THE FAMILY COURT:
A Discussion Paper

by Julie Leibrich and Suzette Holm

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FOREWORD

The New Zealand Family Court has attracted the attention of researchers and commentators and there has been an increasing number of requests to research aspects of its operation and jurisdiction.

Research, in addition to the wider public purposes it serves, is an important source of information for the operation and management of departmental activities and for the review and development of policies. However this contribution must be balanced against, in this case, the rights of people who use the Family Courts and be sensitive to the circumstances which give rise to Family Court proceedings. A programme of well designed and executed research which addresses the main issues will assist in achieving this balance.

This paper reports issues identified by a wide range of people with experience in Family Court matters. The legislation and court procedures, the roles of the various parties and specialists involved in proceedings, and the surroundings in which matters are dealt with are raised as issues.

The paper was written by Dr Julie Leibrich and Suzette Holm of the Planning and Development Division on the basis of the interviews they conducted and meetings they attended.

A programme of research will be drawn up based on the issues identified so far and the comments received on this paper.

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CONTENTS

INTRODUCTION

This paper summarizes the main issues which have emerged from changes to the family law legislation passed in 1980 and brought into action by the new Family Court in October 1981. Its aim is to identify those issues which need research - both explorations and evaluations, and serve as an impetus for those issues which need action. The issues discussed are those raised by the people interviewed. Where appropriate, reference is made to current research and opinion on these issues. Unfortunately, very little of this research was conducted in New Zealand.

The family law legislation consisted of four Acts : the Family Proceedings Act 1980 (FPA), the Guardianship Amendment Act 1980 (GAA), the Family Courts Act 1980 (FCA), and the Social Security Amendment Act 1980. The new legislation brought together a number of ideas which had been developing over previous years - the need for alternative methods of dispute resolution, the provision of a separate court for family proceedings, the concept of no-fault divorce, the need for extended counselling, the encouragement of specialist involvement and representation of children in custody cases and the recognition of the significance of welfare benefits on the break-down of marriage. Some of these ideas were realised, others reinforced by the legislation.

We interviewed over 70 people, most of whom have had direct association with the Family Court. They included people who had used the Court during a marriage or de facto marriage break-down, and those who had not, departmental staff, judges, lawyers, counsellors, specialists and people who represent specific interest groups.

There were many favourable and enthusiastic comments about the Family Court. It is hoped that our focus on the issues does not detract from the generally positive attitude that we detected exists towards the family law legislation and family court system.

The issues are organised under ten headings : counselling; mediation conferences; counsel for the child; access, custody and guardianship; specialist reports and expert witnesses; the multidisciplinary approach; selection, training and standards; violent relationships; social groups; and the cost and organisation of the Family Court.

COUNSELLING

'The best way out is always through'
Robert Frost

Counselling referrals have been a part of family proceedings law for over forty years. The Domestic Proceedings Act 1939 provided for a magistrate or registrar to refer an application for separation, maintenance or guardianship to a court appointed conciliator. Ten years later, the first marriage guidance groups were started in Christchurch and in 1950 the New Zealand Marriage Guidance Council was formed.

The Family Proceedings Act 1980 made extensive provisions for counselling. Either party to a marriage may request counselling before any proceedings have begun (s.9). When an application is filed for a separation order the couple are referred for counselling (s.10(1)) and when an application is filed for a maintenance or custody order the couple may be referred for counselling (s.10(4)). At any stage in most proceedings under the Family Proceedings Act and Guardianship Act 1968, a couple may be referred to counselling in the exercise of the Court's power to 'take such .... steps as in its opinion may assist in promoting reconciliation or ... conciliation' (s.19). In 1983 34% of all referrals were section 9, 49% were section 10 and 17% were section 19.

Counselling services for the Family Court may be provided by approved marriage guidance or counselling organisations, or by counsellors nominated by the Court in specific cases. At present the only approved organisation is the National Marriage Guidance Council, but there is provision for the approval of other counselling organisations (FPA s.5(1)). Prior to the introduction of the new legislation the Auckland Conciliation Centre (closed in April 1981) handled referrals from four courts. About 95% of the remaining referrals nationally were to Marriage Guidance. Approximately 66% of all referrals are now made to this agency[1].

Although there was an overall increase in counselling referrals of 18% between 1982 and 1983, the degree of increase for different types of referrals differed. Section 10 referrals, which usually occur as a matter of statutory direction, increased by only 5% from 2171 in 1982 to 2282 in 1983. In contrast, section 9 referrals increased by 18% from 1341 in 1982 to 1576 in 1983 which may reflect increased awareness of these services within the community and legal profession. Section 19 referrals increased by 84% from 443 in 1982 to 815 in 1983 which may reflect an increased judicial recognition of counselling services.

The issues raised were :

1. What are the aims of counselling and are they being achieved? Several aims have been mentioned including reconciliation, easier agreement on the issues arising from separation, encouraging people to make their own decisions, making these decisions more enduring, keeping family disputes out of court, making the separation process less stressful for the family and more manageable for the individual, and making communication and personal adjustment easier. There has been some research on the effectiveness of marriage counselling in New Zealand (Cramb & Hill, 1982; Manchester & Gray, no date), but court-referred cases were not included in these studies. There is a need to assess the effectiveness of court-referred counselling from the user's point of view (Brown & Manela, 1977; Sampel & Seymour, 1980). Other specific studies are also needed; for example an assessment of whether early counselling is more effective than later counselling. The stage at which counselling begins appears to be an important factor in its outcome (Wallerstein & Kelly, 1980). In particular 'pre-court conciliation can influence the timing and content of legal proceedings in a way that in-court conciliation cannot do.' (Parkinson, 1983a, p24)

2. Is adequate counselling available? Some geographic areas have very limited counselling resources, both in accessibility and range of skills. Also, counselling is rarely available in crisis situations or outside specified hours and counsellors are not generally on call or willing to do home visits.

3. When should court nominated counsellors be used? There is a tendency to refer people to Marriage Guidance more with section 9 and 10 referrals than with section 19 referrals. Approximately 66% of section 9 and 80% of section 10 counselling referrals are to Marriage Guidance compared to only 33% of section 19 referrals.[1] Early referral to nominated counsellors, who are either private counsellors or individual staff of appropriate organisations, may be more appropriate. They are generally able to take the referrals more quickly and cater for specific needs. Family counselling, for instance, may be particularly useful and is not routinely offered by Marriage Guidance. There appears to be a growing trend overseas for counselling to include the extended family (Trapski, 1984).

4. Should Marriage Guidance be the only approved agency? Other agencies have requested approval and specialised services are needed. It is argued however, that given the current legislation, approval of other agencies might lead to uncontrollable State spending on section 9 counselling. It has also been argued that the approval of other agencies might lead to a loss of voluntary counsellors from Marriage Guidance to organisations which would pay them.

5. Is there a conflict between the reconciliation and conciliation objectives of counselling? The Act requires that the counsellor explore the possibility of reconciliation before conciliation (FPA s.12). A number of people however, said that reconciliation is an inappropriate goal in some cases, although one group felt that it should always be the primary goal.

6. Do referrals lead to counselling? Attendance can be affected by the type and time of referral, availability of counselling resources, local procedures and the degree of encouragement or coercion used. A small survey of compliance with counselling referrals showed that both parties attended for counselling in 65% of cases following Section 9 referrals and in 59% of cases following Section 10 referrals. In contrast Section 19 has the higher compliance rate of 82%.[2]

7. Is conciliation counselling appropriate for everyone? Couples who can use conciliation to resolve their conflicts may differ in certain respects from those who cannot (Grana, 1982; Kressel et al, 1980). 'A priority of future research might be to establish whether different patterns of divorce can be reliably identified and if so, how these interact with the type of professional assistance offered to produce constructive or destructive settlement negotiations and post divorce adaptation.' (Kressel et al, 1980 p.116) Moreover counselling may have connotations of therapy which may seem inappropriate and be off-putting for some people.

8. Should counselling be voluntary or compulsory? Sections 9 and 10 require people who are referred to counselling to attend, in the sense that non-attendance may result in a party being summonsed (FPA s.17(1)(a)). It is

sometimes argued that compulsory counselling is ineffective. 'The likelihood of an individual's gaining anything from a counselling situation if he feels pressured into it is very small.' (Pearson et al, 1982 p.337) There is however, continuing debate on this issue.

9. What information should counselling reports contain? The Act requires only a limited statement about issues agreed on (FPA s.11). The amount of detail recorded in the reports varies considerably and is sometimes thought to be insufficient.

10. Should follow-up counselling be provided? The Act does not provide for payment for counselling beyond the court process although the separation experience does not stop with a court order. Post-divorce counselling services are being developed elsewhere (Elkin, 1977). 'One must keep in mind that whenever there is a divorce, not only have adults lost both tangible ... and intangible ... symbols of a prior relationship, but they may also have lost symbols of their future, at least temporarily.' (Grana, 1982/3, p.701)

11. Should registrars and judges have the same referral authority? The effect of the definition of 'counsellor' (FPA s.2) is that registrars may only refer to Marriage Guidance counsellors on their own authority, whereas judges may also refer to nominated counsellors. Also, registrars are limited to making counselling referrals on separation applications under section 10 and on requests for counselling under section 9.

MEDIATION CONFERENCES

He who knows only his side of the case knows little of that'

John Stuart Mill

Mediation conferences were introduced by the Family Proceedings Act 1980. They are chaired by a Family Court Judge (FPA s.14(1)). Those present include the parties and, if requested, the lawyers involved in the case (FPA s.14(3) and (4)). A conference is available in cases where one spouse has applied to the Family Court for a separation or maintenance order, or one parent has applied for a custody or

access order (FPA s.13(1)). Either party to the proceedings or a Family Court Judge may ask the Registrar to convene a conference (FPA s.13(1)). Mediation conferences are held in private (FPA s.14(5)) and may be adjourned (FPA s.14(6)).

The judge records the matters at issue, identifying those on which agreement has been reached (FPA s.14(7)), and may by consent of the parties, make any orders which could have been made by the Family Court and which relate to an application by either party for separation, custody, maintenance or the possession or disposition of property (FPA s.15(1)). This is the only written record of what happens at a conference. In 1982 there were 2104 mediation conferences, and in 1983 there were 2022.

Mediation has a long history as a means of resolving disputes. In ancient China, mediation was the principal means of resolving disputes (Brown, 1982). Similarly, Japan and Africa have histories of the use of conciliation and mediation (Folberg, 1984). In Western societies, it has primarily been used in international and labour disputes. The recent introduction of mediation into the area of family disputes was in response to the increase in family break-down and the expense, slowness and bitterness of adversarial proceedings. Mediation services for family break-down disputes have been available in the USA and Canada since 1974, in Britain since 1977.

The development of mediation services has been enriched by a substantial theoretical exploration of alternative dispute resolution methods. 'There is no agreement as to the precise meaning of divorce mediation, the best model to use, or the exact purposes or goals to be achieved by the process.' (Wolff 1983, p.68) Mediators may be lawyers, mental health professionals, registrars or judges; they may work individually or in interdisciplinary teams; mediation may be funded publicly or paid for privately; it may be conducted in court or out of court (Brown, 1982; Chart, 1984a; Coombes, 1984; Haynes, 1978; Roberts 1983). Mediation styles vary in their degree of directiveness and structure (Davis, 1983; Kessler, 1981; Vanderkooi & Pearson, 1983). Mediation varies in the extent to which it borders on counselling (Roberts, 1983).

The issues raised were :

1. What are the aims of mediation and are they being achieved? The statutory objectives are to identify the matters in dispute between parties and to try to obtain agreement between the parties on the resolution of those matters (FPA s.14(2)). There are also many implicit aims of mediation which include : avoiding unnecessary litigation, reducing the harmful effects of the adversary process, increasing compliance with court orders, providing a model for future conflict resolution, making post divorce adjustment easier and increasing economic efficiency (Bahr, 1981; Folberg, 1984; Priestley, no date; Roberts, 1983; Soloman, 1983; Wolff, 1983). Research in other countries has shown that mediation may lessen the cost and improve the quality of dispute resolution at the time of divorce (Bahr, 1981; Davis & Bader 1982a, 1982b; Irving, 1980; Pearson & Thoennes 1984b). There is a need for clarification of the implicit aims of mediation in New Zealand and there is a need for research into the extent to which it is achieving those aims.

2. Is agreement rate a good measure of success? A small survey of 75 conferences in three courts was conducted by the Courts Division of the Department of Justice in 1982. This indicated that 41% of conferences resulted in agreement on all matters or were adjourned for settlement by solicitors; 16% were adjourned for counselling, reports and further negotiation; 13% resulted in partial agreement, and 27% appeared likely to proceed to a hearing (Family Court Report 1982). Several studies elsewhere have also reported agreement rates for mediated cases : 60% in the Denver Custody Mediation Project (Pearson & Thoennes, 1984a), 70% in the Toronto Conciliation Project (Irving, 1980), 70% at Bristol (Yates, 1984). However the measurement of agreement varies (cases or issues, at the session or later, full or partial, quality or quantity of agreement) and is not necessarily an appropriate measure of success (Davis & Westcott, 1984; Pearson & Thoennes 1984a; Yates, 1983). Perceptions of fairness and the quality of communication in the conferences may be more appropriate measures.

3. What are the expectations and experiences of those present at mediation conferences? There has been no research in New Zealand on the views of couples who have attended mediation conferences. Nor is there any published work about the experiences of judges. A survey of lawyers' comments showed that lawyers had generally positive attitudes about mediation but this survey was conducted soon after the introduction of the new system (New Zealand Law Society, 1981). There is clearly a need for research on the experience of the people at mediation conferences.

4. Are judges the most appropriate mediators? Judges may not be the most appropriate mediators. 'The judge who attempts to mediate enjoys, whether he likes it or not an authority which is in no way derived from his association with the values seen to underlie mediation' (Roberts, 1983, p.555). The perceived authority of a judge may mean that judicial mediation is quite directive : 'the parties more often than not equate authority with semi-omnipotence and quite literally can be seen to be hanging on to every word uttered by the Judge' (Ryan, 1984). It is possible that non-judicial mediation might be more appropriate or that both judicial and non-judicial mediation services could co-exist.

5. Is mediation suitable for all people? It has been suggested that mediation is not a suitable technique for some couples; for instance, where the level of conflict is too high to permit communication, where couples are emotionally immature, where couples want to be told what to do or need 'a day in court' as a part of the separation process (Brown 1982; Herrman et al, 1978). 'Certainly, mediation is not for everyone. Couples who have been unable to communicate with each other throughout their marriage will be unlikely to begin doing so in the mediator's office' (Soloman, 1983, p.676/7). Under New Zealand legislation however, any couple may be required to attend a conference.

6. Is mediation appropriate for all issues? It has also been suggested that mediation may not be suitable for all issues (Brown 1982; Trapski 1984). There are five key issues to be resolved at a marriage break-down; custody, access, child support, spousal maintenance and the division of property. In most cases custody and disposal of the family home are interwoven (Perlberger, 1980). But some people feel that maintenance and property disputes may not be suitable for mediation. Most court programmes elsewhere restrict mediation to the child-related issues of custody and access (Pearson & Thoennes, 1984b, p.24). At present in New Zealand a conference may not be convened solely to discuss matrimonial property but it can be discussed in conjunction with the issues on which the conference was convened.

7. What factors influence the decision making process? The style of the mediator, the status, confidence and relative input of each party, the length of mediation sessions, the type of issues and the presence of lawyers, may all affect the decision that is made. The couple's perception of fairness and the genuineness of consent is likely to affect whether or not an agreement is kept. Information is needed about how mediation conferences are conducted and how this effects decisions.

8. How has judicial mediation changed the role and philosophy of judges? Judicial mediation has involved a change from formal to informal procedures. Instead of being presented with formal evidence the judge now seeks the parties' own accounts. Instead of weighing the evidence the judge helps the parties to make their own decisions. This, and the encouragement of informality in the Family Court, increases the involvement of the judges with the people concerned. What implications does the change from a receptive to a probing role, an adjudicatory to a conciliatory role have for judicial philosophy? Is it reducing people's dependence on the law or merely changing the nature of their dependence.

9. How is inequality of bargaining power dealt with in mediation conferences? There are many kinds of inequality - economic, emotional, intellectual, in cases of violence, and in cases of provisional custody. 'Different kinds of inequality call for different kinds of knowledge and strategies to deal with them.' (Parkinson, 1983b, p.184)

10. Are checks and balances needed for mediation conferences? The fact that conferences are informal and held in private means that justice cannot be seen to be done, and if in some instances it is not done, it is difficult to take any action.

11. Should lawyers be present at mediation conferences? Counsel for the child may be present if he or she wishes; lawyers representing a party may be present only at the request of the party. Some judges however, routinely request the presence of the parties' lawyers at conferences. In some cases the criticism was made that lawyers use conferences to get ammunition for a later hearing.

12. Should mediation conferences be available before applications for orders are filed? If an underlying purpose of mediation is to avoid litigation and adversarial dispute resolution, then it may be better to provide for mediation to be available before proceedings are filed.

13. Is mediation used as much as it might be? The use of mediation conferences depends to a large extent on the willingness of lawyers to recommend this method of dispute resolution to their clients.

COUNSEL FOR THE CHILD

'As the concept of the child as property vanishes from our law, courts, in an effort to focus on the child's best interests, have increasingly permitted the child to express his or her preference regarding custody arrangements. Nevertheless, children frequently remain pawns in divorce cases.'

Perlberger, 1980

Lawyers have been appointed by the Court to represent children in divorce proceedings for over twenty years (O'Reilly, 1979). Appointments however, have increased greatly since the introduction of the family law legislation in 1981. New Zealand is unique in the extent to which it has made financial provision for appointments to counsel for the child (Trapski, 1984). A lawyer may be appointed either to assist the Court (FPA s.162(1)(a), GAA s.30(1)(a)) or to represent the child or children involved in the proceedings (FPA s.162(1)(b), GAA s.30(1)(b) and (2), Matrimonial Property Act 1976 s.26(2)). There are no specific figures of the number of appointments to counsel for the child. The best estimation is that in 1983 there were approximately 1,400 appointments of counsel to represent the child.[3]

The issues raised were :

1. What is an appropriate degree of involvement? Some counsel for the child have minimal contact with the child and family, whilst others involve themselves in a network of contacts, spending a considerable amount of time getting to know the child. The degree of involvement seems to depend to a large extent on the lawyer's individual style. The over-involvement of some counsel for the child was raised as a problem. It has been described elsewhere as 'the tendency of some lawyers to go beyond their legal function and get involved in psychological counselling or therapy or mediation with their divorcing clients.' (Brown, 1982, p.24) 'Most of the literature has focused on the difficulties of role definition for an attorney in court when his client may not be mature enough to define his own interest.' (Mnookin & Kornhauser, 1979, p.988)

2. Are lawyers the most suitable representatives of the child? Custody and access are relationship problems in which the primary skills needed by the child's representative may be those of social work or counselling. However the court knowledge and case style of a lawyer may be crucial in cases which go to defended hearings (Foster & Freed, 1984). Is the need of the child best served by lawyers? Would other people be more suitable?

3. In what circumstances should counsel for the child be appointed and at what point in the proceedings? The time at which counsel for the child is appointed varies. Some people felt that appointment before mediation was essential, and that earlier appointments might reduce litigation.

4. What are the follow-up needs of children after the appointment has ceased? Several people suggested that counsel for the child should have occasional contact with the child as a 'surrogate guardian' for a year or so after the Court proceedings were over to check how access and custody arrangements were working out from the child's point of view.

ACCESS, CUSTODY AND GUARDIANSHIP

'Divorcing parents do not bargain over ... custodial prerogative in a vacuum; they bargain in the shadow of law'

Mnookin & Kornhauser, 1979

The issues raised were :

1. How are custody and access agreements working? In 1983, 1658 custody orders were made, affecting 3236 children. These figures are unlikely to include agreements reached out of court. Despite considerable research in this area (Wallerstein & Kelly, 1980; Trombetta, 1980, 1982; Rothberg, 1983), there is still an acute need to understand the effects of the procedures used to obtain custody and access agreements and the nature and impact of those agreements. There were many concerns. Where both parents agree about custody and access there may be no appointment of counsel for the child nor involvement of any other agency to ensure that the best interests and welfare of the children are taken into account. What fast and effective action can be taken when access orders are not respected by the custodial parent? Do interim custody orders prejudice the outcome of permanent arrangements? Long term studies of families who have to work out custody and access agreements are needed.

2. What are the current patterns of parenting after a relationship break-down? The exclusive possession of children by one parent after divorce has been the tradition in the Western world. The choice of which parent has varied in relation to the psychological theory of the day and the current social divisions of labour. In recent years mothers have tended to have the day to day care of children after marriage break-up. There is now a growing trend for the parents to share this responsibilty (Soloman, 1983) although equal sharing of physical custody is still relatively uncommon (Trapski, 1984). Many difficulties

however, may need to be overcome such as geography, career, social life, new relationships, financial arrangements and control (Rothberg, 1983). The decision about the parenting of children after the break-down of their parents' relationship may be settled completely outside the court system or at various stages within it - what types of decisions are made at the various stages?

3. Should the Guardianship Act provide for the making of orders for joint-custody? Under current legislation only one parent may have a custody order in his or her favour, the other usually having access rights. Although guardianship status protects parents' rights to be involved in matters such as education, health and religious upbringing, the sense of role-loss of the non-custodial parent may be recreased by social institutions, such as schools, which may not involve the non-custodial parent. By early 1980 four states in the USA had enacted laws authorising joint-custody of children after divorce and Californian law had stated a preference for joint-custody. About thirty states in the USA have passed statutes bearing on joint-custody (Freed & Foster, 1984). It should be noted that in the USA there is no concept of guardianship like the one in New Zealand. There are two aspects involved in the American concept of custody - legal custody (guardianship) and physical custody (custody).

4. How specific should access agreements be? The commonly used phrase of 'reasonable access' may cause extreme difficulties where there is no co-operation between the parents. There is a growing trend to make access agreements specific (Andrews, 1984; Shear, 1981).

5. Can the liable parent scheme be made more compatible with joint-custody arrangements? Under the Liable Parent Contribution Scheme, introduced by the Social Security Amendment Act 1980, when an application for a domestic purposes benefit is received, the finances of the person liable in law to maintain the beneficiary and children are assessed to determine how much that person can pay to offset the benefit paid by the State. Arrangements have proved to be complicated in cases of shared physical custody.

SPECIALIST REPORTS AND EXPERT WITNESSES

'Much as statistics may lie, experts may exaggerate or understate opinions and findings. Sometimes they cancel each other out. Experts, like the rest of us, may be mistaken ...'

Foster & Freed, 1984

When a guardianship, custody or access application is before a Family Court Judge, the judge may call for specialist reports from the Department of Social Welfare on the application (GAA s.29(2)), or on the child by any person who is considered qualified to prepare a medical, psychological or psychiatric report (GAA s.29A(1)). A specialist may also be called as expert witness at a hearing. (Figures on the number of reports requested are not available).

The issues raised were :

1. What impact does the preparation of reports have on the family concerned? When specialist reports are prepared there can be significant intervention in a family's life - the specialist may interview the whole family, individual members, teachers and other people connected with the case (Shepherd et al 1984). There is a need to know when and why reports are requested and how the experience affects the family concerned.

2. Should counselling and assessment be assigned to different individuals? The confidentiality of counselling could present ethical problems if counsellors were also asked to write assessments. If different people counsel and write assessments however, then the impact on the individual is greater, decision making can be delayed, and the knowledge gained by the counsellor's understanding of the situation lost to the Court.

3. How do reports and expert witnesses influence decisions? Considerable emphasis may be placed on reports and on the reputation of expert witnesses. What information do reports contain and is this the information needed? Does the Court and do the parties concerned understand the content of the report?

4. Should there be a policy about overseas investigations? There is disagreement about the merits of sending professionals overseas to conduct investigations rather than using services within the countries concerned.

THE MULTIDISCIPLINARY APPROACH

'If the goal is to deal with divorce in all of its aspects, emotional as well as legal, the team approach seems to be the preferable model'

Solomon, 1983

The family law legislation allows for a number of different disciplines to become involved with a family (lawyers, social workers, psychologists, counsellors, and medical professionals). The disciplines all have specific roles and functions but there are inevitably areas of mutual involvement.

The issues raised were :

1. What impact does the number of people involved have on a family? A multidisciplinary approach makes expertise available to families. But if there is no clear co-ordination more intervention may take place than is necessary. One family may encounter a judge, a lawyer, a counsellor, a social worker, a psychologist and a psychiatrist in the course of the relationship break-down. The number of people interviewing a family must affect its members, particularly when proceedings are drawn out over a long period. Moreover, interviews which are for assessment and information rather than for any therapeutic reason are unlikely to be rewarding to the family.

2. How are roles defined to avoid confusion and overlap? Marriage break-down is a social, psychological and legal event. As such, interprofessional problems may be caused by an overlapping of roles. In particular, there may be 'problems of turf encroachment' (Brown, 1982) with lawyers dabbling in counselling and counsellors dabbling in law. There may be a waste of resources as a result of unnecessary double-up.

3. What communication networks are used? The communication between those involved with the case should meet the needs of the total family yet preserve the privacy of its members. In certain cases, for instance where incest is alleged, professionals have to rely on informal channels of communication to alert other professionals to the problem.

4. Who is accountable? When a number of people are involved in a case, and the team approach is ad hoc, responsibility for its total management may need to be designated.

SELECTION, TRAINING AND STANDARDS

'Men must be taught as if you taught them not
And things unknown proposed, as thing forgot'
Pope

The personal and social cost of family break-down is enormous. Yet the selection and training of people working in the Family Courts is variable and the maintenance of standards is uncertain. Concern about these issues was expressed in relation to four main groups of people :

1. Judges : A Family Court Judge should be 'by reason of (his or her) training, experience, and personality, a suitable person to deal with matters of family' (FCA s.5(2)(b)). Qualities which will aid a mediator include 'good listening and verbal skills, a sense of fairness, a creative approach to problem solving, a non-judgemental attitude, and lots of patience' (Egle, 1984; p.704). The suitability of judges was raised particularly in relation to their role as mediators. Family Court Judges have had minimal training in mediation skills. Yet it is strongly argued that mediators need to be trained in the skills of mediation (Brown, 1982; Chart, 1984b; Folberg, 1984; Trombetta, 1982; Wolff, 1983). Qualifications required by Californian law for court-connected mediators include an understanding of family relationships, experience in counselling, therapy and specialised knowledge of human development. At the extreme, it is argued that mediation should be an independent profession with its own graduate professional educational programmes (Brown, 1982). It seems

crucial that in a situation where 'the success of the conference is largely dependant upon the quality of the judge concerned' (New Zealand Law Society, 1981), judges should be thoroughly trained in the skills of mediation. Other issues include the evolving need for ethical guidelines for divorce mediators (Loeb, 1984).

2. Counsel for the child : Counsel for the child has to adopt many roles, including fact-finder, advocate for the child, protector of the child and negotiator. Lawyers have not traditionally been trained to carry out some of these functions. Specifically they have rarely been trained in counselling skills and principles of child development. Moreover, they come to a situation requiring conciliation having been trained in adversarial skills. The procedure for the selection of counsel for the child varies. Some areas in New Zealand have established compulsory training courses, others have organised voluntary workshops (Topham & Davidson, in press). Standard training should be required. Other issues concern the possible need for new ethical guidelines as lawyers move towards the behavioural sciences (Crouch, 1982; Wolff, 1983).

3. Counsellors : The majority of counselling referrals are to Marriage Guidance counsellors. Although their selection and training procedures are relatively consistent throughout New Zealand and they have on-going supervision, their training in court counselling is limited. About a third of referrals are to nominated counsellors. They come from many disciplines, not all of which have clear professional standards. There are no objective criteria for their nomination, nor training requirements, nor mandatory supervision.

4. Court staff : The responsibility for the organisation of family court counselling referrals rests with the family court counselling co-ordinators. They inform the public and legal profession about facilities, set up networks of counsellors and other professionals, and liaise with the judges. They come from diverse backgrounds, have each had to build up their local network, and are likely to have individual training and supervision needs. Other court staff, in particular counter staff, may need special training for family court work. Selected court staff could work in the family court area, although specialization might pose problems in a career service.

VIOLENT RELATIONSHIPS

'... for a typical woman the problem of violence is not the violence in the streets that we hear about all the time, but it's the violence in her own home'

New Hampshire Advisory Committee

In New Zealand there are about 15,000 cases of domestic violence reported to the police every year. It is generally agreed that this is a gross underestimate of domestic violence, with police, hospital and refuge statistics only the tip of the iceberg (Hancock, 1979; Synergy Applied Research Ltd, 1983). It has been estimated in Canada, for instance, that 10% of married or de facto relationships are violent . During the last ten years there has been a dramatic increase in the awareness, uncovering, and understanding of violent relationships. Violent relationships are difficult to change and difficult to leave (Church, 1978). This social problem poses special needs in court conciliation, particularly for women.

The family law legislation recognises that counselling is not appropriate for all situations and specifically provides that, on a separation application, where an applicant or a child has been abused by the respondent, the judge may direct that the parties not be referred to counselling (FPA s.10(3)(a)) : 162 such dispensations were made in 1983. Dispensation however, does not apply to mediation conferences where both parties are required to be present.

The Domestic Protection Act 1982 provided for protective orders for the victims of domestic violence (where the victim is a party to a marriage or de facto relationship). The Family or District Court may issue non-violence, non-molestation, occupation and tenancy orders. In urgent circumstances they may be issued ex parte. In 1983 368 non-molestation orders were granted. (Figures for non-violence orders are not available).

The issues raised were :

1. Should the victims of violence be required to be in the presence of their abuser? Women have been required by the Court to confront their abuser at counselling and at mediation conferences (MacGibbon & Milner, 1984). Where dispensation from counselling is not given and where a victim is required to attend a mediation conference (by the other party or by a judge) the victim's fear is discounted and the unequal balance of power in the relationship may go unrecognised. The well documented fear reaction of victims of violence can result in silence and consent through intimidation (Ash & Payne, 1982; Church, 1984; Stone et al, 1983). Moreover there may be actual physical danger for the victim. There have been cases of physical abuse following counselling and mediation conferences.

   Battered children are protected only indirectly by the Domestic Protection Act 1982. Children cannot apply for the protection of court orders and may be required to confront their abuser through access and custody orders (Church, 1984). Among examples given were cases of fathers being given access to children with whom they were committing incest (MacGibbon & Milner, 1984). Access visits have been continued against the wishes of the child. It is felt that withholding access may prejudice an application for custody (Ash & Payne, 1982; MacGibbon & Milner, 1984). Moreover arrangements for supervised access or go-betweens for access are often not made by a Court which may make an access order in violent situations.

2. What counselling is appropriate? The counselling of people in violent relationships requires specialist skills at the right time (Atkin et al, 1982; Fleming, 1979). Moreover it is commonly argued that the abused and the abuser should receive separate counselling. There are criticisms that dispensations from counselling in cases of violence are not being used enough and that some counsellors are insisting on counselling the couple together (MacGibbon & Milner, 1984). If a woman comes to the court from a refuge she will already be receiving help specifically for victims of violence. The abuser however, is rarely receiving help. The court counselling referral is often the only point of intervention for abusers - a chance which should not be lost. Yet there are few programmes set up specifically to assist abusers. There is also a

need for better counselling provisions for both adult and child victims of violence who are not already receiving help at the time of contact with the court. In the present system children who are victims of violence are not necessarily offered counselling.

3. Are non-violence and non-molestation orders providing appropriate protection? There have been delays in getting orders, particularly in rural areas or during weekend and holiday periods. There were also criticisms of orders not being made when necessary and not being enforced (MacGibbon & Milner, 1984). One group said they were given too freely. Research into the development and impact of the Domestic Protection Act is currently being undertaken for an M.A. thesis.[4]

SOCIAL GROUPS

'Justice is open to everybody in the same way as the Ritz Hotel'

Judge Sturgess

Although legal aid provisions make the Family Court financially within reach, the issue raised was :

Is the process appropriate for those who need to use it?

1. Socio-economic status : Marriage break-down is highest amongst the lowest socio-economic status (SES) groups (Parkinson, 1983). Yet the family court process is dominated by middle-class traditions and values. Most lawyers are from higher SES backgrounds and the offices where clients discuss their cases usually reflect that fact. Legal services are less available in poorer districts (Sloper, 1981). People seeking marriage guidance counselling are likely to come from higher SES groups (Manchester & Gray, no date). People from

lower SES groups may lack the verbal skills needed for conciliation, and practical difficulties (such as transport and phone) mean that appointments are harder to make and keep. Similarly, individuals who seek mediation are 'more likely to have a college education, a higher income and a professional occupation.' (Pearson & Thoennes, 1982, p.338)

2. Women : Only one out of 24 Family Court Judges is a woman. There is a high (though decreasing) probability that the lawyers in court will also be men. In 1980 only 6.9% of practicing lawyers were women (Auckland District Law Society, 1981). It is commonly thought that the majority of family proceedings are initiated by women. (No figures are available). In mediation conferences and defended hearings, women may have to argue their case in a situation dominated by male values.

3. Cultural background : How families are viewed is inextricably linked to cultural norms, as are views about children, the roles of women and men, property, fairness, equality, responsibility, self-determination and confidentiality. The counselling and mediation processes offered do not necessarily improve dispute-resolution methods traditional to other cultures. The Family Court and its associated professionals are predominantly Pakeha and should not assume what is best for other groups. Although court nominated counsellors have appropriate professional status they usually lack an appropriate cultural status for Maoris and Pacific Islanders. There is a need to seek alternative counsellors and mediators.

4. De facto relationships : Reliable figures about the number of de facto relationships in New Zealand are not available. One estimate is that in the 1981 census 1,238,909 people described themselves as married and 87,960 described themselves as living in a de facto relationship (94% compared to 6%). Overseas studies suggest that the number of de facto relationships is growing (Bartlett, 1983). The law has been ambivalent in its acceptance of de facto relationships. The Status of Children Act 1969 abolished the concept of illegitimacy for all purposes of New Zealand law. The Matrimonial Property

Act 1976 did not recognise de facto marriages. The Domestic Protection Act 1982 did recognise the existence of such relationships. The Family Proceedings Act encapsulated the ambivalence by offering only limited services to couples in de facto relationships. The Act does not provide for people in a de facto relationship to be referred to counselling, although a mediation conference may be held if the parties are involved in a custody or access dispute.

THE COST AND ORGANISATION OF THE FAMILY COURT

'There is nothing certain about the law except that it is expensive'
Samuel Butler

The Family Courts Act 1980 provided for the establishment of a Family Court as a division of every District Court (FCA s.4), the appointment of Family Court Judges (s.5) and a Principal Family Court Judge (s.6) and an officer of the Department of Justice to facilitate the proper functioning of the Family Courts and of counselling and related services (s.8(1)) and such counselling supervisors, counsellors, and other officers as necessary (s.8 (2)). There are 60 Family Courts and 24 Family Court Judges. Nineteen of the courts have a counselling co-ordinator (three courts have two co-ordinators). An Executive Officer situated in Wellington is responsible to perform such duties as the Secretary for Justice may direct to facilitate the proper functioning of the Family Courts and of counselling and related services (FCA s.8(1)).

The issues raised were :

1. Is the cost of the services provided justified? Civil legal aid has been available since 1970 and is widely used for domestic proceedings. Dissolution is the only family law matter for which legal aid is not available. In the financial years ending March 1983 and March 1984 the net cost of legal aid for family proceedings was $2.3 million and $2.9 million respectively. In

the financial year ending March 1983, the Department of Justice spent $34,000 on referrals to nominated counsellors and $101,000 on referrals to Marriage Guidance counsellors. The figures for the financial year ending March 1984 were $139,000 and an estimated $100,000[5] respectively. The Department also makes an annual grant to the National Marriage Guidance Council for its work in the community and for the training of counsellors. In the financial years ending March 1983 and March 1984 these grants totalled $726,000 and $789,000 respectively. In the financial year ending March 1983 the Department of Justice spent $760,000 on appointments to counsel for the child. In the following financial year the cost was $1,020,525. (An increase of 34% for approximately the same number of cases). The average cost per case in the financial year ending March 1984 was $730. In the financial year ending March 1984, specialist reports cost the Department of Justice $139,646. (Figures for the previous year are not available). The cost of legal aid, counselling, counsel for the child and specialist reports has substantially increased since the introduction of the new family law.

Bahr reviewed several studies of the economic efficiency of court mediation schemes and found that 'all available data indicate that court mediation would save taxpayers substantial amounts of money' (Bahr, 1981, p.51). Davis and Bader challenge Bahr's conclusion however, pointing out how very difficult it is to make hard and fast judgements of savings. A major concern is to what extent spending can be controlled in a situation where marriage break-down is increasing and extensive services are provided. 'Ultimately, any new procedure should be judged on its merits rather than assessed in terms of its impact on existing patterns of expenditure, which may in themselves be extremely wasteful' (Davis & Bader, 1982b, p.64). The merits of the family court system must rest primarily on the extent to which it is meeting the needs of people who need to use it. Studies might explore whether a redistribution of funding or alternative services would meet these needs more effectively.

2. Is stress a significant problem for people who work in the Family Court? Both the volume of work and its content were reported as being extremely stressful in some areas. The recognition and management of stress is part of training for most counsellors and specialists, although several said court counselling is particularly difficult. Judges and court staff may also need help to cope with the special demands of this work. Stress in family law practitioners is also increasingly recognised (Head, 1983).

3. Is security a problem in the Family Court? The recent attacks on Family Court Judges in Australia (The Bulletin, July 17, 1984), the reporting of similar threats in New Zealand, and the occurrence of attacks on parties leaving counselling sessions, mediation conferences and defended hearings reflect the intensity of feelings in this area. Are there appropriate security measures in family courts? To what extent should security be incorporated in design and lay-out of the court.

4. How can delays in proceedings be reduced? In extreme cases a fixture for a defended hearing may not be available for over 3 months, a mediation conference for 3 months, and counselling for 6 weeks. Reserved decisions have taken up to 18 months. Delays may add extra tensions to an already difficult situation. In particular they may not meet a child's time sense. Volume of work and an increased public awareness of the facilities offered strain resources in some areas.

5. How could court workflow be improved? Scheduling and monitoring cases on computers could be explored. The need to protect privacy under such circumstances would be particularly important (Smith, 1979). Court returns might be used more effectively to predict and control workflow.

6. Are court facilities adequate? Should family courts be housed separately from district courts? Detached buildings are harder to service and administer but may be more appropriate. Are there adequate waiting rooms and child-care facilities? What provision is made for interpreters?

7. Is the statistical information about the Family Court adequate? There is little demographic information about users of the Family Court. The collation of data is primarily in terms of orders and applications whereas families are the unit of interest. Numbers of appointments made to counsel for the child and specialist reports requested need to be available. Compliance with counselling referrals, use of different types of counsellors, and basic outcome information about referrals at different points in the process should be routinely documented.

8. Is the Family Court suitably informal? The Act specifies that family court proceedings shall be conducted in such a way as to avoid unnecessary formality (FCA s.10(1)). Neither judges sitting in the Family Court nor counsel appearing in the Court shall wear wigs or gowns (FCA s.10(2)). Although uniformity of informality is encouraged (Trapski, 1982), the setting and furnishing of courts varies and the personal style of each judge is likely to dictate the degree of informality in each court. How informal does the Court seem to the user?

9. Is the public sufficiently informed about family law and the court? Many people felt that the public was not sufficiently aware of the services of the Family Court nor of the underlying law. In particular a need was seen to describe the services more clearly to minority groups and to ensure that people understand the law and meaning of custody.

CONCLUSION

Many issues relating to the New Zealand family law system were raised by the people we interviewed. Some relate to distinct parts of the family court process - such as counselling, mediation, counsel for the child, the use of specialist reports and expert witnesses. Others concern all stages of the process - the multidisciplinary approach, selection, standards and training, and the cost and organisation of the Family Court. Still others are linked more directly to the structure of society and the way in which people relate to each other - access, custody and guardianship, violent relationships, and how the Family Court provides for different social groups.

There are still broader issues which emerge. How does the total process affect the people involved? Do the stages of intervention match the emotional phases and natural decision points of break-up? To what extent does the legislation reflect social needs? To what extent does it affect or interact with social change? How might the changes in family law extend to other jurisdictions?

There were also several issues beyond the scope of this paper - the impact of lawyers' views on family law; rights of appeal in the Family Court; the jurisdiction over wards of the court; the concurrent jurisdiction of High Court and Family Court in matrimonial property cases; adoption and the status of children born by artificial insemination or in vitro fertilization.

Many issues call for explorations - in particular to discover how current parenting patterns are working and what the custody trends are within society; to find out the true incidence of de facto relationships and their needs in the Family Court; to test the effectiveness of alternative styles of mediation, specialised early counselling and early appointment of counsel for the child; to explore the possibility of non-judicial mediation and of counselling the wider family; and to detect what factors improve compliance with counselling referrals and what issues are best dealt with by mediation.

Many issues call for evaluations - in particular to clarify the aims of counselling and mediation and assess whether they are being met; to describe the processes involved and the experiences of the people concerned; to measure the impact of professional intervention on families; to examine the role of counsel for the child; to assess whether Marriage Guidance should continue to be the only approved agency; to assess the security, stress and workload of the Family Court and to examine the distribution of funding.

Many issues call for action - in particular to ensure that all people working in the area of family law are suitably selected and adequately trained for their respective roles, and that high standards are maintained; to ensure that sufficient counselling is available, in particular specialised counselling; to secure the most appropriate counsellors for minority groups; to respect the views of victims of violence, to develop programmes for abusers, and to provide supervised access; to reduce social bias in the Family Court and to develop better education programmes about family law and related services.

There is a clear need for research into the Family Court - to evaluate how the present system is working and how it is experienced by the people who use it, and to explore social trends and test ideas about the best ways to meet current requirements and provide for future requirements in this area. There is also a clear need to take action in specific ways to improve present practices. It is hoped that this paper will promote needed action and help set priorities about what specific research should now be undertaken.

APPENDIX A : THE INTERVIEWS

The following people were interviewed throughout April to July 1984. Interviews were informal and most involved both authors. Occasionally, we met with groups but the majority of interviews were with individuals. They usually lasted about an hour and ranged from half an hour to three hours. When selecting people to interview we attempted to get a wide range of views and experiences from those who have an interest in the Family Court. As many people as possible were interviewed in the time available and interviews were conducted in Wellington, Auckland, Hamilton, Palmerston North, Westport, Greymouth and Christchurch.

We interviewed a number of people who had experienced marriage or de facto marriage break-up. Some had used the services of the Family Court, others had not. In addition we read departmental files to highlight the kinds of complaints that are commonly made by users of the court. We were also kindly given access to the information collected by the Advisory Committee on Women's Affairs in a survey of comments on the Family Court from various women's groups.

We also interviewed :

S. J. Callahan, Secretary for Justice
B. J. Cameron, Deputy Secretary for Justice
D. Oughton, Deputy Secretary for Justice
Garth Soper, Assistant Secretary Courts
Graham Armstrong, Assistant Secretary Probation
Graheam Simpson, Director, Planning and Development
Margaret Nixon, Legal Advisor, Law Reform Division
Rod Smith, Executive Officer Family Courts

A. J. McGuffog, Registrar, District Court, Auckland
K. J. McDonald, Registrar, District Court, Westport
R. B. Twidle, Registrar, District Court, Christchurch
Lyn Beatson, Family Court Counselling Co-ordinator, Auckland
Alison Henry, Family Court Counselling Co-ordinator, Hamilton
Joan Moxon, Family Court Counselling Co-ordinator, Palmerston North
Ainslie Martin, Family Court Counselling Co-ordinator, Wellington
Gillian Marii, Family Court Counselling Co-ordinator, Greymouth
Ann Caseley, Family Court Counselling Co-ordinator, Christchurch
Diane Elvidge, Family Court Counselling Co-ordinator, Christchurch

Judge P. J. Trapski, Principal Family Court Judge
Judge B. J. Kendall, Family Court Judge, Auckland
Judge N. R. Taylor, Family Court Judge, Auckland
Judge S. R. Cartwright, Family Court Judge, Hamilton
Judge T. W. Fogarty, Family Court Judge, Christchurch

John Adams, Lawyer, Auckland
Bruce Andrews, Lawyer, Palmerston North
Robert Brace, Lawyer, Cannons Creek
Geoff Ellis, Lawyer, Wellington
Warwick Gendall, Lawyer, Wellington
Donna Hall, Lawyer, Lower Hutt
Doreen Hapeta, Lawyer, Community Law Centre, Wellington

Gay Bayfield & Bill Ivory, Counsellors, Leslie Centre, Auckland
Glen Harding, Co-Director, Marriage Guidance, Auckland
Michael Marris, Child Psychotherapist, Auckland
Tony Cramb, Private Counsellor, Hamilton
Win Rockell, Trainer & Director of Marriage Guidance, Manawatu
Paul Davidson, Psychologist, Wellington
Rhonda Pritchard, Private Counsellor, Wellington
Jeff Thomas, National Director, Marriage Guidance, Wellington

Hamish Dixon, Senior Psychologist & other psychologists at Child and Family Clinic, Wellington
Tim Druce, Senior Social Worker, Child and Family Clinic, Wellington
Mary Inglis, Senior Social Worker & other social workers at Department of Social Welfare, Wellington
David Page, Chief Psychologist, Department of Education

Vivienne Ullrich, Senior Lecturer in Family Law, Victoria University
Jane Chart, Senior Lecturer in Law, University of Canterbury
Rosemary Ash, National Co-ordinator, National Collective of Independent Women's Refuges (Inc)
John & Doris Church, Battered Women's Support Group, Christchurch
Roma Balzer, Women's Refuge, Rotorua
Denise Keay, Jenny Simpson, Elizabeth Dawe, Jenny Wilson, Advisory Committee on Women's Affairs, Sub-Committee on Violence
Pat Conroy, Geoff Boxall and Eyvan Pederson, Equal Parental Rights Society (Inc)
Alfred Hunkin, Director, Multicultural Resource Centre, Wellington
Puni Raea, Liaison Officer, Samoan Advisory Council
Sianoa Ostler, Founder member and life member, Samoan Advisory Council
Topsy Ratahi, Maori Women's Welfare League and Department of Maori Affairs

The following meetings were also attended :
Seminar on Mediation with Jay Folberg and Donald McDougal, Wellington, 1 May 1984
Family Court Seminar, Porirua, 28 March 1984
Session at Family Court Counselling Co-ordinators Conference, Tiromoana, Wellington, 12 July 1984
Mediation training session, Community Mediation Service, Christchurch, 13 June 1984
Seminar on Dispute Resolution with Ian McDuff, Senior Lecturer, Victoria University, Wellington, 13 July 1984

Telephone contact was also made with :
Gwen Wright, Society for Research on Women, Study Group on 'Marriage Break-up'
Denise Black, Wellington Rape Crisis Centre

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FOOTNOTES

1. This estimate is based on counselling referrals made from March to June 1984, from the 19 courts with counselling co-ordinators.

2. These estimates are based on counselling referrals from all courts made in February 1984.

3. The Department does not keep precise figures on appointment to counsel for the child. This estimate is based on the number of accounts submitted, which in most instances refer to one case.

4. Angela Lee, c/- Institute of Criminology, Victoria University, Wellington.

5. This figure is only an estimate. Marriage Guidance have only claimed for three-quarters of the 1984 financial year.

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