PROCEEDINGS OF SOCIAL POLICY FORUM 2002

THE CHILD AND THE FAMILY COURT: SEEKING THE BEST INTERESTS OF THE CHILD

ISSUES PAPER NO. 13

Edited by

STUART BIRKS

CENTRE FOR PUBLIC POLICY EVALUATION
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INTRODUCTION

The papers in this collection arise from Social Policy Forum 2002: The Child and the Family Court; Seeking the Best Interests of the Child, held in Wellington on 14th October 2002. It was the fourth Social Policy Forum held, the first being "Fathers, Families and the Future", on 19 April 1999, the second, "Children's Rights and Families", on 26th October 2000 and the third, "Children in Families as Reflected in Statistics, Research and Policy", on 7th September 2001. Papers associated with those forums have been published, along with other contributions, in Issues Papers 4, 6, 10 and 11.

Continuing the now established tradition, the aim on this occasion was to bring together research, practice and policy. The attendees were therefore drawn from a range of backgrounds. They included lawyers, public sector policy analysts, academics, and representatives of grass-roots and voluntary organisations. The organising committee was also drawn from these diverse backgrounds. Support and funding was provided by the Father and Child Trust, Wellington and the Centre for Public Policy Evaluation at Massey University.

A fifth Social Policy Forum is planned for 2003.

The theme for the 2002 Forum was "The Child and the Family Court; Seeking the Best Interests of the Child". Debate on these issues appears to occur in two quite separate areas, with what could be considered an "inside" group and those who are "outside" this circle. The inside group consists of lawyers and others involved in and with the Family Court. The outside group involves diverse researchers, analysts, and members of some interest groups. While on occasion members of the latter are invited in to discuss issues and present views to the former, it is rare for the former to front up to a broader audience.

A particular feature of the day was the conscious attempt to bring together these two groups. It resulted in some interesting discussion. Hopefully a longer-term benefit will be a widening of the agenda for debate and greater understanding of the issues by all parties.

Chapter One

"THE CHILD AND THE FAMILY COURT"

By Judge P D Mahony

INTRODUCTION

I welcome this opportunity to participate in this Fourth Social Policy Forum and thank the organisers for the opportunity to do so.

The overall theme for the day "The Child and the Family Court" inevitably involves us thinking about the child in relation to family and parents because together they provide the context for most Family Court intervention.

The most up to date statement of policy about the family in family law in New Zealand is in the Children Young Persons and Their Families Act 1989 which deals with state intervention on behalf of children in need of care and protection resulting from neglect or abuse within their families.

The principles set out in that Act are a restatement of significant Articles in the United Nations Convention on the Rights of the Child, stressing the primacy of family and parents for children. Those Principles also underpin the range of orders available to the Court.

Our Guardianship Act enacted 20 years earlier in a different era of family law does not enunciate any similar vision. Nevertheless its deficiencies were significantly dealt with by the Family Proceedings Act 1980 and the Family Courts Act 1980 at the time the Family Court with a totally new approach to family law began in operate from 1981.

I want to refer to the institution of the family because our view of it to some extent determines the value we put on the work of those supporting families and parents in relation to their children.

By nature human beings are family people. It is from and within family that we know who we are personally, ethnically, culturally and spiritually. The blueprint and hallmarks of our identity are stamped on us through family. The wonderful discoveries of genetics help us understand how powerful those influences are.

Through family we are deeply fulfilled as we love and care for one another and create and nurture new life. Children are at the heart of the family and its responsibilities. Their well-being is a measure of its effectiveness.

Although there are may forms of family deserving recognition and respect, the unit of father, mother and children is still a model chosen by the majority of people and the one which presents most frequently to the Family Court.

In our lifetime there have been extraordinary pressures on families from a complex variety of causes with the result that many couples separate and begin new lives for themselves.

This process can lead to family re-formation, from two family units replacing one and children moving between the two, to single parent households, to absorption into a wider family unit with an enhanced role for grandparents and other family members.

In these cases parents have to make substantial personal adjustments in managing their own lives through what is a serious upheaval for most people. Children can easily become casualties in the process.

A major focus in modern Family Court systems is the provision of education and support for families, directing parental attention to the impact on their children also affected by what is happening to their parents, their family and themselves. In New Zealand's case, this involves counseling paid for by the Court, mediation, separate legal representation for children and the use of social work and psychological assessments directed in the first place at empowering parents to agree on good workable arrangements for the future parenting of their children.

Other countries over recent years have developed other helping strategies which are being studied by our Law Commission at the moment as part of a report it is preparing on Family Court processes here.

The majority of families are able to make the transition and move forward. A growing number however are finding the process fraught with difficulty and serious ongoing parental conflict - often focused on the children, causes serious unhappiness and emotional harm to both parents and especially their children.

Hostility and conflict can arise from circumstances surrounding the ending of a loving relationship or earlier dysfunction characterised by physical and emotional violence, or from parenting issues themselves.

Increasingly, the themes of international law conferences are directed to these very worrying cases as researchers and commentators highlight the serious harm resulting to children in a growing literature in books and journals.

They are among the most difficult cases facing Judges, and occupying here as in overseas Courts a disproportionate amount of time as parents return to the Court time and again for legal remedies to what are functional disorders.

On a broader front family law is directed at providing a rational workable framework by way of legal intervention around parent/child issues. Inevitably the law is developed piecemeal, in a field nevertheless where change over recent decades has been vast and rapid. Dr Jan Pryor and Bryan Rodgers in their excellent book "Children in Changing Families – Life After Parental Separation"[1] began with the opening line:

> *"Families at the beginning of the twenty first century are going through changes at a pace that is bewildering to both observers and family members themselves".*

Sir Ivor Richardson in his Foreword to the first edition Family Law Policy in New Zealand[2] referred to changes *"not only in institutions but also in attitudes and values making us ''a very different society' from what we were ten years before"*. He also observed that family policy itself was *a "product of a diverse range of social, economic, political and moral processes"*, themselves changing over time.

Inevitably the way in which the law responds to changing values and needs will bring support from some and criticism from others, depending on whether they are beneficially or adversely affected. Laws relating to family violence, child support, property legislation, domestic purposes benefit, and indeed the Guardianship Act itself are all subject to such support and criticism.

As Professor Mark Henaghan notes in the Introduction to the second edition of Family Policy in New Zealand,[3] *"Given the different interest groups, values and beliefs within the community it may not be possible to have an overall family law policy that is both coherent and satisfactory to all".*

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1 Pryor J and Rodgers B (2001) Children in Changing Families: Life After Parental Separation. Blacksmith Publishers Limited, United Kingdom. Blackwell Publishers Incorporated, United States of America.

2 Henaghan M and Atkin B eds (1992) Family Law Policy in New Zealand. Oxford University Press, Auckland, New Zealand.

3 Henaghan M and Atkin B eds (2002) Family Law Policy in New Zealand, 2nd ed, Lexis Nexis Butterworths, Wellington.

NEW PARENTING PATTERNS

One major change affecting children within intact and separated families is the shift in the parenting roles of mothers and fathers – of particular importance to Family Courts.

Fathers as providers, and mothers as day-to-day carers, for their growing families a generation ago created a regular pattern and they were to some extent typecast by those roles. For a complexity of reasons, changes in the workplace, opportunities for tertiary education and personal and professional advancement, the roles are coalescing and parents are sharing more equally the provider and nurturing functions of parenting.

In the process fathers are discovering how well they do as day-to-day carers of their children; the closeness it brings and the sometimes moving revelation of a child's responsiveness and love.

There is now a considerable volume of writing both academic and popular on this change; which is viewed as a correction to what had become an aberration with such titles as "Fatherhood Reclaimed"[4] and "Fatherless America"[5], "The Father: Mythology and Changing Roles"[6], "Father and Child Reunion"[7].

In that context it is useful to refer to the influential work of Freud and Bowllby made popular by Dr Spock and others to the effect that the mother child relationship was unique and without parallel and the prototype for all later love relationships leading to the general expectation that mothers be primary nurturers, and the Courts adopting what became known as the "Mother Principle"[8].

The writings of Mintz and others have uncovered the fallacy in this early research which omitted fathers from the equation. It is now known that children attach firmly to both mothers and fathers beginning in the first months of life.

The benefits for children whose fathers are involved parents before and after separation are set out in Chapter Seven entitled "Fathers and Families" in the Pryor and Rodgers book "Children in Changing Families" where I have noted passages too numerous to use here (see footnote one).

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4 Burgess A (1997) Fatherhood Reclaimed. The Making of the Modern Father, Random House Limited, United Kingdom.

5 Blankenhorn D (1995) Fatherless America: Confronting our Most Urgent Social Problem. Basic Books, New York, United States of America.

6 Colman A and Colman L (1980) The Father: Mythology and Changing Roles, Cheron, Illinois, United States of America.

7 Farrell W (2001) The Father and Child Reunion. How to Bring the Dads we Need to the Children we Love. Penguin Putman Inc, New York, United States of America.

8 Pryor and Rodgers 2001 quoting Freud at 200.

FUNCTION OF FAMILY COURT

The voices of children are also being heard frequently wanting to increase the contact and involvement with their fathers. This change inevitably must impact on the range of parenting orders which the Court makes.

Within such a state of flux including major developments in parenting between mothers and fathers, it is important to understand exactly what the role of the Family Court is and what can be expected of it, but also what is beyond its power to deliver, as the Court itself endeavours to meet the challenges of our times some of which I have already mentioned.

To some extent the Family Court is a social agency providing services and support for families in ways I have outlined, currently under review with an opportunity to diversify and update what can be done in the future[9].

But as a Court of law, its function is to decided cases, by applying the law as it stands to the facts and circumstances of the individual cases before it. The major sources of law are the Statutes – the laws passed by Parliament, precedents from case law itself and international conventions which become part of our law.

THE WELFARE OF THE CHILD – THE PARAMOUNT CONSIDERATION

It cannot be over stressed that in children's cases there is one overriding principle which governs all decision-making and is binding on the Court; namely the principle that the welfare best interests (a more modern term) of the child is the first and paramount consideration. So powerful is that principle and the limitations it imposes on the Court that it sometimes excludes other considerations which would normally apply such as justice between the parties.

> *It is also important to understand how the welfare or best interests principle is to be applied. The Court must conduct an enquiry into the circumstances of the particular case before it following "a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed the choice to be followed will be that which is most in the interests of the child's welfare…"*[10].

[9] Law Commission Preliminary Paper, Dispute Resolution in the Family Court (2002).
[10] J v C [1970] AC 668 at pages 710 - 711

That statement from the House of Lords summarises the law as it must be applied in our Court.

Our own Court of Appeal has added that "all aspects of welfare must be taken into account" including "the child's physical and mental and emotional wellbeing and the development in the child of standards and expectations of behaviour within our society"[11].

The Court must deal with the questions raised in the particular case before it - involving "this father, this mother and this child"[12].

The decision "is necessarily a predictive assessment; it is a decision about the future. It is not a reward for past behaviour"[13]. Under s23(1)(A) of the Guardianship Act 1968 gender based assumptions as to whose parental care will best serve the welfare of the child are of no account. The conduct of the parents is relevant only in so far as it bears upon the welfare of the child.

A factor of increasing prominence is the wishes of children who must be listened to and their wishes given weight according to their age and maturity.

The welfare of the child then is the guiding principle which determines how the Court must exercise what clearly is a discretion, following the line of enquiry with the limitations and exclusions to which I have referred. Challenges to the exercise of that function arise from a number of modern developments and current issues to which I now refer in turn.

INTERNATIONAL CHILD ABDUCTION

International child abduction by parents if left unresolved would lead to a chaotic situation for many children including the permanent loss of one of their parents.

New Zealand is one of now 73 State Parties to the Hague Convention on the Civil Aspects of International Child Abduction which since 1980 has held this abuse largely in check. Where a child is abducted[14] from one country to another under the Convention this child will be sent back to the home country unless one of a small number of defences is established and the Court then exercises a discretion not to order the return of the child.

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[11] G v G [1978] 2 NZLR 444 at page 447
[12] C v E unreported, Judge Inglis QC, 11 May 1987, Family Court Palmerston North, FP 054/53/83
[13] D v S [relocation] CA 21 FRNZ 331 at 342
[14] Schedule to Guardianship Amendment Act 1991

The Convention is a particular application of the welfare principle in protecting children against the harmful effects of abduction. For parents it means that disputes must be determined in the home Court where the left behind parent can put and answer a case, and not in some other country perhaps on the other side of the world, where allegations can be made with impunity and children are still enjoying the novelty of change.

In the early eighties the Convention was used most frequently against fathers taking children on access and then disappearing or retaining them following a visit to another county.

Now 70% of abduction cases involve mothers returning to their own families to escape from an unhappy or violent relationship in another country.

In both types of cases the children are ordered to be returned. The defences of objection by the child, or risk of grave harm to the child if returned are often relied on[15]. These defences however are narrowly construed and even when established to the Court's satisfaction do not prevent the Court from exercising its discretion to order the child's return.

For the Convention to apply the left behind parent must have rights of custody. Our Courts have adopted a liberal view of what "custody" means under the Convention extending it to what might be regarded as "access" by many, a rule which gives the Convention teeth for many cases which would otherwise escape its net.

RELOCATION CASES

Another application of the child's welfare principle occurs in relocation cases. Here a residential parent will apply to relocate with the children to another part of one country or to another country to the detriment of the child or children's relationship with the other parent.

The residential parent may have a very good reason for the proposed move, for example, to start or further a new career or accompany a new spouse on transfer. The implications of a refusal can be devastating. On the other hand a successful application may leave the children without ongoing contact with an involved and loving parent.

The dilemma for the Court is often acute and without any middle ground to fall back on. As the New York Supreme Court recently remarked these disputes pose some of the most disturbing problems Courts face.

[15] Guardianship Amendment Act 1991 s13

Some overseas courts involving Superior Courts in Canada and England have encouraged a trend to permit such moves on the basis that the welfare of the children is inevitably linked to the wellbeing of the resident parent whose unhappiness will in turn affect the welfare of the children.

The New Zealand Court of Appeal[16] has rejected that approach linking the children to the resident parent's welfare in that way as being inconsistent with the wider all-factor child centred approach required under New Zealand law. An important factor in that case was the relationship of three boys aged 10, 8 and 6 with their father in Christchurch, when their Irish mother wanted to take them to Ireland to live.

You can see immediately how differently outcomes focused on children can be viewed as just or unjust by parents with different interests, whichever way the decision might go.

CASES INVOLVING VIOLENCE

Domestic violence is a major social issue affecting families in numerous societies. Initially it was viewed primarily as an issue between adults. It has taken time for researchers to uncover and present scientific data on the serious impact it can have on children exposed to it.

Some United States research has also analysed domestic violence into at least five different categories, some creating ongoing risk to adult victims and children, some no ongoing risk at all[17].

Successive New Zealand Governments through the eighties and nineties have demonstrated a strong resolve to deal with domestic violence involving protective legislation for children, passed in 1995[18].

Before referring to it more specifically, I note that although the legislation is gender neutral a lot of the thinking behind the Act was based on what is often called the "Power and Control Model" developed at a place called Duluth in Massachusetts which is strongly gender based. In my view that does provide a valid analysis of a great deal of domestic violence particularly at the more serious end and is linked to the "battered women syndrome" sometimes raised as a defence or mitigating factor in criminal cases.

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16 D v S [relocation] CA 21 FRNZ 331 at 342

17 Johnston RJ and Roseby V (1997) In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violence Divorce. The Free Press, New York, United States of America (see Chapter Two).

18 Domestic Violence Act 1995

Research has identified other forms of domestic violence strongly interactive, sometimes female initiated, in addition to violence arising out of mental illness, and incidents of violence occurring in the extremely stressful period of separation with no history, and no future risk. It is important that through evidence, Courts know what they are dealing with in individual cases.

Under our Domestic Violence Act 1995, a protection order in favour of a parent also covers the children of that household with the result that effective contact by the other parent is immediately lost. In addition, violence between adults in the hearing or presence of their children is violence against the children themselves – a factor now taken into account by our Courts which also identify domestic violence as a serious parenting issue. Domestic violence in front of children counts against the perpetrator and not the victim and presumably against both in interactive violence.

In addition the Guardianship Act 1968 was amended in 1995 limiting a parent who allegedly has been violent, to supervised contact with his/her children, until the Court has heard the case and decided whether more liberal contact can be established against criteria set out in the Act (see s16B).

The challenge for the Court is in reconciling quickly the tension between children's safety and the desirability and need and indeed children's rights to ongoing contact with a parent. The Judges have had a national meeting about this problem and have instituted a system for urgent hearings to be available following temporary protection orders which impact on children and their relationship with a parent to get interim arrangements in place as quickly as possible.

The Court has also established a protocol with supervised access centres as a measure for promoting contact where it would otherwise be lost. In defended cases the Court needs assistance through evidence in identifying the type of violence involved and its relevance if any, to future risk for the children.

I also refer to the comprehensive system of programmes available around the country for respondents, adult victims and children as a national strategy for stopping violence and providing some remedial measures against its impact.

HIGH CONFLICT CASES

The adversary system which enables the evidence of each side to be tested by the other as part of the process of sifting and evaluating evidence can become particularly inflammatory in cases of high conflict and hostility.

In California at least, a number of strategies have been developed to help these couples and their children. They involve diverting cases from the courtroom, special Masters or Parent Co-ordinators are appointed by the Court to mediate and settle disputes between parents. They are experienced psychologists and lawyers who understand family dynamics and the power struggles and difficulties encountered in these cases.

They try to provide means of communication directing parents to their children's needs, and help them develop skills in resolving problems. They have some authority to arbitrate binding outcomes on some disputes such as when access should begin and end, disputes around children and special family occasions such as birthdays.

Although they may not be a suitable model for New Zealand, they are a valuable example nevertheless showing the need to divert these cases from the Court to other forums for airing grievances and moving forward.

FACILITATING ACCESS AND ENFORCEMENT OF ORDERS

Enforcement of orders, particularly in relation to access is a very difficult and complex problem for Family Courts everywhere. It is a problem associated with ongoing conflict and hostility.

In New Zealand the Family Court as a last resort may issue a warrant for a child to be uplifted by a police officer or social worker and made available for access. This may be seen as a desirable enforcement remedy by parents but the impact on children can be highly traumatic leaving scars which make future access difficult. Adults involved in the process can also become severely distressed.

The remedy is sometimes used; often the Court will issue a warrant to lie in Court while counsel for the child negotiates access - a successful strategy in many cases. A great deal has been written about the nature and causes of extreme hostility which sometimes involves the children becoming alienated from the non-resident parent by aligning themselves with the other parent.

An extensive consultation by a British Taskforce headed by a High Court Justice for the Lord Chancellor's Department[19] concluded that enforcement should follow attempts to facilitate access in such cases. That approach was adopted last year in Australia in legislation which envisaged a three tiered process involving information provided to the defaulting parent, counseling and finally sanctions including a fine, community service and imprisonment.

[19] A Report to the Lord Chancellor on the Question of Parental Contact in Cases Where There is Domestic Violence. Advisory Board on Family Law; Children Act Sub-Committee, May 2001, United Kingdom.

A Ministry of Justice consultation in New Zealand has led to a recommendation which I understand may have been approved, generally adopting the Australian approach.

Courts adopting the function of educating and persuading parents on their responsibilities towards their children is in line with the California initiative. Always in the Court's sights are the children whose interests may not be always in line with those of the frustrated parent who wants his or her order firmly enforced.

INVOLVEMENT OF CHILDREN

Last in my enumeration of challenges to Family Court, I refer to the need to find better and additional measures for including children in the decision making process about their future. In applying the welfare or best interests principle the Court must take children's wishes into account.

In New Zealand we rely heavily on the role of counsel for the child appointed by the Court as a separate representative and the use of specialist psychological assessments to ascertain children's wishes.

These are very effective measures but the involvement of the children needs to be seen in a wider context. Many children are not kept informed about the major upheavals they see going on around them and plans for their future. Many parents find it very difficult to talk to their children who are therefore kept in the dark. Research by the Children's Issues Centre in a small study indicates that may be the case in New Zealand as it certainly is in other countries.

I think it is part of the supporting role of the Family Court to assist parties in understanding their children's needs and keeping them informed. Children also need to be consulted about future plans without having the responsibility for the decisions. Where this happens parents and professionals are often amazed at their responsiveness and resilience. Treating children as passive bystanders in order to protect them against unpalatable truths needs to be replaced with involving them in age appropriate ways.

Involving children in the mediation process is one way of ensuring that they are heard by their parents and their perspectives taken into account.

SUMMARY

I have referred to both the facilitating and supportive role of the Court in its decision making and enforcement functions. It is important to understand the limitations which this imposes.

As Justice Chisholm of the Australian Family Court pointed out in a recent paper on family law and perceptions of unfairness, the law does not actually require anyone to behave like a responsible and caring parent. The law is limited to making orders which deal with such matters as where a child is to live, when a child should be made available for access and so on.

Orders giving expression to the welfare or best interests principle may create seemingly unfair outcomes. A mother unable to take the children to another country, to preserve involvement with their father may feel aggrieved that he may nevertheless decide to move away to further his own prospects and be free to do so despite the impact on the children.

Similar situations arise over access. Although children must be made available for access there is no remedy against the parent who continuously arrives late or sometimes not at all.

A father paying child support who cannot see his children is naturally aggrieved, as might be the mother on the breadline whose children go for expensive outings and holidays with their dad who nevertheless contributes nothing to their support.

These problems are generally avoided where parents act caringly and responsibly, putting their children first but the law cannot legislate to make them do so.

Those then are some of the challenges and limitations facing the Family Court in the environment in which it operates. They involve emerging values and expectations arising out of changing social conditions and patterns of life. The Court, operating within the legal framework imposed on it, is an effective forum for managing and resolving modern issues facing families but Court orders are no substitute for parents who put their children's interests first and therefore act reasonably and fairly in their dealings with each other.

Chapter Two

SOCIAL POLICY FORUM
GENDER AND FAMILY LAW IN THE LAST 50 YEARS

By Vivienne Ullrich QC

1. The law provides a background to the way we order our lives. It provides mechanisms for dispute resolution when we are not able to sort out things for ourselves. Changes in the law tend to follow social change and the law in turn influences the way we behave. The law can be a step behind or a step ahead of majority views in society.

2. Gender roles are partly determined by biology - only women can bear children - most men are potentially stronger than most women - and partly by social conventions. It seems unlikely that there is a biological reason why more women than men work as word processors, or why we expect to see women wearing lipstick but not men. Social conventions can change but there will usually be some dissonance while that happens.

3. These issues are no more clearly confronted than in the way the law has dealt with the changing roles of men and women in the last 50 years especially in the area of family law. During that time women have moved away from an almost exclusively domestic role after marriage and parenthood, while men have embraced a greater parenting role. The law has been more or less successful in responding to these changes depending in part upon the extent to which individual men and women have also changed their behaviour. Not everyone moves in tandem. Both men and women allege gender bias in the operation of the law. They are likely to do so in different contexts.

4. As a background to these issues I propose to sketch briefly the history of the law relating to matrimonial property and custody over the last 50 years.

5. After the Second World War and through the 1950's and into the early 1960's gender roles tended to be clearly defined with men as providers and women as homemakers. During this period there were high rates of employment, high rates of marriage and low rates of divorce. Women tended to stop employment outside the home once they had children and they did not re-enter the workforce.

6. The law relating to property applied equally to men and women as it had done since Married Women's Property Act of 1884. Property acquired by inheritance, by gift or out of earnings belonged to the person who acquired that property. Property purchased out of earnings belonged to the person who earned the money. A couple might buy a house, furniture and perhaps a car. As these were purchased with the husband's earnings all these things were his property. During the relationship that may not matter as everything tends to be shared. On the other hand, the economically powerful partner may exercise more power and control. That person may not share information and may hold the cheque book to the exclusion of the other. If the couple separated then all the property belonged to the husband and the wife was left was without capital resources.

7. Fathers were sole guardians of their legitimate children but because of the role division which operated during marriage, children usually remained in the care of their mother after separation. Generally fathers did not see themselves in the care-giving role and a father would usually only be awarded custody by a court if the mother was proved at fault in divorce proceedings. For example, she had committed adultery or had deserted the family and was therefore an unfit mother.

8. Relatively few children were born outside marriage. Women did become pregnant before marriage, but usually they married the father of the child or alternatively the child was adopted out.

9. During the 1960's and the early 1970's social expectations did begin to change. Rates of marriage remained high and people were marrying at younger ages. During this period the most popular age of marriage for both men and women was in the early 20's. Nearly 90 percent of all children were born to women who were under 30 years old. There were high rates of employment and married women began to enter the workforce as their children became more independent. As the children were mainly born to them during their 20's by the time they were in their 30's the children were at school and women had the independence to be able to work outside the home. Women did however tend to be employed briefly before marriage and not to re-enter the workforce until they were in their 30's. The work they performed was often unskilled and usually done on a part-time basis. During this period some men did become more involved in child rearing tasks, but mostly the traditional pattern prevailed. Mothers still cared for their children while they were infants and tended only to re-enter the workforce when children were at school. The mother remained more available to the children and would take time out of her employment during school holidays or if a child was sick. Men were involved full-time in the workforce.

10. The formal equality provided by the property law began to be seen as unjust. The Matrimonial Property Act 1963 gave courts a discretion to award a wife a share of matrimonial property in recognition of her contributions to the marriage, both monetary and non-monetary. Her contributions to caring for children and running the household were to be seen as a contribution to the assets which had been acquired. The court began to award women a one third share of the home, but not a share of the husband's farm or business because she had not made a contribution to that asset.

11. The label of illegitimate given to any child born outside marriage was criticised for the stigma it imposed on the innocent child.

12. The Status of Children Act 1969 abolished the legal difference between children born inside and outside of marriage. All children had potential for the same legal relationship with each of their parents. The guardianship law was also changed by the Guardianship Act 1968 so that mothers acquired equal guardianship rights with fathers when they were married. Unmarried fathers only became guardians of their children if they were living with the mother at the time of the birth. Non-married fathers who were not living with the mother at the time of the birth were given the right to apply for guardianship of the child. These changes therefore gave guardianship rights to married women and to unmarried fathers which they had not had previously.

13. The social trends which had begun in the late 1960's continued throughout the 1970's. Marriage rates continued to be high and so did employment rates. The reforms to the matrimonial property law were confirmed and extended by the Matrimonial Property Act 1976 which provided that matrimonial property would normally be shared equally between the husband and wife. The house, the car and the furniture would always be shared equally and other property such as businesses would usually be shared equally unless the contribution of one spouse was clearly greater. Relatively few people avoided the operation of the Matrimonial Property Act by contracting out and setting up trusts. The Act therefore provided a more equal result for women. Although this was an improvement on the earlier position, it did not result in equal outcomes. Women were still earning less than men and having interrupted careers. They were still undertaking the major part of care giving for children. Therefore on break up of the marriage they were usually not in such a good position as their husbands to earn an equivalent income and build up further assets.

14. The Guardianship Act was amended in 1980 specifically to provide that there was no presumption that placing the child in the custody of a particular person would because of the sex of that person best serve the welfare of the child. In other words, there was to be no starting principle that a mother would be the preferred caregiver of the children or that a father was the best caregiver for boys over a certain age. The main principle of the Guardianship Act remained that the welfare of the child was the paramount consideration.

15. During the 1980's the social situation in New Zealand changed considerably. After a long period of low unemployment rates increased relatively quickly to up to 10 percent of the working population unemployed. There was a large rise in the number of de facto relationships. People began marrying later in their 20's and women began having their children at older ages. There had been a gradual increase in the numbers of people divorcing and this led on to increased numbers of persons re-marrying. Women's rates of participation in the workforce increased and there were many more women in employment while raising young children. The workforce became more casualised with more part-time work and more redundancies. The work pattern for men changed in that they were liable to have periods of unemployment, or if made redundant in their 40's or 50's not to be able to find re-employment. Therefore some men had more domestic time and shared more of the domestic and child caring tasks. More gay people began living openly together. But the social circumstances of men and women have still not been equivalised. There are still more women at home caring for children than men. Women's rates of pay are on average lower than those of men. It is more often women who take time out of employment to stay home with children.

16. Against these changing economic circumstances the Property (Relationships) Act was amended in 2001. That Act now applies the same property regime to married couples, de facto couples and gay couples. All contributions to the partnership are valued equally and after three years living together, all relationship property is divided equally. It may seem strange that the law applies conformity in property relationships against the background of increasing diversity in society and in relationships. Property acquired before the relationship begins is separate except for the home and chattels. Inherited property is separate and property in a trust is only pulled back if it was relationship property when it was transferred to the trust. The parties can contract out of the provisions of the Act. It remains to be seen if this new law will change our behaviours. It may have an influence on our courting behaviour and in the way in which people form sexual relationships where they do not want to have long-term commitments.

17. Over this more recent period there have been no substantive changes to the law relating to custody and guardianship, but the government is currently reviewing the Guardianship Act and a new Bill is likely to be introduced in the New Year.

18. Men are becoming increasingly concerned that their interests as fathers and their wish for continuing involvement with their children after separation are not being sufficiently recognised by the courts.

19. Many parents are now both involved in the workforce and both spend time caring for their children. When they separate, many of those parents each continue to share the care of the children. But when a relationship breaks down there tends also to be a breakdown in trust between the parties so that even where couples have shared the care of children there are likely to be difficulties in making arrangements after separation. Many couples are able to reach agreement. Sometimes these arrangements are negotiated between the parties themselves or with the assistance of lawyers or with help from counselling. Very few couples end up having the issues decided by a judge.

20. The court is obliged to make a decision as to what arrangements will be in the best interests of the children. That arrangement may not seem fair to one or other of the parties. It may for example give the majority of care for the children to the parent who has been responsible for the break up of the relationship. But what happens with the children after separation is very likely to reflect what happened before separation. If one parent performed the major part of the childcare prior to separation, then in many situations it will be in the best interests of the children that this balance is continued as this is what the children have grown to expect and it is what is comfortable for them. In other situations the practicalities of the situation such as where the children go to school, where the parents live, where the parents work, their working hours, and the commitments of the children all point to a certain division of care. The needs of the children and the wishes of the children must be taken into account. The children cannot be redistributed on separation in the same way as assets. The Family Court cannot impose an arrangement that is "just" between the adults if it is not in the best interests of the children.

21. This is not to say that the courts always make the right decisions. The circumstances of both parents are likely to change after separation in terms of their work commitments and their availability for the children. Therefore the historical status quo is not necessarily reflected in the new situation. Given the separation, mothers may need to spend more time in the workforce and be less available to their children. Likewise, fathers may be willing to give up work time if that is the only way they can spend more time with their children.

22. Apart from the historical factors and the practicalities after separation, there are two other main areas which cause difficulty.

23. Some relationships become especially dysfunctional at the time couples separate. In these cases children can become pawns in the battle between their parents. There can be a lack of any co-operation between the parents and active obstruction to access arrangements. The Family Court can only do so much to manage and correct these situations. The court can assist with effective interventions, possibly specialist counselling, or clearly defined orders. But the continual need to resort to the court to enforce arrangements can be emotionally and economically exhausting.

24. The other area to cause problems is domestic violence. There is no doubt that some women are violent and that men are reluctant to make applications to the court for orders against them. If they do their experiences may sometimes be minimised. Occasionally false complaints are made by women which are part of the dysfunction which sometimes arises on separation.

25. Nevertheless there is overwhelming evidence that there are more men than women who are seriously violent to their partners. Children who witness or overhear or see the consequences of that violence are traumatised. Women and children in these situations need protection. The programmes which are available for the respondents, the victims and the children can be successful in changing that around, but all parties have to be willing to engage in the processes and programmes which are available.

26. It is necessary to retain the possibility for victims of violence to apply to the court without notice for protection. Protection of vulnerable adults and children must be a first priority of the court. On the other hand, where orders are made without notice the court should be obliged and able to respond very quickly so that the other party can be heard. Otherwise there is increasing disaffection with the court system. The time lags involved in being able to challenge orders made without notice and to determine care-giving arrangements where there have been allegations of violence take far too long under the present system. This is a question partly of the law which allows a 42 day time lag and more importantly a lack of resourcing of the Family Court so as to enable it to turn these matters around as quickly as possible.

27. If allegations about violence are untrue, then it is essential that the court provides a process for swift determination of these issues.

28. If there has been violence then the best approach for the parties is to attend the programmes which are available, to understand the problem and seek to change. Only in this way can good relationships be built between children and their parents.

29. Since 1960 there have been substantial changes in the law to give men and women more equal rights as parents and to ensure fairer outcomes in the division of property. There have also been changes to the law, which provide more protection against violence in domestic relationships. In part these law changes reflect changes in demographics, work patterns and distribution of wealth. They also reflect changes in attitude to the roles of men and women in society.

30. Society is not static. It will continue to change. Those changes will inevitably result in changes in attitudes and pressure for law reform. There will always be some laws and some behaviours which will be in conflict with social change.

31. Gender roles are very much a part of the way society is structured. They change with social changes. Allegations of gender bias arise out of the friction brought about by change.

32. In its report on Dispute Resolution in the Family Court, which is to be published shortly, the Law Commission acknowledges that there is likely to be gender bias within the Family Court system just as there is in all other areas of society. It recommends education and training for all those involved in the Family Court so that such bias does not influence the processes available to litigants. The court does however have an obligation to protect the vulnerable and to put the best interests of children first. While there are gender inequities and imbalances within society, they will inevitably be reflected in the outcomes for separating parents.

Chapter Three

THE NEED FOR REFORM

By Mark Henaghan

INTRODUCTION

Family Law is sometimes described as a "touchy-feely" subject. It has its own specialist court, specialist judges and specialist reporting. The Family Court is closed from public view. The rationale for this state of affairs is the private and personal nature of the issues in dispute. Family Court judges are appointed, not only because of their legal experience, but also because their "personality" is suitable to deal with matters of Family Law. The disputes arouse deep feelings in the litigants.

Put yourself in the shoes of the litigants. What do you want from the Family Law system? In reality you probably just want to win the case at all costs. But what if you lost, what might appease you?

Let me venture a few suggestions. I am sure you would want the judge to be as impartial as humanly possible and listen fairly to both sides of the case and treat them with equal respect. You would want to know that the result you received would have been the same no matter who the judge was. You would want to know the result of your case was consistent with other cases similar to yours.

The guiding principle of Family Law on children is noble – the best interests of the child. To achieve consistency and impartiality this principle must have an agreed legal content. At the moment it does not – application depends much on the personal feelings the judge brings to the case. Family Law depends too much on the "personality" of the judge.

WEIGHING AND BALANCING BEST INTERESTS

"Reason cannot control the subconscious influence of feelings of which it is unaware" is how the New Zealand Court of Appeal[1] sums up making a decision about where children should live when their parents have separated and one parent moves away from the home town. The court says that "while seeking total objectivity we are all influenced to some extent by our own perspectives and experiences".

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1 *D* v *S* [2002] NZFLR 116 at 129.

The mother, Siobhan, is Irish, the father, David, a New Zealander. They meet in 1986 while the mother is on a working holiday in New Zealand and marry in Ireland in 1988. A year later, they return to New Zealand where they reside for eight years as a couple. Three children are born of the marriage, all boys – aged five, eight, and 10 at the time of the dispute. They separate in 1997 and share the care of their children in Christchurch. The mother has 60 per cent of the care and the father 40 per cent of the care. When the mother visits Ireland for six weeks, the father has 100 per cent of the care during this time. The mother says she wants to return to Ireland with the children to live. In 1999, the father applies for a shared custody order and an order preventing the removal of the children from New Zealand. The mother applies for a custody order and an order permitting the removal of the children from New Zealand to Ireland. The mother says she will be desperately unhappy if the Court does not make the order but that she will not abandon the children and will remain in New Zealand with them.

The leading Court of Appeal case on the issue *Stadniczenko*[2] holds that the overriding test is the best interests of the child and that those interests can be found by "weighing and balancing factors which are relevant in the particular circumstances of each case without any rigid preconceived notion as to what weight each factor should have". The well-being of the custodial parent, and the relationship between the child and the access parent are "equally important". The reasons for the move, the distance of the move and the child's wishes must also be given consideration. The Court of Appeal accept that different judges can reach different results on the same set of facts when "weighing and balancing" the factors.

In the Family Court, Judge Callaghan puts weight on the importance for the children of having a regular and on-going qualitative relationship with both parents, which would not be possible if the children returned to Ireland with the mother. Emphasis is on their current stable life-style where the children are doing well as opposed to the risks of relocating to Ireland.

Psychological evidence of the important role fathers have in the development of boys is strongly influential in the judgment: "Research establishes that fathers have a particularly important role to play in the development of boys and, for boys, active and positive paternal involvement has been found to be associated with the reduced incidence of anti-social behaviours, increased educational performance and social career choice."

The final order is for the father to care for the children for 40 per cent of the year and for the rest of the time to be in the care of the mother on the condition she will not remove the children from New Zealand without the leave of the Family Court.

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2 [1995] NZFLR 493.

The mother appeals to the High Court. One crucial item of new evidence is introduced. The mother says in an affidavit – "I have made the decision that for my own well-being and sanity I will return to live in Ireland whatever the outcome of my present appeal." This proves to be crucial in the appeal. Panckhurst J chooses not to apply the approach in *Stadniczenko*, which is binding on him, but rather relies on a recent English Court of Appeal case *Payne* v *Payne*.[3] The key ruling in that case is that "refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children". A primary emphasis in the case is placed on the "effect of the refusal of the application on the mother's future psychological and emotional stability" as the "most crucial assessment" in the majority of relocation cases. The psychologist who gives evidence in the case refuses to express a view in favour of either parent because the parenting skills and resolve of each is such that either could adequately fulfil the primary parental role. The psychologist concludes that he did not think he had ever been in a situation where he felt the merits and disadvantages of the two options for the children were so finely balanced.

Panckhurst J concedes that the "simplest, safest and least disruptive answer would be for the boys to remain here where they are settled and content", yet decides that "the best interests of the boys will be promoted if they accompany their mother to Ireland". The key reason is the boys' "need for a mother". The youngest boy has consistently expressed a preference to be with his mother. The two older boys did not want to appear disloyal to either parent. Panckhurst J says nurturing the children had been the mother's "essential function in life since the children were born" and "she believed she could better fulfil her role as a mother in Ireland as opposed to New Zealand". Panckhurst J acknowledges the father's performance as a sole custodial parent when the mother went to Ireland for six weeks but questions "whether the grind of combining a career and the care of three young lads, on a permanent basis, would not take its toll". The risks and detriments of a shift to Ireland are held to be outweighed by the gain "which will flow from the presence of [S] as a mother". The father applies unsuccessfully to stop the order being carried out while he appeals the judgment.

Seven months later, when the children have been living in Ireland with their mother for five months, the Court of Appeal hears an appeal by the father who acts for himself.

The majority of the Court of Appeal holds that Panckhurst J was wrong to put too much on the approach in Payne v Payne with the emphasis on the well-being of the custodial parent. New Zealand judges are required to take a "wider all-factor child-central" approach which requires the "reasonableness of a parent's desire to relocate with the children to be assessed in relation to the disadvantages to the children of reduced contact with the other parent along with all other factors".

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[3] [2001] 2 WLR 1826.

Blanchard J, the dissenting judge, holds that Panckhurst J had not erred in law and that he had taken into account all the factors the Family Court Judge had, but then chose to put crucial weight on the emotional needs of the children to be with their mother.

The appeal is allowed but, because of the process of time, the Court of Appeal does not make an order for return because the changes have been so substantial that it is almost "a matter of looking at questions of custody and residence afresh". A rehearing in the Family Court is ordered.

Three months later the rehearing is heard in the Family Court[4] by a different Family Court Judge than the one who conducted the first week-long hearing. The rehearing takes four days.

The boys' wishes have changed. The oldest child (now eleven and a half) prefers to remain in New Zealand because he misses the company of his father and his friends. The middle child, (now nine and a half) after living with his mother in Ireland expresses a 70/30 preference for remaining in Ireland with his mother. The six-and-a-half-year-old, who previously wanted to be with "Mum in Ireland", says his preference is to spend an equal amount of time with each parent year by year. All three boys are united in their desire to remain together. The boys take pains in their expression of preference to emphasise country rather than parent because they do not want to lose the unconditional love of both of their parents.

The father by now, is "angry, frustrated and bitter". He had succeeded in the Family Court establishing that co-parenting in New Zealand was best for the children. He succeeded in the Court of Appeal showing that the High Court was wrong. He had sought a stay of the High Court judgment unsuccessfully. The stay would have meant the children would have remained in New Zealand until the appeal is heard in the Court of Appeal. He is now angry that a flawed High Court judgment has deprived him of his "rights of fatherhood".

Just as the mother's ultimatum to return to Ireland has been successful in the High Court, the father's "embittered attitude" is successful in the rehearing in the Family Court. There is concern that if the children remained in Ireland, the father will undermine the mother through contact by e-mail particularly with the oldest child (who it is predicted would become unhappy and most likely to return to New Zealand), which will then make the mother less trustful of contact with the two younger children, with the possible outcome that the mother will find it difficult to send the children to New Zealand for access. If the children are placed with their father in New Zealand, it is predicted that he will feel vindicated and his bitterness, anger and frustration will abate over time. It is predicted that, because of his demanding employment schedule, the father will view access as beneficial for him and the children and will therefore foster access. The other major factor is the oldest child's express wish to live in New Zealand,

[4] Family Court, Christchurch, 20 March 2002.

which meant that he will want to return leading to a separation from the other children. Added to this, Judge Somerville says "for these children, who are so energetic and interested in outdoor pursuits, life in New Zealand as adolescents has more to offer than life in some small town in Ireland". In the end, the mother's need to live in Ireland was held to come second to the "needs of her children to live in the land of their birth and have regular and beneficial contact with their father".

The result of the case is that the children are to return to New Zealand before the third school term in New Zealand. The father insists on a joint custody order to reflect the equal rights and responsibilities of both parents in the upbringing of the children, even if the mother does not return from Ireland. The parents do not agree on how frequently the children should travel to Ireland and how long the visits should be. Judge Somerville says contact with the mother, if she chooses to remain in Ireland, will be twice a year - during Christmas and the middle of the year. The children will only have to travel every 18 months, during the other periods the contact will occur in New Zealand. The costs of travel are to be shared.

Three months later, before the children return to New Zealand, the mother appeals the Family Court decision to the High Court.[5] Two High Court Judges hear the appeal. The general principle of law in such an appeal is that the appeal court will "normally" be reluctant to substitute its view for that of the Family Court. At the time of the appeal, the children have been living in Ireland for 11 months, apart from a Christmas holiday in New Zealand.

The High Court Judges, who do not see the witnesses but work off the transcript of evidence, do not accept the Family Court's analysis that the father's "embittered attitude" will heighten conflict and lead to a likely breakdown of communication between the parents if the children are not returned to New Zealand. The High Court holds that "the factor that tips the balance in favour of the children remaining in Ireland is that they are now well settled in that country and are progressing satisfactorily". The mother is granted sole custody subject to access to the father twice a year in July and at Christmas with the children only travelling to New Zealand once every 18 months. Both parties are to share the costs of travel.

Nine Judges have considered the case. Eleven days have been spent in Courts. Judges have emphasised different factors to reach different results depending on how they "weigh and balance" the best interests of the children.

A rule-based approach will create more consistency rather than the current one which depends on whatever the particular judge wants to emphasise as long as the other factors have been considered. What should the rule be? The social sciences do not provide a clear answer. Judith Wallerstein,[6] an American psychologist, has been highly influential in the American courts taking on a presumption in favour of relocation for the custodial parent.

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[5] *S* v *D*, 5 July 2002, AP 10/02.

[6] "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce" (1996) 30 Family Law Quarterly 305-332.

Based on her own research, Wallerstein says "the 'well-functioning' custodial parent is the key factor for the well-being of the child and the new 'family unit'". The custodial parent is often the mother. Wallerstein finds that frequent and continuing contact between father and child is "not significant in the child's psychological development". The conclusion is surprising given Wallerstein's earlier work with Joan Kelly, *Surviving the Break-Up*,[7] where the central theme for the well-being of children was an ongoing relationship with both parents who communicated in a civilised manner.

Warshak,[8] after an analysis of 75 studies, says they generally support a policy of both parents to remain in close proximity to their children. The studies are used to support a link between frequency of contact and emotional health. These studies support a presumption of an ongoing relationship with both parents and therefore are against relocation with one parent.

A possible answer to the deadlock is the law itself. The Guardianship Act 1968 gives each parent equal rights to care for their children and bring them up which presumably is the ideal situation and seen as legally best for children. The law could work on the basis of the minimum disruption to equal parental involvement after the break-up of a relationship. There will of course be exceptions where there is violence, or sexual abuse, or where a parent has been absent from the child's life. Minimum disruption is also open to interpretation. But all judges would be focused on the same criteria and the emphasis will be clear. If a rule of minimum disruption applied here, the mother would know from the beginning that if she chose to go to Ireland she would be disrupting the children's relationship with both parents and she would not be supported by the law.

[7] Surviving the Break-Up, Grant McIntyre (1980).

[8] [2000] 34(1) Family Law Quarterly 83.

Chapter Four

AN OVERSEAS PERSPECTIVE ON THE FAMILY COURT

By Paul Callister

INTRODUCTION

I have just come back from 15 months working at a work and family research unit at Cornell University in the United States. Although the primary focus of research was not family law, I discussed this broad topic with many researchers in both the United States and Canada as well as with policy makers while on a visit to Sweden and Norway.

As further introduction, I am very aware that "the personal is political" so I need to point out that I have never had any contact with the Family Court. I also hope I never do. Therefore my interest in the broad area of family law is a research based one.

As a final part of my introduction, while as a researcher I always hope that research does actually influence policy, I am very aware that it is often popular discourse that has much more influence. At times, this discourse is based on outdated or discredited research that gets repeated as it suits the aims of particular groups.

A prime example of this type of research with relevance to this forum is the notion that fathers in two parent households spend very little time undertaking childcare. For example, in Arlie Hochschild's bestseller *The Second Shift*, published in 1989, she argued that the average father in the United States spends only 12 minutes a day interacting with his children. This figure continues to be reported in the media and in public forums. However, Pleck (1992) tracked through Hochschild's footnotes and found that not only was the data from 1965 but the 12 minutes also ignored the time fathers spent with children in weekends. Pleck's own research indicates that, in 1960, married American fathers spent, on average, one hour looking after their children for every four hours spent by their wives. In the mid 1990s, he calculated the ratio to be one hour for every 1.5 hours their wives spent with their children. More recent U.S. data demonstrates that within married couples, on average, about 60 percent of childcare is undertaken by mothers and 40 percent by fathers (Yeung, Sandberg, Davis-Kean and Hofferth, 2001). While this division of labour in the home is still unequal it is a lot less unequal than 30 years ago.

I now want to talk briefly about three issues.

The first is the biological versus the social construction of parenthood. In doing so, I will briefly discuss the recently passed New Zealand paid parental leave legislation.

The second is how we collect data on families. This second topic is one covered extensively at last year's forum (*Child and family: Children in families as reflected in statistics, research and policy*) but I hope to add some additional information.

The third concerns the recent importance attached to the need to listen to "children's voices" in research projects and policy making.

In terms of both parenting and ethnicity social scientists have generally moved from biological constructions to social constructions (for examples of these debates see Du Plessis, 2000, and Sarre, 1996). At one extreme, a parent is any person in a parenting role. Generally this parenting role is restricted to unpaid caregivers, but it can include stepfathers and mothers, uncles and aunts, other whanau members and even "significant others". Official New Zealand data collections, like the five yearly census of population and dwellings, make no distinction between social parents and biological parents when considering two-parent households (Callister and Hill, 2002).

This debate about social versus biological parenting has a far greater effect on fathers than mothers. This stems primarily from the fact that it is mainly biological mothers rather than biological fathers who gain custody when couples separate. So while in theory motherhood is now a social construct, in reality most children appear to live most of the time with their biological mothers.

While social scientists tend to construct fatherhood socially, the law often falls back on biological links when determining the financial responsibilities of fathers (Sarre, 1996). In America, it is not deadbeat social fathers who are being tracked all over the country and thrown into jail for non-payment of child support, it is biological fathers. As Goldscheider (2000) points out, biology determines legal responsibilities for fathers while affording them very limited rights. In terms of lawmaking, there needs to be on-going debate about whether fatherhood should be determined biologically or socially.

Another aspect of the social construction of parenthood is, of course, the idea that it is not the biologically defined sex of a person that determines whether a person makes a good parent but their social conditioning. Under this theory, if boys are taught nurturing skills they will be just as good as girls in parenting roles. The development of parental leave policies in New Zealand provides an interesting, but somewhat confusing, insight into changing views about the social

versus cultural construction of parenthood. When the first parental leave legislation was passed in the early 1980s (*Maternity Leave and Employment Protection Act 1981)* many groups opposed this legislation being only available to women. As an example, the then newly formed Human Rights Commission was very concerned in its submission to the Select Committee considering the Bill that the legislation was potentially discriminatory (Human Rights Commission, 1980). It noted in its submission that the legislation could be contrary to the Human Rights Commission Act "by causing further discrimination against women in their employment opportunities and career advancement' (p.3).

In the mid 1980s this legislation was changed to be gender neutral *(Parental Leave and Employment Protection Act 1987)*. However, the leave was still unpaid. Late last year legislation was introduced to amend the 1987 Act to make paid leave available. This legislation came into effect in July 2002.

The new paid parental leave legislation is openly discriminatory in nature. For biological parents only the mother has the right to take paid leave, although she can transfer this to the father if she wishes. Apart from fathers groups, the various agencies putting in submissions to this Bill were not only silent on the discriminatory nature of the legislation but some groups, such as the Women's Electoral Lobby, even opposed the idea of the leave being able to be transferred to fathers.

The Human Rights Commission did not take the government publicly to task for passing such a blatantly sexist piece of legislation. At first this seems surprising given that a primary function of the HRC is to challenge discriminatory behaviour whether by individuals, organisations or governments. Yet, their own publications provide some indication that they now privilege women's rights over men's rights. In a publication announcing the appointment of a new manager of the Human Rights team it is noted that "[t]his position involves ensuring that the Human Rights Team achieves the Commission's key strategic aims in areas such as *women's rights*, disability discrimination and age discrimination (Human Rights Commission, 2002: 4 emphasis added).

It is equally worrying that, while in its submission the Commission for Children supported the extension of the legislation to include partners in same-sex couples and expressed concern about women in casual and temporary jobs being excluded from coverage, it did not see any problem in fathers being ineligible for leave in their own right. This is even more surprising given that in an appendix to its submission the Commission for Children cited Article 18 of the United Nations Convention on the Rights of the Child. Article 18 stresses the need for governments to support both parents in raising a child.

Given the topic of this forum, it is also of concern that the Law Society in its submission did not mention how the legislation discriminated against fathers. Rather, the submission noted that women in employment faced discrimination, with this being one of the key factors behind the pay gap. One of the reasons for the pay gap is the continuing gendered care gap in the home, yet this submission, like many others, supported legislation that entrenches this gendered nature of this care gap.

The experience of countries that provide mothers and fathers with equal access to paid leave is that it is primarily mothers who take the leave in the early months of a child's life. Yet, in all industrialised countries nowadays there can easily be found examples of fathers rather than mothers caring for very young children (Callister, 1994). In some of these situations the mothers may still be pumping breast milk, thus fulfilling a biologically determined motherhood role, but with the primary care giving time being determined by other than biological considerations (ibid). This New Zealand law constrains rather than expands the choices that heterosexual couples can make when determining which parent is best placed to take this leave.

The clear message given by this new legislation is that the government defines parenthood by the sex of the parent. If, from the first day of a child's life, mothers are given far greater legal rights than fathers, how can we expect to move toward a society where fathers and mothers are treated equally under family law.

I believe that this parental leave legislation would never have been passed in either the United States or Sweden. In the United States it would have been challenged on the basis of discrimination. Even if it had been passed it would have been challenged in the courts. In Sweden it would have been challenged on equity grounds. It would have been seen as undermining the Swedish goal of achieving equality in the home.

I will now talk briefly about collecting data on a group of children that have two households. Two household children is a term Stuart Birks first used in New Zealand (Birks, 2001).

While in the United States I collaborated with Martha Hill, an economist at the Institute for Social Research in Ann Arbor, Michigan on a paper looking at how to collect data on those children with two living, but separated, biological parents who spend time with both parents (Callister and Hill, 2002). While there is still a long way to go, in the United States there are now data collections that try to determine the level of contact children have with separated parents. Many U.S. based researchers are also aware of the need to collect data on the time non-custodial parents spend with their children, and their new time use survey has been designed with this in mind. There needs to be a similar effort made in New Zealand to collect data on how ties, both financial and emotional, run *across* households merely rather than just *within* households. Alongside this there needs to be a new language developed to describe shared parenting

arrangements. It is not good enough to keep talking about sole parent families when many children do in fact have two involved and loving biological parents who just happen to live in different houses.

However, it is not just the Americans who are aware of the need to collect such data. In Norway the issue is on the policy agenda of Statistics Norway. This is because a new law regulating the maintenance payments of the absent parent will be implemented in October 2003. This legislation will give more consideration to the time children spend with each parent as well as to each parent's relative financial situation. There are already plans being made to carry out an evaluation of the new rules, with surveys to be undertaken both before and after the implementation to capture changes in (i) time spent with each parent and (ii) the economic wellbeing of the two households. The pre-implementation survey is planned for November 2002, but the post-implementation survey will not take place until near the end of 2004.

The first survey should give Statistics Norway very interesting information about the time children spend with each parent and the extent of responsibility that so-called "single parents" really have.

Finally I want to talk about the new emphasis on listening to the voices of children in both research and policymaking. This idea is attracting attention in many countries. This is, in theory, a good idea and I support it. However, it is still very unclear to me as to how this can be put into practice with very young children. Infants can have no voice in terms of childcare arrangements, whom they live with, and how often they see non-custodial parents. We have to be very careful, when promoting this new discourse of giving children a voice, to keep assessing who is actually speaking on behalf of children and what they are saying.

With this in mind, I want to finish by congratulating the new government on a simple change it has made in the allocation of cabinet portfolios. For quite some time, it was common practice to make the same Minister responsible for the Ministry of Women's Affairs and the Ministry of Youth Affairs. This suggested that the voice of women and children was one and the same in government. One result was that women's rights and children's rights were often seen as overlapping in policy debates. This role in cabinet has now been separated and I believe that while this is a small change it is potentially an important one for the development of child centred family policy.

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Chapter Five

LAWYERS REPRESENTING CHILDREN

By Simon Jefferson

"Truth is closely related to identity. What you believe to be true depends on who you believe yourself to be".

Sir Paul Reeves.

INTRODUCTION

I would like to start with a sincere disclaimer: Resort to the Family Court for families in dispute is to be discouraged. Indeed I shall go further: the Family Court is a place to be avoided if at all possible.

However, that bald assertion cannot preclude the necessity for sustaining a Family Court in New Zealand. It may be imperfect, expensive and (some would say) colonised by lawyers for their own benefit but it is plain that in 21st Century New Zealand there are many family difficulties which continue to require a formal forum for resolution in the form of an authoritative decision. New Zealand has every reason to be proud of its Family Court for all its institutional limitations. If one has to resort to a Family Court, New Zealand is not a bad country to live in.

REPRESENTATION OF CHILDREN

Integral to our system of family law is a provision for the separate, and independent, representation of children.

This is a concept distinct from the child's having a voice in policy making. I am focussing on the micro as opposed to the macro on representation within the Court process as opposed to representation in the process of special policy making.

The fundamental rationale for this is not difficult to discern: where families are in dispute the interests, and the welfare of children who are members of the family will frequently be significantly affected. It is axiomatic that people who may be directly affected by the ingoing and outgoing tide of a legal dispute should have the right to have their interests considered. In its simplest form that leads to a right both to be heard as a dispute unfolds and, also, to participate in its resolution, to being active rather than passive participants in the process. Being heard, of

course, is by no means the same as being given the right to determine or dictate the outcome of the dispute. But it does avoid the interests of a child being drowned out by a cacophony of adult voices very often (and quite understandably) diverted, to a greater or lesser extent, by adult issues. Let me insert here one of those infuriating truisms: for children to have a voice we need to be prepared to listen to them. Most litigants in the Family Court proclaim adherence to the principle of promoting the welfare of the child; when it comes down to it few are able to actually do so. The trick, in providing separate and independent representation for the child, is to avoid adding an uninformed and thus, potentially destructive (or at least non-constructive) voice to the debate.

The statutory foundation for the separate and independent representation of children long pre-dates New Zealand's 1993 ratification of the UN Convention on the Rights of the Child. Nestled amongst the provisions of the Guardianship Act 1968 is the progenitor of most of the more recent statutory provisions which can be found in the canon of New Zealand family law. I suspect, from closely reading the provisions of s.30 Guardianship Act 1968, that the legislators even in those fiscally careless times envisaged occasional rather than regular representation of children in Court proceedings.

Since then, of course, the Family Court as a specialist, almost stand-alone jurisdiction has been created and, importantly, New Zealand has formally subscribed to the UN Convention on the Rights of the Child which provides (amongst many other equally important but oft overlooked Articles) as follows (and I paraphrase):

- That a child capable of forming views shall be assured the right to express those views freely in all matters affecting the child, such views being given weight commensurate with the age and maturity of the child.

- A child shall be provided the opportunity to be heard in judicial proceedings affecting the child, either directly or through a representative.

The UN Convention has far greater significance, in the legal sense, than its platitudinous terms might suggest at first blush. Even though it is not expressly incorporated into our domestic law it commits New Zealand and, in particular, it's legislators and its Courts to abide certain moral imperatives.

But it is less the formal statutory framework, I suspect, than the practical operation of this separate, independent representation which causes some disquiet. For, in truth, the expectations of lawyers appointed to represent children are both confused and, at times, conflicting. The role is, frankly, a muddle.

QUALIFICATION

How, for example, are lawyers chosen to represent children? What qualities render an individual suitable for the task? To whom are such lawyers accountable?

More importantly, there is a very real question as to whether or not the training received by family lawyers is appropriate or adequate for the multi-disciplinary role that such lawyers are expected to carry out in New Zealand.

At the risk of being labelled tedious (once more) let me again revert to the legislation. A lawyer representing a child is appointed by (and in the first instance is accountable to) the Court. Neither the adult parties to the dispute nor (interestingly) the child have any say in the appointment (although, by way of digression, the equivalent provision in the Children Young Persons & Their Families Act 1989 and a close reading of the Legal Services Act 2000 offer the tantalising possibility of a child retaining a lawyer other than one appointed by the Court). The sole statutory criteria, in the Guardianship Act 1968, is that the appointee must be a lawyer (in short, possess an undergraduate law degree and have been admitted to the roll of barristers and solicitors of the High Court of New Zealand). That Rubicon having been crossed, the Court's discretion in making the appointment is fettered (if at all) only by the ubiquitous provisions of s.23 Guardianship Act 1968. Interestingly the Children Young Persons & Their Families Act 1989 (presumably reflecting 21 years of legislative progress) slightly (but only slightly, for revolution is not the hallmark of the law) expands the statutory criteria to require the Court to appoint lawyers, so far as is practicable, suitably qualified "by reason of personality, cultural background, training and experience".

A Practice Note promulgated by Principal Family Court Judge Mahony in 2001[1] strove to flesh out qualities necessary to warrant appointment as a lawyer to represent a child. The following criteria were established:

- An ability to exercise sound judgment and identify central issues.
- A minimum of 5 years practice in the Family Court.
- Proven experience in running defended cases in the Family Court.
- An understanding of, and an ability to relate to and listen to, children of all ages.
- Good people skills and an ability to relate to and listen to adults.
- Sensitivity and awareness of gender, ethnicity, sexuality, cultural and religious issues for families.
- Relevant qualifications training and attendance at relevant courses.
- Personal qualities compatible with assisting negotiations in suitable cases and working co-operatively with other professionals.
- Independence.
- A knowledge and understanding of the Code of Practice (published contemporaneously).

[1] http://www.courts.govt.nz/family/c4c_selection_appointment_and_other_matters_practice_note.html.

These criteria are not mandatory (and nor could they be, having strict regard to the legislation). More importantly, many of them beg any objective measurement. Those that can be measured (a minimum of 5 years practice in the Family Court) contain no qualitative element. There is, perhaps inevitably, a sense that, overall, there is a quality of "*je ne sais quoi*" which, eventually, qualifies a lawyer to represent a child.

The real dilemma, however, in establishing such criteria is determining, with clarity, just what the role of the lawyer appointed to represent the child is to be.

In its simplest form the appointment is to *represent* the child - no more and no less.

In that sense, determining what makes a good lawyer for the child is relatively straight forward. That which makes a good lawyer for the child is that which makes a good lawyer generally - a sound knowledge of the law, an acute sensibility to the vagaries of human nature, a searching intelligence and (above all) professional objectivity. Let me refine those qualities further. A good lawyer needs to be an effective communicator, someone who listens as well as speaks, someone who identifies and values the views of others, and most of all, someone whose advocacy clarifies rather than confuses.

In considering, specifically, the role of a lawyer appointed to represent a child, one ambitious New Zealand author has suggested the following prerequisites:

- Attend a basic course in normal and abnormal child development.
- Have a working knowledge of children's physical emotional and social needs.
- Have an understanding of the structure and functioning of the family in modern society, including ethnic and indigenous variation.
- Acquire basic skills and the techniques of psychological interviewing, particularly with regard to interviewing children, and in the context of persons who may be in a distressed state.
- Have a special interest and concern for children and families.
- Have appropriate personal characteristics attributes and attitudes which suit the work.

This daunting checklist exceeds, by a massive margin, the curriculum of any standard law degree in New Zealand and, indeed, begs the question: is it a lawyer or some other sort of representative that is being created? The listed criteria do not form part of any formal post graduate training. Moreover, formal academic qualifications cannot guarantee the necessary insights, judgment or sensitivity. There is, in addition, a presumption of there being sufficient and available expertise to provide the necessary training. Tertiary institutions are no less vulnerable to allegations of having been captured by so-called "activist research" than individuals. The simple fact is that no matter how many children the lawyer has, no matter how widely read the lawyer may be and no matter how many courses the lawyer has voluntarily attended, that lawyer simply cannot assume

the mantle of an expert in child development. Knowledgeable and informed, perhaps, but no more. This, of course, goes to the very heart of the issue – what is to be expected of a lawyer appointed to represent a child? A lawyer presenting a case involving nuclear physics is not expected to be a nuclear physicist. The lawyer is expected to access resources, knowledge and expertise to enable the case to be adequately presented. The lawyer is an advocate. However, the way in which the task of representing has evolved in New Zealand is reflective of a number of unique local characteristics, not the least of which is a paucity of resources and expertise in the area of child and family support services. As a consequence (and in contra distinction to equivalent overseas models) the New Zealand lawyer has a much greater *hands on* involvement with the child and the mundanities which flow from (but which are not necessarily directly related to) the litigation. This has important ramifications and places a responsibility on lawyers appointed to represent children which they are often all too eager to assume and, sadly, all too ill-prepared to fulfil.

THE ROLE

Choosing the right lawyer by reference to any catalogue of qualities is only the beginning of the problem. Once appointed, what is the lawyer's task? To "represent" the child, says the legislation, as we have already seen. Wishes, or welfare? (Fortuitously in most cases these coincide). At what age can a child be said to have the maturity to "instruct" a lawyer in the way that an adult does, to participate independently in the process? How are the influences of those close to the child to be filtered out to ensure that what is being said represents the child's "true" views? Is it, in fact, realistic or even desirable to filter out those influences given that everyone's views and opinions are all, to a very considerable extent, shaped by the influences that are around us? To what extent is the lawyer entitled to overlay his/her notion of the child's "interests"? The questions tumble like a cataract, and if truth be told, few lend themselves to a simple answer. The debate as to the proper role of the lawyer appointed to represent a child is vigorous. There are those who promote the "pure advocacy" role; there are those who say the lawyer's assessment (however formed) of the child's interests should prevail. This debate probably admits no final resolution and it is instructive to note that in NSW a clear distinction is drawn between the "direct representative" who receives and acts on instructions from the child directly and the "best interests representative" who acts impartially and makes submissions to further (the lawyer's perception of) the best interests of the child as well as conveying the child's wishes to the Court. In Ontario appointment is expressed to be "to represent the child's interests". Of course the challenge attaching to "best interests" advocacy is to ensure that it is based on sound and supportable evidence, not the subjective views of the lawyer (no matter how well disguised). As Mr Jaggers advises Pip in Charles Dickens "Great Expectations":

"*Take nothing on its looks; take everything on evidence. There is no better rule*."

Too often what amounts to little more than corn-crake philosophy and notions more journalistic than informed are provided to the Court to "assist" in its decision making process. There is a worrying primacy of anecdote even in material presented as "research". We can, and should, do better.

THE WELFARE PRINCIPLE

Not the least of the problems is that nebulous and sometimes elusive notion

> *"the welfare of the child"*

in the name of which decisions (good bad and indifferent) are made every day by parents, families and (on occasions) Courts.

The legal concept, the paramountcy of the child's interests, would seem to be a relatively late flowering notion (some commentators suggest it dates from as recently as 1924).

What is clear is that the concept of the welfare of the child simply does not, and never can, lend itself to formulaic outcomes. It is no more true to say that all children are in all circumstances better off in a two-parent family than it is to say that all Moslems are terrorists. Principles of general application, such as the so called "mother principle" or the presumption of shared parenting or the "primary caregiver" rule seldom stand up to any sort of objective scrutiny when considered in the context of a specific child. One size does not and cannot fit all. Hear this: Newsflash - Children are individuals. They exist within the unique framework of adult relationships and social constructs at a given point in time. Children inevitably grow and their needs inexorably change. Cultural factors are more than simply significant - in New Zealand they are elemental. There is no universalised definition of "family". Its multiple forms pose a special challenge in the context of family law. Social mores and norms are fluid. Social research is notoriously imprecise and value laden. In such matters there is probably no such thing as an objective truth. The relating of facts, the telling of one's story, can never be neutral. Intuition continues to ride high as a decision-making determinant. Moreover, persistent but convenient myths suggesting that the Family Court is complicit in the "kidnapping" of children by obstructive mothers or that men seeking joint/shared custody are invariably perceived as avoiders of Child Support usually do no more than serve to obscure the fact the Court's sole function is to determine the best outcome for the child in question, in his/her circumstances.

A further confusion attending the role of the lawyer appointed to represent the child centres around the perception that the lawyer is, to all intents and purposes, the decision maker. Stuart Birks is particularly critical of the role of the lawyer appointed to represent the child carried out in "the shadow of the law". Although it is the Judge who determines the outcome of any case

that eventually comes before the Court the reality is that most cases do not. Many litigants compromise the case long before a Judge sets eyes on the paperwork. Many do so in line with their understanding (as communicated by the lawyers involved) of what a Court might do if the matter were to be fully litigated. Others compromise for other reasons entirely. The role of the Court appointed lawyer, ostensibly representing the child, is (and let us not be naive) frequently highly influential. At times it would seem as if that lawyer has become elevated to a role of neo-Judge. The very independence of the role limits the accountability of lawyers operating *in the shadow of the law* (or so it may seem). But neither Family Court Judges nor children's lawyers should be characterised as fools and jesters. More often than not, indeed I venture to suggest that in the very great majority of cases, the Court's response to the issues placed before it by parents themselves unable to resolve matters is efficient and the ultimate outcome for the child is within a reasonable arrow shot of "the best that can be achieved". Of course, parents who can do it better usually do.

CONCLUSION

Appointing a lawyer to give the child a voice is not necessarily the only, or indeed the best, way to achieve the desired goal of the child having a voice independent of the adults. It may, however, in the context of New Zealand, with available resources knowledge and expertise, be the best model that can be devised in the circumstances. That the means of representing children could be improved is without question. Whether those presently tasked with reforming the law relating to children will do so with their eye on anything other than venal fiscal considerations remains to be seen.

Chapter Six

SHAPING SOCIETY

By Stuart Birks

INTRODUCTION

> *"legal formulations do not merely reflect current social norms, but also help to shape them".*
> Robert Rowthorn[1]

The Family Court operates within the context of the wider society. Numerous signals are given in this wider society as to the nature of prevailing social norms. These signals have an impact on legal formulations and the attitudes and behaviour of those (lawyers, counsellors, psychologists, social workers and others) working in and with the court, as well as on the attitudes, expectations and behaviour of the people using the court. Moreover, the flow of signals is two-way. Information is transmitted to, and affects, the court, and signals are sent from the court to society. Both these flows are important. Even in a narrow sense, legal formulations are likely to shape people's behaviour, as recognized by the concept of the "shadow of the law".

It is a concern, therefore, that there has been little attention paid to the quality of the information that might affect the court, and repeated denials of the signals given by the court. As with other examples in this paper, similar reasoning denying the wider impact of the court is accepted and promoted by several interested parties. In time, such reasoning frequently gains general and widespread acceptance. It could be termed "proof by repeated assertion". To illustrate these denials:

1. The foreword to the discussion paper provided for the review of laws relating to guardianship, custody and access (Ministry of Justice and Ministry of Social Policy, 2000) includes the following claim:

   "If parents can agree on the important decisions about how children should be cared for, and if parents stay together, or can reach agreement about the care of children if they do separate, then the laws and structures discussed in this paper are irrelevant." (p.3)

[1] P.134 of Dnes and Rowthorn (2002)

The foreword was signed by Hon Margaret Wilson, Associate Minister of Justice, and Hon Steve Maharey, Minister of Social Services and Employment. They are both Government Ministers involved in formulating and recommending policy and will have been advised by the Ministry of Justice. The claim that laws and structures are irrelevant to these parents means that they have no impact on the decisions the parents make, or any agreements that they reach. While some may agree without thought of the law, many are likely to be influenced by the knowledge of the outcome they could expect were the law to be applied. It may also be possible for some to agree even if the laws were not there, but that does not mean that the laws, once in existence, have no impact on the agreements reached. Similarly, some people might drive slowly even if there are no speed restrictions, but that could not be taken to mean that speed restrictions only affect the driving speeds of those who are penalized for speeding.

2. On 26th April 2000 the Family Law Section of the New Zealand Law Society issued a press release opposing the Shared Parenting Bill. It included the following statement:

"...the Bill seems to ignore the fact that the vast majority of parents seem to be able to find sensible and pragmatic solutions to the problems posed by family separation without resort either to lawyers or the courts. The Section is concerned that substantive law changes are being promoted as a response to a relatively small number of difficult cases." [2]

It would be unfortunate if "difficult", and therefore unrepresentative, cases were to cast a shadow affecting the outcomes in numerous other cases where alternative, superior, solutions would otherwise have been possible.

3. John Priestley QC, then Chair of the Family Law Section of the New Zealand Law Society, in a news release of 6 October 2000, was also unable to see any connection between the Court and the actions of parents. In dismissing a claim that the behaviour of the Court might affect separating parents, he said:

"The large majority of separated New Zealanders put their own joint parenting arrangements into place without any need for intervention by lawyers or the Family Court". [3]

He has since been appointed a Judge in the High Court. In that role, will he use decisions as a signal to others?

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2 http://www.nz-lawsoc.org.nz/fls/news/sharedp.htm

3 http://www.nz-lawsoc.org.nz/family%20law%20section%20pr-oct.htm

These quotes should serve as a warning. Those resorting to this sort of reasoning to counter criticism of the Family Court must have a very weak case.

WHAT SIGNALS ARE WE SENDING?

Information is being transmitted through the Family Court and directly to society that sends signals to people, shaping their perceptions, expectations and behaviour. The issues are very sensitive, touching as they do on the nature of families, the position of men and women in society, and what might be termed "gender politics". There has been a burgeoning literature on these matters in recent decades, much of it unbalanced. A set of thinking has come to dominate a large number of institutions. Its influence is widespread, to the point where many of the ideas and approaches, although not rigorously tested and supported, have become part of mainstream thinking and policymaking. Numerous examples can be found in Issues Papers from the Centre for Public Policy Evaluation, listed at the end of this publication.

Here are some additional, more recent examples that indicate the messages conveyed.

Steve Maharey and Families

The following extracts are taken from *Maharey Notes* of 25 September 2002.[4]

1. The Commission for the Family *"will not exist merely to promote the nuclear family as the ideal for all New Zealanders"*.

2. "*United Future has been at pains to point out that while it prefers to see children raised within a stable two-parent household, it acknowledges the diversity of family forms now existing in New Zealand*."

3. "*Households with two same sex parents had risen from 0.1% to 0.2%. Households with a sole mother rose from 12% to 24% while those with a sole father rose from 2% to 5%.*"

4. "*I have no doubt that children benefit from spending their childhood with their own natural parents who live together in reasonable harmony, just as they suffer from parental conflict and the separation which often follows. The problem is what do we do when reasonable harmony does not exist*."

5. "*…a great deal of the debate about the family, in many countries, now focuses on strategies to strengthen marriage and the nuclear family as if this is the only way forward. The alternative of the sole parent family is often blamed as the cause of all the problems so many children face*."

6. "*…it is the poverty in which many sole parents and their children live that, overwhelmingly, is the factor that accounts for the children's reduced life chances*."

[4] http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=14975

7. "*A government seeking to introduce policies for families should therefore keep three main objectives in mind. First, we need to ensure that all children grow up in surroundings that meet their physical, emotional and intellectual needs. A community should support its families rather than expect strong families to make up for the limitations of weak communities. Second, we need to empower women to share financial, as well as emotional and practical, responsibility for their children. Third we need to encourage and enable men to share emotional and practical, as well as financial responsibilities of parenthood*."

And from Maharey Notes of 7 October 2002[5]:

8. "*…support to help families overcome inequalities is now seen as a key way to prevent social breakdown*."

There are several signals contained in these extracts. The term "diversity of family forms" actually refers to diversity of households, with a family still being defined within a household. We see this with the household data in (3) above, and the statement in (5) that the alternative to the nuclear family is the sole parent family. The diversity claim might be overstated, with only 0.2% of households having same sex parents, although a household with children, one parent and a partner would be classified as a two parent family. There is no mention of shared or parallel parenting, or of other family networks extending beyond one household. Definitional problems, especially that of the household-based concept of family, significantly distort our perceptions and have a marked influence on the interpretation of data and the formulation of research on the family. These matters have been discussed in detail in Birks (2002) and Callister and Hill (2002), with the suggestion that "two-home children" might be a more appropriate concept than "sole-parent family".

In (4), we could ask what is meant by, "when reasonable harmony does not exist". Currently we have no-fault divorce and no constraints on separation. One parent can decide on separation. Is that parent's wish sufficient to meet this criterion? Should it be based on a short- or a long-term view? Should it be based on a parent's or a child's view? As Katherine Shaw Spaht has asked, *"Should marriage be reduced to 'a relationship that exists primarily for the fulfilment of the individual spouses'?"*[6]

The reference to poverty in (6) is also significant. Is poverty to be treated as independent of separation issues, or as one of the costs of separation, which then should be weighed against the benefits? Is Maharey then suggesting that policies should be put in place to eliminate poverty as a cost, while assuming that such policies will have no effect on the decision to separate? If not, how does he explain (8)? Isn't there a possibility that such policies would actually encourage, rather than prevent, social breakdown?

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5 http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=15105

6 Dnes and Rowthorn (2002), p.93

Maharey refers, in (7), to "empowering" women. The Duluth model, which underpins approaches to domestic violence in New Zealand, assigns negative connotations to power when referring to patriarchal power and control, and yet he sees power for women as good. Conversely, he refers to "encouraging" men. At the same time, his government passes paid parental leave legislation that clearly favours women, and allows men's exclusion from their households at the will of their partners, and then excludes them from their families as he defines them. He offers little practical comfort or support to fathers in general, and "non-custodial" fathers in particular.

Frean (2002) describes the use of "relationship jargon" to conceal the implications of separation.

> *"Instead of stepfamilies, the professionals talk of 'blended' families; instead of referring to a serious of broken commitments and deserted children they allude to the 'web of relationships'."*

She could also have given the example of "diversity of family forms".

Steve Maharey and Tariana Turia may be pulling in different directions when considering policies on families. When addressing Maori community health workers, she said of the soon-to-be-released ten year strategy for Maori health[7]:

> *"Instead of treating individuals simply as patients, the system recognises them as tangata whenua, whose mana, identity and strength comes from their membership of whanau."*

In yet another perspective, perhaps related to the above, Michel Vandenbroeck (1999) suggests that a concern for children should also translate into respectful treatment of parents:

> *"The loyalty that all children have towards their parents is an essential given. The fact alone that the parents bore them makes the children feel connected to them…This inspires loyalty, and this loyalty can never be lost, as can be seen for example, with adopted children who want to know who their biological parents are …Even children who have been badly treated by their parents…retain a strong loyalty. Because loyalty is so important, it can be argued that respecting a child's identity cannot be separated from respecting his or her parents." (p.144)*

While Steve Maharey presents his view of families, and of significant issues and policies in relation to families, his is by no means the only possible perspective. Some may well question the unstated assumptions that underpin the picture he promotes.

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[7] Speech by Hon Tariana Turia, "The Whanau Paradigm", 2 October 2002 http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=15032

Ministry of Women's Affairs, "work-family balance" and "economic autonomy"

In *Work and Family Balance: A Policy Perspective* (MWA, 2002b) it states:

> *"This report focuses on issues for women employees with caregiving responsibilities and women with caregiving responsibilities who wish to participate in paid work. It is written from the perspective of work and family balance as a government policy issue."*

In other words, they are concerned about balance for women, not men. The Minister of Women's Affairs, Ruth Dyson, made some "Claytons" concessions to men in an address to the National Council of Women[8] when she said:

> *"This is not just an issue for women. Overall, a decade of a deregulated and competitive environment has reduced the quality of life for many workers of both sexes. A lot of men also have more stress in their lives than is healthy. But women have paid the greater price because of the additional level of stress that accompanies our role as carers."*

It is not clear why women are particularly stressed, and one could equally say that men face more stress due to their role as providers. As pointed out in MWA (2002b):

> *"Time use survey results (Statistics New Zealand, 2001) show that across all productive time (paid work and unpaid work) activities males and females had very similar time commitments – on average women worked for 51.0 hours a week compared with 51.4 for men."*

The Ministry of Women's Affairs briefing paper for the incoming government (MWA 2002a) focuses strongly on women's "economic autonomy". For example, on page 5 of the briefing paper:

> *"...women are finding it increasingly difficult to achieve and sustain economic autonomy while meeting society's expectations that they carry the major responsibility for unpaid work."*

and:

> *"New Zealand's success, prosperity and wellbeing will be assured only when women are able to participate fully, freely and actively in social, political, economic and cultural life. For this to occur, women need to be economically autonomous, secure, safe, healthy and treated justly."*

[8] 27 September 2002, http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=14995

There is no mention there of men and women working in partnership, nor any concern for the constraints men face due to their earning responsibilities, nor any concessions to the possibility that men may wish to be more involved parents and face barriers that deny them this opportunity. It is hard to reconcile this approach with a significant role for families in New Zealand society, and it may conflict with the "Strengthening Families" strategy[9].

"Economic autonomy" as described in the document can be summarised as distorting market signals and the operation of the labour market to favour women (while maintaining their favoured position with respect to children), ignoring the effect of existing financial transfers from men to women (as with men being the main income earner), and further increasing forced transfers from men to women through family law, child support and the tax/benefit system.

In other words, women will have the children, men will have to pay with no rights in return, so as to ensure women's autonomy. These policy initiatives have significant implications for families and children. They set the context in which the Family Court operates, and the shape signals being given to our children.

The stated purpose of the Ministry of Women's Affairs requires it to work "to advance the status of women…in comparison with men", and to "encourage other public policy analysts to take all possible steps to identify and eliminate discrimination against women" [10]. While one-sided, this might be considered reasonable if the Ministry is to act as a government-funded quasi-lobby group. There may be a conflict between this role and the Ministry's duties of overseeing the Time Use Survey[11] and advising on gender analysis.

The Children's Issues Centre and "children whose parents live apart"

On 27th July 2001 the Children's Issues Centre ran a workshop in Wellington on "Children whose parents live apart - family and legal contexts". The focus was on hearing children's voices in Family Court proceedings.

Extracts from Sclater (1995) made up half of a handout for small group discussion sessions. It focused on parents, and included the following:

> *"The vulnerable parent's energies are then channeled into 'doing what's best for the children', conceived from the vantage point of the emotionally vulnerable parent, who is unable to see that the disputes over the children he has become involved in have their origins in his own inability to cope."*

Another handout referred to "a tension" for separated parents having to remain in some kind of relationship if they are both engaged in parenting.

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9 http://www.strengtheningfamilies.govt.nz/

10 http://www.mwa.govt.nz/about/visionmis.html

11 The Time Use Survey was undertaken by Statistics New Zealand under contract to, and with the general supervision of, the Ministry of Women's Affairs.

In combination, the implication is that it is a problem for both parents to continue to be active, and that "he" is considering his own interests over those of the children if he wishes to stay involved. Such a charge is difficult to refute, as any assertion of a wish to be involved can be turned into "evidence" of his inability to cope. One possible interpretation is that fathers' natural instincts to parent their children is being treated as a sickness, requiring treatment. Given the role of assertion in the Family Court and the need to disprove rather than prove allegations, such pathologising could be considered particularly insensitive and harmful to children, and sends a perverse signal.

Care should be taken when considering the literature on gender-related matters. Much of it presents feminist standpoints, which are not noted for displaying empathy with men. There is a dearth of critiques of such work from other, non-feminist, perspectives.

Advocacy research is intended to support a preferred position, rather than attempt a balanced assessment. Some participants at the workshop remarked on what they felt to be an anti-father slant in the material. Certainly quite different points were raised in Anne Smith (2002), when discussing support for parents:

> *"Carollee Howes shows that children can have secure attachments with their childcare caregivers as well as with their parents."*

So, presumably, they can also have secure attachments to both their parents, even when they live apart.

And:

> *"A minority of children in the world are cared for within a nuclear family. Much more common is an extended family, where children have attachments to many relatives and community members. Childcare centres are the modern equivalent of the extended family. They take away from the parent the pressure of total care in isolation within the home."*

Surely these are also strong arguments for supporting the continued involvement of fathers, and their extended families, even when the parents do not live together.

The Marsden Fund and "girl power"

Much of the debate on gender issues and the information flowing into the formulation and interpretation of family law is based on indicators of advantage or disadvantage. It is important to note the extent to which results depend on the selection of indicators and the interpretation of the values of those indicators.

One timely example is the allocation, via the Marsden Fund, of $100,000 of taxpayers' money to a researcher who is "not totally convinced" by results showing girls doing as well as, or better than, boys at maths (Nash, 2002a). She quotes the researcher, "The future may not be as rosy for young women as the concept of girl power would lead us to believe". Note the positive connotation given to the term "power".

The study will not compare boys and girls, and aims to find disadvantage for girls that is not picked up by current indicators. The only outcome we can expect from such research is the identification of some barrier or barriers that the girls or their parents envisage they will encounter. They may be wrong, or boys may face the same or other barriers, but we will not know that. The results will be added to others that are used to argue for policy changes to further favour girls and women.

This is not the only publicly funded project that has a built in bias, nor is the Marsden Fund the only funding body to act in this way. For example, in 1994 the Health Research Council funded three projects that it described as investigating **domestic** violence.

- Emergency Department Protocol of Care - developing, implementing and evaluating an emergency department protocol of care for women abused by their partners. [there is no such protocol for men, the protocol as used in the Hamilton Abuse Intervention Pilot Project included documentation of injuries for use in court, plus advocacy services]

- Investigating Violent Men's Attitudes - interviewing men from Stopping Violence programmes to find out how they see their own behaviour, and what environmental factors legitimise their violence to their partners. [there was no equivalent New Zealand study of violent women]

- The Effect of Domestic Violence on Children - studying the effects of domestic violence on the children of battered women who have been to a women's refuge. [this most probably only covers the effects of domestic violence by men]

Similarly, Maxwell (1994), in a study on the effects of family violence on children, used data from the gendered Hamilton Abuse Intervention Pilot Project. That project had an "Assailant/Men's Programme", and a "Victim/Women's Programme". The report forms did not include questions on violence by the "victim".

Carbonatto's paper on "spousal abuse" (Carbonatto, 1994) was based on the following definition: "Spousal abuse as it is presented here broadly refers to abuse between a female victim and male offender, who are, or have been, in any kind of intimate relationship."

The Women's Access to Justice project, run by the Law Commission in the late 1990s, could also be criticized for bias in its terms of reference, which state:

> *"Priority will be placed on examining the impact of laws, legal procedures and the delivery of legal services upon:*
>
> * *family and domestic relationships*
> * *violence against women, and*
> * *the economic position of women*
>
> *At all stages of the project, there will be widespread consultation with women throughout New Zealand. The project will also draw upon, and complement, the work of other government agencies, the Judicial Working Group on Gender Equity and other Law Commission projects."*

Current Labour Party policies on women's issues include the statement, *"Labour will implement appropriate recommendations from relevant Law Commission reports, in particular the Women's Access to Justice Report"*.

Research - The "Good Man Project"

As reported in various newspapers this September[12], a group of boys' secondary schools have contracted Celia Lashlie to head the "Good Man Project". The project arose from an awareness of the negative way that men were generally presented. You might imagine that the approach taken would be to present males in a positive way. Instead, the project aims to address the negative issues of being male. She says that we have strong role models for women, but not for men. This is hardly surprising, as we have been told repeatedly that it is bad for men to be strong (macho, masculine, aggressive, insensitive, testosterone-driven).

It is even less surprising when we note the criteria required for someone to be considered a role model. NZPA (2002) covers the appointment of a woman as head of New Zealand's largest bank, making the point in the headline, describing her as "the first female head of a major bank in this country", and showing that the woman as sees herself as a role model for women. All the other past and present heads of major banks in New Zealand are men, but they are not presented as role models. Nor are this woman or these men presented as role models for young people in general. The chosen perspective is one of gender, but why not choose training, skill and experience, or ethnicity, or age? The Principal Family Court Judge is a man. Were the post to be filled by a woman, she would undoubtedly be presented as a female role model. There would also probably be reference made to contributions she had made to the advancement of women.[13] The incumbent is bathed in no such glow. By singling

[12] For example, Kelly (2002), Nash (2002b) and Neal (2002)

[13] On the announcement that Dame Sylvia Cartwright would be Governor General, Helen Clark said, "Dame Silvia Cartwright has made an impressive contribution to New Zealand at home and abroad as a lawyer and jurist, and as an advocate for women and women's rights". (Wellwood, 2000)

out women as we do, we are devaluing the contributions and achievements of all the men in positions of responsibility and signaling to young men that their achievements will be viewed as secondary when compared with equivalent achievements by young women.

As a further illustration of the different ways that men and women are perceived, consider the case of a West End play in the context of policies on domestic violence. The play is called, "The Woman Who Cooked Her Husband". It is described by Brian Glover (2002):

> *"Wronged woman Hilary (Alison Steadman) takes revenge on the husband who has left her for a younger woman, Laura (Daisy Donovan), by cooking and eating him. This essentially dark material, worthy of Greek tragedy treatment, is played for laughs and presented as a frothy farce."*

BBC News Online (BBC News, 2002) quotes a spokeswoman for the show: "It is very much a feel-good play that has really attracted quite a female audience".[14]

In fact, the Good Man project is damning of men. The clear message is that, among all the men in New Zealand who are fathers, teachers, writers, musicians, inventors, businessmen, diplomats, doctors, farmers, conservationists, civic leaders, and all the others, there are no good men. They could not even find one to handle the project.

It might be more constructive simply to point out that men have been given a particularly bad press for a very long time. The project itself sends a signal that our society currently appears unable to acknowledge and encourage the positive contributions that men can and do make.

WHAT OF THE FUTURE?

The Family Court operates in a social context. The laws it works with, and the interpretations of those laws, are shaped by that context. It is both a recipient and a transmitter of signals which influence people's expectations and behaviour.

Our children are affected, both immediately, through the impact on the behaviour of parents, and in the future, as they make their own life decisions, and probably start families of their own.

What signals are we giving?

Signals to parents

Signals are being given about the relative importance of mothers and fathers, with stress being placed on the positive (nurturing, caregiving) contributions of mothers, and the negative (violence, power and control) and financial contributions of fathers. Whereas mothers' contributions are taken to require contact with children, men's contact with children

[14] Even many of those attending the forum found this story amusing.

frequently has negative connotations. Financial contributions by fathers are considered to be distinct from, and independent of, other aspects of their relationships with their children, such that their input can be achieved without any contact. Fathers' emotional input is often ignored, and even pathologised. These signals are observed within a broader context of assertions of women's past and current disadvantage, with favourable treatment of women being presented as addressing these disadvantages. There is an imbalance in attitudes towards family violence by men and women, and acceptance of relationship breakdown on the wishes of one partner. There is a downplaying of cooperative behaviour and working through differences and difficulties. Instead, there is an emphasis on independent action and decision making by women.

These signals are likely to directly constrain fathers in their parenting, and serve to encourage family breakup, with the associated exclusion of fathers from active parenting. Such signals are also likely to affect behaviour in ongoing relationships through their impact on attitudes and expectations, and on negotiation between partners.

Signals to children about parents

Children observe their parents, and society's attitudes towards and treatment of them. While circumstances in each individual family, and relations between particular parents are strongly influenced by the individuals themselves, wider social signals and context also have an impact. This is particularly noticeable where parents live apart as there can then be much greater outside involvement. Basic messages being given are that mothers are important and have power as parents, while fathers are expected to pay, but are secondary parents who can be excluded or replaced. There are also often repeated messages that parenting involves the sort of things commonly done by mothers, and that fathers generally do not do enough (as in women doing more unpaid work).

To illustrate an alternative signal, consider a society that valued financial independence free of state support as an important quality. Such a society might place greater emphasis on income earning within a household. It might consider it important that children learn that money is earned, and observe a parent making sacrifices to earn. Income-earning ability would then be considered an important requirement for a custodial parent, and high levels of child support might be viewed as generating what is currently termed a "benefit mentality".

This is not to say that the above alternative should replace the current approach. We should be aware of the broader range of signals that could be given and that might be considered important, however.

Signals to children about families

Far from being stable, it is demonstrated to children that families (as they see them) are transient, with members outside the home not being acknowledged. Financial input from outside (by the state and/or parent a) is to be expected with nothing required in return. Even children whose parents live together receive these signals through the media and through contact with the large number of children whose parents live apart.

More generally, there is a downplaying of the family as a social unit. Individualism in women is encouraged, while women's links to their children are strongly supported. In comparison, men and extended family members are far more likely to find their relationships with their children limited or severed.

Signals to children about their future

What can our children expect as adults? There are general signals being given about relationships. Compared to a few decades ago, we can anticipate less stability and reduced commitment. This increases the risk for those prepared to put most effort into a relationship, possibly leading to them avoiding long-term relationships altogether.[15] There is likely to be a general reduction in the gains from relationships as people safeguard themselves against the possibility of relationship breakdown.

Within this general scenario, there is a marked difference in the opportunities being offered to our sons and our daughters. Very little thought seems to have been given to the future for boys. There is no boys' equivalent of "girls can do anything", and boys' underachievement in education is downplayed to the point of finding alternative measures to justify preferential treatment for girls. Career successes are presented as socially desirable and praiseworthy goals for girls, but there is silence about any goals for boys.

As for future family life, the environment is hostile to cooperative, mutually respectful, long-term relationships. In addition, boys are given the signal that they would have financial responsibilities for children and ex-partners, but there is relatively little concern for their ongoing relationships with their children. In general, the message is that women can expect a lifelong relationship with their children, whereas men can only be sure of a financial obligation. Moreover, women can expect both family and career, whereas separated men are told that they are denied a family due to the time they spend at work.

We are experiencing the harmful effects of one-sided analyses, and there has been little thought given to the effect of the resulting signals. Today's children are tomorrow's adults and parents. Our present is the only reality they know. We have an obligation to present a more balanced picture. Unfortunately some have a far narrower agenda:

> *"Women have fought hard for the right to do anything. Now we must fight for the right not to have to do everything - at least, not at the same time."*[16] (Ruth Dyson, 27 September 2002)

[15] A model indicating a related scenario is mentioned in Dnes and Rowthorn (2002), footnote 3 on p. 159

[16] Ruth Dyson address to the National Council of Women, 27 September 2002, http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=14995

Perhaps we should be addressing the questions:

What is society asking of our children (what roles are they being offered, both girls and boys)?

What can our children, both girls and boys, expect from society in return?

Are we creating a society in which our sons and our daughters can make lives for themselves together?

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Chapter Seven

FAMILY LAW AND THE WIDER FAMILY

By Joan Metge

FAMILY LAWS

New Zealand family laws derive originally from British laws but have been modified, especially during the second half of last century, in response to societal changes and pressures. In none is the term '*family*' explicitly defined but it is assumed that unless otherwise indicated 'family' means a unit comprising parents and their children, often identified as 'the nuclear family'. Most family laws are devoted to regulating relations within this unit, between the spouses and between parents and children.

The last thirty years have seen growing public awareness that the nuclear family takes more than one form. Amendments to family laws have widened the scope of 'the family' to include those involving sole parents, de facto couples, same sex couples and re-arranged families whose members live in or between two households. However, only two Acts recognise cultural differences and kinship connections beyond the nuclear family. The Children, Young Persons, and Their Families Act 1989 recognises three categories of family: 'family' meaning 'nuclear family', 'whanau' which is left undefined, and 'family group' which is defined in relation to the child as including "an extended family in which at least one adult member is connected to the child in at least one of the following ways: biological, legal, psychological or by whanau or other cultural group." The Domestic Violence Act 1995 broadly defines 'a family member' as "including a member of a whanau or other culturally recognised group" but, concentrating on abuser and abused, takes no steps to involve other family members in monitoring, mediating or managing the relation between abuser or abused.

THE 'WIDER FAMILY'

In real life, the parent-child family is not an island, sufficient unto itself. Except in exceptional circumstances, children are usually connected through their parents to other kinsfolk, some of whom play a major part in their lives, have an intimate knowledge of their needs and circumstances and a strong personal attachment. Such relatives constitute an important resource for consultation in situations where the best interests of the child becomes an issue.

But before it can be decided how best to make use of this resource in particular cases it is vitally important to recognise that the term 'wider family' encompasses a variety of realities. Just as we have been forced to recognise several different kinds of nuclear family, so we have to recognise several different kinds of extended family, some arising out of different cultural backgrounds, some a matter of personal and family choice.

First, there is the extended family **household**. While the parent-child household has always been the dominant household type in New Zealand, there has always been a proportion of households which include one or more parents' parents, parents' siblings or other relatives. While this proportion is declining it is by no means insignificant. The statistics available do not tell us what we need to know about the internal dynamics of such households, in particular whether they operate as one domestic unit or as two. We can expect a difference between those in which the nuclear family lives in a house belonging to an older relative and those in which the younger couple are the householders. When my niece, her husband and two children lived with me for four years, my National Superannuation was reduced because I was not "living alone". We managed household expenses and cooking as one unit but I scrupulously refrained from interfering in the parents' management of their children, though the girls tried to play me off against their parents. I suspect Maori grandparents would behave quite differently. But the bond developed in those four years living in daily proximity in the same household has out-lasted my niece and her husband moving into their own home.

When it comes to a child's relations with kin living outside the same household, geographical distance and cultural difference become important.

Probably the most common pattern, typical of most Pakeha families, is that in which children and their parents engage in warm and frequent interaction with a few close relatives - close in terms of genealogy and/or affection regardless of geographic location - usually the parents' parents and siblings on one or both sides, by visits, joint outings and contact by telephone, letter, fax and email. Members of this inner circle usually fall into two distinct groups (father's side and mother's side) and their members may or may not be in close touch with each other. Surrounding this inner circle is a large, amorphous outer circle of distant kin who come together only on significant occasions to attend weddings, funerals and twenty-firsts and then disperse again. The adults in this kind of extended family emphasise the autonomy of the parent-child family, drawing a clear boundary between the rights and responsibilities of the children's parents on the one hand and grandparents and other relatives on the other. However, children do not always see this boundary. A friend of mine recalled that as a child he told an enquirer that his family consisted of " Mum, Dad, my two sisters. Grandma Jane and Uncle Joe." For him the 'family' was defined by daily contact in the same household.

The Maori 'whanau' stands in marked contrast to the pattern just described. It is often described in English as an 'extended family', but it is a quite a different sort of extended family. The word 'whanau', like 'family', has many meanings but the one that comes first to mind for most Maori is a group of kin defined by descent from a common ancestor and by the frequency with which they act and interact together for common ends. The whanau is a not an occasional collection of kin but a **group** with a considerable degree of corporate life. There is less emphasis on the autonomy of the parent-child family in relation to other whanau members, children are held to belong to the whanau as well as to their parents, and adult whanau members are expected to take an interest in and responsibility for each other's children, with grandparents being accorded special rights. The adoption of children takes

place within the whanau, is formally arranged and known to all, and natural parents have a continuing role in the lives of children they share with others. In most cases Maori belong to two whanau, their mother's and their father's.

In real life, the degree of corporateness achieved by whanau ranges from very strong to something approaching the Pakeha pattern. According to research carried out at Massey University, nearly 80% of the respondents said that the whanau played a large or very large part in their lives, and more than 80% that members of their whanau had strong links to each other. As with the nuclear family, strong family loyalty can work to the detriment as well as the benefit of children.

Then there is the work and descent based extended family, in which two or three generations of adult kin work together in a common enterprise, usually a founding couple (husband and wife or a sibling set) working with adult sons, daughters and perhaps nephews, drawing on their children as part- and peak-time labour. Extended families of this kind are closer in many ways to the whanau than the Pakeha extended family. They are common among immigrants from Mediterranean and Asian areas but also occur among those of British background. They have been prominent in such areas as farming, the retail and building trades, and wine-making. Many of these family based enterprises have been corporatised in recent years but their names linger on in our collective memory. And new ones are still being established.

Finally, there are the many family forms associated with the immigrant communities which have been settling in New Zealand from the middle of the 19th century. Because of pressures to assimilate they have been largely hidden from public view but are now beginning to openly assert their separate identity. Grandparents are important in them all, but the details of the roles they fill differ with their cultural backgrounds.

IMPLICATIONS FOR THE FAMILY COURT

The Family Court has the task of interpreting and implementing family laws which vary widely in the recognition they give to extended family forms and relatives from outside the nuclear family in the care and protection of children. The challenges encountered in the process can be tackled on two fronts: through the amendment or reform of existing laws and through developing interpretations that emphasise the spirit rather than the letter of the law.

Law reform is a lengthy process which requires wide consultation, public debate and proper political process. It is vital that when changes are made they are right and effective. The process cannot and should not be hurried.

Despite two amendments the Adoption Act 1955 is badly out of step with modern thinking. Discussion aimed at its reform has been under way for 30 odd years, resulting in numerous reports. The most recent is the Law Commission's Report *Adoption and Its Alternatives* published in early 2000. This Report put forward a proposal for A Care of Children Act which would replace adoption and other legislation governing the guardianship and care of children with a spectrum of provisions for care ranging from temporary custody and/or guardianship through a new concept of 'enduring guardianship' to a reformulated concept of

adoption. These proposals provide for both cultural differences and the role of members of the wider family to be taken into account. But because of the difficulty of obtaining consensus in this contentious area replacement legislation has still not been made public.

Meanwhile, the Family Court has pushed on with developing its interpretation of the existing family laws, including the Adoption Act, in the light of changing social realities. Since it was established the Court has shown an increasing willingness to acknowledge and provide for Maori values and practice, especially with regard to consultation with whanau in Family Group Conferences and by taking account of the practice of Maori customary adoption. The Court grounds such interpretations in the legal principle, confirmed in the High Court, that all acts dealing with the status, future and control of children are to be interpreted in the light of the principles of the Treaty of Waitangi, in particular, the principles of partnership and the active protection of Maori interests and taonga, among which family organisation can be counted. On occasion the Court has been quite innovative. In one case I know of the Court responded positively to the request of a whanau arranging a whangai adoption and conferred the status of guardian on both the natural parents and the adoptive parents, giving the child four guardians, two with custody. At the same time, the judgments reiterated the principle that the welfare of the child remains of paramount consideration and the rights of the whanau should not be allowed to subordinate those of the child.

So, there have been major advances in the recognition of tikanga Maori and the existence and rights of the whanau, but what of the many other cultural minorities in New Zealand, many of long standing, and what of the Pakeha majority, who are identified in law and public opinion as the norm but whose lifeways include an important role for grandparents which is unrecognised at law?

At least in theory the Family Court is committed to recognising the rights and freedoms of all minority groups, including but not limited to Maori, under the New Zealand Bill of Rights and the United Nations Convention on the Rights of the Child. I do not know at first hand to what extent such recognition is implemented in the practice of the Family Court but I am very sure that there are problems in realising such this goal.

Among the problems the Court must deal with are: variations in the understanding and experience of judges, counselors and other court officials, the very large number of cultural minorities (well into three figures), variations within cultural groups, especially among Maori and the Pakeha majority, and the difficulty of assessing information on groups other than the Maori. There is plenty of information on at least some groups but it is scattered in university theses and little-known publications. On my bookshelves I have two books which I treasure for their contents and as models: *Customs of Childbirth: Migrant women from twelve different cultures speak of their own experiences and customs* (Government Printer 1983) and *The Undiscovered Country: Customs of the cultural and ethnic groups of New Zealand concerning death and dying* (Revised Edition, Department of Health, Government Printer 1987). We urgently need something comparable about family, kinship and adoption in New Zealand, with emphasis on the role of relatives outside the nuclear family for the Pakeha majority as well as minority groups.

Chapter Eight

LISTENING TO FATHER'S PRESSURE GROUPS

By Warwick Pudney

INTRODUCTION

In August of 2001, Judge Mahony sought an opportunity to meet the Family Court Fathers' Pressure groups in the Auckland region. This was, at least, a brave move given the level of anger, protest and personal targeting, and at most, a courageous move given attacks that have happened on judges overseas. As facilitator and organiser of the meeting I took the precaution of ensuring two policemen were there, as well as a hired a security guard, and I excluded some of the men who wanted to be there, due to their judged inability to focus on the larger problem rather than their personal case. Megaphones outside at times made it difficult to hear and I personally received a number of abusive phone calls.

It would be easy to dismiss and even counter-attack such provocation, but that does not increase the peace, relationship or understanding. Talking with these pressure groups is difficult. The men are usually very angry and seeking verbal conflict. What we did was something that many of them had never had happen before, we listened to them.

From infancy, we as males are taught to access anger as the essential element to being good protectors. We are also taught to suppress all vulnerable emotions including hurt, sadness, loss, and pain. The 3 year-old boy, when he falls over, is told "Be brave, that didn't hurt did it?", and is dusted off with a denial of his pain. The 3 year-old girl is told, "Did that hurt?", "That's nasty, lets put a plaster on it". Throughout life the boy and the man learns that appearing strong wins admiration and appearing hurt and vulnerable gains denial and scorn. Anger becomes the channel for all emotions. The way we are likely to express pain unless we are in a very safe environment is to go to the anger that feeds fight.

If we take the trouble to go behind the angry and antagonistic exterior, we find immense pain and sadness in fathers' pressure groups. Listening needs the wisdom and calm to sit with the anger, with no fear, and allow it to move to the real essence of the issue, the hurt. I question whether we have served men well by our failing to hear men and their pain well in the Family Court system. We need to redefine the encounter and consider our own attitudes and whether we too hold men to be unfeeling and strong.

We are not.

We need to ask if we are holding outdated ideas of roles in the family. Do we still expect men to do the providing? It seems clear that relationship is what builds people and gives meaning to life. A father in a group I ran says,

> *"I used to drive a truck 80 hours a week taking uppers to keep me awake so that I could provide well for my family. Then my wife sacked me because she said that she wanted a relationship. I haven't got a reason for working anymore."*

And yet there is no-one out there helping separated dads get it right. Instead they are getting the same message from the IRD, "*Get out there and earn your child support*."

Are we respecting the new generation of dads who are very involved with the hands-on parenting of their babies? Are we recognising this when they separate, or are we pushing them into the once-a-fortnight mould by expectation and attitude rather than any court policy.

Listening is the key if you can get behind the anger, and in all my work with angry people I have never heard a person feel angry for no reason at all. Those reasons and rationales may not be what we hold, but this is about respecting others and their right to be respected. Judge Mahony listened, said little, and took notes. I focused the contributions, taking care to steer the personal accounts into the larger picture.

The following points were made at that meeting and requests were made for changes.

In reporting these points to you, I can say that the issues raised by the men in the groups were not agreed upon unanimously. I do not necessarily agree with all of them, though I agree with the principles of most. There were further issues that were not discussed and men who refused to attend. I name the issues rather than deal with them in great depth.

EX-PARTE ORDERS

A key principle should be to protect the relationship of the father and the child while issues are being sorted out under these orders.

The problem the men experienced was that orders are taken out on insufficient evidence with the consequences that fathers are isolated unnecessarily from their children for insufficient reason.

The solution put forward was that:

- Testable evidence is required for ex-parte orders.
- Ex-parte orders are issued only if there is enough evidence for arrest. Access should continue through the time of the order.
- The temporary protection order should only be in effect for 1 week – 10 days.

The problem:

The child may not see the father during this period

Counsel-for-the-child reports written after orders are issued, often suffer from the child having been traumatised by the split, suffering from loyalty issues, and one parent may have induced alienation during the time of non-contact.

The Solution:

- Counsel-for-child reports need to be replaced or influenced by home video or evidence from the past. This may include previous history as a parent.

Problem 2:

There is an inconsistency of judgment by judges and this produces both a sense of unfairness and of some judges being uninformed.

The solution:

- The training of judges in attitudes and interpretation.
- The establishment of clear principles for judges to work from.
- Greater accountability of the Court.

PERMANENT ORDERS

The principle: Ensuring ongoing safety vs personal change and developments in the applicant/respondent/child relationship.

Problems:

The grounds for some orders are questionable but their consequences on the child-father relationship quite far reaching.

Many orders are in effect long after they need to be.

Solutions:

- A Permanent Protection Order to be obtained only with good evidence.
- Permanent Protection Orders will need to be renewed after three years or a period in excess of that, specified by a judge, if the order has been broken.

FALSE ALLEGATIONS

The principle: personal safety vs unaccountable abuse of safety precautions for power/control or payback reasons.

Problem:

Some applicants are making false allegations to obtain orders and there is no disincentive to cease from doing so.

Solutions:

- That there be a penalty for false report, allegation, or perjury.
- Higher standard of evidence be required for allegation of abuse.
- We need to acknowledge envy or revenge response by the custodial parent, which may lead to a punishment motivation in interactions with the accused parent and thus an affect on the children's welfare and relationship with the father.

MANDATORY PARENTING COURSES

The principle: Our children are too valuable to be hurt in parental disputes and parental emotional hurt.

The problem:

Children and adolescents are being hurt in ongoing fighting, disrespect, and incivility, between separated parents.

Solutions:

- All parents who enter the Family Court are required to attend mandatory Parenting Courses on how to be separated parents.
- This would include content on effects of inter-parental conflict, emotional management, communication and the need for two parent responsibility and participation.

I have had the pleasure of working this year with a Ph.D student at AUT who is working with the problem of reducing harm to children during parental separation. She has three groups, the mothers, the fathers and the children. I am reassured as I assist her working to see parents taking more responsibility for themselves and the welfare of their children, being heard in their own pain, understanding their children's dilemmas, and also understanding the other parent. The result is a profound valuing of the children and an arena where they feel understood and their wishes respected. Empathy that has been withdrawn from the relationship may be partially restored, largely by listening and valuing.

At present we have the extraordinary situation where parents can continue destructive behaviour to children and fail to meet basic human needs, while we respect the personal rights of adults to decide whether or not to go to a course. Mandatory courses for Family Court attendees have been in place for anger/violence for years and we have a wealth of experience to work from. All that is needed is for us to value our children more than the fear of a mandatory course.

PROTECTION ORDERS

The principle: Balancing safety with ongoing relationship.

Problem 1:

Fathers who have abused spouses are being prevented from free contact with children after separation due to the policy of assuming that they are also being violent to the child or that they may abuse a new partner.

Solutions:

- There is no justification to assume that the Father has been violent to the child if he has been violent to the partner.
- Children should not automatically go on the Protection Order
- Protection for the child should be given only if the respondent is violent to the child (not just the applicant)

Problem 2:

The respondent is often left for weeks without contact with the child due to allegations of non-safety. This damages both the child and the father and the relationship.

Solutions:

- Have a faster processing of hearing (i.e.-reports)
- Have compulsory mediation quickly with a penalty for non-attendance.

CUSTODIAL /PRIMARY CAREGIVER

The principle: Equal rights and value to both parents.

The problem:

There is a conscious and unconscious practice preferring the mother as the major caregiver and giving that person control over the child's welfare that is unequal to the father. The practice becomes: a father gets custody only by default, the mother is shown to be a bad mother, and the mother gets custody by being the mother.

Solutions:

- The principle needs to be Equal Shared Parenting as an assumed starting place. There would be no Primary caregiver or custodial parent unless it is clearly damaging for the child to be with one of the parents. We should assist the process of parents deciding how they will do this and be aware of dynamics such as protection, loyalty, insecurity, and parent alienation syndrome.
- We should assume that 2 homes are possible.

GENDER BIAS IN BELIEVING TESTEMONY AND ALLEGATIONS

The principle: Equal value to both genders despite social stereotypes.

The problem:

Men, apart from being reluctant to lay complaints, are not so easily believed by the police and the courts.

Solutions:

- Reduce the historical and sexist inclination to rescue women
- The police, lawyers, court staff and the judges need to believe men who apply with allegations of abuse. The principle of equal believability of either gender needs to apply.
- Pay attention to women's violence to both men and children.
- Do not assume that men do not hurt physically, emotionally, relationally, and psychologically. Know that men may try to cover their hurt and shame.

PRO – FAMILY FAMILY COURT

The principle: That the court serves the whole family unit which includes the child and siblings, the genetic parents, the caregivers, both sets of grandparents and the wider whanau.

The problem:

The court has been predisposed to deal more sympathetically with women than men. This has been evidenced by:

- Few or no men as counseling co-ordinators.
- No process for dealing with the specific trauma that men go through.
- High male suicide rates of men waiting in the Family Court.
- Male respondent programmes that have a tone of punishment rather than stopping abuse.
- Female respondent programmes that still blame men for women's abuse of men, women and children.
- No structured rights for grandparents to have time with children.

Solutions:

Staffing at Family Courts.

- At least 50% male staff.
- Train staff to be more male empathic, knowledgeable and helpful.
- Prepare male friendly material, posters pamphlets, videos.
- Set up a committee of father-wise persons to advise on court-friendly measures for men.
- Have appropriate referral lists for male support.
- Have a father's representative on policy and procedures committees.
- Have an hour paid session available from the Family Court for respondents with trained male personnel that assists with court procedures and personal situations to ensure safety, rights and wellbeing.
- Understand that written data and written procedures do not work well with men.
- Appoint male-positive men to Court reviews.
- Have pro-family Respondent programmes that seek to hold the individual responsible while at the same time trying to understand them and help them build relationship skills and retain their father relationships and responsibilities.
- Where at least one parent is supportive of contact, the grandparents need to have some rights of access to the grandchildren.
- Have free mediation available.
- Acknowledge Male PTSD and supply trauma support.

OPEN FAMILY COURT

Principles: Transparency and accountability plus respect for individual personal privacy.

Problems:

- The workings of the court are unseen and the outcomes appear inconsistent.
- There are no statistics available.
- Men feel disadvantaged by the proceedings.

Solution:

- That the Family Court proceedings be open or that the reasons for fear of unfairness and inconsistency be removed.
- That there be no media in the courts.
- That reports be open and accountable.

CUSTODIAL RESIDENCE

The principle: The power of the custodial parent should not be used to damage the relationship with the access parent vs the right for an individual to live where they want.

Problems:

Currently the custodial parent can move away from the vicinity of the access parent's residence.

The custodial parent can move frequently which presents an additional problem if the father chooses to move also to be close to his children.

Solutions:

- Movement away by the Custodial Parent be prevented on the basis that the child's needs for both parents are paramount.
- The custodial parent pays all costs of the access parent's access if that parent chooses to move away.
- All conditions of access to be honoured by both party or there is a penalty. The court needs teeth to prevent abuse of agreements.
- Fathers who fail to take up the responsibility of access be penalised due to both the short-term and long-term disadvantage to the child.
- Fathering courses for all fathers who go through the Family Court.
- Custody access disagreements have mediation available quickly.

TRAINING

Principles: Education creates changes and generates equality of gender better than regulation does.

Problem:

The last 40 years of eloquent feminism has left a system very educated as to women's perspectives and needs. There is a lack of awareness, articulation, and advocacy of men's experience, needs and perspective. Courts are then unwittingly delivering a one-sided service.

Solutions:

- Training for Family Court staff, social workers, police, lawyers, counselors, psychologists, and judges on gender balance and male issues.
- Create a father-friendly Family Court engagement procedure. (A 1 hour talk and briefing of respondent by court or externally contracted worker.)
- Family Court take notice of fathering research (especially the male positive research which has been largely ignored). Eg. Children do better with solo fathers than solo mothers due to the fact that fathers share time more with mothers and so they experience both parents more.

CUSTODY/ACCESS RESEARCH

Principle: Equality of gender in research. Reducing bias in research.

The problem:

- The ratio of research projects generally on social issues runs at 20 to 1.
- Research largely sets out to prove what it wants to believe.
- Much research on men [including fathers] is done by women.
- The positive or negative attitude of the researcher is often reflected in the research and the topics chosen.

Solution:

- Research on men and fathers is done by male-positive men.
- Social fora be established to mature the debate and issues.
- Statistics on the Family Court and its judgments and outcomes be made available to the public.
- There be urgent research on the following topics:
  - Effect on children of having 2 homes.
  - Length of wait by fathers in the Family Court.
  - Attitudinal alienation pressure by either separated parent. (Parent alienation syndrome in NZ.)
  - What really is in the best interest of child. What do children want?
  - The cost to fathers who are alienated from their children.
  - The costs to children of separation and alienation from their fathers.
  - The suicide rate of men post separation and in the Family Court.
  - Spousal violence by women on men.
  - Abuse of children not living with their father.

In conclusion it is important to acknowledge the power of listening. These men need to be listened to. In listening we respect the person's feeling and experience though it may be different from ours. In doing so, we reduce the potential for conflict. Words, however, have to be followed by action, or the trust that is being generated grows to greater mistrust. These wild and angry men are frustrated with their experience of the Family Court. That may not be our experience, but it is theirs and needs to be valued. They will not get everything that they want. No-one does, but there is a level of fairness that needs to be achieved before remaining differences can be dropped. For every man in a fathers' pressure group, there are many more who just give up in despair.

Every one of these men are hurt and they love their children. Some may be crippled in how they show it and need training.

Men will do anything for their children. In my work I have used the request; “Will you do this for your children?”, to motivate men to: go to courses, not suicide, go straight after prison, change parenting practice, get a job, go to counseling, and relate differently to their partners. Children need fathers. Statistics are clear that fathered children learn better, are more socially capable and reassured, work better, have better mental health, have a better standard of living, better self esteem, are less abused. Our boys particularly need fathers. It is better to heal families than throw them away as many separated fathers feel we do now.

Judge Mahony listened and was thanked for listening. You have listened. What becomes of this listening is up to us all.

Chapter Nine

CHILDREN AND FINANCIAL ASPECTS OF FAMILY BREAKDOWN

By Bill Atkin*

I THE PLACE OF CHILDREN

Children are one of the central features of family law. Much of the law addresses the relationship between parents and children and sometimes the role of the State when there are parenting failures. The United Nations Convention on the Rights of the Child appears to reinforce this.

Yet often the focus is on the care of children. This is entirely appropriate, but it means that children tend to be seen as passive rather than active players in the process. Many of the issues turn out to be ones between adults, with the child the mere subject-matter.

This somewhat jaundiced perspective is even more apparent when we consider the financial aspects of family relationships, especially when those relationships have ended. In matters relating to the division of property and the provision of income, the dispute is typically between the parents and sometimes, in the case of child support, with the Department of Inland Revenue. Children have few rights and their welfare and interests are only of marginal concern.

Ironically, children may be more central in unexpected situations. There are apparently 100,000 family trusts in New Zealand. The reasons for their establishment are various, although often to do with tax and other requirements of the State. Children however will usually be beneficiaries and therefore recipients of income and finance from the trust. Trusts may also be useful devices to ensure that funding for a child, maybe one with special needs, is ring-fenced. Another situation where children fare better is when one parent dies. If there is no will, then they have entitlements under the intestacy rules.[1] If there is a will and they are ill-provided for, they can seek a claim under the Family Protection Act 1955. Of course, the children in these situations are quite likely to be adults. Indeed, one criticism of the Family Protection Act is that it enables adult children in comfortable circumstances to get an unwarranted sum of money.[2]

This paper explores briefly some of the aspects of the law of relationship property and child support as it affects children. Other financial matters, such as benefits like the domestic purposes benefit and tax credits for families, are important but are not dealt with here.

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1 See ss77-77C, Administration Act 1969.

2 Cf Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, Wellington, 1997).

II RELATIONSHIP PROPERTY

In 2001 Parliament made significant changes to the Matrimonial Property Act 1976, even to the extent of changing the name of the Act to the Property (Relationships) Act 1976. The principal reforms were in force from 1 February 2002.[3] As is well known, they extended the property division rules to de facto relationships (including same-sex relationships) and survivors after a spouse or partner's death. The reforms were however much more extensive than this. The equal division rule was tightened but at the same time new powers were given to the courts to make orders in cases of economic disparity and to make it easier to reach property held by trusts and companies. Lots of other technical amendments were made, some of them of a tidying up nature, others of more substantive effect. On the whole, the new law is an improvement on the past, but there remain areas of uncertainty, especially surrounding the economic disparity powers. Also, the fact that amendments were made to the 1976 Act instead of a fresh new statute being enacted means that there is a very user-unfriendly numbering system. For a piece of legislation that impacts on so many people, Parliament has done the country a disservice by creating such a mish-mash.

All that said, the reforms contain only passing nods in the direction of children. Section 1M states as the third purpose of the Act the provision of a just division of property "while taking account of the interests of any children of the marriage or children of the de facto relationship". This is not new. It is largely the same as was found before in the title to the Matrimonial Property Act. At first sight, it might sound pretty good for children. But it is not. Children are not entitled to apply under the Act. They have no right to have their say, although the court can appoint a lawyer to represent a child if such an appointment is thought necessary or desirable.[4] It is very rare that one hears of such appointments being made in property disputes. Under s 37, various persons are entitled to be heard and appear as parties, but it is doubtful whether children can take advantage of this.[5]

Section 26 looks more promising for children, but appearances deceive. Echoing s 1M, it states that the court must have regard to the interests of minor or dependent children. This will relate to children up to the age of majority (20) and older children who are still "dependent". This provision cannot however, according to the Court of Appeal, be used as "authority for simply reducing the proper entitlement of one spouse and increasing that of the other", for example to give the custodial parent more capital.[6] The division of property is premised on the right of each adult party to receive a half share, subject to some narrow exceptions. Thus, the primary rules for dividing property have nothing to do with children and regard for their interests cannot upset these primary rules. On the other hand, the interests of children may affect the actual implementation of the division of property. In

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3 For more detailed discussions, see Atkin and Parker *Relationship Property in New Zealand* (Butterworths, Wellington, 2001) and Atkin "Family Property" in Henaghan and Atkin *Family Law Policy in New Zealand* (2 ed, Butterworths, Wellington, 2002).

4 S 37A, Property (Relationships) Act 1976.

5 *Thomas v Brougham* (1981) 4 MPC 200.

6 *Coxhead v Coxhead* [1993] 2 NZLR 397, 408.

particular, they may influence whether a court grants one party occupation of the family home or orders the home to be sold and the proceeds split.[7] Yet, even here s 26 is only of indirect application as there is a separate section dealing with housing. Section 28A states that the court, in deciding whether or not to make an occupation order, "shall have particular regard to the need to provide a home for any minor or dependent child". This does not however exclude other factors from the court's consideration.

So, the obligation in s 26 to have regard to the children's interests has in reality little impact. Arguably, there is good reason for this. The 1976 Act concerns property. This property is owned by one or both of the parents. It is not concerned with any property owned by the children. The children's property, which in most instances is likely to be negligible anyway or will be held in trust until the child reaches a specified age, is outside the scope of the Act. Furthermore, the Act enables the court to make orders which override the conventional legal and beneficial interests in property. It does so because marriage, and since the 2001 reforms, de facto relationships are regarded as partnerships of equals, both parties contributing in different ways to the common life. In exceptional cases where this concept bears little relation to reality the court can depart from the partnership model and divide property according to contributions.[8] Also, since the 2001 amendments, as noted above the court can make compensatory adjustments to take account of economic disparity. But otherwise, when the partnership ends, the property of the common life – "relationship property" as opposed to "separate property" which is property that has not been part of the common life – is divided between the parties on an equal basis. To suggest that children should get a share of the property or should justify one party getting more than a half share upsets the policy premises upon which the Act is based.

Yet, s 26 contains another rule which enable the court to settle relationship property (in whole or in part) "for the benefit of the children". Does this not undermine all that was said in the previous paragraph? The answer is potentially yes but in practice no. The power is not limited to minor or dependent children, so it could be used to benefit adult children. But the instances where s 26 has been used tend to be rather extreme and usually involve some misconduct. For example, there was a settlement in one case where the father had murdered his wife and in another case where the husband was a special patient under the mental health system as a result of killing his wife's sister.[9] It has also been used where the husband had disappeared for many years and neglected the children.[10]

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7 See ss 27 an 33(3)(a), Property (Relationships) Act 1976.

8 Ss 13-14A, extraordinary circumstances exception, and exceptions for marriages and relationships of "short duration".

9 *RN v RN* (1985) 3 NZFLR 694 and *S v C* [1998] NZFLR 734.

10 *Voorburgh v Voorburgh* (1979) 2 MPC 197 and *Dangerfield v Brewerton* (1985) 3 NZFLR 718.

Section 26 has arisen in two recent cases. In *Phillips v Phillips*[11] the wife sought to vest certain chattels in the children. Judge Fitzgerald held however that there was nothing to justify doing so and no explanation was offered. "The application appears to simply be a device by Mrs Phillips to increase her share, and to decrease Mr Phillips [sic] share in the relationship property".[12]

The result was different in *P v P*[13] but it appears that the parties agreed to a settlement in trust on their son. Judge Inglis QC referred somewhat obliquely to "cultural considerations" – the parties were from a Polish Catholic background. He held that the case was an exceptional one justifying a departure from equal sharing, and that the wife was entitled to 30% of the property. He further held that the husband should "buy out" the wife's share in the family home but that 30% of this share should go into the trust. The beneficial interest in the home was then to be divided evenly between the husband and the trust. This case illustrates how parties can invite the court to make a settlement but is not very helpful in situations where there is no agreement.

One of the major additions made by the 2001 reforms was the inclusion of two discretionary powers to redress economic disparities. Only the one contained in s 15 is really relevant to children, but as will become apparent this power is subject to several conditions and is unlikely to be run of the mill. Section 15 is as follows:

1. This section applies if, on the division of relationship property, the Court is satisfied that, after the marriage or de facto relationship ends, the income and living standards of 1 spouse or de facto partner (**party B**) are likely to be significantly higher than the other spouse or de facto partner (**party A**) because of the effects of the division of functions within the marriage or de facto relationship while the parties were living together.

2. In determining whether or not to make an order under this section, the Court may have regard to:

    (a) the likely earning capacity of each spouse or de facto partner:
    (b) the responsibilities of each spouse or de facto partner for the ongoing daily care of any minor or dependent child of the marriage or, as the case requires, any minor or dependent children of the de facto relationship:
    (c) any other relevant circumstances.

[11] New Plymouth Family Court 043/270/99, 14 June 2002.
[12] Para [39].
[13] Wellington Family Court FP 085 715 00, 31 May 2002.

3. If this section applies, the Court, if it considers it just, may, for the purpose of compensating party A, -

   (a) order party B to pay party A a sum of money out of party B's relationship property:
   (b) order party B to transfer to party A any other property out of party B's relationship property.

It will be noticed that an adjustment can be made only if there is a significant difference in both likely income and likely living standards between the parties. Furthermore the difference must be due to the marriage or relationship. The care of children may in some instances provide the necessary connection between what happened during cohabitation and any subsequent disparity, but it will not always be so. Ongoing responsibilities towards the children are relevant to the exercise of the discretion, but other circumstances, eg responsibilities towards the children of a reconstituted family, can also be taken into account. In part, the rationale of s 15 can be seen as support of the custodial parent, but it is not limited to this situation. The older woman with little or no career history is also the kind of person who may benefit.

The 2001 reforms were expected to spawn a vast amount of litigation, especially with respect to s 15. This has not in fact happened. Many have apparently been dealt with at settlement conferences.[14] Of the six judgments on s 15 that the author has so far seen, only two have given rise to a compensatory payment. They all involved children.

The first judgment to a large extent set the scene. *De Malmanche v de Malmanche*[15] was a decision of High Court judge, Priestley J, in an earlier incarnation a distinguished family lawyer. Here, the father sought an award under s 15. He was aged 62 and had left the advertising industry in 1991 when he was made redundant. He was looking after the parties' two sons and earned virtually nothing compared to his wife. On the face of it, this looks like a classic case for a s 15 award, one which would help the parent to bring up the children. However, Priestley J held that this was not merited. He stated that Parliament had not "conferred a broad and unfettered discretion. It has stipulated tight jurisdictional parameters…it would make little sense for Parliament to confer a broad discretion under s 15 which would enable the equal sharing regime to be subverted in an unpredictable way. Parliament has wisely delineated the jurisdictional field".[16] Although he purported not to comment on how the discretion should be exercised, Priestley J thought nevertheless that child support and spousal maintenance could often serve to redress inequalities.[17] On the facts, there was a significant disparity between the husband's income of $3000 and the wife's of $100,000. But it was held that as the husband was living comfortably in the family home

[14] *V v V* (Porirua Family Court, FP 169/00, 8 October 2002, Judge Adams).
[15] [2002] 2 NZLR 838, [2002] NZFLR 577.
[16] Paras [157] and [159].
[17] Paras [154], [167] and [191].

in Remuera, there was no real discrepancy in living standards. Further, his care of the children was counter-balanced by the use of nannies and the reason for the income difference was his voluntary redundancy 10 years earlier and bad career decisions since then.

In *Sullivan v Sullivan*[18] a s 15 award was refused for two reasons. The claimant wife was entitled to $500,000 worth of relationship property plus a share of farm partnership profits and when the interest was calculated, there was no significant income disparity. Furthermore, the reason why the wife could not work was her health, not as a result of the marriage. A lack of causal connection also explained the negative result in *Lo v Chu*.[19] Although the husband was earning $250,000 in Taiwan and the wife was unemployed in New Zealand with a child, the cause of the disparity was the parties' decision to relocate to New Zealand in 1999 and the wife's inability to find work. Also, the wife was getting over $1 million worth of relationship property. In *P v P*,[20] the husband was an engineer with a senior position while the wife did part-time secretarial work and looked after their 12 year old son. Although this looks like an appropriate case for compensation, an order was refused. Judge Inglis QC stated that "a much more detailed body of evidence is required, bearing in mind that it is for the wife to establish a clear evidential foundation upon which the Court would be entitled to exercise its various discretionary powers under s 15. In this are the Court is required to have some basis for making confident future predictions".[21] With respect to the child, the Judge was influenced by the husband's willingness to undertake daily care, but it should be noted that the wife had a protection order against the husband.

Compensation was granted in *Fischbach v Bonnar*.[22] The wife who had been a high earner before the first child was born was now studying for a law degree. The husband who was an engineer had returned to Germany and the court guessed that he would be receiving a high income. In deciding that compensation was merited, Judge Boshier took account of the husband's "declinature to participate in the expensive business of parenting children".[23] He then awarded the wife $30,000 which represented 40% of the husband's share of relationship property (and an unequal split of 70/30 in the wife's favour). It is not clear how this figure was reached nor whether the dollar figure or the percentage was the key feature. The Judge did suggest that quantum should not be approached in isolation but after having regard to how other property is divided. He also thought that the amount was sufficient to "redress the imbalance which has been foist upon the wife, and at the same time leave Mr Fischbach with a reasonable return on his investment in their relationship".[24] With respect, these points do not take us very far in ascertaining precisely how compensation is to be calculated.

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18 [2002] NZFLR 1037.
19 Auckland Family Court, FP 995-C-01, 2 August 2002, Judge Kendall.
20 Wellington Family Court FP 085 715 00, 31 May 2002.
21 Para [78].
22 [2002] NZFLR 705.
23 Para [65].
24 Para [66].

The most recent judgment on the question of s 15 is *V v V*,[25] in which Judge Adams awarded the wife $38,660 in compensation (the pool of relationship property being $700,000). However, there was an interesting twist in the order. The amount would reduce to $36,000 if the husband agreed to allow the wife to move to a nearby major city where the employment prospects for her would be greater. From a children's point of view, the case raises several points worthy of note. There were four children, 3 of whom were "aligned" to the father and the youngest aged 10 who was in the mother's custody. The oldest child was independent and lived elsewhere but the father was supporting a 19 and a 17 year old, and had the youngest child for a significant periods of access. The father was in fact seeking joint custody of the youngest child in separate proceedings.

The Judge held that the husband's income and living standards were significantly higher than the wife's. He said that "[a] prediction of likely income over several years can only be undertaken robustly. An assessment of living standards involves broad considerations. The comparison required by the section requires conscientious shrewd assessment in a broad brush manner".[26] The husband was earning $140,000 per annum whereas the wife was at least for part of the time since separation on a benefit and had also received maintenance and child support at times. The wife was qualified as a teacher but had been having trouble obtaining employment. Even if she did get a job, on the face of it there would still be significant disparity in income. A significant disparity in living standards is however not so obvious. The Judge accepted that, as a result of the property settlement, the wife would be able to buy a house and have a sum of perhaps $50,000 for investment. The husband on the other hand, as part of the property package, was to buy out the wife's interest in the relationship property and would have to borrow at least $220,000 to do so. Given also his support of the second and third children, it is a little hard to see how the parties' likely living standards were going to be so different. The Judge appears to have conflated the concepts of income and living standards into one.

The judge then considered whether there was a link between the disparity and the marriage and held that the ongoing child-care responsibilities for the youngest child were a real and substantial cause of her inability to get work. The job market was not to blame. He then moved directly to consider the question of quantum, without really addressing the intermediate question of whether the discretion should be exercised. That is surely moot in this situation, especially when the children are factored in. This was really an instance of split custody, with the husband having the larger share. Further, to pick up a point made by Priestley J in *de Malmanche*, child support and spousal maintenance might well be enough to redress any disparity and would also avoid the need to speculate about the future. Judge Adams admitted that he had to guess about matters such as the outcome of the joint custody application and future employment. Yet, when it came to ongoing maintenance, he accepted that an award could in theory be made but was not appropriate here.

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[25] Porirua Family Court, FP 169/00, 8 October 2002.
[26] Para 14.

On the question of quantum, the judgment is quite complex. Different calculations were made for different periods of time – from separation until judgment, from judgment until 8 months later when the wife might be expected to start earning, and for 5 years after that. From the shortfall in income during these periods were deducted amounts actually received or expected to be received by the wife and also contingencies for a range of matters such as a change in custody through to improved or diminished income returns. Interestingly, account does not seem to have been fully taken for all the periods of the husband's responsibilities towards the children, the possibility that the wife might repartner (the husband had already done so) and the husband's debts in servicing money raised to buy out the wife's share of the relationship property. Also, a little curiously, the contingencies were smaller for the period further into the future when one might expect them to be greater because of the greater uncertainties. The resultant amount of compensation that the husband was required to pay the wife meant that the division of the relationship property was approximately 45/55 in favour of the wife. The Judge stated that if this had turned out to be a 40/60 split he would have reconsidered the matter, but that was not to suggest that such a split or a wider one (as in *Fischbach v Bonnar*) would be wrong.

V v V is the first case to attempt to come to grips with the difficult question of assessing how much compensation should be ordered under s 15. The attempt is a very worthy one, even though we might have a hesitation or two about some of the steps. But at the same time, the case highlights several issues affecting children:

- How should the court take account of split custody, including responsibilities to older children?
- How should it take account of access, and child support payments?
- Should it second guess the outcome of a pending custody application, or of possible future changes in custodial arrangements?
- Should child care matters really influence the division of relationship property or should these be catered for by child support and maintenance?

III CHILD SUPPORT

Relationship property legislation is very important when domestic partners separate. Often these people will be parents. As we have seen, the Property (Relationships) Act 1976 does not ignore children but they tend to figure at the margins. The Act is not designed to recognise children's rights nor to meet their needs.

The Child Support Act 1991, on the other hand, ought at first blush to serve these purposes. It is supposed to ensure that regular financial payments are made for the ongoing financial needs of a child. At one level, the scheme achieves this for many people by its straightforward formulaic approach. The relevant data is put in the machine and out comes the amount to be paid. But at another level, the scheme is a rigid answer to a human situation. Departures from the formula assessment are possible but they are narrowly defined.

The design of the legislation and its operation are quite distinct from the rest of family law. Indeed, a major aspect of family life is treated in isolation from the other issues that arise. This confounds any holistic treatment of family breakdown, and offers no encouragement to the parties to work through all the issue and reach their own solution.[27]

Thus, there are macro question marks about the child support scheme. These are reinforced when it is Family Court was inundated with applications on a scale hardly dreamt of. That the outcry has settled down may have more to do with a "grin and bear it attitude" and the fact that the multitudinous transitional problems have now worked their way through the system than anything to do with the value of the scheme itself.

One of the great uncertainties here is that we do not really know how child support is really working. It may be "efficient" but is it really helping children, families and their caregivers? Independent research is needed to properly evaluate the scheme. Are children really being helped? What is the impact on reconstituted families? To what extent does it encourage or discourage liable parents to be active in the lives of their children? Should there be incentives so that the level of support both in dollars and in other tangible ways is increased? Does the scheme help caregivers who are on benefits at all? To what extent does it help those who are in low paid jobs? Is the lack of a real link between contact and payment a problem? Are there other ways of payment, eg into a trust fund, which would improve the level of support and compliance? These are just a few of the questions which could be explored.

There are also many micro issues that attention could be drawn to. Just a few are mentioned here.

The Act is about child support. In this modern era, one would expect that a child would be able to obtain the child's own "child support". But this is not so. An attempt to do so by a child who had left home and who wanted support from her parents failed.[28] Child support does not go to the child but to the custodian, or, if the custodian is on a benefit, then to the State. There is no obligation on the custodian to spend the money on the child. Is there any reason why a child should not be able to apply for child support, the money in appropriate cases going into a trust fund for the child's benefit? The cynical answer is that the child support scheme is not child-focused, but adult-focused.

The cynical view is strengthened when we remind ourselves that the Act does not make the welfare of the child a primary consideration, as required by the United Nations Convention on the Rights of the Child. The "Trapski Report" eight years ago,[29] which was damning of the scheme, recommended that the Act be amended to incorporate the welfare criterion. Nothing has happened. Perhaps this is not surprising. Welfare is a flexible notion used to meet the needs of the individual child. Arguably, it is incompatible with a formulaic rigid

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[27] For further on this, see Atkin and Black "Child Support – Supporting Whom?" (1999) 30 VUWLR 221.
[28] *Hyde v CIR* [2000] NZFLR 385.
[29] *Child Support Review 1994: Report of the Working Party* (8 November 1994).

scheme. But if so, what does that say about the scheme? It also raises the problem of which children should be the focus of attention. The child who is the subject of the application is the obvious answer. But there will often be other children in the broader picture. Custody of children may be split between the two parents. Further, there may be "new" children, frequently step-children, whose interests must not be left out of account. To give it credit, the child support scheme does make some allowance for the reconstitution of families in the "living allowance" part of the formula and in some of the grounds for departure.

One of the interesting advances in the reformed Property (Relationships) Act 1976 is the ability of the court when dealing with property matters to make an order with respect to child support. This could be a departure order but it could also be a lump sum order. There is great potential in lump sums. They can be used for special capital needs of the child or even be placed in a trust fund for things like education. The trouble is that the Act is not clearly worded and the courts have interpreted the lump sum provisions in a way which renders much of the potential nugatory. They have said that lump sums cannot be awarded for any more than would be awarded by way of weekly child support, which when totalled may be a relatively small amount.[30] This was not so under the repealed child maintenance laws. Thus, in one case where it was thought that an order of around $20,000 was justified for the children's upbringing, the order had to be limited to $2602.[31]

The Act is badly drafted. Many examples could be cited but a recent judgment highlights one in particular. Departure applications are first dealt with by an internal review with Inland Revenue. To succeed, among other things, "special circumstances" must be shown. If dissatisfied, the applicant can go to the Family Court invoking the same arguments. But if a departure has been granted, a person objecting to the departure can also seek a departure order through the Family Court but will find the going tough. The fact that the Commissioner has granted a departure, even if wrongly, is not a "special circumstance". The respondent cannot argue that the basis for the departure was wrong. In other words, the scales are not evenly balanced.

In *Johnson v Commissioner of Inland Revenue*,[32] O'Regan J said that "where the Commissioner does not order a departure, an applicant will receive an effective subsequent review from the Family Court, but where the Commissioner does order a departure the applicant will not receive such an effective subsequent review. It is hard to believe that the Legislature would have intended that outcome." There is "a very strong case for legislative intervention to correct what appears to be an anomalous provision in the Act."[33] The Judge thought that a comprehensive overhaul is needed.

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30 *Duncan v Videan (No 2)* [1997] NZFLR 721, *Taylor v Oliver* (1997) 15 FRNZ 392 and *Evans v Evans* [2001] NZFLR 202.

31 '*Evans v Evans* [2001] NZFLR 202.

32 [2002] NZFLR 648.

33 Paras [40] and [41].

The liable parent in *Johnson* resorted to High Court judicial review of the Commissioner's decision to resolve the procedural mess. O'Regan J held that such a decision was subject to judicial review and furthermore, the Commissioner had made an error in law and therefore the application for judicial review was successful. Resort to the High Court in this way should however be unnecessary. This is an example of how the child support legislation needs to be fixed.

CONCLUSION

Children are referred to in the Property (Relationships) act 1976 but they are not central. The Act is adult focussed. Surprisingly, this is also true of the Child Support Act 1991. Research is needed to measure the impact of both pieces of legislation on children, families and individuals.

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