THE FAMILY COURT: A VIEW FROM THE OUTSIDE

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TABLE OF CONTENTS

Pages

1. INTRODUCTION

The closing session of the 1998 Family Law Conference in Christchurch was a panel discussion. It was based on a paper, “The Family Court in 2015: directions, challenges and threats - a polemic”, written for the conference by Simon Jefferson, a lawyer specialising in the area. The intention was to stimulate debate.

Flown down to be a panellist from outside the legal profession, I was delayed by fog and only participated in the second half of the discussion. There are serious issues to consider, however, so I have written this paper in response to the Jefferson polemic and in the spirit of ongoing debate.

The focus of this paper is on the Family Court, but the subject matter raises broader questions. It is therefore of wider relevance. The Centre for Public Policy Evaluation's Issues Paper No.1 asked, *inter alia*, whether a policy is likely to be implemented as intended. In this paper I show that the outcome of a policy may be only loosely related to the initial vision. As with most other policy areas, there are many people involved in the implementation process for family law. They have their own objectives, incentives and accountability processes. There are also questions about the boundaries of the areas of responsibility of the participants, as in determining acceptable limits to creativity in interpretation of the law. These factors will affect outcomes.

In this paper, building on Issues Paper No.1, there is more information on professional accountability and standards, not just in the legal profession. Similarly, the suitability of professional training and of implementation processes is questioned. Section 4.2 of Issues Paper No.2 suggested that there is a "menu of principles" upon which judges can draw. This was illustrated in detail by one paper at the 1998 Family Law Conference, as discussed in sections 2.8-2.10 below. It leads us to ask the questions: who makes policy; by what mandate; and to whom are they accountable? Again we see the significance of processes as a determinant of outcomes, and the importance of monitoring, research and broader perspectives. In all these areas, the Family Court is open to criticism.

2. THE ISSUES

In this section I outline 10 issues facing the Family Court. Some have been raised by others in New Zealand, some have arisen overseas and may also be relevant here, and some have come out of research in the Centre for Public Policy Evaluation.

2.1 Problems with an Adversarial System

An adversarial system is seen to have certain problems as discussed by the Australian Law Reform Commission (ALRC) in its review, an extract of which is in Appendix I. In particular, it is confrontational and driven by the lawyers and their clients, with the judge having limited control over the process or over costs incurred.

It could be considered unsuitable for Family Court cases where there are custody and access issues for two main reasons:

i) Access and custody issues are not suited to resolution through court action and a legal decision: i) the issues are ongoing; ii) they are linked to the relationships between the parents; iii) conflict between the parents can be harmful for the children and affect the outcome of the legal process; iv) time delays can be harmful and can affect the available options; and v) small things which the court might prefer to overlook can build up to have a big effect.

ii) Legal action to resolve matrimonial property matters is not directly related to custody and access. Nevertheless, it generates conflict between people who commonly have to co-operate over the children in the long term.

Counselling and mediation have been suggested as alternatives to litigation. There would still be problems if parallel approaches coexist because the court would be the fallback approach. Even with the current option of mediation conferences, there is little incentive for compromise if it is known that there is a high likelihood of successfully achieving a “winner take all” outcome (as with sole custody) through litigation. Under these circumstances mediation and/or counselling become little more than a way of “persuading” the other parent that there is no point trying for more than basic access.

As the ALRC document suggests, the availability of a litigation option will have an effect on the operation of the alternatives. The other approaches could be more constructive if the outcome of litigation were less certain, as where there is a willingness to order shared custody, or to switch custody if the custodial parent is obstructive.

2.2 Professional Standards

I now move on to consider professional standards and accountability of professionals in the Family Court.

2.2.1 Lawyers' Professional Standards

Low standards of behaviour by lawyers impact on the quality of the service offered by the Family Court. Cotter and Roper (Cotter W B and Roper C, 1996?) address the general issue of behaviour by barristers and solicitors, noting that:

> *"Time and again we were told of ignorance of [the Rules], or a lack of realisation of how inviolate the Rules are … not so much a lack of knowledge of the Rules; rather a conscious risk-taking to get around them … and lack of rigour in enforcing them."* (section 2.6)

and:

> *" … legal ethics does not really matter … they ignore the day-to-day pressures under which ordinary lawyers must operate … [the Rules] were not relevant, or were generally just not applied … an attitude that you get away with as much as you can."* (section 10)

Lawyers operate as agents and are paid for their expertise. As with doctors, clients have to place their trust in their agent to operate to appropriate professional standards. Given the nature of the service offered in the Family Court, there is also a need for appropriate standards to be met by lawyers engaged by other parties. Ethical lawyers could operate at a disadvantage compared with less ethical colleagues as they are more constrained in the actions they can take. Generally low ethical standards could result in a lack of

confidence in the legal profession. This would have repercussions for all in the profession and would severely limit the value of work done. There would be resistance to lawyers and the Family Court operating as a state regulated monopoly. Alternative avenues, if available, would appear relatively more attractive.

While the current complaints procedure through the Law Society includes recourse to "lay observers", their powers are limited. As one possible small improvement, it may be appropriate to follow the lead of research ethics committees in universities and include lay people among those considering complaints in the first instance.

In general, the profession has two alternatives. Either it can have high standards and penalise those who behave inappropriately, or it can have low standards, thereby rewarding those who behave badly at the cost of the standing of lawyers as a whole. Currently, according to Cotter and Roper, it appears to be following the latter course.

2.2.2 Judges' Standards

According to Schmitz (1998), writing in the Canadian publication, *Lawyers Weekly*, there is a longstanding dispute between the Canadian Bar Association and the Canadian Judicial Council. The Association is concerned that the Council's original vision of a "Code of Judicial Conduct" has been watered down to a non-binding set of guidelines, or "Ethical Principles for Judges".

The elevated position of judges has also been questioned in the UK. Hugo Young (1990) wrote:

> *"... In 1980 [Lord Denning] heard an appeal in connection with the Birmingham Six. The question was whether they should be allowed to go forward to full appeal on the basis of new evidence. Denning thought the prospect too terrible to contemplate.*
>
> *'If the six men fail,' he ruled, 'it will mean that much time and money will have been expended for no good purpose. If the six men win, it will mean that the police were guilty of perjury, that they were guilty of violence and*

threats, that the confessions were involuntary ... and that the convictions were erronious. That would mean the Home Secretary would either have to recommend that they be pardoned or he would have to remit the case to the Court of Appeal. This is such an appalling vista that every sensible person in the land would say: It cannot be right these actions should go any further.'

The common response to this remarkable statement has been to say how disgraceful it was. Lord Denning has since said that he regrets it. But as each item among his presentiments of doom has come to pass - the perjury, the corrupt evidence, the bad convictions, the remissions and the quashings - the more relevant response is to note how shrewd he was. Sensible persons have indeed lost confidence in the system, and since the system is so imperfect it is a good thing that they have.

Heading the objects of reappraisal ought to be the judges. Not only do they personally tend, in their shift from bar to bench, to acquire this habit of certainty that admits no doubt, they are almost universally encouraged to believe that the legal system itself rests on their being maintained in a quasi-godlike position. Only in the narrowest of circumstances can what they have done ever be undone. Upon that, law and politics insist, the very stability of our society depends."

There may well be a need for more stringent monitoring and accountability of judges in New Zealand in general and in the Family Court in particular, if only to set an example to less senior members of the legal profession. There has been much publicity recently about judges and expense claims. A judge who is ill-informed, or biased, or simply makes bad decisions, can have a fundamental effect on people's lives. It can be very costly, and sometimes impossible, to undo the damage caused. Given the costs of court action and the importance of many of the matters under consideration, judicial standards in these areas are every bit as important as they are with respect to their expense accounts.

2.2.3 Psychologists' Standards

There are professionals other than lawyers who work in the Family Court. It is important that their contribution is of an appropriate standard. These professionals include psychologists who may be engaged to provide assessments in the form of reports to the Court. Paragraph 11.3 of "Guidelines on specialist reports for the Family Court" (Department of Justice, 1995, p.240) states: "*Report writers should belong to a professional body that has…complaint procedures…*" Complaints against registered psychologists are considered by the Psychologists Board under the Psychologists Act 1981. On receipt of a complaint, a Complaints Assessment Committee (CAC) is set up (the April 1998 guidelines indicate that, prior to this, the matter is referred to the Health and Disabilities Commissioner, who determines whether to refer it back to the Board). The committee considers the complaint and supporting information. The practitioner may be invited to respond. The Committee then makes a recommendation to the Board as to whether the Board should consider the complaint. The Board can hear the complaint even if the Committee recommends otherwise.

The CAC Guidelines refer to "natural justice" for both the complainant and the practitioner (page 7, point 9). This requires that, *"Impartiality and fairness must not only be done, but must be seen to be done"* (page 9). Despite this requirement, the Board seems to be in the practice of concluding its deliberations by closing a file while refusing to provide any information on the issues and evidence considered by the CAC and the Board, or on the reasons for the decisions.

It would appear, therefore, that the complaints process is deficient. The Family Court cannot be sure that registered psychologists are maintaining suitable standards.

This is worrying, given recent reports from Canada. Jake Rupert, in the *Ottawa Citizen* of June 21 1998, writes, *"Criminal Lawyers Association president Alan Gold said recovered memory was 'junk science' and couldn't be relied on as evidence in criminal cases of abuse and sexual abuse."* The story was followed up further by Dr Tana Dineen in the *Ottawa Citizen* of July 4 1998. Pointing out that the theory is, *"…untested, unproven and unsafe"*, the doctor points out that, *"…many psychologists have carved out careers selling so-called recovered memory and other unsubstantiated*

notions both to their patients and to the courts. …What should concern us…is that the psychologists are still licensed and practising, their own professional organisations having imposed no sanctions." Given the Law Commission's investigation into psychological syndrome evidence (see below), there may be similar issues in New Zealand. If psychologists cannot be expected to behave professionally in these areas, how can they be expected to do so generally?

2.3 Psychological Syndromes

As overseas, doubts about the suitability of evidence on psychological syndromes have also been raised in New Zealand. In September 1997 the Law Commission produced an internal paper entitled, *Psychological Syndrome Evidence*. The syndromes considered were: battered woman syndrome; child sexual abuse accommodation syndrome; rape trauma syndrome; and recovered memory syndrome.

The paper suggests that evidence on these syndromes could be used, *"to educate the jury about the behaviour that can be expected of [raped or battered] women … or [sexually abused] children …"* (para.27), and *"to disabuse the jury of common myths and misconceptions concerning people who have undergone such experiences. This is termed 'counter-intuitive' evidence or 'rehabilitative' evidence."* (para. 28).

While the reference is to juries, the Family Court also relies on input from experts on such matters. The writers voiced reservations about more far-reaching uses of the evidence, such as to "prove" that abuse had occurred. Caution is indicated.

There was an interesting choice of syndromes for consideration. The Stockholm syndrome is not mentioned, although parallels have been drawn with battered woman's syndrome. Canada's Access to Justice Network describes the syndrome:

> *"The term "Stockholm Syndrome" was first used after four bank employees were held hostage by two robbers in the Swedish capital. During the siege, the hostages formed a bond with the robbers to the degree that they expressed gratitude to the robbers (after the hostage taking ended) for*

sparing their lives. The Stockholm syndrome is a form of survival identification."

Unlike battered woman's syndrome, it applies to both men and women. Like battered women's syndrome, it indicates that people can become helpless in a stressful situation where they feel that they are dominated and have little or no power. It is therefore not clear why there is no men's equivalent to battered women's syndrome. In a domestic situation, are only women likely to react in this way?

Equally surprising is the failure to acknowledge another syndrome that describes children reacting to sustained pressures put on them by someone in a dominant position. This is parental alienation syndrome. It has been heard of in New Zealand and was discussed in a paper by Adamiak to the 1995 Family Law Conference. While she was sceptical and dismissive, the alienating behaviour has been acknowledged as emotional abuse by Judge Blaikie (1994), and as "damaging in the extreme" by the Governor General of New Zealand (see appendix II).

The Law Commission is not alone in its ignorance, however. In response to written Parliamentary question number 6663, lodged on 26 June 1998, the Hon Roger Sowry, Minister of Social Welfare, stated that:

"Parental alienation syndrome is not a term familiar to staff of the Department of Social Welfare. The department is, however, very aware of the impact of domestic violence on children and works actively in this area."

This is paradoxical if parental alienation is considered to be psychological abuse, as would appear appropriate according to the domestic violence literature. See for example the Duluth Wheel (Dominick et al., 1995, p.11) and also the criteria used in the Department of Justice's *Hitting Home* study (see table 3 of Leibrich et al., 1995).

In summary, there appears to be a selective choice of syndromes, but there is a recognition that people may behave in counter-intuitive ways that untrained people might not appreciate.

2.4 Counsel for the Child

The possibility of counter-intuitive behaviour is significant. It means that reliable, expert input can be crucial. Section 2.2.3 above indicates that psychologists may not be reliable, and section 2.3 indicates that lawyers may not be experts.

Jenny Binns is a Hamilton barrister who acts as Counsel for the Child. She presented a paper at the 1998 Family Law Conference, "Counsel for the Child - a practical perspective". Section 2.5 of her paper is called, "Taking a view". She gives two illustrations of cases where she visited children in the home environment. For both of these cases, she states that she saw things that fundamentally changed her attitude and the outcome of the cases. It is a concern that outcomes can be so dependent on a single visit. If the visits were so crucial, what of all the cases where she visited but did not happen to observe some vital clue? What of the cases where she failed to understand counter-intuitive behaviour? In economics, for a finding to be "robust", it must hold under a range of circumstances. Outcomes that depend on single observations or isolated pieces of evidence would not be considered robust. There is a danger that cases will be determined by hasty and subjective assessments by untrained people. Surely opinions which determine people's lives should be based on a firmer foundation and a more rigorous assessment procedure than this.

In matters concerning the children, the Family Court places emphasis on: routine (see issue 8); the importance of the mother as primary caregiver during the marriage; the removal of the father if there is any assumed potential for domestic violence (see issue 10); and sole custody as the natural option. One might also add to this the criteria for child support, the failure to enforce access orders or the non-custodial parent's guardianship rights, and the view that the wellbeing of the custodial parent is a major determinant of the wellbeing of the children. In the majority of cases it would be hard then to distinguish between the roles of Counsel for the Children and counsel for the mother.

2.5 Routine and sole custody

The following is from *60 Minutes*, TV1, TVNZ, broadcast on 5th January 1997:

Narrator: *"Judge Mahony generally believes that young children are better off in one home."*

Chief Family Court Judge Patrick Mahony: *"Young children need routine. Their sense of security is often built around familiarity of environment, familiarity and consistency of caregiving. Those are very important factors for young children. Their bonding is very closely tied to their sense of security."*

This has been taken to mean not just young children, but all children, and has resulted in a marked lack of support for shared custody arrangements. It is puzzling for a number of reasons.

Several of the articles in the United Nations Convention on the Rights of the Child refer to **both** parents, and the Convention describes their parenting role as offering ***"direction and guidance"*** to their children. Similarly article 5 of the Convention to End All Forms of Discrimination Against Women refers to ***"the common responsibility of men and women in the upbringing and development of their children"***.

It would seem that Judge Mahony's concern is that shared custody is not compatible with routine. Children can have one routine at home and another at school, perhaps another at church, or at a sports club, or at grandma's, but they cannot handle one with their mother and another with their father. The result is that, at least for non-custodial fathers, the Family Court would endeavour to exclude them from the routine of their children's lives. It is hardly surprising that these fathers then fail to maintain an effective parenting relationship, since the Court is denying them that possibility. By apparently siding with the custodial mother, the Court is encouraging her to generate conflict, thus "demonstrating" that shared arrangements are commonly not viable.

The "routine" criterion is not consistently applied or accepted, however. On the matter of "parental distance" and the wish of some custodial mothers' to relocate, Adamiak

(1995) *"seriously question[s] the involvement of the Family Court at all"* (p.125). This is despite the change of home and school and the move away from the father, friends, and possibly extended family. Tapp, takes another view in her 1998 conference paper. In her discussion on the division of matrimonial property she says:

> *"Change of home, neighbourhood and school can be extremely stressful for children. There is research evidence that changing residences following marital disruption is associated with psychological distress and unhappiness of children. Children's psychological adjustment benefits from maintaining as many links as possible with the social networks established prior to parental separation. School, and school friends, and neighbourhood can be important points of stability and normality for children when their home life is disrupted."* (p.261)

On relocation, she suggests that, *"It is possible that more parents could be assisted to focus on the needs and welfare of their children if the trend of permitting relocation was slowed."* (p.262)

The relationship between routine and shared custody is indirectly covered by Tapp when discussing a decision by Judge von Dadelszen in the case of a mother with *"limited intellectual ability, … unable, even with assistance, to ensure the child's needs were met"* (p.246) and a child in foster care. An order was made for shared care as, in this instance, according to von Dadelszen,*"…if a child must be removed from their parent they are entitled to have an opportunity to maintain a meaningful relationship with their parent."* (p.246).

The shared care involved the child living with the long-term caregivers during the week and with the mother at weekends. Apparently such a routine is acceptable, but would not commonly be ordered where the parties are two separated parents. It seems that routine is less important than a "meaningful relationship" with one parent, but children are not thought to need a meaningful relationship with both parents. This does raise an interesting question on the meaning of "family" and the Court's view of the importance or otherwise for a child of a non-custodial parent and his/her extended family. Is contact with half a family equated with contact with the whole family?

Even if, despite arguments to the contrary, it can be demonstrated that a young child's need for routine does make shared custody arrangements less desirable, a longer-term perspective should still be taken. If older children's relationships with their other parent are important, then it would be unwise to make arrangements for young children which prevent the development of these relationships.

2.6 Fathers

The Family Court can hardly be said to be supportive of fathers as parents. The emphasis on sole custody, the nebulous concept of "routine", the approach to domestic violence (see point 10 below), and the unquestioned acceptance that women are currently disadvantaged (Jefferson, p.346) all serve to distance separated fathers from their children.

It is paradoxical that Judge David Carruthers, in his role as the Principal Youth Court Judge, advocates mentoring projects to reduce youth offending. Meanwhile judges in the Family Court are effectively telling capable and caring fathers that their parenting input is not required. In fact, fathers who persist in applying to the Court for enforcement of access orders or for increased time with their children run the risk of being labelled "stupid and obsessive" (Judge David Carruthers, panel discussion, 1998 Family Law Conference).

A different approach can be found in a report for the Department of Health and Human Services (DHHS) in the U.S. (Nord C W and Zill N, 1996). It identified a need to pay attention to the nature of the father's involvement, rather than simply following the approach adopted in New Zealand of "enjoyment of access":

> *"Given that most children desire the continuing presence of a father in their lives and that fathers may disengage from their parental responsibilities in part because they feel no sense of control over the new arrangements, steps should be taken to enable fathers to have a more active post-divorce role. There will, of course, be cases where this will be impossible because of the inability of the two parents to cooperate, because the father has no interest*

in remaining involved, or because of a history of past abuse. But, when it is at all feasible, policy should encourage paternal involvement.

- *Allow paternal role to continue, to the extent possible;*
- *Find ways to allow fathers to have a meaningful role in their children's lives where they can shoulder some of the* ***responsibility*** *of raising the child;*
- *Find ways to enable non-custodial parents to have some control over child's life."*

"Responsibility" refers to an effective parenting role, rather than merely having fun or being a "visitor".

The report recognised, *"… a need for more research on non-custodial fathers -- the stresses they face, how they cope, their emotional adjustment, how they feel about changes in their parenting role, and factors that alleviate stresses."* Several of the DHHS report's policy recommendations were aimed at reducing stress on non-custodial fathers so as to promote and improve their effective parenting.

2.7 Domestic Violence

The June/July 1993 issue of the *Massachusetts Bar Association Newsletter* (vol.33 no.7) included, "Speaking the Unspeakable", a President's Message by Elaine M Epstein. Two years before New Zealand's Principal Family Court Judge stated that the Domestic Violence Act would be interpreted "conservatively" (see p.131 of Brown D R, 1995), Epstein described the effect of their legislation:

"…it has become impossible to effectively represent a man against whom any allegation of domestic violence has been made. In virtually all cases, no notice, meaningful hearing or impartial weighing of the evidence is to be had. In response to the tidal wave of largely pro se restraining order seekers, the courts frequently seem to have taken a rubber stamp approach to dispensing such orders. I have seen restraining orders and orders to

vacate granted on the basis of dirty looks, fears - unsupported by past conduct - and virtually anything said in the course of an argument.

In many cases allegations of abuse are now used for tactical advantage. It is a convenient way to have someone immediately ordered out of the home, attempt to restrict access to the home or to the children, limit overnight or unsupervised visitation or acquire a financial advantage. Allegations of violence have a particular strategic advantage at the outset of any domestic relations case and can continue to color the entire case, as they are waved about like a hand grenade about to go off."

There was an audience of about 200 Family Court lawyers and judges at the 1998 conference panel discussion. Judge Green, in response to a comment about the problem of false allegations of domestic violence, stated that the primary concern should be the prevention of family violence. We should be concerned that there appeared to be strong support for this position. Allegations may be either justified or unjustified. Ideally all justified allegations will be identified, and all unjustified allegations would be rejected. In practice errors can occur by failing to correctly identify either a valid allegation or an invalid one. Judge Green's remark indicates an overriding concern not to miss any valid applications. This inevitably means there is little or no concern for wrongly accepting invalid or false allegations. In consequence, false allegations are rewarded, and hence encouraged. Not only does this seem to be contrary to good application of law, but there also appears to be a systematic bias in the application of rewards and punishments, and it seems to go against the "best interest of the child".

It also goes against recent New Zealand findings (Henaghan et al, 1998):

"Continuing relationships with both parents seemed to be an important aspect of helping children to adjust to parental separation. Providing opportunities for children to maintain contact with the non-custodial parent is therefore essential where there is ***no evidence*** *of harm to the child."*
(p.284)
(my emphasis)

In addition, Karen Zelas (1998) cautions about the psychological effects of family disruption and the removal of a parent in cases of proven abuse (p.275). She sees value in protecting the parent-child relationship even when the parent has been abusive. Where there are false allegations or there is parental alienation by a custodial parent, is there not even greater reason to protect the child's relationship with the non-abusive non-custodial parent? There are costs to children from the loss of a father. Moreover, the behaviour is a form of domestic violence according to the Duluth Wheel, and the Court is allowing itself to be used as a vehicle for "indirect aggression" as described by Patricia Pearson (Pearson, 1997). In these cases the Court is actually supporting and assisting, and giving custody to, the abusive parent.

Notably, Zelas also states that, *"We must take care that decisions are not made solely according to the latest or most fashionable professional or political theories."* (p.276)

There do seem to be fashions for theories, and sometimes prevailing theories seem to conflict with each other. For example, battered woman's syndrome suggests that a woman's violence is determined by the home environment. On the other hand, the Domestic Violence Act assumes that violence predominantly by men is determined by factors related to the man alone. It is interesting that a book written in 1976 states:

> *"Our model identifies the parents as the host of the problem of child abuse. It does not focus on the parent who actually beats or injures the child to the exclusion of the one who does not act out."* (Justice B and R, 1976, p.58)

The authors mention other publications taking the same approach.

2.8 A "Menu of Principles"

> *"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean - neither more nor less."*
> *"The question is," said Alice, "whether you can make words mean so many different things."*
> *"The question is," said Humpty Dumpty, "which is to be master - that's all."*
>
> Lewis Carroll, *Through the Looking Glass*

Previously, I suggested (Birks, 1998a, 1998b) that judges selected from a "menu of principles" to support their decisions. Judge Boshier's conference paper conveniently illustrates this point at length with reference to the Matrimonial Property Act (Boshier, 1998).

Following numerous examples of alternative interpretations and associated decisions, he concludes:

> *"This paper has traversed a variety of matrimonial property issues. The aim has been to show you that in spite of the superficially limited nature of the Act there is scope for innovation and diversity in the formulation of claims.*
>
> *I hope that cases discussed have shown the spectrum of outcomes that can result from counsel taking time to think through the issues. Counsel and judge alike should keep at the forefront the aims and objectives of the Matrimonial Property Act. Parties should aim for a just division of matrimonial property, taking into account the interests of the children of the marriage. This will of course involve social policy issues. After all, what would the public rather have: a statute firmly set in the social mores of the 1970s or a statute that lives and evolves with our society? Law does not exist in a vacuum, but is an evolutionary process. Development of the law is dependent on counsel being prepared to push boundaries, and challenge judges to find ways to flesh the bones of the Act and do justice to all parties."* (pp.58-9)

This "creative" approach has many serious implications:

i) The legal reasoning in support of a judge's decision would be a justification, rather than the basis for the decision.
ii) The real basis of the decision would not be identified, and so it would not be transparent why the particular decision was reached.
iii) Decisions would not necessarily be consistent, and they could be purely arbitrary. Besides raising doubts about the quality of decisions, this would also increase uncertainty. Some would therefore accept inappropriate settlements to avoid the

expense of legal action, while others might act opportunistically in the hope of a favourable outcome. Legal action would become more expensive because of the increased complexity and uncertainty.

iv) Justifications as stated in decisions would give wrong or misleading signals. Those who are guided by the content of decisions may be acting inappropriately. In custody or access cases, parties may end up feeling that they are simply "jumping through hoops", meeting one stated requirement after another while getting no nearer their goal.

v) It would not be certain that the issues had been properly considered. In particular, it would not be clear what information had been used to reach the chosen decision or why that information had been selected. The background information underpinning the assessment may not even be stated in court and, in any event, it would not usually be appropriate to debate it there. (See 2.10)

vi) Development of the law through "imaginative" interpretations amounts to judges making policy. (See 2.9)

vii) The decisions reached in court may have broader implications, especially in the long run. By considering cases individually, this dimension is overlooked. (See 2.10)

The Court is not flexing its muscles in all areas, however. Paradoxically, it seems unable to apply even a literal interpretation of section 20A of the Guardianship Act to encourage custodial mothers to abide by court orders for access. This is despite cases where it has found ways to enthusiastically support the relationship of non-custodial mothers with their children.

2.9 Social Policy Issues

New Zealand is not the only country where judges could be accused of political activism. Richard Gwyn (1998), writing in Canada's *Toronto Star*, refers to *"the politicisation of our judiciary"*. He questions the suitability of judges for this role, and cites criticisms of unpredictable and contradictory rulings. Lorrie Goldstein (1998), writing in another Toronto paper, was equally critical of *"run amok judicial activism"*.

They both made the point that, if judges wished to act as politicians, then they should be open to the same public scrutiny and criticism as politicians. To put it bluntly, if judges are to redefine their role in this way, from whom did they get the mandate, and to whom are they accountable?

The secrecy surrounding Family Court proceedings is also a concern. There is a real danger that a commonly-held viewpoint can develop which is not open to scrutiny and challenge from those outside the court. Goleman (1997) describes the behaviour of groups and the self-deception that can occur:

> *"Self-deception operates both at the level of the individual mind, and in the collective awareness of the group. To belong to a group of any sort, the tacit price of membership is to agree not to notice one's own feelings of unease and misgiving, and certainly not to question anything that challenges the group's way of doing things."* (p.12)

> *"... shared schemas guide group dynamics ... the social construction of reality. Shared schemas are at work in the social realm, creating a consensual reality. This social reality is pocked with zones of tacitly denied information. The ease with which such social blind spots arise is due to the structure of the individual mind. Their social cost is shared illusions."* (p.23)

Goleman's comments are of general relevance, but are of particular concern where the group is responsible for the implementation of policy. The group's attitudes and outcomes have a significant effect on the lives of large numbers of people. These people are reliant on the group and have little or no opportunity to challenge prevailing views.

2.10 The "Macro" Dimension

Ian Pool's 1998 conference paper refers to a "macro-level perspective". This is not the same as the personal experience of Family Court lawyers and judges, or the information normally coming available to those in the Family Court, which may focus on extreme cases and extreme situations:

> *"You may see in your daily practice a preponderance of persons whose behaviours are social pathologies rather than normal actions."* (p. 314).

One judge at the panel discussion remarked that custody is not a major issue because there are few custody hearings. He noted that there were many hearings on domestic violence. As pointed out in section 2.7 above, a domestic violence accusation may be a quick and economical way for a mother to secure custody. There may also be few custody hearings because of the Court's views on shared custody, its emphasis on "routine", the failure to enforce orders and the apparent lack of concern about alienation. There is little point in a father taking a custody application to a hearing if, by the date of the hearing, he would have had little contact with the children for perhaps 6 months or so.

The Court also seems to observe little of a family besides the time in Court and in the unusual circumstances of an evaluation. It would have little information on the family's earlier history, and does not generally follow up on families once they are out of the Court system. It does not observe those families which do not go to Court.

Each case is considered on its own, and so the Court does not consider the wider picture in terms of the effects on society of a large number of separations, for example. Nor does it consider the way in which its treatment of cases and interpretation or "development" of the law might influence the behaviour of others. This may be significant. For example, Kuhn and Guidubaldi (1997) found a connection between divorce rates and prevalence of shared custody in US states, higher likelihood of shared custody being associated with less divorce.

There are many important questions relevant to the development of new policy directions and laws that do not appear to have been asked. These include:

i) Is the Court encouraging marriage break-up?
ii) Is it discouraging people from marrying?
iii) What are the social implications of tens of thousands of children growing up without their natural fathers?

iv) What are the implications of thousands of non-custodial fathers having little or no contact with their children?

v) What are the consequences of the thousands of mothers bringing up children on their own?

vi) How will the children of today's separations view marriage and raising children when they are adults?

vii) How will people view the law if custodial mothers can act as if it does not apply to them?

viii) What lessons does this teach their children?

ix) What are the financial implications of these developments in terms of benefits paid, incentives or disincentives to work, incentives for young people to study?

x) Should people make long-term plans if separation can be financially devastating (for some men and some women)?

These questions should be asked and the information available to those determining policy. It is not clear that the Family Court even has a mechanism for considering the issues, far less appropriately researching them.

There is some research undertaken by the Law Commission and the Department/Ministry of Justice. This includes the Law Commission's psychological syndrome research discussed above, and its Women's Access to Justice Project (WAJP), discussed in Birks (1998a, and 1998b). The WAJP is an example of advocacy research, as described in Birks (1998c). The Department of Justice's *Hitting Home* study (Leibrich et al, 1995) was also one-sided, involving men only, and asking them only about their physical and psychological violence towards women and not about women's physical and psychological violence towards them. None of these studies take a broad, social or long-term approach.

It therefore appears to be inappropriate for the Family Court to actively pursue a policymaking role.

3. CONCLUSION

From an economics perspective, in several respects the Family Court can be seen as failing to operate as well as might be hoped. It may be the best that can be achieved, but that is unlikely. It may also be that some entirely different approach, whereby the Family Court is abolished, may be preferable. Such a change is unlikely to happen, given that the Court is already in existence. It has a head start on any possible competitors. That is no basis for complacency, however. If it fails to deliver at reasonable cost, it will face increasingly vocal criticism.

There is a clear need for the Court to have a broader and deeper research base, both in-house and drawing on other local and overseas resources. There is also a need for greater accountability and better means of enforcing satisfactory professional standards. The Court needs to develop a clearer picture of its role within the overall structure of society, as well as the possible wider implications of its actions. It could also possibly be less inward looking than it currently appears to be.

There is a need for open debate on the nature of the Family Court, its function, and its ability to fulfil that function. There are those who would challenge the Court by litigation. It is not clear that this is the appropriate approach, as it is effectively asking the accused to be its own judge and jury.

I leave the closing remark to Simon Jefferson, who invited me to participate in the conference and stated in his paper that:

> *"Perhaps, above all, the Family Court and family law could benefit from the development of a corps of knowledgeable and intelligent commentators, being neither apologists/spin doctors nor snipers, so that informed, rather than tabloid, debate about the functions and future of the Family Court can develop."* (p.334)

APPENDIX I

Extract from: Australian Law Reform Commission (1997)

Review of the adversarial system of litigation

http://www.anu.edu.au/alrc/adversarial/inquiry.html

The problems of an 'adversarial' system

The central point of reference for this inquiry is the 'adversarial' nature of the present system. In practice this focuses the inquiry more on a particular group of problems than on a particular type of legal system.

'Adversarial' does not have a precise meaning. In broad terms the 'present adversarial system' of conducting proceedings refers to a system in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for carrying the dispute forward.

In its simplest form this system has a number of consequences, some of which have been challenged as counterproductive or inefficient, for example

- the system is about winning and losing — each party has responsibility for advocating its own case and attacking the other party's case; this puts an emphasis on confrontation
- the lawyer's role is strictly partisan — the lawyer has a duty to represent the interests of his or her client and is not ethically accountable for the client's goals or the means used to attain them, although the lawyer does have certain countervailing duties to the court and third parties — this gives lawyers an incentive (and perhaps even an obligation) to exploit any advantages the legal system allows for their clients
- the judge is responsible for ensuring that the proceedings are conducted fairly — this makes judges sensitive about limiting the issues and arguments raised by parties and putting other controls on proceedings in case that is considered biased or unfair
- the judge is not responsible for how much evidence is collected, how many different arguments and points are put to the court, how long the proceedings take or how much they cost

- the judge must adjudicate questions of fact and questions of law submitted to the court, but is not responsible for discovering the truth or for settling the dispute to which those questions relate.

These and other features of the adversarial system have been criticized as contributing to (among other things) excessive costs and delays, overservicing, lack of accountability and an unduly confrontational approach to dealing with disputes.

The adversarial system has also been criticized for its indirect effects. Strictly, the adversarial system relates only to a small part of dispute resolution in Australia — trials in courts. However it has a wide ranging impact, affecting in particular all other stages of proceedings in courts, the role and proceedings of tribunals, other dispute resolution procedures used by courts and tribunals, and other forms of dispute resolution outside courts and tribunals.

APPENDIX II

Extract from a speech by The Right Honourable Sir Michael Hardie Boys GNZM, GCMG, Governor-General of New Zealand, at the opening of the Fathering the Future Forum, Christchurch, 28 March 1998

"Then again, and this is very sad, wives who feel aggrieved at the break-up of the marriage are sometimes all too ready to punish the husband by making access to the children as difficult as possible. In legal practice and on the Bench, I found this distressingly common; and very hard to deal with, because at times the mother would convince herself that the children did not want to be with their father, or that he was a malign influence, and so they would justify their attitude with reasons which, if they were valid at all, were of their own, perhaps unconscious, making. Of course, at times the mother's attitude was quite justified, but all too often, looked at objectively, it was not.

The Courts have a responsibility to be firm in this area, and I am sure that is well recognised. Weekly or fortnightly access is bad enough; it's the flimsiest base on which to build a fruitful relationship. But for the other parent to make even that difficult, or to deprive the child of the relationship altogether, is damaging in the extreme, for both child and parent."

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