseling in a Conciliation Court' (1962) Social Casework - cited by Payne 451 n 433. See also the 1961 Report of the Subcommittee on Conciliation, Family Law Section, American Bar Association, which is comprehensively cited by Payne at 424-428, where it is pointed out that 'Considerable controversy exists in the field of reconciliation procedures as to the desirability or propriety of the use of any coercion whatever in the conciliation process. Many social workers find the use of coercion repugnant or ineffective. However, experience has proved what might be termed "Gentle judicial coercion" plays an important role in effecting reconciliations.'

'Our experience has shown that the use of authority can facilitate the process of short contact marital counseling. In some instances the respondent seems to have backed himself into a corner from which he cannot escape without further injury to his pride and an increase in his guilt feelings. A citation to appear for a counseling conference can then become a face-saving device that permits him to keep the appointment and get help.'¹⁾

In practice, the citation is only issued when it is felt that some constructive purpose in the interests of the welfare of the family may be served by securing the attendance of the respondent.²⁾ Furthermore, any third parties³⁾ named in the petition and the accompanying affidavit may also have a citation served upon them to attend a conference.

It must be stressed that the hearing of the petition and other conferences are governed by strict rules of secrecy. The characteristic feature of the Los Angeles counselling services is that it only operates on an intensive short-contact basis which can mean anything from one to six conferences, each one lasting approximately one and a half hours. If further counselling is required the parties will be referred to outside community counselling resources such as family service agencies, private non profit agencies, private practitioners and others on the court's list. In this way, on-going counselling can be maintained where it is felt that this would be beneficial to the parties.⁴⁾

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- 1) Help or relief need not necessarily come in the form of reconciliation. Thus, as was pointed out by Lester E Olson The Conciliation Court of Los Angeles County 6ed (1970), which is cited by Payne at 451, 'Even though no reconciliation is effected, these friendly and helpful conferences result in beneficial byproducts to both parties and particularly their children. Tensions are eased, hostilities reduced, common grounds of understanding created enabling the parties to amicably adjust their differences, such as harmonious visitation arrangements. Many times it promotes the settlement of controversial property rights and the elimination of a bitterly contested dissolution of marriage case.'
 - 2) Elkin 'Conciliation Courts: The Reintegration of Disintegrated Families' (1973) 22 Fam Coordinator 73, 66: Maddi 'The Effect of Conciliation Court Proceedings on Petitions for Dissolution of Marriage' (1973-74) 13 J Fam Law 495, 505.
 - 3) Eg the 'other' woman or interfering mothers-in-law.
 - 4) Burke 'The Role of Conciliation in Divorce Cases' (1961) 1 J Fam Law 209, 213-214. It is patently clear that the Los Angeles Conciliation Court lacks the resources to provide on-going therapeutic treatment to the thousands of couples who approach it each year: see also 16 n 1 above.

At the first hearing or conference the counsellor assigned to the case will initially interview the parties together and will outline to them the main functions of the conciliation court. He will also stress to the parties that they will not be coerced into doing, or agreeing to, anything against their will. It will also be emphasized to the parties that the counsellor's role is an impartial one.¹⁾ The parties are thereafter interviewed and counselled separately and then jointly.

While one of the parties is being separately interviewed or counselled²⁾ the other party, while waiting his or her turn, is given a 'Husband and Wife Agreement'³⁾ in blank form to read. This document, and its function, is described by Elkin⁴⁾ as follows:

'It' consists of approximately 25 pages, which covers practically every facet of married life and common marital problems⁵⁾... It fosters communication between the partners as they attempt to pinpoint the problems they are having and the actions each will take in order to correct the problems. It enables both the husband and wife to redefine their

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- 1) Burke supra 25 n 4 at 215-216: Elkin 'Conciliation Courts: The Reintegration of Disintegrated Families' (1973) 22 Fam Coordinator 63, 65.
 - 2) This takes place in an informal way in a private office.
 - 3) The 'Husband and Wife Agreement' is described by Manchester and Whetton 'Marital Conciliation in England and Wales' (1974) 23 ICLQ 339, 364 as 'bizarre'. See also Finlay 'Family Courts - Gimmick or Panacea?' (1969) ALJ 602, 606.
 - 4) 'Conciliation Courts: The Reintegration of Disintegrated Families' (1973) 22 Fam Coordinator 63, 67.
 - 5) Howard 'Matrimonial Conciliation' (1962) 36 ALJ 148, 150 lists some of the main headings appearing in this remarkable document; namely, forgetting the past, husband's role in the family, where wife works outside the home, religion, shared interests, mutual friends, social activities, recognition of accomplishments, falling out of love, speaking in normal tone of voice, bearing grudges, late hours, privacy, the importance of talking things over, personal appearance, meal times, children, parents' conduct towards child, sexual intercourse, the importance of love making, earnings, the family budget, family prayers, charge accounts, third persons in the home, alcoholic beverages, stepchildren. Foote, Levy and Sander at 1093 n 79 cite the following example of a clause in the 'Husband and Wife Agreement,' viz, 'The wife agrees to respond to the husband's efforts in lovemaking and not to act like a patient undergoing a physical examination. For the husband to acquire proficiency in making intercourse pleasurable to the wife, he must learn to relax physically and to take his time.' Cf Appendix 'C' below.

respective roles and responsibilities in the marriage. The agreement becomes a blueprint for a successful marriage, tailored to meet the needs of each family. Since the agreement mentions most of the problems commonly encountered in marriage, the partners usually find relief in the discovery that others have problems similar to theirs. This discovery gives them emotional support and hope.¹⁾

If the parties should indicate a willingness to enter into the 'Husband and Wife Agreement' only those portions of the document apposite to their particular needs will constitute the final agreement. An amendment in 1955 to section 1769 of the California Code of Civil Procedure gives a judge of the Conciliation Court the power to grant an order compelling compliance with the provisions of the agreement. Wilful failure to comply with the court order is then punishable as a contempt of court. In practice, however, contempt proceedings are rarely invoked. It is, nevertheless, a power that the court has, not only insofar as the respondent is concerned, but also in respect of any named co-respondent such as a mother-in-law or paramour.

The rationale behind the reduction of this agreement to writing is explained by Burke²⁾ as follows:

- '1. Memory may be short concerning the promises that one may make to bring about a reconciliation.
2. Having brought their troubles to the court the parties' promises to one another should be dignified by a formal court order requiring them to comply fully with such promises under penalty of being found in contempt of court for any wilful violation.

1) According to Manchester and Whetton 'Marital Conciliation in England and Wales' (1974) 23 ICLQ 339, 365, it is alleged by some that the 'Husband and Wife Agreement' is psychologically sound ... and entirely in keeping with the most advanced thinking in the psychiatric fields.'

2) Burke 'The Role of Conciliation in Divorce Cases' (1961) 1 J Fam Law 209, 217.

3. Having in mind that it is only by the mutual consent of the parties that the 30 day limitation upon the duration of orders of the conciliation court may be extended, a ['Husband and Wife'] agreement in writing serves as the means of securing the consent of the parties that the orders of the court shall remain in full force and effect until further order of the court.'

Of course, the parties may not wish to enter into the 'Husband and Wife Agreement'. Furthermore, either party is at liberty to request the court to terminate the agreement if the reconciliation has failed. In either of these events the role of the counsellor does not come to an end. The position is explained in the 1977 Conciliation Court Report¹⁾ as follows:

'A conciliation court is more than a reconciliation court. A conciliation court serves families. If, in the course of such service, a family does not reconcile, this does not mean that the counselor's concern and responsibility to the family is at an end. In such cases, we still offer a very important and worthwhile service in our counseling efforts to help the family terminate the marriage with dignity and minimal trauma, without the need to strike back - a need which is often responsible for post-divorce litigation. Conciliation court counselors recognize that a divorce decree cannot and does not end parental responsibility to the children - for the children are forever. Nor do problems stop when the divorce decree is final. Our goal with unreconciled families is to assist the husband and wife to focus feelings and decisions so they can effectively deal with the issues of separation, such as custody, support, visitation, division of property and also to continue their joint responsibilities to their children (and to themselves) in a constructive way. This makes it possible for couples to use the crisis of divorce as an opportunity for personal growth and fulfilment, rather than a vehicle for self-defeating, disabling behaviour.'

1) At 4.

Over the years the Los Angeles Conciliation Court has reported a remarkable degree of success. This alleged success is of particular significance to South Africa inasmuch as Los Angeles is a city comprising about 10 million people made up of many ethnic/racial groups. The Conciliation Court has strived to break down these natural barriers by making its services available to all. Accordingly, over the years its services were extended by the establishment of 'Neighborhood Service Centers'¹⁾ which operate in a non-court setting. The idea was to make the Conciliation Court's facilities more readily accessible to those who could not 'afford the cost of a bus fare, or parking, or telephoning the Conciliation Court ... or the price of gasoline.'²⁾ In this regard, for example, the counsellor in charge of the 'East Los Angeles Neighborhood Service Center' was of Mexican ancestry and spoke Spanish so that he was 'tuned in to the cultural background and values of the clientele he would serve.'³⁾ So also, the counsellor in charge of the 'South Central Los Angeles Neighborhood Service Center' was 'Black and sensitive to Black clients' culture and values.'⁴⁾ It may also be mentioned that court interpreters are provided for couples speaking any language: two of the counsellors are Spanish speaking and one counsellor can communicate with the deaf.⁵⁾

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- 1) Elkin 'Conciliation Courts: The Reintegration of Disintegrated Families' (1973) 22 Fam Coordinator 63, 67.
 - 2) 1977 Conciliation Court Report 13-14.
 - 3) 1976 Conciliation Court Report 12-14.
 - 4) 1976 Conciliation Court Report 14. Regrettably, since September 1976 the 'Neighborhood Service Centers' in East Los Angeles and South Central Los Angeles have been suspended from operations because of a financial crisis: see 16 n 1 above. Strenuous efforts are, however, being made to revive these services: see McIsaac 'Crisis Intervention Techniques in Insuring Conciliation Court Survival' (1977) 15 Concil Cts Rev - also reprinted in 1976 Conciliation Court Report 29-32.
 - 5) 1977 Conciliation Court Report 4.

(E) The Judge of the Conciliation Court

It is apposite to point out that the Conciliation Court is a court of law in every sense and it is not just an administrative organ. The court is presided over by a judge who is legally qualified in the same way as any judge. He is not just a mere figurehead. Of course, he takes no part whatsoever in the counselling of couples for the simple reason that he is not a trained counsellor.¹⁾ Although the judge's functions are generally supervisory in nature, he does perform a number of important judicial functions. Thus, for example, he reviews all 'Husband and Wife Agreements' and imposes thereon his imprimatur giving them the effect of court orders in much the same way as a South African judge makes a consent paper an order of court in a divorce action. He also presides over contempt proceedings and has the power to impose penalties for failure to comply with court orders: in practice, though, this power is sparingly used. He also grants the necessary orders where urgent interim relief is sought, such as restraining orders. It is through the judge of the Conciliation Court that the State maintains its interest in every matrimonial dispute.

Apart from his purely legal functions the judge supervises the staff of the court and through numerous meetings and conferences he is able to discuss and review the practices, proceedings and policies of the court. He also performs an important public relations function in that he makes frequent public appearances to publicise the functions and achievements of the court. Moreover, he engages in follow-up operation by communicating with couples who have reconciled. So far as possible, the judge will try to see all minor children involved in domestic disputes privately and informally in his chambers, especially where questions of custody and access are at issue.²⁾

1) Elkin 'Conciliation Courts: The Reintegration of Disintegrated Families' (1973) 22 Fam Coordinator 63, 67.

2) Further on the status and function of a judge of the Conciliation Court see Elkin supra at 67 and Burke 'The Role of Conciliation in Divorce Cases' (1961) 1 J Fam Law 209, 224-225.

In keeping with the legal atmosphere of the Conciliation Court, legal representation is permitted and never discouraged. In fact, where clients have been referred to the Conciliation Court, every effort is made to keep their lawyers fully informed of the progress made.¹⁾

(F) Post-Divorce Counselling²⁾

An extremely valuable service offered by the Los Angeles Conciliation Court is its post-divorce counselling which was first introduced in 1974. In this respect, an important distinction is made between 'legal divorce' and 'emotional divorce'. Elkin³⁾ explains the difference as follows:

'The divorce decree merely indicates that the legal aspects of the divorce may be over. But, more important than the legal divorce is the emotional divorce, which is a process that invariably continues beyond the legal experience.'

Thus, while a legal divorce puts an end to the marriage it does not necessarily end a family. The aims of the services offered by the Conciliation Court in this respect are succinctly set out in the 1977 Conciliation Court Report⁴⁾ as follows:

1. To help the natural parents reach an amicable agreement to insure that the best interests of the child are served.
2. When such an agreement is reached, to incorporate the mutually acceptable decisions into a written agreement which, when signed by the referring bench, becomes an order of court.
3. To open up channels of communication which have been clogged with unresolved anger and the need to strike back. These

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- 1) There does not seem to be any evidence of hostility on the part of the legal profession in Hawaii to the family court system. For the position in Los Angeles see above at 22 and for the position in Australia see below at 108-109.
 - 2) For a full discussion on the post-divorce counselling services see Elkin 'Postdivorce Counseling in a Conciliation Court' (1977) 1 Journ of Divorce 55: see also 1977 Conciliation Court Report 15-19.
 - 3) Ibid.
 - 4) At 15-16.

are usually carry-over problems that existed at the time the parties were married and were reinforced by the divorce itself.

4. To ascertain at what levels the natural parents are still emotionally connected in a self-defeating, destructive way. We are finding that the parties are often connected by bonds of anger that have never been broken and these bonds impede communication which in turn makes it exceedingly difficult for the natural parents to resolve problems that need resolution, if the best interest of the child is to be served.
5. To help the parties accept the reality that a divorce ends a marriage, but never ends the family where there are children, nor does the role of the parent end, for parents are forever.
6. Where there are step-parents due to re-marriage, to involve the step-parents in the total family system in a constructive way.
7. To help the parties become more aware of the destructive impact of their conflicts on the children.
8. When indicated and accepted by the parties, to make a referral to another community counseling resource for an ongoing type of counseling for the parents and/or the children.
9. To provide the children with an opportunity to discuss matters which are pressing them and to provide an opportunity for the parents and children to discuss matters of mutual concern.'

Since 1974, whenever it has been seised of a post-divorce case involving custody and/or access disputes, the Los Angeles Superior Court has adopted the practice of referring the parties to the Conciliation Court. Once the parties have been referred to the Conciliation Court for post-divorce counselling, the custody or access dispute is postponed for 60 days. The Conciliation Court thereafter interviews the parties on a short contact basis of between one to six sessions during which other parties involved, such as children and step-parents, are also interviewed. If the parties desire long-term, or ongoing, counselling, they will be referred to the community counselling services.

Post-divorce counselling is conducted on a confidential basis and

the counsellors do not submit reports to the court. To do so would mean that the counsellor would be placed in the same position as an investigator so that he will be seen to be part of the adversary process. As Elkin observes¹⁾ 'This would be inconsistent with his role, which is to diminish the impact of the adversary procedure rather than to increase its destructive impact'. The counsellor simply advises the referring court of the outcome of the counselling by placing a notice in the divorce file indicating whether an amicable agreement has been worked out or not. If an amicable agreement has been arrived at a copy of the agreement, which is placed in the court file, will be signed by the referring court giving it the effect of an order of court. The attorneys, if any, are then advised by post.

The rationale behind post-divorce counselling is to afford the parties in a custody and/or access dispute the opportunity of working out for themselves, in a non-adversary atmosphere, their own order.²⁾ As it is neatly expressed in the 1977 Conciliation Court Report³⁾ 'This is consistent with a basic principle in counseling that when crucial decisions are made for people and not with them, the likelihood of compliance is diminished.'

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- 1) 'Postdivorce Counseling in a Conciliation Court' (1977) 1 Journ of Divorce 55, 60.
 - 2) Post-divorce counselling in custody disputes can lead to a more ready acceptance of the final placement order. The parents themselves are generally incapable of being wholly objective with regard to the custody of their children 'because of the emotional state in which most domestic disputes occur': Galligan 'Protection of Children in Family Disputes' (1973) 4 Can BJ 10. In any event, when called upon to resolve a custody dispute the court is often confronted with choosing between alternatives in order to give effect to the best interests of a child : Mnookin 'Child-Custody Adjudication : Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemp Problems 226, 255. It is clear that each case depends on its own facts : Mnookin op cit 253. Very often all the facts are not before the court : Mnookin op cit 257-8.
 - 3) At 19.

3. The Family Court of the First Judicial Circuit of Hawaii¹⁾

(A) Introduction

Of all the American family courts, the Hawaii Family Court²⁾ is probably the most ambitious in that it seeks to amalgamate within its jurisdiction all legal issues relating to the family. The Hawaii Family Court owes its existence to the passing of the Family Court Act in 1965,³⁾ which is based on the Standard Family Court Act of 1959.⁴⁾

Arising out of its enthusiastic interest in the Standard Family Court Act of 1959 the Hawaii Commission on Children and Youth⁵⁾ set up a committee 'to study the present structure of legal services affecting children and families to determine whether such services could be improved by the establishment of a family court such as is outlined in the Standard Family Court Act.' The work of this committee, which was comprised of members of the legal profession, the medical profession, the clergy, the police force and the behavioural sciences such as social workers and psychiatrists, resulted in a 'Proposal for the

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- 1) The writer is particularly indebted to Mary Jane Lee, the director of the Family Court of the First Judicial Circuit, Hawaii, for much of the material and information upon which this account is based. One of the family courts comprehensively analysed by Dyson and Dyson is the Family Court of the First Judicial Circuit, Hawaii - hereafter referred to as the Hawaii Family Court. See also Corbett and King 'The Family Court of Hawaii' (1968) 2 Fam L Q 32.
- 2) The State of Hawaii, which comprises several islands, is divided into five judicial circuits. Family courts have been established in four of these circuits; viz, the First, Second, Third and Fifth Judicial Circuits: s 8 Hawaii Revised Statutes (Chap 571). Of these, the Family Court of the First Judicial Circuit, which serves the city and county of Honolulu, is the most important. Seventy-six percent of all family court cases are disposed of in the First Judicial Circuit, in which an estimated 886,600 persons live: 1977 Hawaii Report 37.
- 3) This Act came into force in July 1965: Hawaii Session Laws (Chap 232). Minor amendments have been effected to this Act. But all the legislative provisions relating to family courts have been consolidated by the Hawaii Revised Statutes (Chap 571).
- 4) Supra at 12-13.
- 5) The Commission on Children and Youth is a creation of statute and was first established in 1949: Corbett and King 'The Family Court of Hawaii' (1968) Fam LQ 32, 33.

Establishment of a Family Court in the First Circuit of Hawaii.¹⁾
 In proposing the establishment of a family court the committee generally followed the recommendations contained in the Standard Family Court Act of 1959, subject to minor modifications which took into account local needs and conditions.

The Hawaii Family Court is created by section 1 of the Hawaii Revised Statutes which states, inter alia, that -

'This chapter creates within this State a system of family courts and it shall be a policy and a purpose of the said courts to conduct all proceedings to the end that no adjudication by the court of the status of any child under this chapter shall be deemed a conviction; no such adjudication shall impose any civil disability ordinarily resulting from conviction; no child shall be found guilty or be deemed a criminal by reason of such adjudication; and no child shall be charged with crime or be convicted in any court except where jurisdiction is waived by the court'.

Section 1 also states that -

'This chapter shall be liberally construed to the end that children and families whose rights and well being are jeopardized shall be assisted and protected, and secured in those rights through action by the court; that the court may formulate a plan adapted to the requirements of the child and his family and the necessary protection of the community, and may utilize all State and Community resources to the extent possible in its implementation.'²⁾

As pointed out above³⁾, Hawaii is divided into 5 judicial circuits, of which the largest is the First Judicial Circuit. The Family Court of the First Judicial Circuit is a division of the Circuit Court System of Hawaii⁴⁾. However in moments of urgency or when the volume of cases so

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- 1) Report No 28 of 1964. The committee also comprised of members of both sexes and was, in fact, chaired by a female, Mrs Kinji Kanazawa.
 - 2) Cf s 1 Standard Family Court Act. It has been claimed that the Hawaii Family Court 'incorporates the essential intent and spirit of the Standard Act and of modern thinking in the fields of family law and the behavioural sciences.' Corbett and King 'The Family Court of Hawaii' (1968) 2 Fam L Q 32, 35.
 - 3) See 34 n 2 above.
 - 4) S 3 Hawaii Revised Statutes. The Circuit Court of Hawaii approximates the South African Supreme Court.

requires, the Chief Judge of the Supreme Court of Hawaii¹⁾ may appoint one or more District Family Court Judges to preside over a District Family Court²⁾. It is important to note that a District Family Court has the same status as a Circuit Family Court³⁾. For practical purposes, there is in effect no difference at all between a Circuit Family Court and a District Family Court and appeals from both lie to the Supreme Court of Hawaii.

(B) Jurisdiction

The Hawaii Family Court, unlike the Conciliation Court of Los Angeles, is more recognizable as a court of law. It assumes jurisdiction over both children and adults. With regard to children⁴⁾ it has -

'exclusive original jurisdiction in proceedings:

- (1) concerning any person who is alleged to have committed an act prior to achieving 18 years of age which would constitute a violation of any federal, state or local law or municipal ordinance ...;
- (2) concerning any child living or found within the circuit,
 - (A) who is neglected as to proper or necessary support, or as to medical or other care necessary for his well-being, or who is abandoned by his parent or other custodian; or
 - (B) who is subjected to physical or emotional deprivation or abuse as a result of the failure of any person or agency to exercise that degree of care for which he or it is legally responsible; or
 - (C) who is beyond the control of his parent or other custodian or whose behavior is injurious to his own or other's welfare; or
 - (D) who is neither attending school nor receiving educational services required by law whether through his own misbehavior or nonattendance or otherwise.
- (3) to determine the custody of any child or appoint a guardian of the person of any child;

1) The Supreme Court of Hawaii approximates the Appellate Division of the Supreme Court of South Africa.

2) 58 Hawaii Revised Statutes. For the broad differences between the jurisdiction of the Circuit Court and the jurisdiction of the District Court see below at 39 nn 2 and 3.

3) S 3 as read with the definition of 'Court' in s 2 Hawaii Revised Statutes see also 35 n 4 above.

4) S 11 Hawaii Revised Statutes: of a 8 Standard Family Court ...

- (4) for the adoption of a person ...;
- (5) for termination of parental rights ...;
- (6) for the judicial consent to the marriage, employment, or enlistment of a child, when such consent is required by law;
- (7) for the treatment or commitment of a mentally defective, mentally retarded or mentally ill child ...'

With regard to section 11 (i) of the Hawaii Revised Statutes, which is cited immediately above, the family court may waive its jurisdiction, after full investigation, over any minor who is older than 16 years and who is alleged to have committed a serious criminal offence.¹⁾

The family court thereafter ceases to have jurisdiction over that minor in respect of that, or any subsequent, offence.²⁾ This provision is clearly designed for those minors³⁾ who, notwithstanding the fact that they are only aged between 16 years and 18 years, allegedly commit a serious offence warranting the attention of the ordinary adult criminal court or who have had previous contact with the family court and have not responded to the special treatment ordered for them by that court. It would seem that a minor under the age of 16 years is never referred to the ordinary criminal court.

In order to protect the jurisdiction the family court has over minors, section 12 of the Hawaii Revised Statutes provides that -

'If, during the pendency of a criminal charge against a minor in another court, it is ascertained that he was less than eighteen years old when he allegedly committed the offence, such other court shall forthwith transfer the case to the family court ...'⁴⁾

It is clear from this provision that the ordinary criminal court has no jurisdiction over minors under the age of 18 years, unless the family court has waived its jurisdiction over minors between the ages of 16 and 18 years. This provision, which is couched in peremptory terms, makes it obligatory for the ordinary criminal court to rectify any

1) S 22 (a) Hawaii Revised Statutes. There is no similar provision in the Standard Family Court Act of 1959. Such a provision was, however, recommended by the American Children's Bureau: (1959) 5 NCPA Journ 99, 147-148. A serious crime is defined as 'an act which constitutes a felony if committed by an adult!'

2) S 22 (b) Hawaii Revised Statutes.

3) A minor is defined by s 2 (5) as 'a person less than eighteen years of age' whereas a adult /s 2 (6)/ is defined as 'a person eighteen years of age or older.'

4) Cf s 9 Standard Family Court Act.

error where a minor under 18 years of age, or where a person over the age of 18 years is alleged to have committed a criminal offence while still under 18 years of age, has been erroneously arraigned before it.

With regard to adults¹⁾ the Hawaii Family Court has -

'exclusive original jurisdiction:

- (1) to try any offense committed against a child by his parent or guardian or by any other person having his legal or physical custody ...;
- (2) to try any adult charged with:
 - (a) deserting, abandoning, or failing to provide support for any person in violation of law;
 - (b) any offense, other than a felony, against the person of the defendant's husband or wife.²⁾

In any case within paragraphs (1) or (2) of this section the court may, in its discretion, waive its jurisdiction over the offense charged.

- (3) in all proceedings for divorce and annulment, as well as paternity proceedings⁷ ...;
- (4) in proceedings for the granting of, enforcement of, and reciprocal enforcement of, maintenance orders⁷ ...;
- (5) for the commitment of an adult alleged to be mentally defective or mentally ill;
- (6) in all proceedings for support between parent and child or between husband and wife, and in all proceedings to appoint a guardian of the person of an adult;
- (7) in all proceedings for waiver of jurisdiction over an adult who was a child at the time of an alleged criminal act ...'

It would seem that the main effect of consolidating jurisdiction in family law matters has been the elimination of jurisdictional disputes.³⁾

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- 1) S 14 Hawaii Revised Statutes: cf s 11 Standard Family Court Act.
 - 2) The offences provided for in s 14 (2) are generally termed 'family offences' which would constitute 'disorderly conduct or an assault between members of the same family or household.' Cases of this sort not suitable for handling in the family court are transferred to a criminal court : Dyson and Dyson 530.
 - 3) Dyson and Dyson 91.

(C) The Officers and Status of the Family Court

There are presently 2 circuit court judges and 5 district court judges of the Hawaii Family Court, one of the circuit court judges being described as the senior judge.¹⁾ Circuit court judges are appointed for 10-year terms and they must have practised as attorneys for at least 10 years.²⁾ District court judges are appointed for 6-year terms and they must have practised as attorneys in Hawaii for at least 5 years.³⁾

Provision is also made for the appointment of a director of the family court whose functions shall be to -

- '(1) prepare an annual budget ...;
- (2) formulate procedures governing the routine administration of court services;
- (3) make recommendations to the court for improvement in court services;
- (4) make recommendations to the senior judge or the judge for the appointment of administrative, supervisory, consultant, and necessary professional clerical and other personnel to perform the duties assigned to the court and the director;
- (5) collect necessary statistics and prepare an annual report of the work of the court;

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- 1) 1977 Hawaii Report 37. Since January 1976 the salary of a family court judge has been \$ 40,000 p.a.- s 8 (2) Hawaii Revised Statutes.
 - 2) 1977 Hawaii Report 16: 'The circuit courts have exclusive jurisdiction in all felony cases, civil suits involving more than \$ 5000, probate proceedings, and conduct all jury trials, including criminal misdemeanor and traffic cases from the district court when a jury trial is requested. Circuit courts exercise concurrent jurisdiction with district courts in civil matters involving less than \$ 5000 but more than \$ 500. Appeals go directly to the Supreme Court.' (ibid.)
 - 3) 1977 Hawaii Report 25. District courts have limited civil and criminal jurisdiction. They have exclusive jurisdiction in cases involving \$ 500 or less, but have concurrent jurisdiction with the circuit court in respect of civil cases involving amounts between \$ 500 and \$ 5000. Their criminal jurisdiction is limited to cases in which the maximum prison sentence provided for is one year. They have no jurisdiction over jury trials. All appeals from the district court go direct to the Supreme Court. S 54 Hawaii Revised Statutes.

- (6) provide supervision and consultation to the administrative and supervisory staff regarding the administration of court services, recruitment of personnel, in-service training, and fiscal and office management;
- (7) perform such other duties as the senior judge or the judge shall specify.¹⁾

To assist the judges of the family court and the director in the performance of their duties provision is made²⁾ for the appointment of probation officers, social workers, marital counsellors, physicians, psychologists, psychiatrists³⁾ and 'other professionally competent persons'.⁴⁾ The judges and the director are assisted by a staff of 143 persons.⁵⁾

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- 1) S 6 (a) Hawaii Revised Statutes. Cf s 6 (1) Standard Family Court Act.
- 2) By s 6 (b) Hawaii Revised Statutes. Cf s 6 (2) Standard Family Court Act.
- 3) As to physicians, psychologists and psychiatrists see Dyson and Dyson at 557. It would appear that psychiatrists are, in fact, only appointed to assist the family court on an ad hoc basis. A psychologist is, however, appointed on a full-time basis and he is stationed in the court buildings so that he is accessible for consultation at all times. The functions of the psychologist are described by Dyson and Dyson at 28-29.
- 4) Legally qualified persons to assist family court judges in their legal work (a type of assessor), intake workers and staff to assist in the collection of maintenance money would appear to fall within the ambit of the general description 'other professionally competent persons': Dyson and Dyson 562-563; 565-568. Thus, for example, 'Overworked judges may need help in researching legal issues ... In doubtful cases, intake workers may need legal advice on such questions as whether certain facts constitute probable jurisdiction or whether the evidence seems sufficient to establish that an act was committed. A lawyer may be necessary to prepare and present the case against a respondent, especially if the respondent is represented by counsel.' (ibid)
- 5) 1977 Hawaii Report 37.

Statutory effect is given to the status of the Hawaii Family Court by section 3 of the Hawaii Revised Statutes¹⁾ which states, inter alia, that 'The family courts shall be divisions of the circuit courts of the State and shall not be deemed to be inferior courts ...' Dyson and Dyson report²⁾ that practical effect appear to have been given to this statutory sentiment in that

'The family court is housed in the general judiciary building, both in the first circuit and on the outer islands; it shares physical advantages available to all circuit judges, such as air conditioning ... and access to the well stocked library of the supreme court.'³⁾

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- 1) Cf s 3 Standard Family Court Act.
 - 2) At 521.
 - 3) This state of affairs is in direct contrast with that prevailing in New York and Rhode Island in respect of which it is alleged that 'dignity may be sacrificed if the family court is not set up as a division of the highest trial court.' (Dyson and Dyson 522). In both New York and Rhode Island, unlike Hawaii, their family courts operate as separate specialized courts rather than as divisions of the supreme court. Both of these courts accordingly lack the facilities and advantages that are enjoyed by their respective supreme courts, such as common library and common room facilities. With regard to the Rhode Island Family Court, for example, Dyson and Dyson (ibid) report that the business of the court is conducted in 'an antiquated, poorly heated, former school building ... The building lacks a library for the judges; personnel offices are noisy and crowded; there are no conference rooms and lawyers must confer with their clients while standing in busy corridors. The building has been called a firetrap, potentially dangerous for employees and for court records stored in non-fireproof vaults.' Dyson and Dyson (at 523) describe the New York Family Court as 'poor man's court - lawyers are rare, court rooms are bare, toilet walls are defaced. The court's waiting rooms resemble those at hospital clinics.' On the New York Family Court see also Paulsen 'Juvenile Courts, Family Courts and the Poor Man' (1966) 54 Calif LR 694.

(D) Procedure Applicable to Children

Insofar as the acquisition of jurisdiction over children, or the initiation of cases involving children, is concerned the Hawaii Revised Statutes distinguish between a 'violation of a law or ordinance'¹⁾ and cases falling within the provisions of section 11.²⁾ In the former case, the family court automatically assumes jurisdiction when a citation or summons is issued without the need to conduct a preliminary investigation or to file a petition. In the latter case, if it is alleged, or brought to the notice of the family court, that a minor falls within the scope of section 11, then the 'court shall make a preliminary investigation to determine whether the interests of the public or of the minor require that further action be taken.'³⁾ The purpose of this preliminary investigation is to afford the intake workers the opportunity of processing those cases which should be dealt with in the family court in the normal course. Where further action is decided upon the court will order the filing of a 'journal petition to commence proceedings.'⁴⁾ In this regard it must be noted that section 44 of the Hawaii Revised Statutes states, inter alia, that:

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- 1) S 21 (b). Cf s 12 (2) Standard Family Court Act.
 - 2) S 11 is cited in full above at 36-37.
 - 3) S 21 (a) Hawaii Revised Statutes. Cf s 12 (1) Standard Family Court Act.
 - 4) Dyson and Dyson (at 4) remark that 'the law calls for a thorough investigation of complaints relative to juvenile matters before /a/ formal petition is filed.' But in a comment on the equivalent section of the Standard Family Court Act of 1959 (ie s 12) in the (1959) 5 N P P A Journ: 99, 124-125, it is pointed out that this 'non-judicial' or 'unofficial' way of handling cases is open to abuse. This reservation clearly has been supported by the criticisms of the American Supreme Court in Kent 383 US 541 and Gault 387 US 1.

'No child under the age of twelve shall be adjudged to come within section 11 (1) without the written recommendation of a psychiatrist or other physician duly qualified by special training and experience in the practice of child psychiatry.'

In respect of those cases where it is decided that no further action is required they are disposed of on an informal basis. But, 'efforts to effect informal adjustments may be continued not longer than 3 months without review by the judge ...'¹⁾

Where the filing of a 'journal petition' is authorized, this becomes the responsibility of the person making the initial complaint. The petition, supported by verified statements, shall contain the following information:

- '(1) the facts which bring the child within the purview of this chapter;
- (2) the name, age and residence of the child;
- (3) the names and residences of his parents;
- (4) the name and residence of his legal guardian if there be one, of the person or persons having custody or control of the child, or of the nearest known relative if no parent or guardian can be found.'²⁾

A summons is thereafter issued and served on the person or persons having the custody or control of the minor to appear personally and to bring the minor before the court at the stated time and place. If the custodian is not the parent or guardian of the minor, then the parent or guardian is also notified by personal service of the time and place of the hearing.³⁾ Failure to comply with the summons may result in a contempt of court charge.⁴⁾

1) S 21 (a) Hawaii Revised Statutes.

2) S 21 (d). Cf s 12 (4) Standard Family Court Act.

3) S 23. Cf s 14 Standard Family Court Act.

4) S 24. Cf s 15 Standard Family Court Act.

The hearing itself is characterized by a lack of formality.¹⁾ Hearings involving adults are heard separately from cases involving children. A record of the proceedings is kept unless the right to a record is waived or the court orders otherwise. The general public are excluded from attending the hearings. The parents, legal custodian or guardian or the minor are advised of the right to be legally represented.²⁾ Significantly, the Hawaii Revised Statutes are silent on the question of the right or otherwise to legal representation at the intake or processing stage.³⁾ Any person making or filing a written report, study or examination is liable to direct and cross examination on request.⁴⁾ Where a ruling is given or a finding is made which is adverse to a parent or guardian, and such parent or guardian is without legal representation, the court must inform them of their right to appeal to the Hawaii Supreme Court. If an appeal is noted the 'record on appeal shall be given a fictitious title to safeguard against publication of the names of the children or minors involved.'⁵⁾

If at the conclusion of the hearing a minor is found to fall within the provisions of section 11 (1) of the Hawaii Revised Statutes in that he has contravened or attempted to contravene any federal, state or local law, or municipal ordinance, the court may deal with such minor in the manner prescribed by section 48 (1) in terms of which the court may -

- '(a) place the child on probation in his own house, or in the custody of a suitable person elsewhere, upon conditions determined by the court, or
- (b) ... vest legal custody of the child, after prior consultation with the agency or institution in the Hawaii youth correctional facility in a local public agency or institution; or in any

1) S 41 states, inter alia, that 'The hearings may be conducted in an informal manner and may be adjourned from time to time.' Cf s 19 Standard Family Court Act. The judges of the family court do not wear robes: Dyson and Dyson 65.

2) Ibid.

3) Dyson and Dyson 5-7.

4) S 41 Hawaii Revised Statutes.

5) S 54. See also s 84. Cf s 28 Standard Family Court Act.

private institution or agency authorized by the court to care for children; or place him in a private home ...¹⁾

It will be noted that the above powers of the court are so framed that a minor is never committed to a prison or correctional institution for adult offenders. But, in respect of a child between 16 and 18 years of age who commits a crime falling within the description of a 'felony' and in respect of whom the court finds 'is not treatable in any available institution or facility ... designed for the care and treatment of children, or that the safety of the community requires that the person continue under judicial restraint for a period extending beyond his minority', the court may waive its jurisdiction.²⁾ If jurisdiction is waived, such minor thereafter falls within the jurisdiction of the ordinary criminal courts. Thus, apart from the situation where jurisdiction is waived, every effort is made to give effect to the best interests and welfare of every minor before the court so that the interests of the community generally take second place.

With regard to minors who fall within the ambit of section 11 (2) of the Hawaii Revised Statutes³⁾ the court is given a number of discretionary powers. For example, the court may 'place the child under protective supervision ... in his own home, or in the custody of a suitable person or agency elsewhere, upon conditions determined by the court.'⁴⁾ Alternatively, the court may grant the custody of the child to an 'agency or institution licensed or approved by the state to care for children.'⁵⁾ The court may also order 'whatever care or treatment is authorized by law'.⁶⁾ In this

1) Cf s 24 (1) Standard Family Court Act.

2) S 22 (a) Hawaii Revised Statutes: see above at 37.

3) See above at 36 for s 11 (2).

4) S 48 (2) (a). Cf s 24 (2) (a) Standard Family Court Act.

5) S 48 (2) (b). Cf s 24 (2) (b) Standard Family Court Act.

6) S 48 (5). Cf s 24 (5) Standard Family Court Act and see Dyson and Dyson 82.

respect, section 44¹⁾ gives the court the power 'to order that a child or minor ... shall be examined by a physician, surgeon, psychiatrist, or psychologist, and it may order treatment by them of a child or minor who has been adjudicated by the court.' Finally, 'the court may dismiss the petition or otherwise terminate its jurisdiction at any time.'²⁾

(E) Procedure Applicable to Adults

As to adults, a distinction is made between criminal and non-criminal matters. The procedure applicable to criminal cases falling within the jurisdiction of the Hawaii Family Court is exactly the same as that applied in the ordinary criminal courts except that before a criminal case is prosecuted in the family court a preliminary investigation may be conducted if the 'defendant or the parties in interest' give their consent.³⁾ The purpose of the preliminary investigation is to try and resolve on an amicable basis any complaints of a criminal nature, particularly where the accused and the complainant have a close relationship. This does not mean to say that the family court will automatically always try to resolve on an amicable basis all criminal cases, especially where children are the complainants. The court may, for example, terminate the offending parent's parental rights.⁴⁾ But before taking such a drastic step the safety valve of a preliminary hearing is available if necessary. Where it is necessary 'to protect the welfare of the persons before the court' the case may be heard in chambers and persons having no direct interest in the case may be excluded.⁵⁾ Finally, in regard to criminal actions the court is enjoined to make use of the same pre-sentencing investigation reports that are compiled in respect of ordinary

1) Cf s 22 Standard Family Court Act.

2) S 48 (9) Hawaii Revised Statutes.

3) S 42. Cf s 20 Standard Family Court Act. Dyson and Dyson 44.

4) S 61 (b) Hawaii Revised Statutes. See below at 49 for the termination of parental rights.

5) S 42 Hawaii Revised Statutes.

criminal cases.¹⁾

The preliminary investigation procedure has an equally important part to play in non-criminal matters. Thus, with a view to deciding whether a formal hearing is necessary in respect of those matters covered by sections 14 (3),²⁾ 14 (4)³⁾ and 14 (5)⁴⁾ of the Hawaii Revised Statutes a preliminary investigation may be conducted 'with the consent of the parties in interest'.⁵⁾

So as to place the family court in a position to arrive at a decision which will be in the best interests of any minor involved in a criminal or non-criminal case, the court is enjoined by the provisions of section 45 of the Hawaii Revised Statutes to make use of social study and pre-sentencing reports.⁶⁾ Such social study reports

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- 1) S 45 Hawaii Revised Statutes. See below for a discussion on s 45.
 - 2) Divorce, annulment and determination of paternity.
 - 3) The granting, enforcement, and reciprocal enforcement, of maintenance orders.
 - 4) Commitment of adults alleged to be mentally defective or mentally ill.
 - 5) S 42 Hawaii Revised Statutes.
 - 6) Cf s 23 Standard Family Court Act. Unlike the Hawaii legislation, s 23 Standard Family Court Act prescribes the minimum matters that shall be covered by the report; viz. 'The investigation shall cover the circumstances of the offense or complaint, the social history and present condition of the child or litigants and family, and plans for the child's immediate care...; in cases of support, it shall include such matters as earnings, financial obligations, and employment.' Despite these differences, the provisions of s 45 Hawaii Revised Statutes apparently reflect the clearly stated sentiment of the Hawaii State Commission on Children and Youth in its report No. 28 of July 1964 at 3 (see above at 35) which reads: 'It is vital that a family court always be mindful of the rights and responsibilities of parents in its attempt to protect the interests of children. The State, as parens patriae, can involve itself in a family situation only when it becomes apparent that the parents have been unable or unwilling to carry out their responsibilities. The court must be mindful also of the State's responsibility to protect the children and to assure that they are properly supported. Thus, in the interests of the public as well as the children, the judge needs all the relevant information he can get from a person not involved in the proceedings and who is qualified by training and experience to secure it objectively.' According to the 1977 Hawaii Report (Table 13) a total of 238 requests for social study investigations were made.

are obligatory in cases concerning minors falling within the ambit of sections 11 (1) and 11 (2) of the Hawaii Revised Statutes,¹⁾ unless the court otherwise orders.²⁾ They are also obligatory 'in proceedings to decide disputed or undetermined legal custody and in custody disputes arising out of a divorce action', unless the court otherwise orders.³⁾ But such reports may only be called for where the judge so exercises his discretion where it is believed to be 'necessary to assure adequate protection of the minor or of any other person involved in the case' and 'in support cases covering financial ability and other matters pertinent to making an order of support.'⁴⁾

It will be recalled⁵⁾ that any person making or filing a written report, study or examination is liable to direct and cross examination on request. In practice, however, the maker of such report is very rarely called upon to submit to cross examination even where one or other of the parties is legally represented. The recommendations of the maker of the report are generally accepted without question. The value of such reports cannot be over-emphasized. As Dyson and Dyson point out:⁶⁾

'Not only does the court receive a useful guide in reaching a decision but the investigators are often able to smooth over a number of problems during the investigation process itself. For example, a social worker in exploring whether a father claiming custody can provide a suitable home may induce the father to withdraw his claim voluntarily, by reasoning with him that he cannot change diapers or that his mother is probably going to end up raising the child.'

1) See above at 36 for ss 11 (1) and 11 (2).

2) S 45 Hawaii Revised Statutes.

3) Ibid.

4) Ibid.

5) See above at 55 n 4. S 41 Hawaii Revised Statutes.

6) At 35.

(F) Termination of Parental Rights

An innovative and unique procedure for the termination of parental rights is provided for by section 61 of the Hawaii Revised Statutes. A distinction is made between the voluntary and involuntary termination of parental rights. In the former case, 'the parents or either parent or the surviving parent who desire to relinquish parental rights to any natural or adopted child and thus make the child available for adoption or readoption' may make the necessary application to the family court by way of petition. Insofar as an unborn child is concerned such petition may be filed by the mother at any time after the sixth month of pregnancy. But after the birth of the child the mother is expected to provide written confirmation of her petition before the court can order the adoption to take place. Alternatively, the mother must be given 10 days notice of the court's intention to order the termination of parental rights and allow the mother an opportunity to be heard.¹⁾

As to the involuntary termination of parental rights this may occur in any one of the following instances;²⁾ namely, where a legal parent:

- (a) has deserted the child without affording means of identification for a period of at least 90 days; or
- (b) has voluntarily surrendered the care and custody of the child to another for a period of at least two years; or
- (c) has failed when the child is in the custody of another to communicate with the child when able to do so for a period of at least one year; or
- (d) has failed when the child is in the custody of another to provide for the care and support of the child when able to do so for a period of at least one year; or

1) The same period of 10 days notice must also be given to the parents or surviving parent where they have previously filed a petition to relinquish their parental rights. The procedure described here would appear to apply to both legitimate and illegitimate children. But notice of termination of parental rights also must be given to the child's father /referred to in s 61 (4) Hawaii Revised Statutes as the 'legal, adjudicated or presumed father' unless the identity or whereabouts of the father is unknown.

2) S 61 (b) Hawaii Revised Statutes.

- (e) whose child has been removed from his physical custody in terms of section 11 (2) (A) of the Hawaii Revised Statutes¹⁾ and who is unable to provide immediately and in the foreseeable future for the care necessary for the well-being of the child; or
- (f) has been found to be mentally ill or mentally retarded and incapacitated from giving consent to the adoption of, or from providing adequate care to the child; or
- (g) has been found not to be the child's natural or adoptive father.

The petition to terminate the rights of any parent on any of the above grounds may be filed 'by some responsible adult person on behalf of the child'.²⁾ Furthermore, 'a copy of the petition, together with notice of the time and place of the hearing thereof, shall be personally served at least twenty days prior to the hearing upon the parent whose rights are sought to be terminated.'³⁾

Regardless of whether the petition to terminate parental rights is voluntary or involuntary, a copy thereof must be forwarded to the director of the department of social services and housing.⁴⁾ The director shall then have the right of appearance on behalf of the child at any hearing as well as the right to be heard. He is also accorded the same rights of appeal as any other party to the proceedings and, to this extent, he is entitled to rely on the assistance of the Hawaii Attorney-General.⁵⁾ The director of social services and housing, any petitioner, or any parents whose parental rights are affected, may request 'an objective investigation of the circumstances of the minor and of the parent or parents concerned.'⁶⁾ Upon receipt of such

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- 1) See above at 36 for s 11 (2) (A) which deals with a child who is found to be neglected in that he has not received proper support, medical or other care necessary for his well-being, or who has been abandoned.
- 2) S 61 (b) (3) Hawaii Revised Statutes. Although the filing of a petition to terminate parental rights 'by some responsible adult person' seems to be very wide it must be remembered that most of the instances in which this may be done constitute serious charges of child neglect for which remedial action is needed. In practice, it would be an intake worker (see 40 n 4 above) who would file the petition on receipt of a complaint from a relative, neighbour or friend of the child.
- 3) Ibid.
- 4) S 62 Hawaii Revised Statutes.
- 5) Ibid.
- 6) Ibid.

request the court must adjourn the matter for at least 30 days to enable the requisite report to be filed which, when filed, forms part of the court record. If necessary, the court may 'appoint a guardian ad litem to represent and defend the interests of the child ... or of any minor parent.'¹⁾

The right to appeal against an order terminating parental rights is preserved but it is limited to the ground that the order was not in the best interests and welfare of the child concerned.²⁾ The order to terminate parental rights shall not 'operate to terminate the mutual rights of inheritance of the child and the parent or parents involved, or to terminate the legal duties and liabilities of the parent or parents, unless and until the child has been legally adopted'.³⁾

(G) Counselling and Divorce Procedure

Like the Standard Family Court Act, the Hawaii Revised Statutes does not make specific provision for pre- or post-divorce counselling. But the power to order the parties to a matrimonial dispute to submit to counselling seems to be inherent in the provisions of section 42 of the Hawaii Revised Statutes which provides, inter alia, that in actions for divorce the court may make a preliminary investigation and 'with the consent of the parties ... may make such adjustment as is practicable without further formal procedures.'⁴⁾ Apart from this, the Director of the Hawaii Family Court reports⁵⁾ that

'Marital counseling services are provided to clients who seek this assistance.'⁶⁾ However, this ... service is limited to short term counseling within a 60 day period at which time referral is

1) Ibid.

2) S 63 Hawaii Revised Statutes.

3) Ibid.

4) The 1977 Annual Report (Table 13) reveals that the Hawaii Family Court ordered counselling in 12 cases in the period covered by the report.

5) In a private communication addressed to the writer in May 1978.

6) The 1977 Annual Report (Table 13) reveals that there were 128 cases for counselling filed prior to the initiation of a divorce action.

made to another community agency for longer term counseling or toward hopefully having assisted the couple in reducing or ameliorating their hostilities toward each other.'

Apparently, the voluntary use of this facility is not too frequently resorted to since 'middle-class people who can afford to go elsewhere are not likely to seek advice at the family court.'¹⁾ In a pamphlet entitled 'You Are Still Parents'²⁾ ten social agencies and organisations in Honolulu are listed and which are available to people experiencing post-divorce problems regarding the custody of, and access to, their minor children.

But where there are any minor children involved in any divorce, the person filing the complaint for divorce is required at the same time to complete a 'conciliation form'.³⁾ The family court personnel will then review the information contained in the form and may then decide to contact the parties involved to offer them the services of the court. This offer may be accepted or rejected by the parties concerned and in this way the voluntariness of the services offered by the court is preserved. No pressure is put on the parties one way or the other.

If a divorce proceeds as an uncontested matter, the case is set down by the plaintiff's attorney for hearing in a closed court room. If, however, the case is being contested, then either party may set the case down for hearing. Each party must provide full

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- 1) Dyson and Dyson 39 quoting the Director of the Hawaii Family Court.
 - 2) Prepared and published by the Hawaii State Judiciary in 1975. The main purpose of this pamphlet, which is handed to every divorced or separated couple, is to emphasise to divorced and separated couples that they are still responsible to their children for their support; for the provision of advice and guidance to their children as they grow up; and for assisting their children to cope with their changed world brought about by the divorce or separation. A pamphlet published by the Los Angeles Conciliation Court has a similar theme. See Appendix 'A' below.
 - 3) Information on this aspect of the Hawaii divorce procedure has been gleaned from a short handbook entitled 'Divorce In Hawaii', prepared and published by the Hawaii State Judiciary in 1976.

financial disclosure and if the custody of, and access to, any minor children are at issue a social study report must be compiled before the hearing. In the normal course, a pre-hearing conference is held between the judge and the attorneys for the parties 'to refine issues and suggest settlement.' If no agreement is reached on the contested matters the case must then proceed to trial in the usual way after which the decree of divorce may be granted.

In cases where urgent relief is sought at the pre-divorce stage, such as interim maintenance, protection from physical harm, protection against the wasting or squandering of matrimonial property, or in respect of the custody of minor children, this is readily available in the form of an 'order to show cause.'¹⁾ This order is served on the defendant who is allowed to file a reply. If the parties cannot reach agreement on any of the issues raised in the 'order to show cause' the matter is then set down for hearing in court not less than 48 hours after service of the order.

(H) Statistical Data²⁾

Statistics reflected in the 1977 Annual Report³⁾ show that the family court carries a very heavy caseload. For the period 1976-1977 a total of 15756 cases were initiated in the family court. This together with a total of 8094 cases pending at the beginning of the period under consideration, meant that the family court had a total caseload of 23850 cases, in respect of which a final decision was reached in 14609 cases: this represented an increase of 10% over the number of cases completed in the previous year.⁴⁾

1) According to the 1977 Annual Report 76, a total of 1099 'orders to show cause' were filed. At the beginning of the period under consideration 879 such orders were pending. By the end of the period under consideration 828 orders had been finalised: 407 matters were contested, 55 uncontested and 366 resolved through other means: eg as a result of a pre-hearing conferring between the judge and the attorneys for the parties.

2) The statistical data cited here only refers to the First Judicial Circuit, Honolulu.

3) Table 13.

4) For a full appreciation of the statistical data cited here it must be remembered that for the period under consideration 2 circuit court judges and 5 district court judges, supported by a staff of 143 persons, were responsible for the total caseload: 1977 Annual Report 37

More specifically, with regard to divorce the family court carried a total caseload of 6825 cases in respect of which finality was reached in 4265 cases. Of these completed cases 278 were contested while 3513 were uncontested. Divorce cases accounted for the largest part of the family court's workload.

Apart from divorce cases, the family court also disposed of 3653 cases of children involved in 'law violations.' Final adoption orders were granted in 514 cases while at the end of the period under consideration 364 adoption cases were still outstanding. Paternity proceedings were also concluded in 363 cases.

4. The Family Court of Australia

(A) Background, Objectives and Status

'Possibly the most humane and enlightened social reform to be enacted in Australia since the Second World War' is how the Hon Kep Enderby¹⁾ described the Family Law Act of 1975.²⁾ It is not the function of this work to deal with all the changes brought about by the Family Law Act.³⁾ Suffice to point out that the Act has, inter alia, swept away the old fault-principle of Australian divorce law and has provided 'irretrievable breakdown' as the sole ground for the dissolution of marriage.⁴⁾ In addition, the Act abolished the decree of judicial separation,⁵⁾ the order for the restitution of conjugal rights,⁶⁾ and imprisonment as a penalty for failing to pay maintenance.⁷⁾ The duty to pay maintenance as between husband and wife is no longer simply based on the criterion of matrimonial fault but, rather, is conditional upon, inter alia, the extent to which a party is able to pay, and is limited to when the other party is unable to support himself or herself.⁸⁾

- 1) 'The Family Law Act 1975' (1975) 49 ALJ 477.
- 2) Act 53 of 1975 (Cth). The Family Law Act came into operation on 5 January 1976.
- 3) The main changes brought about by the Family Law Act are mentioned by Enderby (1975) 49 ALJ 477; Joske 1-11; Nygh 1-15; Family Law Service (1976) 1001-1018; Family Law Handbook 3-24.
- 4) S 48 (1) Family Law Act.
- 5) S 3 (2) (C) (iv) Family Law Act.
- 6) S 3 (2) (C) (v) Family Law Act.
- 7) S 107 (1) Family Law Act.
- 8) S 75 (2) Family Law Act sets out all the criteria that can be taken into account in maintenance proceedings.

Certainly, the most far-reaching innovation brought about by the Family Law Act is the creation¹⁾ of the Family Court of Australia, which has as an indispensable part of its make-up a counselling and reconciliation procedure.²⁾ The main objectives of the Australian Family Court are contained in section 43 of the Act which enjoins the court in the exercise of its jurisdiction to have regard to -

- '(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
- (b) the need to give the widest possible protection and assistance to the family as a natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
- (c) the need to protect the rights of children and to promote their welfare;
- (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage.'

The Family Court of Australia is accorded the status of a 'superior court of record'³⁾ and it 'consists of a Chief Judge and of Senior Judges and other Judges, not exceeding 6 in total, or such greater number a

1) By s 21 (1) Family Law Act. The feasibility of establishing a family court system in Australia had been mooted for some time before 1975. In this connection see, *inter alia*, Biggs 'Stability of Marriage - A Family Court?' (1961) 34 ALJ 343; Howard 'Matrimonial Conciliation' (1962) 36 ALJ 148; Finlay 'Family Courts - Gimmick or Panacea' (1969) 43 ALJ 602; Finlay 'Justiciable Issues and Legalism in the Law of Divorce' (1972) 46 ALJ 543, 557-560; Turner 'Family Courts: Their Formation and Jurisdiction' (1973) 8 Aust Journ of Social Issues 121; Kovacs 'Maintenance in the Magistrates' Courts: How Fares the Forum?' (1973) 47 ALJ 725, 733-734; Bates 'A Family Court in Australia - Its Implications for Lawyers and Legal Education' (1975) 9 Law Teacher 18.

2) Ss 14-19 Family Law Act.

3) S 21 (2) Family Law Act.

may be prescribed by regulations from time to time.¹⁾ According to section 22 (2) of the Family Law Act a judge of the family court²⁾ is expected to possess the following qualification: that is -

- (a) he must be, or must have been a judge of another court, or he must have been enrolled as a legal practitioner of the High Court or of the Supreme Court for not less than 5 years; and
- (b) by reason of training, experience and personality, he must be a suitable person to deal with matters of family law.³⁾

(B) Jurisdiction

The jurisdiction of the family court is prescribed by section 31 (1) of the Family Law Act and with regard to causes of action⁴⁾ it extends to

- 1) S 21 (3) Family Law Act. The first, and present, Chief Judge is Justice Elizabeth Evatt. Initially, apart from the Chief Judge, 5 other judges were appointed to the bench of the family court: (1976) 50 ALJ 6. When the Family Law Regulations 210 of 1975 were first published provision was made for increasing the number of judicial appointments from 6 to 29. In a communication to the writer in June, 1978, from Mr Justice R S Watson, Senior Judge of the family court, the writer was advised that there were then 36 judges of the family court with 2 further appointments still to be made. At that stage, the Family Court of Western Australia had 5 judges. Of the 36 judges of the Family Court of Australia, 32 were males and 4 were females: Lusink 'The Family Law Act 1975-77: Australia' (1978) 16 Concil Cts Rev 39, 40.
- 2) Unless otherwise indicated the words 'Family Court' will henceforth mean the Family Court of Australia or the Australian Commonwealth Family Court.
- 3) The retiring age for judges of the family court is 65 years: s 23 A Family Law Act 1976, inserted by s 4 Family Law Amendment Act, 102 of 1977.
- 4) It may be mentioned that since Australia, like South Africa, is such a vast country, it has been impossible to establish a family court in every rural town. The family court has, however, been given the power to sit in any place in Australia √s 27 Family Law Act, and it may go on circuit in such country places where business does not warrant the establishment of a permanent family court. In any event, the family court shares some co-ordinate jurisdiction with the Australian courts of summary jurisdiction. Appeals from the courts of summary jurisdiction lie either to the family court or to the 'Supreme Court of that State or Territory'. √s 96 (1) Family Law Act.

1. matrimonial causes. According to section 4 (1) a 'matrimonial cause' is defined as:

'(a) proceedings between the parties to a marriage for a decree of

(i) dissolution of marriage; or

(ii) nullity of marriage;

(b) proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage by decree or otherwise;

(c) proceedings between the parties to a marriage with respect to -

(i) the maintenance of one of the parties to the marriage; or

(ii) the custody, guardianship or maintenance of, or access to a child of the marriage;

(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or of either of them, being proceedings in relation to concurrent, pending or completed proceedings for principal relief between those parties;

(cb) proceedings by or on behalf of a child of a marriage against one or both of the parties to the marriage with respect to the maintenance of the child;

(d) proceedings between the parties to the marriage for the approval by a court of a maintenance agreement or for the revocation of such an approval or for the registration of a maintenance agreement;

(e) proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship;

(f) any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process) in relation to concurrent, pending or completed proceedings of a kind referred to in any of paragraphs (a) to (e), including proceedings of such a kind pending at, or completed before, the

commencement of this Act;¹⁾

2. proceedings instituted or continued under the Marriage Act 1961-1973, other than proceedings under Part VII of that Act;²⁾

3. matters arising under a law of a Territory concerning -

(a) the adoption of children;

(b) the guardianship, custody or maintenance of children; or

(c) payments of a kind referred to in section 109 of the Family Law Act.³⁾ The payments provided for in section 109 refer to:

(i) the expenses of maintaining, for the period before her confinement or expected confinement, a woman who has been, or is expected to be, confined for the purposes of childbirth;

(ii) the medical, surgical, hospital or nursing expenses in respect of the confinement of such woman;

(iii) the expenses of maintaining such a woman for the period immediately following her confinement;

(iv) the expenses of maintaining a woman who is expecting a child, where an order has been made by reason of the fact that she was expecting the child;

(v) an amount in respect of the maintenance of an ex-nuptial child who has not attained the age of eighteen years and which is payable on the basis of parentage of the child;

(vi) funeral expenses in respect of an ex-nuptial child payable on the basis of parentage of the child;

(vii) funeral expenses in respect of the mother of an ex-nuptial child on the basis of the parentage of the child;

1) Paragraphs (c) and (e) were amended by, and paragraphs (ca) and (cb) were added by, the Family Law Amendment Act, 209 of 1976. It became necessary to effect these amendments as a result of the constitutional challenge to certain provisions of the Family Law Act in the cases of Russell (a Victorian case) and Farrelly (a South Australian case) both of which were heard, and dealt with, together by the Australian High Court and reported at (1976) 59 ALJR 594: see below under 'Jurisdictional Limitations and Constitutional Challenge.'

2) S 31 (1) (b) Family Law Act.

3) S 31 (1) (c) Family Law Act.

- (viii) the medical, surgical, hospital or nursing expenses in respect of any woman or child referred to in (vi) and (vii) above; and

4. matters in which jurisdiction is conferred on it by a law made by Parliament.¹⁾

(C) Transitional Period and State Family Courts

Even for Australia, the family court concept constituted a radical departure from established procedure. Accordingly, the family court was designed to be phased in gradually and, to this extent, section 40 (2) of the Family Law Act provided that the family court was not to exercise its jurisdiction until such time as the Governor-General had by proclamation fixed a date from which proceedings could be instituted in the family court.²⁾ In the interim, jurisdiction under the provisions of the Family Law Act was to be exercised by the various State courts, either at Supreme Court level or at summary jurisdiction (magisterial) level.³⁾ But since the Family Court of Australia is a creation of the Federal Legislature it cannot assume jurisdiction over certain matters, such as adoptions and paternity disputes, which remain the preserve of the State courts.⁴⁾ Thus, until such time as the Federal Government has entered into the agreements provided for by section 41 (1) of the Family Law Act with the various State governments, the family court and the various State courts will continue to exercise their own respective jurisdictions over the various family law matters. It is anticipated, however, that the jurisdiction of the various State courts over family law matters will be gradually phased out once such agreements have been concluded.

1) S 31 (1) (d) Family Law Act.

2) Cf s 2 Family Law Act. As has already been noted, the Act came into operation on 5 January 1976 from which date the family court began to exercise its jurisdiction.

3) In the main, the State Supreme Courts have general original jurisdiction while the jurisdiction of the courts of summary jurisdiction is limited to applications concerning the property rights of spouses, the guardianship and custody of the children of the marriage, and proceedings for an order or injunction in circumstances arising from a marital relationship: Nygh 42.

4) See below under 'Jurisdictional Limitations and Constitutional Challenge.'

In terms of section 41 of the Family Law Act an agreement is provided for in terms of which the Australian Federal Government will provide the necessary funds for the establishment and administration of State family courts. It is expressly provided however, that before such agreement can be entered into between the Federal Government and any State Government, the Governor-General must be satisfied on the following points: namely, that

- '(a) arrangements have been made under which Judges will not be appointed to that court except with the approval of the Attorney-General of Australia;
- (b) Judges appointed to that court are by reason of training, experience and personality, suitable persons to deal with matters of family law and cannot hold office beyond the age of 65 years; and
- (c) arrangements have been made under which full use will be made by that court of the counselling and welfare facilities that are available to the Family Court of Australia.¹⁾

Once the Governor-General is satisfied on these points he will then issue the necessary proclamation in terms of which such newly created State family courts will assume federal jurisdiction under the provisions of the Family Law Act. This means that the then newly created State family courts will assume jurisdiction over the entire range of matrimonial causes whether or not the action flows from, or is an incident of, a marriage.

This, however, does not mean to say that the individual States are unable to establish their own family courts in the absence of an agreement with the Federal Government. But, of course, such a State family court will only have jurisdiction over matters affecting the family at State level only. In fact, the State of South Australia had already established its own family court prior to the passing of the Family Law Act. But this court only has the status of a

1) S 41 (4) Family Law Act.

court of summary jurisdiction.¹⁾

Presumably because of distance considerations, Western Australia is the only State which has set up a family court²⁾ in accordance with the provisions of section 41 of the Family Law Act. The Western Australian family court has full jurisdictional powers and it does not seem to labour under the jurisdictional and procedural problems that are experienced in other States. Thus, it has jurisdiction not only over those matters referred to in the Family Law Act, but provision is also made for it to acquire jurisdiction over non-federal matters such as ex-nuptial children (including paternity disputes) and adoptions.³⁾ Although Western Australia has its own separate family court, appeals from that court may be heard by the Full Court of the Australian Family Court.⁴⁾ A judge of the Western Australian family court is accorded the status of a State Supreme Court judge.⁵⁾ Should the rest of the Australian States follow the example of Western Australia it will be possible for family courts to be set up in every State which would have jurisdiction over all State family law matters as well as the family law matters provided for by the Family Law Act.

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- 1) Nygh 40. The South Australian family court first opened its doors to the public in February 1974 and it has jurisdiction over, inter alia, the following matters - (1) custody and guardianship proceedings (ie independent of divorce); (2) matrimonial property disputes; (3) consents to marry; (4) paternity cases; (5) adoptions; (6) breach of peace proceedings; (7) assaults by one member of the family against another; (8) maintenance proceedings, including proceedings for enforcement and variation. For a comprehensive description of the South Australian family court see Turner 'Family Courts - The Adelaide Experiment' Viewpoints (1974) 5-12.
 - 2) Family Court Act, 1975-76 (WA): see also Finlay 'Australian Family Law: The Twilight Zone' (1976) 8 Fed LR 77, 84: Crawford 'The New Structure of Australian Courts' (1978) 6 Ad LR 201, 210.
 - 3) S 26 Family Court Act, 1975-76 (WA).
 - 4) S 94 Family Law Act.
 - 5) Ss 15-16 Family Court Act, 1975-76 (WA): see Wade 'Jurisdiction under the Family Law Act to Make Orders Affecting Property in the Absence of Proceedings for Principal Relief' (1977) 5 Univ Tas LR 248, 251.

(D) Jurisdictional Limitations and Constitutional Challenge

Reference has already been made above to the fact that the family court is a creation of the Australian Federal Legislature. The family court, accordingly, only has a unified and all-embracing jurisdiction over both federal and territorial family law matters within the Federal Territories to which the Family Law Act applies.¹⁾ The Territories concerned are the Australian Capital Territory (ACT); the Northern Territory and Norfolk Island.²⁾ This is the result of the fact that Australia operates under a federal constitutional set-up. Under the Australian constitution the Federal Legislature is given the power to legislate on, inter alia,

- '(xxi) Marriage;
- (xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.'³⁾

Any matters falling within the realm of family law not covered by the above fall to be dealt with only by the various State parliaments. This explains the apparent anomaly why the Family Court of Australia cannot acquire jurisdiction over paternity disputes, illegitimate children and adoptions: these matters fall within the jurisdiction of the various State courts.⁴⁾

Because of the dichotomy in jurisdiction over family law matters as a result of the constitutional set-up, it was inevitable that there

- 1) S 31 (1) (c) - see under 'Jurisdiction' above.
- 2) See s 4(1) Family Law Act for the definition of 'Australia' and 'Territory.'
- 3) S 51 Commonwealth of Australia Constitution Act, 63 and 64 Vict. Cap 12 (1900).
- 4) Nygh 10. Some of the constitutional difficulties which have been experienced in the field of family law had already been anticipated by a number of writers: eg Sackville and Howard 'The Constitutional Power of the Commonwealth to Regulate Family Relationships' (1970) 4 Fed LR 30; Finlay 'Commonwealth Family Courts: Some Legal and Constitutional Implications.' (1971) 4 Fed LR 287. For recent contributions see Finlay 'Australian Family Law: The Twilight Zone' (1976) 8 Fed LR 77; Finlay in a note in (1976) 50 ALJ 360; Turner 'The Commonwealth Family Law Act, The First Challenge'. Russell v Russell' (1976) 1 Aust Child Fam Welfare 51; Lusink 'The Family Law Act 1975-77 - Australia' (1978) 16 Concil Cts Rev 39; Lane 'Federal Family Law Powers' (1978) 52 ALJ 121; Crawford 'The New Structure of Australian Courts' (1978) 6 Ad LR 201, 205-210.

should be a challenge to the constitutional validity of certain of the provisions of the Family Law Act of 1975. This challenge came about in the case of Russell v Russell: Farrelly v Farrelly¹⁾ which declared invalid certain sections of the Family Law Act. As to the jurisdiction of the family court, the Australian High Court held in the Russell and Farrelly case that the provisions of section 4(1) of the Family Law Act defining a 'matrimonial cause'²⁾ were invalid to the extent that they strayed outside the area of constitutional validity; ie where the Family Law Act purported to make provision for any matter not falling within its 'marriage' power in terms of section 51 of the Australian Constitution. Thus, it was held that it is only where the litigants in an action are married to each other that proceedings may be brought in the family court in respect of the following matters;³⁾ namely,

(a) proceedings for the maintenance of one of the parties to a marriage: in other words, maintenance proceedings cannot be brought in the family court independently of, and unsupported by, an action for the annulment of, or dissolution of, or declaration as to the validity of, a marriage. Thus, for example, actions for maintenance against a third party on behalf of an ex-nuptial child fall outside of the jurisdiction of the family court and remain exclusively within the jurisdiction of the State courts;

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- 1) (1976) ALJR 594: see also Cako /1977/ VR 245. For comprehensive discussions on the Russell and Farrelly case see, inter alia, the post 1975 references given in the note immediately above and also the Family Law Service (1976) 1006-1010.
- 2) See above under 'Jurisdiction' where the definition of a 'matrimonial cause' in its amended form is cited in full.
- 3) And then only if they involve ancillary relief under paragraphs (a) and (b) of the definition of 'matrimonial cause' in s 4 (1) Family Law Act.

(b) proceedings with respect to the property of one or both parties to a marriage;¹⁾

(c) proceedings with respect to the custody, guardianship, or maintenance of, or access to, a child of the marriage. But such proceedings may only be brought in the family court if the parents are also involved in an action for the annulment of, or dissolution of, or declaration as to the validity of, the marriage. In the result, the phrase 'child of a marriage' as originally contained in the Family Law Act has had to be amended to give it a more restricted meaning: the phrase 'child of a marriage' is now limited, for most purposes, to a child born to, or adopted by, the parties to a marriage²⁾ and it excludes, for example, a child who has been merely accepted by the parties into their family, such as a stepchild. Thus, actions relating to the custody of such stepchild or other ex-nuptial children cannot be brought in the family court.

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- 1) It had earlier been held by the Australian High Court in Lansell (1964) 110 CLR 353 that the Federal Parliament had the power to provide for the re-arrangement of property rights between spouses as an incident of divorce. But unlimited property jurisdiction which is not ancillary to principal relief was held in the Russell and Farrelly case to be beyond the power of the Federal Legislature: Wade 'Jurisdiction under the Family Law Act to Make Orders Affecting Property in the Absence of Proceedings for Principal Relief' (1977) 5 Univ Tas LR 248. Thus, for example, a spouse cannot obtain from the family court an immediate and urgent 'property order' (eg where the other spouse is squandering the matrimonial assets) before seeking principal relief (ie a divorce), or where no principal relief is being contemplated at all.
- 2) S 4 Family Law Amendment Act, 63 of 1976, has amended s 5 Family Law Act as a result of the decision in the Russell and Farrelly case: s 5 (1) now reads: 'For the purposes of the application of this Act in relation to a marriage -
- (a) a child adopted since the marriage by the husband and wife; or
 - (b) a child of the husband and wife born before the marriage; shall be deemed to be a child of the marriage, and a child of the husband and wife (including a child born before the marriage) who has been adopted by another person or other persons shall be deemed not to be a child of the marriage.'

Section 97 (1) of the Family Law Act originally provided for the hearing of all proceedings in the family court to be conducted in closed court.¹⁾ This provision failed to pass the scrutiny of the High Court in the Russell and Farrelly case: it was held by a majority of three to two that this provision was invalid insofar as State courts were concerned since it concerned the constitution and organizational structure of State courts which did not fall within the power of the Federal Legislature. The validity of this provision was, however, upheld insofar as it applied to the family court.

The 'no robes' provision²⁾ was a little more fortunate in surviving an attack upon its constitutional validity insofar as State courts were concerned. It was held in the Russell and Farrelly case, again by a majority of three to two, that this provision was valid. The proviso was added, however, that non-compliance with the 'no robes' section in any State court would not render a judgment of that court invalid.

The constitutional challenge to these seemingly insignificant procedural provisions of the Family Law Act carried with it far-reaching implications: it, in fact, opened the way for the High Court to cast doubt upon the constitutional validity of other provisions of the Family Law Act, and which it did in obiter form.³⁾ The supporters of the family court concept can hardly regard these challenges in a light vein since, as Turner pertinently remarks,⁴⁾ 'the way in which family law is administered is even more important than the corpus of the law.'

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- 1) That is, with the exception of relatives or friends of either party, marriage counsellors, welfare officers and legal practitioners: s 97 (2) Family Law Act.
 - 2) S 97 (4) states that 'Neither the Judge hearing proceedings under this Act nor counsel shall robe.'
 - 3) Family Law Service (1976) 1008.
 - 4) 'The Commonwealth Family Law Act: The First Challenge: Russell v Russell' (1976) 1 Aust Child Fam Welfare 51, 53.

(E) Procedure

The clearly stated aim of the Family Law Act¹⁾ is that the family court shall 'proceed without undue formality and shall endeavour to ensure that all proceedings are not protracted.' The fact that neither judge nor counsel need robe also lends itself to the informality of proceedings. But, as has just been noted, section 97 (1) of the Family Law Act which provides for all hearings to be conducted behind closed doors only applies to the family court itself and not to the State courts. The clear aim behind this provision was also to restrict the formalism experienced in the ordinary law courts.

(F) Family Law Council and Institute of Family Studies

An interesting innovation is to be found in section 115 of the Family Law Act which provides for the establishment, by the Attorney-General, of a Family Law Council 'to advise and make recommendations to the Attorney-General ... concerning -

- (a) the workings of this Act and other legislation relating to family law;
- (b) the workings of legal aid in proceedings in family law; and
- (c) any other matters relating to family law.'²⁾

The Family Law Council consists of a 'Judge of the Family Court and such other judges, officers of the Public Service of Australia or of a State, representatives of marriage counselling organizations and other persons

1) S 97 (3) Family Law Act.

2) S 115 (3) Family Law Act. The Family Law Council performs functions similar to that performed by the director of the Hawaii Family Court (above 39-40). It may also be likened to the Standing Advisory Committee appointed by the Minister of Economic Affairs in terms of s 18 Companies Act, 61 of 1973. The function of this committee is 'to make recommendations to the Minister in regard to any amendments to /the Companies Act/ which may appear to it to be advisable and shall advise the Minister on any matter referred to it by the Minister.' So far as family law in Australia is concerned the Family Law Council is now able to keep abreast of current social developments. Cf the Board of Family Court Judges in Hawaii appointed in terms of s 5 Hawaii Revised Statutes (Chap 571) which is discussed below at 83.

as the Attorney-General thinks fit.¹⁾ Meetings of the Family Law Council are convened either by the chairman of the Council or by the Attorney-General. Records of the meetings are to be kept and an annual report is to be furnished to the Attorney-General setting out the operations of the year. As Nygh puts it:²⁾

'Hopefully, it [the Family Law Council] will provide an important and expert body whose recommendations can be acted upon by Parliament without having to enter into political controversy.'

In addition to the Family Law Council, provision is made for the establishment of an Institute of Family Studies.³⁾ The functions of this research institute are:

- '(a) to promote, by the encouragement and co-ordination of research and other appropriate means, the identification of, and development of understanding of, the factors affecting marital and family stability in Australia, with the object of promoting the protection of the family as the natural and fundamental group unit in society; and
- (b) to advise and assist the Attorney-General in relation to the making of grants, out of moneys available under appropriations made by the Parliament, for purposes related to the functions of the Institute and the supervising of the employment of grants so made.'

- 1) S 115 (2) Family Law Act. According to the Second Family Law Council Report (1978) the Chairman of the Council is Justice Elizabeth Evatt, the Chief Judge of the family court: there are 12 other members of the Council.
- 2) At 5. See also Joske 8-9. In the first 2 Annual Reports of the Family Law Council numerous recommendations for improvement to the Family Law Act were made. Many of these recommendations appear to have been accepted by the Australian Parliament and the Act has already been amended in numerous respects.
- 3) Part XIV A ss 114 A - 114 M Family Law Act.

(G) Counselling and Reconciliation

A counselling and reconciliation procedure is provided for by sections 14 to 19 of the Family Law Act.¹⁾ These provisions have been framed in accordance with the sentiments expressed in section 43.²⁾ In all proceedings for the dissolution of a marriage and in maintenance or custodial proceedings, a positive duty is cast³⁾ upon the judge or magistrate, and also upon the legal representatives of the parties, to bring their minds to bear upon the possibility of a reconciliation of the parties. To this extent, a judge or magistrate is empowered to adjourn proceedings to enable the parties to consider the possibility of a reconciliation and, with the consent of the parties, may even interview them in chambers.⁴⁾ Should the judge or magistrate consider it desirable the parties may even be referred to a marriage counsellor⁵⁾ or approved marriage counselling organization.⁶⁾ Thereafter, if either of the parties requests that the hearing be proceeded with, the judge or magistrate shall resume the hearing as soon as possible.⁷⁾

1) See Family Law Service (1976) 1031-1038.

2) S 43 Family Law Act is cited in full above at 56.

3) By s 14 (1) Family Law Act.

4) S 14 (2) (a) and (b) Family Law Act.

5) A marriage counsellor is defined by s 4 (1) as:

'(a) a person appointed as a counsellor under section 37 /ie by the Attorney-General/; or

(b) a person authorized by an approved marriage counselling organization; or

(c) a person authorized under the regulations to offer marriage counselling.'

6) See below at 71 for approved marriage counselling organizations.

7) S 14 (3) Family Law Act.

It would seem that the parties are at least obliged to attend any session set up for them by a marriage counsellor or an approved marriage counselling organization and that a failure to do so may constitute a contempt of court. The Family Law Act, however, does not make this particularly clear. But, Nygh suggests that marriage counselling must be conducted on a voluntary basis otherwise very little success can be achieved. The learned author expresses himself thus:¹⁾

'There is, of course, no requirement that the parties should actually attempt reconciliation. All that is required is that the parties, either separately or together, meet with a marriage guidance counsellor to discuss the chances of reconciliation. The meeting may establish no more than that no such chance exists; hopefully in some cases it may prevent an over-hasty divorce.'

Similarly, where the family court has granted an injunction 'for the personal protection of a party to the marriage or of a child of the marriage or for the protection of the marital relationship or in relation to the property of a party to the marriage or relating to the use or occupancy of the matrimonial home,'²⁾ it may direct or advise either or both of the parties to attend upon a marriage counsellor.³⁾ In this instance, the Act⁴⁾ makes it clear that a failure to comply with such direction or advice does not constitute a contempt of court.

The confidentiality of any admissions or communications made to a marriage counsellor is protected by section 19 (1) of the Family Law Act.⁵⁾

1) At 33-34.

2) S 114 (1) Family Law Act.

3) S 14 (4) Family Law Act.

4) Ibid.

5) See also Reg 20 Family Law Regulations.

The counselling and reconciliation machinery is not only available to those who have actually initiated a matrimonial action but is also available to anyone who simply seeks the assistance of the counselling services of the family court.¹⁾

All counselling, however, is meant to be conducted on a short-term basis. It is envisaged that long-term counselling will be handled by voluntary organizations.²⁾ The Attorney-General is given the power to approve any organization as an official marriage counselling organization.³⁾ The criteria for such approval, which are contained in section 12 (2) of the Family Law Act, are that -

- '(a) the organization is willing and able to engage in marriage counselling; and
- (b) marriage counselling constitutes, or will constitute, the whole or major part of its activities.'⁴⁾

Provision is made for the appointment of a Director of Counselling and Welfare, as well as other counsellors and welfare officers.⁵⁾ The

1) Ss 15 and 16 Family Law Act.

2) Nygh 31.

3) S 12 (1) Family Law Act.

4) An approved organization may receive funds approved by the Australian Parliament upon such conditions as the Attorney-General may determine: s 11 Family Law Act. The organization must, however, submit to the Attorney-General each year an audited financial report and a report on its marriage counselling activities: s 13 Family Law Act. Failure to submit the requisite reports may result in the revocation of the Attorney-General's approval: s 12 (6) Family Law Act.

5) S 36 (8) Family Law Act. The present director is D J McKenzie who has very kindly made available to the writer various reports, reviews and statistical data prepared by himself and his staff.

director, who is expected to work in close liaison with the Chief Judge of the family court, has the duty of preparing documents for distribution to all courts exercising jurisdiction under the Family Law Act, and to all legal practitioners, setting out information regarding the following matters:

- '(a) the legal and possible social effects of proposed proceedings (including the consequences for the children of the marriage); and
- (b) the counselling and welfare facilities available within the family court and elsewhere.'¹⁾

Where either of the parties to a matrimonial action is legally represented, the legal representative is obliged to furnish his client with copies of such documents prepared by the director before any proceedings are actually initiated.²⁾ Where, however, neither of the parties is legally represented, this becomes the duty of an officer of the family court.³⁾

(H) General

It is apposite to recall that the Family Law Act was promulgated against the background of a research into 'The Law and Administration of Divorce, Custody and Family Matters, with particular regard to Oppressive Costs, Delays, Indignities and other Injustices.'⁴⁾

- 1) S 17 Family Law Act: Reg 19 (2) Family Law Regulations. A pamphlet entitled 'Family Law and You' prepared by the Director of Counselling And Welfare is designed to assist the public to answer the following questions: Would marriage counselling help? Where are marriage counsellors located? What kind of court proceedings can be taken and how do they operate? Is legal advice available, or can you conduct your own case? Are you eligible for social security?
- 2) Reg 19 (3) Family Law Regulations.
- 3) Reg 19 (4) Family Law Regulations.
- 4) Enderby 'The Family Law Act 1975' (1975) 49 ALJ 477. The research referred to was conducted by the Australian Senate Standing Committee on Constitutional and Legal Affairs. Its final report was presented to the Australian Parliament in 1974 and it was mainly on the strength of this report that the Family Law Act was promulgated.

With regard to costs, section 117 (1) of the Family Law Act provides that each party to proceedings under the Act must bear his/her own costs. The court, however, still retains its discretion on the question of costs and in terms of section 117 (2) of the Family Law Act the court has the discretion in particular circumstances 'to make such orders as to costs and security for costs, whether by way of interlocutory order or otherwise.'¹⁾ It would seem that the Family Law Act now recognizes the equality of sexes so far as earning capacity is concerned.²⁾ A party is no longer automatically entitled to his/her costs on 'winning' a case: the criterion seems to be, inter alia, the ability or otherwise to pay costs. This is also in keeping with the aim of the Family Law Act to abandon finally the fault-principle in family law.

Whether the aim of cutting down on the costs of matrimonial litigation will be achieved in practice is doubted at this stage since the family court, especially in Sydney,³⁾ is faced with a tremendous backlog of cases. It is alleged⁴⁾ that this is hardly an improvement on the position as it existed under the old legislation. It is, of course, true that undue delays in disposing of matrimonial cases can be costly from the financial point of view. Furthermore, such undue delays are hardly conducive to the reduction of the acrimony which is traditionally associated with matrimonial litigation in its fault-orientated context. But this backlog is seen⁵⁾ as being only a temporary set-back while the Family Law Act experiences its teething problems.

Certainly, a number of problems are being experienced with the implementation of the Family Law Act. This is inevitable

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- 1) See also s 118 which permits the court to make such order as to costs as it thinks fit where proceedings are held to be frivolous or vexatious.
 - 2) It must also be remembered that legal aid is now readily available: ss 117 (3) and (4) Family Law Act.
 - 3) See the note in (1978) 52 ALJ 237.
 - 4) Ibid.
 - 5) Ibid.

considering that it has constituted a radical change in the family law of Australia. Its implementation has been a tremendous expense to the Australian taxpayer with the appointment of family court judges and other personnel to administer the Act: new court premises have also had to be found and even constructed. But in the long run these costs may prove to have been justified and the assertion of Enderby,¹⁾ a former Commonwealth Attorney-General, that the Act is 'possibly the most humane and enlightened social reform to be enacted in Australia since the Second World War' may well prove to be correct.

1) 'The Family Law Act 1975' (1975) ALJ 477.

CHAPTER FOUR

A BRIEF EVALUATION OF THE MAIN CHARACTERISTICS
OF THE FAMILY COURTS UNDER CONSIDERATION

1. Introduction

There are two basic lessons to be learnt from an evaluation of the Conciliation Court of Los Angeles, the Family Court of Hawaii and the Australian Family Court. In the first place, it would seem that before any meaningful changes can be made to family law and, more particularly, before serious consideration can be given to the establishment of a family court system, there will have to be a radical overhaul of the divorce law. In this respect, the traditional fault-orientated principles of divorce law will have to be eliminated or severely curtailed.¹⁾ It would also seem that a serious consideration of the family court system involves not only the reform of the substantive law of divorce but also a reform of the divorce procedure and a change of attitude towards the problems of divorce.²⁾

In the second place, it is apposite to note that such family courts as there are differ from country to country, and even from State to State as in the United States of America. It is clear, therefore, that the establishment of a family court in any particular country has to be tailored to the needs and social development of the society it seeks to serve. Furthermore, the development of the family court system must be seen as an ongoing exercise.³⁾

The following characteristics of the family courts under consideration will now be discussed and evaluated; namely, unified jurisdiction; family court procedure; counselling; and the safeguarding of the interests of minors.

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- 1) See, for example, the contribution that the California Family Law Act, 1970, made to the development of the Los Angeles Conciliation Court: see above at 16-17.
 - 2) The drafting of the Standard Family Court Act, 1959, is evidence of this fact: see also Rubin 'The Standard Family Court Act' (1961) J Fam Law 105.
 - 3) Cf the role of the Family Law Council and the Institute of Family Studies in Australia: see 67 above. For the position in Hawaii see 39-40 above.

2. Unified Jurisdiction

(A) Introduction

The most frequently cited argument in support of the establishment of family courts is the attempt to eliminate the problems of fragmented jurisdiction in matters falling within the realm of family law. This is not only the view of the many writers¹⁾ on the subject, but it is also the conclusion of various commissions and committees.²⁾ The criticisms that can be levelled at the fragmentation of jurisdiction in family law matters are crisply presented by Roscoe Pound³⁾ as follows:

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- 1) Among the many writers in the United States who have criticized the fragmentation of jurisdiction in family law matters are Alexander 'What is a Family Court Anyway?' (1952) Conn BJ 243, 256-257; Alexander 'The Family Court - An Obstacle Race' (1958) 19 Univ Pitts LR 602-603; Goldberg and Sheridan 'Family Courts - An Urgent Need' (1959) 8 J Fam Law 537-539; Pound 'The Place of the Family Court in the Judicial System' (1959) 5 NPPA Journ 161; Watson 'Family Law and its Challenge for Psychiatry' (1962) 2 J Fam Law 71, 76; Arthur 'A Family Court - Why Not?' (1966) 51 Minn LR 223-225: 229-230; Dinkelspiel and Gough 'The Case for a Family Court - A Summary of the Report of the California Governor's Commission on the Family' (1967) 1 Fam LQ 70, 72; Dyson and Dyson 515-516; Kay 'A Family Court. The California Proposal' (1968) 56 Calif LR 1205, 1239-1241; Gordon 'The Family Court: When Properly Defined it is both Desirable and Attainable' (1975) 14 J Fam Law 1, 9-12. On the problem of fragmented jurisdiction in Australia see, *inter alia*, Biggs 'Stability of Marriage - A Family Court?' (1961) 34 ALJ 343, 348-349; Turner 'Family Courts: Their Formation and Jurisdiction' (1973) 8 Aust Journ Social Issues 121, 123-125. As to the position in Canada see, *inter alia*, Baxter 'Family Law Reform in Ontario' (1975) Univ Tor LJ 236, 241-242; Macdonald 'A Comprehensive Family Court' (1967) 10 Can BJ 323, 325-329; Payne 44-48; Webb 'Family Courts for Quebec' 1975 NZLJ 803. As to the position in England see, *inter alia*, Brown 'The Legal Background to the Family Court' 1966 Br Journ Criminology 139, 141-143; Samuels 'Family Courts - The Future' (1972) 122 NLJ 133; Manchester 'Reform and the Family Court' (1975) 125 NLJ 984; Turner 'University of Birmingham - Institute of Judicial Administration, Family Courts' (1974) 4 Fam Law 39-41. Horgan 'Family Court: The Need and the Obstacles' (1976) 27 NILQ 120, 121-122, discusses the problem of fragmented jurisdiction in the Irish Republic.
- 2) See, for example, Finer Report § 4.342 - 4.346; Law Reform Commission of Canada: Working Paper Number 1: The Family Court (1972) - discussed by Eekelaar in (1974) 37 MLR 450.
- 3) 'The Place of the Family Court in the Judicial System' (1959) 5 NPPA Journ 161, 164.

'A system of courts devised to deal with the typical single issue required by the system of formulating an issue in pleadings, reducing the controversy by a series of successive formal statements to a fact asserted by the one and denied by the other, is not adequate to the troubles of a family in a complex society and manifold, diversified and complicated activities of today. Treating the family situation as a series of single separate controversies may often not do justice to the whole or to the several separate parts. The several parts are likely to be distorted in considering them apart from the whole, and the whole may be left undetermined in a series of adjudications of the parts.'

The unfortunate consequences of this needless fragmentation of jurisdiction are also neatly summarized by the same writer¹⁾ as follows:-

1. It [the fragmentation of jurisdiction] involves conflicts and overlappings of jurisdiction and consequent waste of judicial power on jurisdictional points at the expense of the merits of cases.
2. It involves [a] waste of litigants' time and money in throwing meritorious cases out of court to be litigated over again in other tribunals.
3. It involves successive appeals such as those on jurisdictional questions followed by appeals on the merits.
4. It requires [a] determination of controversies in fragments in which the merits of the whole situation may be lost or the efficacy of the legally appointed remedies may be impaired.
5. It involves a waste of public money in maintaining separate courts of limited powers, whereas a unified administration not only would deal more adequately with each aspect but would assure effective dispatch of the whole at less expense both to litigants and to the parties.'

1) Op cit 162.

In all fairness, it must be pointed out that to vest in a single court an all-embracing jurisdiction over all family law matters will not necessarily eliminate a fragmented approach to family law, especially in major population centres, where there will be a natural tendency to 'departmentalize' such a court.¹⁾

Guidance as to what family law matters should fall within the unifying jurisdiction of a family court, must inevitably be obtained from the Standard Family Court Act of 1959. With regard to children the model Act proposes to give to a family court exclusive original jurisdiction over the following persons and causes of action:- delinquency cases; neglect cases; children whose environment is injurious to their welfare or whose behaviour is injurious to their own and others' welfare; children who are beyond the control of their parents or other custodians; custody and guardianship cases; adoptions; termination of parent-child relationships; consents to marriage; employment or enlistment of a child; treatment or commitment of the mentally ill or defective.²⁾ With regard to adults, the Act proposes that a family court be given exclusive original jurisdiction over the following causes of action and persons:- criminal offences committed against children by parents or legal guardians; desertion of, abandonment of, or failure to support, any person in contravention of any law; criminal offences committed against any member of the accused's immediate family; actions for support, maintenance, divorce, separation, annulment, and paternity of a child born out of wedlock; actions under the reciprocal enforcement of maintenance orders legislation; and mentally ill or defective persons.³⁾

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- 1) Payne 41-42. For example, the reality of a unified jurisdiction over all family law matters in the New York Family Court has not materialized. Various specialist departments of this court are, in fact, scattered throughout the city of New York: Paulsen 'Juvenile Courts, Family Courts, and the Poor Man' (1966) 54 Calif LR 694, 706-707.
- 2) See generally s 8 Standard Family Court Act: see also (1959) 5 NPPA Journ 99, 116-118, for comments on this section. The use of the words 'delinquency' and 'neglect' was avoided because of the stigma attached to them. The phrases preferred by the framers of the model Act are 'any child who is alleged to have violated or attempted to violate any federal, state or local law, or municipal ordinance' and 'any child ... who is neglected as to proper or necessary support, or education as required by law, or as to medical or other care ...'
- 3) See generally s 11 Standard Family Court Act.

(B) Los Angeles Conciliation Court

With the above in mind, the jurisdictional limitations of the Los Angeles Conciliation Court immediately become apparent.¹⁾ Thus, for example, the Conciliation Court has no jurisdiction to grant a divorce order:²⁾ this falls within the jurisdiction of the California Superior Court of which the Conciliation Court is only a 'special department.'³⁾ Neither does it have any jurisdiction over juvenile offenders. The reason for this omission is that the Conciliation Court has preferred to be regarded as a purely helping social agency rather than be associated with crime, delinquency, law enforcement and punishment. Such an association, it was felt,⁴⁾ would have impaired the image of the Conciliation Court.

The strength of the Conciliation Court lies not so much in an all-embracing jurisdiction - which it does not have - but, rather, in its stated purpose of protecting the rights of children, of promoting and protecting family life and the institution of marriage, and of providing means for the reconciliation of spouses and the amicable settlement of domestic and family controversies.⁵⁾ Accordingly, the Conciliation Court generally only has jurisdiction over spouses who have children and who are involved in a matrimonial dispute which may result in the break-up of the marriage.⁶⁾ The Conciliation Court is, however, prepared to assume jurisdiction over matrimonial cases in which no children are involved if the normal work of the court in cases involving minors is not jeopardized.⁷⁾ As has already been

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- 1) See above at 21-23 for the jurisdiction of the Los Angeles Conciliation Court.
 - 2) The Conciliation Court also does not appear to have any jurisdiction over matrimonial property disputes, though it does play a very useful supportive role in this field in its pre- and post-divorce counselling.
 - 3) Elkin 'Conciliation Courts: The Reintegration of Disintegrating Families' (1973) 22 Fam Coordinator 63.
 - 4) Cf Finlay 'Family Courts - Gimmick or Panacea?' (1969) 43 ALJ 602, 603.
 - 5) § 1730 California Code of Civil Procedure.
 - 6) § 1760 California Code of Civil Procedure: s 1760 is cited in full above at 21.
 - 7) See above at 23.

noted,¹⁾ the court has been given jurisdiction over post-dissolution counselling and custody/access disputes. Finally, it has the jurisdiction to give pre-marital counselling to any couple (when one or both are under the age of 18 years) where the Superior Court of California has ordered such counselling.²⁾

(C) The Hawaii Family Court

Unlike the Los Angeles Conciliation Court, which falls far short of the ideal of consolidated family law jurisdiction proposed by the Standard Family Court Act of 1959, Hawaii has made a determined effort to consolidate its family law jurisdiction. As has already been noted,³⁾ the Hawaii Family Court assumes jurisdiction over the same matters involving children and adults as those listed in the Standard Family Court Act. In this respect, the Hawaii Family Court is more recognizable as a court of law than the Los Angeles Conciliation Court. Another material difference between the Hawaii Family Court and the Los Angeles Conciliation Court is that the former makes no specific provision for pre- or post-divorce counselling, whereas this feature constitutes the strength of the latter. Such pre- or post-divorce counselling that is offered by the Hawaii Family Court is of a purely voluntary nature.⁴⁾

1) Above at 31-33.

2) See above at 17-21.

3) See above at 36-38.

4) See above at 51-52.

(D) The Family Court of Australia

The scope of the family court's jurisdiction has already been noted.¹⁾ It must, of course, be stressed that the failure to achieve a completely unified jurisdiction for the family court has not been due to a lack of endeavour on the part of the sponsors of the Family Law Act of 1975.²⁾

(E) Conclusion

Of the three family courts considered above, the Hawaii Family Court is the only one to have a comprehensive and integrated jurisdiction over all matrimonial and familial proceedings.³⁾ The Los Angeles Conciliation Court lies at the other extreme while the Australian Family Court lies somewhere between these two extremes.

That the draftsmen of the Australian Family Law Act have failed to achieve a fully integrated family court is hardly surprising.⁴⁾ This failure is clearly attributable to the uncomfortable dichotomy between federal and state family law, and to constitutional issues such as those raised in the Russell and Farrelly case.⁵⁾ It is, therefore,

1) Above at 57-60 and 63-66.

2) See below under 'Conclusion'.

3) Reagh 'The Need for a Comprehensive Family Court System' (1970) 5 UBCLR 13, 26, suggests that Hawaii has 'probably the most integrated and comprehensive family court now in existence.'

4) In this respect, the Australian experience can be compared with that in Canada where the jurisdiction and organization of the respective family courts vary from province to province: Payne 90-91. The family courts of the various Canadian provinces do not have a supreme court status: Payne 89. Accordingly, in view of the constitutional limitations on the transfer of jurisdiction over 'many types of matrimonial and familial proceedings' to an inferior court, such as a provincial family court, it follows that such a court will never be able to acquire a comprehensive and integrated jurisdiction over all family law matters: Payne 74, 90, 95 and 104-109. The submission is made by Payne at 106, however, that jurisdiction over all family law matters should in fact be conferred on provincial family courts which should be accorded a supreme court status.

5) (1976) 50 ALJR 594.

inevitable that because of the Australian constitutional set-up there should be jurisdictional, as well as procedural, difficulties being experienced. This is a frustrating and confusing situation.¹⁾ For example, custody cases may fall within the jurisdiction of either the Australian Family Court or a state court according to the principles laid down in the Russell and Farrelly case.²⁾ Thus, in a recent case,³⁾ a father of minor children erroneously made application for their custody to the Supreme Court of New South Wales while, at the same time, the maternal grandparents of the children also acted in error by applying to the family court for their custody.⁴⁾

Various recommendations for the elimination of the jurisdictional problems being experienced by the Australian Family Court have been made by various commentators⁵⁾ and the Family Law Council. In its first Annual Report for 1977⁶⁾ it was recommended that there should be a unified jurisdiction over maintenance and custody matters in respect of all children, whether legitimate or illegitimate, and that to achieve this the various states should surrender their jurisdiction

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- 1) In commenting on the Russell and Farrelly case Turner 'The Commonwealth Family Law Act: The First Challenge' (1976) 1 Aust Child Fam Welfare 51, 56, suggests that the Australian Federal Legislature has been frustrated in its efforts to create a truly unified family court structure because of the Australian constitution which has 'once again prevented or placed severe restrictions on sweeping and enlightened legislation ... The framers of the Australian constitution have a lot to answer for.'
 - 2) See above at 65.
 - 3) Cited in (1978) 52 ALJ 237, 238.
 - 4) Not unnaturally Helsham CJ described this situation as being a 'silly' one. His Lordship continued to add that 'When the law is stupid, those who suffer because of it are entitled to have its stupidity publicly exposed'.
 - 5) Among the Australian commentators who have made suggestions for improvement are Finlay 'Australian Family Law: The Twilight Zone' (1976) 8 Fed LR 77; Finlay in a note in (1976) 50 ALJ 360; Turner 'The Commonwealth Family Law Act: The First Challenge: Russell v Russell' (1976) 1 Aust Child Fam Welfare 51; Wade 'Jurisdiction under the Family Law Act to make Orders affecting Property in the Absence of Proceedings for Principal Relief' (1977) 5 Univ Tas LR 248.
 - 6) At § 55.

over these matters to the family court. In its second Annual Report for 1978¹⁾ the Family Law Council again expressed itself in favour of such change and even went further than before by suggesting that the law relating to the guardianship of ex-nuptial children should also fall under the jurisdiction of the family court. There is no doubt that with the passage of time these jurisdictional problems of the Australian Family Court will be ironed out. Until this happens the Family Court of Australia will continue to experience conflicts and overlappings of jurisdiction and the determination of cases in fragments will not result in the expected saving of costs of litigation and an expeditious determination of cases.²⁾

By way of contrast with the position in Australia, Hawaii has experienced a relatively smooth transition from its old court structure to the new regime of family courts. Provision has been made for the establishment in Hawaii of a Board of Family Court Judges which is obliged to meet at least once every 6 months to discuss and 'attempt to achieve agreement upon general policies for the conduct of family courts and forms for use in such courts.'³⁾ The Board may also, inter alia, formulate recommendations for remedial legislation.⁴⁾ In practice, however, the Board seldom meets mainly because of a lack of time and funds for travel among the islands that constitute the State of Hawaii.⁵⁾ This, in fact, only serves to highlight the smooth passage Hawaii experienced with the establishment of its family court.

As already indicated above,⁶⁾ the Conciliation Court of Los Angeles is restricted in its jurisdiction. The Conciliation Court, by its nature, however, is not suited for an all-embracing jurisdiction

1) At §§ 5-12.

2) See the comment in the (1978) 52 ALJ 237 where it is suggested that the failure to achieve a more expeditious disposal of family law cases in the family court is one of its most serious defects.

3) § 5 Hawaii Revised Statutes.

4) Ibid.

5) Dyson and Dyson 533.

6) At 79-80.

over all family law matters. Such all-embracing jurisdiction is clearly the aim of the Hawaii Family Court, where it has been achieved, and the Family Court of Australia, where it has yet to be achieved. The continuing efforts to obtain this unified and comprehensive jurisdiction in Australia are indicative of the advantages to be obtained from a unified family court system. Certainly, this should not be impossible of attainment in the South African context where there are no constitutional difficulties of the sort that exist in Australia.

3. Counselling: Conciliation and Reconciliation

(A) Introduction

An important feature of any family court is to be found in the provision it makes for counselling. This is particularly true of the American family court system which is basically committed to a 'social work philosophy which regards family breakdown as a phenomenon to be dealt with primarily by diagnosis and treatment.'¹⁾ This approach is

1) Finer Report § 4.281. It is, however, difficult to understand the Finer Committee's assertion [at § 4.282] that it owed 'little to American experience or writings, or to any preconceived attachment to the notion of a family court,' particularly when the Finer Committee itself [at § 4.283] favoured the following criteria which, it felt, a family court should in principle satisfy. They are very similar to the main criteria of most American family courts; namely,

- '(i) the family court must be an impartial judicial institution, regulating the rights of citizens and settling their disputes according to law;
- (ii) the family court must be a unified institution in a system of family law which applies a uniform set of legal rules, derived from a single moral standard and applicable to all citizens;
- (iii) the family court must organize its work in such a way as to provide the best possible facilities for conciliation between parties in matrimonial disputes;
- (iv) the family court must have professionally trained staff to assist both the court and the parties appearing before it in all matters requiring social work services and advice;
- (v) the family court must work in close relationship with the social security authorities in the assessment both of need and of liability in cases involving financial provision;
- (vi) the family court must organize its procedure, sittings and administrative services and arrangements with a view to gaining the confidence and maximising the convenience of the citizens who appear before it.'

The Finer Committee also appears to have relied heavily on the commentaries of writers such as Hall; Brown 'Legal Background to the Family Court' 1966 Br Journ Criminology 139; Samuels 'Family Courts - The Future (1972) 122 NLJ 133. These writers, in turn, appear to have been influenced by the American family court experience. See also Phillips 'A Family Court System for Scotland?' (1976) Journ Law Soc Scotland 12 and 52 esp 53-54.

understandable when it is remembered that the American family court system has its roots in the juvenile court movement.¹⁾

This 'social work philosophy', which promotes the diagnosis and treatment of family law problems provides the essential link between the legal and social sciences and this, in turn, would appear to be possible only by the creation of a single court system with exclusive jurisdiction over family law matters. The main motivations behind the promotion of this social work philosophy would appear to be the desire to safeguard the interests of children; the desire to prevent needless divorces from taking place; the desire to minimize the bitterness, distress and humiliation experienced by parties to a matrimonial conflict; the desire to enable the court to focus its attention upon the real problems of a marriage in jeopardy; and the desire to provide a form of individualized justice for every person falling within the jurisdiction of a family court.²⁾

Before one is properly able to evaluate the counselling services of the family courts under consideration it is necessary (i) to dispel the ill-conceived notion that the function of the counsellors of the family court is solely to promote the reconciliation of warring spouses and to prevent, at all costs, a divorce from taking place;³⁾ (ii) to highlight the distinction between the conciliation and reconciliation process;³⁾ and (iii) to refer, briefly, to the English counselling experience.

1) See above at 4-6.

2) Cf the stated purpose of the Los Angeles Conciliation Court in s 1730 of the Code of Civil Procedure which is cited in full above at 15. See also the oft-quoted aims of a good divorce law as formulated by British Law Commission in 1966 in its report Field of Choice at § 15; viz. 'A good divorce law should seek to achieve the following objectives:

(i) to buttress, rather than to undermine, the stability of marriage; and

(ii) when, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.'

3) See, for example, Appendix 'B' which sets out the counselling services offered by the Edmonton Family Court, Alberta, Canada.

(i) Reconciliation at all Costs:

Nothing could be further from the truth than the idea that the family court personnel make it their business to prevent warring spouses from obtaining a divorce to which they are entitled. Perhaps the clearest statement on the true role and function of a family court counsellor is that of Elkin¹⁾ who states that:

'We [the counsellors] do not have as a goal the saving of all marriages, but we are concerned with the tragedy of the unnecessary divorce. The intent of the law is very clear and definitely embraces more than a reconciliation function. A conciliation court serves families. If in the course of such service a family does not reconcile, this does not mean that the counsellor's concern and responsibility to the family is at an end. In such cases, we still offer a very important and worthwhile service in our counseling efforts to help the family close the book gently rather than bang it shut in anger; to help the family terminate the marriage with dignity, minimal trauma, and without the need to strike back - a need which is often responsible for much of post-divorce litigation. Conciliation court counselors recognize that a divorce decree cannot and does not end parental responsibility to the children - for parents are forever. Nor do problems stop when the divorce decree is final. One of our goals with unreconciled families is to assist the husband and wife to focus feelings and decisions so that they can continue to exercise their joint responsibilities to their children in a constructive way, as well as to use the crisis of divorce as an

1) 'Conciliation Courts: The Reintegration of Disintegrating Families' (1973) 22 Fam Coordinator 63, 64.

opportunity for personal growth and fulfilment.¹⁾

(ii) Conciliation and Reconciliation

The distinction between the conciliation and reconciliation process has not always been readily apparent. The failure to appreciate the significant differences between these two concepts may well account for some of the misguided criticisms of the counselling functions of the family court system.²⁾ In England, the Finer Committee appears to have

- 1) Elkin Marriage, Family and Divorce Counseling in Courts: A Position Paper (1977) 4 has again emphasized that 'Conciliation does not just mean reconciliation. "Conciliation" is an umbrella concept ... under which is subsumed any marriage, family and divorce counseling service which is court related ... Conciliation courts engage in conciliation counseling, which includes reconciliation counseling, separation and divorce counseling, custody and visitation counseling, both before, during the divorce, and after the final decree has been entered. Conciliation courts deal with the crisis of divorce or impending divorce, an experience which next to death is one of the most wrenching and stressful of all experiences...' On the attributes of a good marriage counsellor see Elkin Techniques are not Enough (1970) - a paper presented at the Eighth National Conference of Conciliation Courts in May 1970 at Detroit, Michigan. For further descriptions of the counselling process in American family courts see, *inter alia*, Biggs 'Stability of Marriage - A Family Court?' (1961) 34 ALJ 343, 350; Macdonald 'A Comprehensive Family Court' (1967) 10 Can BJ 323, 333-335; Kay 'A Family Court: The California Proposal' (1968) 56 Calif LR 1205, 1225-1226; McLaughlin 'Court-connected Marriage Counseling and Divorce - The New York Experience' (1971) 11 J Fam Law 517, 530-531.
- 2) The lack of appreciation of the important differences between the conciliation and reconciliation process has, in part, been due to the fact that some family courts have themselves failed to define the true functions of their counsellors: ie whether their aims are directed at conciliation, or at reconciliation, or both: see McLaughlin 'Court-connected Marriage Counseling - The New York Experience' (1971) 11 J Fam Law 517, 530; Payne 403-405.

recognized the importance of the distinction between conciliation and reconciliation and it has rightly emphasized¹⁾ that:

'By "reconciliation" we mean the reuniting of the spouses. By "conciliation" we mean assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving consents to reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees, and every other matter arising from the breakdown which calls for a decision on future arrangements.'²⁾

Of the two processes the reconciliation process, by its very nature, must of necessity rank before the conciliation process in point of time. It is, in fact, a widely held view that for the reconciliation process to have any chance of success it must be applied at an early stage of marital discord and, preferably, before an attorney is consulted. Once an attorney is consulted the possibility of reconciliation becomes remote.³⁾

1) Finer Report § 4.288.

2) Cf Manchester and Whetton 'Marital Conciliation in England and Wales' (1974) 23 ICLQ 339, 342, where they point out that 'whereas marital reconciliation is designed to keep the marriage legally intact and may be the result of counselling, the aim of the counsellor is to help couples perceive for themselves the potential which the marriage itself may still have for them. Indeed there is some reason to believe that, even if the married partners decided not to become reconciled, the conciliation process may assist them to face the post-divorce situation.'

3) Cf Freeman 'The Search for a Rational Divorce Law' (1971) 24 CLP 178, 205-207, who pertinently points out that 'The solicitor is not only ill-equipped to undertake guidance but his training and environment are such that therapy is a remedy that is not even likely to occur to him. Furthermore, he lacks the incentive. He is not paid if his conciliatory services prove successful'. See also 'The English Counselling Experience' below.

(iii) The English Counselling Experience

In England, the purely reconciliation-orientated provisions of section 6 of the Matrimonial Causes Act of 1973¹⁾ have apparently met with very little enthusiastic support. Section 6 states that

'(1) Provision shall be made ... for requiring the solicitor acting for a petitioner for divorce to certify whether he has discussed with the petitioner the possibility of a reconciliation and given him the names and addresses of persons qualified to help effect a reconciliation between parties to a marriage who have become estranged.

(2) If at any stage of proceedings for divorce it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation.'

It is clear that the emphasis is on the reconciliation of spouses experiencing marital discord. No provision at all is made for post-divorce counselling. In this regard, Freeman²⁾ expresses himself as follows:

'The world of the formerly married has been but little explored. Role disturbance and adjustment, alienation have to be conquered. Unlike death, the patterns of post-divorce adjustment are not well institutionalised. A high percentage of divorcees remarry, many of them successfully. But many problems could be alleviated if post-divorce welfare was strengthened.'³⁾

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- 1) Chapter 18. See generally Stone 105-108; Bromley 256-257; Cretney 153-155. See also Putting Asunder 150-161 where the conclusion reached is that more effort should be put 'into saving marriages than in terminating them.'
 - 2) 'The Search for a Rational Divorce Law' (1971) 24 CLP 178, 207.
 - 3) Freeman's comments were being directed at the identical provisions of the 1969 Divorce Reform Act (Chapter 55) which were replaced by s 6 of the 1973 Matrimonial Causes Act (Chapter 18).

When the provisions of section 6 (1) first appeared in 1969, there was a tendency on the part of solicitors to regard the section as being responsible for a needless and unwarranted increase in their paper work - a necessary formality that had to be complied with in every case.¹⁾ As a counter to this tendency a Practice Direction²⁾ stressed that

'It is important that reference to a marriage guidance counsellor or probation officer should not be regarded as a formal step which must be taken in all cases irrespective of whether or not there is any prospect of reconciliation.'

The practical effect of section 6 (1) of the Matrimonial Causes Act, as read with the above Practice Direction, was to emphasize what always had been appreciated; namely, that a divorce should be proceeded with only when it is genuinely desired and unavoidable.³⁾

With regard to section 6 (1) of the Matrimonial Causes Act its effectiveness in practice is debatable. In the first place, for there to be any chance of a reconciliation being effected, the reconciliation counselling must be invoked at an early stage of marital discord - certainly before the case has reached court, and preferably, before a solicitor is consulted.⁴⁾ Secondly, no English divorce court has ever needed statutory authority to adjourn so as to enable the parties to a matrimonial action to reconsider their decision to divorce. In the third place, it is unlikely that the possibility of reconciliation will be seriously considered by the spouses where the court suo motu adjourns a case. Only the spouses themselves, and not the court, are best qualified to decide whether or not reconciliation is a viable

1) See Griew 'Marital Reconciliation - Contexts and Meanings' (1972) 30 Camb LJ.

2) [1971] 1 All ER 63.

3) As Griew 'Marital Reconciliation - Contexts and Meanings' (1972) 30 Camb LJ 294, 307-308, puts it: 'The practical effect ... is to provide a statutory incentive to do what self-respecting solicitors claim always to have done spontaneously - namely, to ensure, when necessary and so far as they can, that divorce is genuinely desired and unavoidable.' See also Bromley 257.

4) See above at 89.

proposition. It would seem that for such adjournment to be of any value it must at least be with the consent of the parties themselves, and they must have expressed a willingness to submit to reconciliation counselling.¹⁾

It was, no doubt, because of the above shortcomings of section 6 (2) of the Matrimonial Causes Act that another Practice Direction of considerable importance was issued in January 1971²⁾ when, for the first time, there appeared a measure of recognition of the importance of the distinction between reconciliation and conciliation counselling. Thus, it is stated³⁾ that:

'Even if complete reconciliation cannot be achieved, expert help will often enable the parties to resolve, with the minimum possible anxiety and harm to themselves or their children, many of the issues liable to be ancillary to the breakdown of a marriage. Short of this, it should at least identify the issues on which the parties remain seriously at variance and on which in consequence they require adjudication by the court.'

In view of the significance of the distinction between reconciliation and conciliation counselling the procedure prescribed by the Practice Direction is worthy of citation in full, if only to confirm the failure of the erstwhile purely reconciliatory approach. The Practice Direction, in fact, marks a substantial deviation from the spirit and letter of section 6 (2), and it provides that:

1) On the shortcomings of s 6 (2) Matrimonial Causes Act see Griew 'Marital Reconciliation - Contexts and Meanings' 294, 309: the writer's comments are directed at the provisions of s 3 (2) of the 1969 Divorce Act (Chapter 55) which are identical to s 6 (2) of the Matrimonial Causes Act (Chapter 18). Commenting on similar provisions in the Australian Matrimonial Causes Act of 1959 Mr Justice Selby 'Development of Divorce Law in Australia' (1966) 29 MLR 473, 487, is of the view that 'Experience suggests that ... these provisions remain in the realm of pious hope. By the time a matrimonial cause reaches a hearing the parties are too far apart, one of them, at least, is too anxious for a final determination of the suit and too much bitterness has been engendered to allow any reasonable prospect of reconciliation.' Cf Hanlo 'Fighting the Dragon Divorce.' (1963) 80 SALJ 27.

2) 1971 1 All ER 894.

3) Ibid.

'(a) Where the court considers that there is a reasonable possibility of reconciliation or that there are ancillary proceedings in which conciliation might serve a useful purpose, the court may refer the case, or any particular matter or matters in dispute therein, to the court welfare officer.

(b) The court welfare officer will, after discussion with the parties decide whether there is any reasonable prospect of reconciliation (experience having shown that reconciliation is unlikely to be successful in the absence of readiness to cooperate on the part of the spouses) or that conciliation might assist the parties to resolve their disputes or any part of them by agreement.

(c) If the court welfare officer decides that there is not such reasonable prospect, he should report accordingly to the court.

(d) If the court welfare officer decides that there is some reasonable prospect of reconciliation, or that conciliation might assist the parties to resolve their disputes, or any part of them, by agreement, he will, unless he continues to deal with the case himself, refer the parties to either (i) a probation officer; or (ii) a fully qualified marriage guidance counsellor by the branch of the appropriate organisation concerned with marriage guidance and welfare; or (iii) some other appropriate person or body indicated by the special circumstances (eg denominational) of the case.

(e) The person to whom the parties have been referred will report back to the court welfare officer who in turn will report to the court. These reports will be limited to a statement whether or not reconciliation has been effective, or to what extent (if at all) the parties have been assisted by conciliation to resolve their disputes or any part of them by agreement.'

While this Practice Direction is a great improvement on the erstwhile application of section 6 (2) of the Matrimonial Causes Act, it is debatable whether it succeeds in practice since it is designed

for operation in an adversary atmosphere.¹⁾ It is true that the sole ground on which a divorce may be granted in England is 'that the marriage has broken down irretrievably.'²⁾ But a court will only find that a marriage has broken down irretrievably if it is satisfied on one or more of the facts listed in section 1 (2) of the Matrimonial Causes Act, three of which are clearly fault-orientated.³⁾ Against this background it is difficult to reconcile the conciliation process with the adversary procedure where fault-orientated considerations play such an important part. Such agreements as are negotiated in such an adversary atmosphere can hardly be construed as genuine agreements. On this aspect, Eekelaar⁴⁾ expresses himself as follows:

'Within the adversary mould of ... litigation it is very difficult to know how genuine agreements are. This is because the parties may be in negotiation, often through their solicitors, until the last moment and settlement might only have been reached at the door of the court. This type of process resembles the kind of bargaining common in commercial litigation and is far removed from conciliation. By the time the parties come before a registrar, even if he is disposed to try and promote a better atmosphere there may be little he can do in the short time available to him to reduce the hostility encouraged by the bargaining

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- 1) See below at 114-121 for the adversary procedure.
 - 2) S 1 (1) Matrimonial Causes Act 1973 (Chap 18).
 - 3) These facts are that '(a) the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent; (b) the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; (c) the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition; (d) the parties ... have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition ... and the respondent consents to the decree being granted; (e) the parties ... have lived apart for a continuous period of at least 5 years immediately preceding the presentation of the petition ...' See Cretney 97-153; Bromley 244-256.
 - 4) At 150-151.

postures adopted earlier.¹⁾

Thus, although referrals to the probation services by divorce courts for conciliation work have been increasingly made, the overall total number of referrals still remains minimal.²⁾ This is understandable when it is remembered that such referrals can only be made after the divorce action has already commenced. It is, accordingly, submitted that there is much substance in the suggestion of Manchester and Whetton³⁾ that the ineffectiveness of the reconciliation provisions of the Matrimonial Causes Act has been due to a misplaced emphasis on reconciliation: it might have been better if the emphasis was placed on conciliation (or divorce) counselling with the possibility of reconciliation (albeit on very rare occasions) being seen as a hopeful consequence.⁴⁾ If reconciliation were to be the sole aim of the counselling services it is clear that its effectiveness would be inhibited by at least two important factors. In the first place, many parties would be 'scared off' in thinking they would lose their remedies if they attempted a reconciliation. In the second place, it is a truism that no matter what counselling they receive the parties concerned will never reconcile if they do not want to do so. The position is well expressed by Griew⁵⁾ as follows:

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- 1) See also Manchester and Whetton 'Marital Conciliation in England and Wales' (1974) 23 ICLQ 339, 358.
 - 2) Eekelaar 150.
 - 3) 'Marital Conciliation in England and Wales' (1974) 23 ICLQ 339, 359.
 - 4) Cf Payne 405: 'Legislation should specifically reflect the philosophy that counselling cannot be sub-divided into separate categories such as "reconciliation" counseling and "conciliation" counseling and that the role of the counsellor is to assist in the resolution of matrimonial and familial problems irrespective of whether this leads to the preservation of the marriage or family unit or to its dissolution and disintegration.'
 - 5) 'Marital Reconciliation - Contexts and Meanings' (1972) 30 Camb LJ 294, 312. See also Sir Jocelyn Simon PC 'Recent Developments in the Matrimonial Law' - the 1970 Riddell Lecture cited in full by Rayden 3227, 3238: 'Even if full reconciliation is not possible, skilful and sympathetic advice will often enable the parties to go their separate ways with the least pain and damage to themselves and their children.' Cf Clark 285.

'The avoidance of divorce may be the product of counselling. But, it is not, for the counsellor, the aim; it may not, in a particular case, be a desirable outcome. The counsellor can hardly help his clients to determine for themselves what is best for themselves if the "best" is predetermined.'

(B) Los Angeles Conciliation Court

(i) Pre-marital Counselling

The Los Angeles Conciliation Court was the first American family court to introduce the concept of pre-marital counselling.¹⁾ The procedure is described above.²⁾ There is, at present, very little research data available to enable one to assess the success rate of the pre-marital counselling procedure.³⁾ But according to Elkin⁴⁾ it has been found in a recent survey that out of the 58 superior courts in California most of them were in favour of the pre-marital counselling provisions of section 4101 of the Code of Civil Procedure. Apparently, only one court argued in favour of the repeal of section 4101. Despite this, however, the survey showed that the effectiveness of the pre-marital counselling provisions 'will remain contradictory until more information is available.'⁵⁾

It should, of course, be remembered that the superior courts of California are only permitted to order pre-marital counselling for a couple applying to court for permission to marry where one or both are under the age of 18 years, and the court considers such

1) 1977 Conciliation Court Report 8.

2) At 17-21.

3) Elkin 'Premarital Counseling for Minors: The Los Angeles Experience' (1977) 26 Fam Coordinator 429, 442.

4) Op cit at 441.

5) Ibid.

counselling necessary. Furthermore, pre-marital counselling is not normally undertaken by the Conciliation Court staff, but by outside counselling services.¹⁾ At the most, it can be said that enthusiasm for court connected pre-marital counselling in the Los Angeles Conciliation Court is guarded.

(ii) Pre-Divorce Counselling

Such statistical data as there is concerning the success of the Conciliation Court is to be found in the various annual reports.²⁾ In 1977 the Conciliation Court completed a total of 1245 cases in respect of which 747 couples were either reconciled or entered into an amicable agreement.³⁾ This represents a success rate of 60% for the year ending 1977. Failure to effect a reconciliation, or an amicable 'Husband and Wife' agreement, was registered in 436 cases - a failure rate of 35,02% - while 62 cases were dismissed. Neither the 1976 and 1977 annual reports indicate how many minor children were involved in those cases where a reconciliation was effected.⁴⁾ Nor

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- 1) According to Payne, 316, the only conciliation court whose personnel have assumed responsibility for pre-marital counselling is the Conciliation Court of Maricopa County, Arizona. The 1977 Annual Report of the Maricopa Conciliation Court, 8, shows that in 1977 the total number of couples where one or both partners were underage, and who needed court permission to get married, was 240. Of this number, 194 couples were granted the necessary permission to marry, while 46 couples were either refused permission to marry or were allowed to re-apply at a later date : see also 110 n 1 below.
- 2) See also Foote, Levy and Sander (1966) 790 n 110: statistical data relating to the Conciliation Court does not appear to have been cited in the 1976 edition of the authors' work.
- 3) A completed case is one in which the parties have reached a definite decision to resume or not to resume the marriage: ~~Maddi~~ 'The Effect of Conciliation Court Proceedings on Petitions for Dissolution of Marriage' (1973-74) 13 J Fam Law 495, 498.
- 4) Such statistics are, however, to be found in the 1974 Conciliation Court Report (Table 1) for the years 1972, 1973 and 1974: viz

Total Cases Completed	1972 1454	1973 1103	1974 984
Reconciliation Effected	1097	832	812
Unreconciled	357	269	172
Reconciliation Percentage	76,9%	75,6%	82,5%
Number of children involved in reconciled cases	1929	1458	1399

do the annual reports indicate how long the couples remained reconciled. But it has been alleged that by means of a follow-up procedure, on average, three out of four reconciled couples were still living together one year later.¹⁾ In terms of the follow-up procedure a judge of the Conciliation Court writes to every reconciled couple one year after the reconciliation has been effected enclosing a questionnaire which asks, inter alia, whether they are still living together as man and wife or, if not, when they separated. Also enclosed is a stamped and self-addressed envelope in which to return the questionnaire. No further follow-up is effected because, as Howard remarks,²⁾ 'It is a fair conclusion that if a couple remain reconciled one year later they are likely to remain so.'³⁾

It must be stressed, however, that the statistics cited above have been gleaned from the official reports of the Los Angeles Conciliation Court. The only independent evaluation of the Conciliation Court that the writer has been able to discover is that of Maddi.⁴⁾ It must also be noted that it has been suggested that some of the claims of success are exaggerated.⁵⁾ In this regard, it is significant to recall that

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- 1) Elkin 'Conciliation Courts: The Reintegration of Disintegrated Families' (1973) 22 Fam Coordinator 63, 67. See also Burke 'The Role of Conciliation in Divorce Cases' (1961) 1 J Fam Law 209, 212 - 'At the end of one year following the effecting of a reconciliation, attempts are made to ascertain whether or not the parties are still living together. Three out of every four replies received reveal that the reconciliations remain in effect; that one out of every four fails. Often the letters of reconciled persons contain voluntary expressions of gratitude for the efforts and advice of the counselors. In the 1954-59 period there were over seven thousand seven hundred children involved in the families reconciled.'
 - 2) 'Matrimonial Conciliation' (1962) 36 ALJ 148, 152.
 - 3) Whether this is in fact a 'fair conclusion' is highly debatable: cf Maddi 'The Effect of Conciliation Court Proceedings on Petitions for Dissolution of Marriage' (1973-74) 13 J Fam Law 495, 498.
 - 4) 'The Effect of Conciliation Court Proceedings on Petitions for Dissolution of Marriage' (1973-74) 13 J Fam Law.
 - 5) See, for example, Clark 285. Even Payne, 452, doubts the accuracy of the official statistics and he points out (ibid) that 'reliance cannot be placed upon such statistics in the absence of any independent appraisal.'

proceedings in the Conciliation Court are initiated by way of a 'Petition for Conciliation'.¹⁾ A reluctant respondent could be compelled to attend counselling sessions by the issue of a citation. In practice, however, this citation is only issued if it is felt that it might accomplish some constructive purpose. Thus, the conciliation process is hardly ever set in motion where one of the parties is reluctant to attend. It follows, then, that the court counsellors are only called upon to concentrate their attentions on those cases where the parties have voluntarily expressed a willingness to submit to counselling.²⁾ In this way, the reconciliation statistics are made to look more impressive than would be the case if counselling was thrust on everyone. Thus, in the official reconciliation statistics no account is taken of those cases which proceed to a final decree of divorce in which no 'Petition for Conciliation' has been filed.

The impressive statistics suggesting an outstanding reconciliation rate would, therefore, appear to be illusory. For example, in a sample study undertaken by Maddi³⁾ it would appear that out of 6682 dissolution, nullity and legal separation cases filed in the Superior Court of the Los Angeles County for the period February to May, 1970, only in 330 cases was a 'Petition for Conciliation' filed. This constituted only 4,9% of the total sample. When measured against the total number of dissolution, nullity and legal separation cases, the reconciliation rate would, in fact, be very low. At the conclusion of her comprehensive evaluation of the Conciliation Court procedure, Maddi suggests that⁴⁾

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- 1) See above at 23-25 for the 'Petition of Conciliation.'
 - 2) As Foster 'Conciliation and Counseling in the Courts in Family Law Cases' (1966) 41 NYULR 361, 366, puts it: 'The conciliation court makes its services available only to a select group where at least one of the parties is highly motivated for reconciliation.'
 - 3) 'The Effect of Conciliation Court Proceedings on Petitions for Dissolution of Marriage' (1973-74) J Fam Law 495, 506-507: cf Foster 'Conciliation and Counseling in the Courts in Family Law Cases' (1966) 41 NYULR 361, 366.
 - 4) Op cit 551-552.

'Although there may be other reasons for supporting or establishing a conciliation service similar to the one examined in this study [the Los Angeles], the impact on the overall decree rate of cases which have filed for dissolution of marriage is not one of them. This is not to say that the service does not have any impact on the decree rate, but that the impact was not clearly demonstrated by the statistics gathered and in any event is restricted to such a small proportion of the total dissolution filing that the overall effect is negligible. In a county such as Los Angeles, where over 47,000 family law petitions are filed each year, even a relatively large and well staffed conciliation court can provide services for only a small fraction of the couples coming before the court.'

Maddi then concludes¹⁾ that

'Unless the service were expanded dramatically it could not serve more than a minor proportion of the attrition - prone cases. Therefore, unless legislatures are willing to fund conciliation programs with large staffs capable of serving a significant portion of the population seeking divorce, the impact on [the] decree rate is bound to be minimal. Nor is it clear that serving a larger portion of the divorce-seeking population would have a significant impact.'

Whether the Conciliation Court would, in fact, be able to increase its staff resources is highly debatable. The truth of the matter is that a large porportion of divorce-bound couples have no desire at all to submit themselves to counselling. To this extent, the Conciliation Court adopts a realistic approach in that its counselling services are only available to those who are likely to benefit from them; namely, those who are desirous of counselling.²⁾ In this way, the staff of the Conciliation Court are better able to concentrate their endeavours on those cases where the germ of reconciliation exists.

1) Ibid.

2) Cf Foote, Levy and Sander 787: 'It's silly ... to try to achieve reconciliation, for the divorce proceeding merely hardens the parties in the discord and makes treatment that much harder.'

This approach is, in any event, absolutely necessary in view of the fact that the Conciliation Court is in no position to offer long-term counselling.¹⁾

One's impression of the official statistics must, therefore, be tempered by the realization that they refer only to those who have submitted themselves voluntarily to the jurisdiction of the Los Angeles Conciliation Court and do not take account of the greater majority of those who proceed to obtain the final decree of divorce without first having gone through the court counselling process. Thus, although the results of the Conciliation Court, at first blush, seem impressive, they are by no means as impressive as often made out to be. This submission appears to be supported even by some who are, or have been, most directly concerned with the operation of the Conciliation Court. Thus, even Meyer Elkin, the former Director of Counselling Services of the Los Angeles Conciliation Court, was constrained to admit that he was not 'so naive as to believe that the mere establishment of a court of conciliation and its successful operation is the only answer to dealing with the increasing problems of family breakdown.'²⁾

(iii) Post-Divorce Counselling³⁾

In post-divorce counselling the emphasis is on conciliation counselling as opposed to reconciliation counselling. In this way, attention is focussed on the 'world of the formerly

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- 1) In 1976, largely due to a fiscal crisis, there was a 50% reduction in both the clerical and professional staff of the Conciliation Court with the result that the services offered by the court had, of necessity, to be curtailed. This resulted in an even more selective intake process: 1976 Conciliation Court Report 1. But, the erstwhile position has now, happily, been restored while the selective intake process has been retained: 1977 Conciliation Court Report 3.
 - 2) 'Conciliation Courts: The Reintegration of Disintegrated Families' (1973) 22 Fam Coordinator 63, 71.
 - 3) Cf Elkin 'Postdivorce Counseling in a Conciliation Court' (1977) 1 Journ of Divorce 55: 'The divorce experience does not stop with the divorce decree. The divorce decree merely indicates that the legal aspects of the divorce may be over. But more important than the legal divorce is the emotional divorce, which is a process that continues beyond the legal experience.' See above at 31-33 for the post-divorce counselling procedure in the Conciliation Court.

married.¹⁾ Regrettably, there has been very little published comment on the efficacy of post-divorce counselling in the Conciliation Court.²⁾ The 1977 Conciliation Court Report³⁾ does, however, show that in 1977 out of 692 couples who were referred to the Conciliation Court for post-divorce counselling, approximately 41% were able to work out a written amicable agreement with resulting benefits to them and their children. This, in itself, would appear to be a significant rate of success and one can readily agree with Payne's conclusion⁴⁾ that 'If ... court-counselling staff have a useful role to discharge in the context of "conciliation counselling" this role appears equally significant irrespective of whether litigable issues arise before or after judicial dissolution of the marriage.'

(c) The Hawaii Family Court

Unlike the position in the Los Angeles Conciliation Court there is no provision in the Hawaiian legislation for pre-marital counselling, the attitude being that this is a matter for the individual concern of the parties involved and their parents.⁵⁾

As to pre- and post-divorce counselling this is conducted on a limited scale. Thus, for the 1976-1977 period the family court was concerned with a total of 214 cases at the pre-divorce stage out of which 17 cases were completed at the end of the period under consideration.⁶⁾

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- 1) Cf Freeman 'The Search for a Rational Divorce Law' 24 CLP 178, 207.
 - 2) See Payne 410-414; Elkin 'Postdivorce Counselling in a Conciliation Court' (1977) 1 Journ of Divorce 55.
 - 3) At 19.
 - 4) At 414.
 - 5) See above at 51 and see Payne 317-318.
 - 6) These figures have been extracted from the 1977 Hawaii Report (Table 13) 76.

With the exception of these statistics very little empirical data regarding the efficacy of the counselling services of the Hawaii Family Court is available. It seems a little surprising that the above statistics do not reveal a heavier counselling caseload in view of the fact that -

'in the first circuit, intake services are freely offered - even advertised - to the general public. "Take your troubles to the family court; make a phone call or drop by the office" is the title of an article in a local paper. The story lists a family court telephone number which the public may call any week day between 8 and 4.30 for free "advice or information about any problem involving your family." Or people may come in off the street if they would rather seek help face to face.'¹⁾

In fact, the counselling services of the family court are not unduly flooded with requests for counselling assistance for at least the following reasons: in the first place, 'middle class people who can go elsewhere are not likely to seek advice at the family court.'²⁾ In this regard, Dyson and Dyson³⁾ observe that 'it must be remembered that most of the people who appear before family courts are members of the lower economic classes.' In the second place, the counselling therapy offered by the family court is of a short-term nature in that an effort is always made to conclude a case within 90 days.⁴⁾

It is clear that the strength of the Hawaii Family Court is not to be found in its counselling services. Corbett and King⁵⁾ sum up the position with regard to Hawaii as follows:

'Our family court is being developed as a court utilizing the techniques of the social services and not as a social agency utilizing the authority of the law.'

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- 1) Dyson and Dyson 9.
 - 2) Dyson and Dyson 39, quoting Mary Jane Lee, Director of the Family Court of the First Judicial Circuit, Hawaii.
 - 3) At 522.
 - 4) Dyson and Dyson 40.
 - 5) 'The Family Court of Hawaii' (1968) 2 Fam LQ 32, 39.

Interestingly, even though the family court's counselling services do not concern themselves to any great extent with matrimonial problems at their various stages, they do concentrate to a large extent on children accused of 'law violations.' Thus, according to the 1977 Hawaii Report¹⁾ of the 3653 child 'law violation' cases dealt with by the family court in 1976-1977, 1595 of the cases were successfully disposed of by the counselling services. In respect of children needing protective supervision 960 cases were handled and disposed of by the counselling services.

(D) The Family Court of Australia

(i) Pre-marital Counselling

The pre-marital education programmes provided for by the Australian Marriage Act of 1961²⁾ are relatively new to the Australian scene. Very little is known about their effectiveness to reduce the rate of marriage breakdown and divorce, or to improve the quality of marital relationships.³⁾ Bates,⁴⁾ however, does suggest that the pre-marital education provisions are totally ineffective. In particular, he suggests that section 13 (1) (c) of the Marriage Act which requires an authorized celebrant to

'give to the parties to a marriage a document ... outlining the obligations and consequences of marriage and indicating the availability of pre-marital education and counselling,'

is nothing more than an 'impertinence',⁵⁾ if only because young people on the threshold of marriage are generally unwilling to learn no matter how well intentioned the advice given is. As a general proposition, so it is alleged, such young people have their own pre-conceived ideas on matters such as sex, courtship, marriage and child-bearing.

- 1) (Table 13) 76 and see below under 'Safeguarding the Interests of Children.'
- 2) As amended by the Marriage Amendment Act, 1977: see Bates 'The Enforcement of Marriage Revisited' (1977) 6 Anglo Am LR 172, 179-180.
- 3) Second Family Law Council Report (1978) 43.
- 4) 'The Enforcement of Marriage Revisited' (1977) 6 Anglo Am LR 172, 179.
- 5) Per contra Turner 'The Marriage of Minors' (1968) 8 Univ WALR 319, who strongly argues that counselling is much more effective before the marriage takes place than after it breaks down. Cf Appendix 'C'.

(ii) Pre- and Post-Divorce Counselling

Counselling and reconciliation procedures were originally provided for by the Commonwealth Matrimonial Causes Act, 1959-1966. These procedures, however, did not find widespread acceptance in Australia.¹⁾ Thus, for example, it was seriously questioned by Kovacs²⁾ whether such provisions actually worked in practice. So also Bates³⁾ has long suggested that too much emphasis is placed on the first of the two main objectives of a good divorce law propounded by the British Law Commission in 1966.⁴⁾ Like Kovacs, Bates is of the view that 'social problems require social answers' and that in place of the first of the main objectives of a good divorce law as propounded by the British Law Commission the following would be a more suitable and realistic formula; namely,

'That the law should ensure that the unhappy and unsuccessful marriage be dissolved as effectively as possible, thus giving encouragement to successful marriages and emphasising their importance to the welfare of the spouses, their children and, hence, the community.'⁵⁾

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- 1) See, for example, the articles cited by Hambly and Turner 199, as well as the comments of Mr Justice Selby 'Development of Divorce Law in Australia' (1966) 29 MLR 473, 487, and Butler 'A Sole Ground for Divorce' (1971) 45 ALJ 168, 173-174. See also Finlay 35-52.
 - 2) 'Maintenance in the Magistrate's Court: How Fares the Forum?' (1973) 47 ALJ 725 at 734 / 'It is time to abandon the practice of looking to legal institutions for the correction of social ills, a practice which is both naive and evasive.'⁷.
 - 3) 'The Enforcement of Marriage' (1974) 3 Anglo Am LR 75. At 83 the learned writer suggests that 'Reconciliation provisions can only be truly effective if applied at an early stage in the development of marital difficulties: they have no place in divorce litigation.' The learned writer then goes on (*ibid*) to suggest that it is time for legislatures to 'free themselves from the notion that divorce is somehow socially undesirable and that a marriage is worth preserving for its own, rather than the parties', sake.'
 - 4) Field of Choice § 15: these objectives are cited above at 86 n 2.
 - 5) 'Legal and Social Change in Australian Family Law' (1976) 9 CILSA 299, 308. In this respect, Bates 'The Enforcement of Marriage Revisited' (1977) 6 Anglo AM LR 172, 177-179, is very critical of the provisions of s 43 of the Australian Family Law Act, 1975, which, he believes, have fallen into the same pitfalls as the counselling and reconciliation provisions of the Matrimonial Causes Act, 1959.

But the reaction towards the counselling and reconciliation provisions of the Family Law Act¹⁾ has not been entirely negative. There are some who regard these provisions as being among the more positive of the Act.²⁾

Although no independent research data regarding the counselling and reconciliation provisions of the Family Law Act is available, one can, at least, refer to the personal observations and conclusions of those most directly concerned with the administration of these provisions.³⁾ It must be stressed, though, that in having regard to these observations the political background against which the Family Law Act was promulgated must not be lost sight of.⁴⁾ The Act was assented to in June 1975 but was only to come into force on a date to be fixed by proclamation.⁵⁾ The Act was passed by a majority of 80%

- 1) S 43 (d): see above at 56 where this section is cited in full.
- 2) For example Nygh 29-36 and Enderby 'The Family Law Act 1975' (1975) 49 ALJ 477.
- 3) Numerous working papers and view-points have been prepared by various officials responsible for the administration, and implementation, of the counselling and reconciliation provisions of the Family Law Act. These have been made available to the writer by the Director of Court Counselling (D J McKenzie). At least two of these working papers deal with the difficulties attendant upon the collection of, and research of, court counselling data and statistics; viz McKenzie 'Problems for Research in Family Court' (May 1978) and Nasser 'Court Counselling Data Collection and Statistics' (August 1978). The main problem, at present, seems to lie in the unsystematic compiling, and keeping, of records coupled with the fact that most Australian family courts are experiencing administrative teething problems and a shortage of adequately trained staff.
- 4) The political background against which the Family Law Act finally came into effect is graphically explained by McKenzie in a paper read at the Family Conciliation Conference in Vancouver in February 1978 entitled 'The Setting-up of a Family Court Counselling System in Australia.' The account given in the text is mainly based on this paper.
- 5) S 2 Family Law Act.

in both Houses of Parliament and 'objection or assent was seen as a matter of conscience and not politics.' But because of the political and constitutional upheaval that existed in Australia during 1974 and 1975 it was widely felt that if a family court were to exist at all it had to be set up as soon as possible. Accordingly, urgent steps were taken to set the wheels in motion and the Chief Judge¹⁾ was appointed in May 1975 while the first Principal Director of Court Counselling was appointed in August 1975. The original deadline by which the family court was to begin functioning was October 1975. This deadline was later extended to the 5th January 1976 and this was, in fact, the date on which the Family Law Act came into effect.

Because of the almost indecent haste to get the family court established, it was inevitable that there would be teething problems above the normal. There were, for example, no reliable estimates of the likely clientele of the counselling and reconciliation services. The practical experience of those responsible for launching the provisions of the Family Law Act was practically non est. Furthermore, it was found that it was impossible to recruit as counsellors people of a sufficiently mature age with appropriate credentials.²⁾ The Principal Director of Court Counselling, in fact, 'spent much of the time between October 1975 and March 1976 travelling around the capital cities, attempting to get some uniformity, and giving some encouragement to counselling staff who were beset by problems of equipment and accommodation.' It was only in June 1976, some 6 months after the family court had come into existence, that a meeting of the Directors of Court Counselling from the various registries could be held with a view to organizing a general system for court counselling.³⁾ By way of contrast, however, it seems that because the Western Australian Family

1) Justice Elizabeth Evatt.

2) In a working paper entitled 'Family Court Counselling - One Year After' McKenzie admits that 'By and large, the people selected [as counsellors] tended to be younger than overseas experience had suggested as an acceptable minimum age.' McKenzie does add, however, that in his experience this was not a significant inhibiting factor in regard to the services offered.

3) In fact, the continued survival of the family court was in doubt right up until judgment was delivered in May 1976 in the celebrated cases of Russell and Farrelly (1976) 50 ALJR 594.

Court was established some six months after the Commonwealth Family Court, it was better prepared and equipped to face its teething problems.

When one bears in mind the above background it is not altogether surprising that sound and objectively critical comment on the efficacy of the counselling and reconciliation provisions of the Family Law Act is not presently available. But such comment from those concerned with the implementation and administration of these provisions is generally enthusiastic, albeit cautious. Thus, for example, McKenzie¹⁾ reports that

'It will be appreciated ... that it is not easy to get a completely satisfactory evaluation of a system. Family Court counsellors have had many surprising and spectacular successes where people who have drawn themselves up into warring factions, and after counselling withdrew their suite from the court and had voluntary orders made. Although these successes have been heartening and have sustained counsellors' morale through a very stressful time ... we must be cautious.'²⁾

There is also evidence to suggest that many solicitors, who had previously adopted a cynical attitude towards the establishment of the family court, now seem more interested in an early referral to the counsellors for reconciliation and divorce counselling. But an overall enthusiastic acceptance of the family court by solicitors still remains a dream in Australia.³⁾ There is still much tension between the counsellors and the legal profession 'who are still very attached to the value of

- 1) 'Family Court Counselling - One Year After' (Working Paper).
- 2) Marshall, the Director of Court Counselling of the Sydney Registry, in a working paper entitled 'Social Workers and Psychologists as Family Court Counsellors within the Family Court of Australia' (March 1977) reports as follows: 'My own experience so far leads me to believe that it [the family court] is essentially a "helping court" and that the provision of counselling and welfare services within the Court structure was a wise and useful provision. It remains to be seen if the service can continue to gain acceptance and credibility and to what extent it will be able to contribute conceptually as well as in practical terms to the future development of the Family Court.'
- 3) See Finlay 48 where it is suggested that legal practitioners are suspicious of counselling because 'it will affect their relationship with the client.' It is conceded, however, that if clients persist in their divorce action after counselling, communication between clients and their legal representatives becomes more meaningful.

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the adversary system'.

Another positive result of the establishment of the family court is that the reconciliation and counselling provisions have resulted in a tremendous saving of legal costs for the parties to a matrimonial action. For example, McKenzie reports²⁾ that

'For a half-day case, the cost to clients is also not inconsiderable and counselling which enabled the case to be settled out of court would save from \$240 in solicitors' fees, \$500 in barristers' fees (if employed by both clients) and from \$24 in worktime lost, a total of \$765, or \$382 per client. Most of this would be paid by the taxpayer if the clients were on legal aid.'

Beyond suggesting that there are some very positive results flowing from the counselling and reconciliation provisions of the Family Law Act, it is difficult to be dogmatic in one's views on the efficacy of these provisions. Difficulties are being experienced.³⁾ But, it is significant to note that despite these difficulties it has not been seriously suggested that the counselling and reconciliation procedures should be scrapped in their entirety.

- 1) Marshall in a paper entitled 'The Work of the Counselling Service of the Family Court of Australia in Conciliating Family Disputes and in Related Tasks' delivered at the Association of Conciliation Courts Conference in Vancouver in May 1976 [This (relationship between counsellors and solicitors) remains an area of some tension, and gives the counselling service one of its main challenges in the future.]⁷ This view was confirmed by Mr Justice R S Watson, Senior Judge of the family court, in information supplied to the writer. His Lordship does add, though, that these difficulties are in the process of being resolved (June 1978). It would seem that the erstwhile hostility of the legal profession towards counselling [see Finlay 487] has now been tempered.
- 2) In a working paper entitled 'Cost Benefit Consideration of Court Counselling' (1976 and 1978). See also McKenzie 'Family Court Counselling - One Year After' where the assertion is made that 'In one three week interval it was found that 70% of people presented for section 62 conferences withdrew from court action and had voluntary orders made. When costing was carried out, it appeared that for the three week period alone there was an approximate saving to the client and taxpayer combined of something like \$33,000'. S 62 Family Law Act is dealt with below at 137-140.
- 3) See the Family Law Council Report (1978) 35-38 where it is pointed out that some of the practical difficulties being experienced relate to a lack of counselling facilities in the magistrates' courts and the heavy work load carried by the counsellors in the family court.

(E) Conclusion

There is little or no evidence to suggest that pre-marital counselling achieves any useful purpose. Hawaii has chosen to leave out of its legislation altogether any reference to pre-marital counselling. In the Los Angeles Conciliation Court pre-marital counselling is limited to cases where one or both of the parties to an intended marriage are under the age of 18 and where application has been made for the court's permission to marry. Even then, pre-marital counselling is not undertaken by the Conciliation Court staff but by outside counselling agencies. There seems, in fact, to be a strong body of opinion that pre-marital counselling should not form part of the functions of a family court.¹⁾ With regard to the position in Australia pre-marital counselling provisions have only been in force since 1977 and already their efficacy has been doubted.²⁾

It would seem, then, that the better view is that court-connected pre-marital counselling does not achieve all that is hoped for: it certainly does not help to reduce the divorce rate. In any event, the best evidence available seems to indicate that the available counselling services are already stretched to their limit without also being burdened by pre-marital counselling tasks and programmes.

As to pre-divorce counselling, this constitutes the high-water mark of the Los Angeles Conciliation Court. That this court achieves tremendous success in this direction cannot be doubted, even though official statistics would appear to be inflated. But it must be stressed that the secret of the Los Angeles Conciliation Court's success lies in the fact that its attention is focussed only on those couples with marital problems who desire some form of counselling. Counselling, no matter how frequent or intensive, and no matter whether it is compulsory or not, is never likely to succeed unless the parties

1) See, for example, Payne 314-318 and 383-384 where the views for and against the efficacy of pre-marital counselling by the staff of family courts are canvassed. Apparently, the only court whose personnel have assumed responsibility for pre-marital counselling is the Conciliation Court of Maricopa County, Arizona - see above at 97 n 1. A useful document prepared by the Conciliation Court of Maricopa County is entitled 'You and Your Marriage : A Guide to a Happy Marriage' : see Appendix 'C'. This document is handed to all couples on receipt of their licence 'to contract a legal marriage.'

2) See above at 104.

being counselled desire to be counselled.

It is difficult at this stage to give an accurate assessment of pre-divorce counselling in Australia. It may, however, be argued that the misgivings expressed in respect of the reconciliation provisions of the Matrimonial Affairs Act of 1959 are equally valid in respect of the Family Law Act of 1975. It should also be remembered that there is an apparent hiatus in the Australian counselling system in that no provision has been made for counselling in the magistrates' courts.¹⁾ It is argued²⁾ that 'if it were possible to provide the services of trained counsellors at an early date in the breakdown, not only might there be better prospects of reconciliation but, should breakdown ensue, the possibility that bitter disputes over custody and other matters might be lessened.' Furthermore, one is mindful of the frequent assertion³⁾ that the counsellors attached to the family court have to endure an exceptionally heavy work load.

In one's assessment of court-connected counselling one cannot help but be struck by the paradox that, on the one hand, it is generally believed that pre-marital counselling is ineffective while, on the other hand, it is widely argued that pre-divorce counselling is initiated at too late a stage for reconciliation to be considered as a real possibility.⁴⁾ In this regard, the crucial question to be asked is: at what stage in the legal procedure should provision be made for counselling for it to play a more meaningful role in the possible reconciliation of the parties? Most of those who are concerned with this question are agreed that the prospects of reconciliation are better if counselling is invoked at an early stage of marital discord. But, one should guard against an over-preoccupation with the possibility of reconciliation. One must accept the reality that a marriage may be incapable of being preserved. In this situation, which is more normal in practice than exceptional, the counselling services can, and do, play a most constructive role in

1) Family Law Council Report (1978) 36.

2) Ibid.

3) Ibid.

4) It is quite possible that this paradox is responsible for the Hawaii Family Court playing down its counselling role.

promoting the amicable and equitable settlement of pre-divorce problems.¹⁾ Expressed in different terms this means that reconciliation should be seen as the subsidiary object of court-connected counselling rather than as its main one. Should, however, the possibility of reconciliation arise further counselling in this direction must, of necessity, be conducted by outside counselling services. In this respect, the idea of using the court's authority, as in the case of the Los Angeles Conciliation Court, to oblige the parties to honour the terms of a 'reconciliation agreement' is a little difficult to accept. Certainly, there can be no objection to using the court's authority to compel a party, in appropriate circumstances, to attend a counselling session subject, however, to the proviso that if it becomes apparent that further counselling is going to be of no use the court authority to compel further attendances immediately should be discontinued. After all, the decision to reconcile is one that can be made only by the parties themselves.

Finally, with regard to post-divorce counselling, the Australian and Hawaii Family Courts have not been as successful as the Los Angeles Conciliation Court. This is a serious drawback since, it is submitted, post-divorce counselling and guidance has an important and constructive role to play in the world of the formerly married. The Family Law Council of Australia is aware of its deficiency in this regard and in its Second Annual Report of 1978²⁾ it remarked that

'The Council is of the view that many people may require counselling at the stage of the decree absolute and should be encouraged to seek it. To facilitate this and to help persons over what can be a difficult time, the Council considers that a post-divorce document should be prepared for distribution with the decree absolute. Such a document should include basic information and addresses of counselling organisations. The Council has been informed that such a document is being prepared by the Court Counselling Service.'

Such documents or pamphlets have been prepared by the Los Angeles Conciliation Court and the Hawaii Family Court, and the documents of

1) Cf Payne 116.

2) At 58.

both courts are remarkably similar in content.¹⁾ In these documents, copies of which are handed to all divorced persons when the divorce order is granted, emphasis is placed on the fact that although the parents are now legally separated their responsibilities towards their children continue. Practical guidelines are offered to assist the parents and their children to cope with the divorce situation with the minimum bitterness, distress and humiliation.²⁾ Should on-going post-divorce counselling be required this can be obtained from any of a number of social agencies and organizations, which are listed in the documents. There is no doubt that such documents play a most constructive role in alleviating some of the trauma experienced at the post-divorce stage.

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- 1) The document emanating from the Conciliation Court of Los Angeles is entitled 'Parents Are Forever' while that of the Hawaii Family Court is entitled 'You Are Still Parents' : see Appendix 'A' below.
 - 2) For example, the following is some of the advice offered: assure your children that they did not cause the divorce; continuing anger or bitterness can injure your child more than the divorce itself; beware of hindering your children's growth by over-protecting or over-burdening them; never question the children about their parent; encourage regular contact with the other parent. With regard to access rights the following is some of the advice offered: the visit should not be used to check on the other parent; do not try to punish the other parent through the children by reducing or denying visitation rights; keep to your visitation schedule and inform the other parent timeously if you cannot keep an appointment; avoid taking your children to your girlfriend's (or male-friend's) house; try always to maintain contact with your children.

4. Family Court Procedure

(A) Introduction

Fundamental to the success of any family court is the informality of its procedure; that is, if it is to obtain and retain the confidence of the persons it seeks to help. The degree of informality varies from court to court. The question of what degree of informality (if at all) the ideal family court should aspire to inevitably leads to a consideration of the merits and demerits of the adversary procedure as opposed to the inquisitorial procedure. Insofar as it may be relevant to the concept of family courts it is proposed to refer, very briefly, to some of the main advantages and disadvantages of the adversary procedure.¹⁾

(i) Advantages of Adversary Procedure

Inasmuch as the divorce action ordinarily involves many conflicting interests it has been argued that the proper way to protect the various interests at stake is to insist upon a rigid and highly formalised procedure such as the adversary procedure. In this way, the danger of not observing the proper rules of 'due process' is eliminated.²⁾ But to the uninitiated observer it may be difficult to understand how a highly rigid and formalised adversary procedure is able to protect the various conflicting interests at stake in a divorce action especially when the undefended divorce action (and most divorce actions are undefended) takes but a few minutes to be disposed of by the court.³⁾ However, what the uninitiated observer does not realize is that the plaintiff's

1) The main advantages and disadvantages of the adversary procedure are fully discussed by Payne 49-77.

2) See Re Gault 387 US (1967) 18-20 where Fortas J said: 'The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness ... Unfortunately, loose procedures, high-handed methods and crowded court calendars, whether singly or in combination, all too often have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process ... Due process of law is the primary and indispensable foundation of individual freedom.' See also Fortas J in Kent v United States 383 US 541 (1966) 554-556, and see above at 5.

3) These few minutes in a divorce court have been described by Lord Scarman, the Chairman of the Law Commission of England in a speech entitled 'Family Law and Law Reform' delivered at the University of Bristol in March 1966 as the 'unsubmerged tip of the iceberg'. Copious

legal representative has, inter alia, taken a comprehensive statement from his client; has given instructions to counsel for the drafting of the particulars of the claim; has drawn his client's attention to the necessity for making proper provision for the custody, maintenance and welfare of any minor children (and of the necessity of satisfying the court on this score); has more often than not negotiated a settlement with the defendant spouse for a fair and equitable distribution of the matrimonial property and assets (which settlement forms the basis of a consent paper ultimately to be made an order of court); and, generally, (if he is as conscientious as he is made out to be), has advised his client on any number of other ancillary matters of great legal and social importance. It is, Lord Scarman concludes,¹⁾ 'a complete misconception to assess the value of the judicial process ... by looking only at the unsubmerged tip - the ten minutes taken in open court to prove that which is uncontested, namely, the matrimonial offence.'

As a corollary to the paragraph above it is submitted that there is much substance in the suggestion of Payne²⁾ that because the great majority of divorce cases are undefended this is evidence of the 'efficacy of the adversary procedure which promotes the negotiation of settlements by the lawyers representing the two spouses and the consensual resolution of matters incidental to the divorce, such as the distribution of matrimonial property and assets, interspousal maintenance, and the custody and support of the children of the family.'³⁾

Finally, from the practical point of view it is unnecessary to subject every marriage breakdown to the full investigative process of the inquisitorial procedure, especially where the divorce action is undefended. To submit the undefended divorce action to the full glare of the inquisitorial procedure would only serve to prolong the agony for the warring spouses and their children and to increase, unnecessarily, the legal costs. In any event, court-connected counselling services are

1) Ibid.

2) At 67-68.

3) Cf Arthur 'A Family Court - Why Not?' (1966) 51 Minn LR 223, 228-229 - 'It may well be true that cross-examination engenders bitterness, but if the truth be necessary to the viable solution, the crucible of adversary proceedings will best find that truth ... Moreover, lawyers are quite able to find compromise ... That lawyers lack objectivity in adversary proceedings is also true; they are appearing as advocates, not as arbitrators. It is the judge who is objective.'

generally far too under-staffed and over-burdened to engage in such an exercise in every divorce case.

(ii) Disadvantages of Adversary Procedure¹⁾

The assertion has been made²⁾ that family law cases involve not only legal problems but also social problems. Accordingly, it is highly undesirable to force the parties to matrimonial litigation into opposing corners so that they become the participants of a 'mud-slinging' match the outcome of which will benefit neither party, least of all the minor children involved.³⁾ Rather, it would be in the public

- 1) Apart from Payne 49-77 where most of the criticisms of the adversary procedure in family law litigation are thoroughly canvassed, see Dyson and Dyson 509-511; Alexander 'Lets Get the Embattled Spouses out of the Trenches' (1953) 18 Law and Contempt Problems 98; Alexander 'The Family Court - An Obstacle Race' (1958) 19 Univ Pitts LR 602 esp 614-615; Alexander 'The Lawyer in the Family Court' (1959) 5 NPPA Journ 172; Elkin 'The Language of Family Law is the Language of Criminal Law' (1975) 13 Concil Cts Rev iii-v; Elston, Fuller and Murch 'Judicial Hearings of Undefended Divorce Petitions (1975) 38 MLR 609, 634-640; Bates 'The Lawyer's Social Role: A Lesson from Family Law' (1978) 2 Natal Univ LR 125, 134-136.
- 2) Eg Payne 49.
- 3) See Alexander 'Lets Get the Embattled Spouses out of the Trenches' (1953) 18 Law and Contemp Problems 98, 101 who posed the following apt question: 'Did it ever strike you as at least mildly absurd that the law should proclaim its interest in the preservation of the family unit and express its desire to see the disunited reunited, and then when the parties go to law for relief the law, instead of helping them reunite, forces them to fight each other?' The same writer, a former judge of the Toledo Family Court, Ohio, in an article 'The Family Court - An Obstacle Race?' (1958) 19 Univ Pitts LR 602, 604, observes that 'The divorce court appears to have inherited from the ecclesiastical courts, Anglican as well as Roman, not the basic Christian philosophy of love and forgiveness but the ancient pagan doctrine of guilt and punishment.' See also Bradway 'Wny Divorce?' 1959 Duke LJ 217, 226, who states that 'If divorce were a simple matter, like an ordinary action for civil damages, there might be more reason to supply it with an adversary setting. But it is not simple.' The writer then goes on to add (at 227) that 'Divorce too often tends to place the couple on a sort of barbaric pyre and to invite all the neighbors to view the ghastly show. It pours oil on the troubled flames.' See also Bradway 'Divorce Litigation and the Welfare of the Family' (1956) 9 Vanderbilt LR 665, 669-671.

interest, and in the interests of the parties and their children, for the court to be seised of the real reasons for the marriage and family breakdown, than for the court to be engaged in a recriminatory fault-finding enquiry. Thus, the retention of, or undue emphasis on, the adversary procedure clearly inhibits the diagnostic and therapeutic functions of a family court.

The traditional divorce court is only concerned with the legal grounds for divorce and the legal severance of the marriage tie: it cannot resort to a diagnostic approach and neither can it prescribe any therapy. The adversary procedure militates against a therapeutic approach since the prescription for therapy becomes a non sequitur the moment the initiator of a matrimonial action walks into his/her attorney's office to set in motion the adversary procedure against the defendant spouse. The legal practitioner is, of course, very well aware of the failure.¹⁾ The application of a diagnostic and therapeutic approach to the divorce procedure may well be questioned. But, it is important to bear in mind that while, as a general proposition, civil litigation is economically orientated,²⁾ this is not necessarily so in the case of divorce and matrimonial litigation. Certainly, divorce litigation is both economically and emotionally orientated. There is much more involved in the divorce action than the severance of the marriage tie, the settlement of proprietary disputes between the parties, and the assessment of the quantum of any maintenance payable. Also at stake, for example, is the question of the custody and guardianship of, and access to, any minor children of the marriage. The issues involved in a divorce action are not only legal in character, but also of a social and emotive nature and which are not always capable of solution

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- 1) This may well account for the almost traditional hostile reaction of the legal profession to the idea of introducing an inquisitorial procedure in the divorce court.
 - 2) Eg breach of contract; claims for specific performance; claims for damages for non-performance, or improper, or incomplete, performance of contractual obligations; claims for damages in delict. Defamation and nuisance cases, of course, are not purely economically orientated.

(or even of understanding) where the parties are driven into opposing corners by the adversary procedure.¹⁾

The adversary procedure has also been criticized as being unnecessarily formal, involved and expensive.²⁾ Like all other superior court litigation matrimonial litigation is notoriously expensive,³⁾ especially if an appearance to defend has been entered. Regrettably, where, as in the great majority of cases, the divorce action is undefended, this cost factor in the adversary procedure can, and often does, promote harsh and unconscionable settlements.⁴⁾ In the result, a divorce action has generally become more concerned with economic considerations than with the fact of divorce itself.⁵⁾

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- 1) Bradway 'Divorce Litigation and the Welfare of the Family' (1956) 9 Vanderbilt LR 665, 669-671, comments as follows: 'In a divorce case the orthodox adversary litigation framework may be adequate to provide the limited quantum of facts necessary for the court to decide the private issues between the spouses. These are basically economic in character, mostly lying in the past, and often limited to a few narrow points. But if we conceive of divorce on a larger canvas in terms of the ailing family as including public problems, non-economic in character and dealing with the relations between the family and the state, it is reasonable to argue that something more than direct and cross-examination is indicated.'
 - 2) Cf Payne 77.
 - 3) Cf Coetzee J in Reef Lefebvre (Pty) Ltd v S A Railways and Harbours 1978 (4) SA 961 (W) 966-967; Nienaber 1980 (2) SA 803 (O).
 - 4) Payne 70-72. Kay 'A Family Court: The California Proposal' (1968) 56 Calif LR 1205, 1236, makes the following allegation: 'The law also allowed the defendant [ie where the plaintiff did not appear before the court with clean hands] to demand payment for consenting to the divorce ... [H]igher alimony, vacating the family apartment, unequal division of matrimonial property, transfer of ownership of real or personal property, and cash payments were all included in typical arrangements made to acquire the necessary consent to divorce.' An example of a South African case in which a divorced mother was induced to enter into an agreement which was contra bonos mores rather than sacrifice the custody of her children is Shepstone 1974 (1) SA 411 (D); 1974 (2) SA 462 (N).
 - 5) Cf Baxter 'Family Law Reform in Ontario' (1975) 25 Univ Tor LJ 236, 245. In his review of J G Miller Family Property and Financial Provision (1974) Holmes, writing in the (1976) 10 Law Teacher 55-56, observes that 'divorce has become less about divorce and more about money. The very fact that books are written and published which are concerned only with the financial and property aspects of family law rather than the traditional approach of ceremony, coverture, divorce, nullity, and finance in one volume evidences the growing importance placed upon financial and property aspects rather than upon marriage and divorce.'

Despite the abolition of the fault-orientated grounds for divorce in most American jurisdictions, the parties to a divorce action are still cast in the role of a winner and a loser by the retention of the adversary procedure. In this regard, Elkin remarks¹⁾ that

'No-fault divorce laws have eliminated some of the harshness of the divorce process, but not all. No-fault has eliminated blame, but does not eliminate the need to deal with the emotional crisis of divorce which may include the ongoing need to strike back and use the children as weapons. Of particular concern is the fact that child custody and visitation issues are still "resolved" through fault proceedings which allow blame and deepseated animosities to further fragment an already fragmented family. We will not achieve a no-fault approach to family law until no-fault attitudes and values penetrate the attorney's office, and even before that, society itself must accept a no-fault attitude.'

There can be no doubt that legal practitioners, schooled in the adversary mould as they are, are responsible for the perpetuation of the adversary procedure in family law matters. In the American context, at any rate, the legal representative of a party to a matrimonial action appears to be concerned only with the interests of his client and he considers that he has no business meddling in the lives and affairs of those who are not his clients, such as any minor children of his client. The moment a legal representative drops his partisan approach, and attempts to put on an impartial mantle, he faces the risk of losing a client. The world of the legal practitioner is a highly competitive one. In any event, the legal practitioner is schooled in the adversary procedure, though he is prevailed upon by the ethics of his profession to appreciate both sides of a case. The legal practitioner owes a primary duty to his client subject to the qualification that he does not knowingly mislead the court.²⁾ But this, in turn, is dependent upon the instructions he receives from his client and, generally speaking, the busy practitioner has no means, let alone the time and inclination, to check on his instructions in every case. The weakness of this state of affairs is highlighted by the fact

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- 1) 'The Language of Family Law is the Language of Criminal Law' (1975) 13 Concil Cts Rev iii, iv.
- 2) On the duties of an advocate see Singleton 22-39. On the duties of an attorney see Randell and Bax 85-89. On the position of the legal representative in divorce proceedings in South Africa see below at 173-177.

that most divorce cases are undefended. The end result is that the court, more often than not, is provided with insufficient information to determine upon the root causes of the marriage breakdown. In this respect, the Finer Report¹⁾ expresses itself very clearly as follows:

'In the accusatorial or adversary form of procedure, as it characterises our civil form of litigation, the parties not only choose the issues which form the subject matter of the dispute, but also determine what evidence shall be brought before the court. The court has no right and no means to act as its own fact-gatherer.'²⁾

It must be pointed out that most of the criticisms of the adversary procedure mentioned above were voiced at a time when fault-orientated grounds for divorce were still very much part of the divorce process.³⁾ It is trite that in recent years there has been an almost international movement away from fault-orientated grounds of divorce. Despite this movement, however, it is submitted that the above criticisms of the adversary procedure are still relevant in the modern context of no-fault divorce. Thus, to permit divorce on no-fault grounds while, at the same time, to demand an adherence to the adversary procedure in the divorce court would appear to be anomalous. These two concepts are mutually incompatible. It is difficult to imagine how the adversary procedure can permit a family court to give expression to its diagnostic and therapeutic functions notwithstanding the abolition of the fault-orientated grounds for divorce in most jurisdictions. In this regard, Alexander⁴⁾ comments as follows:

1) At § 4.405.

2) See also Dyson and Dyson 510 who point out that 'The traditional divorce procedure has no provision for examining the underlying psychological problems of the marriage, for seeking a solution short of divorce, for counseling on problems attendant on divorce, or in fact for offering any advice at all, beyond what the parties' lawyers may offer on their own.' See also 287 and 298 below.

3) See, for example, Dyson and Dyson, *ibid*, who feel that 'The adversary procedure for dissolving marriages, like a primitive dance, is essentially a ritual. A lawyer files a petition charging a guilty act. Highly stylized testimony is given in open court to prove the act. Where there is a contest, it centres on the relative "fault" of the parties, with the respondent often seeking to show that the petitioner is equally "guilty".'

4) 'Lets Get the Embattled Spouses out of the Trenches' (1953) 18 Law and Contemp Problems 98, 102.

'As an observer in the front-line trenches ... in the war between the spouses, ... I ... express the ever-deepening conviction that ... the private fight concept and the adversary proceeding ... makes the court inevitably more of a punitive than a healing agent, and makes almost impossible the court's attempts at preventive justice.'

The learned writer then continues to add,¹⁾ rather significantly, that 'This conclusion is born of experience sitting contemporaneously in the adversary divorce court and the non-adversary juvenile court.'

(B) Los Angeles Conciliation Court

There is very little scope for the employment of the adversary procedure in the Los Angeles Conciliation Court. There are a number of factors which bring about this result and these may be tabulated as follows:

(i) In 1970 the California Code of Civil Procedure was amended so that the erstwhile fault-based grounds for divorce were abolished.²⁾ The 1977 Conciliation Court Report³⁾ suggests that the abolition of the fault-based grounds for divorce

'greatly reduces the necessity for the type of aggressive pre-marital and courtroom techniques conducive to much of the hostility in contested cases. Legal efforts can now more productively be expended on matters relating to property valuation, accounting and tax problems, rather than the fault of one marriage partner or a third party'.

The inter-party animosity, of course, will never be entirely eliminated insofar as the divorce action is concerned. The most that can be hoped for is that this animosity will be reduced. In this regard, the following comment is made in the 1977 Conciliation Court Report⁴⁾; namely,

'While it would be naive to believe that a statutory enactment can eliminate all rancour and acrimony in marital disputes, the

1) Ibid.

2) See above at 16-17.

3) At 11.

4) At 10.

elimination of fault and the limitation of adversary activity has materially assisted. The concept that a marriage breaks down solely because of the fault of only one marriage partner is too archaic to require criticism. The abolition of "granting" a divorce to one spouse "against" the other for wrongdoing is an enlightened improvement.'

(ii) Another significant amendment was effected to the California Code of Civil Procedure in 1970 in terms of which all community property, upon the dissolution of a marriage, is to be divided equally between the spouses, unless the spouses themselves agree otherwise.¹⁾ This statutory provision appears to be couched in peremptory terms so that the court has no discretion in the matter where the spouses are unable to agree on the division of the community property between themselves. Prior to 1970, the court had a discretion to award more than half of the community property to the innocent spouse where a divorce had been granted on the grounds of extreme cruelty or adultery. This led to much heated litigation the purpose of which was to ensure a spouse's stake in the community property. It is clear that the necessity of resorting to the adversary procedure for the determination of inter-spousal property disputes has been severely limited by this innovation. Instead, the parties are encouraged to reach an amicable agreement on the question of the division of matrimonial property.

(iii) Yet another change of far-reaching importance that was effected to the California Code of Civil Procedure in 1970 was that the custody of a child involved in a matrimonial dispute is to be awarded to one or more persons who are listed in a definite order of preference.²⁾ Previously, the custody of a child was given to the father or the mother depending on the age of the child. The 1970 amendment was designed to give effect to the best interests of the minor children involved in divorce litigation and to play down the possibility of minor children being used as pawns by their parents in custody disputes. In reality, however, the 1970 amendment has failed to curtail the resort to the adversary

1) 1977 Conciliation Court Report 11. Community property is 'roughly defined as all property acquired by either spouse during marriage, except property acquired by gift or inheritance, the income on such property, or its later transmutions. All property owned prior to marriage is separate property.' (ibid).

2) See below at 132-133 where this order of preference is listed.

procedure in custody disputes.¹⁾ The minor children of a broken marriage are still being used by their parents to strike at each other regardless of whether this is in the best interests of the children or not. Such battles over the children are particularly pronounced at the post-divorce stage.

(iv) The adversary procedure is also curtailed at the counselling stage by virtue of the fact that counsellors are obliged to maintain a strict stance of impartiality. Moreover, a counsellor's relationship with his clients is strictly confidential and communications between counsellor and client are privileged.²⁾ This undoubtedly helps to keep the counsellors outside the area of the adversary atmosphere. Thus, a counsellor never submits written or oral reports to the court even in respect of those cases where clients have been referred to counsellors for post-divorce custody / access counselling. The counsellor's role is explained by Elkin³⁾ as follows:

'The court feels that once a counselor reports to the bench and makes a recommendation, he becomes an investigator, and that the roles of counselor and investigator should not be intermixed. As an investigator he would become part of the adversary process. This would be inconsistent with his role, which is to diminish the impact of the adversary procedure rather than increase its destructive impact.'

At the conclusion of the counselling process, all that the court receives from the counsellor is a notice as to whether an amicable agreement has been effected or not. If, however, an amicable agreement has been entered into, this must be reduced to writing so that a copy thereof can be referred to the court in much the same way as a consent paper in South Africa is presented for endorsement as an order of court.

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- 1) Thus, Elkin 'Postdivorce Counseling in a Conciliation Court' (1977) 1 Journ of Divorce 55, 62, reports that 'Unfortunately, the adversary approach is still used regarding custody / visitation matters, even in courts following the no-fault approach.' In his recent Position Paper Elkin also says: 'Although no-fault legislation has diminished the primitive aspects of family law, there is still an adversary procedure used in custody / visitation conflicts, ugliest of all litigation, with no winners - just sheer damage to the physical and mental health of all concerned including the relationship between the parents.'
- 2) 1977 Conciliation Court Report 17 and see Elkin 'Conciliation Courts: The Reintegration of Disintegrating Families' (1973) 22 Fam Coordinator 63, 67.

(C) The Hawaii Family Court

One of the pronounced features of the Hawaii Family Court is the emphasis it places on the welfare and protection of children.¹⁾ With regard to a child in conflict with the law the view has been expressed²⁾ that such child needs help and that such help can only be given in a non-adversary atmosphere. This view is mirrored in section 1 of the Hawaii Revised Statutes in terms of which the traditional adversary procedures are played down. Thus, the informal juvenile court procedure has been adopted by the family court. Judges seldom wear robes and proceedings are conducted in small conference-sized rooms without elevated benches. In the normal course, proceedings are conducted in an informal conversational manner.³⁾

The adversary procedure, of course, has not been completely eliminated in Hawaii. The traditional adversary procedure is, for example, resorted to in cases where the family court has waived its jurisdiction over delinquent children between the ages of 16 years and 18 years.⁴⁾ Furthermore, all findings of fact by a judge of the family court 'shall be based upon a preponderance of evidence admissible in the trial of civil cases.'⁵⁾ The only exception appears to lie in

- 1) S 1 Hawaii Revised Statutes: see below at 133-137. A 'child' or 'minor' means a person less than 18 years of age: s 2 (5) Hawaii Revised Statutes.
- 2) Eg in a comment on s 1 Standard Family Court Act in (1959) 5 NPPA Journ 99, 106.
- 3) See s 41 Hawaii Revised Statutes which states, inter alia, that with regard to the procedure in children's cases 'The hearings may be conducted in an informal manner ... The general public shall be excluded and only such persons admitted whose presence is requested by the parent or guardian or as the judge ... finds to have a direct interest in the case or in the work of the court from the standpoint of the best interests of the child involved.' See also Dyson and Dyson, 65, who points out, however, that the danger of this informality lies in the fact that it may 'tempt the trier of fact to slur over certain procedural requirements.'
- 4) See above at 37 on waiver of jurisdiction.
- 5) S 41 Revised Statutes of Hawaii: cf s 19 Standard Family Court Act and the comments thereon in (1959) 5 NPPA Journ 99, 137-141. S 41 is cited in extenso below at 134.

the case of children under the age of 18 years who are alleged to have committed a criminal offence in which case 'proof beyond a reasonable doubt in accordance with rules of evidence applicable to criminal cases' is the standard.¹⁾ In addition, 'the maker of any written report, study or examination shall be subject to both direct and cross-examination upon demand, and when he is reasonably available.'²⁾ The retention of the civil and criminal standards of proof, as well as the availability of cross-examination, coupled with the right to legal representation, seems to suggest that, in reality, it is difficult to subvert completely the adversary procedure in the family court. The continued adoption of the adversary procedure is apparently necessary for the attainment of proper justice and the protection of 'due process' rights. However, with regard to the right to legal representation, although this is enshrined in the Hawaii Revised Statutes,³⁾ the practice seems to be to discourage the exercise of this right.⁴⁾ In this way, the adversary atmosphere of the traditional courtroom is inhibited.

By way of contrast, the adversary procedure is a characteristic feature of adult criminal proceedings. Unlike a child, an adult, if found guilty, is deemed to have been criminally convicted and, in appropriate circumstances, a prosecuting official from the ordinary criminal courts can be invited to prosecute an adult criminal case in the family court.⁵⁾

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- 1) S 41 Revised Statutes of Hawaii. But, it must be noted that 'no adjudication ... shall be deemed a conviction' and 'no child shall be found guilty or be deemed a criminal by reason of such adjudication:' see s 1.
 - 2) Ibid.
 - 3) S 41 Revised Statutes of Hawaii, which is cited in extenso below at 134.
 - 4) Dyson and Dyson, 51, report that 'even the manner in which the right to a private attorney is presented ... seems to be somewhat weighted against the likelihood that the right will be exercised. In one observed hearing, the referee stated to a child's father, "You have the right to hire." After the child's father declined to exercise the right, the referee nodded and said, "98 percent of all children are not represented in this court," as if to imply approval of the father's decision.'
 - 5) S 42 Revised Statutes of Hawaii.

Despite the fact that Hawaii has adopted a no-fault divorce law, it seems that the adversary procedure still has an important role to play, especially in contested divorce cases.¹⁾ In a divorce action, where the parties are unable to resolve any of the matters at issue between them, the case will be set down for hearing by a judge. Each party must then provide full financial disclosure and if the question of the custody of, and access to, any children is involved, a 'Social Study' report must be prepared for the court. Thereafter, a pre-hearing conference between the attorneys for the parties and the presiding judge is held in order to define the issues between the parties and to try and effect a settlement. Thus far, the adversary procedure plays no part in the attempted resolution of the problems experienced by the parties to the divorce action. If, however, no solution is arrived at in consequence of the pre-hearing conference, the contested hearing will subsequently take place. At the contested hearing the parties and their witnesses will be called upon to give their evidence in the usual way, and they may be subjected to cross-examination. Thereafter, the court will arrive at its decision in the normal course. The decision may be reviewed on a 'motion for reconsideration'. If either party is still not satisfied with the result, the decision may be taken on appeal to the Hawaii Supreme Court. It follows from this brief description of the contested divorce case in Hawaii that it is entirely up to the parties concerned to decide whether they wish to resolve their differences in a more tranquil non-adversary atmosphere or to 'fight it out' in a more expensive adversary setting.

(D) The Family Court of Australia

As has already been pointed out,²⁾ it is a fundamental principle of the Family Law Act that formal procedure be kept to a minimum and that proceedings should not be unduly protracted. In this respect,

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- 1) The account of the divorce procedure in contested divorce cases that follows is based upon the account given in a pamphlet published by the Hawaii State Judiciary in 1976 entitled 'Divorce In Hawaii.'
 - 2) Above at 67, and see s 97 (3) Family Law Act.

the Family Law Regulations¹⁾ provide that in certain proceedings²⁾ the court may, with the consent of the parties, dispense with such procedures and formalities as it thinks fit. This, however, does not mean that a judge of the family court is permitted to dispense 'palm tree justice';³⁾ he is still obliged to act in accordance with legal principle. Thus, the suggestion by Watson J in the court a quo in the case of Re Watson: Ex Parte Armstrong⁴⁾ that proceedings in the family court were not adversary, but were in the nature of an inquisition followed by an arbitration did not meet with the approval of the Australian High Court. As it was put by the learned judges⁵⁾ of the High Court

'He [the judge of the family court] must also follow the procedure provided by the law. The provisions of s 97 (3) ... which require him to proceed without undue formality, do not authorize him to convert proceedings between the parties into an inquiry which he conducts as he chooses ... A judge can neither deprive a party of the right to present a proper case nor absolve a party who bears the onus of proof from the necessity of discharging it. These remarks are not intended to fetter a judge of the Family Court in the exercise of a proper discretion or to insist upon the observance of unnecessary formality; they are designed to make it clear that a judge of the Family Court exercises judicial power and must discharge his duty judicially.'

Although provision has been made for formal procedure to be kept down to a minimum by, for example, introducing a no-robres provision⁶⁾

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- 1) 210 of 1975: Reg 108 (2).
 - 2) Normally, evidence in an application for a decree of dissolution of marriage that is defended, or an application for a decree of nullity, shall be given orally and the traditional procedures and formalities shall be observed.
 - 3) Re Watson: Ex Parte Armstrong (1976) 50 ALJR 778, 783. See also Nygh 1!
 - 4) (1976) 50 ALJR 778. Watson J's views are cited in the High Court judgment of Jacobs J at 793-794; 'The matter in which I am involved is more in the nature of an enquiry, an inquisition followed by an arbitration ... We do the best we can and look upon this procedure ... as an inquiry rather than an adversary procedure.'
 - 5) At 783: per Barwick CJ, Gibbs, Stephen and Mason JJ.
 - 6) s 97 (4) Family Law Act: see above at 66-67 where this provision

and providing for proceedings in the family court to be conducted behind closed doors,¹⁾ the adversary procedure is still very much part of the Australian Family Court scene. This is particularly the case where a divorce action is defended or where there is an application for a decree of nullity.²⁾ In these cases, the court has no discretion but to order that evidence be given orally so that a situation is created where the adversary procedure can play an important part.

On the other hand, where an application for the dissolution of a marriage is undefended, and provided no children under the age of 18 years are involved, the parties to the action need not attend court, unless the court otherwise directs, and the matter may be decided on affidavit.³⁾ But where any children under the age of 18 years are involved the court requires the parties to the marriage to be present at the hearing to give oral evidence concerning the welfare of the children.⁴⁾ In this case, the adversary procedure will play its usual role and in this way the best interests of the minor children are safeguarded.

But in all other actions which may be brought in the family court, and which are not referred to in regulations 106 and 107⁵⁾, the court

- 1) S 97 (1) Family Law Act: see above at 66 where this provision is discussed. The decisions of the Australian High Court in the Russell and Farrelly cases (1976) 50 ALJR 594, which upheld the constitutional validity of s 97 (1) only insofar as it applied to the Commonwealth Family Court, caused widespread reaction on the ground that the public is denied access to the family court, and to information about its procedures and decisions. The Family Law Council in its Second Report (1978) at § 203 has recommended that this section be amended to allow hearings in the family court to take place in open court except when the court is exercising jurisdiction in respect of the custody, or guardianship of, or access to, a child of a marriage.
- 2) Reg 107 Family Law Regulations.
- 3) Reg 106 (1) Family Law Regulations. Cf the position in England - in an undefended divorce action which is not based on the defendant's behaviour, and if there are no children of the marriage, the petitioner need not attend court and may simply give evidence on affidavit: see Bromley 266-267.
- 4) Reg 106 (3) Family Law Regulations.
- 5) Namely, undefended applications for the dissolution of marriage in respect of which no children under the age of 18 years are involved, and defended actions for divorce or where a decree of nullity has been applied for.

has a discretion to order that evidence be given orally or by affidavit.¹⁾ Regulation 108 (2) of the Family Law Regulations then goes on to say that in such proceedings 'the court may, with the consent of the parties to the proceedings -

(a) dispense with such procedures and formalities as it thinks fit; and

(b) inform itself on any matter in such manner as it thinks just notwithstanding any rules of evidence to the contrary.²⁾

In this way, the formal adversary procedure is curtailed. For example, proceedings between the parties to a marriage concerning their property can be more expeditiously disposed of, rather than for the parties to be obliged to confront each other in open court in an acrimoniously-charged atmosphere. It must, of course, be emphasized that the court can only exercise its discretion in this way with the consent of the parties. It is, after all, up to the parties themselves to bring to the attention of the court any matters that are at issue between them rather than for the court to insist in every case upon a microscopic investigation into every marriage where there is an application for a divorce.

(E) Conclusion

Notwithstanding the criticisms of the adversary procedure, it would seem that its total elimination in family law litigation is an ideal incapable of attainment. Los Angeles Conciliation Court, for example, which comes the closest of the three courts considered above to eliminating the adversary procedure, still finds that the adversary procedure is necessary in custody cases where children are being used by their parents to strike back at each other. Also, one suspects that those concerned with the administration of justice in American family courts are deeply conscious of affording to every litigant

1) Reg 108 (1) Family Law Regulations.

2) Reg 108 (2) Family Law Regulations.

his 'due process' rights so that, in reality, it becomes very difficult to play down to any great extent the adversary procedure.¹⁾

By way of contrast, there seems to be a more open admission in Hawaii and Australia that the adversary procedure still has an indispensable part to play in the administration of justice, particularly in defended divorce actions. However, the experience of the family courts of Hawaii and Australia shows that it is possible to blend the adversary and inquisitorial procedures according to the exigencies of the situation. Even in the undefended divorce action an enquiry into the causes of the marital breakdown is unnecessary where the marriage is clearly dead. But such an enquiry may become necessary where the interests of any minor children are at stake or where there is any dispute over the matrimonial property. It is one thing to place less stress on the adversary procedure²⁾ and another to attempt to eliminate it altogether. With the former there can be no objection but the latter remains an unattainable dream.

1) Cf Gault 387 US1 (1967) and Kent 383 US 541 (1966).

2) Cf Biggs 'Stability of Marriage - A Family Court?' (1961) 34 ALJ 343 who reports as follows with regard to the Toledo Family Court, Ohio; 'In striving to get the parties to come to an amicable settlement, either completely or in part, the idea of adversary proceedings is played down as much as possible.'

5. Safeguarding the Interests of Children

(A) Introduction

Almost without exception, family courts have as one of their main objectives the protection of the rights of children. That this should be so cannot be doubted especially in divorce litigation.¹⁾ But, the extent to which, and the manner in which, this protection is afforded varies from court to court according to the jurisdictional limitations of each individual court.²⁾

(B) Los Angeles Conciliation Court

In order to ensure that the rights of children involved in divorce litigation are adequately protected, the attention of the counselling services is focussed on those matrimonial controversies in which children are involved.³⁾ It is reasoned that if the parents can be prevailed upon to adjust their differences in an amicable, mature and responsible way then the problems of any minor children involved will be similarly resolved. As it is put in the 1977 Conciliation Court Report:⁴⁾

'We feel we help the children when we help the parents, but if the children need a more direct kind of counseling help just for themselves, this in itself will cause the conciliation court counselor to make a referral to a qualified community counseling resource. In other words, we try our best not only to hear the anguish of the parents who sit before us, but we also listen to

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- 1) Cf Elkin in the Preface of the 1974 Conciliation Court Report; viz, 'Children of divorce are children in crisis. In their state of helplessness and powerlessness, they suffer silently, consumed by a kind of anxiety that only a child can feel, as his family, his most important source of nurturing and security, collapses.' See also, inter alia, Goldstein, Freud and Solnit 105-111; Stone 13-20, 71-73, 76-79, 97-101, 198-208, 230-231, 243-245; Eekelaar 40-43; 61-119, 217-235; Glendon 272-275.
- 2) Eg the Los Angeles Conciliation Court has no jurisdiction over juvenile delinquency cases, whereas the Hawaii Family Court does. Also, the Australian Family Court has no jurisdiction over illegitimate children, paternity disputes and adoptions whereas the Hawaii Family Court does, while the Los Angeles Conciliation Court has no jurisdiction over adoptions.
- 3) See 23 above.
- 4) At 4.

the silent cries of children, for the cries of children are often echoes of parental pain.'

Accordingly, the idea of independent legal representation for children of divorce does not appear to be strongly countenanced in Los Angeles. There are some¹⁾ who argue that an independent legal representative for children involved in a matrimonial dispute in the context of the Los Angeles Conciliation Court is superfluous because of the substitution of the fault-orientated divorce procedure by the marriage breakdown theory. This (so the argument continues), taken in conjunction with the counselling process, makes it unnecessary to consider too seriously the possibility of children being used by their embittered parents as instruments with which to hit back at each other. On the other hand, there are others²⁾ who consider the separate legal representation of children of divorce as being absolutely essential no matter whether the proceedings are conducted in an adversary or inquisitorial atmosphere.

Since the jurisdiction of the Conciliation Court is limited in its scope,³⁾ it does seem that to insist upon the separate legal representation of children in the Conciliation Court context is superfluous. Furthermore, since the abolition of the fault-orientated grounds for divorce in California in 1970⁴⁾ the sole criterion for the award of the custody of children is now the 'best interests of the child' and in this regard a definite order of precedence has been laid down; namely, the custody of a child will be awarded -

- (i) to either parent according to the best interests of the child; or
- (ii) to the person or persons in whose home the child has been living in a wholesome and stable environment; or
- (iii) to any other person or persons deemed by the court to be suitable

1) Eg Kay 'A Family Court: The California Proposal' (1968) 56 Calif LR 1205, 1236-1237.

2) Eg Payne 488-489 and Bradway 'Divorce Litigation and the Welfare of the Family' (1956) 9 Vanderbilt LR 665, 675-676.

3) See above at 79-80. The Conciliation Court has no jurisdiction over adoptions, juvenile delinquency cases: neither does it have the power to grant an order of divorce or a decree of judicial separation.

4) See above at 16-17.

and able to provide adequate and proper care and guidance to the child.¹⁾

This, coupled with the strongly motivated counselling services makes it unlikely that the Conciliation Court would grant any order detrimental to the best interests of a child.²⁾

(C) The Hawaii Family Court

It has already been mentioned above³⁾ that notwithstanding the statutory right to legal representation, the exercise of this right seems to be discouraged in Hawaii. Whether this is a desirable state of affairs is open to grave doubt. Be that as it may, it does seem that great stress is placed on the best interests of children by the Hawaii Family Court. This is more noticeable than in the case of the Los Angeles Conciliation Court because the Hawaii Family Court has assumed a more comprehensive jurisdiction over children⁴⁾ which includes, inter alia, jurisdiction not only in respect of children involved in divorce litigation, but also over children who are neglected, subjected to physical or emotional deprivation, or who are beyond the control of their parents, or who are truants, or who are juvenile delinquents.⁵⁾

In the exercise of its jurisdiction over children, the family court is enjoined by the provisions of section 41 of the Hawaii Revised Statutes to resort to a relaxed and informal procedure.⁶⁾ Thus, section 41 states that:

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- 1) 1977 Conciliation Court Report 10, and see s 46 Hawaii Revised Statutes which is cited below at 136-137.
 - 2) For an excellent overview of custody disputes in the American context see Mnookin 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemp Problems 226: see also Oster 'Custody Proceeding' (1965) 3 J Fam Law 21.
 - 3) See above at 125.
 - 4) See above at 36-38.
 - 5) It should be noted that s 1 Hawaii Revised Statutes states, inter alia, that 'no adjudication by the court of the status of any child ... shall be deemed a conviction; no child shall be found guilty or be deemed a criminal by reason of such adjudication'.
 - 6) The relevant portion of s 41 (as well as other sections) are being cited in extenso because of the general unavailability of the Hawaii Statutes in South Africa.

'Cases of children in proceedings under section 11(1) and (2)¹⁾ shall be heard by the court separate from hearings of adult cases ... The hearings may be conducted in an informal manner and may be adjourned from time to time. The general public shall be excluded and only such persons admitted whose presence is requested by the parent or guardian or as the judge or district family judge finds to have a direct interest in the case or in the work of the court from the standpoint of the best interests of the child involved. Prior to the start of a hearing, the parents, guardian, legal custodian and, when appropriate, the minor shall be notified of the right to be represented by counsel ...

In the disposition part of the hearing any relevant and material information, including that contained in a written report, study or examination, shall be admissible, and may be relied upon to the extent of its probative value: provided that the maker of the written report, study or examination shall be subject to both direct and cross-examination upon demand and when he is reasonably available. The disposition shall be based only upon the admitted evidence, and findings adverse to the child as to disputed issues of fact shall be based upon a preponderance of such evidence.

Upon the final adverse disposition, if the parent or guardian is without counsel the court shall inform the parent or guardian of his right to appeal ...

The judge or the senior judge if there is more than one may by order confer concurrent jurisdiction on a district court ... to hear and dispose of cases of violation of traffic laws or ordinances by children ... The exercise of jurisdiction over children shall, nevertheless, be considered non-criminal in procedure and result in the same manner as though the matter had been adjudicated and disposed of by a family court.'

Although the procedure prescribed for children appears to be informal and relaxed, the basic legal rights (or 'due process' rights) are still

1) Ss 11(1) and (2) are cited in full above at 36-37.

safeguarded so that the prospect of the Gault-type of situation occurring in Hawaii seems remote. No effort seems to have been spared to give effect to the best interests of children in Hawaii. In this regard, the provisions of section 44 of the Hawaii Revised Statutes are most instructive; namely,

'The court may order that a child or minor who is facing a criminal charge⁷ ... be examined by a physician, surgeon, psychiatrist, or psychologist, and it may order treatment by them ... For either the examination or treatment, the court may place the child or minor in a hospital or other suitable facility. The court, after hearing, may order examination by a physician, surgeon, psychiatrist or psychologist, of a parent or guardian whose ability to care for a child before the court is at issue.

No child under the age of twelve shall be adjudged to come within section 11(1) without the written recommendation of a psychiatrist or other physician duly qualified and experienced in the practice of child psychiatry.¹⁾

It would seem that next to the development of the probation services no development in the juvenile court system has been more fruitful than the increasing use of psychological and psychiatric study and treatment. Physical and mental examinations often reveal unsuspected conditions which help to explain the misbehaviour at issue. The discretion to order physical and mental examinations is clearly in keeping with the Hawaii Family Court's functions of understanding and helping rather than simply convicting and punishing.

The decision whether to order the above examination and/or treatment is, in the normal course, in the discretion of the court. But, the court has no discretion but to call for a 'social study report' in all cases where a minor appears in court pursuant to the provisions of sections 11(1) and 11(2).²⁾ Such 'social study reports', though normally essential in custody and maintenance disputes, are in the discretion of the court.

1) This procedure is substantially the same as that provided for by s 22 Standard Family Court Act.

2) S 45 Hawaii Revised Statutes.

Thus, the rest of section 45 of the Hawaii Revised Statutes states that -

'Except where the requirement is waived by the judge, social studies shall also be made in proceedings to decide disputed or undetermined legal custody and in custody disputes arising out of a divorce action. In all other awards of custody arising out of a divorce action, including those where an agreement with respect to custody has been made by the parties, and in any other case or class of cases, the judge may order a social study when he has reason to believe such action is necessary to assure adequate protection of the minor or of any other person involved in the case. By special order of the judge ... a social study may be required in support cases covering financial ability and other matters pertinent to making an order of support ...

The judge may order and use presentence investigation with respect to any criminal action under the jurisdiction of the court ...'

In matrimonial actions, the interests of minor children are also of paramount importance. In this regard, the provisions of section 46 of the Hawaii Revised Statutes are worthy of extensive citation; namely,

'In actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court may, during the pendency of the action, at the final hearing at any other time during the minority of the child, make such order for the custody of the child as may seem necessary or proper. In awarding the custody, the court is to be guided by the following standards, considerations and procedures:

- (1) Custody should be awarded to either parent according to the best interests of the child.
- (2) Custody may be awarded to persons other than the father or mother whenever such award serves the best interest of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody.
- (3) If the child is of sufficient age and capacity to reason, so

custody shall be considered and given due weight by the court.

- (4) Whenever good cause appears therefor, the court may require an investigation and report concerning the care, welfare and custody of any minor child of the parties ...
- (5) The court may hear the testimony of any person or expert produced by any party or upon the court's own motion, whose skill, insight, knowledge or experience is such that his testimony is relevant to a just and reasonable determination of what is the best physical, mental, moral and spiritual well-being of the child whose custody is at issue.
- (6) Any custody award shall be subject to modification or change whenever the best interests of the child require or justify the modification or change and wherever practicable, the same person who made the original order shall hear the motion or petition for modification of the prior award.
- (7) Reasonable visitation rights shall be awarded to parents and to any person interested in the welfare of the child in the discretion of the court, unless it is shown that such rights of visitation are detrimental to the best interests of the child.
- (8) The court may appoint a guardian ad litem to represent the interests of the child and may assess the reasonable fees and expenses of the guardian ad litem as costs of the action, payment in whole or in part by either or both parties as the circumstances may justify.'

The interesting feature of the above provision is that it goes much further than any other possibly comparative provision of the Standard Family Court Act. Clearly, the best interests of minor children involved in custody disputes weighed heavily with the Hawaiian Legislature and in giving effect to these best interests it would appear to have succeeded admirably.

(D) The Family Court of Australia

The jurisdictional limitations with regard to children have already been dealt with above.¹⁾ Part VII of the Family Law Act deals

1) See above at 63-66: 69-70. For example, like Los Angeles, but unlike Hawaii, the Australian Family Court has no jurisdiction over children involved in criminal cases.

with the welfare and custody of the children of a marriage.¹⁾ For the purpose of Part VII a child is any person below the age of 18 years.²⁾ Where the welfare and custody of a child are at stake, proceedings in respect thereof may be instituted independently of any principal matrimonial relief, such as the dissolution of, annulment of, or declaration of the validity of, a marriage. This means that proceedings relating to the welfare and custody of a child can be brought in any court, other than the Family Court, which has jurisdiction under the Family Law Act. Such proceedings can be initiated either before or after the dissolution of a marriage. But, in any event, whether the proceedings are ancillary to such principal relief or not, section 62 (1) of the Family Law Act states, inter alia, that -

'the court may, at any stage of the proceedings, of its own motion or upon the request of a party to the proceedings, make an order directing the parties to the proceedings to attend a conference with a welfare officer³⁾ to discuss the welfare of the child and, if there are any differences between the parties as to matters affecting the welfare of the child, to endeavour to resolve those differences.'

If any party should fail to attend such conference it is the duty of the

- 1) Part VII of the Act, which comprises ss 60-70 inclusive, is comprehensively discussed by Nygh 75-91 and Joske 66-78 (and 1977 Supplement). It will be recalled (see above at 69-72) that as a result of the decisions in the Russell and Farrelly cases (1976) 50 ALJR 594 (and see also Cako /1977/ VR 245), the phrase 'child of a marriage' is now restricted to meaning a child born to, or adopted by, the parties to a marriage. It follows that illegitimate children and stepchildren do not fall within the jurisdiction of the family court: see also Finlay 'Australian Family Law: The Twilight Zone' (1976) 8 Fed LR 77, 79-81.
- 2) Cf s 61 (2) Family Law Act, which states that 'An order with respect to the custody or guardianship of or access to, a child -
 - (a) shall not be made in respect of a child who has attained the age of 18 years or is or has been married; and
 - (b) ceases to be in force when the child attains the age of 18 years or marries.'
- 3) It may be mentioned that the description 'Welfare Officer' is not approved of by the Family Law Council: it prefers the description 'Court Counsellor'. In this context the description 'Court Counsellor' is undoubtedly more appropriate than 'Welfare Officer.'

welfare officer to report such failure to the court.¹⁾ A report of the welfare officer may be received in evidence,²⁾ though anything said at, or any admission made at, the conference is not admissible as evidence in any court unless the parties so consent.³⁾

There is little empirical data available on the efficacy of the procedure just described. Initially, there was much hostility and distrust towards such procedure. McKenzie, however, reports⁴⁾ that the erstwhile hostility and distrust have been converted into enthusiasm. The result is that there has been an increasing demand for the services of the welfare officers, which has caused a manpower problem. This problem, however, is not seen as a major obstacle and, in fact, there now appears to be a hard core of seasoned welfare officials who have acquired, through their experience, the necessary expertise in respect of matters affecting the wishes of children involved in custody and access disputes. Much of the work of the welfare officers is devoted to the counselling of couples who no longer wish to live together but who, nevertheless, are genuinely concerned about the welfare to their children notwithstanding the fact that they themselves cannot agree in respect of them.

Despite the recent enthusiasm for the above procedure, it is, nevertheless, apparent that some practical problems are being experienced with the application of Section 62 (1) of the Family Law Act. In the first place, there appears to be some controversy over the weight to be attached to the reports of welfare officers. This controversy is analysed by Bates⁵⁾ who inclines to the view that 'It would seem strange

1) § 62 (3) Family Law Act.

2) § 62 (4) Family Law Act.

3) § 62 (5) Family Law Act.

4) In a paper presented at a Congress of Psychiatrists in Melbourne in August 1978 entitled 'Children in the Family Court.'

5) 'New Trends and Expert Evidence in Child Custody Cases: Some New Developments and Further Thoughts from Australia' (1979) 12 GILSA 68, 78-81.

if the 1975 legislation, aimed as it is at informalising court procedures, were to require stricter standards in this area than were previously required.' Obviously, one of the ways of testing the views and opinions of welfare officers is to submit them to cross-examination. But, even then, there is some doubt as to whether this is permissible under the provisions of the Family Law Act.

In the second place, there are practical difficulties in the application of section 62 (1) of the Family Law Act when the court requires both a conference to be held and a report to be submitted. If a report only is called for, the welfare officer concerned usually arranges a conference between himself and the parties to enable him to compile the necessary report. If such a conference is held it is not deemed to be confidential so that any disclosures or statements made at such conference may be disclosed in a subsequent report to the court. On the other hand, if a conference has been ordered in terms of section 62 (1) of the Family Law Act then all statements and disclosures made at this conference to the presiding welfare officer are confidential, and are inadmissible in evidence unless the parties agree under section 62 (5) to such statements or disclosures being given in evidence in the report. Welfare officers are, therefore, under the duty to ensure that they are quite clear as to the circumstances under which the conference is being held. The parties themselves may not fully appreciate the distinction between these two different types of conferences unless it is explained to them. This particular problem is presently under investigation by the Family Law Council,¹⁾ which has pointed out, however, that the parties to a conference do not themselves necessarily regard confidentiality as important. Nevertheless, the possibility does arise that if matters important to the welfare of a child are disclosed at the second type of conference²⁾ the welfare officer may well find himself being precluded from reporting these matters to the court.

Before granting an order for the dissolution of a marriage the court must first satisfy itself that there are no children of the marriage

1) 1978 Family Law Council Report Ss 41-44.

2) Ie where a conference has been ordered by the court in terms of s 62 (1) Family Law Act.

under the age of 18 years. If there are, the court must then satisfy itself that -

- '(i) proper arrangements ... have been made for the welfare of those children; or
- (ii) there are circumstances by reason of which the decree nisi should become absolute notwithstanding that the court is not satisfied that such arrangements have been made.'¹⁾

If the court should be in any doubt as to the arrangements made for the welfare of the children of a marriage, the court may adjourn the proceedings until a report has been obtained from a welfare officer.²⁾

An attempt is made to give effect to the paramount interests of the children of marriages that have broken down not only at the pre-divorce state but also at the post-divorce stage. In this regard, the provisions of Section 64 (1) of the Family Law Act are pertinent; namely,

'In proceedings with respect to the custody, or guardianship of or access to, a child of a marriage -

- (a) the court shall regard the welfare of the child as the paramount consideration;³⁾
- (b) where the child has attained the age of 14 years, the court shall not make an order ... contrary to the wishes of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so; or
- (c) subject to paragraphs (a) and (b), the court may make such order in respect of those matters as it thinks proper, including an order until further order.'

1) S 63 (1) Family Law Act.

2) S 63 (2) Family Law Act.

3) The wording of s 64 (1) Family Law Act is substantially the same as s 85 (1) of the Commonwealth Matrimonial Causes Act of 1959 which, in turn, is discussed in some depth by Finlay 'First or Paramount? The Interests of the Child in Matrimonial Proceedings' (1968) 42 ALJ 96.

It is, of course, one thing to talk about the noble sentiment of regarding the welfare of a child of a broken marriage as the paramount consideration, but it is quite another matter to give effect to this consideration. There are, however, various ways of giving effect to this consideration and one of them is by making greater use of the reports of welfare officers as outlined above. Another welcome tendency in this direction is the giving of some recognition to expert psychiatric evidence.¹⁾ However, with the comparatively recent emergence of psychiatry as an important science, it is becoming increasingly obvious that the courts alone are ill-equipped to give adequate expression to the best interests of children involved in matrimonial litigation. This point is emphasized by Goldstein, Freud and Solnit²⁾ as follows:

'Too frequently there is attributed to law and its agents a magical power - a power to do what is far beyond its means. While the law may claim to establish relationships, it can in fact do little more than give their recognition and provide them an opportunity to develop ... It [the law] neither has the sensitivity nor the resources to maintain or supervise the ongoing day-to-day happenings between parent and child - and these are essential to meeting ever-changing demands and needs. Nor does it have the capacity to predict future events and needs, which would justify or make workable over the long run any specific conditions it might impose concerning, for example, education, visitation, health care or religious upbringing ... In the long run the child's chances will be better if the law is less pretentious and ambitious in its aim; that is, if it confines itself to the avoidance of harm and acts in accord with a few, even if modest, generally applicable short-term predictions.'

With regard to the separate legal representation of the children

1) See Barnett [1973] 2 NSWLR 403, 409-410, and Bates 'Custody of Children: Towards a New Approach' (1975) 49 ALJ 129. It is, however, by no means the invariable rule that favourable consideration will be given to expert psychiatric evidence in Australian child custody cases. Cf Bates 'Expert Evidence in Cases involving Children' (1975-76) 12 Univ WALR 139 - 'Lawyers must ... face the fact that the psychiatrist, clinical psychologist and social worker possess qualities and expertise which they do not, and in cases concerning the welfare of children there can be no place for the lawyers' traditional insularity.' (at 152); Bates 'New Trends and Expert Evidence in Child Custody Cases: Some New Developments and Further Thoughts from Australia' (1979) 12 CILSA 65.

2) At 49-52.

of parties involved in matrimonial litigation section 65 of the Family Law Act states that -

'Where, in proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage, it appears to the court that the child ought to be separately represented the court may, of its own motion, or on the application, of the child or of an organization concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it thinks necessary for the purpose of securing such separate representation.'

Where the court has ordered such separate legal representation it may request that the representation be arranged by the Australian Legal Aid Office.¹⁾ Although the decision to allow a child to be separately represented appears to be in the discretion of the court, it does seem that the court will be sparing in the exercise of its discretion in favour of such representation.

(E) Conclusion

One of the most effective ways of ensuring the protection of the best interests of children is to afford them separate legal representation, not only where their parents are involved in matrimonial litigation and where custody, access and maintenance is at issue, but also in neglect and juvenile delinquency cases.²⁾ As the experiences of the Hawaii and Australian Family Courts reveal there is an increasing recognition of the fact that a child is as much a party to matrimonial proceedings as are his parents. There would seem to be some confusion, however, as to the exact role of the legal representatives of children; that is, are they simply to play a passive role in assisting the court to arrive at a proper decision regarding the best interests

1) Reg 112 (2) Family Law Regulations.

2) Ie where juvenile delinquency cases fall within the jurisdiction of a family court as in Hawaii. On the question of the right to legal representation see generally Dyson and Dyson 48-64 (esp 52-53) and Payne 336-338 and 470-506.

of children on the available evidence,¹⁾ or are they to play a more active role (including the conducting of appropriate investigations) in presenting to the court facts and evidence which will be in the best interests of the children they represent?²⁾ In this regard, it would seem that the Hawaii Family Court inclines to the view that a child's legal representative only has a passive role to play and this may well account for its authorities expressing approval of decisions not to engage legal representatives. There is no evidence of similar approval from the Australian Family Court judges. It is submitted that there is much merit in the separate legal representation for the children of divorce.³⁾ One may, with justification, even go further by recommending such separate legal representation in all cases in which children are involved.

Certainly, the experiences of all three courts discussed above show that there is a growing awareness of the need to give greater effect to the best interests of children, be it their best financial, or moral, or spiritual interests. The courts can no longer continue to pay lip-service to the best interests of children. Nor can the courts, in their apparent endeavour to give expression to the best interests of children, simply rely on whatever evidence the warring parents choose to place before them. Children are not chattels. There is, fortunately, a recent awareness of this truism as is evidenced, for example, by the procedures governing all three courts above which make it necessary to give, so far as possible, effect to the wishes and desires of children of a mature age regarding any preference as to which parent should have custody.⁴⁾ In their own respective ways the Los Angeles Conciliation Court and the Family Courts of Hawaii and Australia have made honest endeavours to give expression to the best interests of the children with which they are concerned. The limitations of the Australian Family Court in this regard are not due to any lack of endeavour but, rather, to the peculiar constitutional problems that prevail there.

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- 1) Ie a type of watching brief.
 - 2) See, for example, Bates 'The Lawyer's Social Role: A Lesson from Family Law' 1978 Natal Univ LR 125, 138-139.
 - 3) Cf Payne 474-475.
 - 4) See generally Mnookin 'Child-Custody Adjudication: Judicial Functions in the face of Indeterminacy' (1975) 39 Law and Contemp Problems 226: Oster 'Custody Proceeding' (1965) 3 J Fam Law 21.

Finally, the greater attention that is now being focussed on the best interests of children has led to a greater degree of co-operation between the lawyer and the behavioural or social scientist than was hitherto thought possible. There is evidence of such co-operation in all three courts above.

CHAPTER FIVESOUTH AFRICAN MATRIMONIAL LAW REFORM1. Introduction

In the climate of divorce and matrimonial property law reform virtually the world over,¹⁾ it is not surprising to note that there has also been some development in recent years in South Africa in these fields. Thus, for example, section 3 of the Matrimonial Affairs Act of 1953 was amended²⁾ and the Divorce Act of 1979³⁾ as well as the Dissolution of Marriages on Presumption of Death Act of 1979⁴⁾ were

- 1) Apart from the legislative developments in Los Angeles, Hawaii and Australia which have been noted above in Chapters 3 and 4, there have also been recent developments in the divorce and matrimonial property laws in England [cf Matrimonial Causes Act, 1973 (Chapter 18)], Canada, United States of America, France, Federal Republic of Germany, the Netherlands and the Scandinavian countries. Such is the pace of legislative change that it is becoming increasingly difficult to keep abreast of recent developments: see Hahlo in Studies On Divorce 13-14; Glendon who canvasses recent changes in the United States, England, the Federal Republic of Germany and France. Apart from dealing with recent developments in South Africa, Barnard in his thesis (1979) covers divorce law reform in England and the Netherlands. The following are some of the many recent law journal discussions on legislative changes effected in different parts of the world: Glendon 'The French Divorce Reform Law of 1976' (1976) 24 Am Journ Comp Law 199; Floyd 'The New French Divorce Law' (1976) 126 ALJ 692; Meston 'Divorce Reform in Scotland' (1977) 51 Tulane LR 259; Rheinstein and Glendon 'West German Marriage and Family Law Reform' (1978) 45 Univ Chicago LR 519; Muller-Freienfels 'The Marriage Law Reform of 1976 in the Federal Republic of Germany' (1979) 28 ICLQ 184. Also see generally Chloros.
- 2) By Act 13 of 1976. For comments on the amendments see van Aswegen 'Wet 13 van 1976 onder die Vergrootglas' (1977) 18 Cod 25; Sinclair 'Household Necessaries: A Necessary Amendment' (1977) 94 SALJ 449; Nathan 'Household Necessaries: The Proof of the Pudding and a New Recipe' (1979) 96 SALJ 247.
- 3) Act 70 of 1979.
- 4) Act 23 of 1979. For comment on this Act see Nathan 'New Grounds for Dissolution of Marriage' (1979) 8 BML 224; Nathan 'Presumption of Death and Dissolution of Marriage' (1979) 96 SALJ 439; Stoop 'Enkele Aspekte van die Wet op Ontbinding van Huwelike by Vermoede van Dood, Wet 23 Van 1979' (1979) 20 Cod 12; Venter 'Vermoede van Dood en Beeindiging van die Huwelik' (1979) 2 DJ 290; Pauw 'Die Vermoede van Dood - Nuwe en Ou Reg' (1980) 43 THR-HR 71.

promulgated. Further changes are also anticipated in the field of matrimonial property law.¹⁾

Of the legislative changes that have already been effected, the most far-reaching are to be found in the Divorce Act of 1979 in terms of which the erstwhile fault-principle of the South African divorce law has apparently been abandoned,²⁾ as well as the decree of judicial separation and the order for the restitution of conjugal rights.³⁾ A considered treatment of other changes brought about by the Divorce Act would be beyond the scope of this thesis.⁴⁾ What is more important from the point of view of this thesis lies not so much in what the Divorce Act has achieved but, rather, in what it failed to achieve. In this regard, it is appropriate to consider some aspects of the Divorce Report (1978) of the South African Law Commission.⁵⁾

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- 1) Towards the end of 1979 the South African Law Commission published a draft Bill on Matrimonial Property, together with an explanatory memorandum. This is the second draft Bill to have been prepared by the Law Commission: 5887 dated 24 February 1978. On suggestions for the reform of the South African universal community system see, inter alia, van Wyk Thesis (1976) 304-307.
 - 2) Ss 3-5 Divorce Act.
 - 3) S 15 Divorce Act. As to judicial separation generally see Schäfer 'Judicial Separation' (1976) 93 SALJ 289.
 - 4) These changes include the prohibition against the publication of particulars of a divorce action §s 12; the granting to the court of a discretion where an order for the forfeiture of the benefits of a marriage is sought §s 9; the granting to the court of a discretion to apportion the costs of a divorce action §s 10; the placing of less emphasis on the fault element when the quantum of maintenance to be paid is in issue §s 7 (2). For discussions on the Divorce Act (and the preceding Divorce Bill) see, inter alia, Barnard 'Enkele Opmerkings oor die Voorgestelde Nuwe Suid-Afrikaanse Egskeidingsreg' (1978) 41 THR-HR 263; Sinclair 'The New Divorce Bill' (1978) 7 BML 219; Barnard 'Nog 'n Stap Nader aan 'n Nuwe Egskeidingsreg' 1979 DR 11; van Wyk 'Die Wet op Egskeiding 70 van 1979' 1979 DR 633; Barnard Thesis (1979); Hahlo and Sinclair; Barnard (Divorce).
 - 5) Report 57 of 1978.

2. The Law Commission's Attitude to Family Courts

It must be stressed at the outset that the Law Commission's inquiry only related to the law of divorce and it did not examine the concept of the unified family court system as a whole.¹⁾ Rather, it confined itself to matters such as the potential reconciliation between the parties to a divorce, and the regulation of the consequences of divorce in a way satisfactory to the parties having regard to the interests of minor children.²⁾

It was also pointed out³⁾ that in 1974 two State officials, one from the Department of Justice and one from the Department of Social Welfare and Pensions, toured Canada and the United States to study their family court systems. Their conclusion was that the family courts visited performed the same functions as our Childrens' Courts, Maintenance Courts, the Juvenile Courts.

The Law Commission pointed out that although there was tremendous enthusiasm for the institution of family courts, there appeared to be little idea as to 'what the character and modus operandi of such courts should be.'⁴⁾ It found,⁵⁾ however, that the ideal family court would appear to have at least the following characteristics:-

- (a) it should have a comprehensive and unified jurisdiction over all matters affecting the family unit;
- (b) its approach should be therapeutic;
- (c) its procedure should be informal;
- (d) it should be within the reach of, and readily accessible to, all those with problems falling within its jurisdiction.

1) For example, the Law Commission did not consider (except, perhaps, in parenthesis) matters such as the adoption of children, consent to marry, children in need of care, juvenile delinquency and other matters that could fall within the jurisdiction of a family court.

2) Divorce Report (1978) § 13.3.

3) Ibid.

4) Divorce Report (1978) § 13.1. Cf Finer Report § 4.280: 'The dearth of material helps to explain why the numerous submissions made to our Committee in favour of the introduction of a family court system offer more by way of enthusiasm than elucidation.'

5) Divorce Report (1978) § 13.1. Cf Finer Report § 4.283.

The Law Commission conceded that it had obtained very little guidance from a study of the family courts in different parts of the world because, as it pointed out,¹⁾ they varied from each other considerably on the question of jurisdiction. Thus, for example, only a few States in America which have family courts also include divorce within their jurisdiction. No guidance was sought, or obtained, from the Australian Family Court system because it was felt, at that stage, that it could not be determined how successful they were.

In canvassing the viability of the family court system, the Law Commission only referred to the works of McLaughlin,²⁾ Cretney and Gordon.³⁾ The Finer Report received no more than a fleeting mention, whereas the views of Phillips,⁴⁾ who suggests that the many claims of success attributed to family courts have not been substantiated, would appear to have influenced the Law Commission considerably.

Dealing specifically with the reconciliation function of family courts the Law Commission was of the view that reconciliation could not be foisted upon anyone. Furthermore, the manpower to investigate and promote the possibility of reconciliation between the parties in a domestic dispute would not be available. In any event, the Law Commission was of the view that 'a judge should be able to tell at a glance'⁵⁾ which cases are likely to be amenable to counselling. Hence, the Law Commission preferred to allow the court a discretion to decide

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- 1) Divorce Report (1978) § 13.2.
 - 2) 'Court - Connected Marriage Counseling and Divorce - The New York Experience' (1971) 11 J Fam Law 517.
 - 3) 'The Family Court: When Properly Defined, it is both Desirable and Attainable' (1975) 14 J Fam Law 1.
 - 4) 'A Family Court System for Scotland' (1976) 21 Journ Law Soc Scotland 12 and 52.
 - 5) Divorce Report (1978) § 13.3.

which cases should be postponed with a view to affording the parties an opportunity to effect a reconciliation.

As to the therapeutic function of a family court the Law Commission felt that the main objection lay in the possibility of a family court 'being converted into a social service bureau which deviates from the application of substantive law.'¹⁾

Finally, the Law Commission felt that 'the fragmentation of jurisdiction regarding family law matters was not a serious problem in South Africa.'²⁾ It was felt³⁾ that the services rendered by the Childrens' Courts, Maintenance Courts and Juvenile Courts were 'apparently being rendered satisfactorily at present.' Also, from a practical point of view it would be impossible to establish a family court with Supreme Court status in every rural town in South Africa.

1) Divorce Report (1978) § 13.3.

2) Divorce Report (1978) § 13.5.

3) Ibid. It may be mentioned that Barnard Thesis (1979) 437 generally supports the Law Commission's attitude to family courts: see also Barnard (Divorce) 86-88.

3. Criticisms of the Law Commission's Approach to the Concept of Family Courts

Although the Law Commission did not regard an examination of the family court system as its main area of concern, it is submitted, nevertheless, that it adopted a negative approach to the concept of family courts. This can be attributed to the following factors:

In the first place, the Law Commission was entirely representative of the legal profession, both practising and academic.¹⁾ The problems of divorce are not only legal in nature, but are also social, psychological, spiritual and economic in nature. It is regrettable that representatives of other disciplines concerned with the problems of divorce were not also invited to serve on the Commission on an ad hoc basis. By way of contrast, for example, the Group appointed by the Archbishop of Canterbury in January 1964 to review the English law of divorce consisted of a bishop and 2 canons, 2 judges (one being a Lord of Appeal and the other a judge of the High Court), a barrister, a female solicitor, a consultant psychiatrist, a director of advanced legal studies, a professor of sociology, a female writer on Christian ethics, a member of parliament, and the president of a society described as the National Council for the Unmarried Mother and her Child. This Group produced its report²⁾ in 1966 and such is the standing and significance of this report that it cannot be ignored or overlooked by any committee, group or commission anywhere in the Western World which has been charged with an examination of the law of divorce. Taken in the context of its time in 1966, Putting Asunder recommended changes in the English divorce laws which can only be described as radical and far-reaching but which, today, are virtually accepted in most legal systems as being absolutely essential. One is prompted to ask whether these changes would have been recommended had the membership of the Archbishop's Group been confined exclusively

1) The members of the Law Commission were made up of 2 judges, an advocate, an attorney, the head of the Department of Justice Training Section, and 2 professors of law, one of whom was a female /Professor Catherine Smith/ who was invited to serve on the Commission on an ad hoc basis for the purposes of the divorce law project. Professor Smith's main interests appear to lie in the field of commercial law and she is the author of The Law of Insolvency (1973): she did, however, write a short article entitled 'Equal Rights for Women before the Law' (1975) 16 Cod 7.

2) Putting Asunder.

to the legal profession.¹⁾

The legal profession is, by tradition, conservative notwithstanding the fact that 'the dynamic nature of society inevitably produces changes which require laws to change.'²⁾ In reality, such changes are very slow in forthcoming notwithstanding the clamour for change. This is particularly true of South African family law.³⁾ The Law Commission has itself acknowledged⁴⁾ the existence of a widespread demand for the institution of family courts in South Africa. Yet, despite the circumscribed limits within which it worked, the Law Commission

- 1) Cf the composition of the Hawaii Commission on Children and Youth regarding its 'Proposal for the Establishment of a Family Court in the First Circuit of Hawaii' [see above at 34-35], and the Finer Committee.
- 2) Per Kirby 'Law Reform, Why?' (1976) 50 ALJ 459, 562.
- 3) For example, in Glazer 1963 (4) SA 695 (AD) the Appellate Division refused to extend an earlier 'error' in interpreting Groenewegen to afford a surviving spouse the right to claim maintenance out of the estate of the deceased spouse. This earlier 'error' had been made by Lord De Villiers C J in Carelse v Estate de Vries (1906) 23 SC 532 who held that a father's estate, if able to, is liable for the support of both his legitimate and illegitimate children. (see Beinart 'Liability of a Deceased Estate for Maintenance' 1958 AJ 92). The effect of Glazer's case has been to perpetuate an unpardonable hardship on a surviving wife who was married out of community of property to her husband and who has been disinherited by him. Clearly, some remedial legislation is called for and, indeed, has been called for by, inter alia, Hahlo 'Maintenance out of a Deceased Estate: An Epitaph' (1964) 81 SALJ 1; and Beinart 'The Forgotten Widow' 1965-1966 AJ 285. A proposed Family Maintenance Bill was read once in Parliament after which it was referred to a select committee which recommended that it be dropped. (The full English version of this proposed Bill is reproduced in (1971) 88 SALJ 205 Annexure 1. See also Hahlo 'The Sad Demise of the Family Maintenance Bill 1969' (1971) SALJ 201.) It would seem that despite the clamour for change in this respect our Legislature is unable, or unwilling, to take up the necessary challenge. Cf van den Heever J A in Oberholzer 1947 (3) SA 294 (AD) at 297 ('Family law is resistant to change ... and is not readily influenced by foreign schematic notions') See also Boberg 283-286; Olivier 235.
- 4) Divorce Report (1978) § 13.1.

has failed to give adequate expression to these demands and the Legislature, in which the legal profession is more than well represented, is not likely to initiate a family court system in South Africa without a firm recommendation from the Law Commission.

In the second place, it is submitted that the Law Commission's satisfaction with the present court structure is entirely misplaced.¹⁾ For example, it is submitted that the problem of fragmented jurisdiction in family law matters is a real one.²⁾ Also, it is submitted, it cannot be said that there is widespread satisfaction with the services presently being rendered by the Childrens' Courts, the Maintenance Courts and the Juvenile Courts. Even at Supreme Court level the services rendered by that court in the field of divorce law are far from satisfactory.

1) Cf the Commission under the chairmanship of Mr Justice G G Hoexter 'to inquire into the structure and functioning of the courts of law in the Republic of South Africa.' Government Gazette 6761 of 30 November 1979.

2) See below at Chapter 8.

4. The Law Commission's Attitude to Inquisitorial Procedure

The Law Commission felt that the introduction of an inquisitorial procedure was unnecessary.¹⁾ Instead, it was felt that the Law Commission's proposed changes to the substantive law, especially the recommended introduction of the irretrievable break-down of marriage as a ground for divorce, 'would go a long way towards mitigating the conflict and emotion with which divorce proceedings are fraught.'²⁾ These proposed changes have now been effected³⁾ and it remains to be seen whether the conflict and emotional upheavals associated with the divorce action will be significantly reduced.⁴⁾

1) Divorce Report (1978) § 13.9.

2) Ibid.

3) S 3 Divorce Act.

4) Hahlo and Sinclair 62-63 suggest that the possibility cannot be excluded that 'court battles about maintenance, forfeiture of patrimonial benefits, provisions for the welfare of the minor children of the marriage and costs may become more frequent and bitter.'

5. The Prospects for a Family Court System in South Africa

At this stage, it may seem that the establishment of a full-blooded family court in South Africa is remote. However, it is significant to note that on the 30th November, 1979, the State President appointed the Hoexter Commission of Inquiry to report on, inter alia, the desirability of establishing an intermediate court system and of establishing a family court as a branch of such intermediate court system, 'or otherwise'.¹⁾ It is submitted that this is a very welcome step in the right direction.

The Hoexter Commission's terms of reference regarding family courts call into question the status of a family court. In South Africa, marriage always has been regarded as a status which lies at the root of civilized society.²⁾ It is submitted that this traditional approach should be nurtured and any effort to compromise this status by bringing within the jurisdiction of a court with a status inferior to that of the Supreme Court the problems of marriage and divorce should be resisted. It is significant to note that the Conciliation Court of Los Angeles, as well as the Hawaii and the Australian Family Courts all have a superior court status. The effect of this is to attract to the bench of a family court judges and legal practitioners of high repute, calibre, and ability.³⁾ Were it otherwise,

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- 1) The background to the appointment of the Hoexter Commission lies in the comments of the Secretary for Justice /J P J Coetzer/ in the 1978 Annual Report of the Department of Justice 5-7: see also Coetzer 'Intermediêre Howe' (1978) 132 DR 673. The Secretary for Justice has suggested, inter alia that the proposed intermediate court system be given civil, as well as criminal, jurisdiction so that, for example, divorce actions would fall within its jurisdiction.
 - 2) Weatherley (1878) Kotzé 66 at 71; Carter 1953 (1) SA 202 (AD); Campher 1978 (3) SA 797 (O) at 802.
 - 3) Cf Finer Report § 4.350. 'Just as it is essential to localise the family jurisdiction, so, reciprocally, is it essential to have that local jurisdiction supervised by professional judges of the highest rank, to guard against error and promote uniformity in decision.'

there might well be a tendency to regard litigation in the family court as a matter to be handled by the junior and less experienced members of the profession. As Arthur puts it¹⁾

'The Family Court must be a division of the highest court of general jurisdiction. It cannot be an inferior court or it will attract inferior people and acquire an inferior image'.²⁾

The problems of marriage and divorce and, indeed, the problems of family law in general are too complex, vital and important to be relegated to a court of inferior status.³⁾

It is a truism that our Supreme Court judges are overburdened and that our magistrates are under increasing work pressure. But, rather than increase the criminal jurisdiction of magistrates, and rather than create so-called intermediate courts, and rather than give such intermediate courts a civil jurisdiction to include family law matters such as divorce, it may be better to give serious consideration to the establishment of family courts with an all-embracing jurisdiction over all family law matters. In this way, the Supreme Court judges would be relieved of handling divorce cases, applications for consent to marry, maintenance cases, juvenile delinquency cases and the like.⁴⁾ The result would be to reduce the present burden on our judges and magistrates and a family court of the highest status would be created to give some meaningful expression to the problems of family law that hit at the root of civilized society.

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- 1) 'A Family Court - Why Not?' (1966) 51 Minn LR 223, 230-231.
 - 2) See also Payne 597; Goldberg and Sheridan 'Family Courts - An Urgent Need' (1959) 8 J Public Law 537, 538-539.
 - 3) Cf Paulsen 'Juvenile Courts, Family Courts, and the Poor Man' (1966) 54 Calif LR 694-695. At 698 the writer states that 'It is a common belief among New York social workers that the Family Court does not possess annulment, separation or divorce jurisdiction because of notions related to class divisions. How would it be possible for the judges who preside over the delinquent, the neglected, and the husbands who refuse to pay small support orders, to handle intelligently the complex separation agreements of the well-to-do?'.
 - 4) See below at 268-269.

CHAPTER SIXRHODESIAN¹⁾ DIVORCE LAW REFORM

There are two main reasons for briefly considering recent developments in the Rhodesian law of divorce; firstly, Rhodesia, like South Africa, practices a Roman-Dutch common law system; and secondly, an inquiry into the divorce laws of Rhodesia was conducted at more or less the same time that the South African Law Commission was investigating the South African law of divorce. Comparisons are, accordingly, most useful.

1. Rhodesian Divorce Commission

In August 1976 the Rhodesian State President appointed a Commission to inquire into certain aspects of the Rhodesian law of marriage and divorce.²⁾ The Commission's terms of reference were -

'To inquire into the law in Rhodesia relating to -

- (a) the age at which persons can enter into marriage;
- (b) the grounds upon which a divorce may be granted;
- (c) the procedure for obtaining a divorce;
- (d) the property rights of the parties on divorce, especially the question of maintenance of the spouses and any dependent children;
- (e) the custody of and access to minor children of the marriage on the actual separation of the parties;

and, having regard to social conditions in Rhodesia and any changes in the relevant laws in the United Kingdom and the Republic of South Africa relating to the above-mentioned matters, to report whether

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- 1) For the purposes of this thesis the words 'Rhodesia' and 'Rhodesian' will be used in preference to the words 'Zimbabwe' or 'Zimbabwean'.
 - 2) Apart from the chairman there were 5 other members of the Commission from differing walks of life, two of whom were females: one of the females was a Black.

any changes in the present law of Rhodesia are necessary or desirable and, if so, to what extent.'

It is not the purpose of this thesis to traverse all the recommendations of the Rhodesian Divorce Commission save to mention those that are apposite to this thesis. Its first recommendation was for the establishment of specialist matrimonial courts in Rhodesia.¹⁾ The Divorce Commission motivated its recommendation for the establishment of such courts as follows:

- (a) the legal personnel involved in the adjudication of matrimonial matters should have, so far as possible, a special training and interest in this field;
- (b) the proposed matrimonial court should have its own pre-trial or reconciliation machinery in an effort to curtail the 'ill-advised or over-hasty divorce proceedings which are presently instituted and subsequently regretted';
- (c) a simplified and less formal trial procedure should be employed in the proposed matrimonial court. This would also have the effect of curtailing costs;
- (d) the establishment of such courts should result in a 'greater consistency of approach' to matrimonial proceedings. This would also enhance a greater degree of expertise in the field of matrimonial law.

The Rhodesian Divorce Commission's second recommendation²⁾ concerned the setting-up of the proposed matrimonial court in the two main Rhodesian centres of Bulawayo and Salisbury to 'deal with all disputes relating to marriage, divorce, maintenance, matrimonial property rights, custody of, and access to, children, and many other ancillary matrimonial proceedings'. The Divorce Commission left the door open for the inclusion within the jurisdiction of the proposed matrimonial court of all matters falling within the realm of family law such as adoptions.

1) Rhodesian Divorce Commission Report § 13.

2) § 14.

As to the composition of the proposed matrimonial court the Rhodesian Divorce Commission recommended that the presiding judge (or magistrate) should be required to sit with two assessors 'one of whom would be required to be a person qualified and experienced in social work.'¹⁾ It was recommended that the second assessor be drawn from a panel 'but selected for especial interest and experience.' Furthermore, both sexes would have to be represented on the bench of such matrimonial court.

With regard to procedure, the Rhodesian Divorce Commission recommended²⁾ that the proposed matrimonial court should be given the power to formulate its own rules governing the conduct of its proceedings. Approval was also voiced of the present High Court practice whereby all matrimonial cases were being dealt with as hearings in private. As to privacy, it was recommended³⁾ that the proposed court should have the power to curtail the press reporting of any proceedings before it. The Commission even went further in suggesting that in 'legal reporting' the parties should be protected in having their identities withheld. Attorneys should have the right of audience in the proposed court and proceedings should be by way of petition rather than by way of action.⁴⁾ The reason given for this recommendation was the apparent curtailment of costs.

As to the counselling and reconciliation efforts to be undertaken with regard to warring spouses the Rhodesian Divorce Commission made the following recommendations:⁵⁾

(a) that the proposed matrimonial court should have attached to it a registry of counsellors, some of whom would be legally qualified while others would be qualified in social work and guidance. The

1) § 16.

2) § 18.

3) § 19.

4) § 20. By way of contrast, South Africa has abolished petition proceedings: Petition Proceedings Replacement Act, 35 of 1975. This Act came into force on 1 July 1976.

5) § 21.

team of counsellors should be both full-time and part-time members of the proposed court registry. Also included in the team of counsellors should be workers from other fields such as clergymen and counsellors of marriage guidance societies;

(b) that matrimonial proceedings should not be allowed to be instituted until the parties have been counselled. Furthermore, attorneys should be 'restrained from writing to one spouse on the instructions of the other until counselling has taken place.' The duration and scope of the counselling should be in the proposed court's discretion; and

(c) that the counsellors of the registry forming part of the proposed matrimonial court should 'produce advisory literature on both the legal and social aspects of marriage and matrimonial proceedings' for the benefit not only of those contemplating matrimonial action but also for the benefit of those 'looking for advice and guidance in a troubled or unsuccessful marriage.'

Closely allied to the above is the recommendation¹⁾ that 'wherever one of the intending spouses is under the age of 21, both spouses should be required to be counselled before the court consents to the marriage.'²⁾

1) § 30 (a).

2) It is interesting to note that the Rhodesian Divorce Commission suggested /§ 30 (b)/ that the phrase 'intending spouses under the age of 21' should expressly include 'a girl over 19 whom we have recommended should be relieved of the requirement of having parental or judicial consent, and any intending spouse under the age of 21 who has been previously married and divorced or widowed and who would ... enjoy the legal status of a major.'

2. Brief Appraisal of Recommendations

One's immediate impression of the Report of the Rhodesian Divorce Commission is that the Commission had to contend with terms of reference that were very onerous and far-reaching in nature.¹⁾ The Commission, however, appears to have completed its task with commendable speed in the face of great difficulties.²⁾

The obvious danger of working under stressful circumstances is that the resultant report is likely to be characterized by an insufficient consideration of and research into a number of important matters. Thus, for example, the proposals regarding matrimonial courts and counselling only featured in but a few pages of the Report.³⁾ Apart from mentioning that family or matrimonial courts exist in the United States of America, Canada and Australia there is little evidence of a detailed research into their success or otherwise in those countries. The mere fact of their existence in other countries is not ipso facto evidence of their success. For example, although pre-marital counselling is provided for in the Los Angeles Conciliation Court it is generally not considered to be a success. Hawaii does not even have pre-marital counselling provisions and in Australia there is little evidence to suggest that pre-marital counselling is likely to be a success.⁴⁾ If there are any special reasons why it is considered that pre-marital counselling should be a success in Rhodesia, these have not been reflected in the Rhodesian Divorce Commission Report.

With regard to its recommendations regarding counselling the Rhodesian Divorce Commission does not appear to make clear the distinction

- 1) The Rhodesian Divorce Commission itself seems to have appreciated its difficulties in this regard: see its Report 1-6.
- 2) The Rhodesian Divorce Commission was appointed in August 1976 and it completed its Report in September 1977. Also, the Commission only had the benefit of assistance from a total of 97 memoranda: no oral evidence was heard: see the Report at (ii)-(iv).
- 3) Rhodesian Divorce Commission Report 7-16. By way of contrast see the voluminous Finer Report.
- 4) For pre-marital counselling in Los Angeles, Australia and Hawaii see above at 17-21; 51; 96-97; 102; 104; 110.

between conciliation counselling and reconciliation counselling.¹⁾ There also seems to be a misplaced emphasis on reconciliation counselling.²⁾ Also, the suggestion that the duration and scope of counselling should be in the discretion of the proposed matrimonial court appears to be a non sequitur in the light of the earlier recommendation that attorneys should be 'restrained from writing to one spouse on the instructions of the other until counselling has taken place.' How is the proposed court going to be able to bring its mind to bear on the question of the duration and scope of any counselling when attorneys are not going to be permitted even to write the customary first letter to the other spouse until such counselling has taken place? If the purpose of counselling at this stage is simply to advise and inform 'intending litigants as to all the consequences of divorce' then surely the same purpose could be achieved by means of advisory literature?

It is also to be regretted that the Rhodesian Divorce Commission did not give one the benefit of its views regarding the procedures to be adopted to give expression to its counselling recommendations. For example, the suggestion that no person should be permitted to institute proceedings until counselling has taken place³⁾ by itself seems draconian in the extreme. How is the counselling to be effected? Must both parties be present at the same time or would it be in order for them to be counselled separately? Would the proposed counselling authorities have the power to summon a reluctant party to attend counselling sessions? What if the other party is absent or cannot be found? Are the children of the parties, where they are mature enough, to be included in the proposed counselling programme? Can a person be denied

1) See above at 88-89.

2) Cf the English reconciliation-orientated counselling experience which is discussed above at 90-96.

3) Rhodesian Divorce Commission Report § 21 (b).

his or her right to obtain a divorce where the marriage is an empty shell simply because the other party is reluctant or unwilling, or even unable, to submit to counselling?

It is submitted that the Rhodesian Divorce Commission has, nevertheless, made a number of enlightened suggestions which, unfortunately, are detracted from by a lack of consideration of some of the more important points of detail. Notwithstanding this, the effect of the Rhodesian Divorce Commission Report shows that the matrimonial laws of that country are in a state of flux. But whether that country has the time, the inclination, the manpower or financial ability to give expression to its Commission's recommendations is open to grave doubt in view of its present political and constitutional difficulties.

CHAPTER SEVENTHE JUSTIFICATION FOR THE ESTABLISHMENT OFFAMILY COURTS IN SOUTH AFRICA1. The Children of Divorce

The effect of section 6 of the Divorce Act of 1979 is to give statutory effect to what every divorce court judge has always done; that is to attempt to ensure that the best interests of the children on divorce are adequately safeguarded.¹⁾ Of particular significance is section 6 (1) of the Divorce Act which states that -

'A decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances.'

Yet, notwithstanding this provision, the crucial question remains; namely, are the courts properly able to discharge their duty to the children of divorce by giving adequate expression to their best interests? It is true that section 6 (4) of the Divorce Act permits the court to appoint a legal practitioner to represent a child at divorce proceedings between the parents. But this provision is only couched in permissive terms and is not peremptory. Considering the number of children involved in divorces in South Africa each year one is constrained to wonder how a judge is able to give adequate expression to the best interests of such children, unless they are separately legally represented.²⁾ In other words, the problem at issue is not whether the judges are giving any expression to the best interests of children on divorce but whether they are able adequately to do so under the present divorce procedure.³⁾

1) Cf Fletcher 1948 (1) SA 130 (AD); Bailey 1979 (3) SA 128 (AD), and the authorities cited by Hahlo at 459 n 19. See also Spiro 259-261.

2) See below at 249-251.

3) See Olmesdahl 'The Rights of Children on Divorce' 1980 DR 481, and see below at 301-302.

This problem must be seen against the background of the following statistics:-¹⁾

<u>WHITES</u>			
<u>Year</u>	<u>Number of Marriages</u>	<u>Number of Divorces</u>	<u>Number of Children</u>
1968	37162	6241	8818
1969	39179	7262	10092
1970	41427	7748	11098
1971	42121	8240	11710
1972	41294	8432	11940
1973	40602	8890	10031
1974	41066	9907	11145
1975	41333	10730	12386
1976	40483	10850	13815
1977	38537	9864	13019
Totals	403204	88164	114054

<u>COLOUREDS</u>			
<u>Year</u>	<u>Number of Marriages</u>	<u>Number of Divorces</u>	<u>Number of Children</u>
1968	12488	741	1389
1969	12819	748	1345
1970	13832	753	1497
1971	14190	886	1748
1972	15385	900	1833
1973	16626	1212	2151
1974	16054	1307	2237
1975	16694	1260	2204
1976	18010	1187	2333
1977	18611	1165	2435
Totals	154709	10159	19172

- 1) These statistics have been gleaned from the 1977 Marriage and Divorce Report. For the purposes of this thesis the reference to statistics has been confined to the last 10 years for which records have been kept. There is no reason to believe that the divorce rate will drop in view of the promulgation of the Divorce Act in June 1979: if anything, the indications are that the divorce rate will increase: Sunday Times 3 February 1980.

<u>Year</u>	<u>ASIANS</u>		
	<u>Number of Marriages</u>	<u>Number of Divorces</u>	<u>Number of Children</u>
1968	4823	88	
1969	5299	160	
1970	5490	143	No statistics for
1971	6077	163	the period 1968-
1972	7166	187	1976 appear to
1973	7250	135	have been kept.
1974	7495	226	
1975	7938	265	
1976	7695	292	
1977	7831	364	547
Totals	67064	2023	547

Regrettably, the writer can find no statistics of a similar sort for the Blacks. This is, presumably, because Black marriages are governed either by the Customary Law or the Common Law of South Africa, or both. From the writer's personal experience, however, it can be stated that the numbers of Black divorces granted by the Supreme Court are very few and far between because of the higher costs of Supreme Court litigation as opposed to the more expeditious and less expensive litigation in the special Black divorce courts.¹⁾

If there is any substance in the contention of Hahlo and Sinclair²⁾ that 'If the experience in other countries is any guide, it will not often happen that separate legal representation of a minor child will be ordered' then, it is submitted, our courts, notwithstanding the provisions of section 6 (1) of the Divorce Act, will in reality just not be able to give adequate expression to the best interests of the children on divorce. Our divorce statistics make this impossible and the complaint of van den

1) S 10 Black Administration Act, 38 of 1927 and see Hahlo 39 and the authorities cited at n 58. Also see below at 215.

2) At 42.

Heever J in Walkinshaw¹⁾ that in an undefended divorce action the court is normally obliged to decide questions of custody on the one-sided version of the plaintiff without the advantage of a probation officer's impartial report is still valid today.

1) 1971 (1) SA 148 (NC) at 149H. Cf Trengove JA in Golden Jubilee Report (1974) at 102 [see also (1975) 90 DR 259, 264] where the learned Judge of Appeal states that 'Wanneer die huwelik ontbind word, en die kinders nie langer onder die sorg, toesig en beheer van albei ouers kan bly nie, moet die hof, as opperste voog, besluit wie die toesig en beheer van die kinders sal kry. Dit is 'n lewensbelangrike funksie. Dit affekteer jaarliks die lewens van die duisende kinders wat deur die egskeidings van hul ouers getref word ... Maar ingevolge ons huidige stelsel, veral soos dit in die Transvaal geld, kan die hof ... hierdie belangrike plig nie behoorlik uitvoer nie.' The learned Judge of Appeal gives the following as his reasons for the above statement:

(i) the high number of unopposed divorces;

(ii) the fact that in the great majority of cases the parties enter into a consent paper concerning the custody of any children and that the court only has the benefit of the one-sided evidence of the plaintiff;

(iii) the fact that because of the high number of divorces a judge is not able [in the Transvaal, at any rate] to devote more than 3-5 minutes to each case in order to ascertain what is exactly in the best interests of any children concerned in the divorce.

This is by no means a situation that is unique to South Africa. For the position in England see Elston, Fuller and Murch 'Judicial Hearings of Undefended Divorce Petitions' (1975) 38 MLR 609, 626. See also Eekelaar 143 who points out that the position in Canada is no different to that prevailing in England.

2. The Judge in Divorce Proceedings

An analysis of the statistics referred to above reveals a number of alarming features. Thus, if one were to confine oneself to the total number of White, Coloured and Asiatic divorces for the year 1977, it will be seen that these amounted to a total of 11393 divorces. Taking into account the fact that as at the end of 1977 there was a total of 90¹⁾ judges of the Supreme Court this would mean that each of them would have granted approximately 126 final orders of divorce. More specifically, in the Transvaal each of the 35 judges of the Transvaal Provincial Division would, on average, have granted 160 final orders of divorce.²⁾

Lest the uninitiated get the impression that our judges of the Supreme Court are only concerned with divorce cases, one must hasten to add that the same 90 judges, in the same period, dealt with 40795 civil cases and 3700 criminal trials: they also heard 2440 appeals from the Magistrates' Courts, 63 appeals from the Commissioners' Courts, and 482 appeals from the Regional Courts. In addition, they reviewed 70264 judgments from the Magistrates' Courts and 5183 judgments from the Commissioners' Courts. The judges were also faced with 13958

- 1) According to the 1977 (4) SA Law Reports: this figure includes the acting judges, but excludes the Judges of Appeal and South African judges on secondment to the Supreme Courts of Transkei and Bophuthatswana.
- 2) Cf Mr Justice JJ Trengove 'n Kritiese Beskouing van ons Egskeidingsreg met Verwysing na die Skuldbegrip' - Paper Delivered at the South African Law Conference, Cape Town, April 1972, where the learned Judge of Appeal remarks: 'Ek wonder dikwels watter indruk toeskouers wat die verrigtinge in die hof vir onbestrede egskeidings op 'n Woensdag in Johannesburg of Pretoria bywoon - waar die regter tussen vyftig en negentig egskeidingsake op 'n dag afhandel - van die hof se houding ten opsigte van huwelike en egskeidings kry.' See also Petersen 'Divorce Law Reform' (1971) 88 SALJ 478, 479, where it is stated that on the 25th March 1971 a total of 192 couples had their marriages dissolved in the Witwatersrand Local Division.

applications and 69124 motion court applications.¹⁾

In view of the pressure of work that a modern-day judge is faced with it is not altogether surprising that the present Chief Justice should remark that he was 'jammer om te moet konstateer dat die "tranquility" waarna verwys word, vandag weens die hoeveelheid werk verdwyn het.'²⁾ In addition, there has been a remarkable admission by

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- 1) These figures have been gleaned from the 1977 Report of the Department of Justice 58-59. For the most recent figures available see the 1978 Report of the Department of Justice 92. The comparative table of figures for the 2 periods are as follows:

	<u>1977</u>	<u>1978</u>
Civil cases disposed of	40795	48916
Criminal cases disposed of	3700	2840
Appeals from magistrates' courts	2440	1823
Appeals from commissioners' courts	63	26
Appeals from regional courts	482	548
Reviews of judgements of magistrates	70264	31699
Reviews of judgements of commissioners	5183	3690
Applications received	13958	13920
In Forma Pauperis applications	942	4974
Bill of costs taxed	16607	18389
Motion court applications	69124	71025

- 2) Per Rumpff CJ on the occasion of the centenary celebrations of the Transvaal Supreme Court in Pretoria on 21 May 1977. The learned Chief Justice had just commented on the fact that judges of yesteryear were able to engage in very valuable research into our legal heritage, mainly because of the tranquil and unpressurized atmosphere that then prevailed: see (1977) 115 DR 392, 394. Even the Appellate Division has not escaped the increasing pressure of work: see the Hon Mr Justice PJ Wessels 'Die Rol van die Howe as Regsprekende Gesag' (1978) 131 DR 597, 600-601.

a judge¹⁾ that he was unable to prepare a proper judgment in a civil case because of pressure of work. Yet another judge²⁾ complained that he was forced to retire prematurely because his health was deteriorating as a result of the pressure of work he was being subjected to.

In the light of the above, it is difficult to agree with the Law Commission's suggestion that 'a judge should be able to tell at a glance

- 1) Sunday Times 19 June 1977. Cf the comments of Irving Steyn J in S v Kavin 1978 (2) SA 731 (W) at 732; viz, 'Before commencing judgment I should like to express my appreciation to my learned assessors for having been so willing to work, and to work very hard, since the adjournment yesterday in order to enable us to deliver this judgment today. Probably the main motivating reason for delivering judgment today is the fact that, if we did not deliver it today, this court could not be reconstituted for at least the following three weeks... In the circumstances we have done the best we could ...' See also Novick and Another v Comair Holdings Ltd and Others (1979) (2) SA 116 (W). The opening words of Colman J's judgment were as follows: 'The litigation with which I am concerned began as an urgent application ... It took up 13 days in November ... I heard evidence on 20 days in February, 17 days in March and 8 days in April. That was followed by 16 or 17 days of argument. Although there were only 15 or 16 witnesses, nearly all of them were examined and cross-examined at great length: and about 250 exhibits were put in ... I think ... that I am right in saying that (apart from questions of credibility) over 40 distinct issues were raised for determination. The evidence which bears on most of those issues is widely scattered over the record and the exhibits. That being the magnitude and complexity of the material laid before me, I have been faced with unusual difficulties in deciding how to formulate this judgment.'
- 2) Sunday Times 26 June 1977. See also Coetzer 'Intermedière Howe' (1978) 132 DR 673 and the 1978 Annual Report of the Department of Justice 5-7.

in which cases it would be unnecessary to take steps with a view to reconciliation.¹⁾ This would be to accord to our judges superhuman qualities which no mortal possesses.

Certainly, the above statistics bear stark testimony to the fact of the large number of minor children involved in the divorces granted. In respect of each of these children important issues are involved. Essentially, these concern questions of far-reaching significance such as custody, access and maintenance. In this regard, the following observation of Attorney van der Post²⁾ is most pertinent:

'Persoonlik dink ek dit sou onbillik wees om te verwag dat 'n regter wat voorsit in 'n Mosiehof in die geval van onverdedigde egskeidingsake, so 'n volledige ondersoek ten opsigte van minderjarige kinders moet instel, want daar is glad te veel ander sake en werk wat met so 'n geleentheid ook sy aandag verg. Sal dit nie veel beter wees en sal dit nie tot groter voordeel van ontwrigte minderjarige kinders en die gemeenskap as 'n geheel strek, indien 'n spesiale egskeidingshof wat 'n afdeling van ons huidige Hooggeregshof kan wees, ingestel word nie?'

It is indeed a tribute to the judges of the Supreme Court that they, somehow, manage to discharge an Herculean task. However, to discharge a task is one thing: to do so properly is another!³⁾

- 1) Divorce Report (1978) § 13.3. Cf Barnard (Divorce) 87.
- 2) Golden Jubilee Report at 131. van der Post is described as the President of the Law Society of the Free State.
- 3) Cf the following comment of Pentragon in the Law Society's Gazette - cited in (1977) 115 DR 381; viz 'The burden we put on our judges is a heavy one, heavier than most of us realize ... ~~W~~hat they tell us ... is that they can discharge it properly with the help ... of that small band of professional advocates who present the evidence and the arguments, and whom they can trust to select what is essential, bring it before them in an orderly fashion, and above all exercise integrity in not coaching witnesses, not suppressing documents, not putting forward known false points and drawing the court's attention to all the relevant law, even if it is against them. Judges are not omniscient. They need clear argument and, frequently, guidance to lead them to a decision.'

Quite apart from the onerous burden we place on our judges, it must be pointed out that our judges are impartial arbiters who remain detached from the arena of conflict. Accordingly, a judge cannot take an active part in the counselling of any parties to a divorce action no matter how desirable he feels this to be. He can only order the parties to consider the possibility of reconciliation, either through marriage counselling, or treatment, or by further reflection.¹⁾ But this procedure is hardly ever resorted to. In any event, our judges are generally unskilled and untrained in the behavioural sciences to engage actively in any counselling.²⁾ Furthermore, the divorce process is nothing more than a ritual over which the judge presides. It is true that the divorce judge has to be satisfied that a marriage has irretrievably broken down before granting a final order of divorce³⁾ and that the interests of any dependent and minor children have been safeguarded.⁴⁾ However, taking into account the high divorce rate and the number of children involved, it is seriously doubted whether our judges are properly able to direct their attention to these matters in each and every divorce case.

It is, of course, fair to point out that although the divorce process is, from a judge's point of view, nothing more than a ritual, the role of the judge must be seen in its proper perspective. In most divorce cases, the appearance of the plaintiff in court is preceded by costly and time-consuming negotiations between the parties and their legal representatives.⁵⁾ More often than not, this results in a consent paper which the court is ultimately called upon to embody in the final order of divorce.

1) S 4 (3) Divorce Act.

2) Cf Payne 81-82.

3) S 4 (1) Divorce Act.

4) S 6 (1) Divorce Act.

5) See above at 114-115.

3. The Legal Representative in Divorce Proceedings

As the Magistrate's Court has no jurisdiction over divorce¹⁾ the litigant in a divorce action must perforce engage both an attorney and an advocate to present the case to the Supreme Court. Apart from the costs²⁾ involved in having to engage two legal representatives, the attorney and the advocate labour under a number of difficulties insofar as divorce litigation is concerned.

In the first place, neither the attorney nor the advocate are experienced or skilled in the behavioural sciences. This clearly imposes on the legal practitioner in divorce proceedings a serious limitation with regard to the evaluation of any prospect of reconciliation.³⁾

- 1) S 46 (1) Magistrate's Court Act, 32 of 1944: see also s 19 (1) Supreme Court Act, 59 of 1959.
- 2) The average cost of an undefended divorce action without any complications varies between R350 and R450. If defended, the cost will be considerably higher and may even run into thousands of Rands, depending on the complexity of the case. According to Christie in 1973 RLJ 89, 91, 'divorce has never been a profitable part of the work of the legal profession'. However, it is hard to escape a contrary conclusion. Thus, the total of 11393 White, Coloured and Asian divorces in 1977 would have cost a total of R4557200 (ie on the assumption that each divorce cost R400). On average, the attorney's fees (ie less disbursements and counsel's fees) in each case would amount to approximately three quarters of the costs; viz R300. Accordingly, in attorney's fees alone the 11393 White, Coloured and Asian divorces in 1977 would have brought in a total of R3417900. On the basis that in 1977 there were approximately 3000 practising attorneys in South Africa, each attorney would have earned approximately R1139 per annum for divorce work alone. This figure is, however, illusory because most of the divorce work is handled in the bigger centres such as Johannesburg, Pretoria, Cape Town and Durban. It may be mentioned that if an attorney receives instructions from a correspondent to attend to a divorce action the costs will be higher still. It has been estimated, for example, that the costs of an undefended divorce action which originates from Pietersburg but which is heard in the Supreme Court in Pretoria would amount to approximately R425: 1978 Report of the Department of Justice 5. It is interesting to note that the cost of a divorce in England when neither of the parties is obliged to attend the court hearing amounts to between £100 and £200: Eekelaar 143.
- 3) Alexander 'The Lawyer in the Family Court' (1959) 5 NPPA Journ 172, 175; Manchester and Whetton 'Marital Conciliation in England and Wales' (1974) 23 ICLQ 339, 352; Callner 'Boundaries of the Divorce Lawyer's Role' (1977) 10 Fam LQ 389, 392.

Apart from his lack of expertise and experience in the behavioural sciences the attorney in particular is inhibited from giving more than just a cursory consideration to the question of marriage counselling for a number of other reasons. For example, according to the ethics of his profession, the attorney must avoid a conflict of interests¹⁾ and this he will not be able to do if he feels obliged to counsel both parties to a divorce action. At best, the attorney can refer his client to outside counselling agencies and marriage guidance clinics for assistance. But this is not what his client has paid him for and the average attorney, rightly, is conscious of the fact that clients only consult him to organise a burial for a dead marriage, and not to attempt to resurrect it.²⁾ Furthermore, the attorney is paid to be partisan: traditionally, his duty is to represent his client to the best of his ability. From the client's point of view this partisanship is most essential and if he is not partisan enough the attorney runs the risk of losing a client.³⁾

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- 1) Cf § 13 of the International Code of Ethics cited by Randell and Bax 280-281; Payne 82.
 - 2) Manchester and Wnetton 'Marital Conciliation in England and Wales' (1974) 23 ICLQ 339, 351 ('If we examine ... the client's view of the lawyer, he tends to be seen as a legal expert paid to exercise his specific skills, not to be burdened with social or personal problems or doubts as to whether legal proceedings are really wanted.')
 - 3) Murch 'The Role of Solicitors in Divorce Proceedings' (1977) 40 MLR 626, 635 - the second part of this article is published in (1978) 41 MLR 25. Murch, however, points out (at 637 and 33) that an over robust stance of partisanship on the part of a solicitor can be a self-defeating exercise. Most divorce cases result in a consent paper in one form or another. In the survey conducted by Murch it was found that a number of solicitors had presumed that their clients were in conflict simply because they were divorcing each other: this had made the settlement of a consent paper much more difficult and costly.

In the second place, the legal representative of a litigant in a divorce action is bred in the tradition of an adversary atmosphere. This pre-supposes that there is a dispute on two sides.¹⁾ This, however, is not always the case, though once the adversary procedure has been invoked the prospect of bitterness, distress or humiliation being experienced between the parties becomes real. Furthermore, guilt-orientated principles in our divorce laws do not seem to have been entirely eliminated. Thus, for the purposes of sections 7 (2),²⁾ 9 (1)³⁾ and 10⁴⁾ of the Divorce Act the conduct of the parties is still one of a number of important factors which must be taken into account by the court. The effect of this is that the law tends to present only one face of divorce.⁵⁾ In view of the fact that the great majority of divorce cases are undefended it is to be expected that the divorce courts will continue to be presented with one-sided versions of the events surrounding the divorce. The great divorce battles of the future will not be concerned with the fact of divorce itself but will be, as in the past, mainly concerned with financial matters such as maintenance, patrimonial benefits and costs. The main problem is that the court will not always be in a position to ascertain the defendant's version of events unless the defendant decides to enter a costly appearance to defend.

In the third place, the fact that the great majority of divorce cases are undefended conjures up the real possibility of undue pressure being brought to bear on the defendant to agree to any number of harsh and unconscionable terms in a consent paper. It is a matter of considerable concern that a party to a divorce action can be so easily, and sometimes unscrupulously, pressured into signing away maintenance rights, proprietary rights, and rights of access to children.⁶⁾ Alternatively, the same pressure can be used to persuade a defendant to agree to

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- 1) Elston, Fuller and Murch 'Judicial Hearings of Undefended Divorce Petitions' (1975) 38 MLR 609, 634; and see 174 n 3 above.
 - 2) S 7 (2) deals with the maintenance payable by one party to the other.
 - 3) S 9 (1) deals with the forfeiture of the patrimonial benefits of a marriage.
 - 4) S 10 deals with the costs of the divorce action.
 - 5) Cf Manchester and Whetton 'Marital Conciliation in England and Wales' (1974) 23 ICLQ 339, 373-374.
 - 6) See, for example, Shepstone 1974 (1) SA 411 (D); 1974 (2) SA 462 (N).

maintenance claims¹⁾ and claims to patrimonial benefits²⁾ which in normal circumstances would not be justified.

Finally, the attorney in particular is not in the ideal position to ascertain the best interests of the children of divorce.³⁾ Although section 6 (4) of the Divorce Act is a step in the right direction in that it gives the court a discretionary power to appoint a legal practitioner to represent a child at divorce proceedings it is submitted that it does not go far enough.⁴⁾ The difficulty that an attorney finds himself in on this point is neatly highlighted by Murch⁵⁾ as follows:

'The fact that solicitors seldom see the children of their divorcing clients, coupled with their partisan role means that when drawing up the documentary evidence concerning the children for the court ..., solicitors are restricted to adopting their clients' view of the children. Solicitors who take a separate individual perspective of their own, in the context of the present adversarial procedure, risk their client asking the question "Which side is he on?"'

The position of the advocate vis-a-vis the children of divorce is even harder to justify. He only sees the interests of the children through the eyes of his client and instructing attorney. In practice,

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- 1) Cf Beneke 1967 (1) SA 855 (T) which is commented on by Hahlo 'To Divorce or not to Divorce' (1965) 82 SALJ 285. The defendant spouse agreeing to pay token maintenance in circumstances where this is not justified also appears to be a fairly common experience: Schäfer 'Token Maintenance' (1980) 43 THR-HR 57.
 - 2) Cf § 3.1 Divorce Report (1978) where it is stated that 'There is evidence that the proviso to s 3 of the Matrimonial Affairs Act is used to compel a husband in the case of divorce to agree to a settlement that is advantageous to the wife.'
 - 3) See above at 164-167 on the children of divorce.
 - 4) Further on the question of separate legal representation for children see below at 248-251.
 - 5) 'The Role of Solicitors in Divorce Proceedings' (1978) 41 MLR 25, 28.

he will never meet the children and only on very rare occasions might he consult the more mature children about their wishes on matters such as custody and access. For that matter, he usually only meets his client for the first time on the morning that the case is to be heard in court.¹⁾

To sum up, one can do no better than to cite the following words of Attorney van der Post²⁾; namely,

'Die advokate en prokureurs doen hulle bes om to verseker dat die belange van die kinders behoorlik in ag geneem word met die aangaan van skikkingsaktes, maar daar moet onthou word dat in 'n oorweldigende meerderheid van die sogenaamde onverdedigde egskeidingsake, sien die advokaat en die prokureur van die een gade nooit die teenparty nie en hoor hulle slegs die verhaal van hulle eie klient. Dit is ook 'n onomstootlike feit dat in hierdie soort van sake 'n klient voor sy eie advokaat en prokureur hom gewoonlik baie goed voordoën en sy eie saak so goed as moontlik voorstel. Heeldikwels gebeur dit dat die klient sy eie advokaat en prokureur nie in sy volle vertrouë neem en al die omstandighede, insluitende sy finansiële vermoë, aan hulle openbaar nie.'

1) Eekelaar 142-143: Elston, Fuller and Murch 'Judicial Hearings of undefended Divorces' (1975) 38 MLR 609, 614.

2) Golden Jubilee Report 130, 131.

4. Conclusion

The inescapable conclusion from the above brief review is that our consumers of justice are getting a raw deal in the field of divorce law. The present procedure for obtaining a divorce is hardly designed to engender an healthy respect for our judicial institutions. It is true that much-needed reforms have been effected by the Divorce Act.¹⁾ But, it is submitted that, in addition, a complete overhaul of the procedure for obtaining a divorce,²⁾ less emphasis on the adversary procedure and a serious re-appraisal of the role of the advocate (and to a lesser extent, the attorney) in the divorce process are required. Above all, serious consideration will have to be given to the establishment of family courts in South Africa. In this regard, the Finer Report³⁾ makes the following pertinent observation:

'There is no branch of legal administration for which the respect of the community is more important than the administration of family law, and in the ultimate resort, the case for a family court is that it is the institution through which respect for the law can be fully achieved.'

But, before serious consideration can be given to the establishment of family courts in South Africa further research will have to be undertaken. Even the Law Commission itself has recognized⁴⁾ that

'The law must keep pace with developments in all spheres of life. We live in a time where development in many fields are taking place rapidly. Changing circumstances require

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- 1) Eg the elimination of our erstwhile fault-orientated grounds for divorce.
 - 2) Cf Alexander 'Legal Sciences and the Social Sciences: The Family Court' (1956) 21 Miss LR 105, 108 / 'Reform of the divorce laws will do no good unless we can establish new procedures in courts which are especially designed and equipped for that purpose.'⁷⁾ see also Hahlo 'Fighting the Dragon Divorce' (1963) 80 SALJ 27, 30: Payne 5.
 - 3) § 4.424.
 - 4) 1975 Annual Report of the South African Law Commission RP 45/1975, 10.

continuous adaptations in our law and often rules of law which applied for many years must be reconsidered.¹⁾

But whether the Law Commission is able to keep pace with developments in all spheres of life, particularly with regard to family courts, is open to serious doubt. The Law Commission only operates on a part-time basis and it is expected to give its attention to many comprehensive and wide-ranging programmes and projects. One can only marvel at the Law Commission's industry in completing the work it has.²⁾ Accordingly, it is submitted that the Law Commission's conclusion³⁾ that the 'existing divorce courts can efficiently adjudicate upon divorce proceedings, and ... that there is no ... need to establish special family courts for this purpose' cannot be regarded as the final word on the matter.⁴⁾

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- 1) The Law Commission then went on (ibid) to plead for the appointment of full-time members of the commission. The same plea has been repeated in the 1978 Annual Report of the South African Law Commission RP 65/1979.
 - 2) Since its establishment in 1973 the Law Commission has completed 20 projects: 1978 Annual Report of the South African Law Commission RP 65/1979. This is a remarkable achievement in view of the fact that the Law Commission only meets irregularly. In 1978 the Commission met on 3 occasions while in 1977 it met on 4 occasions. In 1976 it only met twice and in 1975 it met 4 times. The danger of approaching law reform in this piecemeal manner will be to develop our law of marriage as it has always been developed; ie by means of a 'patchwork quilt of changes, brought about partly by legislation and partly by the subtler hardly alluvial process of judicial law-making.' - per Hahlo '100 Years of Marriage Law in South Africa' 1959 AJ 48. This method of law reform is not likely to result in the establishment of family courts in South Africa.
 - 3) Divorce Report (1978) § 18.7.
 - 4) Cf the Law Commission's acknowledgement Divorce Report (1978) § 13.17 that 'with various organisations ... as well as with the public at large, there is a strong feeling in favour of family courts.' This acknowledgement may well have been the reason for including within the terms of reference of the Hoexter Commission of Inquiry the direction to consider the question of family courts at the proposed intermediate court level: see above at 155.

CHAPTER EIGHTTHE FRAGMENTATION OF JURISDICTION IN FAMILY LAW MATTERS1. Introduction

The problem of fragmented jurisdiction is not unique to South Africa as the experience in Los Angeles, Hawaii, Australia and other countries shows. The problem of fragmented jurisdiction is traditionally seen as the main justification for the establishment of family courts.¹⁾ This is because a fragmentation of jurisdiction in family law matters can result in competing and overlapping jurisdictions as well as a 'potential conflict of philosophy and approach in the respective courts which engenders forum shopping.'²⁾

It will be recalled³⁾ that the South African Law Commission came to the conclusion that the fragmentation of jurisdiction regarding family law matters was not a serious problem and that the services rendered by the Maintenance Court, the Children's Court and the Juvenile Court were 'apparently being rendered satisfactorily at present.'⁴⁾ It is respectfully submitted that this conclusion is not supported by the reality of the situation as it presently exists. If further justification for the establishment of family courts in South Africa is needed, it is to be found in the fact that there is a multiplicity of jurisdictions in family law matters, such as maintenance, consents to marry and in the law relating to minors generally.

1) See above at 76.

2) Payne 41.

3) See above at 150.

4) Divorce Report (1978) § 13.8.

2. Maintenance Jurisdiction

Jurisdiction in respect of matters relating to maintenance is vested in four different courts as well as in the Minister of Social Welfare and Pensions.

(A) The Supreme Court

Maintenance jurisdiction is vested in the Supreme Court by Section 7 of the Divorce Act which reads as follows:

'(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct insofar as it may be relevant to the break-down of the marriage, and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.'¹⁾

The Supreme Court's jurisdiction is not only limited to granting maintenance orders on divorce, but it may also grant maintenance orders pendente lite.²⁾ Nor is the Supreme Court's maintenance jurisdiction

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- 1) S 7 Divorce Act replaces s 10 Matrimonial Affairs Act. For the legal position prior to the passing of the old s 10 in 1953 see Hahlo 442.
 - 2) Rule 43(1)(a) Consolidated Rules of the Supreme Court. Further on maintenance pendente lite see Hahlo 524-525; Zaphiriou 1967 (1) SA 342 (W) at 345 F-G; Colman 1967 (1) SA 291 (C); Varkel 1967 (4) SA 129 (C) at 131 G; Gunston 1976 (3) SA 179 (W) 181 F-H; Smit 1978 (2) SA 720 (W); Barass 1979 (1) SA 245 (R); van der Walt 1979 (4) SA 891 (T) at 892; Nienaber 1980 (2) SA 803 (O).

limited to 'the payment of maintenance by the one party to the other'. The Supreme Court may also grant a maintenance order in respect of a 'dependent child of the marriage'.¹⁾ Furthermore, the Supreme Court's jurisdiction in this regard is not only limited to the dependent children of a marriage but it also extends to questions of whether persons related to each other in any way other than as parent and child are under a duty to support each other; for example, whether a grandchild is under a legal duty to support a grandparent where there are other closer relatives in a position to provide the requisite maintenance.²⁾

Over the years, however, the Supreme Court's maintenance jurisdiction has been 'watered down' so that, for practical purposes, it is generally only concerned with the granting of maintenance orders on divorce.³⁾ Its maintenance jurisdiction has been largely taken over by the Maintenance Court in respect of which a cheaper and less formal procedure is provided for by the Maintenance Act.⁴⁾ Whilst the Supreme Court retains its overall power to grant a variation or rescission of a maintenance order it has been pointed out on more than one occasion that the Supreme Court is generally reluctant to become involved in such applications when the matter can just as easily be handled by a Maintenance Court where it is likely to be dealt with more expeditiously and, certainly, on a cheaper scale.⁵⁾ Thus, for example, in Sher⁶⁾ Melamet J said:

1) S 6 (3) Divorce Act.

2) Barnes v Union and South West Africa Insurance Co Ltd 1977 (3) SA 502 (E), and see generally Boberg 249-278.

3) Boberg 293; Olivier 233-234.

4) Act 23 of 1963.

5) The Maintenance Court is given the power by s 5 (4), as read with the definition of a 'maintenance order' in s 1, of the Maintenance Act to vary or discharge any maintenance order, even that of a Supreme Court.

6) 1978 (4) SA 728 (W) at 729 G-H.

'Although all these authorities indicate that the proper forum for disputes of this nature is the maintenance court, none suggest ... that this Court has lost or abrogated its jurisdiction in this regard. It is competent to bring an application for variation or suspension of a maintenance order in this Court but it is a procedure which is actively discouraged by virtue of the fact that the procedure in the former court is cheaper and more expeditious. Applications are discouraged normally by refusing to allow a successful applicant his costs. In the absence of what has been described as good and sufficient circumstances or reasons or special reason a Supreme Court will not allow a successful applicant his or her costs.'¹⁾

There are at least two undesirable features arising out of the legal position just described. In the first place, it is seriously doubted whether consistent expression is given to the sentiment that so far as possible applications for the variation of, discharge of or enforcement of maintenance orders should be handled by the Maintenance Court. A clear example of this anomaly is to be found in the case of Watson²⁾ which concerned an application for the variation of a maintenance order. No indication was given as to why the proceedings were launched by way of notice of motion in the Supreme Court rather than in the Maintenance Court except, perhaps, because the defendant was clearly a man of substantial means. Such overlapping and competing jurisdiction between the Supreme Court and the Maintenance Court is, it is submitted, unjustified and unwarranted. There can be no legal justification for affording litigants the right to choose which court they should approach in maintenance matters. An unfortunate effect of such overlapping jurisdiction is the regrettable suspicion that the Supreme Court is more readily available to wealthy litigants than to poorer ones. In any event, as has already been

1) See also Troskie 1968 (3) SA 369 (W) at 371; Tate v Jurado 1976 (4) SA 238 (W).

2) 1979 (2) SA 854 (AD). See the comment on Watson's case by Schäfer 'An Upward Variation of a Maintenance Order - An Expensive Luxury versus the Best Interests of a Child?' (1979) 96 SALJ 540.

pointed out,¹⁾ the judges of the Supreme Court are overburdened enough without becoming embroiled in maintenance applications which could be more properly dealt with by the Maintenance Court which was established for the purpose of providing a cheaper, less formal and speedier form of relief.

In the second place, with regard to maintenance matters, there would appear to be no consistency in the powers accorded to the judges, magistrates and officers presiding over Maintenance Courts. Thus, for example, despite the fact that the Maintenance Court has the power to vary, suspend, discharge and enforce a maintenance order of the Supreme Court, a magistrate presiding over a criminal prosecution for a contravention of section 11 (1) of the Maintenance Act is precluded from writing the arrears off.²⁾ Similarly, such magistrate presiding over a criminal court is not permitted to amend a maintenance order,³⁾ no matter how desirable this may be. In the latter event, however, a magistrate has the discretionary power to convert the criminal proceedings into an enquiry by a Maintenance Court.⁴⁾ Where such conversion has been effected the magistrate no longer functions as a magistrate presiding over a criminal court but as a judicial officer presiding over a Maintenance Court. Thereafter, the Maintenance Court may amend the maintenance order. It would seem, however, that such power of conversion is only accorded to a magistrate and public prosecutor in terms of section 13 of the Maintenance Act and not to a

1) See above at 168-172.

2) S v Dickenson 1971 (3) SA 932 (E). Beadle CJ explains the reason for this in S v Clark 1971 (2) SA 352 (R AD) at 355 c: 'The obligation to pay arrear maintenance is a continuing obligation and as soon as the accused has the money in his possession with which to pay the arrear maintenance he is under a duty to use that money to pay such arrears'.

3) S v Jacobs 1973 (4) SA 302 (O); S v Sebola 1974 (1) PH H (S) 92 (NC); S v Olivier 1976 (3) SA 186 (O) at 190, 191 G-H.

4) S 13 Maintenance Act. Cf S v Cloete 1977 (4) SA 90 (K). The public prosecutor also has the right to request such conversion. In practice, it is open to an accused to try to persuade the magistrate to effect such conversion if he (the accused) wishes to argue that the amount he has been ordered to pay by way of maintenance no longer takes account of the alleged changed circumstances: S v Miller 1976 (1) SA 12 (C) at 14; S v Olivier 1976 (3) 186 (O) at 190 D.

Supreme Court judge to whom application has been made for the payment of arrear maintenance. For example, in Sher¹⁾ it was argued²⁾ that by launching proceedings in the Supreme Court, the Applicant was denying the Respondent 'the opportunity of converting the proceedings into an enquiry in regard to the whole maintenance order.' Although there would appear to be some substance in this argument it was rejected on the facts by Melamet J because, inter alia, the Applicant had already on two previous occasions 'gone before the maintenance court.' On the last occasion the criminal proceedings were converted into an enquiry which was subsequently abandoned.³⁾ If, as Sher's case seems to indicate, the Supreme Court does not have the power to convert an application for the payment of arrear maintenance into an enquiry, then the possibility does exist of an applicant choosing to bring the application in the Supreme Court so as to frustrate the possibility of having an enquiry.

Mention has already been made of the fact that the Maintenance Court is accorded the power to vary or discharge any maintenance order, even that of a Supreme Court.⁴⁾ What used to be anomalous about this, however, was the fact that, for example, the Cape Provincial Division of the Supreme Court had no jurisdiction to vary or alter a maintenance order of, say, the Transvaal Provincial Division.⁵⁾ Only the Transvaal Provincial Division had the power to vary its original order.

1) 1978 (4) SA 728 (W).

2) At 729 A.

3) It may be mentioned that the ordinary execution of a Supreme Court maintenance order is competent but rarely resorted to: Hahlo 447 n 126. Cf Jeanes v Jeanes and Another 1977 (2) SA 703 (W); Du Preez 1977 (2) SA 400 (C). But proceedings for contempt of court are not appropriate: Du Flessis 1972 (4) SA 216 (O).

4) See above at 182.

5) Joss v Board of Executors 1978 (1) SA 1106 (C) and on appeal to the Full Bench see 1979 (1) SA 780 (C). But now see s 8(2) Divorce Act which gives any court the power to rescind, vary or suspend a maintenance order. The only requirements appear to be the 'domicile' of the applicant and the consent of the respondent to the jurisdiction of the court.

(C) The Maintenance Court¹⁾

The Maintenance Court is a creature of statute. Section 2 of the Maintenance Act states that 'Every magistrate's court shall within its area of jurisdiction be a maintenance court for the purposes of this Act.' This court is presided over by a magistrate in his capacity as a presiding judicial officer²⁾ whereas the maintenance officer, who investigates maintenance complaints and who institutes the enquiry in the Maintenance Court, is usually a public prosecutor who has been specially appointed to this position.³⁾ The Maintenance Court is given the power to make, enforce, vary or discharge a maintenance order,⁴⁾ including an order of the Supreme Court. A maintenance order is privileged in that it may be executed upon any pension, annuity, gratuity, compassionate allowance or other similar benefit not normally subject to execution or attachment.⁵⁾ So also, a maintenance order is not affected by the insolvency of a husband, nor does the order automatically terminate in the event of the husband's sequestration.⁶⁾

Quite apart from its powers under the Maintenance Act, the Maintenance Court also has the power to enforce a maintenance order emanating from a proclaimed country.⁷⁾ But, the power to enforce a

- 1) Boberg 293-301; Hahlo 117-121; Olivier 233-235.
- 2) S 3 (1) Maintenance Act.
- 3) S 3 (2) Maintenance Act. For a proper description of the officials of the Maintenance Court see Khumalo 'Procedure under the Maintenance Act 1963' (1966) 85 SALJ 266.
- 4) S 5 (4) Maintenance Act.
- 5) S 11 (2) Maintenance Act. See also s 4 Pension Laws Amendment Act, 73 of 1973, which provides that if a pensioner is ordered by the Supreme Court on divorce to pay maintenance to his ex-spouse the Minister of Social Welfare and Pensions may direct that part of the pension shall be paid to the ex-spouse.
- 6) Hahlo 120 and the authorities cited at n 113-114.
- 7) S 4 Reciprocal Enforcement of Maintenance Orders Act, 80 of 1963. The proclaimed countries are conveniently listed by Hahlo 120 n 118.

maintenance order of a proclaimed country does not include the power to vary it: this can only be done by the court that originally granted the order.¹⁾

Strangely enough, although a magistrate's court has no jurisdiction in matters in which the dissolution of a marriage, or a separation from bed and board,²⁾ or of goods, of married persons is sought,³⁾ the irony of the factual position is that a magistrate can quite conceivably find himself in the position of having to adjudicate in what can appropriately be termed a 'mini' divorce action. Thus, the judicial officer presiding over a Maintenance Court (who is, after all, a magistrate) may well be obliged to adjudicate upon a complicated issue arising out of matrimonial fault where this has been put in issue in a maintenance case.⁴⁾

(C) The Children's Court

The Children's Court is given the power⁵⁾ to grant a contribution order for the maintenance of a child alleged to be in need of care.⁶⁾ The Children's Court is presided over by a commissioner, or assistant

- 1) Hirschowitz 1965 (3) SA 407 (W).
- 2) Judicial separation is no longer part of our law: s 14 Divorce Act.
- 3) S 46 (1) Magistrate's Court Act, 32 of 1944.
- 4) As in Alarakah 1975 (3) SA 245 (RAD). The fault-principle has been 'watered down' considerably as a result of the passing of the Divorce Act, which came into force on 1 July 1979. The extent to which the fault principle plays a part in the divorce process is still a matter of some contention: cf Hahlo and Sinclair 1-7. The fault-principle, however, would still appear to be an important consideration insofar as the grant of a maintenance order on divorce is concerned: s 7 (2) Divorce Act and see 175 above.
- 5) By s 62 (1) (a) Children's Act, 33 of 1960.
- 6) For a full description of a 'child in need of care' see below at 243 n 1.

commissioner, of child welfare.¹⁾ In the normal course, a commissioner of child welfare is a magistrate.²⁾ A contribution order is defined by section 1 of the Children's Act as 'an order for the payment or recurrent payment of a sum of money as a contribution towards the maintenance of a child in a place of safety or in any custody wherein he was placed under this Act or the Criminal Procedure Act ..., or towards the maintenance of a pupil.' A pupil is also defined at the same place as 'any person who, under any law, was sent to or received in or is cared for in an institution or any person who has been released on licence or has absconded from an institution and who is still under the control or protection of the management of that institution, or is liable to be brought back thereto.'

Unlike the conventional order for maintenance, a contribution order for the maintenance of any person shall not continue to apply once that person reaches the age of 21 years.³⁾ Furthermore, such order shall have the effect of a civil judgment of a Magistrate's Court in favour of the Government of the Republic and may be enforced by a clerk of the court like any other judgment.⁴⁾ Whether a contribution order can be construed as falling within the ambit of the penal provisions of the Maintenance Act is open to doubt though both Spiro⁵⁾ and Boberg⁶⁾ are inclined to the view that it does.

1) S 7 (1) Children's Act.

2) S 2 (1) Children's Act.

3) S 64 (2) Children's Act.

4) S 63 Children's Act.

5) At 400.

6) At 441 no 98.

(D) The Magistrate's Court

In terms of section 62 (1) (b) of the Children's Act a magistrate is also given the power to grant a contribution order for the maintenance of any child or pupil of an institution. Apart from this, the magistrate is given the right to preside over the criminal prosecution of any person for the failure, inter alia, to maintain a child which such person is legally liable to maintain,¹⁾ and of any person who fails to comply with an ordinary maintenance order.²⁾

(E) The Minister of Pensions and Social Welfare

Jurisdiction is vested in the Minister of Pensions and Social Welfare to make a contribution, out of moneys appropriated by Parliament for this purpose, to the maintenance of a child or pupil in a children's home.³⁾ He may also make a similar contribution to the maintenance of any child by his parent, step-parent or guardian or the person in whose custody the child has been placed under the provisions of the Children's Act, or section 290 of the Criminal Procedure Act, 51 of 1971.⁴⁾

(F) Procedure in Maintenance Cases

The procedure applicable in maintenance cases generally varies from the formal notice of motion proceedings in the Supreme Court for maintenance pendente lite⁵⁾ and applications in the Supreme Court for

1) S 18 (2) Children's Act.

2) S 11 Maintenance Act.

3) S 89 (1) (b) Children's Act.

4) S 89 (1) (c) Children's Act. S 290 Criminal Procedure Act deals with the manner in which a convicted juvenile is to be dealt with; viz, that, inter alia, until such time as he can be sent to a reformatory (where this has been so ordered) the juvenile offender may be kept in a place of detention or a place of safety.

5) Rule 43 Consolidated Rules of the Supreme Court.

maintenance on divorce,¹⁾ on the one hand, to the more informal and relaxed procedure in the Maintenance Court and the Children's Court, on the other hand. Even within the ambit of the Maintenance Act itself, differing degrees of formality are applicable in an enquiry under section 5, on the one hand, and a prosecution for a failure to comply with a maintenance order under section 11, on the other hand. Thus, the procedure in a criminal prosecution under section 11 is strictly adversary whereas, according to Kumleben J in the case of Perumal v Naidoo²⁾;

'The proceedings in ... the Maintenance Court⁷ are inquisitorial in character. The court is enjoined to hold and conduct the necessary enquiry, which has as its object the determination of important questions relating to the duty of support. Often the interested parties ... are without legal representation. In the circumstances it is clearly the duty of the maintenance officer³⁾ to ensure that a thorough investigation is carried out.'⁴⁾

Quite apart from the differing degrees of formality applicable in the above mentioned courts dealing with maintenance, it is significant to note that the officials presiding over these various courts all have differing legal training, experience and qualifications. Does this not inevitably lead to inconsistency in maintenance matters? Certainly, the magistrates, prosecutors and clerks of court who operate in Maintenance Courts generally do not see this type of work as being their most important. These officials are schooled in a criminal adversary atmosphere and, through no fault of theirs, are often insensitive to the difficulties experienced by persons receiving

1) § 7 Divorce Act.

2) 1975 (3) SA 901 (N) at 903 D-E.

3) The learned judge appears to have failed to make the proper distinction between the maintenance officer and the judicial officer presiding over a Maintenance Court: see Khumalo 'Procedure under the Maintenance Act 1963' (1966) 85 SALJ 266.

4) Further on the procedure applicable in the Maintenance Court see, inter alia, Pieterse 1965 (4) SA 344 (T) at 346; Buch 1967 (3) SA 83 (T) at 85-87; Kruger v Ferreira 1979 (1) SA 915 (NK); Govender v Amurtham and Others 1979 (3) SA 358 (N) at 360-362.

maintenance. Thus, accusations of a lack of understanding and sympathy for the plight of women who have not received their maintenance cheques on due date are frequently voiced. So, also, frequent accusations are levelled against officials in the Maintenance Office for failure to take prompt and effective action against maintenance defaulters. In fact, one often comes across the allegation that there is, on the part of certain maintenance officials, a misplaced expression of concern at the 'burden' a maintenance defaulter is called upon to discharge!

The officials charged with giving expression to the provisions of the Maintenance Act are, as public servants, liable to frequent transfer. This is to be regretted since, it is submitted, it would be better if such officials remain in the community they are expected to serve. There is, however, no easy solution to this problem and one can sympathize with the difficulties experienced by such public officials: they have, after all, to look after the interests of the broadest possible spectrum of the public from the poorest to the richest; from the lowest class to the upper class; White, Black and Brown people. Is the Maintenance Court as presently structured properly able to discharge its duties? Can it, for example, at any given moment, properly handle a maintenance claim of, say, R2 500 per month by a woman for her personal maintenance and R1 000 per month for each of her 3 minor children? Bearing in mind that there appears to be no limit to the amount of maintenance that may be claimed in a Maintenance Court, how is the judicial officer presiding over the Maintenance Court going to acquit himself in such an application when he is only used to handling small maintenance claims?¹⁾ Has not the Maintenance Court, with the passage of time, acquired a reputation of being a poor person's court?²⁾

1) Is this, perhaps, not the reason why cases such as Watson 1979 (2) SA 854 (AD) bypass the Maintenance Court and are launched, in the first instance, in the Supreme Court? See also Schäfer 'An Upward Variation of a Maintenance Order - An Expensive Luxury versus the Best Interests of a Child?' (1979) 96 SALJ 540.

2) Cf Paulsen 'Juvenile Courts, Family Courts and the Poor Man' (1966) 54 Calif LR 694: see 156 n 3 above.

The building that houses the Magistrate's Court is usually the same building in which the Maintenance Office is housed. This inevitably leads to the constant presence of policemen, prison officials, criminals and persons charged with having committed crimes of one sort or another. The surroundings are steeped in a criminal atmosphere. How soul destroying it must be for perfectly respectable women (in most of the smaller centres at any rate) to have to queue up behind a counter¹⁾ during a busy month-end period with all sorts of persons not even remotely concerned with maintenance matters? How much more of an ordeal does it not become for the woman to be told that her cheque is not ready or that the maintenance payable has not yet been paid in? Worst still for the woman whose maintenance is not timeously or regularly paid so that because of her frequent visits to the Maintenance Office she comes to be branded as a nuisance!

The procedure prescribed for the Maintenance Court²⁾ is so designed to cut down on costs. The maintenance officer is the person to whom a complaint is made on oath when it is alleged either that any person legally liable to maintain any other person has failed to maintain such person, or that sufficient cause exists for the substitution or discharge of a maintenance order. Having received details of the complaint, the maintenance officer is then given the discretion to decide whether to institute an enquiry in the Maintenance Court or not. In practice, however, it is submitted that he very rarely decides not to proceed with an enquiry. If he decides to proceed with the necessary enquiry the maintenance officer has the power to summon certain persons, including the person alleged to be liable to comply with the duty of support, to appear before the Maintenance Court. He will also collect all the necessary evidence that he can to place before the Maintenance Court.

The procedure to be observed by the Maintenance Court is prescribed by section 5 of the Maintenance Act. Section 5 (2) of the Act states

1) Which is usually protected by iron-grill bars!

2) Ss 4 and 5 Maintenance Act.

that 'Any person against whom an order may be made under this section may be represented by counsel or by an attorney'. This does not appear to include the other party to the proceedings. However, it is submitted that it cannot have been the Legislature's intention to deny such person the right to legal representation.¹⁾ Certainly, in practice, the informal nature of the proceedings provided for makes it desirable that the interests of all parties be safeguarded by legal representation, if this is desired. This, in turn, makes the task of the presiding officer an easier one to discharge. If the parties are unrepresented the task of the presiding officer becomes more difficult since he is not permitted simply to play a passive role in the proceedings; he cannot leave the leading of evidence to the parties concerned; he is not permitted to function as an umpire²⁾; he may examine or cross-examine both parties; he may even have to summon witnesses and require books and documents to be produced.³⁾ In short, he is obliged to act in a way very different to his normal role as a magistrate presiding over a criminal case or an ordinary civil case. He has to grapple with concepts peculiar only to the provisions of the Maintenance Act. Ordinary laymen do not know how to conduct an enquiry of the sort provided for by the Maintenance Act. They require assistance from their legal representatives and, if unrepresented, from the officer presiding over the Maintenance Court. Is not the situation of which Claassen J complained of in Pieterse's case⁴⁾ where the whole enquiry recorded in the Maintenance Court took up only 24 lines, of far too frequent occurrence?

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- 1) On the question of legal representation see Katzen v Presiding Officer, Maintenance Court, Johannesburg 1975 (1) SA 805 (T), esp 808 A-B; and see Boberg 294 n 28. See also Huisamen 'Ondersoek Ingevolge die Onderhoudswet, 1963' (1973) DR 165 where a full report on the case of Tulipan v Maintenance Officer, Cape Town, and Chanin, Case No M27/70, appears.
- 2) Boberg 295.
- 3) On the procedure in the Maintenance Court see, inter alia, Pieterse 1965 (4) SA 344 (T); Buch 1967 (3); Perumal v Naidoo 1975 (3) SA 901 (N); Kruger v Ferreira 1979 (1) SA 915 (NK); Govender v Amurtham and Others 1979 (3) SA 358 (N).
- 4) 1965 (4) SA 344 (T) at 346.

3. Minors

With regard to minors the following courts have jurisdiction: the Supreme Court, the Children's Court and the Magistrate's Court. In addition, the Minister of Social Welfare and Pensions is given limited powers of jurisdiction over minors.

(A) The Supreme Court

At Common Law, the Supreme Court has overall jurisdiction in respect of all matters relating to minors.¹⁾ It exercises this jurisdiction in its capacity as upper guardian.²⁾ However, as Boberg rightly points out,³⁾ the Supreme Court's Common Law powers in this regard have been largely superseded by the more comprehensive statutory powers accorded to it by the Matrimonial Affairs Act and the Children's Act.⁴⁾ This was mainly because of the Supreme Court's inability at Common Law to give effect to the true interests of minor children whose parents, though not divorced or judicially separated, were de facto living apart from each other. Thus, section 5 (1)⁵⁾ of the Matrimonial Affairs Act provides that -

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- 1) Boberg 412 n 2 where all the relevant authorities are conveniently collected.
 - 2) On the historical development of the concept in terms of which the Supreme Court sees itself as the upper guardian of all minors see Spiro 1-5; Hahlo and Kahn 386.
 - 3) At 412 and 421.
 - 4) See also s 19 (1) Supreme Court Act, 59 of 1959, where it is stated, inter alia, that 'A provincial or local division shall have jurisdiction in and over all persons residing or being in and all causes arising and all offences triable within its area or jurisdiction and in all other matters of which it may according to law take cognizance ...'
 - 5) As amended by s 16 Divorce Act. See also s 6 (3) Divorce Act which is substantially the same as s 5 (1) Matrimonial Affairs Act, except that s 6 (3) goes further by giving the Supreme Court the power to grant orders for the maintenance of dependent children. Furthermore, s 6 (3) only applies to a court granting a decree of divorce whereas s 5 (1) applies where the parents are already divorced or are living apart. Hahlo and Sinclair 40-42.

'Any provincial or local division of the supreme court or any judge thereof may, on the application of either parent of a minor whose parents are divorced or are living apart, in regard to the custody or guardianship of, or access to, the minor, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor either jointly with or to the exclusion of the surviving parent.'

Prior to the introduction of the original section 5 (1) in 1953 the father of a minor child was alone entitled to all the natural guardianship rights and the Supreme Court could only interfere with these natural guardianship rights in exceptional circumstances.¹⁾

Now, of course, where the parents are divorced the father of a minor child no longer automatically has a better claim than the mother to the natural guardianship rights. The oft-expressed test is what is in the best interests of the minor child.²⁾ But the essential question is whether proper effect is being given to the best interests of minor children.³⁾ Is the child not still considered as the 'prize' for the winning litigant in matrimonial litigation?⁴⁾

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- 1) Calitz 1939 AD 56 at 63. See also generally §§ 140-172 Women's Disabilities Report (1949).
 - 2) Fletcher 1948 (1) SA 130 (AD); Bailey 1979 (3) SA 128 (AD); and see Sornarajah 'Parental Custody: The Recent Trends' (1973) 90 SALJ 131.
 - 3) See above at 176 and below at 288 n 3 and 301 n 2. As to what is meant by the 'best interests of a child' see Young J in van Deijl 1966 (4) SA 260 (R) at 261 H where he said: 'The interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must also be regarded and in the case of older children their wishes in the matter cannot be ignored.' See also Boberg 4230427.
 - 4) See the review of Hahlo by Olmesdahl in (1976) 93 SALJ 232, 243-244; Boberg 416 n 13. On the question of the split guardianship and custody of minor children see Hahlo 456 et seq; Boberg 427-428; Olivier 306-308.

While the Children's Court¹⁾ does not completely replace the jurisdiction of the Supreme Court over matters involving children, there is still the possibility of the Supreme Court competing with the Children's Court for jurisdiction over matters affecting children.²⁾ Thus, where a Children's Court has dealt with a child in terms of section 31 of the Children's Act,³⁾ a judge of the Supreme Court will not upset this order by imposing his own order: if he does in fact grant an order regarding the custody or guardianship of a child, this may be made subject to any existing order of the Children's Court, as in the case of Walkinshaw,⁴⁾ or it may be ordered to take effect only from the date when the order of the Children's Court ceases to operate, as in the case of Forbes.⁵⁾ But where the Children's Court has already transferred the parental power from one parent to another⁶⁾ the Supreme Court, in a subsequent matrimonial action between the parents, has not felt itself barred from again considering the question of guardianship, as in the case of Walters.⁷⁾

But where the Children's Court is confronted with a prior Supreme Court order concerning the custody of a child the position is even more uncertain. As a general proposition, an order of the Children's Court cannot be allowed to compete with an order of the Supreme Court: such order would be invalid to the extent that it purports to compete

1) See below at 198 where Childrens' Courts are dealt with.

2) Spiro 329. Where this occurs the solution to this difficulty is by no means clear.

3) S 31 is cited below at 199 n 1.

4) 1971 (1) SA 148 (NK).

5) 1960 (1) SA 875 (D): see also Lochenbergh 1949 (2) SA 197 (E).

6) In terms of s 60 Children's Act.

7) 1949 (3) SA 906 (O).

with, or vary, an order of the Supreme Court.¹⁾ But what exactly is a competing order is a difficult question to answer.²⁾ Certainly, the significance of this difficulty is highlighted by Vieyra J in the case of Raath v Carikas³⁾ as follows:

'Supposing, for example, that, custody having been awarded to a mother by the Supreme Court, the child thereafter becomes in need of care⁴⁾ because it has been abandoned, or because the custodian parent has been convicted of committing some offence ... In such circumstances, it could not be disputed that an enquiry could be instituted under section 30 [of the Children's Act] at the instigation of a policeman or a probation officer who was apprised of these facts, even if the parents made no move in the matter. If that is so, an appropriate order could be made by the children's court which could not be regarded as competing with or of varying the original order to the extent of being inconsistent with it.'⁵⁾

That this difficulty regarding 'competing' orders exists can, of course, only be attributable to the fragmentation of jurisdiction in regard to matters affecting minors.⁶⁾ Would this difficulty not be resolved by the establishment of a unified family court in respect of which there can be no question of competing jurisdictions?

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- 1) Raath v Carikas 1966 (1) SA 756 (W).
 - 2) See Boberg 445-447 where the learned author discusses this question in a comprehensive review of the relevant authorities.
 - 3) 1966 (1) SA 756 (W) at 761-762.
 - 4) Boberg at 445-446 rightly points out that 'A child may be in need of care from the very inception of his sojourn with a legally-appointed custodian as easily as with a naturally-acquired one.'
 - 5) See also Murphy v Venter 1967 (4) SA 46 (O) at 51-52.
 - 6) As to the suggested solution to the problems of 'competing' orders just outlined see Boberg 447.

(B) The Children's Court

This court, which has existed in South Africa since 1937, is constituted by the provisions of sections 4 and 5 of the Children's Act, and 'it sits in a room other than that in which any other court ordinarily sits, unless no such other room is available and suitable.'¹⁾ The official presiding over the Children's Court is the commissioner or assistant commissioner of child welfare,²⁾ and except for the fact that its proceedings are generally conducted in camera³⁾ the Children's Court is governed by the same rules of procedure as govern the ordinary courts.⁴⁾ Thus, in Napolitano v de Wet NO and Others⁵⁾ Marais J said -

'I am of the opinion that children's courts were intended to be courts of law, bound in the main to observe all the rules of evidence and procedure commonly observed by other courts of law. There appears to be no basis for the contention that it might pardonably function less formally than any other court of law, or might admit otherwise inadmissible evidence except where explicitly or by necessary implication a departure or relaxation has been provided for.'⁶⁾

The jurisdiction of the Children's Court is extensive and far-reaching. Its general powers⁷⁾ include the power -

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- 1) S 8 (1) Children's Act. See generally Spiro 320-329; Boberg 430-456.
 - 2) S 7 (1) Children's Act.
 - 3) S 8 (2) Children's Act.
 - 4) S 9 Children's Act.
 - 5) 1964 (4) SA 337 (T) at 342 F-G.
 - 6) See also Snyder en Andere v Steenkamp en Andere 1974 (4) SA 82 (N) at 87 D-G; J and Another v Commissioner of Child Welfare, Durban 1979 (1) SA 219 (N) at 222 D-H.
 - 7) Spiro 325.

- (i) to make certain orders in respect of children found to be in need of care¹⁾;
- (ii) to make temporary custody orders in respect of children whose parents are living apart²⁾;
- (iii) to deprive a parent living apart from the other of the parental power³⁾; and
- (iv) to make adoption orders.⁴⁾

1) These orders are provided for by s 31 (1) Children's Act. The Children's Court, after holding the necessary enquiry in terms of s 30 may, after finding a child to be in need of care, order that the child -

- (a) be returned to or remain in the custody of his parents or guardian or of the person in whose custody he was immediately before the commencement of the proceedings; or
- (b) be placed in the custody of any suitable foster parent; or
- (c) be placed under the control of an approved agency; or
- (d) be sent to a children's home; or
- (e) be sent to a school of industries.

See also Spiro 325-326.

For the definition of a child in need of care see below at 243. According to the 1978 Social Welfare and Pensions Report, 20, the following numbers of children were dealt with as provided for in (a), (b), (d) and (e) above in the years 1976, 1977 and 1978: viz

	<u>1976</u>	<u>1977</u>	<u>1978</u>
Returned to former custody	1164	1135	1093
Referred to children's homes	1185	873	755
Referred to school of industries	613	498	343
Placed in foster care	930	897	791

- 2) S 83 (1) Children's Act.
- 3) S 60 (1) Children's Act. Cf s 5 (1) Matrimonial Affairs Act and s 6 (3) Divorce Act which are discussed above at 194 n 5.
- 4) S 71 (1) (a) Children's Act.

Certainly, the largest proportion of the work of the Children's Court is concerned with children alleged to be in need of care and the granting of adoption orders. Thus, the total number of children found to be in need of care for the years 1976, 1977 and 1978 were as follows:

1976	3036
1977	2814
1978	3195 ¹⁾

The following table reflects the total number of adoption orders granted in the 5-year period referred to:

1974	2637
1975	2775
1976	2888
1977	2810
1978	2769 ²⁾

In addition to the above powers, a commissioner of child welfare is given other duties and powers. For example, a commissioner of child welfare may at any time direct that a protected infant, or any infant who is being kept apart from his parents in circumstances believed on reasonable grounds to be prejudicial to his interests, be medically examined.³⁾ The commissioner of child welfare may, of course, delegate some of his duties regarding the protection of infants by appointing any person to be an 'infant protection visitor.'⁴⁾

If any person wishes to provide entertainment at which a child under the age of 14 years is to perform, or be exhibited, application will have to be made to a commissioner of child welfare who will give his permission for such performance or exhibition only if:

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- 1) 1978 Social Welfare and Pensions Report, 21.
 - 2) 1978 Social Welfare and Pensions Report, 24, Table 27.
 - 3) S 12 (4), as read with s 11 (1), Children's Act. The power to order the medical examination of a sick or filthy child is also given to a medical officer by s 20.
 - 4) S 12 (1) Children's Act.

- (a) the child is physically or mentally fit for the performance or exhibition; and
- (b) there is no risk of physical, mental or moral injury or detriment to the child; and
- (c) proper provision is made for securing the health, education and kind treatment of such child.¹⁾

Whilst it may be generally true to say that Childrens' Courts function as ordinary courts of law²⁾ it is, nevertheless, pertinent to note that enquiries to determine whether a child is in need of care are much more informal than proceedings relating to an order for adoption. Thus, in Napolitano v Commissioner of Child Welfare, Johannesburg³⁾ Holmes JA said:

'In my view it is plain that an enquiry under s 30 of the Children's Act, to determine whether a child is in need of care, is a much more informal proceeding than that relating to an application for adoption under s 71 of the Children's Act; and different issues are involved. Hence, it was irregular in this case for the Commissioner to telescope the two proceedings into one. To put it another way, inadmissible or incompetent evidence was admitted in the hearing of the application for the adoption, namely the evidence which had been led in the enquiry under s 30'.

It would seem that quite apart from the fact that there are different courts available to deal with children in one way or another, there are differing degrees of formality or informality recognized within the framework of the Children's Court itself. Furthermore, the Children's Court is a court for children only and it has no business involving itself in the domestic problems of the parents of the children that are before it. In this regard, de Vos Hugo JP clearly sets out the position in Ex Parte Kommissaris, Kindersorg: In Re Steyn Kinders⁴⁾ as follows:

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- 1) S 23 Children's Act: Spiro 345 and 350.
 - 2) See the authorities cited above.
 - 3) 1965 (1) SA 742 (AD) at 745 G-H.
 - 4) 1970 (2) SA 27 (NK) at 33 G.

'Daar is perke aan die bevoegdheid van die kinderhof en 'n kinderhofondersoek kan nie gebruik word om huweliksprobleme tussen ouers op te los nie. Dat daar sulke probleme kan ontstaan en dat dit 'n nadelige invloed op die kinders kan hê ly geen twyfel nie, maar verrigtinge onder die Kinderwet kan nie gebruik word om daardie probleme op te los nie.'¹⁾

In any event, it should also be noted that as against this background the commissioners of child welfare, who are also magistrates, are steeped in a criminal court atmosphere which inevitably makes them generally ill-equipped for the many tasks entrusted to them by the Children's Act.²⁾

(C) The Magistrate's Court

With regard to criminal prosecutions, the minor, at first blush, appears to be getting the best of both worlds. Thus, section 254 (1) of the Criminal Procedure Act states that

'If it appears to the court at the trial upon any charge of any accused under the age of eighteen years that he is a child in need of care³⁾ as defined in section 1 of the Children's Act, 33 of 1960, and that it is desirable to deal with him in terms of sections 30 and 31 of that Act, it may stop the trial and order that the accused be brought before a children's court ... and that he be dealt with under the said sections 30 and 31.'⁴⁾

This procedure, however, will only be invoked where the trial court feels that the child concerned falls within the definition of a child in need of care. The criminal proceedings are then replaced by an enquiry and the child is thereafter dealt with by the Children's Court in the manner described above.

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- 1) See also Weber v Harvey NO and Others 1952 (3) SA 711 (T).
 - 2) With regard to the competing jurisdiction between the Supreme Court and the Children's Court see above at 194.
 - 3) For the definition of a child in need of care see below at 243.
 - 4) S 254 (1) Criminal Procedure Act, 51 of 1977, replaces the old s 159 of the 1955 Act, the only difference being that the old s 159 made it clear that the procedure did not apply to minors charged with murder or rape. This limitation apparently no longer applies.

If, however, the minor concerned does not fall within the definition of a child in need of care, he will be dealt with by the juvenile criminal court in the same way as any other ordinary convicted person. In this case, though, the provisions of section 290 (1) of the Criminal Procedure Act are relevant in that -

'Any court in which a person under the age of eighteen years is convicted of any offence may, instead of imposing punishment upon him for that offence -

- (a) order that he be placed under the supervision of a probation officer; or
- (b) order that he be placed in the custody of any suitable person designated in the order; or
- (c) deal with him both in terms of paragraphs (a) and (b); or
- (d) order that he be sent to a reform school as defined in section 1 of the Children's Act, 33 of 1960.¹⁾

It is clear that the sentencing and treatment of convicted juveniles involves considerations additional to those existing where an adult is sentenced. Thus, in Adams²⁾ Steyn J very appropriately remarked that -

'Dit is met die jeugdige soveel meer as met enige ander beskuldigde noodsaaklik dat die Hof sy straftoemettingsfunksie nie behoort uit te voer tensy hy volledige gegewens voor hom het aangaande wat 'n gepaste vonnis is nie. Die regspleging verg steeds die grootste voorsorg en versigtigheid

1) According to the 1978 Social Welfare and Pensions Report, 23, Table 26, the total number of juvenile offenders dealt with under the provisions of this section in 1976, 1977 and 1978 was 107, 164 and 985 respectively. There appears to have been a dramatic increase in the number of juveniles dealt with under this section in 1978. Of the 985 juveniles so dealt with 784 were dealt with in terms of s290 (1) (c) Criminal Procedure Act ie they were placed in the custody of a suitable person and under the supervision of a probation officer. In 1977 only 12 juveniles were dealt with in this manner. No explanation is given in the Report for such a dramatic increase.

2) 1971 (4) SA 125 (K) at 126 G.

by die vasstelling van 'n geskikte straf, maar dit verg dit in 'n besondere mate waar met jeugdiges gehandel word. Die moontlikheid van hervorming is by die jeug soveel meer aktueel en die gevolge van 'n onoorwoë uitoefening van diskresie deur die voorsittende amptenaar kan soveel meer onherstelbare skade meebring in die geval van 'n jeugdige.'¹⁾

The dilemma facing the trial court, however, lies in deciding which of the above two sections of the criminal code to invoke - whether to refer the juvenile accused to the Children's Court as a child allegedly in need of care, or whether to deal with the accused after conviction in one of the ways provided for by section 290 (1) of the criminal code. Whatever the decision of the trial court the consequences for the juvenile accused are far-reaching. To assist the trial court to arrive at a proper decision a probation officer's report may be called for and, as a rule of practice, before a juvenile is sentenced in respect of a serious offence one is usually called for.²⁾ Despite this rule of practice, however, it cannot be said that a decision which is in the best interests of a juvenile accused is always taken. This clearly emerges from a brief review of the following recent cases.³⁾ These cases concern, in the main, the question of the desirability of ordering a juvenile to be sent to a reformatory in terms of section 290 (1) (d) of the Criminal Procedure Act.

1) See also Yibe 1964 (3) SA 502 (E).

2) See, for example, Jansen and An 1975 (1) SA 425 (AD) at 428 A where Botha JA said: 'To enable a court to determine the most appropriate form of punishment in the case of a juvenile offender, it has become the established practice in the Courts to call for a report on the offender by a probation officer in, at least, all serious cases.' Jansen and An was followed with approval by Rumpff CJ in Hlongwana 1975 (4) SA 567 (AD) at 570-571. See also Harcourt 637 and Midgley 130-131. Further on probation officers see below at 234-235.

3) That is, Yibe 1964 (3) SA 502 (E); A and Others 1976 (3) SA 144 (C); D 1977 (1) SA 759 (C); L 1978 (2) SA 75 (C).

This problem was highlighted by Wynne J in Yibe's case¹⁾ where he adopted with approval the following sentiment of Gardiner and Lansdown²⁾; namely,

'The main purpose of a reformatory is to secure the reformation of a juvenile delinquent and the correction of his maladjustment to society, ends which might be hopeless of attainment if he was associated with criminals. Before, however, a sentence of reformatory detention is passed, care should be taken to see that the accused is a fit subject for the reformatory. His offence may have been really a boyish prank, his character may be good and there may be no need of a reformation, he may be in charge of parents or fit persons to look after him, and he may as a general rule be amenable to their control. In such circumstances it would be wrong and might cause incalculable harm to the boy, to send him to a reformatory ... It must be borne in mind that any sentence of detention in a reformatory is bound to be drastic. It removes a boy from his relatives for at least two years, and whatever care be taken in regard to the classification, it is bound to bring him into contact with some boys of vicious tendencies.³⁾

Before deciding therefore upon detention in a reformatory, the Court should take into consideration the nature and circumstances of the offence, and if sufficient information is not disclosed by the evidence in the case, should make enquiries as to the accused's character, his home life, and should determine whether his case is one for which reformatory treatment is needed.'

Yibe's case concerned a ten year old African boy who had been sentenced by a magistrate to a reform school for the theft of a 44 gallon drum of paraffin. He admitted two previous convictions for theft though, in the instant case, there had been a suggestion that

1) 1964 (3) SA 502 (E) at 506 B-D.

2) At 711.

3) Emphasis supplied.

he had been 'forced' to steal. The probation officer recommended¹⁾ that the accused be given cuts and be placed in the custody of his parents, under the control of a probation officer, coupled with the direction that he attend school regularly. The magistrate, however, disagreed with this recommendation and felt that the time had come 'to bend the tree'²⁾ and he sentenced the boy to a reformatory. On review Wynne J altered this sentence and ordered³⁾, instead, that the accused be placed in the custody of his father, under the supervision of a probation officer.

Magistrates in particular have been frequently enjoined in the past to note that to send a juvenile to a reform school is a drastic measure and that the greatest care should be exercised before such a sentence is imposed. In particular, it is generally undesirable to impose such a sentence on a first offender.⁴⁾ Even in recent times the Supreme Court has expressed concern at the manner in which the power to sentence a youthful offender to reformatory has been invoked. Thus, in A and Others⁵⁾ two out of the three female accused, both aged 19 years, were sentenced to be detained in a reformatory.⁶⁾ The effect of these sentences was that they were liable to serve 'a term of incarceration of 4 years' since they could be detained in a reformatory until they reached the age of 23 years.⁷⁾ Their offence was that of being on board a ship in the Republic without the permission of the owner or the master of the ship.⁸⁾ It was pointed out by Van Winsen AJP

1) At 504 H.

2) At 503 G.

3) At 512 F.

4) The authorities are reviewed by Wynne J in Yibe 1964 (3) SA 502 (E): see also Zungu 1962 (1) SA 377 (N).

5) 1976 (3) SA 144 (C).

6) The third accused was an adult and her sentence of a fine of R50 or 100 days imprisonment was found to be in order.

7) At 145 A. Cf Re Gault 387 US 1 (1967) and Kent v United States 383 US 542 (1966).

8) In contravention of s 318 (a) Merchant Shipping Act, 57 of 1951.

that the maximum fine for this offence was R100. In the circumstances Van Winsen AJP (Steyn J concurring) held that there was no ground for distinguishing the cases of the two female juvenile accused, particularly in view of the fact that a probation officer had reported that no meaningful advantage was to be gained by placing the two younger girls in a reformatory. The sentences on each of the two younger girls were accordingly altered to fines of R50 or imprisonment for a period of 100 days.

The case of A and Others was subsequently followed by the case of D,¹⁾ the facts of both being substantially the same. In D's case the accused was a 16 year old female juvenile and the order that she be sent to a reformatory could have meant a period of incarceration for 5 years for an offence that the Legislature did not regard in a serious light. Diemont J (van Zijl JP concurring) was constrained to comment²⁾ that

'I/t must be conceded that a reform school does not always reform. Young people do not necessarily benefit from a prolonged spell in a reformatory. In a case such as this ... both prison and the reformatory should be avoided and a third course adopted. In my view this is an appropriate case for the application of the machinery of the Children's Act.'³⁾

One of the most recent cases in point is the case of L⁴⁾ where a female accused, aged 15 years, was convicted of housebreaking with intent to steal and theft from her own home during her mother's absence. The items stolen were a pair of trousers and some groceries. On review, Hofmeyer AJ, following Zungu and Another⁵⁾ and Yibe⁶⁾, ordered that the reform school sentence be set aside and that the accused be dealt with as a child in need of care in terms of section 30 of the Children's Act.

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- 1) 1977 (1) SA 759 (C). It is clear that in both cases, the females were on board the ships for the purposes of prostitution.
 - 2) At 760 G.
 - 3) For the orders that a Children's Court may grant in terms of s 31 (1) Children's Act see above at 199 n 1.
 - 4) 1978 (2) SA 75 (C).
 - 5) 1962 (1) SA 377 (N).
 - 6) 1964 (3) SA 502 (E).

In the final analysis, then, it can hardly be seriously contended that a minor is in the position of getting the best of both worlds when it comes to criminal prosecutions. That the problems outlined in the brief analysis of the cases above are very real are evidenced by the fact that in recent years there has been a significant increase in the number of juveniles committed to reformatories. Thus in 1976 a total of 65 juveniles were sentenced to a reform school while in 1977 the number was 82 juveniles. In 1978 the number of committals to a reform school jumped to 127.¹⁾

(D) The Minister of Social Welfare and Pensions

Apart from his many administrative duties under the Children's Act,²⁾ the Minister of Social Welfare and Pensions has a number of powers over minors at the post-committal stage. For example, after consultation with those in charge of the institution or approved agency at which a pupil or child is being 'detained', the Minister may order the discharge of such pupil or child from the effect of any order made under section 31 of the Children's Act, or under section 290 (1) of the Criminal Procedure Act. So also, the Minister may cancel any licence granted to any pupil.³⁾ The Minister also has the power to authorize the marriage of a minor pupil or child in certain circumstances.⁴⁾

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- 1) 1978 Social Welfare and Pensions Report, 23, Table 26.
 - 2) By virtue of Proclamation 42 of 1968 the administration of the provisions of the Children's Act is entrusted to the Minister of Social Welfare and Pensions.
 - 3) S 44 (7) (a) Children's Act.
 - 4) This is dealt with immediately below under 'Consent to Marry'.

4. Consent to Marry

The granting of consent to minors wishing to marry also affords another example of needless multiple jurisdiction. The position, very briefly stated, is that a judge of the Supreme Court can be called upon to override the parents' or guardians' refusal to give their consent to the marriage of their minor child, or to overrule the refusal by a commissioner of child welfare to give his consent to a minor's proposed marriage.¹⁾ A judge will only override a prior refusal of consent if such refusal is without adequate reason and contrary to the interests of such minor.²⁾

On the other hand, a commissioner of child welfare can be approached for his permission for a minor to contract a marriage where the minor concerned is unable, for some reason or other³⁾, to obtain the consent of a parent or guardian.⁴⁾

But where a female under the age of 15 years or a male under the age of 18 years wishes to marry an approach must be made to the

1) S 25 (4) Marriage Act, 25 of 1961.

2) C en 'n Ander v van T 1965 (2) SA 239 (O); Allcock 1969 (1) SA 427 (N); Kruger v Fourie 1969 (4) SA 469 (O). See also Joubert 'Geregtelike Toestemming tot Huwelike van Minderjariges' 1976 DJ 243.

3) For example where the parent is absent or where his whereabouts are unknown.

4) S 25 (1) Marriage Act, and see Ex Parte Visick and Another 1968 (1) SA 151 (D).

Minister of the Interior for his consent to the proposed marriage.¹⁾
 It should be noted that the application to the Minister of the Interior is quite apart from any parental or guardian's consent which, if refused, may involve an application to a judge of the Supreme Court.²⁾
 An interesting, but very welcome, practice on the part of the Minister is to call for psychological reports on the background of all boys and girls under 18 years and 15 years respectively who intend to marry.³⁾
 Such reports deal with the desirability of the proposed marriage and the chances of its success.

Where a minor has been placed in the custody of a person or institution, other than in the custody of a parent or guardian, and such minor wishes to marry, the requisite permission will have to be

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- 1) S 26 (1) Marriage Act. According to the 1979 Interior Department Report, 22, applications for ministerial permission to marry in 1977, 1978 and 1979 were disposed of as follows:

		<u>REFUSED</u>			<u>GRANTED</u>		
		<u>1977</u>	<u>1978</u>	<u>1979</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
<u>BOYS</u>	Under 18	4	5	4	19	27	30
	Under 17	2	1	1	10	1	1
	Under 16	-	-	-	-	-	-
<u>GIRLS</u>	Under 15	4	6	5	8	8	2
	Under 14	2	2	2	2	-	-
	Under 13	-	-	-	-	-	-

Should the necessary ministerial consent be lacking, the 'marriage', if it takes place, will be null and void: Shields 1959 (4) SA 16 (W); Abels 1961 (2) SA 639 (C). But, the children of such 'marriage' will be treated on the same basis as the children of a putative marriage and be declared legitimate: Abels (supra). In this case the plaintiff bona fide believed that the marriage was valid and binding notwithstanding the fact that she lacked the necessary ministerial permission to marry.

- 2) The necessity for obtaining the Minister's consent falls away if 'the consent of a judge or court having jurisdiction in the matter is necessary and has been granted' : s 26 (1) Marriage Act - second proviso.
- 3) 1978 Annual Report of the Department of Social Welfare and Pensions RP30/1978.

obtained from the Minister of Social Welfare and Pensions. The Minister will only give his permission if he is satisfied on the two following points:

- (i) that it is in the interests of the minor to get married; and
- (ii) that the parent or guardian of the minor has unreasonably withheld consent, or cannot be found, or is deceased, or is unable to give consent because of mental illness.¹⁾

In the light of the above one is prompted to ask whether it is really necessary to make provision for so many officials, apart from parents and guardians, to have the power to determine whether a minor should or should not marry. Surely, a judge of the Supreme Court can just as competently deal with such questions as a commissioner of child welfare, or the Minister of the Interior, or the Minister of Social Welfare and Pensions?

1) S 59 (4) Children's Act.

5. The Fragmentation of Jurisdiction in respect of Customary Family Law Matters.

It is proposed to deal very briefly with the fragmentation of jurisdiction in family law matters under the Customary Law.¹⁾ The legal position of the South African black citizen is often complicated by the fact that, broadly speaking, there are two systems of law available to him and within each system there are various courts administering that system. These two systems are the traditional Customary Law²⁾ and the South African Common Law.

At the lowest level of jurisdiction there are the courts of chiefs and headmen which are created by section 12 of the Black Administration Act, 38 of 1927, and which have limited civil and criminal jurisdiction. The jurisdiction of the chief or headman is limited to 'civil claims arising out of Black Law and Custom brought before him by Blacks against Blacks resident within his area of jurisdiction.'³⁾ The chief or headman, however, has no power 'to determine any question of nullity, divorce or separation arising out of a marriage.'⁴⁾ The courts of chiefs and headmen are characterized by their informality. Legal

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- 1) The term 'Customary Law' is being used in preference to other terms like 'Bantu Law', 'Native Custom', 'African Law', or 'Black Law' for the reasons given by Kerr 7-12.
- 2) The courts administering Customary Law are discussed by, inter alia, Seymour 14-36; Olivier (N) 577-578; Yates 'Bantu Civil Courts in South Africa' (1971-72) 7 Spec Juris 42 /reprinted in (1973) 70 DR 421/ - this article is critically analysed by Suttner 'Problems of African Civil Law Today' (1974) 78 DR 266 and 311; see also Labuschagne and Swanepoel 'Regspiegling van die Stedelike Swartman in Suid-Afrika' (1979) 12 DJ 17-25.
- 3) S 12 (1) (a) Black Administration Act.
- 4) Proviso to s 12 (1) Black Administration Act.

practitioners are not permitted to appear in these courts and for the judgments of these courts to be effective they must be registered with the clerk of the Commissioner's Court within two months of deliverance, otherwise they lapse. Appeals from these courts are heard in the Commissioner's Court.¹⁾

At the next level of importance there is the Commissioner's Court which is created by section 10 (1) of the Black Administration Act. This court is enjoined by the Act to hear all 'civil causes and matters between Blacks and Blacks only.' But from the family law point of view, the Commissioner's Court has no jurisdiction in respect of the following matters:

- (1) where the status of a person in respect of mental capacity is sought to be affected;
- (2) where a decree of nullity, divorce or separation in respect of a marriage is sought.²⁾

Recognizing the fact that Blacks have always 'had a relatively well developed legal system'³⁾ the Legislature granted the Commissioner's Court a discretion as to which system of law to apply. Thus, section 11 (1) of the Black Administration Act provides that -

'Notwithstanding the provisions of any other law, it shall be in the discretion of the Commissioner's Courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black law applying to such customs except insofar as it shall have been repealed or modified: Provided that such Black law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.'

1) S12 (4) Black Administration Act.

2) Proviso to s 10 (1) Black Administration Act. These matters that are excluded from the jurisdiction of the Commissioner's Court fall to be dealt with by either the Supreme Court or the Divorce Court: see below.

3) Suttner 'Problems of African Civil Law Today.' 1974 DR 266 and 311.

This section is critically examined by, inter alia, Kerr¹⁾ who points out²⁾ that the above discretion is given to the court and not to either or both of the parties. The exercise of this discretion is no easy matter as the cases of Ex Parte Minister of Native Affairs: In Re Yako v Beyi³⁾ and Umvovo⁴⁾ show. Pending a decision by the court the Black Man may well find himself in a state of uncertainty as to which system of law will apply to his particular problem.⁵⁾

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- 1) 'Choosing a System of Law by the Exercise of Discretion' 1977 AJ 95. See also Bennett 'The Application of Common Law and Customary Law in Commissioners' Courts.' (1979) 96 SALJ 399; Bennett 'Conflict of Laws in South Africa: Cases Involving Customary Law' (1980) 43 THR-HR 27.
 - 2) At 96.
 - 3) 1948 (1) SA 388 (AD).
 - 4) The case of Umvovo was comprehensively ventilated in the courts and is cited at the following references: (1949) 1 NAC (S) 96; (1950) 1 NAC (S) 90; (1952) NAC (S) 80; (1952) NAC (S) 151; 1953 (1) SA 195 (AD).
 - 5) It would seem that the problem for the Black Man is not too serious since the effect of Ex Parte Minister of Native Affairs: In Re Yako v Beyi 1948 (1) SA 388 (AD) is that the Common Law will apply in the Commissioner's Court unless the court, in terms of s 11 (1) Black Administration Act decides to apply Customary Law. What is clear, however, is that the exercise of the court's discretion will quite often have a profound effect on the result of the case so far as the respective litigants are concerned. This point is graphically illustrated by Kerr 'Choosing a System of Law by the Exercise of Discretion' 1977 AJ 95, 98-99, as follows: 'In South African common law the mother of an illegitimate child is its guardian. The father is bound to maintain the child. In the customary law of the Cape Nguni tribes, in certain cases the father, if he pays damages plus a beast for isondhlo, is entitled to claim the custody and guardianship of the child. Suppose that the mother institutes a common law action against the father for maintenance and that she is successful. If the father then tenders to her guardian damages plus a beast for isondhlo he will be entitled, if customary law is applied and if the mother has been joined in the action, to take the child and to cease paying the maintenance ordered.'

Appeals from the Commissioner's Court are heard in the Appeal Court for Commissioners' Courts which is created by section 13 of the Black Administration Act. A decision of the Appeal Court for Commissioners' Courts shall be final and conclusive.¹⁾

Like the Commissioner's Court, the Divorce Court is a creature of statute, which has 'jurisdiction to hear and determine suits of nullity, divorce and separation between Blacks ... in respect of marriage and to decide any questions arising therefrom.'²⁾ Such questions would include disputes concerning the custody of children, maintenance and matrimonial property rights.³⁾ The Divorce Court has a concurrent jurisdiction with the Supreme Court to hear an action for nullity, divorce or separation where the parties are both Black and have married under the Common Law. However, the Divorce Court was specially created for Blacks⁴⁾ and the scale of costs applicable in this court is much cheaper than that applicable in the Supreme Court. Not insignificantly, Clayden J in the case of Mbelle⁵⁾ spoke of the 'determination to discourage litigants from the use of an expensive procedure where a cheaper one is available.' His Lordship then went on to point out⁶⁾ that -

'Just as any litigant is discouraged from proceeding in the Supreme Court when he can proceed in the magistrate's court by the likelihood that his costs will be limited, so the Black instituting proceedings for divorce ... is encouraged to use the special court which has been provided for such actions.'

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- 1) S 18 (2) Black Administration Act. But in terms of s 14 of the Act the Minister of Co-operation and Development may submit any decision of the Appeal Court for Commissioners' Courts to the Appellate Division of the Supreme Court where he has any doubts as to the correctness of its decision on a question of law. The resultant decision will be binding on all Commissioners' Courts and all Appeal Courts for Commissioners' Courts.
 - 2) S 10 Black Administration Act, 1927, Amendment Act, 9 of 1929. The Divorce Court was formerly known as the 'Bantu Divorce Court': s 17 (1) (k) Second Black Laws Amendment Act, 102 of 1978. There are three divisions of the Divorce Court: viz, the Southern Divorce Court in Kingwilliamstown; the North-Eastern Divorce Court in Pietermaritzburg; and the Central Divorce Court in Johannesburg.
 - 3) Seymour 31. If such custody, maintenance and property disputes are not raised in conjunction with a divorce action then the Commissioner's Court is the appropriate court to deal with any such question.
 - 4) Maimane 1931 WLD 99.
 - 5) 1947 (1) SA 782 (W) at 784.

The Black who has married under the Common Law who wishes to obtain a divorce has the choice of going to the Divorce Court or to the Supreme Court. It is clear that although the jurisdiction of the Supreme Court has not been ousted by the Divorce Court, the choice as to the forum in which a Black will launch his matrimonial action is going to be affected by the question of costs.

Not only do the Blacks have the right to choose the forum in which to launch any matrimonial action, but they also have the right to choose the form of their marriages: they may decide to marry either under the Common Law or under the Customary Law.¹⁾ The choice is entirely theirs. But whatever their choice, they are going to be bedevilled by problems of conflict of laws.²⁾ It is clear that we can no longer regard the Customary Law as a primitive system of law for primitive peoples. The way of life for the Black has experienced far-reaching 'social adjustments and upheavals' leading broadly speaking to the detribalization of the Black Man.³⁾ Yet, notwithstanding this fact old customs and traditions die hard with the result that, for example, it is not uncommon for Blacks to marry under the Common Law while, at the same time, giving expression to the customary system of lobola.⁴⁾ If, however, the marriage should fail and if the parties should bring their divorce action before the Divorce Court, the Divorce Court will not consider any question arising out of the lobola contract.⁵⁾ The proper forum for the disposal of any dispute on the lobola contract is the Commissioner's Court which is able to exercise its discretion in deciding whether to

1) Seymour 58-60; 92 ff; 237 ff.

2) Seymour 43-45 and see Bennett 'Conflict of Laws in South Africa: Cases involving Customary Law' (1980) 43 THR-HR 27.

3) Suttner 'Problems of African Civil Law Today' (1974) 78 DR 266, 267.

4) The custom of lobola is expressly declared by the proviso to s 11 (1) Black Administration Act not to be repugnant 'to the principles of public policy or natural justice.'

5) Mtiyane 1952 NAC 229 (N-E).

apply Customary Law so as to give effect to the custom of lobola.¹⁾ Finally the Supreme Court itself may deal with an action based on a lobola contract which was entered into in connection with a Common Law marriage.²⁾

Appeals from the Divorce Court are heard in the Supreme Court.³⁾ On the other hand, appeals from the Commissioner's Court are heard in the Appeal Court for Commissioners' Courts.⁴⁾

Finally, it may be mentioned that quite apart from the problem arising out of the fragmentation of jurisdiction in respect of Customary Law matters, the Black Man is confronted with two further difficulties: Firstly, the Customary Law is not always to be found in readily accessible form,⁵⁾ and, secondly, the Customary Law tends to vary from tribe to tribe.

Whether the proposed family court in South Africa should have a discretion to apply Customary Law is not an easy matter to decide upon. There are two possible avenues of approach. In the first place, the solution may be to make only the Common Law of South Africa applicable in the proposed family court. Thus, any family law problem falling within the ambit of Customary Law, but outside the field of the Common Law, would have to be dealt with by any of the courts described above which administer the Customary Law. The decision as to whether a matter properly falls to be determined by the

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- 1) S 11 (1) Black Administration Act. According to Kerr 'Roman-Dutch Law Marriages and the Lobola Contract' 1960 AJ 334 and 'Implied Lobola Contracts Ancillary to Roman-Dutch Law Marriages' 1963 AJ 49, where the parties have married under the Common Law any lobola contract should be regarded as being ancillary to the Roman-Dutch Law marriage contract. In other words, the lobola contract is a contract in Roman-Dutch Law which contains implied terms based on the Customary Law.
 - 2) Sigcau 1944 AD 67 and see Kerr 'The Application of Native Law in the Supreme Court' (1957) 74 SALJ 313.
 - 3) S 10 (5) Black Administration Act, 1927, Amendment Act, 9 of 1929.
 - 4) See above at 215.
 - 5) Kerr 13-14.

proposed family court, or by one of the courts outlined above, would have to remain with the proposed family court.¹⁾

It is doubted, however, whether this suggested solution will meet with much approval. It is a suggestion which is deceptively simplistic. The difficulties that are being sought to be avoided would in fact be perpetuated by the suggested solution. Thus, for example, the same Black family could find itself being subjected to the jurisdiction of both the proposed family court and one of the courts administering Customary Law. Thus, a dispute arising out of a lobola claim could fall to be determined by the Customary Law whereas a custody and guardianship dispute,²⁾ or a maintenance claim, could well fall within the jurisdiction of the proposed family court. A further problem could arise where one of the litigants wishes to have a matter settled by the proposed family court whereas the other litigant might wish to have the matter decided by one of the courts administering the Customary Law.

The second possible solution to the question whether the proposed family court should have a discretion to apply Customary Law is that it should have such a discretion. The only possible difficulty with this suggested solution is that the Customary Law is not always to be found in readily accessible form and it tends to vary from tribe to tribe. It is suggested, however, that this problem can be readily overcome by giving a judge of the proposed family court the discretion to appoint an assessor to assist him with any matters arising out of the Customary Law. In practice, this would only occur in rarely disputed family law cases which involve complicated and obscure points of Customary Law. Of course, the main advantage of the second suggested solution is that the proposed family court would be available to everyone in South Africa so that it would not assume an inferior status in the eyes of the largest section of the South African population.

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- 1) It must, of course, be remembered that any Black can bring any action before the Supreme Court: cf Sigcau 1944 AD 67.
 - 2) On the question of which system of law will apply in guardianship disputes see Kerr 'Does a Minor need two Natural Guardians in two Systems of Law to assist Him at the same Time?' (1965) 82 SALJ 487. See also Church 'Guardianship as an Incident of the Customary Law of Parent and Child - With reference to Transkei' (1979) 12 CILSA 326.

CHAPTER NINETHE COURTS AND THE BEHAVIOURAL AND SOCIAL SCIENTISTS¹⁾1. Introduction

The main purpose of this chapter is to show that there already exists in South Africa a reasonably sound foundation on which there is co-operation between the courts on the one hand, and the behavioural and social scientists on the other. It is the nurturing of, and strengthening of, this co-operation that lies at the root of a successful family court system.

For the purposes of this thesis a broad distinction is made between the medical profession on the one hand, and the behavioural and social scientists on the other. Broadly speaking, the medical profession includes not only the general medical practitioner but also the medical specialist and pathologist. Included within the broad description 'behavioural and social scientists' are psychiatrists, psychologists, probation officers, social workers and sociologists.²⁾

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- 1) 'Social workers and sociologists, as well as psychologists and psychiatrists, now and in the foreseeable future, will have a minimal impact on the law, including our areas of mutual concern. This is because law is a fickle mistress with many consorts, including religion, philosophy and history. To single out but one love of the law is to ignore her promiscuity. The behavioural sciences will have to compete with experienced rivals in courtroom and legislative chambers, and it is to be doubted that law ever will settle for one true love. Such is her nature.' - per Foster in his review of the 1966 edition of Foote, Levy and Sander in (1966) 42 NYULR 396, 398.
- 2) The broad distinction being made between the medical profession, and the behavioural and social scientist is an arbitrary one. In other contexts this would not be a valid distinction to make. Thus, for example, a psychologist and a medical practitioner are persons who are registered as such under the same piece of legislation; viz The Medical, Dental and Supplementary Health Service Professions Act, 56 of 1974 (see s 1). A psychiatrist is defined by s 1 Mental Health Act, 18 of 1973, as a person who is registered as such. It is to be noted that a psychiatrist falls within the ambit of s 32 (1) Medical, Dental and Supplementary Health Service Professions Act, 56 of 1974, which provides, inter alia, that 'The registrar /of the South African Medical and Dental Council/ shall ... establish and keep registers in which shall ... be entered particulars in respect of persons who are practising any profession ... which has as its object the treatment, prevention or relief of physical or mental defects, illnesses or deficiencies in man.' See also s 79 (12) Criminal Procedure Act where it is stated that a psychiatrist means a person registered as such under the Medical, Dental and Supplementary Health Service Professions Act.

2. The Medical Profession

There exists a long tradition of healthy co-operation between the courts and the medical profession, particularly in the field of delict and criminal law.¹⁾ Experience shows that as a general rule this co-operation and assistance on the part of the medical profession is freely given.

To a lesser extent, however, this co-operation is made necessary by the requirements of some or other statutory enactment. For example, section 12 (4) of the Children's Act provides that -

'A commissioner of child welfare may at any time direct that a protected infant or any such infant as is mentioned in paragraph (b) of subsection (1) of section eleven who is kept within his district,²⁾ be medically examined by the district surgeon, or any other qualified medical practitioner.'³⁾

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- 1) For example, in a delictual claim based on an assault, and in a criminal prosecution for an assault, medical reports are, more often than not, of crucial importance. So also, in drunken driving cases the opinion evidence of a medical practitioner is vital: see Cooper and Bamford 332-380. In murder prosecutions the evidence of a pathologist is generally considered indispensable.
 - 2) S 11 (1) (b) Children's Act deals with an infant which is being kept apart from its parents in circumstances believed on reasonable grounds to be prejudicial to its interests. See also s 20 Children's Act which makes provision for children alleged to be sick or filthy to be medically examined.
 - 3) For a further example see s 3 (2) Inquests Act, 58 of 1959, which provides that 'any magistrate to whom the death is reported shall, if he deems it expedient in the interests of justice, cause it /the body/ to be examined by the district surgeon or any other medical practitioner who may, if he deems it necessary for the purpose of ascertaining with greater certainty the cause of death, make or cause to be made an examination of any internal organ or any part or any of the contents of the body, or any other substance or thing.' See also s 25 (1) Compulsory Motor Vehicle Insurance Act, 56 of 1972, in terms of which a medical report in regard to the cause of death or the nature and treatment of the bodily injury in connection with a claim for compensation is absolutely essential.

3. Behavioural and Social Scientists

(A) Psychiatrists and Psychologists

The relationship between the courts and psychiatrists and psychologists has not always been consistently sound. It is only in comparatively recent years that psychiatry and psychology have made their impact as recognizable science. Statutory recognition is now accorded to the professions of psychiatry and psychology.¹⁾ Although psychiatrists and psychologists are newcomers to the modern scene their contribution to the development and shaping of our law has not been insignificant both in the area of statute and Common Law.

(i) Statute

The Mental Health Act, 18 of 1973, represents a recognition by the courts and the legislature of the important role that psychiatry and psychology have to play in the administration of justice.²⁾ Although the Mental Health Act generally obliges the alienist to

1) See above at 219 n 2.

2) The Mental Health Act must be considered against the background of the attempted assassination in 1960, and the assassination in 1966, of a former South African premier, Dr H F Verwoerd. In 1966 a one-man commission of inquiry under the chairmanship of Mr Justice J T van Wyk, a Judge of Appeal, was appointed to inquire into the circumstances of the assassination: see Report RP 16 of 1967. Also in 1966, a further commission under the chairmanship of Mr Justice F Rumpff, the present Chief Justice, was appointed to inquire 'into the responsibility of mentally deranged persons and related matters:' see Report RP 69 of 1967, hereafter referred to as the Rumpff Report. For a critical analysis of the Rumpff Report's criterion of responsibility where insanity is raised as a defence see Olmesdahl 'Furiosus Solo Furore Punitur' (1968) 85 SALJ 272. Arising out of a recommendation contained in the Rumpff Report [§ 12.42] a further commission of inquiry under the chairmanship of Mr Justice J T van Wyk was appointed to consider the revision of the Mental Disorders Act, 38 of 1916. The recommendations of this commission - see Report RP 80 of 1972 - eventually resulted in the promulgation of the Mental Health Act. It should be noted that when the Mental Health Act was promulgated, it left intact sections 27 to 29 bis Mental Disorders Act. These sections have, however, now been replaced by ss 77 to 79 Criminal Procedure Act in respect of which see below at 223-224.

work in close co-operation with the courts, it by no means follows that this always results in a harmonious relationship. This is especially because of the inclusion of psychopathic disorder in the definition of mental illness,¹⁾ since psychopathy has been described as 'one of the most controversial, misunderstood and misused concepts in the fields of psychology, psychiatry and law.'²⁾ Notwithstanding the differences of opinion that may arise between the courts and the alienist with regard to the concept of psychopathy, it is clear that the courts and the alienist will have to continue working in close contact and co-operation with each other. There is, accordingly, no room in this modern day for the outmoded suggestion that psychiatry is 'an empirical and speculative science with rather elastic notation and terminology, which is usually wise after the event.'³⁾

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- 1) S 1 Mental Health Act defines mental illness as 'any disorder or disability of the mind, and includes any mental disease, any arrested or incomplete development of the mind and any psychopathic disorder.' A psychopathic disorder is defined as a 'persistent disorder or disability of the mind (whether or not subnormality of intelligence is present) which has existed in the patient from an age prior to that of 18 years and which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient and psychopath has a corresponding meaning.' See Mnyanda 1976 (2) SA 751 (AD).
 - 2) Editorial (1976) 5 CPC 5. In Mnyanda (supra) where the definition of a psychopath is extensively discussed and criticized, Rumpff CJ concludes that psychopathy is a vague concept even in modern times. See also van Rooyen, Goldberg and Morris 'The Psychopath in South African Criminal and Mental Health Law' (1976) 9 CILSA 1 and the Report of the Committee of Enquiry into Psychopathy under the chairmanship of Professor A J van Wyk - Report RP 93 of 1967.
 - 3) Per van den Heever JA in Von Zell 1953 (3) SA 303 (AD) at 311 B: see also the Rumpff Report at ~~ss~~ 1.13 to 1.16.

The Criminal Procedure Act provides further evidence of the statutory co-operation between the alienist and the courts. Thus, section 79 prescribes the procedure to be adopted before an accused person can be declared a State President's patient under sections 77 and 78. In this regard, a distinction is made between an accused person facing a criminal charge in respect of which the death penalty may not be imposed and an accused person facing a criminal charge which carries a possible death sentence. As to the former situation an enquiry into the accused's mental condition shall be conducted 'by the medical superintendent of a mental hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court.'¹⁾ In the latter case, the appropriate enquiry must be conducted -

- '(i) by the medical superintendent of a mental hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;
- (ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State; and
- (iii) by a psychiatrist appointed by the accused if he so wishes.'²⁾

The rationale behind the procedure to be complied with before an accused person can be declared a State President's patient is explained by Rumpff JA (as he then was) in Mahlinza³⁾ as follows:

'Omdat 'n Hof elke geval voor hom volgens die feite en die medies-psigiatrisiese getuienis moet beoordeel, skyn dit my vir die Hof onmoontlik - en ook gevaarlik - te wees om te probeer om 'n algemene simpton te soek waaraan 'n

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- 1) S 79 (1) (a) Criminal Procedure Act.
 - 2) S 79 (1) (b) Criminal Procedure Act. The result of s 79 is that it gives statutory effect to the rule of practice that was previously recognized by the courts; namely, that properly qualified expert evidence by given before the court could declare an accused person a State President's patient. The dangers of a court finding that an accused person was suffering from a disease of the mind, whether temporary or permanent, without the assistance of medical-psychiatric evidence were revealed in Regional Magistrate du Preez v Walker 1976 (4) SA 849 (AD) at 854. See also Mahlinza 1967 (1) SA 408 (AD) at 417 F-G; Loyens 1974 (1) SA 330 (E); Trickett 1973 (3) SA 526 (T).
 - 3) 1967 (1) SA 408 (AD) at 417 F-G.

geestesversteuring herken kan word as 'n sieklike geestesversteuring. Dit kan alleen lei tot spekulasie deur Howe op 'n gebied aan hulle onbekend, nl. die psigiatriese gebied, waardeur die benadering van die feite van 'n spesifieke geval mediese-wetenskaplik onsuiver kan wees.'

(ii) Common Law

Apart from being instrumental in the shaping of some statutes, psychiatrists and psychologists have also contributed to the development of the Common Law. Thus, the defence of automatism clearly owes its existence to the researches of the alienist.¹⁾ For the defence of automatism successfully to be raised the evidence of an alienist is absolutely essential. The courts will not accept the accused's bald allegations that he could not remember the events in question.²⁾ The defence of automatism is further complicated by the fact that it may be classified either as insane automatism, in which event the accused would qualify for the special verdict in terms of sections 77 to 79 of the Criminal Procedure Act, or as sane automatism, in which

- 1) Burchell and Hunt 219-220; Howard 331. Automatism can be simply described as unconscious involuntary action which is not attributable to a disease of the mind.
- 2) In the case of Trickett 1973 (3) SA 526 (T) a young female, on her way to play squash, for no apparent reason suddenly swerved across the centre white line of the road and collided head-on with an oncoming car. The accused claimed that she had suffered a 'blackout'. The magistrate rejected the accused's claim and convicted her of negligent driving. The appeal against conviction and sentence was dismissed by Marais J largely on the basis that no 'medical' evidence had been led to support the accused's claim of sane automatism.

event the accused would be entitled to an acquittal.¹⁾

The distinction between sane and insane automatism was only fairly recently accepted by the Appellate Division in Mahlinza²⁾ as a valid one to make, and in this regard, the vital importance of the evidence of the alienist cannot be over-stressed. For example, in both Schoonwinkel³⁾ and Kumalo⁴⁾ the actions of the accused persons were attributed to epilepsy except that in Schoonwinkel the epilepsy was not attributed to a disease of the mind so that the accused was entitled to his acquittal,⁵⁾ whereas in Kumalo the epilepsy was due to a disease of the mind as a result of which the accused was declared a State President's patient.

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- 1) Sane automatism can arise in a number of different situations: eg as the result of a nightmare: see Dhlamini 1955 (1) SA 120 (T); Ngang 1960 (3) SA 363 (T); Ncube 1978 (1) SA 1178 (R) - or as the result of a state of amnesia or blackout: see du Plessis 1950 (1) SA 297 (O); Kruger 1958 (2) SA 320 (T); Botha 1959 (1) SA 547 (O); Ahmed 1959 (3) SA 776 (W) - or as the result of epilepsy: see Schoonwinkel 1953 (3) SA 136 (C); Mkize 1959 (2) SA 260 (N) - or as the result of involuntary intoxication: see Bourke 1916 TPD 303 at 307; Innes-Grant 1949 (1) SA 753 (AD) at 766; Johnson 1969 (1) SA 201 (AD) at 205, 206, 211; Gardener 1974 (1) SA 304 (R AD). In the case of Ncube 1978 (1) SA 1178 (R) it was accepted that the accused had acted mechanically to a dream picture as a result of which, without motive, intention or volition, he stabbed the deceased, his brother and with whom he was on affectionate terms. The action was described as a purely reflex action. Gubbay J, however, found that although the accused qualified for an acquittal under the Common Law, the accused's conduct was such as to qualify him for the 'special verdict' under the Rhodesian Mental Disorders Act, Chap 324.
- 2) 1967 (1) SA 408 (AD).
- 3) 1953 (3) SA 136 (C).
- 4) 1956 (3) SA 238 (N).
- 5) At 138G Steyn J correctly observed that 'not all epileptics are mentally disordered; it is only a person suffering from epilepsy who is a danger to himself or others or who is incapable of managing his own affairs.'

(iii) The Standing of Psychiatric and Psychological Evidence in the Courts¹⁾

Although there is much co-operation between the alienists and the courts, it does not necessarily follow that the courts will invariably accept the expert evidence of alienists.²⁾ There are numerous instances of the courts rejecting the evidence of psychiatrists and psychologists especially where those called by the defence do not agree with those called by the State. For example, in Harris³⁾ the evidence of a psychiatrist 'of high standing',⁴⁾ to the effect that the accused was suffering from a mental disease,⁵⁾ which precluded criminal responsibility, was rejected. It would be an over-simplistic approach to hold that the rejection of such expert evidence is based on a subconscious resistance by the courts to the views of psychiatrists and psychologists, especially where they appear on behalf of the defence.⁶⁾ However, in this regard, Ogilvie Thompson CJ stated that

'While the opinions in relation to psychiatric matters of so eminent an expert in that field as Professor Hurst naturally merit the closest attention, it must also be borne in mind that, not only are these opinions in large measure in direct conflict with those expressed by the two State psychiatrists,

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- 1) On expert evidence see generally Hoffman 78-86; Schmidt 331-336; Joubert Vol 9 420-430.
 - 2) Eg in Trickett 1973 (3) SA 526 (T) Marais J warned (at 536 G) that 'Defences such as automatism and amnesia require to be carefully scrutinized. That they are to be supported by medical evidence, although of great assistance to the Court, will not necessarily relieve the Court from its duty of careful scrutiny for, in the nature of things, such medical evidence must often be based on the hypothesis that the accused is giving a truthful account of the events in question.' See also H 1962 (1) SA 197 (AD) at 208; van Zyl 1964 (2) SA 113 (AD) at 120; Harris 1965 (2) SA 340 (AD) at 364.
 - 3) 1965 (2) SA 340 (AD).
 - 4) At 342 G.
 - 5) Which was described as 'manic ecstasy'.
 - 6) The evidence of Professor Hurst on the question of 'manic ecstasy' was really rejected because his diagnosis was based on facts which the court did not accept as true.

but also that, in the ultimate analysis, the crucial issue of appellant's criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrist, but by the Court itself. In determining that issue the Court - initially the trial Court; and on appeal this Court - must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period.¹⁾

This does not mean to say, however, that the courts only rarely accept the evidence of alienists: their evidence is, in fact, often heavily relied upon. In the case of Pratt,²⁾ where the court found the accused to be mentally disordered and declared him a State President's patient, the following experts gave evidence; namely, Professor Friedman of the Department of Forensic Medicine of the University of the Witwatersrand; Professor Hurst, Head of the Department of Psychiatry and Mental Health of the University of the Witwatersrand; Dr Chesler, a Johannesburg psychiatrist; Dr Jacobson,

1) Cf Lehnberg and Another 1975 (4) SA 553 (AD); Loubser 1979 (3) SA 47 (AD).

2) 1960 (4) SA 743 (T).

another Johannesburg psychiatrist; and Professor Lamont, Head of the Weskoppies Institution.¹⁾ The cumulative effect of this evidence indicated that the accused's mental condition was such that he could not stand trial.

One of the most recent examples of the court accepting psychiatric evidence is the case of Kavin.²⁾ Irving Steyn J had no hesitation in accepting the evidence of three psychiatrists who were unanimous in their findings that because of a 'progressive depression' the accused was not criminally responsible for the acts in question.³⁾

- 1) See also Rumpff Report §s 4.3 to 4.13 for details of the evidence of the psychiatrists involved in the trial of Pratt. Evidence was also led to show that Pratt had been treated previously in America by an authority on epilepsy. In the trial of Dimitrie Tsafendas, who assassinated Dr HF Verwoerd on the 6th September 1966, five psychiatrists, one psychologist and two physicians gave evidence. Among the psychiatrists to give evidence were the Professor of Psychiatry at the University of Pretoria, the Senior Psychiatrist of the General Hospital and the Deputy Commissioner for Mental Health: Rumpff Report §s 4.14 to 4.38. For an instructive account of the general reaction of our courts to psychiatric and psychological evidence concerning pathological mental disturbance see Rumpff Report §s 4.1 to 4.73. Among the cases reviewed are Kennedy 1951 (4) SA 431 (AD); von Zell 1953 (3) SA 309 (AD); Kruger 1958 (2) SA 320 (T); F 1960 (4) SA 27 (W); Harris 1965 (2) SA 340 (AD).
- 2) 1978 (2) SA 731 (W). Kavin's case is an early example of the implementation of ss 77-79 Criminal Procedure Act. In particular, Kavin's case is an example of the new approach to 'irresistible impulse' as provided for by s 78 (1) (b) Criminal Procedure Act. Prior to 1977 it was generally thought that 'irresistible impulse' was only concerned with the sudden flare-up situation as opposed to the gradual process of mental deterioration: Burchell and Hunt 207. It is clear that 'irresistible impulse' now includes behaviour following upon a gradual personality disintegration which results in mental illness.
- 3) Kavin had shot and killed his wife, his son and one daughter. The fourth count related to the attempted murder of his second daughter who survived the shooting but who was blinded for the rest of her life.

The leading of psychiatric and psychological evidence is not only confined to the pre-verdict stage but is also often led at the post-verdict and pre-sentencing stages of a criminal trial, especially in cases where the imposition of the death sentence is a real possibility. For example, in De Bruyn¹⁾ evidence of the accused's epilepsy and psychopathic tendencies was given by a social worker, a psychiatrist and a clinical psychologist. The purpose of this evidence was to prove the existence of extenuating circumstances. This, however, failed and the accused was sentenced to death.'

It is at this stage of the proceedings in a criminal trial that the evidence of the alienist is likely to carry less weight than would normally be the case. The reason for this is given by Ogilvie-Thompson JA (as he then was) in Nell²⁾ as follows:

'It must again be emphasised that the decision as to the existence or otherwise of extenuating circumstances is, in the first instance, essentially one for the Trial Court. It is well established that, in the absence of any misdirection or irregularity, this Court will not interfere with a Trial Court's findings as to the non-existence of extenuating circumstances unless that finding is one to which no reasonable Court could have come.'

The learned former Chief Justice then went on to say:³⁾

'Whether or not a convicted murderer's psychopathic personality is to be regarded as an extenuating circumstance falls to be decided by the Trial Court in the light of the facts of the particular case before it.'

1) 1976 (1) SA 496 (AD). See also Williamson 1978 (2) SA 233 (T).

2) 1968 (2) SA 576 (AD) at 580.

3) Ibid. See also Malinga and Others 1963 (1) SA 692 (AD) at 695 and Saaiman 1967 (4) SA 440 (AD) at 441.

Even after conviction and sentence, it may be possible to lead psychiatric evidence.¹⁾ The discretion whether to allow such further evidence to be called remains with the trial court. In the case of Lehnberg and Another²⁾, after conviction and sentence (both accused having been sentenced to death) leave under the provisions of section 363 (3) of the 1956 Criminal Procedure Act³⁾ was granted by the trial court for the calling of certain persons to testify in connection with the social, medical and psychological factors which could affect the moral blameworthiness of the two convicted persons. Those who gave evidence on behalf of the accused Lehnberg were a psychiatrist and a psychiatric social worker. On behalf of the second accused, Choegoe, seven experts gave evidence; namely, three doctors,⁴⁾ three professors and a female expert whose qualifications are not mentioned in the report. The head psychiatrist of the Valkenberg Hospital and a social worker gave evidence on behalf of the State. The trial court (Diemont J) held that on a balance of probabilities the accused Lehnberg was not a psychopath though it was accepted that she displayed some psychopathic tendencies. Although the Appellate Division⁵⁾ disagreed with the trial court's view that what was required before Lehnberg's mental condition could be regarded as a factor in extenuation was ' 'n soort van geestelike onweerstaanbare dwang,'⁶⁾ it did point out⁷⁾ that

1) S 316 Criminal Procedure Act.

2) 1975 (4) SA 553 (AD).

3) Now replaced by s 316 (3) Criminal Procedure Act. See also Loubser 1979 (3) SA 47 (AD).

4) At 558 B-C. It does not appear from the report whether they were psychiatrists or psychologists.

5) Rumpff CJ (Muller and Galgut JJA concurring).

6) At 559 B.

7) At 559 G-H.

'dit nodig [is] om op te merk dat die vraagstuk van psigopatie as versagtende omstandigheid met groot omsigtigheid behandel behoort te word omdat dit anders maklik sou wees om daardeur die leerstuk van die determinisme by die agterdeur in ons strafreg in te bring. 'n Volwaardige psigopaat mag miskien 'n aangebore en verworwe swakheid hê maar hy sal nie 'n vrou in die publiek probeer verkrag nie. In dié opsig verskil hy nie van 'n persoon met sterk seksdrange, wat geen psigopaat is nie, en wat ook nie 'n vrou in die publiek sal probeer verkrag nie. Aan die ander kant is dit moontlik dat 'n psigopaat in sekere gevalle nie in staat is om dieselfde weerstand te bied as wat volkome normale persone sou kon bied nie en dan sou in sulke gevalle die swakheid tereg as 'n versagtende omstandigheid in aanmerking geneem kon word.'

The most recent case in which an application under section 316 (3) of the Criminal Procedure Act was made is the case of Loubscher.¹⁾ The evidence that was sought to be led concerned the little known disease, Huntington's Chorea.²⁾ The application failed because there was no apparent effort on the part of the experts to connect the mental condition of the accused with the full particulars of the crime

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- 1) 1979 (3) SA 47 (AD). The unusual feature of Loubscher's case is that the application to lead further expert evidence was made direct to the Appellate Division - at 54 G-H.
- 2) Huntington's Chorea is described at 56 C-D as follows: 'It is an hereditary nervous system disease which has its onset in adulthood. It frequently presents as a social problem with anti-social behaviour, change in personality and promiscuity. In the initial stages of this disorder it is not often easily recognizable as such. After a few years, however, characteristic abnormal movements develop which are severe, incurable and progressive. In fact, this disease is characterised by irregular spasmodic involuntary movements of the limbs and facial muscles, including speech disturbances. The abnormal muscular movements are also associated with mental deterioration. This progresses gradually until the unfortunate person afflicted with this disorder loses his intelligence, becomes demented and incontinent and death usually occurs within 10 to 15 years of onset of the disease.'

committed. In this regard, Rumpff CJ said¹⁾

'Vir 'n Hof is die werklike motief waarmee 'n moord gepleeg word van allergrootste belang wanneer die toerekeningsvatbaarheid van die moordenaar oorweeg moet word. Nietemin het nie een van die deskundiges ... hom uitgespreek oor die feit dat die beskuldigde twee maal erken het aan 'n landdros dat hy die oorledene doodgemaak het omdat sy hom sou herken het, 'n motief wat nie, volgens die getuienis voor hierdie Hof, iets met Huntington-chorea te doen het nie.'

The learned Chief Justice then concluded,²⁾ by setting out the respective roles of the courts and the alienist, as follows:

'Die kritiek wat op die getuienis van die deskundiges in hierdie saak uitgespreek is, moet gesien word in die lig van die begeerte van die juris dat daar samewerking behoort te wees oor die probleem van toerekeningsvatbaarheid en aanspreeklikheid in verband met 'n misdaad tussen die juris aan die een kant, en die psigiater of die sielkundige of die neuroloog aan die ander kant, met erkenning van mekaar se grondliggende benadering en probleme ... Hiervolgens rus daar 'n plig op die juris sowel as op die geestesdeskundige en dit is die plig van 'n geestesdeskundige om in 'n strafsak nie slegs algemene opinies uit te spreek nie, wat miskien op mediese gebied as verantwoord beskou kan word, maar om sy opinies te lewer met behoorlike inagneming van wat die taak van 'n verhoorhof is by die toepassing van die strafreg en veral by die oorweging van toerekeningsvatbaarheid en strafregtelike aanspreeklikheid.'

1) At 60 F-G.

2) At 61 B and 61 E-F.

In the light of the above review of some of the relevant case law, it is respectfully submitted that the present standing of psychiatric and psychological evidence in the courts is best summed up in the Rumpff Report¹⁾ as follows:

'It is clear that the courts usually accept well-grounded and responsible evidence from psychiatrists. It is also evident that the testimony of psychiatrists is not accepted (i) when the court does not accept the facts upon which the psychiatrist based his diagnosis; and (ii) when the psychiatrist's conception on non-responsibility in a particular case does not agree with that of the court. In the latter group of cases this usually happens when a psychopath is involved who, it is contended, could not control his emotions. The courts obviously recognize the possibility that a psychopath's mental condition may be such that he must be deemed to be not criminally responsible as a result of a morbid mental disorder, but, in the absence of convincing facts, the courts are not disposed to return such a verdict.'

1) At § 4.73.

(B) Probation Officers

Reference has already been made¹⁾ to the fact that a criminal court dealing with a juvenile offender is often placed in the dilemma of having to decide whether to refer a juvenile accused to the Children's Court²⁾ or whether to deal with him in the ordinary criminal courts.³⁾ The report of a probation officer is accordingly of crucial importance.⁴⁾ Probation officers are regarded as officers of every Children's and Magistrate's Court and they receive their appointment from the Minister of Social Welfare and Pensions.⁵⁾

(i) Probation Officers in Juvenile Criminal Courts

The functions of a probation officer in a juvenile criminal court are:

'(a) to enquire into and report to the court or magistrate upon the character and environment of children or persons under the age of twenty-one years on trial before that court or undergoing preparatory examination before that magistrate and into and upon the causes and circumstances contributing to the delinquency of such children or persons ... ;

1) See above at 202.

2) S 254 (1) Criminal Procedure Act: see 202 above.

3) S 290 (1) Criminal Procedure Act: see 203 above where s 290 (1) is cited.

4) Zungu 1962 (1) SA 377 (N); Yibe 1964 (3) SA 502 (E); A and Others 1976 (3) SA 144 (C); D 1977 (1) SA 759 (C); L 1978 (2) SA 75 (C): see above at 205-208 where these cases are discussed. Midgley 130-131, however reports that a social enquiry report at an early stage of the criminal trial of a juvenile is very rarely called for. If an early report is called for it is only because the court wishes to have some information on the juvenile offender's background before deciding whether to transfer the case to the Children's Court.

5) S 57 Children's Act.

(b) to devise and carry out measures for the observation and correction of tendencies to delinquency in children and for the discovery and removal of conditions causing or contributing to juvenile delinquency;

(c) to supervise or control any child or person convicted of an offence and placed under the supervision of the probation officer;

(d) to perform such other duties as may be imposed upon them by this Act or any other law or by the Minister.¹⁾

Insofar as the courts are concerned, there has been an emphasis on the important role that probation officers have to play in the administration of juvenile criminal justice. For example, in Adams²⁾ Steyn J, after reviewing at length the importance of pre-sentencing reports and the role of probation officers in the United States and England, concluded³⁾ with the following words:

'Ek het met opset vollediglik verwys na die rol wat 'n proefbeampte se verslag as 'n hulpmiddel vir die Hof kan speel by straftoemeting. Ek het dit met opset gedoen omdat hierdie Hof die mening toegedaan is dat hy al hoe meer, as dit kom by die uitoefening van sy plig om die gemeenskap te beskerm en die individu te straf, sy vonnis in die lig en nie in die duisternis moet oplê nie. 'n Behoorlik saamgestelde voorvonnisverslag is heelvaarskynlik die belangrikste enkele faktor wat die Hof kan help om op sodanige wyse sy straftoemetingsplig te vervul.

1) S 58 (1) Children's Act, 33 of 1960. On the relationship generally between the juvenile court and probation officers see, inter alia, Motsoaledi 1962 (4) SA 703 (O) at 704 G-H; Mkwanazi 1969 (2) SA 246 (N); Barry and Chanaly 1973 (4) SA 424 (R AD) at 426 (F-G); Jansen and Another 1975 (1) SA 425 (AD); Hlongwane 1975 (4) SA 567 (AD).

2) 1971 (4) SA 125 (K).

3) At 131 D-E.

Ek onderskryf veral die feit dat, wat my aanbetref, die Hof vir leiding soek en dat as hy betekenisvolle aanbevelings gebaseer op gegronde feite van proef-beamptes beskikbaar kan hê die Hof sy pligte op 'n baie beter en doeltreffender wyse sal kan uitoefen.¹⁾

Earlier²⁾, his Lordship had drawn attention to the fact that it happened all too often that 'heelwat tyd is in die ... hof bestee om uit te vind of ... [die] kind skuldig was ... ; geen tyd hoegenaamd is bestee om uit te vind wat vir hom 'n geskikte straf behoort te wees nie.' The learned judge's comments would appear to be well-founded. In 1968 Midgley, in a penetrating analysis, reviewed all the cases dealt with in the juvenile criminal court in Cape Town during that year.³⁾ He found⁴⁾ that although the probation services were being more frequently called upon to undertake pre-sentence investigations into the background, circumstances and needs of young offenders, in fact such reports were only called for in 65 (or 11,3 per cent) of the cases

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- 1) See also H and Another 1978 (4) SA 385 (E) at 386 C-E, where Smalberger J said: 'The purpose of a probation officer's report is to provide a court with all available information which will assist in understanding the problems of the juvenile being dealt with, thereby enabling the court to determine an appropriate punishment in all the circumstances ... The probation officer's recommendation is merely an expression of opinion for the guidance of the court. Where necessary, it must be tested and subjected to critical analysis. The ultimate responsibility for the determination of a proper sentence rests with the presiding judicial officer. In order to exercise his discretion in this regard he must apply his mind judicially to all relevant considerations affecting sentence. He must not slavishly follow the recommendation of the probation officer, and merely substitute the latter's view for his own'. Cf Harvey 1977 (2) SA 185 (O) at 189 A-C.
- 2) At 127 E-F.
- 3) In all, 898 cases were heard in the juvenile criminal court in Cape Town in 1968: see Table 3.5 at 91 where these cases are analysed and categorized according to age, sex and ethnic origin.
- 4) At 129-130.

in which the accused were convicted.¹⁾

Notwithstanding the desirability of calling for pre-sentence investigatory reports, the practice is only to call for such reports in the more serious cases.²⁾ There is no statute or precedent which places upon the court the legal obligation to call for such reports in all cases involving juvenile offenders. Thus, for example, in Hlongwana,³⁾ Rumpff CJ, after referring to the practice of calling for a pre-sentence investigatory report on a convicted juvenile, especially in serious cases, proceeded to add⁴⁾ that -

'Ek ... wil beklemtoon dat die feit dat 'n Verhoorhof nie 'n verslag van 'n proefbeampte ingewin het nie, nie in elke geval en outomaties 'n geldige rede skep om 'n opgelegde vonnis tersyde te stel nie. Ek dink nie dit was die bedoeling om so 'n reël in die lewe te roep nie omdat dit in elke besondere geval sal afhang van die ouderdom van die beskuldigde en van ander relevante feite wat reeds deur getuienis geopenbaar is, of 'n verdere verslag behoort te vra of nie.'

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- 1) It is clear that the fact that only 15% of White juvenile offenders are legally represented is further evidence of the value of a probation officer's pre-sentence report. It is also clear that in reality the role of the legal practitioner in the juvenile criminal courts is limited, especially when Black juvenile offenders are involved since even fewer of them are legally represented. Cf Gericke 'Die Professionele Verhouding tussen die Regspraktisyn en die Maatskaplike Werker' Golden Jubilee Report (1974) Vol 3, 104-111.
- 2) Motsoaledi 1964 (4) SA 703 (O) at 704 G; Mkwanazi 1969 (3) SA 246 (N); Adams 1971 (4) SA 125 (C) at 127; Jansen and Another 1975 (1) SA 425 (AD); Hlongwana 1975 (4) SA 567 (AD).
- 3) 1975 (4) SA 567 (AD).
- 4) At 571 A.

It is entirely in the discretion of the court as to whether to call for a probation officer's report or not.¹⁾ If a report is not requested, it would seem that the chances of a juvenile offender being referred to a Children's Court to be dealt with as a 'child in need of care' are relatively slim. In this event, a youthful offender will in all probability be dealt with in the ordinary criminal courts and released without any further contact with social workers or probation officers. Midgley²⁾ reports that in 1968 in Cape Town most of the juvenile offenders sentenced in the juvenile criminal court were dealt with in this way.

On the other hand, the evidence led at the trial of a juvenile offender may be such as to convince the presiding judicial officer, without the necessity of a social welfare enquiry report, that the juvenile offender should be more appropriately dealt with by the Children's Court as a 'child in need of care.'³⁾

The end result is that there is an under utilization of probation officers and other welfare officials by the courts. This is particularly manifest in the treatment of, and sentencing of, juvenile offenders. One of the reasons frequently cited for this under-utilization is the staff shortages in the social work services, and the weighty case loads that existing staff have to carry. Midgley,⁴⁾ however, doubts whether this is a plausible enough reason for the courts failing to make more use of the welfare services - at any rate, in the Cape Town metropolitan area where, in 1968, there were 3 social work training schools and numerous voluntary agencies with specific child welfare interests. He suggests⁵⁾ that:

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- 1) It may be mentioned, however, that in certain circumstances the court has no discretion but to call for a probation officer's report. Thus, for example, the court is obliged to call for a probation officer's report before it can commit a person to an institution in terms of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, 41 of 1971: see Dalton 1978 (3) SA 436 (O).
 - 2) At 131.
 - 3) Midgley 137. Cf Hlongwana 1975 (4) SA 567 (AD) at 571A.
 - 4) At 139-140.
 - 5) Ibid.

'the supposed integration of the philosophies of criminal procedure and social welfare in the form of juvenile justice is in reality unworkable ... The failure to produce a synthesis in these two antithetical elements is well illustrated in the South African juvenile court.'

It is submitted that there is much substance in the contention that such integration is, in practice, unworkable. Furthermore, such integration should not be seen as the ideal. The separate functions of the courts and probation officers should always be kept in mind. The failure to recognize their respective functions can only result in disappointment for those who see the working relationship between the courts and probation officers only in terms of integration rather than co-operation.

An appreciation of the different functions that the courts and probation officers have to play in the administration of juvenile justice goes a long way towards understanding why a court is sometimes constrained to disregard the recommendations of a probation officer.¹⁾ There are, in fact, a number of reasons why the courts may disregard the recommendations of a probation officer; namely,

(a) the probation officer is essentially concerned with the interests of the juvenile offender whereas the courts are obliged to have regard to the broader interests of society as a whole.²⁾ This

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- 1) An example of where the court chose to ignore the recommendations of a probation officer is Yibe 1964 (3) SA 502 (E). Cf Zungu and Another 1962 (1) SA 377 (N) and H and Another 1978 (4) SA 385 (E).
- 2) See Adams 1971 (4) SA 125 (K); Hlongwana 1975 (4) SA 567 (AD); H and Another 1978 (4) SA 385 (E): cf Harvey 1977 (2) SA 185 (O) where an experienced police officer differed with the probation officer over the question of whether an accused had been rehabilitated. In the course of his judgment M T Steyn J said (at 189A-C) 'Waar sekere belangrike aspekte rakende straftoemeting gedek word en behandel is deur die getuienis van 'n proefbeampte en van ander getuies en daar 'n botsing is tussen daardie stelling getuienis moet die aangeleentheid sorgvuldig van alle kante oorweeg word, en volg die nie noodwendiglik dat dié van die proefbeampte aanvaar moet word nie. Proefbeamptes in diens van die Departement van Volkswelsyn is spesialiste op hul gebied en lewer daagliks waardevolle getuienis in geregshoue, onder meer ten aansien van die moeilike taak van vonnisbepaling, maar, soos ook in die geval van ander deskundiges, is die hof nie aan hulle getuienis en menings gebonde nie, want die verhoorhof moet al die gelewende getuienis evalueer, self tot sy eie bevindings raak, en straf daarvolgens toemeet.'

may account for the reason why the recommendations of a probation officer may sometimes appear to a court to be unrealistic;¹⁾

(b) the reports of probation officers are often drawn up on the basis of hearsay, or other inadmissible, evidence and it is for this reason that the courts sometimes are suspicious of any recommendations made by a probation officer.²⁾ There is a statutory duty cast upon a court in a criminal case to ensure that a probation officer's report does not infringe any of the rules relating to the admissibility of evidence;³⁾

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- 1) Cf Smith and Woollard (1978) 67 Cr App Rep 211. At 213 Lawton LJ made the following trenchant comments: 'The court was surprised that a probation officer should recommend that an offence of this gravity should be dealt with by a fine particularly as Smith had been out of work for some time and the wages he was getting as a result of the employment which he had found a week before the trial were on the low side.' /The accused had been convicted of a burglary which was committed at a time when they were on bail for an offence of dishonesty/. Lawton LJ continued to add /ibid/ that 'For many years now the courts have encouraged probation officers to make specific recommendations ... Recommendations by probation officers can be very valuable indeed but they are not likely to be of much value if they are not realistic. Mr Devlin /the probation officer/ was in Court and was asked to explain why he thought a fine was an adequate sentence for a youth who had joined with others in turning a house upside-down and stealing a considerable amount of property. He told us he was concerned about the future of this young man. He may be. This Court is concerned about the security of citizens' houses and it is with regard to that object that the Courts have to decide what should be done in this class of case.' Smith, in a commentary on Smith and Woollard's case in /1978/ Crim L R 758, 759, suggests that Lawton LJ misconstrued the functions of a probation officer whose duty 'is to recommend what he or she thinks is most appropriate for the individual, without having regard necessarily to the public consequences.' See also Harris 'Recommendations in Social Inquiry Reports' /1979/ Crim L R 73.
- 2) Cf the views of magistrate Fourie 'Wetlike Optrede as Ouers Faal' Golden Jubilee Report (1974) 76, 79-81.
- 3) See the proviso to s 57(1)(a) Children's Act: see also Agus 1970 (2) SA 25 (NC) at 26-27.

(c) the close relationship which a probation officer must perforce form with the accused often inhibits him from giving expression to his genuine impressions.¹⁾ Thus a probation officer often finds himself in a dilemma. If he recommends, for example, that the accused be sent to reformatory but the court disregards this recommendation and, instead, orders that the accused be placed under the supervision of a probation officer for a given period of time, it is clear that the accused will harbour some resentment against the probation officer with the result that the after-care treatment is hardly likely to succeed. On the other hand, the probation officer may adopt a softer approach and recommend that the accused be placed under the supervision of a probation officer, or that he receive a fine by way of a sentence. However, should the court, instead, sentence the accused to a period of imprisonment, the youthful offender may develop an over-powering feeling of having been let down. During the course of his enquiries, questions such as 'are you going to give my boy a good report?' and 'are you going to recommend a lenient punishment?' are commonly asked of the probation officer. His response and attitude to such questions will clearly determine the degree of response and co-operation he will receive from the accused and his family;

(d) following on from the above, it is not unusual to come across attempts to mislead the probation officer so as to influence his recommendations. No doubt, some attempts to mislead the probation officer do succeed.²⁾ That is all the more reason for testing the validity of a probation officer's recommendations against the evidence that is before the court and of which the probation officer may not have been aware;

1) Harris 'Recommendations in Social Inquiry Reports' [1979] Crim L R 73, 79.

2) Harris 'Recommendations in Social Inquiry Reports' [1979] Crim L R 73, 77, mentions a report of a probation officer which convincingly demonstrated how the accused's early life had led him to commit the crime he was charged with. After conviction and sentence it was discovered that the accused was an army deserter who had supplied wholly fictitious particulars to the probation officer.

(e) finally, the standing and experience of the probation officer producing the report may also influence the court in deciding whether to accept or reject the recommendations made.¹⁾

(ii) Probation Officers in Childrens' Courts

Probation officers derive their powers and duties from the Children's Act. Thus section 26 (1) of the Act gives the probation officer the power to remove a child from any place to a place of safety if he believes the child to be in need of care. Section 30 (1) of the Act also gives him the power to bring a child alleged to be in need of care before the Children's Court. Under section 31 (2) of the Children's Act a probation officer may be appointed to supervise 'the protection, welfare and reclamation of children.'²⁾ A discretionary duty is cast upon a probation officer by s 31 (5) of the Act to furnish the commissioner of child welfare with a report on the welfare, progress and behaviour of children placed under probation. Reports of a probation officer are also required to be submitted to the Minister of Pensions and Social Welfare in respect of children in any person's custody, other than the custody of their parents or guardians, on the expiration of the first two years of such custody, and thereafter every succeeding year of such custody.³⁾

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- 1) In Zungu and Another 1962 (1) SA 377 (N) the magistrate did not even bother to call for a probation officer's report because he knew that the probation officer in his district was 'untrained and inexperienced in the functions of a probation officer'.
 - 2) It should, however, be noted that the function of a probation officer under s 31 (2) is a limited one. Thus, his function is merely to supervise the exercise, by the person in whose custody the child has been placed, of the powers of control and custody of the child. According to the case of van Schoor 1978 (2) SA 600 (AD) at 610 G nowhere does the section give the probation officer powers which are vested in the Supreme Court such as defining the rights of access of the non-custodian spouse.
 - 3) S 46 bis Children's Act.

But the valuable role that a probation officer has to play in the administration of juvenile justice is no better illustrated than in the Children's Court when it is dealing with a child alleged to be in need of care.¹⁾ In order to arrive at a proper decision on the question of whether a child is in fact in need of care the report of a probation officer is of cardinal importance.²⁾ Thus, the fact that in the 1973-1974

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- 1) In terms of s 1 (X) Children's Act, a child in need of care is defined as a child who -
- '(a) has been abandoned or is without visible means of support; or
 - (b) has no parent or guardian or has parents or a parent or guardian who do or does not or are or is unfit to exercise proper control over that child; or
 - (c) is in the custody of a person who has been convicted of committing upon or in connection with that child any offence mentioned in the First Schedule to this Act; or
 - (d) cannot be controlled by his parents or guardian or the person in whose custody he is; or
 - (e) is an habitual truant; or
 - (f) frequents the company of any immoral or vicious person, or is otherwise living in circumstances calculated to cause or conduce to his seduction, corruption or prostitution; or
 - (g)
 - (i) begs; or
 - (ii) being under the age of 12 years engages in any form of street trading /without the necessary authority/; or
 - (iii) being not under the age of 12 years but under the age of 16 years engages in any form of street trading /in contravention of the bye-laws of the local authority/; or
 - (h) is being maintained apart from his parents or guardian in domestic circumstances which are detrimental to his interests and whose parents or guardian cannot be found or have failed to make suitable provision for the care and custody of the child although they have been called upon to do so; or
 - (i) is in a state of physical or mental neglect.'
- 2) Where the interests of a child alleged to be in need of care are involved, the probation officer is not the only official concerned with the proceedings. Indeed, anyone involved in the interests of a child is invited to participate in the proceedings - social workers, psychologists, the parents and even the child himself: see generally Midgley 132-133. Social welfare officers of approved agencies also have an important role to play in Children's Courts: cf s 9 (3) Children's Act. It should be noted, however, that unlike probation officers such social welfare officers are not officers of the court and their reports are, accordingly, not admissible in evidence without the approval of the court: Pautz v Horn 1976 (4) SA 572 (0) at 574 E. It would seem that the proper course would be for social welfare officers to give their evidence orally and not on affidavit.

period a total of 3 210 White children in South Africa were found to be in need of care¹⁾ is stark testimony to the value of a probation officer's report. Furthermore, the fact that only 5% of the White children appearing in Childrens' Courts have legal representation²⁾ means that the commissioner of child welfare must perforce rely heavily on the report of a probation officer. In this regard, Marais J in Napolitano v de Wet NO and Others³⁾ said

'The need for reports by probation officers is self-evident. Before the parents, guardian or custodian of a child who may be in need of care are traced and brought before the court, it may be vitally important to collate, consider and even act upon whatever information is available. Probation officers are employed, inter alia, for collecting such information.'

As to the probative value of such reports, his Lordship continued to add⁴⁾ that:

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- 1) 1974 (2) Hansard Vol 53 Col 76. It has not been possible to obtain the figures for children belonging to other population groups.
 - 2) Gericke 'Die Professionele Verhouding tussen die Regspraktisyn en die Maatskaplikke Werker' Golden Jubilee Report (1974) 104-111.
 - 3) 1964 (4) SA 337 (T) at 343 G-H.
 - 4) Ibid.

'This does not ... mean that their reports are to be relied upon in court if better evidence is available, and as I understand the practice in inferior as well as superior courts such a report is superseded by direct evidence on oath whenever its contents are challenged and better evidence is made available. But ... a children's court may ... act on hearsay and otherwise inadmissible evidence and, therefore, rely on probation officers' reports, when better evidence cannot be obtained without undue delay or inconvenience.'¹⁾

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- 1) Cf Napolitano v Commissioner of Child Welfare Johannesburg 1965 (1) SA 742 (AD) at 745 G where Holmes JA said 'A/n enquiry under s 30, to determine whether a child is in need of care, is a much more informal proceeding than that relating to an application for adoption under s 71; and different issues are involved.' Certainly, the rules of evidence in a Children's Court are not as restrictively applied as in a juvenile criminal court.

4. Matrimonial Litigation

The basis for healthy co-operation between the courts and behavioural and social scientists is to be found in sections 6 (1) and (2) of the Divorce Act; namely,

'(1) A decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances.

(2) For the purposes of subsection (1) the court may cause any investigation, which it may deem necessary, to be carried out and may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance.'

It is submitted that the above investigation may be carried out not only by a social worker, but also by a psychiatrist, a medical practitioner or psychologist. In this regard, Mr Justice Margo of the Transvaal Provincial Division is reported as having said:¹⁾

'The judge is not a child psychiatrist or a trained social worker. His duty, within his limitations, is to judge the issues, to weigh the evidence, and to decide the question within the requirements of the law and on the basis of human wisdom and experience and to endeavour to reach the fairest, most practical and most benevolent solution to the family problem of custody. In many cases today a welfare report has become an indispensable requirement.'

1) In an address to the School of Social Work, University of the Witwatersrand, which is cited by Gericke 'Die Professionele Verhouding tussen die Regspraktisyn en die Maatskaplike Werker' Golden Jubilee Report (1974) 104, 110.

Reference has already been made to the number of children involved in divorce litigation.¹⁾ What is disturbing, however, is the fact that between 55% and 60% of the marriages that end in divorce, do so in the first five years of marriage.²⁾ This must inevitably mean that most of the children involved in divorce proceedings are at an age where a proper decision as to their custody is of crucial importance to their future well-being: a decision which cannot be lightly undertaken without a proper appraisal of all relevant considerations. Yet, notwithstanding the limitations of the judiciary in this regard, it is only in exceptional cases that a welfare report on the interests of minor children involved in divorce is called for.³⁾

It is, accordingly, difficult to accept that our courts are in a position to give adequate expression to the best interests of children on divorce.⁴⁾ The inability to give true expression to

1) See above at 164-167.

2) According to Trengove JA in an address entitled 'Die Howe se Rol by Egskeiding' Golden Jubilee Report (1974) 96, 102. The text of this address is reprinted in (1975) DR 259.

3) An example of where the courts called for a welfare report into the circumstances relative to the custody dispute over a minor girl is Pautz v Horn 1976 (4) SA 572 (O). But, an application to place before the court a further report of a probation officer, as well as a report by a social worker and also the record of an enquiry by a Children's Court, failed notwithstanding the fact that the opposing party had raised no objection thereto.

4) See above at 164 and cf Trengove JA 'Die Howe se Rol by Egskeiding' Golden Jubilee Report (1974) 95, 102 - 'Wanneer die hof oor die toesig en beheer van die kind moet beslis, moet die hof vasstel wat in die beste belang van die bepaalde kind sal wees. Dit is die deurslaggewende oorweging. Maar onder ons huidige stelsel, veral soos dit in die Transvaal geld, kan die hof, na my mening, hierdie belangrike plig nie behoorlik uitvoer nie.' Cf Olmesdahl 'The Rights of Children on Divorce' 1980 DR 481. Further on the best interests of children on divorce see below at 301 n 2.

the best interests of children on divorce can be attributed, according to Trengove JA¹⁾ (in the Transvaal at any rate), to the following factors:

(a) the high number of divorce actions which in the Transvaal is higher than any other province;²⁾

(b) in undefended actions the parties usually enter into consent papers concerning, inter alia, the custody and maintenance of any minor children and which the courts, generally without question, incorporate in the final orders of divorce.³⁾ Only in rare cases are there an official report before the court concerning the circumstances and particulars of the parents and the minor children;

(c) when a judge is faced with a motion court roll of between 60 and 90 divorce actions, as is often the case in the Transvaal, he cannot devote more than 3 to 5 minutes to any single case. It follows that a judge cannot give his full attention to the question of what is in the best interests of the minor children involved.⁴⁾

It is submitted that there is much substance in the above view of Trengove JA that the courts are simply not in a position to give proper expression to the best interests of the children on divorce. This is not the first occasion that a judge of appeal has drawn attention to this situation. Thus, even as far back as 1947 Schreiner JA had the following pertinent comments to make in Fletcher,⁵⁾ namely,

1) Op cit at 103.

2) Out of a total of 12 037 divorce orders granted in 1976 in the Republic of South Africa, 6 204 final orders of divorce were granted in the Transvaal alone: 1976 Report on Marriages and Divorce in South Africa: Report 07-02-10.

3) Generally speaking, the courts do not lightly interfere with the provisions contained in a consent paper save in exceptional circumstances: Spiro 254 and the authorities there cited. As most divorce actions are undefended the courts generally assume that the parents, in their negotiations leading up to the drafting and signing of consent papers, have properly taken the interests of any minor children into account. But see Olmesdahl 'The Rights of Children on Divorce' 1980 DR 481.

4) See also 168 n 2 above.

5) 1948 (1) SA 130 (AD) at 145-146.

'I/n such undefended cases, unless the court has some reason to doubt the plaintiff's capacity to look after the minor offspring of the marriage, an order granting him/her custody will usually follow as a matter of course upon the main order. The court has ordinarily in such cases no material from which to judge whether the children would be better off with the plaintiff or with the defendant beyond the fact that the latter has not taken the trouble to claim custody.'¹⁾

There are three possible solutions to the apparent inability of the courts to give adequate expression to the true interests of minor children involved in divorce litigation; namely,

(1) such children ought to have separate legal representation. In this regard, Olmesdahl²⁾ expresses himself as follows:

'He [the judge] cannot ignore the fact that the agreement as to custody in a consent paper may be a compromise between maintenance and custody claims, with a child a mere pawn. The court can protect the child's interests only after adequate investigation. Does this not mean that the child is an indispensable party to the proceedings and that his interests (which may conflict with those of parents) can only be established by counsel representing him?'³⁾

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- 1) Emphasis supplied. Despite the lack of adequate material from which the best interests of minor children can be assessed, it was recognized by Centlivres CJ in the same case (at 134) that 'what is really in issue in all custody cases is the interests of the child itself.' Cf Bailey 1979 (3) SA 128 (AD). See also Hahlo 459 and the authorities cited at n 19.
- 2) In his review of the 4 ed of Hahlo (1975) in (1976) 93 SALJ 232 at 243.
- 3) Cf Murch 'The Role of Solicitors in Divorce Proceedings' (1978) 41 MLR 25, 35 - 'Solicitors representing divorcing parents do not see it as their place to interview children ... It is not always realized by lawyers or litigants that to concentrate attention on one member of the family to the exclusion of the others is to risk over-simplification and bias, which, when acted upon, may weaken the complex emotional ties that link all family members even when a marriage is no longer viable. Many lawyers have become so bonded to the adversary system that it is not easy for them to appreciate this point.' See also Olmesdahl 'The Rights of Children on

It is, of course, true that section 6.(4) of the Divorce Act permits the court to 'appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.' This, however, is only a permissive provision and is not framed in peremptory terms. It is doubted whether, in practice, this provision will be invoked to any great extent.¹⁾

It is significant to note that the call for the legal representation of children in divorce proceedings has been made not only in South Africa, but also elsewhere. Thus, for example, Payne²⁾ has opined for the view that a lawyer should be attached to the court to act, as the occasion arises, as an amicus curiae. Payne does not envisage the lawyer's services being used in all cases where minor children are involved but only in such cases as the court in its discretion considers necessary.³⁾ In some

1) Hahlo and Sinclair 42 and see 166 above.

2) At 475. See also Bradway 'Divorce Litigation and the Welfare of Family' (1956) 9 Vanderbilt LR 665, 676-677; cf Foster and Freed 'Child Custody' (1964) 39 NYULR 423 and 615; Mnookin 'Child - Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemp Problems 226; Mnookin and Kornhauser 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale LJ 950.

3) Cf Galligan 'Protection of Children in Family Disputes' (1973) 4 Can BJ 10 (a Canadian Judge) who draws attention to the shortfalls of the divorce procedure that then existed in Canada: he points out, inter alia, that counsel's ethical duty is to his client and that the interests of the children are only of peripheral interest to him. The children themselves are generally, because of their age, immaturity and the pressures brought to bear upon them, unable to give the court adequate expression of their real wishes. The parents to whom they look for the necessary guidance are only bent on using the children as levers against each other. Finally, it is not uncommon for parents to bargain away claims for maintenance for the children. At 12 Galligan cites fully the case of Hansford /1973/ 1 OR 116 in which he, as presiding judge, refused to give his imprimatur to a clause in a consent paper in terms of which the mother agreed to waive any claim for the future maintenance of her child. Instead, the 'Official Guardian' was ordered to collect, and enforce payment of, the maintenance which the court ordered the father to pay. Cf Shepstone 1974 (1) SA 411 (D); 1974 (2) SA 462 (N).

jurisdictions provision has been made for the courts to appoint lawyers as 'guardians ad litem' or as 'friends of the court' to look after the interests of minor children in cases where there is grave concern as to their welfare;¹⁾

(2) the second possible solution would be for the courts to insist on the production of a welfare report on the circumstances and background of every child involved in a divorce. The South African courts have the power to call for such welfare reports²⁾ and have done so in the past.³⁾ However, it is seriously doubted whether our courts have called for such welfare reports with meaningful frequency. Unlike the position in South Africa, the Los Angeles Conciliation Court regards as indispensable a welfare report where the custody of a minor child is at issue.⁴⁾ The result is that the separate legal representation of such children has become largely irrelevant;

(3) the third possible solution would be for the judge presiding over a divorce action to interview in chambers each and every child involved, provided the child is of an age of understanding.⁵⁾ In reality, our courts already have this power and from time to time this power is

1) Eg Wisconsin and Michigan: Foster 'Conciliation and Counseling in the Courts in Family Law Cases' (1966) 41 NYULR 351, 360 and 367-368. Cf s 46 (8) Hawaii Revised Statutes (Chap 571) which is cited above at 137, and s 65 Australian Family Law Act, 1975, which is cited above at 143.

2) S 6 (2) Divorce Act cited above at 246.

3) See, for example, the views of Mr Justice Margo cited above at 246.

4) See above at 131-133.

5) Where the children are not of an age of understanding the judge would perforce have to rely on a welfare report.

exercised.¹⁾ However, this possible solution by itself should be rejected out of hand: to demand of our judges to interview all children of an age of understanding involved in every divorce, custodial or maintenance action would be impractical for at least the following reasons:

(a) our judges are simply not qualified in the social and behavioural sciences and to expect them to rely solely on their experience at the Bar and on the Bench would not be fair to both the judges themselves and to the children concerned;

(b) it is seriously doubted whether our judges would be able to come to a proper conclusion on what is in the best interests of the children concerned simply on the strength of a single interview in chambers;

(c) the burden we place on our judges is already heavy enough²⁾ without expecting them to conduct such interviews in chambers.

It is submitted that a combination of the proposals above would constitute a satisfactory solution to the court's inability to give

1) A recent example of a judge interviewing in chambers children involved in a custody dispute is Nugent 1978 (2) SA 690 (R) at 696. The presiding judge /Goldin J/ did, however, complain /at 696 E/ that he did 'not have the benefit of any expert evidence concerning this problem'. In this case, the plaintiff father claimed the right to bring the 3 children of the marriage (now dissolved by divorce) up as Roman Catholics, while the defendant mother (who had the custody of the 3 children) claimed the right to continue to bring the children up as Anglicans. The plaintiff failed in his action because of the failure to adduce facts to show that the true interests of the children required a change.

2) See above at 168-172.

adequate expression to the best interests of children on divorce. An example of such an approach is to be found in Hawaii. Thus, in Hawaii, if a child is old enough and capable of forming an intelligent preference the family court is enjoined to give due weight to his wishes.¹⁾ In addition, the family court may in its discretion order an investigation into the care, welfare and custody of the child and when the resultant report is produced it may be received in evidence.²⁾ Furthermore, the family court has the discretion to appoint a guardian ad litem to represent the interests of the child.³⁾

5. Conclusion

It is only in comparatively recent years that the medical profession, as well as the behavioural and social scientists, have made their presence felt in the courts. The erstwhile resistance to them has been gradually whittled down over the years and they are playing an increasingly more meaningful role in the administration of justice generally. However, there is still much scope for increased co-operation between the courts and the behavioural and social scientists especially in the juvenile criminal courts and in the field of matrimonial litigation. But, it is submitted, this co-operation is bound to increase with the further passage of time. Certainly, this co-operation would reach its high water mark with the establishment of family courts in South Africa.

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- 1) S 46 (3) Revised Statutes of Hawaii s 46 is cited in full above at 136-137. Note that the wording of this section makes it obligatory for a judge of the Hawaii Family Court to give due weight to a child's wishes when he is old enough and capable of forming an intelligent preference.
- 2) Ss 46 (4) and (4) Revised Statutes of Hawaii.
- 3) S 46 (8) Revised Statutes of Hawaii. Cf s 6 (4) Divorce Act.

CHAPTER TENTHE PHILOSOPHY AND PURPOSE OF THE PROPOSED FAMILY
COURT IN SOUTH AFRICA

In the light of the above brief description and analysis of the family courts of Los Angeles, Hawaii and Australia¹⁾, and in view of the present position in South Africa with regard to matrimonial law reform²⁾, the role of the legal profession in the field of family law³⁾, the fragmentation of jurisdiction in family law matters⁴⁾, and the relationship between the courts and the behavioural and social scientists⁵⁾, it may now be broadly stated that the philosophy and purpose behind the establishment of a family court in South Africa should be concerned with at least the following factors; namely,

- (a) concern over the children of marriages that have broken down;
- (b) concern over the rising tide of divorce and the apparent breakdown of the family as a unit;
- (c) Concern over the unwieldy system of multiple jurisdiction over matters that fall within the ambit of family law;
- (d) concern over the lack of court-connected counselling and conciliation facilities;
- (e) concern over the lack of specialised knowledge of, and experience in, the behavioural and social sciences on the part of the courts and legal practitioners;
- (f) concern over the lack of a more practical and meaningful co-operation between the courts and the behavioural and social scientists.⁽⁶⁾

1) See Chapters 3 and 4 above.

2) See Chapter 5 above: cf Chapter 6 for Rhodesian Divorce Law Reform.

3) See 168-179 above.

4) See Chapter 8 above.

5) See Chapter 9 above.

6) This factor, to a large extent, follows on the previous one.

It must be stressed that the philosophy of a family court is hardly ever expressed in terms of preserving marriages at all costs.¹⁾ Nor, it is submitted, is the philosophy behind the establishment of a family court so much concerned with the question of whether there should be more or less divorce.²⁾ The divorce problem has been with us for hundreds of years and will no doubt remain with us for the future.³⁾ The fact that marriage was given a sacramental character by the English medieval church, and that divorce a vinculo matrimonii was abolished, gave rise to very impressive divorce statistics. In the modern context impressive divorce statistics are also to be found in, for example, Spain where divorce, as a result of strong Catholic influence, is not permitted. But, as Rheinstein was constrained to ask -⁴⁾

'Does this fact indicate ... that no ... Spanish ... husband ever abandons his wife, that no wife ever runs away from her husband, that no couples in these countries ever separate, that no married man maintains a mistress and no married woman ever has a lover?'

Even amongst the canon lawyers there was an early recognition of the reality that marriages break-up notwithstanding the sacramental character of the marriage contract. Thus it was that divorce a mensa et thoro was allowed.⁵⁾ This procedure, however, left intact the sacramental character of a marriage since neither party was free to contract another valid marriage. But, if the validity of a marriage could be successfully attacked on the basis that the parties were

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- 1) See 87-88 above.
 - 2) This question is comprehensively discussed by Hahlo 'Fighting the Dragon Divorce' (1963) SALJ 27.
 - 3) See, for example, van Leeuwen Commentaries 119, cited above at 2 n 2.
 - 4) 'The Law of Divorce and the Problem of Marriage Stability' (1956) 9 Vanderbilt LR 633, 643-644.
 - 5) Schäfer 'Judicial Separation' (1976) 93 SALJ 289. Judicial separation has now been abolished in South Africa by s 14 Divorce Act.

discovered to be related to each other within the prohibited degrees¹⁾ such marriage could be annulled: the effect of the decree of annulment was that the 'marriage' was deemed never to have been contracted in the first place. The decree of annulment could even be obtained after many years and even after a number of children had been born to the parties. In fact, the prohibited degrees of relationship were so extended with the passage of time that 'spouses who had quarrelled began to investigate their pedigrees and were unlucky if they could discover no impedimentum dirimens.'²⁾

The scandalous approach of the canon lawyers to the problem of divorce did keep the divorce rate down to a minimum, but it conveniently swept under the carpet the real problems of marriage-breakdown. The fact that up until the recent promulgation of the Divorce Act,³⁾ a divorce could only be obtained on well-defined grounds was no safeguard against the pernicious and widespread

- 1) The risk of a close /and prohibited/ relationship between the parties was much greater in earlier times than it is in modern times. This is because communities tended to live in small close units and travel was more restricted than it is today.
- 2) McGregor 'The Morton Commission: A Social and Historical Commentary' (1956) 7 Br Journ Sociology 171, 172-173, quoting Pollock and Maitland The History of English Law 2 ed (1898) Vol 2, 389. See also Schäfer 'Judicial Separation' (1976) 93 SALJ 289, 291 n 14. A graphic example of ecclesiastical hypocrisy in this regard is cited by Jackson at 22; viz 'There was no limit to the persons who could have a marriage investigated to see whether it came within the prohibited degrees; the parties themselves, a prying bishop's commissary or even a spiteful neighbour might be responsible for its annulment, and there seems to have been no time limit set to their activities. In the reign of Edward III, Thomas married a wife and had issue. After Thomas and his wife were dead, the bishop's commissary was informed at a visitation that Thomas, prior to his marriage, had stood godfather to a female cousin of his future wife. Proceedings were thereupon taken in the bishops' court, and the marriage was annulled.' See also Bromley 69 et seq.
- 3) The Divorce Act came into force on 1 July 1979.

practice of connivance and collusion. Thus, with regard to the position prior to the passing of the Divorce Act Hahlo convincingly pointed out¹⁾ that 'the stark truth is that ... spouses who are mutually determined to sever the marriage tie will succeed in obtaining their divorce decree, if not at the first attempt, at the second one.' Whether the Divorce Act will have the effect of curbing South Africa's unenviably high divorce rate remains to be seen, though this is seriously doubted.²⁾ What seems clear is that, notwithstanding the welcome reforms to the substantive divorce laws of South Africa, the basic problems of divorce are still with us. These basic problems are reflected in above stated factors of concern that underlie the philosophy and purpose behind the establishment of a family court in South Africa.

It is, accordingly, submitted that an even more pressing need than an overhaul of the substantive family and divorce law is the need to overhaul the family and divorce law procedure.³⁾ As Hahlo rightly comments⁴⁾ 'wherever the solution may be found, it won't be

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- 1) 'Fighting the Dragon Divorce' (1963) 80 SALJ 27, 37.
 - 2) According to a report in the Sunday Times on 3.2.1980, there were 798 more divorces from July to December 1979 than in the first half of the year on the Witwatersrand. Similar increases were experienced in Cape Town and Durban. It may, however, be argued that the Divorce Act has made divorce harder to obtain. Thus, for example, the court is not necessarily obliged, as it previously was, to grant a divorce on the ground of a single act of adultery. The fact of adultery must now be considered together with the question of whether there has been an irretrievable breakdown in the marriage § 4 (2) (a). Adultery per se is no longer a ground for divorce.
 - 3) It is in this area that the Divorce Act is lacking. It is true that the Act makes provision for the court to adjourn proceedings to enable the parties to consider the possibility of reconciliation § 4 (3); for the court to order anyone to appear before it, or to order an investigation, in connection with the welfare of any minor or dependent child of a marriage § 6 (2); and for the court to order the legal representation of a minor child § 6 (4). It is also true that the Act has abolished the order for the restitution of conjugal rights § 14. But, it is submitted, the Act does not go far enough in respect of the matters under consideration.
 - 4) 'Fighting the Dragon Divorce' (1963) 80 SALJ 27, 37.

in reforming the substantive divorce law'.¹⁾ There is no doubt that an overhaul of the divorce procedure will give 'the consumers of our system of justice'²⁾ a better deal. In order to achieve this purpose it would seem that there must be a change in emphasis. In this regard, it is appropriate to remind oneself of the oft-cited, and now almost universally accepted, objectives of a good divorce law as formulated by the British Law Commission in 1966;³⁾ namely,

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- 1) See also Alexander 'Legal Science and the Social Sciences: The Family Court' (1956) 21 Miss L R 105, 108 - 'Reform of the divorce laws will do no good unless we can establish new procedures in courts which are especially designed and equipped for that purpose.' In his discussion of the Standard Family Court Act in (1961) 1 J Fam Law 105, Rubin correctly points out that the model Act does not, for example, attempt to revise the substantive law of divorce. Rubin explains (at 106) that the 'liberalization of divorce laws is not all, and perhaps not more important than procedural changes.' What the Standard Family Court Act seeks to do is to provide a more realistic procedure within the framework of the existing substantive law by focussing attention on the unfortunate consequences of family actions. See also Putting Asunder § 28 - 'Procedural change is therefore one of the necessary conditions of reforming the substantive matrimonial law.'
- 2) Per Elston, Fuller and Murch 'Judicial Hearings of Undefended Divorce Petitions' (1975) 38 MLR 609, 610. See also Bradway 'Divorce Litigation and the Welfare of the Family' (1956) 9 Vanderbilt LR 665.
- 3) Field of Choice (1966), § 15.

'A good divorce law should seek to achieve the following objectives:

- (i) to buttress, rather than to undermine, the stability of marriage; and
- (ii) when, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.'

These objectives of 'a good divorce law' are, in a sense, contradictory in that they give expression to conflicting interests; namely, the preservation of marriage, on the one hand, and the break-up of marriage, on the other.¹⁾ There is, therefore, a danger that an undue emphasis will be placed on either one of these objectives while the other is relatively neglected.²⁾ This has, in fact, occurred in South Africa. Thus, it is submitted, the Divorce Act places an undue emphasis on the first of these objectives. The 'bitterness, distress and humiliation', a feature of the divorce action prior to July 1979, will still continue to be a feature of the divorce action after July 1979. It may well be that far from eliminating the erstwhile fault-orientated grounds of divorce, the Divorce Act has retained them, albeit in modified form. Thus, among the factors that the court may accept as evidence of the irretrievable breakdown of a marriage are -

- '(a) that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;

1) Cf Biggs 'Stability of Marriage - A Family Court?' (1961) 34 ALJ 343, 344 - 'There have been two opposing forces throughout the development of matrimonial law: (1) attempts by the State to stabilize marriage by restricting the right to terminate one marital relationship in order to enter another; (11) the desire of individuals to terminate one union which has become unbearable and to acquire the right to form another.'

2) Bates 'Legal and Social Change in Australian Family Law (1976) 9 CILSA 299, 307-308.

(b) that the defendant has committed adultery and that the plaintiff finds it irreconcilable with the continued marriage relationship.¹⁾

Furthermore, there appears to be a misplaced enthusiasm for the possibility of reconciliation after the divorce action has commenced,²⁾ while no provision at all has been made for the conciliation counselling of the parties to a divorce action. The only welcome hint of a conciliation programme for which provision has been made is to be found in section 6 of the Divorce Act which seeks to safeguard the interests of dependent and minor children.³⁾

It is, therefore, submitted that if the establishment of a family court in South Africa is to become a reality there will have to be a shift in emphasis from the first to the second of the two above stated objectives of a 'good divorce law'. Unless this is achieved, there will be no possibility of giving effect to the philosophy underlying the structure and operation of a family court in South Africa.

A consideration of these matters of concern outlined at the beginning of this chapter, and which give expression to the philosophy behind the concept of family courts makes it easier to understand one of the main purposes of a family court; namely, to apply preventive and therapeutic measures to constructively assist spouses, and members of their family, to resolve their problems.⁴⁾ History has proved that marital discord as a social problem will always be with us. But what we apparently have yet to learn from the history of divorce and its attendant problems is that a change of attitude as well as a change of procedure, and not only a change in the substantive law, is needed.

1) Ss 4 (2) (a) and (b) Divorce Act.

2) S 4 (3) Divorce Act, and see 111-112 above.

3) But, in the absence of the court ordering an investigation under s 6 (2) Divorce Act, the court will have to rely on whatever evidence the litigating spouses choose to place before it that proper provision has been made for the welfare of any affected minor or dependent child. This was the position before the promulgation of the Divorce Act and it is doubted if the divorce courts in future will make much use of the power to order investigations.

4) Payne 89 and 95-96.

CHAPTER ELEVENDEFINITION OF THE PROPOSED FAMILY COURT
FOR SOUTH AFRICA

The main characteristics of a family court have been formulated in the past by, inter alia, the South African Law Commission,¹⁾ the Finer Committee²⁾ and by Payne.³⁾ According to Payne there are nine basic characteristics to be strived for in the ideal family court. These may be best summarized as follows:

- (1) the family court must be seen as a court of law and not as a social agency;⁴⁾
- (2) the procedure of the family court should be characterized by its informality, flexibility and investigatory nature, rather than be unduly formal and contentious;⁵⁾
- (3) the pleadings must be consistent with the procedure advocated in the second characteristic above;⁶⁾
- (4) there should be a limitation on the publication of proceedings in the family court. So also, the records of proceedings, as well as the hearings, must be kept confidential;⁷⁾
- (5) there must be a central repository for the housing of statistical data;⁸⁾

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- 1) Divorce Report (1978) § 13.1. These characteristics are cited in full above at 148.
 - 2) Finer Report § 283. These characteristics are cited in full above at 85 n 1.
 - 3) At 119-206.
 - 4) Payne 120-122.
 - 5) Payne 122-133.
 - 6) Payne 133-143.
 - 7) Payne 144-167. Payne stresses, however, that 'secrecy, as distinct from privacy, of hearings is to be condemned.' (at 167).
 - 8) Payne 167-182. As Payne puts it (at 169) 'research is vital to assess the validity and efficacy of established or proposed programmes of prevention and treatment.' This, of course, pre-supposes that minimum requirements for the maintenance and evaluation of legal and social records must be legislatively defined.

- (6) no judge of a family court should be expected to work alone since, as a lawyer, he is not normally trained in the social and behavioural sciences. Accordingly, a condition precedent to the establishment of a successful family court is a support staff of persons trained and experienced in the social and behavioural sciences. Such persons, however, will be expected to work in conjunction with, rather than in competition with, any social welfare organizations and agencies which are not attached to the family court;¹⁾
- (7) the building in which the family court is to be housed must be adequate enough to provide sufficient office-space for all the court and court-connected personnel, and must not be seen as a dark and forbidding place by the public;²⁾
- (8) the physical construction and siting of a family court building must take account of any peculiar local conditions;³⁾
- (9) to be efficacious the family court must be available to people not only in the urban areas but also to all persons in rural and outlying areas.⁴⁾

It is clear that there is not much difference of opinion in the various formulations of the characteristics that go to make-up the ideal family court.⁵⁾ Such differences as there are, lie in the main, in the order of importance attached to the various characteristics. In this regard, the formulation by the South African Law Commission of the characteristics that constitute an ideal family court⁶⁾ is a useful starting point, subject to the inclusion of the following factors;

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- 1) Payne 182-194.
- 2) Payne 194-197.
- 3) Payne 197-200.
- 4) Payne 200-206. Coupled to this characteristic is the suggestion that there is no room for each province or state within a country to operate its own family court system. This, however, is a problem that would be peculiar to those countries operating under a federal constitutional set-up, such as Australia and Canada, and would, accordingly, be of no relevance in South Africa.
- 5) Cf Bates 'The Lawyer's Social Role : A Lesson from Family Law' (1975) 2 Natal Univ L R 125, 136-137.
- 6) See 148 above.

namely,

- (1) a family court must be seen as a court of law and not as an arm of the social services;
- (2) a family court should be endowed with a status at least equal to that of the Supreme Court;
- (3) the records and proceedings of family courts should be treated as confidential.

It is, accordingly, submitted that the following would serve as a useful definition of a family court for South Africa; namely,

'A family court may be defined as a supreme court of law having jurisdiction over all family law matters which are to be adjudicated upon in an informal and confidential manner so that emphasis may be placed on the resolution of problems rather than the settlement of disputes.'

There are, of course, many other definitions of a family court. Some, characterized by their brevity and vagueness,¹⁾ tend to emphasize only one or two characteristics of a family court,²⁾ while others are

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- 1) Eg Hall 'Outline of a Proposal for a Family Court' (1971) 1 Fam Law 6 - 'There should be one lower tier local court dealing with all domestic proceedings. This I would define as the Family Court.'
 - 2) Eg Alexander 'The Family Court - An Obstacle Race' (1958) 19 Univ Pitts LR 602 sees the family court as one in which there is a 'concentration of the handling of all justiciable family conflicts and problems in one court.' Alexander's reluctance to propound a comprehensive definition of a family court is presumably tempered by the following observation in an article entitled 'What is a Family Court Anyway?' (1952) 26 Conn BJ 243, 244; viz. 'From my contacts with lawyers both off and on the bench I have learned that there are as many degrees of comprehension of the family court as there are degrees on a thermometer.' See also the same writer in 'Family Cases are Different - Why not Family Courts?' (1954) 3 Kansas LR 26. Finlay 'Family Courts - Gimmick or Panacea?' (1969) 43 ALJ 602, 603, suggests that a family court 'is a myth at present because it can be defined by the well-known method of Alice in Wonderland: "It means what you want it to mean." ... /W/hen people talk of family courts they invest this term with a meaning of their own choosing. Discussion is often informed by optimism and hopefulness rather than precision.'

more comprehensive.¹⁾ It is submitted that the suggested definition above has the merit of being reasonably concise: it also gives expression to the main characteristics of a family court; namely,

- (1) the family court must be seen as a court of law and not simply as a social welfare institution;
- (2) the family court must be endowed with a supreme court status;
- (3) the family court must have a unified jurisdiction over all family law matters;
- (4) proceedings in the family court should be conducted as informally as possible.
- (5) proceedings, and records of proceedings, should be treated as confidential;
- (6) the approach of the family court should be therapeutic.

It is proposed to deal with each of these characteristics in the following chapter. It must be stressed that the order in which these characteristics are being dealt with does not necessarily signify their order of importance.

1) Eg Kay 'A Family Court : The California Proposal' (1965) 56 Calif LR 1205 states that a family court 'should have integrated jurisdiction over all legal problems that involve the members of a family; be presided over by a specialist judge assisted by a professional staff trained in the social and behavioural sciences; and employ its special resources and those of the community to intervene therapeutically in the lives of the people who come before it.' Arthur 'A Family Court - Why Not?' (1966) 51 Minn LR 223, 227, states that 'A true family court: (a) is a court of law; (b) encompasses all litigable areas of family trouble (c) is under the control of a single and continuing judge; (d) deals with facts rather than jurisdictional pleadings and (e) is supported by a competent staff.' Foster 'Conciliation and Counselling in the Courts in Family Law Cases' (1966) 41 NYULR 351, 352, is of the view that 'The ideal family court ... would have comprehensive and integrated jurisdiction over all or most family problems, employ a professional staff of psychiatrists, psychologists, case workers, marriage counsellors, and probation officers, and be committed to the philosophy that its function was to act in the best interests of the family and society.' According to Gordon 'The Family Court: When properly defined, it is both desirable and attainable' (1975) 14 J Fam Law 1, 3, 'The ideal traits of a family court include: (1) a court that adheres firmly to legal principles and has resources available to correct with minimal intervention the problem that brought the individual into court: (2) a court that has broad substantive and geographic jurisdiction over family matters; (3) a court that has proper status and access to resources; and (4) a court that has a clear-straight-line chain of command and responsibility in judicial and administrative areas.'

CHAPTER TWELVEAN ANALYSIS OF THE MAIN CHARACTERISTICS OF THE PROPOSED
FAMILY COURT FOR SOUTH AFRICA1. THE FAMILY COURT AS A COURT OF LAW

For the proposed family court to function properly it must function as a court of law. As Gordon¹⁾ pertinently observes:

'To believe otherwise is a contradiction in terms. It is utter hypocrisy for an institution that purports to interpret the law, adjudge conduct under the law and apply the law with great authority, to question whether it is bound by all legal principles.'

If a family court was to function as anything less than a court of law its judgments and pronouncements would command scant respect from those it is designed to serve.²⁾ The family court is required to do justice according to legal principles and, above all, it 'must remain, and must be seen to remain, impartial.'³⁾ The therapeutic functions of a family court must not be allowed to usurp its judicial functions. Thus, there must be a proper compliance with the normal rules of legal procedure so that there can be no question of an abuse of fundamental rights such as occurred in the celebrated case of Re Gault.⁴⁾ Proper legal protection should at all times be accorded to those seeking relief in the family court. Though the family court represents a 'highly beneficial synthesis between law and social welfare' it is clear, as the Finer Committee was at pains to point out,⁵⁾ 'the individual in the family court must in the last resort remain the subject of rights, not the object of assistance.'

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- 1) 'The Family Court: When properly defined, it is both desirable and attainable' (1975) 14 J Fam Law 1, 3-4.
- 2) It is submitted that the judgments of the proposed family court should be reportable in the same way as judgments of the Supreme Court: cf The Family Law Service of Australia.
- 3) Finer Report § 4.285. Even with regard to the Los Angeles Conciliation Court great stress is placed on the fact that the Conciliation Court is a court of law in every sense and is not just an administrative organ: see above at 30.
- 4) 387 US 1 (1967).
- 5) Finer Report § 4.285.

2. THE STATUS OF THE PROPOSED FAMILY COURT

There is presently in South Africa a strong body of opinion which holds the view that the status of the lower court system would be considerably enhanced by the creation of the so-called intermediate court system. It is argued¹⁾ that such intermediate courts should be accorded a civil, as well as criminal, jurisdiction, so that, for example, divorce would fall within the jurisdiction of such courts.²⁾ It is against the background of this strong body of opinion that the Hoexter Commission of Inquiry was appointed.

There is no doubt that magistrates do feel, with some justification, that they can perform the same rubber stamp functions of a judge of the Supreme Court in a divorce case.³⁾ It is also true that the cost of divorce litigation in the Supreme Court is needlessly expensive. Yet, notwithstanding these facts, it is still difficult to accept that the divorce action should be handled by an intermediate court. It is trite that marriage is the cornerstone of our society. Certainly, the aura of sanctity surrounding the marriage contract would be lessened if its termination were to be relegated to a court of inferior jurisdiction and status to that of the Supreme Court.⁴⁾ As to costs, this is a problem that can easily be resolved by providing for a special tariff of costs which will be applicable in the proposed family court.

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- 1) See 1978 Annual Report of the Department of Justice 5-7; Coetzer 'Intermediere Howe' (1978) 132 DR: see 155 above.
 - 2) The main arguments in favour of the introduction of so-called intermediate courts are centred on the desire to reduce the cost of litigation which must of necessity be conducted in the Supreme Court (eg divorce litigation) and to relieve the Supreme Court of some of the pressure of its work.
 - 3) Cf Elston, Fuller and Murch 'Judicial Hearings of Undefended Divorce Petitions' (1975) 38 MLR 609; Eekelaar 142-151. On the role of the judge in divorce proceedings see above at 168-172.
 - 4) It should be mentioned that the proposed family court would be able to share the Supreme Court's library facilities. These facilities however, would have to be increased to cater for the specialized interests of the staff of the proposed family court.

The idea that the proposed family court should be accorded a status at least equal to that of the Supreme Court is in keeping with developments in other countries.¹⁾ Thus, the Conciliation Court of Los Angeles has a superior court status²⁾ as does the Family Court of Hawaii³⁾ and the Family Court of Australia.⁴⁾ Of course, not all family courts have a superior court status.⁵⁾ But such courts do not command the same respect as those family courts with a superior court status, and they have generally assumed the reputation of being a 'poor man's court.'⁶⁾

- 1) See generally Payne 593-659. After reviewing a 'super-abundance of alternatives respecting the status and place of the Family Court in the judicial structure', Payne comes to the conclusion (at 657) that the family court 'should be a division of the Superior or Supreme Court and should not be a separate autonomous court, although it will probably be necessary to provide a separate plant for the Family Division in order to accommodate its total resources, which should not be geographically fragmented.'
- 2) See above at 14.
- 3) See above at 41.
- 4) See above at 56.
- 5) Eg the provincial family courts in Canada (see above at 81 n 4) and the family courts of certain American States (see above at 41 n 3).
- 6) Ibid.

3. UNIFIED JURISDICTION

An attempt has already been made to show that the fragmentation of jurisdiction in family law matters in South Africa is a real one.¹⁾ Quite apart from the power of the Minister of Pensions and Social Welfare to make contributions to the maintenance of certain classes of children²⁾ and his powers over children at the 'post-committal' stage³⁾, the present jurisdiction over family law matters is vested in the Supreme Court, the Children's Court, the Maintenance Court and the Magistrate's Court.

(A) The Supreme Court

It is submitted that in order to achieve a unified jurisdiction over family law matters the proposed family court should have the jurisdiction to adjudicate on all the following matters which are presently within the jurisdiction of the Supreme Court; namely,

- (i) applications for consent to marry⁴⁾;
- (ii) divorce actions⁵⁾;
- (iii) ancillary matters arising out of a divorce action such as the maintenance, custody, access and guardianship of the minor children of a marriage. This would include, inter alia, disputes concerning the

1) See Chapter 8 above.

2) S 89 Children's Act: see above at 189.

3) See 208 above.

4) For the present position on consent to marry see above at 209-211.

5) The decree of judicial separation has now been abolished by s 14 Divorce Act; ie since 1 July 1979. It follows that a decree of judicial separation granted prior to 1 July 1979 does not have to be first set aside before an order of divorce under the Divorce Act can be granted - Kruger 1980 (3) SA 283 (O).

schooling and religious upbringing of minor children¹⁾, as well as paternity proceedings;²⁾

(iv) applications for maintenance for wives both stante matrimonio and on dissolution of a marriage,³⁾ as well as maintenance applications as between parent and child, grandparent and grandchild etc;

(v) actions pendente lite such as applications for contributions towards costs, maintenance for, and the custody of, and access to, the minor children of a marriage;⁴⁾

(vi) property disputes between husband and wife both stante matrimonio and on divorce. This would include ejectment proceedings as between husband and wife;⁵⁾

(vii) applications for leave to presume death;⁶⁾

(viii) breach of promise actions;

(ix) applications for interdicts in matrimonial matters;⁷⁾

- 1) As to disputes concerning the schooling and religious upbringing of minor children on divorce see Nugent 1978 (2) SA 690 (R) where Goldin J re-affirmed the view that, subject to the best interests of the children being given effect to, the duty of care for the religious upbringing and education of the minor children of a marriage lay with the custodian parent: cf Vermaak 1965 (1) SA 341 (T); Hill 1969 (3) SA 544 (R AD); Holland 1975 (3) SA 553 (AD); Grobler 1978 (3) SA 578 (T).
- 2) A finding by the Maintenance Court that a man other than the husband of the mother of the child is the father of the child does not affect the status of the child. On the basis of the maxim pater est quem nuptiae demonstrant the child is still considered to be legitimate until an order of a competent court (ie the Supreme Court) otherwise declares: Park v de Necker 1978 (1) SA 1060 (N).
- 3) S 7 (2) Divorce Act.
- 4) Rule 43 Consolidated Rules of the Supreme Court. On the purpose of Rule 43 see Colman 1967 (1) SA 291 (C) at 292 H. As to the abuse of the procedures provided for by Rule 43 see Smit 1978 (2) SA 720 (W) and Nienaber 1980 (2) SA 803 (O).
- 5) Owen 1968 (1) SA 480 (E); Cattle Breeders Farm (Pvt) Ltd v Veldman 1974 (1) SA 169 (R AD); Buck 1974 (1) SA 609 (R).
- 6) Cf Dissolution of Marriages on Presumption of Death Act, 23 of 1979; see above at 146 n 4.
- 7) Eg where a husband wishes to interdict his wife from pledging his credit for household necessities: Traub 1955 (2) SA 671 (C); or where the wife wishes to interdict her husband from making donations to others in fraud of her rights: Pickles 1947 (3) SA 175 (W); Pretorius 1948 (1) SA 250 (AD); Laws 1972 (1) SA 321 (W).

(x) applications for the appointment of curators ad litem and/or bonis on the grounds of a spouse's mental deficiency, inability to manage his/her own affairs, intoxication and the influence of drugs, and prodigality;¹⁾

(xi) declarations of majority in terms of the Age of Majority Act 57 of 1972.²⁾

(B) The Children's Court

It is also submitted that all the matters adjudicated upon in the Children's Court should fall within the jurisdiction of the proposed family court. In particular, the proposed family court should have the power -

- (i) to deal with children alleged to be in need of care;³⁾
- (ii) to grant adoption orders;⁴⁾
- (iii) to grant temporary custody orders;⁵⁾
- (iv) to deprive parents of their parental power.⁶⁾

(C) The Maintenance Court

It is clear that all maintenance matters should fall within the jurisdiction of a family court. Accordingly, the proceedings presently provided for by the Maintenance Act, 23 of 1963, the Reciprocal Enforcement of Maintenance Orders Act, 80 of 1963, should fall within the jurisdiction of the proposed family court.

(D) The Magistrate's Court

Apart from its criminal jurisdiction, the jurisdiction of the Magistrate's Court over matters falling within the realm of family law is limited.⁷⁾ There are, however, at least two matters presently within the

1) See generally Boberg 130-180. It is contemplated that all applications for the appointment of curators will fall under the jurisdiction of the proposed family court.

2) See generally Boberg 381-383.

3) S 31 Children's Act.

4) S 71 Children's Act.

5) S 83 Children's Act.

6) S 60 Children's Act. It is also proposed to include within the jurisdiction of the proposed family court all cases of alleged child ab

7) See above at 189, and 202-208.

jurisdiction of the Magistrate's Court which should properly be dealt with by the proposed family court; namely, breach of peace proceedings and the prosecution of juvenile offenders.

(i) Breach of Peace Proceedings

In terms of section 384 of the Criminal Procedure Act, 56 of 1955, if a 'complaint on oath is made to a magistrate that any person is conducting himself violently towards, or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault' the magistrate may summon the person alleged to be responsible for such conduct to attend an enquiry.¹⁾ If necessary, the magistrate may order such person to be arrested. It makes no difference that the alleged behaviour threatening to provoke a breach of the peace took place in public or private. If the complaint is found to be justified the person responsible for the threatened breach of peace can be ordered 'to give recognizances with or without sureties in an amount not exceeding fifty rand for a period not exceeding six months to keep the peace towards the complainant and refrain from doing or threatening injury to his person or property.'²⁾ For failing to observe these conditions the recognizances may be declared to have been forfeited and the order of forfeiture 'shall have the effect of a judgment in a civil action in a magistrate's court.'³⁾

1) S 384, together with s 319 (3) of the old Criminal Procedure Act 56 of 1955, has been retained by the new Criminal Procedure Act, 51 of 1977: see Schedule 4 of the 1977 Act. Hiemstra, 646, suggests that s 384 was not repealed 'omdat 'n nuwe en wyere bepaling daaromtrent oorweeg word en dit wenslik geag is om die oue voorlopig op die wetboek te behou.'

2) S 384 (1) Criminal Procedure Act.

3) S 384 (4) Criminal Procedure Act.

Breach of peace proceedings are essentially administrative in nature having a quasi-judicial form.¹⁾ The proceedings are designed to prevent a threatened offence rather than to deal with an offence that has already been committed.²⁾ It is regrettable to note, however, that breach of peace proceedings are hardly, if ever, resorted to in South Africa. It has certainly been the writer's experience in practice that very few magistrates are even aware of the provisions of section 384 of the Criminal Procedure Act, 56 of 1955. This is particularly unfortunate in view of the fact that members of the police force are understandably reluctant to become involved in the investigation and prosecution of intra-familial disputes, especially as between husband and wife.

In husband and wife assault cases, it is usually the wives who are the victims.³⁾ It is true, of course, that the husband's marital power over the person of his wife has been curbed so that now it is generally accepted that a husband no longer has the right to administer corporal chastisement, moderate or otherwise, to his wife.⁴⁾ Yet, the sad reality is that 'wife beating' is far too prevalent a feature of the modern South

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- 1) Limbada 1953 (2) SA 368 (N). According to Broome JP in Limbada at 370 the origin of the breach of peace procedure is not clear. As the learned judge put it: 'One view is that it depends upon a statute of Edward III, passed some six hundred years ago. Another view is that it is a Common Law jurisdiction which was in existence from an even earlier date.' Further on the historical background of the binding-over procedure see Grim 'Binding-Over to keep the Peace and be of Good Behaviour in England and Canada' 1976 Public Law 16, 18-20.
- 2) Ibid. By the same token it is not the purpose of the breach of peace proceedings to punish, but rather to prevent the apprehended danger of a breach of the peace.
- 3) Hence the phrase 'battered wives': Maidment 'The Laws Response to Marital Violence in England and the USA' (1977) 26 ICLQ 403. According to Maidment it is difficult to determine the extent to which wives are assaulted by their husbands. But, it is apparently accepted that the known and reported cases of 'battered wives' represent the tip of the iceberg. There is no reason to believe that this conclusion does not also reflect the situation in South Africa. However, it is only in recent years that 'husband battering' has been identified as a problem: Freeman 'Violence in the Family' (1980) 4 SACC 5.
- 4) Palmer 1955 (3) SA 56 (O) at 59; Mdindla 1977 (3) SA 322 (O) at 323. See also the following notes entitled 'Wife Beating' (1924) 41 SALJ 79 and 'Battering Rams' (1976) 14 JP 158.

African domestic scene to be swept quietly under the carpet.¹⁾ Even though 'wife beating' is nothing more, or less, than the crime of assault²⁾, the police and prosecuting authorities are generally, and understandably, reluctant to become embroiled in what is popularly termed a 'domestic or matrimonial dispute', unless the assault is particularly serious or reprehensible. In principle, it is difficult to justify this reluctance. However, it is generally felt that most cases of marital assaults are of a minor nature and that to prosecute the offending spouse would be to make matters worse for the innocent spouse who will continue to live in fear of a reprisal assault for having reported the matter to the police in the first place.³⁾ It is not inconceivable for the reprisal assault to result in the murder of the innocent spouse. Alternatively, the reprisal could take the form of making life for the innocent spouse intolerable in one way or another such as keeping late hours, sulking and withholding household allowances.⁴⁾

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- 1) 'Wife beating' is not the only regrettable feature of the modern South African domestic scene. The problem of a husband sexually abusing his wife has also received increasing attention in recent years: see, for example, English 'The Husband who Rapes his Wife' (1976) 126 NLJ 1223; Scutt 'Reforming the Law of Rape: The Michigan Example' (1976) 50 ALJ 615; Scutt 'Consent in Rape - The Problem of the Marriage Contract' (1977) 3 Monash LR 255; Walker 'Victims on Trial - Prosecutions for Rape' (1977) 1 SACC 147, 157-161; Scutt 'Reform and the Law of Rape: Common Law and Continental Directions' (1978) 11 CILSA 1; Freeman 'Rape by a Husband?' (1979) 129 NLJ 332. See also Labuschagne 'Misdade Tussen Gades' (1980) 43 THR-HR 39 who suggests that allegations of sexual abuse as between husband and wife should be referred to a family court.
- 2) Hunt, 429, defines assault as 'unlawfully and intentionally (1) applying force to the person of another, or (2) inspiring a belief in that other that force is immediately to be applied to him.'
- 3) Maidment 'The Laws Response to Marital Violence in England and the USA' (1977) 26 ICLQ 403, 406-413.
- 4) In fact, the punishment of the guilty spouse, either by fine or imprisonment, may result in hardship for the rest of the family: see Zaal 'Sufficiency or Surfeit of Sanction? State Processing of Petty Crime Cases in the South African Context' (1980) 4 SACC 17 esp at 21-22.

Quite apart from the reluctance of the police and prosecuting authorities to arraign before the criminal court a husband who has allegedly assaulted his wife, the wife herself is often reluctant to see her husband, the father of her children, criminally prosecuted. Despite a husband's brutal behaviour towards his wife, such a wife very often still loves her husband and has every desire, albeit perverse in some circumstances, to continue with the marriage. In such circumstances such wife will not want to feel responsible for her husband's possible imprisonment.¹⁾ What such wife, in reality, is seeking is help and not undue publicity which would inevitably follow on the conviction, and possible imprisonment, of her husband for an assault perpetrated upon her. It is clear that such help is not forthcoming from the ordinary criminal courts.

It is, accordingly, easy to understand the reluctance of the police and prosecuting authorities to prosecute husbands who assault their wives, except in the more serious cases. It may be argued that there are other remedies available to such a wife. She could, for example, as in van den Berg,²⁾ interdict her husband against any further assaults. In van den Berg's case the husband had previously used grossly abusive language to his wife and had threatened to shoot or disfigure her. In this case, however, the husband and wife were at arms length from each other and were in the process of being divorced. Interdicts of this sort are hardly likely to be resorted to where the parties are still living together sub spe reconciliationis. Another important factor inhibiting applications of this sort is the exorbitant cost of Supreme Court litigation.³⁾ Should the defendant spouse fail to comply with the interdict the wife would face the further expense and inconvenience of invoking the machinery for the enforcement of the interdict. Such further action is very rare in practice either because it is unnecessary as where the husband complies

1) Ibid.

2) 1959 (4) SA 259 (W).

3) Because of this it would seem that applications for interdicts are limited to cases where there have been serious assaults and threats on the innocent spouse. By this stage, also, the innocent spouse will have experienced much needless pain and suffering.

with the interdict or because the wife is deterred by the expense and inconvenience of taking such further action. In any case, a wife in this position, especially where the parties have any children, may not want to feel responsible for the committal of her husband to prison for contempt.

It is submitted, by way of solution to the above problem, that more effective use should be made of the breach of peace procedure. The chances of a husband, who has been bound-over, keeping the peace towards his wife are likely to be much greater than where he has simply been convicted of an assault by the criminal court. After all, he faces the prospect of forfeiting his recognizance to keep the peace which, at the present moment, cannot exceed fifty Rand.¹⁾ This amount is clearly insufficient and the maximum amount permitted will have to be substantially increased.²⁾ It is submitted that in extreme situations there should be no reason why, in addition to ordering the amount of the recognizance to be forfeited, the defaulting husband should not be referred to the criminal court for prosecution and possible committal to prison. To this extent, the presently prescribed breach of peace procedure should be amended. It is suggested that if a husband who has been bound-over to keep the peace towards his wife appreciates that he is likely to forfeit a large sum of money if he breaches the terms of the recognizance then he will think twice before molesting, or assaulting his wife, or using foul, abusive and threatening language towards her.

1) S 381 (1) Criminal Procedure Act.

2) Where forfeiture of the recognizance is ordered the court so ordering should be enjoined, by an appropriate amendment to the present procedure, to order that the amount so forfeited shall not be deemed to be a charge on the joint estate of the spouses who are married in community of property; cf by way of analogy the case of Potgieter 1959 (1) SA 194 (W) where Hiemstra J (as he then was) ordered that the damages awarded to a husband married in community of property for his wife's adultery with one, O'Neill, should not form part of the joint estate. However, no such order was made in the earlier case of Strydom v Saayman 1949 (2) SA 739 (T).

Finally, it is submitted that there is much to be gained by placing breach of peace proceedings in the intra-familial context within the jurisdiction of the proposed family court. Thus, for example, the need to resort to criminal prosecutions, save in exceptional cases, would be largely eliminated. Also, the many hundreds of wives who approach their attorneys with instructions to write to their husbands 'to warn them to behave themselves' would be better served, at less cost to themselves, if they invoked the breach of peace procedure in the non-criminal atmosphere of the proposed family court.

(ii) Prosecution of Juvenile Offenders¹⁾

The question whether the prosecution of juvenile offenders should fall within the jurisdiction of the proposed family court has long been a controversial one²⁾ with the result that some family courts include within their jurisdiction the prosecution of juvenile offenders while others do not.³⁾

There are, in fact, a number of reasons for and against including within the jurisdiction of a family court, the prosecution of juvenile offenders. These may be briefly tabulated as follows:

(a) in the first place, it is alleged that the problem of juvenile delinquency has little, if any, bearing on family problems as a whole. On the other hand, there are those who strenuously argue that 'much juvenile crime has its roots in familial strife' so that to stigmatize automatically a juvenile offender with a previous criminal conviction is both unrealistic and self-defeating;⁴⁾

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- 1) The procedure for the prosecution of juvenile offenders has been dealt with above at 202-208. The word 'juvenile' in this context means any person under the age of 18 years: cfs 254(1) Criminal Procedure Act.
 - 2) Payne 298-311.
 - 3) Hawaii is an example of the former while the Australian Family Court is an example of the latter.
 - 4) Eg Turner 'Family Courts : Their Formation and Jurisdiction' (1973) 8 Aust Journ Social Issues 121, 129. The same point is again made by the same writer in (1974) 4 Fam Law 39, 42. It is for this reason that the treatment of juvenile offenders should be brought (so it is argued) within the jurisdiction of a family court.

(b) in the second place, the view has been expressed on more than one occasion that a family court should have nothing but a civil jurisdiction,¹⁾ and that to include within its jurisdiction the problems of juvenile delinquency would be to give the family court an undesirable criminal flavour. Such a criminal flavour, so it is alleged, would be damaging to the image of a family court and would be incompatible with its therapeutic functions. By way of contrast, however, there are those who argue that because of the relatively recent de-emphasis of the element of criminality in juvenile misconduct, the problems of juvenile delinquency are hardly likely to affect adversely the image of a family court.²⁾ In the South African context it may be argued that this welcome de-emphasis of the element of criminality in juvenile misconduct is only a trend as opposed to a fait accompli. This trend is evidenced, for example, by the discretion of the criminal court to transfer to the Children's Court the case of a child believed to be in need of care. Notwithstanding this, however, and in the light of the suggested procedure to be adopted,³⁾ it is submitted that this is an unconvincing reason for excluding from the proposed family court's jurisdiction the problems of juvenile delinquency. A main reason for placing the problems of juvenile delinquency within the jurisdiction of the proposed family court is not to emphasize the criminality of any juvenile misconduct but, rather, to discover (and to treat) the causes of the misconduct which more often than not have their roots in family problems;

(c) in the third place, the fear has often been expressed that if the prosecution of juvenile offenders were to fall within the jurisdiction of the proposed family court this would result in the possibility of the

1) Eg Finer Committee § 4.321 and § 4.362.

2) Turner 'Family Courts : Their Formation and Jurisdiction' (1973) 8 Aust Journ Social Issues 121. See also Midgley 159-179 who argues in favour of the creation of a 'welfare court with legal status but operating outside the criminal law' (at 170) as an alternative to the present juvenile criminal court.

3) Which is dealt with below at 278-279.

4) The sole purpose of the proposed family court in this regard must not be seen only in terms of a therapeutic or rehabilitative potential: ie with an emphasis on the welfare of the delinquent child. The proposed court would be just as much concerned with the interests and basic security of the community: see Allen 49-61 and see 279 § (b) below.

basic rights of a juvenile offender being overlooked as in the Gault-type¹⁾ of situation. Whether this would be a valid criticism in the South African context is doubted since section 74 of the Criminal Procedure Act makes provision for the parent or guardian of an offender under the age of 18 years to be warned to attend 'the relevant criminal proceedings.' Parental awareness of the predicament of their children means that the possibility of such children being legally represented in terms of section 73 of the Criminal Procedure Act is much greater than would otherwise be the case.²⁾

In the light of the foregoing, it is submitted that children³⁾ who are alleged to have committed a criminal offence, other than treason, murder or rape,⁴⁾ should come within the jurisdiction of the proposed family court. Thus, an alleged juvenile offender should, in the first instance, be referred to the proposed family court which will immediately cause a full investigation to be made into the

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- 1) Re Gault 387 US 1 (1967), and see Allen 54-56.
 - 2) Section 73 states that 'An accused ... shall ... be entitled to the assistance of his legal adviser as from the time of his arrest.' It is interesting to note the suggestion of Gericke 'Die Professionele Verhouding Tussen die Regspraktisyn en die Maatskaplike Werker' Golden Jubilee Report Vol 3 104, 109, that only about 15% of White children appearing in a juvenile criminal court are legally represented while only about 5% of White children appearing in Childrens' Courts are legally represented. It is a fair assumption that even fewer non-White children are legally represented in such courts. Is it not the reality of the situation that the role of legal practitioners in such courts is overrated? Does this not, perhaps, justify a greater emphasis being placed, rather, on the role of the social worker?
 - 3) Unless otherwise indicated, a child for the purposes of the submissions made herein shall be deemed to be a person who is under the age of 18 years: cf ss 73 (3) and 74 (1) Criminal Procedure Act.
 - 4) With regard to treason, murder or rape the present procedure will continue to apply so that, for example, on a charge of rape it would not be inconceivable for the ordinary criminal court to find the accused to be a child in need of care, in which event the matter would be transferred to the proposed family court. Notwithstanding the fact that some murders are committed in the context of intra-familial strife (eg K 1956 (3) SA 353 (AD) where a 14 year old boy killed his insane mother, and Whitehead 1970 (4) SA 424 (AD) where an 18 year old boy murdered his step-mother and assaulted his father with intent to murder), the retention of the present procedure is suggested because of the seriousness of crimes like murder.

circumstances of the child. Should the proposed family court find that the child falls within the meaning of a 'child in need of care',¹⁾ it should be able to deal with such child in the manner presently provided for by section 31 of the Children's Act.²⁾ If, however, the proposed family court should find that the child is not in need of care it would then have to resort to one of the three following alternatives:-

(a) it may proceed to deal summarily with the child, provided that any sentence imposed on such child shall not include whipping, or any period of imprisonment, or a fine exceeding, say, R150.³⁾ If the proposed family court were to opt for this alternative then the sentence imposed should not be regarded as a previous criminal conviction. In reality, this alternative should only be resorted to for minor transgressions of the law. This suggested summary disposition of such a case is designed to impress upon the child the serious consequences of any further lapse into criminal conduct and to give him another chance to take his place in society without the stigma of a previous criminal conviction. In addition to any sentence imposed, a warning should be issued to the child that should he again appear before the proposed family court on a criminal charge his case will be automatically transferred to the ordinary criminal courts for disposal in accordance with (c) below, unless he is then found to be a child in need of care in which event he ought to be dealt with as suggested above; or

(b) it may, in view of the seriousness of the criminal charge, transfer the case to the ordinary criminal courts to be dealt with there;⁴⁾ or

(c) it will be obliged to transfer the case to the ordinary criminal courts if the child concerned has previously been dealt with as in (a) above unless the child concerned is found to be in need of care.

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- 1) See 243 n1 above for the definition of a child in need of care.
 - 2) See 199 n1 above for the powers of the Children's Court with regard to children who have been found to be in need of care.
 - 3) As an alternative to a fine some form of community service may be considered an appropriate sentence. A fine may well prove ineffective since in the normal course it would be the child's parents who would pay any fine imposed.
 - 4) The emphasis here clearly would not be on the welfare of the delinquent child but rather on the protection of the community 'from acts of violence or deprivations of property'. See Allen 54 and cf 240 n1 above

The above suggested procedure is, in effect, the reverse of the present procedure whereby a child's alleged criminal conduct is, in the first instance, dealt with by the ordinary criminal court which, if it considers that the child is in need of care, may transfer the case to the Children's Court. Should the suggested procedure in (b) or (c) above be resorted to, it is submitted that a copy of the record of the proceedings in the proposed family court should be immediately transmitted to the prosecutor so that in the event of the child being convicted by the criminal court the record can be handed in to that court. The evidence contained in such record can thereafter be taken into account in the assessment of an appropriate sentence. If, of course, the child is acquitted in the ordinary criminal court there can be no question of that child being subsequently brought before the proposed family court in respect of the same matter.

It will be recalled that in deciding whether a child is in need of care or not the Hawaiian procedure goes much further than that outlined above. Thus, the Family Court of Hawaii is given the discretion to order the psychological and psychiatric examination (and treatment, if need be) of any child before it.¹⁾ It is submitted that a similar provision in the South African context would be most desirable even if only resorted to in rare cases. There is more than just a grain of truth in the suggestion that physical and mental examinations often reveal unsuspected conditions which help to explain a child's criminal conduct.²⁾ Such explanations are undoubtedly conducive to the implementation of the therapeutic functions of the proposed family court.

1) S 44 Hawaii Revised Statutes (Chap 571): see 135 above.

2) For example, in Long 1970 (2) SA 153 (R AD) the accused, although not a juvenile, laboured under great difficulties and unhappiness since 'she' was 'a trans-sexual person with the body of a female and the mind of a man' (at 161). In mitigation of sentence for convictions of kidnapping and extortion it was submitted (and medical evidence supported this submission) that it was the accused's desperate urge to undergo reconstructive surgery with the object of changing her sex that drove her to commit the crimes in question: it was the intention of the accused to use the extorted money for a sex-change operation.

It is submitted that the procedure outlined above will go a long way towards meeting the objections of those who are against including in a family court's jurisdiction the problems of juvenile delinquency. Certainly, the above suggested procedure would afford a child a better opportunity,¹⁾ in a more relaxed and more informal non-criminal atmosphere, of having impressed on him the errors of his ways without attaching to him the stigma of a previous criminal conviction. Should such a child not respond favourably to this opportunity he will then be dealt with in the ordinary criminal courts on any second or subsequent criminal charge,²⁾ unless he is then found to be a child in need of care.

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- 1) Which he is generally denied at present. According to Midgley, 95, in 1968 out of a total of 898 cases in the Cape Town Magistrate's Court involving children, only 35 were referred to the Children's Court. These 898 cases involved a total of 800 children (at 146). This is because some of the children appeared in court on more than one occasion. Apart from the 35 cases referred to the Children's Court, a few other cases were transferred either to the Supreme Court or the Regional Court for trial because of the seriousness of the charges involved. Furthermore, a large number of the remaining 800 children were acquitted or had their charges withdrawn so that in 1968 only a total of 432 children were actually convicted of various offences in the Cape Town Magistrate's Court. In the 5 year period following on from their convictions in 1968 ie 1968-1973 213 of these children re-appeared in the Magistrate's Court and were convicted of various offences - ie 49,3% of the 432 children (at 147-148). There does not appear to be any record of the remaining 219 children committing any further criminal offences. These 219 children will, of course, always carry with them the stigma of a previous criminal conviction. This would be avoided if the procedure suggested above were to be invoked.
- 2) In discussing the juvenile court movement in the United States Allen, 51-52, points out that 'It is an unfortunate fact that the juvenile court of every large urban community is confronted by significant numbers of adolescents whose behaviour cannot be ignored because it imperils the basic security of the community, and who, as a class, elude the reformatory capabilities of the court'.

Another advantage of the above suggested procedure would be that once a criminal case involving a child is before the Magistrate's Court or the Regional Court, or the Supreme Court, as the case may be⁷ it will be disposed of more expeditiously. Thus, it would become unnecessary to resort to frequent remands to enable welfare officials to prepare and present their reports into the circumstances of the child concerned. This will already have been done when the child was before the proposed family court. The more expeditious disposal of criminal cases involving children will undoubtedly assist towards removing the backlog of criminal cases in the Magistrates' Courts of South Africa - at least in the larger magisterial districts such as Cape Town, Port Elizabeth, Durban, Johannesburg, Pretoria and Bloemfontein. In this way, the need to establish a costly intermediate court system would largely fall away.¹⁾ It is submitted that the force of this contention becomes even stronger when coupled with the suggestion made above²⁾ that all matters presently dealt with in the Children's Court should be brought within the jurisdiction of the proposed family court. There would, therefore, no longer be any need for magistrates to function as commissioners of child welfare. Similarly, if all proceedings presently provided for by the Maintenance Act, 23 of 1963,³⁾ were placed within the jurisdiction of the proposed family court this would relieve magistrates of the need to function as judicial officers presiding over the Maintenance Court. The end result would be, it is submitted, that magistrates would have even more opportunity to concentrate on their duties in the criminal courts. It is, in any event, seriously doubted whether magistrates, who are traditionally steeped in a criminal atmosphere, are suitably qualified to perform the functions they are presently called upon to perform under the Children's Act and the Maintenance Act.⁴⁾

1) With regard to the Hoexter Commission of Inquiry see above at 153 and 155-156.

2) See 270 above.

3) See 270 above.

4) It should also be remembered that magistrates who function as presiding officers in the Maintenance Court or as commissioners of child welfare do not occupy such positions on a full-time basis but on a rotation basis. It is believed that some magistrates do not particularly relish occupying such positions. In any case, such positions are generally seen as being ancillary to the magistrate's main work in the criminal courts.

(E) CONCLUSION

It is submitted that a unified jurisdiction over all the matters outlined above would not be impossible of attainment in South Africa, notwithstanding the existence of diverse population groups that go to make up South African society.¹⁾ A truly unified jurisdiction over all family law matters has not been achieved by the Family Court of Australia and for this reason one may wonder whether the proposed family court for South Africa is likely to be more successful in this regard. It must be remembered, however, that the attainment of a completely unified jurisdiction in countries such as Australia and Canada is made difficult by the complicated federal constitutional set-ups that exist in those countries.²⁾ By way of contrast, the Family Court of Hawaii appears to have achieved a unified jurisdiction over family law matters mainly because it is physically situated in the middle of the Pacific Ocean thousands of kilometers from the American mainland.

Together with the object of achieving a completely unified jurisdiction for the proposed family court in South Africa there exists an important need to avoid a 'conflict of philosophy' on the part of the judges of such court. Thus, it is submitted that the judges of the proposed family court should receive permanent appointments as in, for example, Australia,³⁾ so that persons who occupy a seat on the bench of such court would do so only by virtue of their 'training, experience and personality'. In this regard, it is submitted that the rotation of judges would be most undesirable.⁴⁾

It may be countered that it would be difficult to find permanent appointees to the bench of the proposed family court because the work of such court would not be sufficiently varied to keep the judges fully occupied and free from boredom. However, it is submitted that there is no substance in such suggestion. Thus, Payne correctly remarks⁵⁾ that 'a specialist bench in a unified family court will exercise a wide diversity of jurisdiction and that no serious danger of staleness is

1) See 212-218 above for the present position regarding customary family law matters.

2) See generally 81-84 above.

3) For the position in Australia see 56-57 above.

4) See generally Payne 660-681.

5) At 680.

likely to be encountered.¹⁾

There is one further matter that needs to be commented on and that is the fact that South Africa is physically a vast country. This would make it difficult for people living in outlying areas to have ready access to the proposed family court. This is a problem that has exercised the minds of the members of the South African Law Commission which has concluded that 'it would not be practicable to provide a family court ... in every rural town.'²⁾ This is also a problem that was experienced in Australia. An attempt to resolve this problem in Australia has been made by giving the Australian Family Court the power to go on circuit. Furthermore, the Australian Family Court shares some co-ordinate jurisdiction with the courts of summary jurisdiction.³⁾

The Australian solution to this problem may well have some application in South Africa. This, however, is by no means a unique solution. Dealing with a similar problem in Rhodesia, the Rhodesian Divorce Commission recommended⁴⁾ 'that within reasonable distances of Salisbury and Bulawayo (which areas could be proclaimed) only the Matrimonial Division would have jurisdiction in all specified ancillary matrimonial matters,⁵⁾ but outside these districts the local

- 1) Watson J, a senior judge of the Australian Family Court, remarked in a communication to the writer in June 1978 that he had found the first two years of his position on the bench most stimulating. The learned judge, who had a widely varied practice at the Bar, added that 'The variety of problems associated with the inter-relationship of spouses and their children is never-ending. Anybody bored with the resolution of these problems is probably bored by humanity itself.'
- 2) Divorce Report (1978) § 13.8.
- 3) See 57 n 4 above.
- 4) Rhodesian Divorce Commission Report § 22.
- 5) An ancillary matrimonial matter would appear to include an urgent application for a maintenance order, or the variation of an existing one: ibid.

Magistrate's Court would retain jurisdiction in such matters.' It was also further recommended that 'all such orders would be subject to automatic review by the Matrimonial Division.'¹⁾ In this way, a high level of uniformity of approach would be attained.

It is submitted that the South African Law Commission is correct in its conclusion that it would not be feasible to establish a family court in every rural district of South Africa. However, there is much merit in the Australian approach to this problem as well as in the suggestion of the Rhodesian Divorce Commission. Translated into the South African context this would mean that it would be inevitable that the proposed family court would have to share some co-ordinate jurisdiction over certain family law matters of an ancillary nature²⁾ with the Magistrates' Courts in outlying areas. This is unavoidable but, as suggested by the Rhodesian Divorce Commission, a high degree of uniformity of purpose and application can be achieved by a system of automatic review by the proposed family court of those ancillary matters disposed of by the Magistrates' Courts in outlying areas. The idea of the proposed family court travelling on circuit also seems eminently suitable to the South African context.³⁾

1) Rhodesian Divorce Commission Report § 23.

2) Eg breach of peace proceedings; applications for maintenance and variations thereof; applications for consent to marry; urgent applications for interdicts in the intra-familial context; urgent applications for the appointment of curators (see 269 above).

3) In this regard, s 27 Australian Family Law Act makes provision for the Family Court to sit at any place in Australia.

4. PROCEDURE IN THE PROPOSED FAMILY COURT

A. Introduction

The general advantages and disadvantages of the adversary procedure have already been dealt with.¹⁾ Notwithstanding the fact that the South African Law Commission has come to the conclusion 'that the introduction of a completely new procedure of an inquisitorial character is not necessary',²⁾ it does concede³⁾ that there are certain 'inquisitorial elements' in the Divorce Act. For example, section 6 states, inter alia, that a divorce will only be granted if 'the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances.' To satisfy itself on this issue the court may cause the appropriate investigation to be made and order that the costs thereof be paid by one or both of the parties to the action.⁴⁾ Also, as the South African Law Commission has pointed out,⁵⁾ the introduction of irretrievable breakdown of marriage as a basis of divorce has gone 'a long way towards mitigating the conflict and emotion with which divorce proceedings are fraught.'

There is no doubt that the adversary procedure has an important part to play in any family court. This has certainly been the experience in Los Angeles, Hawaii and Australia, especially in defended divorce actions where ancillary matters such as matrimonial property disputes and child custody disputes are at issue.⁶⁾ In this regard, therefore, it is submitted that the complete elimination of the adversary procedure should not be regarded as a main objective behind the establishment of a family court. Rather, the trend to encourage the introduction of certain 'inquisitorial elements' should be continued.

1) See 114-121 above.

2) Divorce Report (1978) § 13.9.

3) Ibid.

4) See also Schäfer 'An Upward Variation of a Maintenance Order - An Expensive Luxury versus the Best Interests of a Child?' (1979) 96 SALJ 540.

5) Divorce Report (1978) § 13.9.

6) See 130 above.

One of the main aims of the Divorce Act is to remove the sting and bitterness from the divorce process. In this respect, the introduction of irretrievable breakdown of marriage as a ground for divorce does make a valuable contribution. But to establish irretrievable breakdown in an adversary atmosphere - even in the limited form of adversary procedure provided for by the Divorce Act - seems to be incompatible with this aim. This suggested incompatibility is even more pronounced when one has regard to the fact that it is only on very rare occasions that divorce actions are defended.¹⁾ Furthermore, it should also be remembered that no children were involved in about half of the White divorces and approximately a third of the Coloured divorces granted in South Africa in 1976.²⁾ Especially where there are no children involved it would seem to be quite unnecessary to oblige the parties to resort to the adversary procedure.

It is, furthermore, a regrettable feature of the modern divorce process that our courts are only able to adjudicate on those issues that are placed before the courts by the litigants themselves.³⁾ The obvious danger of this is that the courts do not always have a complete over-view of the real problems at issue. It is trite that apart from the litigants themselves, there are often other persons, especially minor children, whose interests are vitally at stake in the same action. It is submitted that a greater emphasis should be placed on the inquisitorial procedure so as to give effect to the broader issues involved in family law litigation

A characteristic feature of divorce litigation is the deeply felt need on the part of the litigants to strike back at each other, very often at the expense of their children. Vital issues that should be resolved by the divorce court are often not so resolved. This is evidenced by the large number of post-divorce cases concerning the maintenance of, custody of and access to minor children which are often unnecessarily bitter and acrimonious

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- 1) According to the Divorce Report (1978) § 7.1 more than 90% of all divorce actions are uncontested.
 - 2) 1979 Report on Marriages and Divorces in South Africa 11: Report 07.02.10. There is no reason to believe that this is anything other than an established pattern.
 - 3) See 120 above and 298 below.

An extreme example is the case of Kustner v Hughes¹⁾ where the applicant, a graduate of Cambridge University and an engineer by profession, confronted his ex-wife with 16 prayers for relief in respect of his 3 children and in respect of whom custody had been awarded to his ex-wife.²⁾ Although the applicant denied having any animosity towards his ex-wife the court accepted that he was in fact very bitter towards her.³⁾

For the purposes of the submissions to be made a distinction will be made between undefended divorce actions and defended divorce proceedings.

1) 1970 (3) SA 622 (W).

2) At 623 Colman J observed that 'There is a long and unhappy history of court proceedings, taking various forms. There have been a number of applications in this Court; there has been an appeal to the Transvaal Provincial Division; and a series of contests in the maintenance court.' Understandably the court found that the applicant had gravely harassed his ex-wife with vexatious litigation. The applicant failed in his action and was ordered to pay costs on the attorney and client scale and, inter alia, not to bring any further proceedings against his ex-wife unless he had first received a certificate from counsel of at least 12 years standing certifying that the proceedings were justified: cf Ressell 1976 (1) SA 289 (W). Interestingly, by way of contrast in Revill 1974 (1) SA 743 (AD), instead of directing his feelings of frustration and bitterness at his ex-wife, the accused waged a campaign of denigration of the judge who granted the original decree of judicial separation. Happily there do not appear to have been any minor children involved. The accused was 70 years old.

3) At 623 Colman J remarked that 'He speaks of her in contemptuous terms and is quick to accuse her of perjury and other types of dishonest and improper conduct.' Boberg 416-430 cites and discusses the leading cases concerning the so-called best interests of the children of parents involved in disputes both at the pre- and post-divorce stage (see esp 416-417 n 13). It would seem that an undue emphasis is placed on the interests of the parents rather than the children: cf Germani v Herfst and An 1975 (4) SA 887 (AD) where it was held, inter alia, to be permissible to use force on a child to enable the non-custodian parent to obtain access to the child. In fact, in appropriate circumstances, there seems to be no reason why the interests of the parents should not be sacrificed for those of their children even to the extent of depriving the parents of their normal custody/access rights: see generally Goldstein, Freud and Solnit 31-65, and Olmesdahl 'The Rights of Children on Divorce' 1980 DR 481.

B. Undefended Divorce Proceedings

Most divorce actions are undefended. However, a further distinction must be made between those cases where the parties have no minor or dependent children and where they do.

(1) Where there are no Minor or Dependent Children

It is submitted that to require every undefended divorce case in respect of which no minor or dependent children are involved to be subjected to the glare of the inquisitorial procedure would be as superfluous, needlessly time-consuming and expensive as is the present position of requiring the parties in such a case to resort to the adversary procedure. It has been convincingly proved in the past that the adversary procedure (and ex hypothesi the inquisitorial procedure) in no way inhibits spouses who are intent on divorcing each other from succeeding in their resolve to obtain a divorce even to the extent of committing perjury or 'bending' the law in some way.¹⁾

Accordingly, it is submitted that there is some merit in considering the introduction of divorce by consent in cases where no dependent children are involved. There are, however, serious objections to divorce by consent and these are conveniently described by the South African Law Commission²⁾ as follows:

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- 1) See Petersen 'Divorce Law Reform' (1971) 88 SALJ 478; Aden 'Fault and Breakdown - A Comparative Survey of Modern Divorce Law' 1970 AJ 39; Hahlo and Sinclair 3. To this extent, there is some substance in the contention of Kovacs 'Maintenance in the Magistrates' Courts: How Fares and Forum?' (1973) 47 ALJ 725, 734, that 'It is time to abandon the practice of looking to legal institutions for the correction of social ills, a practice which is both naive and evasive.'
 - 2) Divorce Report (1978) § 7.2. See also Barnard (Divorce) 36-43. Barnard (at 42) would appear to favour consensual divorce 'subject to appropriate prescribed conditions'. However, he does not appear to spell out what these conditions ought to be.

'The objections that are levelled against the granting of divorce on the ground of the consent of the spouses are, in the first place, that this would detract from marriage as a social institution. Marriage is not just a private contract between two persons which contract is capable of being terminated by mutual agreement. If this were so, many people would contract trial marriages. Society, however, has an interest in the stability of marriages and must ensure that marriages are not dissolved for insufficient reasons. It would, moreover, be extremely difficult to determine whether a spouse's consent to the dissolution of a marriage has been given voluntarily. Finally, it must be pointed out that in countries where the consent of a spouse is a ground of divorce, the divorce rate is much higher than in the countries where consent is not recognised as a ground of divorce.'

It is, of course, true that marriage is not just an ordinary contract.¹⁾ This has never been the case. In all cases of divorce the court's sanction is required and this should always continue to be the position so that the community's interest in the stability of, and the sanctity of, marriage can be maintained.²⁾ It is through the courts

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- 1) Hahlo 28-29, and see Carter 1953 (1) SA 202 (AD), at 205 B, where Centlivres CJ said: 'Marriage is not like an ordinary contract which can be terminated by the mere consent of the parties and the reason why this is so is because it is in the interests of the State that the marriage tie, which involves a matter of the status of the parties and the interests of the offspring, should not be lightly dissolved. Before dissolving a marriage ... the Court must be satisfied ...' that it has irretrievably broken down. The best evidence of irretrievable breakdown must surely be that of the parties themselves!
 - 2) In Putting Asunder at § 48 the fundamental objection to divorce by mutual consent is based on the assertion that this 'would repudiate the community's interest in the stability of marriage'. Cf Erasmus J in Campher 1978 (3) SA 797 (O) at 802 C; viz 'The institution of marriage all over the world, whether it be a Christian marriage, a ritual or a customary union between man and wife, remains the cornerstone of society and is prima facie responsible for that complex whole which includes morals, knowledge, belief and all other capabilities acquired by man as a member of society.'

that the community interest should be maintained.¹⁾ If, therefore, it is clearly understood that a divorce cannot, under any circumstances, be granted without the court's sanction then the objections to divorce by consent would become less plausible. Thus, the fear that if divorce by consent were permitted 'many people would contract trial marriages' is an unfounded fear which seems to fly in the face of modern reality. It is a truism that an increasing number of couples are living together outside of marriage by way of experiment rather than going through the legal ritual of a marriage ceremony.²⁾ Such is the state of affairs in England, for example, that a mistress of some standing is now entitled to a certain degree of legal recognition in much the same way as a legal wife.³⁾ This does not mean, however, that this trend

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- 1) Of course, the degree of community interest is a variable factor. It is submitted that for such community interest to be real and meaningful no effort should be spared to prevent the situation from arising where the court merely performs a rubber stamp function. Cf § 48 Putting Asunder: 'Dissolution of marriage ought always to require a real exercise of judgment by the court acting on the community's behalf' : see also § 59.
- 2) According to Bates 'Legal and Social Change in Australian Family Law' (1976) 9 CILSA 299, 302, it does not invariably follow that because more couples are living together outside of marriage that the institution of marriage is on the wane. So also, according to the 1976 official British Handbook Britain 1976, 10, over the past 30 years the proportion of the population of Great Britain who are or have been married has risen from about 52% in 1939 to 59% in 1973. At the same time the proportion of single persons in the population aged 15 years or over has fallen from 33,3% to 22,5%. On the other hand Baxter 'Recent Developments in Scandinavian Family Law' (1977) 26 ICLQ 150, 157-158, points out that the annual number of Swedish marriage declined from 61 000 in 1966 to slightly over 38 000 in 1973. It was also estimated that in 1975 about 12% of Swedish men and women who lived together were not married to one another. With regard to the position in South Africa it is alarming to note that the popularity of marriage among Whites appears to have declined. The comparative figures for 1975, 1976 and 1977 for Whites, Coloureds and Asians are as follows:

	Whites	Coloureds	Asians
1975	41 333	16 694	7 938
1976	40 483	18 010	7 695
1977	38 537	18 611	7 831

- Marriages and Divorce Report (1977)

- 3) Poulter 'The Death of a Lover'. (1976) 126 NLJ 417; Pearl 'The Legal Implications of a Relationship outside Marriage' (1978) 37 Camb LJ 252. See also Glendon 1-23.

is to be welcomed, or even encouraged.¹⁾

With regard to the fear that it would be very difficult to determine whether a spouse has voluntarily given her consent to the dissolution of the marriage it is submitted that it would be an easy matter for the court to call for evidence on this score. A simple affidavit would suffice. In extreme cases, there would be nothing to stop the court from postponing the action to enable either spouse to give a clear and unequivocal indication of intention one way or the other. It is, in any event, a little difficult to appreciate the concern over the apparent difficulty in determining whether a spouse has given her consent to the dissolution of the marriage when it is remembered that the Divorce Act appears to contemplate a divorce being granted against the will of a spouse. Thus, in terms of section 4 (2) (a) of the Divorce Act the court may accept as evidence of the irretrievable breakdown of a marriage the fact 'that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action.'²⁾ It is not inconceivable that notwithstanding the continuous living apart as husband and wife for more than one year the respondent spouse may genuinely and sincerely desire to continue with the marriage. Yet, if the court is satisfied that the marriage has irretrievably broken down it will have to (and rightly so, too) grant a divorce in these circumstances.³⁾

Finally, mention must be made of the assertion of the South African Law Commission⁴⁾ that the divorce rate in those countries which recognize divorce by consent is much higher than the divorce rate in those countries where it is not recognized. Unfortunately, the South African Law

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- 1) Cf Bates 'The Presumption of Marriage arising from Cohabitation' (1978) 13 Univ W A L R 341 who clearly approves of the legal sanctity of marriage.
 - 2) See generally Hahlo and Sinclair 23-29 on the potential difficulties relating to s 4 (2) (a) Divorce Act.
 - 3) And even in circumstances where it is the plaintiff spouse who is the original cause of the parties living apart! One may well ask which is worse - unilateral divorce or divorce by consent?
 - 4) Divorce Report (1978) § 7.2. Cf Barnard (Divorce) 41.

Commission does not cite any empirical data in support of its contention. In any case, even if its contention is correct there does not appear to be any real indication to suggest that this higher rate of divorce is due solely to the fact of divorce by consent. As the South African Law Commission points out,¹⁾ Sweden is one of the few countries to recognize divorce by consent.²⁾ France has also recently recognized divorce by consent,³⁾ which takes one of two forms; namely, divorce-convention⁴⁾ where the spouses jointly petition for the

- 1) Divorce Report (1978) § 7.2.
- 2) Baxter 'Recent Developments in Scandinavian Family Law' (1972) 26 ICLQ 150: Eekelaar 155. Other countries to recognize a limited form of divorce by consent, subject to strict conditions, are Belgium, Luxembourg and Portugal: Lasok 'The Reform of French Divorce Law' (1977) 51 Tulane LR 259, 262 n17.
- 3) Glendon 'The French Divorce Reform Law of 1976' (1976) 24 Am Journ Comp Law 199, 203-205; Lasok 'The Reform of French Divorce Law' (1977) 51 Tulane LR 259, 262-263; Glendon 204-207. The new French Divorce Reform Law came into force on 1 January 1976 and it repealed the previous divorce laws of 1884 which only allowed divorce on the grounds of adultery, condemnation to an infamous punishment (eg the death sentence), and grave violation of marital duties. The 1884 French Divorce Law had, in its turn, repealed the Code Napoleon of 1804 which had revolutionized the law of divorce by allowing divorce on diverse grounds including mutual consent and 'incompatibility of temperament.'
- 4) Divorce-convention is described by the following provisions of the French Civil Code as follows:

'Art 230. When the spouses petition together for a divorce, they need to make known the cause; they must only submit for the approval of the judge the draft of an agreement which will regulate the consequences. The petition may be presented either by the respective lawyers of the parties, or by one lawyer chosen by common accord. Divorce by mutual consent may not be sought during the first six months of the marriage.

Art 231. The judge is to examine the petition with each of the parties, then to call them together. Then he is to call in the lawyer or lawyers. If the spouses persist in their intention to divorce, the judge is to advise them that their petition should be renewed after a three-month period of reflection. In the absence of a renewal within the six months following the expiration of this period of reflection, the joint petition will lapse.

Art 232. The judge is to pronounce the divorce if he is convinced that the intention of each spouse is real and that each of them has given his consent freely. In the same judgment he approves the agreement governing the consequences of the divorce. He can refuse his approval and the granting of the divorce if he judges that the agreement does not sufficiently secure the interests of the children or of one of the spouses.'

-Glendon 205. Divorce-convention appears to be the normally understood form of divorce by mutual consent.

termination of their marriage, and divorce-resignation¹⁾ where the divorce is sought by one spouse and accepted by the other. There is little evidence to suggest that in France and Sweden the divorce rate has significantly increased as a result of these reforms of their respective divorce laws. In Sweden, for example, the reverse may well be true if only because fewer couples than before are going to the trouble of getting married.

Arising out of the above it is submitted that divorce by consent should become part of the South African Law²⁾ subject, however, to the following conditions:

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- 1) Divorce-resignation is described by the French Civil Code as follows:

'Art 233. One spouse may petition for divorce by setting forth the fact of a set of acts, proceeding from both spouses, which make the continuation of their life in common intolerable.

Art 234. If the other spouse acknowledges the facts before the judge, the judge is to grant the divorce without ruling on the allocation of fault. A divorce granted in this manner produces the legal effects of a divorce granted for shared fault.

Art 235. If the other spouse does not acknowledge the facts, the judge is not to grant the divorce.'

-Glendon 206. It would seem that divorce-resignation is a peculiarly French institution which is not likely to be resorted to too widely. As Glendon points out (*ibid*) this type of divorce by consent will be resorted to only where a spouse does not wish to participate actively in the divorce process but would prefer to 'leave the economic and other consequences of divorce up to the judge'. In practice, very few people would be so indifferent to the effects of divorce as to abandon these matters to judicial discretion.

- 2) Cf RWL 'Divorce by Mutual Consent' (1953) 16 THR-HR 91, and see Barnard (Divorce) 42; Mackenna 'Divorce by Consent and Divorce for Breakdown of Marriage' (1967) 30 MLR 121; Hahlo and Sinclair 35 n 104.

(i) divorce by consent should only be permitted where the parties have no 'minor or dependent children',¹⁾ or, alternatively, if the parties have any children they must have reached the age of at least 18 years or have become self-supporting, whichever is the sooner;

(ii) the parties must have been married for at least 2 years²⁾ so as to discourage the idea of trial marriages of short duration.³⁾ The court, however, should have the discretion to allow a divorce by consent despite the fact that the parties have been married for less than 2 years. This will only occur in exceptional cases of hardship;

(iii) the court must be satisfied with any agreements entered into by the parties regarding their respective matrimonial property and maintenance rights. In particular, the court must be satisfied that the consent of both parties to the divorce has been freely and voluntarily given and, if necessary, it shall call for evidence on this issue. Finally, the court should always retain the discretion whether to grant or refuse the divorce. In this way, effect will be given to the view that a marriage is not simply a private contract between spouses terminable at the will of either of them.

- 1) The phrase used in s 6 (1) Divorce Act. Note by way of comparison s 41 Matrimonial Causes Act, 1973, (Chap 18) which provides, inter alia, that the court shall not grant a final order of divorce unless it is satisfied '(b) that the only children who are or may be children of the family ... are the children named in the order and that - (i) arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances; or (ii) it is impracticable for the party or parties ... to make any such arrangements.' See generally Cretney 469-479.
- 2) The suggested period of 2 years is an arbitrary one. For example, s 3 of the English Matrimonial Causes Act, 1973, (Chap 18) states that no petition for divorce can be presented before the expiration of the period of 3 years from the date of the marriage, unless it is shown that the case is one of exceptional hardship suffered by the petitioner or one of exceptional depravity on the part of the respondent: see Cretney 98-101. In France, the waiting period before a divorce by mutual consent can be applied for is 6 months after which the parties are given a further 3 months period of reflection: see 293 n 4 above.
- 3) The idea of prescribing a time limit before divorce can be obtained so as to discourage over-hasty divorce is questioned by Cretney 100-101

It is submitted that in the light of recent developments in this field in other parts of the world there is nothing radical or revolutionary in the above submission. In this regard, it is also submitted that the present South African divorce procedure is probably at the same stage of development at which the English divorce procedure was in 1973 before the introduction of the 'Special Divorce Procedure', the background and details of which are dealt with immediately below.

(a) Background and Outline of Special English Divorce Procedure¹⁾

The 'Special Divorce Procedure' has its roots in a study of the judicial disposal of undefended divorce actions in three English county courts by Elston, Fuller and Murch of the University of Bristol in 1973.²⁾ Their conclusions, it is submitted, have much relevance to the South African context. For example, they concluded³⁾ that notwithstanding the introduction of the allegedly no-fault marriage breakdown principle the procedure for divorce in England remained very much the same as it was before the Divorce Reform Act, 1969, (Chap 55).⁴⁾ In South Africa, apart from the abolition of the order for the restitution of conjugal rights,⁵⁾ the Divorce Act has had virtually no more than a ripple-effect on the former divorce procedure.

1) See generally Cretney 159-163: Eekelaar 143-144.

2) 'Judicial Hearings of Undefended Divorce Petitions' (1975) 38 MLR 609.

3) At 633-634.

4) The Divorce Act, 1969, has now been replaced by the Matrimonial Causes Act, 1973 (Chap 18).

5) By s 14 Divorce Act, 70 of 1979. For a comprehensive description of the procedure applicable to the order for the restitution of conjugal rights see Hahlo 407-418.

Elston, Fuller and Murch also concluded¹⁾ that the ritual of the adversary procedure in an undefended divorce proceeding was an unnecessary expense. They also correctly suggested that to refer to the undefended divorce proceeding as a 'trial' was a misnomer since there was no real dispute about the fact of the marriage and divorce. Yet, it is easy to understand why this misconception still continues. It is essentially due to the insistence on a strict compliance with the traditional adversary procedure. As Elston, Fuller and Murch pointed out²⁾ the adversary procedure has a number of characteristics which make it difficult to move away from the idea that an undefended divorce proceeding is not a trial.³⁾

In the first place, the adversary procedure⁴⁾ pre-supposes that there is a dispute on both sides. It is clear, however, that in the undefended divorce there is no dispute over the fact of the marriage breakdown.

In the second place, the adversary procedure assumes the involvement of a risk in respect of which on party will 'win' and the other will 'lose'. In the undefended divorce proceeding both parties 'win' in the sense that they obtain the divorce they are seeking. However, this is not entirely accurate since even in the undefended divorce proceeding there is, more often than not, a 'loser' who will have chosen not to contest the divorce because of some form of pressure being brought to bear upon him. For example, the prospect of paying the costs of a protracted divorce proceeding often deters a defendant from entering an appearance to defend. So also, the threat of having to pay the costs often has the effect of pressurizing a defendant spouse, who has chosen not to defend the proceedings, into agreeing to terms in a consent paper which he would not otherwise have agreed to. But, in the ultimate analysis, both parties to a divorce proceeding, whether it be defended or not, are the 'losers'.

1) At 633-634.

2) At 634-636.

3) Indeed, it may well be a misnomer to refer to the undefended divorce proceeding as an 'action'.

4) On the general advantages and disadvantages of the adversary procedure see above at 114-121.

Finally, under the adversary procedure, the judge is often seen as playing a very passive role in the undefended divorce proceeding. In the divorce proceeding all that a judge is concerned with is to satisfy himself that the formal procedural requirements have been complied with and that the consent paper, if any, adequately protects the interests of the children and effects an equitable distribution of the matrimonial property.¹⁾ It was also submitted that the judge was singularly ill-equipped for this task since he could only rely on the uncontradicted and one-sided evidence of the plaintiff.²⁾ As Elston, Fuller and Murch concluded³⁾:

'It is not surprising to find that many petitioners were themselves puzzled about the real nature of the proceedings. Many were astounded at the brevity of the hearing, particularly after the elaborate build-up that they had experienced with their solicitors in the preceding months.⁴⁾ In retrospect many considered that obtaining the decree itself had been an expensive formality. In the absence of dispute many saw little point in going to court at all.'

Even before Elston, Fuller and Murch published their findings in 1975, the English divorce procedure was amended in 1973, the effect of which was to introduce the 'special procedure' for undefended divorce proceedings based on the ground of 2 years separation,⁵⁾ provided that there were no children of the marriage to whom section 41 of the Matrimonial Causes Act, 1973, (Chap 18)⁶⁾ applied. As a result of the impact of the findings of Elston, Fuller and Murch, the 'special procedure' was extended in 1975 to apply also to where the following

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- 1) Even in this respect, it is seriously doubted whether a judge is properly able to discharge his duties: see above at 168-172.
 - 2) See 120 and 287 above.
 - 3) At 636-637.
 - 4) But cf Lord Scarman (see 114 n 3 above) who suggests that 'It is a complete misconception to assess the value of the judicial process ... by looking only at the unsubmerged tip - the ten minutes taken in open court to prove that which is uncontested, namely, the matrimonial offence.'
 - 5) S 1(2)(d) Matrimonial Causes Act.
 - 6) See 295 n 1 above for the relevant provisions of s 41.

facts were relied upon as evidencing the breakdown of marriage; namely, adultery,¹⁾ desertion for 2 years²⁾ and 5 years separation,³⁾ provided that there were no children of the marriage to whom section 41 of the Matrimonial Causes Act, 1973, (Chap 18) applied.⁴⁾ In 1977 the 'special procedure' was again further extended so that it now applies to all undefended cases, whether or not children are involved.⁵⁾

In terms of the 'special procedure', which has in reality become the ordinary or normal procedure since most divorce cases are undefended, neither party is obliged to appear in court. Certain forms and documents have to be completed by the petitioner for divorce. If the respondent should indicate that he/she does not wish to defend the matter, and if the registrar is satisfied that a proper case has been made out he files a certificate to that effect. In due course, the judge will formally grant the decree nisi in open court, very often doing so in bulk; for example, 'I pronounce decree nisi in cases 1 to 50.' After a further 6 weeks the party in whose favour the decree nisi was granted may apply to have the decree made absolute.

1) S 1 (2) (a) Matrimonial Causes Act.

2) S 1 (2) (c) Matrimonial Causes Act.

3) S 1 (2) (e) Matrimonial Causes Act.

4) See generally the Practice Direction of the Family Division in [1975] 1 WLR 1594.

5) Matrimonial Causes (Amendment) Rules 1977. Further on the Special English Divorce Procedure see Bradley 'Realism in Divorce Law' 1976 NLJ 1204.

(b) Relevance of Special English Divorce Procedure in South Africa

As suggested above, there is much substance in the conclusions of Elston, Fuller and Murch. However, it is submitted that the 'special procedure' outlined above in its present form would have no place in the South African context in that it goes too far. Even Cretney¹⁾ is constrained to remark -

'that the extension of the special procedure has made that substance of the "breakdown" principle a hollow form: it certainly much diminishes the importance of the termination of marital status (in practice achieved by an administrative act) ... Indirectly, the dejudicialisation of the divorce process makes the complexity of the substantive law ... seem unnecessary and irrelevant.'

In the light of the English experience there is much to be said for the view that every effort should be made to prevent the relegation of the divorce process to a purely administrative act.²⁾ It is submitted that the suggested conditions upon which divorce by consent should be permitted in South Africa³⁾ still oblige the courts to play a meaningful role in the divorce process. Certainly, the English experience suggests that to all intents and purposes divorce by consent is now permitted under any circumstances regardless of whether or not there are any minor children of the marriage involved, and that the courts are merely confined to 'rubber stamp' functions. It seems that had the development of the 'special procedure' stopped in 1975 there would have been much in it that would have been of relevance to the South African context.

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- 1) At 163 - and see especially n 15 for Cretney's comments on the 'Special English Divorce Procedure'.
 - 2) The submission that the divorce process should not be relegated to a purely administrative act is in keeping with the suggestion that the proposed family court should function as (and be seen to function as) a court of law: see above at 265. Cf the views of Denning J in his interim report on Procedure in Matrimonial Causes published in 1946 and cited by Bradley 'Realism in Divorce Law' 1976 NLJ 1204; viz 'If there is a careful and dignified proceeding such as obtains in the High Court for the undoing of a marriage, then quite unconsciously the people will have a much more respectful view of the marriage tie and of the marriage status than they would if divorce were effected informally in an inferior court.'
 - 3) See 295 above.

(2) Where there are Minor or Dependent Children¹⁾

In this instance, it is submitted, there is no room for divorce by consent. The inquisitorial procedure would have an important part to play since the issues that are involved concern not only the husband and wife but also their minor or dependent children. One cannot over-stress how important it is that proper and adequate effect be given to the best interests of children on divorce.²⁾ Certainly, section 6(4) of the Divorce Act is a step in the right direction though, it is submitted, it does not go far enough.³⁾

It is a truism that the effect of divorce is to divide a family as a result of which it is normally the children who suffer the most.⁴⁾

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- 1) For the purposes of the submissions made herein a minor will be deemed to be any child who has not yet reached the age of 18 years, whereas a dependent child would include a major child who is still dependent on his parents for support because of some disability or, perhaps, because he is furthering his studies at a tertiary institution: see Hahlo and Sinclair 40 and cf the first suggested condition before divorce by consent may be granted: above at 295.
 - 2) On the apparent failure of our courts to place the interests of the children above those of their parents see 288, n 3 above. The phrase 'best interests of the children' is not capable of easy definition: cf Mnookin 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemp Problem 226, 229, who describes the phrase as being 'indeterminate and speculative' (see also 195 n3 above). Mnookin, however, advocates (op cit 247) 'highly individualised determinations that focus on the child, not the parents' (see also above at 288). But this depends on the court being in possession of all the relevant information (op cit 257). Hence the importance of the proposed family court's active involvement in the divorce process. See also Foster and Freed 'Child Custody' (1964) 39 NYULR 423 and 615; Mnookin and Kornhauser 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale LJ 950.
 - 3) See generally 164 et seq above, and see Olmesdahl 'The Rights of Children on Divorce' 1980 DR 481.
 - 4) In this regard it is important to remember that the main purposes of a custody/access order are to preserve the ongoing parent/child relationship and to minimize, so far as possible, the psychological trauma and hurt young children experience when their parents separate: cf Appendix 'A' 'Parents are Forever'.

The divorcing parents still retain a moral and legal commitment to their minor or dependent children and, it is submitted, it is the duty of the court to ensure that such parents are reminded of their commitments. It is not enough to assume that parents are aware of their duty, for example, to support their children: it is just as important that the parents be made aware of the nature and extent of such duty. This can only be achieved by the proposed family court becoming more involved in the divorce process by means of the inquisitorial procedure.

C. Defended Divorce Proceedings

More often than not a contested divorce case concerns not so much a dispute over the fact of irretrievable breakdown but rather a dispute about maintenance, custody of and access to minor or dependent children, and the division of matrimonial assets.¹⁾ It is submitted that if the parties, notwithstanding the fact that they have had the benefit of conciliation counselling,²⁾ are unable to resolve their areas of dispute the adversary procedure will still be indispensable. By the time such disputes are brought before the proposed family court the parties will have had every opportunity to resolve their disputes and, it seems, there would be no option left but to resort to the traditional adversary procedure. This, it is submitted, will only occur in very rare cases. Experience shows that where an appearance was entered initially to defend a divorce case the parties were still able to 'come to agreement' on the terms of a consent paper. It is anticipated that this will continue to be the trend under the suggested procedure for conciliation counselling.

It may happen that an appearance to defend is entered in a divorce case not because there is a genuine dispute on any issue but out of sheer vindictiveness in order to protract the proceedings and

1) Cf 118 n 5 above. With regard to the best interests of children on divorce see 195 n 3; 288 n 3; 301 n 2 above.

2) See below at 318 et seq.

fritter away the assets of the joint estate.¹⁾ Should this occur it would mean that the adversary procedure would have to be resorted to. In this regard, therefore, the provisions of section 10 of the Divorce Act are a step in the right direction towards the discouraging of unnecessary defended divorce actions. Among the factors that the court may take into account in exercising its discretion on the question of costs is the conduct of the parties 'in so far as it may be relevant.' Whether this means only conduct during the marriage, or whether it would also include conduct during the divorce proceedings, is far from clear. However, it is submitted that there is no reason why the court should not take into account a defendant's frivolous and vexatious appearance to defend in deciding the question of costs.

1) Cf Tel Peda v Laws (1) : Laws v Laws and Another (2) 1972 (2) SA 1 (T) where the very reverse occurred. Here, the husband refused to enter an appearance to defend an action in which a detective agency was claiming default judgment in the sum of R2 920. The wife, who was married to her husband in community of property, (a divorce case was pending) applied for leave to intervene in the action, claiming that her husband's conduct in failing to enter an appearance to defend was 'tantamount to a deliberate intention to prejudice her' (at 5 C). In view of the fact that the summons issued by the detective agency was defective in many respects its action was dismissed by Galgut J. It followed that it was not necessary for the wife to intervene after all. Galgut J did, however, say that if the detective agency again instituted action against the husband (which it was entitled to do) then the wife was to be granted leave to defend the action.

D. Pleadings¹⁾

Consistent with the notion that the ideal family court should be governed by an informal procedure there is a fairly widespread view that there should also be a relaxation of the presently rigid and formal type of pleading in our courts. Among those who are sympathetic to this view is the Finer Committee²⁾ which, however, does not give any clear indication³⁾ of how the system of pleading should be rendered more informal. The Finer Committee did, however, remark⁴⁾ that -

'We are impressed by the unanimity of the commentators in favour of greater informality in proceedings in family matters. But, we are impressed, too, by the lack of studies of the effect of legal ritual upon citizens who use the courts ... On these aspects of court procedure, we think that decisions should be delayed until they can be based on knowledge of what will best satisfy the citizen user's desire for fairness and dignity in the determination of matrimonial cases'.

It is submitted that all parties to litigation, whether in the proposed family court or otherwise, are entitled to reasonably precise particularity on the issues between them. The proposed family court should not be entitled to assume an unfettered jurisdiction over all potential issues which may affect a family merely because a case is before it. For example, it would be wrong for the proposed family

1) The pros and cons of informal pleadings in the American and Canadian context are discussed by Payne at 133-143. At 142 Payne concludes that 'There must ... be some degree of flexibility so as to permit effective and efficient disposition of the many varied issues which may arise for determination by the court. The pleadings must be sufficiently explicit to enable the parties to present relevant submissions to the court but complexity should be avoided unless the circumstances are such as preclude a simplified form of pleadings. The pleadings must be sufficiently precise to enable the court to determine the issues without undue expenditure of time and effort.'

2) At § 4.283.

3) § 4.338.

4) At § 4.404.

court to concern itself with the question of maintenance when it is not in issue and when the real point at issue concerns the custody of minor or dependent children. It is submitted, therefore, that there is no small measure of common sense and experience in Rule 18(4) of the Consolidated Rules of the Supreme Court which states that -

'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.'¹⁾

This does not mean that our courts do not have a wide discretion with regard to pleadings. Thus, in Shill v Milner²⁾ De Villiers JA pointed out that 'The importance of pleadings should not be unduly magnified.' The learned Judge of Appeal then went on to quote from the judgment of Innes CJ in Robinson v Randfontein Estates GM Co Ltd³⁾ to the following effect; namely,

'The object of pleading is to define the issues; and the parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings.'

There seems to be no reason why the present system of pleadings should not be continued in the proposed family court. It is true that the less formal the pleadings are the less need there will be for legal assistance in the drafting of pleadings and that this would serve to cut down on the costs involved in family court litigation. This, however, would only be a small advantage at the expense of particularity of pleadings which serves to define the matters at issue. The proposed

1) Herbstein and Van Winsen 295-296; 310; 354-356.

2) 1937 AD 101 at 105.

3) 1925 AD 173 at 198.

family court, like any other court of law, must administer a just and efficient system of justice and to do so it must not be expected to grope around in the dark not knowing what the real issues are between the parties.¹⁾ To advocate a less formal procedure and a less formal atmosphere in the proposed family court is one thing, but to advocate more informal pleadings is another matter.

E. The Family Courtroom

A relaxed and informal atmosphere in the proposed family court is essential. The paradigm for the ideal family court setting is to be found in the Children's Court²⁾ which 'shall sit in a room other than that in which any other court ordinarily sits.'³⁾ Commissioner's of child welfare do not robe⁴⁾ and the round-table conference approach is the characteristic feature of the Children's Court. Nor do commissioner's of child welfare sit on an upraised bench as in the traditional courtroom. Although a friendly and informal atmosphere should be encouraged in the proposed family court it should always be remembered that it will be a court of law and must always function as such.⁵⁾ Thus, for example, as in the case of the Children's Court there can be no question of a case being disposed of in the absence of anyone who has a direct interest in the case. Proper notice must be given to all parties concerned.⁶⁾ Failure to

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- 1) For this reason, the idea of 'Do It Yourself' divorces should not be encouraged. On the other hand, it would be wrong for the proposed family court to deny a party the relief he is entitled to simply because he has chosen not to seek the assistance of a legal practitioner
 - 2) For a description of the Children's Court see above at 198-202 and see Spiro 320-329.
 - 3) S 8 (1) Children's Act.
 - 4) Cf the position in Hawaii which is dealt with above at 124 and Australia which is dealt with above at 66.
 - 5) See 265 above; see also Napolitano v de Wet NO and Os 1964 (4) SA 337 (T) at 342; Snyder en And v Steenkamp en And 1974 (4) SA 82 (N) at 87; J and An v Commissioner of Child Welfare Durban 1979 (1) SA 219 (N) at 222.
 - 6) See s 34 Children's Act which makes it obligatory for the parents, or the guardian, or the person having the custody, of a child in respect of whom an inquiry under s 30 is to be held, to be given proper notice of such inquiry.

give such proper notice would constitute a material irregularity and would be contrary to the dictates of justice and fairness.¹⁾

As in the case of the Children's Court,²⁾ it is also submitted that no person should be present during proceedings in the proposed family court unless his presence is necessary. Persons whose presence would be necessary would obviously be the parties themselves, the parents, or guardian, or person in loco parentis, of any child whose presence is necessary,³⁾ or the legal representatives of such persons. It should also be noted that while section 12 of the Divorce Act limits the publication of the particulars of a divorce action, it does not go so far as to prohibit the presence of persons whose presence may not reasonably be required.⁴⁾ As it is envisaged that the proposed family court should have jurisdiction over, inter alia, all those matters presently

- 1) Weepner v Warren and van Niekerk NO 1948 (1) SA 898 (C); Philips v Commissioner of Child Welfare Belville 1956 (2) SA 330 (C); Snyder en And v Steenkamp en And 1974 (4) SA 82 (N); J and An v Commissioner of Child Welfare Durban 1979 (1) SA 219 (N). The landmark decision in Re Gault 387 US 1 (1967) was mainly based on the failure to give the parents of the juvenile accused proper notice of the trial; cf Kent v United States 383 US 541 (1966).
- 2) S 8 (3) Children's Act; Raison v Commissioner of Child Welfare 1948 (4) SA 218 (N). Cf s 5 (3) Maintenance Act which is to similar effect.
- 3) The children of divorce are just as much parties to the divorce action as are their parents. Their presence will therefore be most desirable, particularly where they are of an age of understanding. Certainly, the separate legal representation of all children of divorce is essential: see above at 249 et seq.
- 4) Cf s 97 (1) of the Australian Family Law Act: see 66 above. The background to s 12 Divorce Act is explained by the South African Law Commission Divorce Report (1978) § 177 as follows:- 'It is an established principle of our law that justice should not only be done but that the general public should also be able to see that justice is done. For this reason, hearings normally take place in open court and the publication of the evidence given is freely permitted. The reason given for the proposed exception in the case of divorce proceedings is that a divorce is a highly personal matter. The public has an interest in the matter only in so far as the status of the parties is concerned. The intimate relationship of the parties and the causes of their marriage breakdown do not, however, concern the public. Such details are published, merely to stimulate the public taste for sensation.'

provided for by the Children's Act and the Divorce Act there seems to be no reason why section 8 (3) of the Children's Act and section 12 of the Divorce Act should not be combined. It must be stressed, though, that as a general proposition secrecy, as opposed to privacy, is to be condemned. However, it is submitted that a strong case for some measure of secrecy can be made out in respect of cases involving children alleged to be in need of care and adoptions. In this regard, it is useful to compare the positions in the Los Angeles Conciliation Court, and the Family Courts of Hawaii and Australia.

In the Los Angeles Conciliation Court the hearing of the 'petition of conciliation' is conducted in private.¹⁾ This is where the strength of the conciliation and counselling process of the Los Angeles Conciliation Court lies since the parties are enjoined to raise and discuss any matters at issue. Such discussions remain privileged from future disclosure so that the parties are not inhibited from raising issues which they feel might otherwise prejudice their case. If the parties should enter into a 'Husband and Wife Agreement',²⁾ the matter is then referred to the court by the counsellors for formal endorsement as a court order whereupon the need for further secrecy falls away. Similarly, if the parties are unable to arrive at a 'Husband and Wife Agreement' their action will be resumed in court in the ordinary way without fear of any disclosures made at the conciliation stage being used against them. Thereafter the need for continued secrecy falls away.

With regard to the Hawaii Family Court section 41 of the Hawaii Revised Statutes provides, inter alia, that in cases involving children -

'The hearings may be conducted in an informal manner ... The general public shall be excluded and only such persons admitted whose presence is requested by the parents or guardian or as the judge or district family judge finds to have a direct interest in the case or in the work of the court from the standpoint of the best interests of the child involved.'

1) See 25 above.

2) See 26-28 above.

Insofar as the procedure in cases involving adults is concerned, section 42 of the Hawaii Revised Statutes provides, inter alia, that -

'Where in his opinion it is necessary to protect the welfare of the persons before the court, the judge may conduct hearings in chambers, and may exclude persons having no direct interest in the case.'

In all other circumstances, it would seem that cases involving adults are heard in open court from which the general public is not excluded.

The position in Australia is governed by sections 97 (1) and (2) of the Family Law Act, 53 of 1975, which make provision for proceedings to be heard in private in closed court.¹⁾ This, however, is subject to relatives or friends of either party, the marriage counsellors, welfare officers and legal practitioners being permitted to be present in court 'unless in a particular case the court otherwise orders.' With regard to the publication of proceedings section 121 (1) of the Family Law Act, states that -

'A person shall not print or publish -

- (a) any statement or report that proceedings have been instituted in the Family Court or in another court exercising jurisdiction under this Act;
- (b) any account of evidence in proceedings instituted in the Family Court or in another court having jurisdiction under this Act, or any other account or particulars of any such proceedings.'

1) S 97 (1) Family Law Act only applies to the Commonwealth Family Court and not to state family courts: see 66 above.

5. RECORDS OF PROCEEDINGS

With regard to the records of proceedings in the proposed family court it is submitted that the present provisions of the various statutes governing the keeping of, and access to, records of proceedings in the Children's Court, the Maintenance Court and the Divorce [Supreme] Court should be consolidated. This can be done to cater for the various situations. Thus, section 9 (3) of the Children's Act, states that -

'The contents of a statement or a report of a probation officer, or of an officer of an approved agency which has been lodged with a children's court, shall not be disclosed for the purposes of any civil action except by order of any court to a court where such disclosure would be in the interest of any particular person.'

Furthermore, regulation 6 (4) of the Rules and Regulations of the Minister of Social Welfare and Pensions¹⁾ states that no person who was not a party to the proceedings may inspect the record of any enquiry except with the permission of a commissioner of child welfare.²⁾

The records of adoption proceedings are, understandably, even more strictly controlled. Thus, regulation 14 (2) of the Rules and Regulations of the Minister of Social Welfare and Pensions³⁾ states in peremptory terms that -

'No person other than an officer of the court or other person generally or specially authorized thereto by the Secretary shall have inspection of or access to an Adoption Record Book and the clerk of the children's court shall take all necessary precautions to ensure that access to the Adoptions Record Book in his custody is not had by any unauthorized person.'⁴⁾

1) GN R523 of 1961.

2) There are exemptions in the case of publications in newspapers and journals and also with regard to inspections of records for official purposes and for reasons of research: see the proviso to reg 6 (4): GN R523 of 1961.

3) GN R523 of 1961.

4) With regard to Blacks see reg 32 (1) Rules and Regulations of Minister of Bantu Administration and Development GN R1085 of 1960, which is to similar effect.

Before an adoption order is granted the most searching examinations are conducted by social workers into the personal backgrounds of the natural parents, the child concerned and the adoptive parents.¹⁾ Even after the adoption order has been granted there is the possibility of the Children's Court being called upon to rescind the order.²⁾ For a period of at least 2 years after the granting of an adoption order the adoption file remains open.³⁾

There is no similar restriction on the right to have access to the records of proceedings in the Maintenance Court.⁴⁾ In the case of divorce proceedings there is also no restriction on the right to have access to the records of the proceedings.⁵⁾

A successful combination of the various provisions relating to the custody of, and access to, records of proceedings in a family court has been achieved by the Hawaii Legislature. Section 84 of the Hawaii Revised Statutes provides, inter alia, that -

'The court shall maintain records in all cases brought before it. In proceedings under section 11,⁶⁾ and in paternity proceedings ..., the following records shall be withheld from public inspection: the court docket, petitions, complaints, motions and any other papers filed in any case;

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- 1) Napolitano v de Wet NO and Others 1964 (4) SA 337 (T); Napolitano v Commissioner of Child Welfare Johannesburg 1965 (1) SA 742 (AD). It is doubted whether the recent overseas trend of allowing adopted persons to have access to adoption records to ascertain who their natural parents are will gain ready acceptance in South Africa.
 - 2) S 76 Children's Act.
 - 3) S 76 (1) Children's Act.
 - 4) S 5 (10) (a) Maintenance Act. Of course, no person whose presence is not necessary is permitted to be present at a maintenance enquiry unless he has the permission of the court: s 5 (3) Maintenance Act.
 - 5) But there is a restriction on the right to publish the particulars of a divorce action: s 12 (1) Divorce Act.
 - 6) s 11 is cited in full at 36-37 above.

transcripts of testimony taken by the court; and findings, judgments, orders, decrees, and other papers other than social records filed in proceedings before the court. The records, other than social records, shall be open to inspection by the parties and their attorneys, by an institution or agency to which custody of a minor has been transferred by an individual who has been appointed guardian; with consent of the judge, by persons having a legitimate interest in the proceedings from the standpoint of the welfare of the minor; and, pursuant to order of the court or the rules of court, by persons conducting pertinent research studies, and by persons, institutions, and agencies having a legitimate interest in the protection, welfare, or treatment of the minor.

Reports of social and clinical studies or examinations ... shall be withheld from public inspection, except that information from such reports may be furnished, in a manner determined by the judge, to persons and governmental and private agencies and institutions conducting pertinent research studies or having a legitimate interest in the protection, welfare, and treatment of the minor.

No information obtained or social records prepared in discharge of official duty by an employee of the court shall be disclosed directly or indirectly to anyone other than the judge or others ... entitled to receive such information, unless and until otherwise ordered by the judge ...

The records of any police department, and of any juvenile crime prevention bureau ... shall be confidential and shall be open to inspection only by persons whose official duties are concerned with the provisions of this chapter, except as otherwise ordered by the court. Any such police records concerning traffic accidents in which a child or minor ... is involved shall, after the termination of any proceedings ... arising out of any such accident, or in any event after six months from the date of the accident, be

available for inspection by the parties directly concerned in the accident, or their duly licensed attorneys acting under written authority signed by either party. Any person who may sue because of death resulting from any such accident shall be deemed a party concerned.'

It is clear that the above provision is designed with the best interests of children in mind. No useful purpose would be served by the publication of, or even by allowing the general public access to, records of adoption proceedings. Nor can it be said that the advantages of publishing evidence recorded in a Children's Court outweigh the disadvantages. In divorce actions there are far too many minor or dependent children involved whose best interests would in no way be furthered by the publication of the unsavoury particulars of their parents' divorce. But, as section 84 of the Hawaii Revised Statutes shows, it is possible to combine into one section the various provisions relating to the records of proceedings to give effect to the varying degrees of restriction on access and publication.

6. THERAPEUTIC FUNCTIONS OF PROPOSED FAMILY COURT

The therapeutic functions of the proposed family court can be conveniently considered from the following standpoints:

- (A) pre-marital counselling;
- (B) pre-divorce counselling; and
- (C) post-divorce counselling.

(A) PRE-MARITAL COUNSELLING

There is no statutory provision in South Africa making it obligatory for persons wishing to marry to undergo pre-marital counselling. With regard to the position in Los Angeles, Hawaii and Australia, pre-marital counselling has met with little or no success.¹⁾ It is submitted that it would be far more desirable if greater emphasis were to be placed by our educational authorities on the social and personal consequences of marriage rather than to make this an area of concern for the proposed family court. Apart from the home, the proper place for such educational programming is in the schools²⁾ and other institutions of learning such as universities and colleges. Once young people reach a marriageable age they generally have developed their own preconceived ideas of what the social and personal consequences of marriage are and it is not likely that their views will be changed by an intensive short-term course of counselling just before their proposed marriage.

With regard to the legal consequences of a marriage, however, the position is different. In this regard, it is submitted that persons about to be married for the first time should be made more aware of the legal consequences of a marriage contract and, in the South African context, this is particularly important with regard to the decision whether to enter into an antenuptial contract or not.³⁾

1) On pre-marital counselling in other jurisdictions see above at 17-21; 51, 96-97; 102; 104; 110; 161.

2) Cf § 11(b) Rhodesian Divorce Commission Report. Apart from the vital topics of sex and contraception the matters mentioned in Appendix 'C' below, may usefully form part of a pre-marital education syllabus; viz welfare of children; personal appearance; tempers and nagging; mutual interests; talking things over; money matters; mutual friends; tolerance and privacy.

3) On the present legal position relating to antenuptial contracts see Hahlo 259-322; Olivier 262-270; Boberg 225-227. See also Bosman 'Huweliksvoorwaardeskontrakte: Gister en Vandag' (1978) 41 THR-HR 402.

How best to achieve this, though, is a moot point. On the one hand, this could be achieved by pre-marital legal counselling.¹⁾

Alternatively, all that might be necessary would be for the parties before the proposed marriage ceremony, to have their attention drawn to the legal consequences of marriage. This could be achieved by the marriage officer handing to the intending spouses the appropriate pamphlet to this effect. The marriage officer could also be required to certify that such pamphlet has been handed to the intending spouses at least, say 48 hours, before the proposed time of the wedding ceremony.²⁾

Of the two possible alternatives, it is submitted that the second is likely to be more readily acceptable. As has been pointed out before, pre-marital counselling, whether it be with regard to the legal or the social consequences of marriage, has not met with much success in other jurisdictions. All that intending spouses need is to have their attention drawn to the legal consequences of marriage which will, inter alia, assist them in arriving at a firm decision one way or the other on the desirability of entering into an antenuptial contract.³⁾ At the very least, the intending spouses should be made aware of the need to seek legal advice on the matter. However, the burden of informing intending spouses of these matters should not be cast on the staff of the proposed family court: they will have enough onerous and more compelling duties to comply with at the pre-divorce and post-divorce counselling stage.⁴⁾

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- 1) This suggestion, at first blush, seems particularly attractive with regard to intending spouses where one or both are under 21 years of age and they are marrying for the first time: cf § 30 Rhodesian Divorce Commission Report.
 - 2) Cf Appendix 'C' below.
 - 3) In particular, it should be stressed to the intending spouses that once married under a particular matrimonial regime they will be bound by that regime for the rest of their married lives and that an antenuptial contract normally cannot be varied post nuptially. Should the proposed accrual system become part of the South African Law there will be an even greater need to inform intending spouses on what will then be a new concept of law governing, inter alia, the proprietary consequences of a marriage: see the Draft Bill on Matrimonial Property published by the South African Law Commission at the end of 1979.
 - 4) Although opinions on the efficacy of pre-marital counselling are divided the writer inclines to the view of Payne 384 who is of the view that 'The provision of premarital counselling should be viewed in the broad context of a comprehensive programme of family life education'. See generally Payne 383-385 and the authorities there discussed.

B. PRE-DIVORCE COUNSELLING¹⁾

Reference has already been made to the distinction between reconciliation and conciliation counselling.²⁾ For the purposes of the submissions to be made hereunder it is proposed to continue with this distinction³⁾.

(i) Reconciliation Counselling

Prior to the promulgation of the Divorce Act, the Supreme Court never had the inherent discretion to order the parties to a divorce action to submit to reconciliation counselling. Once the appropriate ground for divorce had been proved the court had no option but to grant the desired divorce notwithstanding the fact that it may have felt that the possibility of a reconciliation existed. At the most, the court could postpone a divorce case indefinitely in the hope that the parties might become reconciled. In practice, this was very rarely resorted to and there is no record of this procedure having been successful.

- 1) On pre-divorce counselling in other jurisdictions see above at 23-28; 51-53; 69-72; 97-101; 102-104; 105-109; 110-112.
- 2) See 88-89 above.
- 3) Payne 405 would appear to be of the view that such distinction is fallacious: he suggests that 'legislation should specifically reflect the philosophy that counselling cannot be subdivided into separate categories such as "reconciliation counselling" and "conciliation counselling" and that the role of the counsellor is to assist in the resolution of matrimonial and familial problems irrespective of whether this leads to the preservation of the marriage or family unit or to its dissolution and disintegration.'

Now section 4(3) of the Divorce Act, provides that:

'If it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings in order that the parties may attempt a reconciliation.'¹⁾

It is clear that section 4(3) found its way into the Act in response to the South African Law Commission's rather dubious contention²⁾ that 'a judge should be able to tell at a glance in which cases it would be unnecessary to take steps with a view to reconciliation'. It should also be noted that section 4(3) does not give the court the power to order any of the parties to attend any counselling sessions.³⁾

In the light of similar experiences in other jurisdictions it is doubted whether the provisions of section 4(3) will be implemented with any regularity. Even if the section should be implemented the chances of the parties becoming reconciled are very slight, especially in view of the continued emphasis on the adversary procedure.⁴⁾

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- 1) S 4(4) states that 'Where a divorce action which is not defended is postponed in terms of subsection (3), the court may direct that the action be tried de novo, on the date of resumption thereof, by any other judge of the court concerned.'
 - 2) § 13.3 Divorce Report (1978). See above at 170-171.
 - 3) As the South African Law Commission itself correctly observes 'reconciliation cannot be forced upon the parties': § 12.3 Divorce Report (1978).
 - 4) As far as can be ascertained, there is no recorded instance of a court adjourning in terms of s 4(3) Divorce Act. In this regard, Hahlo and Sinclair conclude at 36 as follows: 'T/here will be, as a rule, no prospect of reconciliation, and even in those cases where the spouses desire divorce for no better reason than that they have grown tired of each other reconciliation attempts are generally doomed. It is only where the parties are young and inexperienced and have not been married for long, that there is, occasionally, a reasonable prospect of reconciliation.' There do not seem to be any official South African statistics showing how many divorced couples re-marry each other. In the writer's experience this is a rare occurrence. The fact that a large number of previously divorced couples in other countries re-marry each other is not necessarily indicative of the fact that reconciliation counselling would have been a useful exercise when the parties were in the process of divorcing each other: cf the Los Angeles experience which is discussed above at 97-101.

But despite these reservations about the efficacy of section 4(3) of the Divorce Act, it is submitted that the section should be retained, even if only for the benefit of those very rare cases where the remote possibility of reconciliation exists. Of course, the possibility of reconciliation will only become a reality where the spouses desire to consider reconciliation, and they must be willing to submit to counselling with this end in mind. Beyond this, it is submitted, it is not possible to legislate on the question of reconciliation.¹⁾

(ii) Conciliation Counselling

The importance of conciliation counselling was graphically explained by Sir Jocelyn Simon PC in 1970²⁾ as follows:

'Even if full reconciliation is not possible, skilful and sympathetic advice will often enable the parties to go their separate ways with the least pain and damage to themselves and their children.'

There are, basically, two areas in respect of which conciliation counselling can play an important part; namely, in the safeguarding of the interests of minor or dependent children and in the adjustment of the respective proprietary rights of the warring spouses. In both these areas, the court is very much in the hands of the litigating parties. Thus, the court, for example, can only be satisfied that the 'provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage'³⁾ have been properly made purely on the strength of such evidence as the litigating parties choose to place before the court. It is true that the court can appoint a legal practitioner to represent a child.⁴⁾ But this is likely to be resorted to only on rare occasions.⁵⁾ So also, when deciding whether the consent

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- 1) Such legislation would be 'in the realm of pious hope': per Selby J 'Development of Divorce Law in Australia' (1966) 29 MLR 473, 487: see 92 n 1 above.
 - 2) 1970 Riddell lecture: see 95 n 5 above.
 - 3) S 6 (1) Divorce Act, 70 of 1979. On the children of divorce see above at 164-167, 246-253 and 301 n 2. The main result of conciliation counselling would be the granting of fairer custodial orders insofar as the children themselves are concerned.
 - 4) S 6 (4) Divorce Act.
 - 5) On the question of the legal representation of children see above at 249-251.

paper accurately gives expression to the rights of the respective parties, all that the court usually has to rely on is the evidence that the parties choose to place before it and, of course, its judicial instinct for justice and fair play.

It is, therefore, submitted that conciliation counselling can play an important part in the resolution of the many pre-divorce problems. However, if this should fail, the effect of conciliation counselling would then be to crystallize the problems at issue. For the purposes of the submissions to be made in this regard, a further distinction between defended and undefended divorce proceedings will have to be made.

(a) Defended Divorce Proceedings¹⁾

It is submitted that where a divorce case is defended both parties should be compelled to attend, individually, one or two counselling sessions²⁾ before the date set down for the hearing of the action in the proposed family court. The purpose of such counselling sessions, which ought to be conducted in the absence of any legal advisers, would be to try to identify, and isolate, the real problem areas that exist between the parties and then to apply the necessary counselling in an endeavour to eliminate any hatred, bitterness and distress. It is confidently believed that if the problem areas are successfully identified the chances of resolving them become that much greater in a non-adversary atmosphere.

There are two possible results that could flow from such counselling; namely,

- (i) the parties concerned may be persuaded to reach agreement on those areas which were previously the subject of acrimonious dispute. If this should occur, the counsellor's report to

1) See above at 302-303. Most of the divorce cases that are contested are, in fact, not contested on the merits but, rather, because of disagreement over ancillary issues such as custody, access, maintenance and the division of matrimonial property. The fact of impending divorce is generally conceded.

2) The suggested number of counselling sessions is purely arbitrary. Experience would, in due course, suggest the more appropriate number of counselling sessions. What is clear, though, is that counselling by the personnel of the proposed family court would, of necessity, only be of a short-term duration. If on-going counselling is required this would have to be sought from outside and independent counselling agencies.

the proposed family court would prove invaluable when it comes to the endorsement of such agreement as an order of court; or

- (ii) on the other hand, the parties may still not be able to reach agreement on those areas of dispute which have been identified and isolated. A counsellor's report to this effect would again prove to be an invaluable guide to the judge of the proposed family court when he is finally called upon to resolve the dispute, especially where the interests of minors or dependants are concerned. It is reasonably anticipated, however, that this second situation will hardly ever arise in practice since the 'pressures' of counselling are more likely to induce agreement between the parties than not.

It should also be mentioned that quite apart from the above situations, the counsellor's report to the court would undoubtedly prove to be invaluable when the court is called upon to consider the 'conduct of the parties' in so far as it may be relevant to the break-down of the marriage' in relation to the question of maintenance and the division of the assets of the parties in terms of section 7 (1) of the Divorce Act. The report would also be most useful to the court in determining 'the circumstances which gave rise to the break-down of the marriage' and any substantial misconduct on the part of either of the parties' in terms of section 9(1) of the Divorce Act, which concerns the forfeiture of the patrimonial benefits of marriage. Finally, it would assist the court in determining the question of costs in terms of section 10 of the Divorce Act.

(b) Undefended Divorce Proceedings

Here, a broad distinction must be made between the two following types of undefended divorce proceedings; namely,

- (i) where the defendant does not bother to enter an appearance to defend at all: the defendant may even have disappeared from the scene and in this type of situation the divorce is, in effect, granted by default. There is very little that counselling could achieve in such a situation. Even if he could be located and contacted, it would be extremely unlikely that the defendant would respond to an invitation to attend any counselling sessions. The role of the counsellor in such a situation would depend on whether there are any minor or dependent children

involved. If there are none then all that would be required of the counsellor would be a certificate to that effect addressed to the proposed family court. If there are any minor or dependent children involved then the counsellor's task would be limited to reporting to the proposed family court on whether he has satisfied himself that the plaintiff has made proper arrangements for the safeguarding of their interests. Counselling in this instance would be of a formal nature but which, it is submitted, is made necessary because of interests other than the plaintiff's which may be at stake; and

(ii) where the defendant has initially entered an appearance to defend, or has evinced an intention to do so when first confronted with the possibility of being divorced, but has later decided not to continue with his defence. There could be a number of reasons for this; for example, the defendant may have agreed to the terms of a consent paper because of the threat of the high cost of litigation or because of 'other pressures'.¹⁾ If the parties do reach agreement on the terms of a consent paper they should both be obliged to attend, individually, one or more consultations²⁾ with a counsellor. The purpose of these consultations would be for the counsellor to investigate whether the parties are generally agreed on the fact of divorce and on the terms of the consent paper. In particular, the counsellor should be expected to pay close attention to the questions of the custody of, access to, and maintenance of, any minor or dependent children. At these consultations, which would be merely investigatory, neither party should be legally represented. At the conclusion of these consultations the counsellor should submit a report to the proposed family court in much the same way as a trustee in an insolvent estate reports to creditors at the second meeting of creditors.³⁾ It must be stressed that the counsellor should not be seen to be representing the interests of either side. He would also be operating in a non-adversary atmosphere.

1) The defendant may be prepared to agree to any terms in a consent paper simply in order to 'gain his freedom' from an unhappy marriage.

2) See 319 n 2 above.

3) S 81 Insolvency Act, 24 of 1936.

(C) POST-DIVORCE COUNSELLING¹⁾

Post-divorce litigation usually concerns disputes over the custody, access and maintenance of any minor or dependent children, disputes over the maintenance payable to the former spouse and even matrimonial property disputes, all of which may or may not be accompanied by the compelling desire on the part of the ex-spouses to strike back at each other. In the event of any post-divorce litigation between the former spouses, it is submitted that the parties should be obliged to attend one or more counselling sessions.²⁾ These counselling sessions should take place individually and in the absence of legal advisers. The main aim of such counselling would be, in the calm of a non-adversary atmosphere, to try and resolve the areas of dispute between the parties. Normally, in post-divorce litigation the area or areas of dispute will be more clearly defined than at the pre-divorce stage.

If the parties, after having been counselled, are able to reach agreement on their dispute, this fact should be reported to the proposed family court which may then endorse such agreement as an order of court.

If, however, the parties are unable to resolve their dispute after having been counselled this fact should be reported by the counsellor concerned. In his report the counsellor should pay particular attention to the best interests of any minor or dependent children. Such report would be of invaluable assistance to the proposed family court in arriving at a proper decision on the dispute. It is, of course, obvious that the adversary procedure would have to be resorted to where the parties, despite counselling, have been unable to resolve their differences. But, even in this instance, the effect of counselling would be to reduce the areas of conflict and, at the very least, counselling would help to reduce the bitterness that characteristically pervades post-divorce litigation.

1) As to post-divorce counselling see above at 28, 31-33, 51, 101-102, 105-109, 112-113.

2) See 319 n 2 above.

(D) ATTENDANCE AT COUNSELLING SESSIONS

Ideally, counselling operates to best advantage only if the parties concerned voluntarily attend the requisite counselling sessions. One cannot be so naive as to believe that the parties to a matrimonial dispute will always voluntarily attend any counselling sessions. On the other hand, it would be a waste of time to compel a reluctant party to attend any counselling sessions. It is, therefore, submitted that the following procedure should be resorted to.

Whenever a matrimonial action is initiated the registrar of the proposed family court should be obliged, as a matter of routine, to advise the counsellors' office of the nature of the action being instituted, the names and addresses of the parties concerned, and whether the action is being defended or not. From the procedural point of view this could easily be achieved by making it necessary for all process to be filed with the registrar of the proposed family court in duplicate so that copies thereof could be forwarded to the counsellors' office by the registrar.

Upon receipt of the above information, the counsellor assigned to the case should immediately invite the parties concerned to attend the requisite counselling sessions. Should there be no response to the invitation to attend, the counsellor should have the discretionary power to issue a subpoena. Failure to comply with the subpoena would render the defaulting party to the normal penalties for contempt of court. It must be emphasized that the power to issue a subpoena should be a discretionary one. This power should only be resorted to in those very rare cases where it is believed on reasonable grounds that the attendance of a defaulting party at a counselling session is absolutely essential.¹⁾

1) Cf the Los Angeles Conciliation Court's experience with the so-called citation to compel a person's attendance at a counselling session which is described above at 24-25 and which has been referred to as a form of 'Gentle judicial coercion'.

Difficulties with regard to the above suggested procedure may well be encountered in practice; for example, the defendant's whereabouts may be unknown or he may live at a place many miles away from the court in which the action is instituted. In the former case, it is clear that any attempt to compel the missing defendant's attendance at a counselling session would be superfluous. In the latter case, where it is felt on reasonable grounds that the defendant should attend a counselling session he could be compelled to do so in the town nearest to him where such counselling services are available. In due course, the appropriate report could be forwarded to the Registrar of the proposed family court which will be dealing with the case.

CHAPTER THIRTEENSOME PRACTICAL OBSTACLESTO THE ESTABLISHMENT OF FAMILY COURTS IN SOUTH AFRICA

The proposal for the establishment of a family court in South Africa may possibly be regarded by some as being so far-reaching, impractical and too costly as to be totally inconsistent with our present judicial system and court structure. However, in the words of Payne¹⁾

'It should not be assumed that the establishment of specially constituted family courts with a comprehensive and integrated jurisdiction over matrimonial, familial and juvenile proceedings would involve radical changes or totally novel concepts or procedures in the legal and judicial process.'

In effect, the proposal for the establishment of a family court in South Africa as outlined in this work amounts to no more than a process of consolidation which lends itself to greater consistency and efficiency. In this regard, the position is neatly expressed by Arthur²⁾ as follows:

'A family court would add nothing new, but would merely consolidate the existing structure into a single court. It should not be considered as a novel, social encroachment into individual and family privacy; these invasions now exist, usually at the request of the family itself. A family court would merely combine the various existing forms of judicial intervention into family affairs. Nothing new would be added except the fruits of the consolidation - consistency and efficiency.'

1) At 212.

2) 'A Family Court - Why Not?' (1966) 51 Minn LR 223, 226.

It is, of course, conceded that the proposal for the establishment of a family court in South Africa is not being made in the naive belief that it would be easy of attainment. Practical problems would most certainly be encountered. Some of these problems are the following:

(i) in view of the fact that the concept of a family court in South Africa is a novel one it may, at first, be difficult to persuade all levels of the general public to accept it. Such acceptance is a condition precedent to the success of any family court.¹⁾ This, however, is essentially a problem of education and in this regard provision should be made for the appointment of an official similar to the Director of Counselling and Welfare in Australia.²⁾ One of his most important duties would be the preparation of, and dissemination of, the appropriate pamphlets publicising the purposes, functions and philosophy of the proposed family court. It is submitted that constructive use should also be

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- 1) See generally Payne 262-274. 'If unified family courts are established, their successful operation will demand widespread publicity of the philosophy and role of the court and of the auxiliary services available to the public.' - Payne 271. See also Foster 'Conciliation and Counselling in the Courts in Family Law Cases' (1966) 41 NYULR 351, 379; Kay 'A Family Court: The California Proposal' (1968) 56 Calif LR 1205, 1247.
- 2) See above at 71-72 for the functions of the Director of Counselling and Welfare in Australia. The educative functions of the Director are supplemented by the Family Law Council and the Institute of Family Studies: see above at 67-68. The Family Law Council is required to furnish a report to the Commonwealth Attorney-General within 60 days after each year ending on 30 June : s 115 (9) Family Law Act. The equivalent official in the Los Angeles Conciliation Court is referred to as the Director of Family Counselling Services (see 14-15 above) while in Hawaii he is referred to as the Director of the Family Court (see above at 39-40). The work of the Director of the Hawaii Family Court is apparently supplemented by the Hawaiian Board of Family Court Judges (see above at 83).

made of the mass media in this regard.¹⁾ In addition, it is also submitted that the purposes, functions and philosophy of the proposed family court should be part of the proposed pre-marital education syllabus.²⁾ The task of educating the public on all aspects of the proposed family court should be an ongoing exercise. This can be achieved by means of public lectures and the publication of working papers and view points.³⁾ In addition, the publication of an annual report would be essential. The importance of an annual report is stressed in the commentary on section 5 of the Standard Family Court Act as follows⁴⁾ :-

'An annual report serves several constructive purposes for the court and for its relationships with the community at large as well as with particular groups, especially the legislature. A properly documented report supports budgetary requests, enhances the court's public relations, provides essential records and statistical data for the court's own information, and encourages an attitude of critical self-examination';

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- 1) Payne 272. Payne even goes further and suggests (ibid) that 'It would be desirable, if not essential, to ensure that teachers, lawyers, doctors, the clergy, public health nurses, welfare workers, and the police are aware of the facilities and resources available since they have first hand contact with families in distress ...' It is submitted that this suggestion could also be put to good effect in the South African context.
 - 2) See 314 n 2 above.
 - 3) See 106 n 3 above. In this regard the publication of the Conciliation Court's Review has proved to be very useful.
 - 4) Note 'Standard Family Court Act' (1959) 5 NPPA Journ 99, 111.

(ii) quite apart from the initial problem of acquainting the general public with the purposes, functions and philosophy of the proposed family court, there is the added difficulty of overcoming the traditional conservatism of the legal profession - the Bench, the Bar and the Side-Bar.¹⁾ It is quite possible that the resistance of the legal profession may even harden if it should be thought that the concept of family courts would, in some appreciable manner, curtail the role of the legal practitioner in familial and matrimonial disputes. However, it must be emphasized that it is not intended to diminish the role of the legal practitioner in the proposed family court system. All that the proposal for a family court system in South Africa essentially involves is a reallocation of business.²⁾ Attorneys in particular have always had an important role to play in family law litigation and there is no reason to suppose that they will not continue to play an important, if not indispensable, role in the proposed family court system. It is submitted that what the attorney's role would be in proceedings in which children are involved in the proposed family court is well summarised by Dyson and Dyson³⁾ as follows:

'(1) the attorney can help develop evidence so that the judge is not cast in the triple role of prosecutor, defense lawyer, and impartial judge;

(2) the attorney can seek precise development of the evidence where a child may have committed a particular act but not in a manner which would constitute any violation of law;

(3) the attorney can insure that the child receives whatever protections the law grants him, such as the right to adequate notice of the charges or the right to remain silent;

1) See generally Payne 274-277.

2) See 268-285 above.

3) At 97 n 21. Although Dyson and Dyson set out the role of the attorney in the American context there is, nevertheless, much of relevance in their summary to the South African context.



- (4) the experienced attorney can speak for poorly educated or inarticulate children and their parents who might otherwise be frightened by court confrontation;
- (5) the attorney can assist in the dispositional phase by adducing or questioning background facts or suggesting treatment possibilities;
- (6) the presence of an attorney may present the appearance as well as the actuality of fairness, impartiality and orderliness - in short, the essentials of due process which may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.'

The importance of the role that attorneys can play in the proposed family court may also be seen against the background of the fact that, unlike advocates, they have an association with their clients 'from beginning to end,'¹⁾ and their relationship is generally a continuous one. It is, accordingly, submitted that attorneys should have the right of appearance in the proposed family court.²⁾ One of the obvious benefits of this submission is that the costs of litigation

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- 1) On the role of the legal representative in divorce proceedings see 173-177 above.
 - 2) The only exception would be at conciliation counselling sessions when no legal representatives should be permitted to be present: see 319 above. It is submitted that their presence would be counter-productive to the conciliation process. Furthermore, the parties being counselled should feel that they are able to speak freely without looking over their shoulders to see whether their legal representatives approve of what they are saying. Finally, the presence of legal representatives at conciliation counselling sessions would run counter to the intention that such sessions should be conducted in an informal and confidential manner. See also 321 above.

in the proposed family court would be considerably lower than would otherwise be the case if counsel had to be briefed.¹⁾

In the light of the above, it is submitted that there is no reason why the legal profession in South Africa should not be able to adapt itself to the proposed family court system.²⁾ It is significant to note that erstwhile resistance on the part of the legal profession in other countries to the concept of family courts has often been converted to an apparent acceptance of, if not enthusiastic support for, family courts;³⁾

- 1) At this stage, it is also submitted that in order to reduce the exorbitant cost of family law litigation special consideration should be given to the drawing up of a special tariff of costs applicable to the proposed family court (see 266 above). Furthermore, legal aid should be made available to all litigants in the proposed family court, as well as to all children involved in any such litigation. In this regard, the provisions of s65 Australian Family Law Act may serve as a useful paradigm; viz 'Where, in proceedings with respect to the custody, guardianship, or maintenance of, or access to, a child of a marriage, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application of the child or of an organization concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it thinks necessary for the purpose of securing such separate representation.' (my underlining) According to Reg 112(2) Family Law Regulations 'Where the court orders that a child be separately represented in accordance with section 65 of the Act, it may request that the representation be arranged by the Australian Legal Aid Office.' Certainly, the Australian Family Law Council's approach to legal aid is that 'equality of access to the courts and to legal assistance should not be denied to any person because of inability to afford the costs.': 1978 Family Law Council Report 27. On the saving of legal costs as the result of the establishment of the Family Court of Australia see 109 above.
- 2) It is true that much emphasis has been placed on the role of the attorney in the proposed family court. However, it is submitted that the advocate will have an equally important role to play, especially with regard to those who are willing and able to pay for his services.
- 3) This has been the case in Los Angeles: see 15 and 22 n 3 above. For the position in Hawaii see 40 n 4 above. Although the wholesale acceptance of the family court system by the Australian legal profession has yet to be attained (see 108 above), it does seem that the initial hostility no longer rages with the same intensity as before.

(iii) the qualifications and appointment of judges of the proposed family court may cause some debate.¹⁾ Stress has already been laid on the fact that the proposed family court must function as a court of law and must not be seen as an extension of the welfare services.²⁾ It follows that while the judge of the proposed family court must not be seen to be a mere administrative figurehead, so also he must take no part whatsoever in any counselling sessions.³⁾ He will have a judicial function to perform - to dispense justice in the same way as a judge of the Supreme Court.

First and foremost, a judge of the proposed family court must be legally trained and qualified. In Australia, for example, a judge of the Australian Family Court must either have been a judge of another court, or he must have been entitled to practice in the High Court or Supreme Court of Australia for at least 5 years before his appointment.⁴⁾ It is trite that in South Africa there is a general shortage of judges of our Supreme Court. It is not the purpose of this thesis to traverse all the reasons for this except to note that one of the reasons for this shortage may be due to the lack of adequately experienced members of the Bar. If there is any truth in this suggestion it would mean that it would be difficult to secure the appointment of a sufficient number of judges of the proposed family court from the ranks of the practising Bar.⁵⁾ However, it is submitted

1) See 283 above.

2) See 265 above.

3) Cf the position of the judge of the Los Angeles Conciliation Court: see 30 above. On the appointment and tenure of judges of the Hawaii Family Court see 39 above and for the position in Australia see 56-57 above.

4) S 22 (2) (a) Family Law Act : see 57 above.

5) It is difficult to determine in advance with certainty how many judges of the proposed family court should be appointed initially. The Australian experience in this regard seems to have been an unhappy one. At first, provision was made for the appointment of a Chief Judge and 6 other judges (at 56-57 above). That this was an insufficient number of judges was clearly evidenced by the fact that by June 1978 the Australian Family Court bench had been increased to 38 judges (at 57 n 1 above). Certainly, the work load of the Australian Family Court turned out to be much greater than was initially anticipated, especially divorce applications: see the Note on the Marriage Amendment Bill 1976 in (1976) 50 ALJ 325, and see 73 above. The Australian experience suggests that the workload of the proposed family court must not be underestimated: nor must the content and variety of its work be played down: see 268-285 above.

that favourable consideration should be given to appointing attorneys of, say, 10 years standing and experience to the bench of the proposed family court.¹⁾ The nature of an attorney's work is such that he is in an even better position than an advocate to acquire the necessary knowledge, skill and experience in family law. It is submitted that this would become even more pronounced under the proposed family court scheme.

Apart from legal training and experience it is submitted that no person should be appointed to the bench of the proposed family court unless 'by reason of training, experience and personality, he is a suitable person to deal with matters of family law'.²⁾ Apart from referring to 'training, experience and personality' the Australian Family Law Act does not define with any precision a person who is suitable to deal with matters of family law.³⁾ However, some assistance may be sought from the following list of attributes of a family court judge which Dyson and Dyson cite;⁴⁾ namely, a family court judge must be:

- '(1) deeply concerned about the rights of people;
- (2) keenly interested in the problems of children and families;
- (3) sufficiently aware of the contribution of modern psychology, psychiatry and social work that he can give due weight to

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- 1) On the role of the attorney in family law litigation see above at 173-177. It is submitted that under the proposed family court scheme a magistrate would not be suited for appointment as a judge. It is true that it is proposed that in respect of certain ancillary family law matters a magistrate would share some co-ordinate jurisdiction with the proposed family court (see 284-285 above). It is submitted, however, that this would not enable a magistrate to acquire the necessary skill and expertise in family law matters for him to be considered for appointment to the bench of the proposed family court. Academics in the field of family law, however, may well be considered for appointment to the bench of the proposed family court.
 - 2) S 22 (2) (b) Family Law Act: see 57 above.
 - 3) See generally Payne 660-676.
 - 4) At 569. These attributes were laid down by the American Standards for Juvenile and Family Courts.

the findings of these sciences and professions;¹⁾

- (4) able to evaluate evidence and situations objectively, and make dispositions uninfluenced by his own personal concepts of child care;
- (5) eager to learn;
- (6) a good administrator ...;
- (7) able to conduct hearings in a kindly manner and to talk to children and adults sympathetically and on their level of understanding without loss of the essential dignity of the court';

(iv) It is anticipated that the problem of costs will be raised as a stumbling block to the establishment of family courts in South Africa.²⁾ This, however, should not be regarded as an insurmountable problem. In the light of the suggestion that the proposed family court should be accorded a status equal to that of the Supreme Court³⁾ there seems to be no reason why it should not physically become part of the Supreme Court. It may, of course, become necessary to expand the present Supreme Court buildings. But this, however, would clearly not involve the State in an expenditure anywhere near the cost of housing a completely new court structure such as the so-called intermediate court system, for example, would entail.⁴⁾ In addition to obviating the need to embark on an expensive building exercise, should the proposed family court physically become part of the Supreme Court this would carry with it the following advantages:

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- 1) It should be noted that it is only an interest in the behavioural sciences that is called for. In this regard, Payne submits (at 676) 'that prior training, experience or expertise in social welfare, or in the social or behavioural sciences should not constitute a condition precedent or an alternative qualification for appointment to the bench of the family court.'
 - 2) Cf Divorce Report (1978) § 13.8.
 - 3) See 266-267 above.
 - 4) Cf the views of Mr Justice John Didcott which he expressed to the Hoexter Commission of Inquiry: Eastern Province Herald 15 October 1980.

- (a) there would be greater chance of the proposed family court acquiring the status and prestige of the Supreme Court if it was part of the Supreme Court. In this way judges of a higher judicial calibre and experience would be attracted to the bench of the proposed family court than what otherwise might be the case. In turn, by attracting to its bench men and women of the highest judicial calibre and experience, the proposed family court would be more likely to gain the confidence and respect of the legal profession and the public at large;
- (b) if the proposed family court were to become part of the Supreme Court this would 'be a valuable step in adapting the traditional courts to the needs of the times.'¹⁾ The Supreme Court is presently involved in a large proportion of family law matters²⁾ and to this extent it is already equipped with a great degree of expertise;
- (c) finally, the proposed family court would be able, with great advantage, to share the Supreme Court library resources³⁾ as well as the Supreme Court judges' common room facilities.

On the other hand, the main disadvantage of the proposed family court physically becoming part of the Supreme Court would be that the traditional court structure might inhibit the development of the family court system; that is to say there might be 'a tendency to apply procedures suited for the determination of other issues but too time-consuming, expensive and impersonal for family law problems'.⁴⁾ In this regard, it is submitted that every effort should be made to resist the idea of the rotation of judges of the Supreme Court so that a judge's term of duty in the proposed family court covers only part of his normal duties.⁵⁾ It may, of course, be countered that

1) Payne 610.

2) See 268-269 above.

3) See 266 n 4 above.

4) Payne 610. See generally the recommendations of the Institute of Law Research and Reform, Alberta, which are cited by Payne 609-625.

5) See 283 above. Payne 677-680 deals fully with the arguments for and against the rotation of judges. It is submitted that appointments to the bench of the Supreme Court and appointments to the bench of the proposed family court should be kept entirely separate and distinct from each other.

unless the system of the rotation of judges was resorted to, a judge of the proposed family court is likely to experience boredom with resultant negative job satisfaction.¹⁾ However, it is submitted that in reality 'a specialist bench in a unified family court will exercise a wide diversity of jurisdiction and that no serious danger of staleness is likely to be encountered';²⁾

(v) there may be some initial difficulty in securing the staff to perform the counselling functions of the proposed family court. However, it is submitted that this difficulty could be resolved by resorting to the Australian solution in terms of which the Commonwealth Attorney-General is given the power to accord to any voluntary organization the status of an official marriage counselling organization.³⁾ In South Africa, apart from the career social welfare officers in the Department of Pensions and Social Welfare, there are numerous welfare and religious bodies and organizations concerned with, inter alia, marriage counselling. In this regard, the activities of the National Council for Marriage and Family Life (SA)⁴⁾ readily spring to mind. For example, the Grahamstown Society for Marriage and Family Life, which is affiliated to FAMSA, has the following aims:

- (a) the dissemination of knowledge and the information about marriage and family life and concomitant relationships;
- (b) to establish and maintain a marriage counselling service for those in need of perspective and help in their marital relationship;
- (c) to be responsible for the recruiting, selection and training of counsellors as supervised staff members of the service with a panel of experts at their disposal;

1) See 282-284 above.

2) Payne 680 and see especially 284 n 1 above.

3) S 12 (2) Family Law Act. See 71 above and Finlay 35-52.

4) Otherwise referred to as FAMSA. FAMSA is a registered welfare organization: WO 1873.

- (d) to provide for education in marriage, both on a pre-marital and post-marital level;
- (e) to encourage research into matters of marriage and the problems related thereto;
- (f) to co-ordinate, guide and encourage all local efforts and activities in the field of marriage guidance.¹⁾

It is submitted that there is no reason why the services of bodies such as FAMSA should not be accorded a greater measure of official recognition. Such bodies have already acquired a high degree of experience in counselling and such official recognition would only cement further the relationship and co-operation between the courts, on the one hand, and the behavioural and social scientists on the other;²⁾

(vi) reference has already been made to the fact that South Africa is such a physically vast country and that to establish a family court with Supreme Court status which would be available to everyone may prove to be impossible.³⁾ However, it is submitted that the resolution of this difficulty should not prove to be too difficult in the light of the suggestions⁴⁾ that provision should be made for the proposed family court both to travel on circuit and to share some co-ordinate jurisdiction over certain family law matters of an urgent and ancillary nature with Magistrates' Courts in the outlying areas;

1) Apart from Grahamstown, Societies For Marriage and Family Life have been established in the following centres: Johannesburg, Cape Town, Durban, Pretoria, Bloemfontein, Port Elizabeth, Welkom, Pietermaritzburg, East London, Vanderbijlpark, Klerksdorp, Kempton Park, Windhoek, Kimberley, Krugersdorp, Soweto and Rustenburg.

2) See generally Chapter 9 above.

3) See 284-285 above.

4) Ibid.

(vii) with regard to appeals, it may be difficult, at this stage, to make any firm recommendations. Various submissions regarding the structure of our courts have already been made to the Hoexter Commission of Inquiry¹⁾ and it is confidently anticipated that some changes will be effected.²⁾ However, the submissions that follow must be regarded as provisional, and they are based on the existing court structure.

It is submitted that much assistance can be had by referring to the provisions of the Australian Family Law Act that deal with appeals.³⁾ Thus, section 94 states:

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- 1) See, for example, the proposal for an intermediate court of appeal by Wessels JA and 4 other Judges of Appeal. In turn, this proposal has resulted in responses by James JP (the 'James Memorandum'), and Shearer J and 5 Judges of the Natal Provincial Division (the 'Shearer Memorandum').
 - 2) The exact nature of which cannot be predicted at this stage.
 - 3) Ss 93-96. For the position in Hawaii see s 54 Hawaii Revised Statutes. It is significant to note that the Australian Family Law Act makes no provision for reviews. But, a system of automatic review by the proposed family court of all proceedings in a Magistrate's Court sharing concurrent jurisdiction with the proposed family court is envisaged: see 285 above. It is also significant to note that s 93 Family Law Act states that 'An appeal does not lie from a decree of dissolution of marriage after the decree has become absolute.' It is submitted that there is much merit in this provision. After all, no useful purpose can be served by reversing a decision holding that a marriage has irretrievably broken down, especially in view of the fact that s 10 Divorce Act states, inter alia, that 'In a divorce action the court shall not be bound to make an order for costs in favour of the successful party ...'

- '(1) Any person aggrieved by a decision ... may, within the time prescribed by the regulations, appeal¹⁾ from the decree to the Full Court²⁾ of the Family Court.
- (2) Upon such an appeal, the Full Court may affirm, reverse or vary the decree the subject of the appeal and may make such decree as, in the opinion of the court, ought to have been made in the first instance, or may, if it thinks fit, order a re-hearing, on such terms and conditions, if any, as it thinks fit.'

It is submitted that this section, with appropriate modifications, could easily be incorporated in any legislation establishing the proposed family court. Thereafter, it is submitted, any further appeal should be directed to the Appellate Division of the Supreme Court of South Africa subject, however,

- (1) (a) to leave being granted by the full court of the proposed family court, or
 (b) in the event of such leave being refused, to the special leave of the Chief Justice, and
 (2) which leave shall only be granted by the full court or the Chief Justice, as the case may be, when an important question of law or of public interest is involved.³⁾

It is submitted that the above submissions have the merit that appeals in the ordinary course will be dealt with within the proposed family court system. It will be only on rare occasions that the Appellate Division will be burdened with an appeal from the proposed family court;

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- 1) In the South African context this would include an appeal from a magistrate exercising co-ordinate jurisdiction with the proposed family court.
- 2) A full court of the proposed family court could be two family court judges.
- 3) Cf s 95 Family Law Act: '1/An appeal does not lie to the High Court ... except -
 (a) by special leave of the High Court; or
 (b) upon a certificate of the Full Court of the Family Court that an important question of law or of public interest is involved.'

(viii) finally, quite apart from the practical difficulties referred to above, there is the need to caution all proponents of the family court system against a self-defeating and misconceived enthusiasm for its capabilities, real or imagined. In particular, the proposed family court should not be seen as the cure of all Man's social ills.¹⁾ This would be to set for the proposed family court a goal which it cannot possibly hope to achieve.²⁾ This, in turn, would create disillusionment in the eyes of the public and disappointed expectations create the possibility of tension between the courts on the one hand, and the public on the other.³⁾ The objectives and functions of any proposed family court system, therefore, must be realistically tailored to cater for the needs of the society for which it is designed otherwise its chances of success will be doomed.

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- 1) Cf Kovacs 'Maintenance in the Magistrates' Courts: How Fares the Forum?' (1973) 47 ALJ 725: 'Inflated claims for family courts derive from an unfortunate habit of looking to legal institutions to correct social ills' - op cit 733-734; but see 289 n 1 above.
- 2) Cf Allen who, in speaking of the juvenile court movement in the United States, says (at 56) that 'The tendency to describe the court only by reference to its therapeutic or rehabilitative potential creates the peril of unrealistic and unrealizable expectations'. See also Dyson and Dyson 89-98.
- 3) Allen 50.

APPENDIX 'A'EXTRACTS FROM A PAMPHLET ENTITLED 'PARENTS ARE FOREVER' PREPARED BY
THE LOS ANGELES CONCILIATION COURT FOR DISTRIBUTION TO ALL DIVORCED
PERSONS

The pamphlet commences with the following message from the supervising Judge of the Family Law Department and Conciliation Court:

'A dissolution decree cannot and does not end your responsibility as a parent. Parents are forever. Both parents should make every attempt to play a vital part in the lives of their children, no matter who has custody. Children need the ongoing affection, interest and concern of their parents. A child must feel that he has two who love him, even though they could not live happily with each other.

It is the hope of the Conciliation Court that the information in this pamphlet will assist you and your children to cope with your marriage dissolution with a minimum of hurt. The practical guidelines which follow are based on the many years of counseling experience of the Conciliation Court.

If you are like most people, you probably have had, and may still be having, feelings of isolation, despair, depression loneliness, grief, guilt and a loss of self-confidence. Like others in a similar situation, you are probably worried about many things, such as finances, a new social life, employment, fulfillment of sexual needs and the welfare of your children. You can use this present time of difficulty as an opportunity for growth.

I know that you want to do what is best for your children, but sometimes it is hard to know what is best. However, as you proceed with the dissolution of your marriage the way you feel about yourself will effect the way your children feel about themselves. The way you cope with your dissolution will in large part determine how your children cope with it. You are at a cross-road and can choose from alternative routes.

One road leads to self-pity, living in the past, nurturing bitterness and turning the children against your former marriage partner. This is a dead-end road which spells trouble for you and your children.

The other road, and the constructive one, leads to becoming involved in experiences that provide opportunities for you to again feel "success", to get to know yourself better, restore your self-confidence, reach out for goals that will make your life productive, satisfying and meaningful.

The task of all parents, whether or not a marriage continues, is not easy. All parents make mistakes. But if you have a good relationship with your children and they feel your love and acceptance, they will soon forget your mistakes and remember only your goodness.'

Thereafter, the following guidelines are proffered:

'GUIDELINES FOR PARENTS

As we have already indicated, the way you cope with your dissolution will in large part determine how your children cope with it. Try to use the experience of dissolution as an opportunity for personal growth, not defeat. In this way you can continue to be effective as a parent and to not only effectively meet your children's needs, but just as important, your own needs as a person. Continuing conflicts between you and your marriage partner during and after dissolution of the marriage can interfere with your effectiveness as a parent:

1. Allow yourself and your children time for readjustment. Convalescence from an emotional operation such as dissolution is essential.
2. Remember the best parts of your marriage. Share them with your children and use them constructively, whether or not you have custody.
3. Assure your children that they are not to blame for the break-up, and that they are not being rejected or abandoned. Children, especially the young ones, often mistakenly feel that they have done something wrong and believe that the problems in the family are the result of their own misdeeds. Small children may feel

- that some action or secret wish of theirs has caused the trouble between their parents.
4. Continuing anger or bitterness toward your marriage partner can injure your children far more than the dissolution itself. The feelings you show are more important than the words you use.
 5. Refrain from voicing criticism of the other parent. It is difficult, but absolutely necessary. For a child's healthy development, it is important for him to respect both parents.
 6. Do not force or encourage your child to take sides. To do so creates anxiety, frustration, guilt and resentment.
 7. Try not to upset your child's routine too abruptly. Children need a sense of continuity and it is disturbing to them if they must cope with too many changes all at once.
 8. Dissolution of marriage often leads to financial pressures on both parents. When there is a financial crisis, the parents first impulse may be to keep the children from realizing it. Often, they would rather make sacrifices themselves than ask the children to do so. The atmosphere is healthier when there is frankness and when children are expected to help.
 9. Marriage breakdown is always hard on the children. They may not always show their distress or realize at first what this will mean to them. Parents should be direct and simple in telling children what is happening and why, and in a way a child can understand. This will vary with the circumstances and with each child's age and comprehension. The worst course is to try to hush things up and to make a child feel he must not talk or even think about what he senses is going on. Unpleasant happenings need explanation, which should be brief, direct and honest.
 10. The story of your marriage dissolution may have to be retold after the child gets older and considers life more maturely. Though it would be unfortunate to present dissolution as a tragedy and either party as a martyr, it would be a pity also to pretend there are no regrets and that dissolution is so common it hardly matters.

11. The guilt parents may feel about the marriage breakdown may interfere in their disciplining the children. A child needs consistent control and direction. Overpermissive or indecisive parents who leave the child at the mercy of every passing whim and impulse interfere with a child's healthy development. Children need and want to know quite clearly what is expected of them. Children feel more secure when limits are set. They are confused when grown-ups seem to permit behavior which they themselves know to be wrong and are trying to outgrow. Children need leadership and sometimes authority. Parents must be ready to say "NO" when necessary.

VISITATION GUIDELINES:

The behavior of parents has a great influence on the emotional adjustment and development of their children. It is equally true after the dissolution of a marriage. The following visitation guidelines have been found to be helpful in achieving meaningful visits:

1. It is important to try to maintain contact between the child and the parent who has left home. Maintaining some form of contact helps the child deal with his fantasies which are much worse than the reality of what is happening; helps to decrease feelings of rejection; decreases feelings that the divorce happened because he is a bad child; reduces his feeling that he may never see the other parent again.
2. Visits should be pleasant, not only for the children, but for both parents. Visitation should help your children maintain a positive relationship with their visiting parent. It is important that neither parent verbally or physically attack the other parent in the presence of the children. Children tend to view such attacks as attacks on them.
3. The parent with whom the children live must prepare them physically and emotionally for the visit. The children should be available promptly at the time mutually agreed upon and returned at the time agreed upon.

4. Generally speaking, the visits should not take place only in the children's home. The visiting parent may wish the children to visit in his or her home overnight, or may want to plan an enjoyable outing.
5. The question is often asked, "Should the father take the children to the girlfriend's house?" And sometimes the same question is asked about the mother. Visitation is a time for the parent and the children to be with each other, to enjoy each other, to maintain positive relationships. Having other people participate may dilute the parent-child experience during visitation. Also, it may appear to the children that the parent does not have time for them and that he does not care enough to give them his undivided attention during visitation.
6. Keep your visitation schedule and inform the other parent as soon as possible when you cannot keep an appointment. Not keeping a visit without notifying the other parent may be construed by the child as rejection.
7. You may need to adjust the visitation schedule from time to time according to your children's age, health and interests.
8. Frequently a father asks, "Why should I visit?" He is hurt, as his comments reveal: "I'm no longer needed; the wife has our home and my children." The visit is one of the few times that the father has personal contact with the children and for that reason should be a meaningful one for both the father and the children. Even though the parents have not been able to get along, the children still need both parents if they are to grow up in a normal way.
9. Often a father questions where he will take the children on the visits and what he should plan in the way of amusement for them, particularly if they are young children. Activities may add to the pleasure of a visit, but most important of all is the father's involvement with the children. A giving of himself is more important than whatever material things he may give them.
10. The visit should not be used to check on the other parent. The children should not be pumped for this kind of information. They

should not be used as little spies. Often in the child's perception the parents hate each other, and he will feel uncomfortable at the time of visit. In his mind if he does anything to please the visiting parent, he may invite outright rejection by his other parent. He has already lost one parent in his mind, and is fearful of losing the other. For this reason, parents should show mutual respect for each other.

11. The child may be left with many problems following visits and both parents should make every effort to discuss them and to agree with each other and with the children, if old enough, on ways to deal with them.
12. Both parents should strive for agreement in decisions pertaining to the children, especially discipline, so that one parent is not undermining the other parent's efforts.
13. Do not try to punish the other parent through the children by reducing or denying visitation rights for failure to pay child or spousal support. This unfairly punishes the children themselves.
14. During and after the dissolution, you may feel that your former partner's visits are an intrusion in your life, which you may resent. If you begin to feel this way, remember that your child does not feel that visits are an intrusion. The child welcomes them and needs them. It is unreal and impossible to wish away some things, including visits. The task at hand for you, therefore, is to face and accept the reality of visitation, recognizing that the visits are intended to meet your children's needs and not yours.'

APPENDIX 'B'EXTRACTS FROM A BROCHURE SETTING OUT THE AIMS OF THE COUNSELLING SERVICES OFFERED BY THE EDMONTON FAMILY COURT, ALBERTA, CANADA'WHAT IS THE FAMILY COURT CONCILIATION SERVICE?'

It is a family counselling service related to the court system. It is for couples seeking remedies through the law as a solution to marriage problems. You may be referred for counselling by your lawyer or by a Judge. Do not hesitate to ask them if you wish counselling.

IS DIVORCE THE ONLY ANSWER?

Not always. Divorce often gives rise to new problems: with money, with children, with making a new life. Your counsellor will help you explore alternatives. If marriage is your answer it may be necessary to change habits and behaviour. If divorce is your answer, your counsellor may help you deal with the emotional problems created by divorce, as well as the changed relationship with your children.

WILL YOU FORCE US TO RECONCILE?

No. Your life and the decisions affecting it are your own. We will not impose any decisions upon you. We offer you our professional knowledge and skill to help you study all the possible choices and to think them through clearly. If you are sure about your decisions, you will be more confident about the future.

It is not a reconciliation service.

If reconciliation is achieved it is only one by-product of conciliation counselling.

"Conciliation" means working things out by discussion with the help of a professional counsellor - whether it be for marriage or for divorce.

WHAT KIND OF COUNSELLING IS OFFERED?

Through a minimum number of interviews, you will be helped to choose the best available direction for the future of your family, including the

alternatives of marriage and divorce, and the issues of continuing parenthood.

REMEMBER ...

Though divorce terminates marriage it changes - and does not end - the parental relationship.

WILL WE MEET WITH OUR COUNSELLOR MORE THAN ONCE?

Perhaps. At the first meeting you will learn about our counselling services as well as others in the community. You may choose to continue in counselling, and if you do, additional appointments will be made. Or you may wish to be referred to some other community service. In either case, what you decide at this initial interview could have an important effect on the rest of your life.

DO BOTH SPOUSES HAVE TO BE PRESENT?

No, but it is best if you attend together. After all you both have an investment in the outcome.

WHAT IS A MARRIAGE COUNSELLOR?

Your counsellor will be a mature person, chosen for sensitivity to human problems, and carefully trained in family counselling to the point of being a specialist. He will listen to each of you separately and together, will help you to make decisions, but will not make decisions for you or dictate your behaviour. He will undertake to be your partner, not your boss.

WHAT IF I MAKE ONE CHOICE AND MY SPOUSE INSISTS ON ANOTHER?

We do not take sides for or against either party. We will try to enable you both to see your total situation: and where husband and wife are sincere and open minded, they are likely to come to similar decisions. Once having made a decision your counsellor will help you put it to work.

WHAT ABOUT THE CHILDREN?

Frequently children become upset by the separation of their parents and the new problems it causes. Even where parents reconcile, children may

need help in understanding their part in the family relationship. In either case, the counsellor can often help them to understand and accept your decision - whether it is to separate or to renew your marriage.

HOW MUCH DOES IT COST?

Nothing. There are no fees for this service; it is funded by the provincial government.

WHAT IF I NEED LEGAL ADVICE?

Your counsellor does not give legal advice. Whenever the need arises he will refer you back to your lawyer.

WILL WHAT WE SAY BE DISCLOSED IF DIVORCE PROCEEDINGS ARE TAKEN?

If you are concerned about this, you should consult your lawyer. Your counsellor will be keeping him informed as counselling progresses, and will notify him of any decisions made. The content of your counselling sessions will not be reported to anyone without your consent unless required by Court order.

WHY DOES THIS SERVICE EXIST?

Your province and your community have an interest in and responsibility for the well-being of citizens. While the law provides for divorce, at the same time it discourages the unnecessary break-up of families. Counselling offered to you through this service is to help insure that, whether you become divorced or continue married, you and your family will gain the maximum benefit possible.

WHAT IF WE DECIDE TO RECONCILE AND LIVE TOGETHER AGAIN?

We will, if you want, help you understand better what each expects of the other. Sometimes this understanding may be made into a written agreement, to which you can refer for guidance from time to time. Sometimes we will plan with you for extended counselling either in the Conciliation Service or elsewhere. Always, the invitation will be open to you to come back to your counsellor whenever you need to do so; simply telephone for an appointment.

WHAT IF WE DECIDE NOT TO RECONCILE?

With or without marriage, with or without divorce, the obligations of parents toward children continue until the children are adult. We hope and urge that if you cannot continue as husband and wife, you will accept assistance in being effective as father and mother.'

APPENDIX 'C'EXTRACTS FROM A PAMPHLET PREPARED BY THE CONCILIATION COURT IN MARICOPA COUNTY, ARIZONA, USA, ENTITLED 'YOU AND YOUR MARRIAGE : A GUIDE TO A HAPPY MARRIAGE.'

The pamphlet is handed to young couples at the time that they receive their licence 'to contract a legal marriage.'

'INTORUCTION:

As you embark upon your new way of life the difference between a happy family and an unhappy one is not the absence of problems. Rather it is the manner in which each family faces up to its problems. It depends upon the willingness of each spouse to share in the responsibility for resolving them. No husband and wife are always going to agree on everything. But it is important that they be agreeable. The ability of a husband and wife to meet each other's basic needs as human beings is important to a successful marriage. Unless these needs are met there undoubtedly will result unhappiness, resentment, frustration and argument. Instead of being united in marriage each party begins to pull in the opposite direction. This makes it difficult for husband and wife to work out their problems together. When people are sick, they normally go to a doctor for help to get well. When their marriage is sick, they should go to a professionally trained person for help. In the Conciliation Court couples who have experienced a crisis request and use an agreement as a guide line for their marriage. This agreement in contract form in part reads as follows:

DIVISION OF RESPONSIBILITY:

We know that in maintaining a home there must be a division of responsibility between us and that, generally speaking, the care of the inside of the home, the preparation of meals, the care of the physical needs of the children and the family clothing are mainly the responsibilities of the wife. We recognize that usually the financial support of the family and the care of the outside of the home are mainly the responsibilities of the husband; and where husband and wife both work, the financial responsibility must be shared.

Each party agrees to do everything in his or her power to merit the confidence of the other party and to respect and encourage the other party in his or her efforts in maintaining a better and happier home life.

WELFARE OF THE CHILDREN:

The supervision of the children is the joint responsibility of both parents and each parent should support the other in this responsibility rather than ridicule and downgrade the other parent. We agree that we will make every effort to give proper supervision to the children and the household. We also agree that we will not discuss our own marital difficulties in front of the children or other persons outside the home, including the neighbors, friends and our own parents.

PERSONAL APPEARANCE:

We recognize that personal appearance is a material factor in the attraction one person has for another and that in a marriage it is easy to ignore this factor. We agree that we will make every effort to keep our personal appearance and habits neat, clean and on a plane similar to the time before our marriage when we definitely recognized the importance of our personal appearance.

CONTROL OF THE TEMPER - NAGGING:

We recognize that bad temper in a person can cause unrest and unhappiness in a home and that the main responsibility to control a bad (or quick) temper lies with the person having the temper.

We agree that we will do all in our power to control any bad temper we may have and that we will not aggravate the other party who might be subject to a bad temper. Each of the parties agrees to assist the other in this regard.

We recognize that nagging is an annoying fault and contributes to discord in a marriage. We partners agree that each will do his very best not to nag or otherwise harass the other partner.

THE IMPORTANCE OF TALKING THINGS OVER:

We recognize that a husband and wife may live together in the same household and be joined together in a most intimate relationship and yet find it very difficult, if not impossible, to discuss with each other the problems vitally affecting their marriage and their children. This frequently is failed 'inability to communicate' with each other. In order for human beings to relate and understand each other they must be able to talk to each other. If not, the end result of this lack of communication is misunderstanding, frustration, anger, tension and emotional disturbance. We agree that we will make a definite effort to establish communication with each other in an attempt to discuss our problems reasonably and try to avoid this type of fault. Therefore, we agree to do the following:

- A. The time for discussion of problems being important, we will try not to discuss them until we are in a relaxed atmosphere and after mealtimes.
- B. Minor children and other people will not be present.
- C. Each agrees to patiently and sincerely listen to the other's discussions and make a determined effort to understand the other person's point of view.
- D. Each of us agrees to use the phrase 'I'm sorry' when it seems he or she has perhaps hurt the other's feelings.

MUTUAL INTERESTS:

Each party will make an effort to be interested in the work, hobbies and legitimate outside activities of the other spouse and we recognize that this requires some 'giving and taking' on the part of each spouse. We agree to join each other wherever possible in our social and recreational activities rather than to do these things separately. We do recognize, however, that a certain amount of independence and freedom is necessary in order to make our living together more agreeable.

MUTUAL FRIENDS:

We recognize that when one becomes married a certain amount of independence is surrendered and that the husband cannot always continue to be 'one of the boys' and that the wife cannot continue her activities with her women friends to the same extent as she did prior to the marriage.

We agree that we will attempt to strengthen our marriage ties through keeping or making new mutual friends with other people who, preferably, are happily married and responsible persons. We will attempt to avoid undesirable friends and unhappily married couples who themselves are having domestic strife.

TOLERANCE AND PRIVACY:

Each party agrees to exert every effort to treat the other party with consideration, tolerance and understanding at all times. The parties agree not to give each other the 'silent treatment' by refusing to engage in normal conversation for extended periods of time and agree that they will not harbour grudges or use sarcastic or belittling language.

The parties agree to respect each other's right of privacy and not unduly quiz or question the other on minor matters and certainly not to infringe upon strictly private activities, including mail of the other party.

The parties agree not to maintain late hours or to be away from home for an unusual length of time without advising the other party of the necessity for being away, and in case of emergency, where he or she can be reached.

MONEY MATTERS:

We recognize that in circumstances where the wife and the husband both earn money or have any separate funds available, trouble can develop such as jealousy and resentment because one party makes more money than the other; disagreements on how much can be spent for personal reasons by the party having his own salary or income; how much of the earnings should go on the joint expenditure for the home or children; arguments over what might or might not be a necessity or a luxury; whether the parties should have a joint bank account; whether to have charge accounts, and the like.

CONCLUSION:

We would like to acquaint you with the services that the Conciliation Court of Maricopa County offers. It was created by the Maricopa County Superior Court in accordance with Arizona Statutes in order to promote the public welfare by preserving, promoting and protecting family life and the institution of matrimony. Since family problems and domestic relations comprise the largest single category of civil litigation in our courts, it is our sincere hope that the information offered in this pamphlet will help you to build a good marriage and to enjoy future happiness. If you should find yourselves involved in irreconcilable conflicts, or unable to communicate, or involved in some other situation that threatens your marriage, we invite you to request the free counseling service which our court offers.'