

ONTARIO

CANADA

Background

Among the waves of immigrants who have settled in and developed Canada, the British have been the ones to stamp their language and institutions most effectively upon the country. Perhaps the centre of their influence is Ontario though it is also the province that has attracted the largest and most diverse groups of immigrants from other places. It seems therefore the province which would offer the best insights into the working of family laws and procedures. In addition to this consideration, its choice was influenced by the fact that in the last fifteen years a great deal of work has been done in this area, spearheaded by the Ontario Law Reform Commission. Its Reports and legislation which has resulted in acceptance of some at least of their recommendations give a clear picture of the legal view of the family and its workings, and this will be looked at in some detail later.

Elsewhere the view of the family and how it is expected to function is much less clear. Observers and planners from other disciplines and other points of view give a good deal of attention to the multi-racial, multi-cultural nature of Canadian society, and indeed the pursuit of 'multi-culturalism' has become a significant policy objective in recent years. A paper published by the Ministry of Social Development of Ontario in May 1979 entitled "The Family as a Focus for Social Policy" began by stating that "..... the concept of family entertained by each of us is a function of our age, sex, ethnic origin, language, economic position and even the region where we live". That it takes many forms in Ontario and includes complex family establishment within various cultural and ethnic groups and that these had to be acknowledged and protected as a matter of policy was accepted. But it is obvious that if the support, strengthening and protection of the family is to be a focus for social policy there has to be some general agreement about its nature and the kind of functioning public policy considerations should accept and promote. The paper does not deal with these very difficult questions but instead turns first to description through statistics.

The family in Ontario: the statistical view

The statistics quoted show that there is no decline in the popularity of marriage, though the figures include a steadily increasing proportion of second marriages. Over the last twenty years there has been a marked fall in the birth rate, though the figure conceals some large families in some of the ethnic groups. Families based on marriage with children are still the main group

in the population though there has been some growth among the number of births to mothers who are not married. Most of these latter are under twenty, but what is perhaps of greater significance is that a sharply increased number of these are keeping their children rather than offering them for adoption.

Working habits have changed too. In more than half of the number of families husband and wife both work outside the home, and this includes roughly 45% of those in which there are children of school age. Life expectancy has lengthened significantly throughout this century and a man can now expect to live to 72, a woman to 78. Not only has this implications for the care of the elderly, for the state as well as for families, but the growing contribution by older couples to the rate of divorce has been noted.

Reform of family law is often sought by persons and by groups who wish it to embody "enlightened" or "progressive" ideas. Family law has, however, a fundamental role that concerns such as this may distort. The way families function depends upon many things - geography, economics, health and sanitation for example, to name but a few of the things which influence the way life is lived in any country. There is evidence from both history and anthropology that family has developed by legitimising practices which have grown up in response to the circumstances of life at a particular time in a particular place. There are very few countries where this connection can be clearly seen today, but this does not mean that it does not still exist and still has importance. There is some negative evidence for it in those countries where the law, being perceived as irrelevant to the needs of people, is ignored.

It is in this context that the family law of the following sample of Commonwealth jurisdictions is considered, bearing in mind the influence of English family law on their development and their efforts to achieve reform. It should be made clear at the outset that an acquaintance with English family law is assumed. Consequently interest is centered on the difference from, rather than the likenesses to, the English model where these have arisen from social or constitutional differences or, in some cases, a combination of both.

The sociological view

Even so cursory a reference to these statistics about families has highlighted a number of the problems to which the law, the courts and the social services will have increasingly to find solutions. Solutions acceptable to the people involved depend upon an understanding of the way families function. But in spite of the way public interest in changing family patterns has led to discussion, controversy, the setting up of new institutions for research and education like the Vanier Institute of the Family as well as considerable research undertaken by university departments, public and voluntary social service agencies, the nature of the Canadian family remains elusive. However, the periodical literature, social agency reports and the media comments on the working of these, and on family problems generally, suggest that the generally acceptable model of the Canadian family is that of the dominant group in the society - formed by British and American attitudes. These are admirably set out in Shorter's "The Making of the Modern Family". In his view, three things underlie the functioning of the modern family - romantic love as the basis for marriage or other pair formation, the importance attached to the mother-child relationship (now becoming more parent-child) and the boundary that exists between the family and the surrounding community, expressed in a very real sense of family solidarity. This is not to underestimate the influence of peer group association and pressure, and the growing assertion of independence by women both in the economic and social fields.

Other studies, collected in "Canadian Society: Sociological Perspectives" largely agree with these emphases though some stress is placed on the view that home and the male career still jointly provide the base from which the family articulates with the community. The importance of what are seen as 'good' child rearing practices is also underlined. These are geared to the freeing of the child to develop individual goals and patterns of living. It is the duty of the family to see that the child is equipped to use whatever means are available to better himself. In an essay on 'Family and Socialization in the Upper Class Community' stress is laid on the importance of the individual in Canadian society. The conclusion is 'The democratic norms require that whatever the training given by the home, the child must be treated as having rights and privileges because he is a human being.' The author of another paper remarks that the Canadian pattern of the egalitarian society is very attractive to immigrant children. He finds that 'immigrants are rather indifferent to the Canadian status system, but it is not so with their daughters' - a comment with which many social workers would agree.

The status system is only one aspect of the social system that the children of immigrants learn well in schools. The public school system is a most effective means of teaching the emphasis that the society gives to individual rights, as well as approving group pressures on conformity in social and mating habits and behaviour. Many of these conflict with the family norms of some immigrant groups and the resulting family stress has been a growing matter of concern.

Discipline

It is interesting that in the light of the acceptance of multi-racialism and of the fact that there are cultural differences in the ways families function, that there was no discussion in the pamphlet "The Family as Focus for Social Policy" about the problem of discipline and what would be socially acceptable forms of it. Emphasis was laid on the socialization of the young and the maintenance of social order and continuity as important roles for the family in the community. Each of these imply the exercise of some form of family discipline. Discussion about discipline has in general concentrated on the forms of discipline, but it would seem more important to understand what kinds of behaviour attract discipline within the family and why.

The ends of discipline are surely as important as the means, and their inter-relationship is crucial to an understanding of the things that a family feel are important in the functioning of their communal life.

The view underlying the Report on Family Law

The six volumes of the Report on Family Law - the work of the Ontario Law Reform Commission - also embody a view of the family in Ontario and the way it functions. In passing it may be observed that by far the largest amount of space is given to the consideration of family property and support obligations - these being factual matters capable of both legal determination and solutions. In these reports generally the emphasis is on the economic rather than on the moral basis of marriage. The husband and wife relationship is seen as approaching an equal partnership with joint management of family affairs and possibly also joint ownership of family assets. Freer personal relationships outside marriage are tolerated and the expectation is that each spouse should be capable of self-support. However it is acknowledged that the factual situation falls some way short of this. For example, on page 4 of the report on Family Property, it is stated "... the dependency of the wife is still very much a fact in twentieth-century Ontario On a secular basis, marriage can be characterized as an economic arrangement that assumes this dependency .. with a legal framework that is designed to provide a remedy for the wife if the husband's obligation to maintain is not properly discharged".

The volume that deals with Marriage also underlines the importance of the economic basis of marriage. It states positively (p.11) that "the stability of the marital union is and will continue to be of vital importance to Canadian society". The idea of marriage on which its proposals are based is set out in the following terms - "Marriage represents the creation of a new family unit by persons who have detached themselves from the homes of their own parents. The fundamental considerations must therefore be whether the maturity and economic independence of the spouses is consistent with the successful founding of such a unit and whether there exists the basis for a viable family group which can provide care and protection for dependents". This point of view is particularly stressed in the discussion on the age of marriage. But it may be questioned whether it represents a generally accepted point of view. For example, the booklet on Family Law Reform issued by the Ministry of the Attorney-General in 1976 contained the following statement - "A 16-year old is entitled to quit school, drive a car, apply for a social insurance number, get a job, apply for unemployment insurance or welfare, leave home or join the armed forces". It seems clear that for most young people growing up in Ontario this is fair statement of what they expect. If there is added to this the freedom of association between the sexes and the greater tolerance of sexual activity among the unmarried, it is unlikely that the view of the meaning of marriage on which the Commission based its proposals has much meaning for many of them. It is rather than any question of economic viability that will lead to the formation of pair relationships and sometimes marriage.

Here in Ontario, as elsewhere, early marriage because of pregnancy often leads to early divorce and in turn to second marriage. There are a number of indications to suggest that the question of second marriage will grow in importance. If, as is suggested above, economic viability is important in achieving stability in marriage, a good deal of thought will have to be given to the economics of second marriages and the way these affect support obligations arising from the first marriage. The Report on Family Law hardly dealt with this topic at all, though perhaps the importance it attached to the notion that upon separation the dependant spouse should be "restored to self-sufficiency" indicates what would be their preferred approach to the problem. It suggests there may be something of an urban bias in their way of looking for solutions. It could also seem neither fair nor just to a number of ethnic groups in the province.

Legislative Reform

The work of the Law Reform Committee initiated a very active period of discussion and consultation about the way family law should be changed. The legislative programme which resulted could be said to have begun with the passage of the Unified Family Court Act in 1976 which enabled the setting up of an experimental court exercising the full range of federal and provincial jurisdictions in family matters in the Hamilton-Wentworth area. Between 1978 and 1980 a number of Acts dealing with various aspects of family relationships were passed. These Acts will be referred to in more detail below. In general, the aim of the programme was so to alter the concepts about family relationships and obligations that the law would reflect the social and economic realities of life in Ontario in these days, and would take into account the expectations, the rights and responsibilities of all family members. Procedurally, it brought within the jurisdiction of the Provincial Court (Family Division) all those matters with which it was constitutionally able to deal, eliminating some of the confusion caused by the pursuit of similar remedies under different statutes and in different courts.

The Family Law Reform Act which came into effect in Ontario on the 31st of March 1978 is based largely upon the recommendations in the Family Law Report and the public reactions to these. In its preamble it states that "in order to encourage and strengthen the role of the family in society it is necessary to recognise marriage as a form of partnership". In the body of the Act this is reaffirmed in sec.4 (5) "The purpose of this section is to recognise that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to an equal division of the family assets ..." unless this would in the particular circumstances of a marriage be inequitable. Clearly a claim to an equal share of the family assets is dependent on assumption of family responsibilities unless there is any particular reason why a spouse should be excused from carrying these out. Upon divorce the fact of marriage will not be enough to support a claim to maintenance. This basic change in the way the law regards the relationship of husband-wife is underlined by the repeal of a number of Acts, such as the Deserted Wives' and Children's Maintenance Act, the Dower Act, the abolition of the right to alimony and any action for the loss of consortium. It is noteworthy, too, that the individuality of husband and wife recognised by the Act extends to the matter of the acquisition of domicile, and its provisions apply to marriages which are either actually or potentially polygamous.

The other important change embodied in the Act is the recognition that a man and woman who cohabit, but do not marry, have not only a claim to be regarded as a family but merit some protection from the law in this relationship. While not treated as spouses for the purpose of the division of property acquired during their relationship, they are so regarded for the purpose of support obligations. It is of interest too to observe that among the circumstances to be considered in determining the amount of support there is included "a contribution by the dependent to the realisation of the career potential of the respondent". So far as property sharing is concerned however they may, like any other two persons, enter into an agreement about this which may cover either the time of their cohabitation, or upon their ceasing to cohabit or upon death.

The new Marriage Act, the Children's Law Reform Act and the Child Welfare Act taken together with provisions concerning support in the Family Law Reform Act has brought up to date the law concerning children. Perhaps the most far-reaching change is embodied in the provisions of the Children's Law Reform Act which set out the ways in which parentage is to be determined, and effectively abolishes the old distinction between legitimate and illegitimate children. The Act declares that so far as Ontario law is concerned, a person's right will be determined without references to whether his parents were married or not. Since the establishment of the mother-child relationship is usually a straight-

forward matter, the Act deals in some detail with presumptions of paternity. Cohabitation, whether within or without marriage is a strong presumption of paternity, and this extends to a birth within three hundred days of the cessation of such cohabitation. Acknowledgement of paternity can be presumed by either subsequent marriage, or by registration as a father under the provisions of the Vital Statistics Act. Previous court proceedings in which a finding of paternity was made will also be enough to found a presumption. But presumptions may always be challenged and can be refuted upon evidence. The Act also provides that applications for declarations either of paternity or of maternity may be made to the courts, but since this is a matter of status, jurisdiction is confided to the Supreme Court of Ontario, or to the Unified Family Court in Hamilton-Wentworth which has been given jurisdiction in some matters not enjoyed by other provincial Family Courts.

The arguments of the Law Reform Commission against permitting early marriage appear to have been accepted. The law had permitted marriage at the age of fourteen years on the ground of the desirability of preventing illegitimate births. Since the illegitimate no longer suffer disabilities under the law the main reason for permitting very early marriages seems to have disappeared. Now, as in most other countries and jurisdictions, a person under sixteen years of age may not marry in Ontario. The age of eighteen is the age of majority and therefore consent is necessary for persons under that age to marry. Normally it is the consent of parents that is needed, though if such consent cannot be got or is unreasonably refused, application may be made to a judge for an order dispensing with such consent.

The Family Law Reform Act sets out the support rights and obligations as between parents and children. These do not depend upon the marital status of the parents but on the established parent-child relationship. To the extent that he or she is capable of doing so, every parent has an obligation to support an unmarried child under the age of eighteen according to the needs of that child. The obligation to support a child between the ages of sixteen and eighteen, however, depends on whether or not that child is still under parental control. If not, there is no obligation. The child's obligation to support a parent depends not only upon the relationship and the need of the parent but upon whether the parent had cared for and provided support for the child while he or she was a minor.

The whole approach to the determination of which of the parents who no longer cohabit should be given custody of the children has been changed. "The best interests of the child" (sec.35(1) Family Law Reform Act) now determine who shall have custody, whether it be mother, father or any other person. This approach conflicts in some measure with the handling of custody matters under the Divorce Act. The grounds for divorce usually influence in a great measure how decisions regarding custody matters arising from divorce are handled. The 1969 Act retained the usual matrimonial faultground but added one which was not based on fault - separation of between three to five years duration depending upon the circumstances. In spite of the fact that a large number of persons took advantage of the new ground, the majority of the cases still require the proof of matrimonial fault. The finding of guilt in such cases usually has a considerable effect on determining which of the spouses gets custody and even rights to access, though the interests of the children are taken into account. The need to harmonise the different approaches to custody matters is discussed later.

The constraints on reform

With the passing of the Family Law Reform Act, the Marriage Act, the Succession Law Reform Act and the Children's Law Reform Act the Ontario government has done a notable job of tidying up the laws directly relating to families, so far as this lay within the competence of its legislation. But there are still two major areas of concern. The first arises out of the constitutional split between the federal and provincial governments of powers to legislate in the family law area.

The second is that, because of the division of power in the appointment of judges there are still procedural difficulties in the way of the smooth handling of family matters by the courts, even though some attempt has been made to tackle the most obvious problems by the setting up of an experimental Unified Family Court in the Hamilton-Wentworth area.

Constitutional division of legislative powers

The fact that Canada is a confederation of provinces and territories, each with marked local loyalties and a desire to solve their problems in their own ways has to be borne in mind in looking at developments in the family law area. The division of legislative power between the federal government and the provinces, and the differences between the provinces as a result of the manner of settlement, the time at which they joined the confederation and the circumstances under which they did so, are reflected in the difficulty of harmonising the administration of family law in a country in which people move freely between provinces and between jurisdictions.

The division of legislative power between the provinces and the federal government weighted the balance in favour of the centre. The British North America Act gave to the federal government the legislative basis for creating a nation state and necessarily included in this was the power to deal with matters such as nationality and status. In the family law area, the federal government was assigned the power to legislate concerning marriage and divorce, the provincial legislatures the subjects of the solemnisation of marriage and property and civil rights. As a reading of the decided cases show there is sometimes only a very fine line to be drawn between, for example, the capacity to marry and the formalities which the licensing procedures stipulate. On which side, for example, does the age at which a person may marry fall? The Ontario Legislature has now taken the step of including provisions about age in the recent Marriage Act. Persons under sixteen may not now marry in Ontario, and between sixteen and eighteen parents' consent is necessary unless judicially dispensed with. Perhaps a judicial test will be needed to demonstrate whether this has solved one aspect of this problem.

Maintenance is another area in which the split of powers between the federal and provincial governments can create difficulties. In 1969 the Federal Parliament passed a Divorce Act (R.S.C. 1970, c.D-8) which established the grounds for divorce and empowered courts granting divorce to make corollary orders for maintenance of a spouse and children of the marriage. The Ontario Legislature has always exercised the power to make an order for the maintenance of a wife during her marriage. Because of the doctrine of the paramountcy of federal legislation over provincial when dealing with the same matters, upon divorce a provincial order would cease to have effect even if no order for maintenance had been made under the Divorce Act. The confusion this created was considerable, but it has now been tidied up in the Family Law Reform Act sec.20(2) which provides that where a marriage is terminated by divorce or nullity and there has been as a result of the hearing no judicial determination of the question of support, an order made by a provincial court continues in force. The view is still expressed, however, that the provision in the Divorce Act of the power to make an ancillary order for maintenance was an error that unnecessarily confuses the settling of financial matters between divorcing spouses. The consideration of the obligation to maintain and the quantum of maintenance cannot really be separated from other property matters. The division of family assets, the rights to occupation of the matrimonial home are matters for the provincial legislature and are dealt with in the Family Law Reform Act 1978 of Ontario. It would be much tidier legislatively and much easier for divorcing couples if the ancillary powers concerning maintenance could be excised from the Divorce Act, especially as, on the question of the conduct of the spouses affecting the right to as well as to quantum of support, the federal and provincial governments are now much closer together.

Because of the difference of approach to the provision of maintenance which underlay provincial legislation on the one hand and the federal Divorce Act on the other, a spouse in a marriage sometimes felt obliged to seek a divorce so as to have the advantage of the more generous provisions for support available under the Divorce Act. This kind of hard choice is no longer necessary. Under the Family Law Reform Act of 1978, every spouse has an obligation to support himself, herself and the other spouse in accordance with need and the capacity to provide support. Marital misconduct has ceased to have the crucial place it did in determining eligibility for support and it is only considered when "it is so unconscionable as to constitute an obvious and gross repudiation of the relationship." (Sec. 18, (6)). In addition Ontario has adopted a family assets regime based upon equal shares in the family assets, though spouses can contract out of this if they wish. The new provisions, taken together with the change in support obligations means that couples in disagreement are no longer pressed by economic considerations to regard divorce as the only real option they have. There is now the opportunity for counselling, conciliation or even temporary separation to be tried with some chance of being effective.

It should however be pointed out that in adopting a view of marriage as a partnership between spouses and basing its new legislation on this, the Ontario legislation has gone beyond the federal view of the relation between spouses as expressed in the Divorce Act. There are probably some wives who may prefer to apply for maintenance under the provisions of the Divorce Act where in making an order for such a claim during the proceedings there is a rebuttable presumption that the wife is dependent upon the husband for support. In addition, evidence of the existence of a valid marriage will in general be enough to found her claim. A wife's ability to maintain herself has to be established by the husband if he disputes his obligation to support her. It may be only a small interim gain, but it helps to confuse the picture.

The meaning of spouse has been widened in Ontario. So far as the application of the family assets regime to property is concerned it includes persons whose marriages are voidable but have not been annulled, and persons whose marriages are void but who continue to cohabit. So far as support obligations are concerned it now takes in persons who live together without having gone through any form of ceremony, valid or not, and have lived together for not less than five years, or have a child and a relationship of some permanence. The central place of support obligations in the functioning of the family however formed, has been recognised by the law and it can be expected that even more effort will be made by the courts and ancillary services to see that maintenance orders are obeyed.

The special problems of maintenance enforcement

The enforcement of maintenance orders is always a difficult problem, but it is especially difficult in a country like Canada where people move freely across provincial borders and where each province has its own laws and procedures on the subject. The Reciprocal Enforcement of Maintenance Orders Act has gone some way toward meeting the problem, but it does not always help if the order requires to be varied as well as enforced. Judicial decisions about the power to vary in the various provinces have not really helped to clarify the matter.

All across Canada a lot of time and thought has gone into work on the problem of enforcing maintenance orders. There appear to be a limited number of options - attachment or garnishment of wages, payment through court officers with automatic enforcement procedures if there is default, charges against property whether real or personal and, as an ultimate option, imprisonment. But it has been realised that one of these, either separately or together, will guarantee that support obligations will be honoured even when there is no lack of financial resources.

The Alberta Institute of Law Research and Reform has begun to tackle the problem from another point of view. They are looking at why people avoid paying support obligations. In order to carry out their research they had to trace a number of people who use movement as a way of avoiding payment, and in the process discovered that it was not too difficult to find them if one persevered and used the agencies available in the community. The most interesting finding that has resulted from their preliminary report is that support orders are honoured when some obligation is felt to the recipient even if other emotional ties have been formed. Where no obligation is felt, or there is hostility, it is very difficult to secure payment of the amounts ordered. This suggests that, as has been found in other countries, where the amount of support ordered has been the result of agreement between the parties it is more likely to be paid. It also suggests that there may be some ground for thinking that orders relating to spouses should be separated from orders relating to children, as when a marriage breaks up the hostility is more often than not centred on the spouse rather than on the children and it might be easier to get support for the children if this were done. Clearly there is much more work to be done on this problem but it seems a very promising line of enquiry.

Custody

The custody of children is another area in which the division of legislative power between Parliament and the Provincial Legislature may cause difficulties. An application for custody of "the children of the marriage" may be made as ancillary to a divorce petition, and is in these circumstances dealt with under the Divorce Act. All other applications for custody, including those where a divorce is not granted, can now be dealt with under Section 35 of the Family Law Reform Act of Ontario. In discussing the problem of whether or not one court exercising power to make an order for custody under one Act could have this order overturned by another court exercising jurisdiction under another Act, the Report on Children, a volume of the Report on Family Law by the Ontario Law Reform Commission, referred (p.108) to "the fluid nature of custody disputes". By its very nature an order for custody cannot always be a once for all time settlement of the matter since changing circumstances may require that the matter be reconsidered.

Since the Family Law Reform Act has clarified the law relating to orders for the custody of children, including applications to alter, vary or discharge those orders, the only real difficulty remaining concerns orders made ancillary to divorce under the Divorce Act. Under sec. 92(13) of the BNA Act the provinces have the exclusive right to legislate concerning property and civil rights, and these include custody and access, maintenance and alimony. But in the Divorce Act of 1970 the Federal Parliament provided that ancillary relief by way of maintenance and alimony, custody and access could be ordered. Constitutional challenges in the Papp and Tapson cases failed, and the Ontario Court of Appeal held that federal legislation on these matters was not ultra vires. Other provinces have agreed that such powers are inherent in the right to grant divorces and could not be challenged. But the federal powers are very limited. They cover only matters raised as ancillary to a divorce action, and so far as custody and access are concerned are exercisable only when a divorce is granted. Also it is limited to 'children of the marriage' - not necessarily all children for whom the couple have taken responsibility as parents. But custody applications can arise apart from divorce, and even before application is made for divorce. Under section 35 of the Family Law Reform Act "... either parent or any person..." may apply for the custody of or access to a child. Though the Act provides that agreement between marriage or cohabitation partners on the right to custody of or access to their children is not permitted, these matters can form part of a separation agreement between the partners. However, the right of the court to disregard any such agreement is preserved where in the opinion of the court this would serve the best interests of the child.

It would seem in the circumstances that parties contemplating the possibility of divorce and anxious not to submit their children or themselves to the strain of a custody battle could settle that matter in the way the provincial legislation indicates. It would make no real difference to the custody arrangements whether or not the divorce was granted and prevent the children, however inadvertently, being used as pawns in the divorce battle. So long as divorce proceedings retain an adversarial character it may be difficult to persuade lawyers to adopt this approach to the determination of custody particularly as it is often seen as having a bearing on decisions on maintenance. Indeed, the Regulations 450/77 made under the Unified Family Act 1976 require that applications regarding custody be supported by financial statements, underlining the inseparability of financial considerations and custody matters.

Any approach such as that suggested above to the handling of custody matters in a situation where divorce was contemplated or decided upon, would require that the relationship between the powers exercised by the federal and the provincial jurisdictions in this field be clarified. There has been much discussion on this topic insofar as it relates to cases in which custody has been awarded ancillary to divorce but subsequently the need has arisen for a further custody order under provincial child protection legislation. The discussion has centred around two points, the nature of the application of the doctrine of federal paramountcy in the family law area where there is much overlap, and also the need for clarification of the nature of the power to make custody orders under the Divorce Act. On the paramountcy issue recent decisions in family law cases have strongly indicated that the doctrine applies only when federal and provincial legislation expressly contradict each other, and that so long as this is not the case, both may legislate in the same field within their powers to do so. As to the second point, the extent of the power under the Divorce Act to deal with custody, as already noted, is limited to those cases in which a petition for divorce is granted and limited also to the children of the partners. It may be that in the circumstances it is effectively limited to the consideration of custody as between the parties with the best interests of the children determining the outcome.

A comment in the Report of the Law Reform Commission of Canada 1979 on the topic of economic re-adjustment on the dissolution of marriage shows that there is some recognition of the problem of dealing with custody in the context of a divorce action. It says (p.48) "Custody considerations (under the Divorce Act) sometimes over-emphasise inter-spousal matters to the exclusion of the all-important parent-child relationship". It goes on to suggest that a different timing of the hearing of custody matters in divorce proceedings and a different forum for consideration of it might put the emphasis where it belongs - on the interest of the child, which is often bound up with maintaining a relationship with both parents during minority.

Federal and provincial powers to appoint judges

In addition to the division of legislative powers between the federal and provincial governments, the administration of family law in Ontario is affected by the division of power between them in the matter of the appointment of judges. The source of a judge's appointment determines the jurisdiction which he may exercise. Under sec. 96 of the B.N.A. Act the Governor General is given the power to appoint judges of the Supreme Court and of the County and District Courts in each province. Judges of the Provincial Courts are appointed by the Province. In practice this has been interpreted so as to draw a jurisdictional line between the courts in which federally appointed and those in which provincially appointed judges sit. The test as to which side the jurisdictional divide a matter falls is determined even today by reference to the powers exercised by the judges of the Superior, District and County Courts at the date of Confederation. The court system in Ontario at that time was modelled on that of the English courts, an example of the way in which the English legal past continues to dominate the Canadian present.

How this division of judicial powers works in practice can be seen in the provisions of the Family Law Reform Act. The whole of Part I of this Act deals with the division of property between spouses under a family assets regime, as well as the disposition of other property owned by them which falls outside the definition of family assets where it would seem fair and equitable that this be done. Family assets are defined to include the matrimonial home, usually the most important piece of property owned by spouses. Jurisdiction over these matters falls outside the scope of the judges of the Provincial Court (Family Division). Also their power to make orders for support is limited as they cannot order a lump sum to be paid or held in trust, nor that any specified property be held in trust or that a life interest in it vest in a dependant. They cannot even secure the payment of an order through a charge on property or the like. In effect, all the ways in which an order for support could be secured thereby lessening resort to enforcement proceedings through the court are denied these courts as a result of the constitutional limitations upon their powers. Exclusive jurisdiction, however, is given to them over paternity agreements concerned with arrangements about payments for pre-natal or birth expenses, support of a child or burial expenses of the child or mother, entered into by a man and a woman who are spouses. Generally speaking, then, these courts cannot deal with a very important range of family concerns that often lie at the heart of the settlement of a family's problem.

The Unified Family Court Act (S.O. 1976 c.85) is an attempt to solve the constitutional problem. Because of constitutional considerations, the initiative for this had to come from the federal government. The several studies on family law procedure undertaken during the ten years previous to 1976 had clearly indicated the need both to bring the law into line with the requirements and expectations of families, and reduce the confusion in its administration by reducing the number of courts to which application could be made for a variety of sometimes conflicting reasons. Access to the courts needed also to be simplified. On the administrative and procedural side, the most pressing need seemed to be to create a forum which was in the words of the Law Reform Commission of Canada "designed to deal with the family as an organic whole". It would have the power to make final decisions on legal rights and obligations but would also be "capable of dealing with social problems without requiring their translation into legal issues before anything can be done about them". This implied the provision of a range of services capable of using a number of techniques by which solutions to family difficulties might be reached, especially as the Report stressed the importance of consensual resolutions, where these were possible, in preference to judicial ones. But it was recognised that in the final analysis the shape that the court would take and the services that would be provided would be decided by the provinces. Beyond the appointment of judges and the provision of their salary there was little more that the federal government could do to make these views a reality.

The Unified Family Court Experiment

A unified family court was set up along the lines recommended by the Family Law Reform Committee of Canada by the Unified Family Court Act of 1976 in Ontario. This Act provided for the establishment of a single experimental court in the Judicial District of Hamilton-Wentworth. The problem of combining the federal and provincial jurisdictions in one court was met by giving the Lieutenant-Governor in Council the authority to confer upon a local Judge of the Supreme Court jurisdiction to try matters under the federal and provincial statutes listed in the Schedule. These covered matters such as divorce, nullity, property as well as juvenile and domestic relations cases.

The Rules (Ont. Regul. 450/77) expressed the new approach to family matters that was embodied in the conception of the court. Rule 3, for example, stated that the Rules were "to be construed liberally so as to secure an inexpensive and expeditious conclusion of every proceeding consistent with a just determination of the proceeding". Flexibility in the timing of hearings was provided for, and the power to make interim orders where the matter was urgent. The Court was also given the discretion

to order separate representation for a minor or a person of unsound mind whenever their interests were involved.

The Act (sec.7) provided for the establishment of observation and detention homes, and for a conciliation clinic to be maintained and operated as part of the Court. But by 1978 only the conciliation service was in operation. The observation and detention services had never been established. As the life of the Court under the Act was so short it seemed unlikely that they would ever be established, so that provision was repealed.

It appears that the Court will be given further short extensions of life as it has become apparent that experiments such as these cannot be fairly judged over a short period.

The Provincial Court (Family Division)

The Unified Family Court set up to serve the busy Hamilton-Wentworth area demonstrates both the strengths and the weaknesses of this approach to dealing with family problems. Juvenile, child welfare and domestic problems arise all over the province and the Provincial Court (Family Division) has met this need by providing for sittings throughout the province on a periodical and flexible basis which can be capable of responding to the volume of work. Use has been made of part-time staff, when this seemed appropriate, of a level of expertise that could be lower than that demanded by a Unified Family Court. That it was felt there was little likelihood of the Unified Family Court system extending beyond Hamilton-Wentworth in the near future could be deduced from the intensification of efforts to improve the social service input into the provincial family courts. The Children's Services Division of the Ministry of Community and Health Services in Ontario set up a Task Force on Family Court Clinics in November 1977. The Federal Government has financed projects to try out the effectiveness of conciliation as an aid to settlement in domestic disputes. Both these are looked at below.

Family Court Clinics

Following the initiative of the Clarke Institute of Psychiatry in Toronto, clinics began to be set up attached to the family courts in the larger cities. They were a response to the acceptance of the idea that the social sciences had something to offer the courts when it came to assessing the behavioural problems of the young and recommending appropriate ways of dealing with these. Delinquency, particularly persistent delinquency, was the first concern, and later child welfare and then some domestic cases were included. Assessment and recommendation for intervention upon referral from the courts formed the basis of the clinics' work. The Task Force was set up to look at the role and operation of the existing clinics and to use these as a basis for further development of work of this type more widely throughout the province. The proposals set out in their Report reflect very strongly both the origins of the existing clinics and the fact that the projects were set in motion by the Children's Services Division.

The Task Force recognised that effective operation of such a service was "directly related to how quickly and intensively it can respond to and work with those children and families in need" (p.3). It appeared however to interpret need as arising after matters had become serious enough to warrant appearance before the court, intervention from social services such as the children's aid societies or probation or after-care, or lawyers and other professionals. Referral from such sources was seen as forming the basis of the clinics' work, and assessment and recommendations what was expected of them. This seems to be based on assumption that families wanting somewhere to take their problems at a rather earlier stage than this could find other sources within the community. Perhaps, also, it seemed that the kind of assessment service offered was only appropriate where serious problems had already developed, and the clinics

could not offer the kind of service that would be acceptable at an earlier stage.

The work of the existing clinics is strongly child-centred, and this is reinforced by the guidelines concerning operation set out by the Task Force. There may be some question whether in planning in this way for the future development of family court clinics the Task Force considered the possible effect of at least two changes in public attitudes that are likely to grow. There is no reason to suppose that Ontario will be immune to the increasing scepticism being voiced about the utility of some of these assessments and recommendations based upon meeting the needs of one child in trouble which would have the effect of creating other problems with other family members. The size of Ontario's immigrant population and the many different styles of family functioning that may be found within it suggest that more flexibility than has been planned for will be needed if it is to meet successfully the demands that will be made upon clinic services.

The other change in public attitude that might also affect the planning of court-related services is the greater willingness of people to acknowledge the existence of family problems and to seek help for them early enough to prevent breakdown. The present organisation of court-related services such as legal aid and the family court clinics tend to emphasize in the minds of the public that help is available after matters have reached a serious enough state to warrant an appearance in court. Such appearances in themselves reduce the possibility of finding an amicable solution. Both these services are exceedingly useful at the stage at which they become available, but perhaps also what is needed is to create a service to which people could have recourse at a much earlier stage, and on their own initiative which would be - in the words of the Law Reform Commission of Canada quoted above - "capable of dealing with social problems without requiring their translation into legal issues before anything can be done about them".

It is understandable that much thought went into the relationship between the judges and the court services and the clinics. In an area like this clear lines of communication and definition areas of responsibility lay the ground work for a good working relationship, but in the end success depends upon person relationships and a clear understanding of what each side contributes to the process. What seemed to be missing from the Report - perhaps it was not asked for - was a client's view of the matter - how the delivery of the service could be seen from their side. The change in emphasis that brought the juvenile court within the family court system has not yet found proper expression in this.

Conciliation services

The other initiative, beside the Family Court Clinics, in extending the services available to family court judges, concerned conciliation. With joint funding from the federal and provincial governments, and experimental projects, using conciliation to identify points of disagreement between family members and reach agreements in such matters as maintenance has been tested in four of the larger Provincial Courts (Family Division) in Ontario. The judges to whom this service has been available have welcomed the help it gives in reducing the amount of court time spent on acrimonious disputes between parties, especially spouses, and its effectiveness in getting parties to agree on things like the quantum of maintenance to be paid, and variation in access by the non-custodial parent in custody matters. The existence of the units as well as any future expansion of the service is in doubt. Dependent as it is on joint federal-provincial funding, withdrawal of funds by either government would probably bring it to an end.

It would seem that this kind of approach has much to offer, not only to the judges and court administration, but to the clients who can perceive themselves as taking an active part in the solution of their own difficulties. It is probably too early yet to judge whether maintenance orders, the amounts for which have been negotiated in this way, have a better chance of being honoured. Certainly the Ontario record for

defaulters is not good. In one British Columbia study (Issues in the Determination and Enforcement of Child Support Orders by Butch et al) it was stated that in Ontario around seventy percent of men against whom support orders were made defaulted at some time or other. It would be interesting to know whether there was any indication that the work of conciliation units would make any contribution to tackling this very severe problem.

Considerable attention has been given to procedural solutions to this problem - the latest being the automatic enforcement of maintenance orders. It remains to be seen whether this, taken together with the extension of agreements for reciprocal enforcement beyond the provinces of Canada, will reduce the number of persistent defaulters, or whether something like the conciliation units is needed as well. The payment of maintenance generally goes on over a long period of time and only the monitoring of the various approaches over time will indicate which way, or combination of ways, of dealing with problems is likely to work.

Legal Aid

The provision of legal aid has made a good deal of difference to the way matters are handled in the family law area. The large majority of the cases that it handles in the Provincial Court (Family Division) concern juveniles in trouble, as might be expected from its origin in the provision of legal advice and representation for those accused of offences who were unable to pay for these services. In the large provincial centres the legal aid service provides counsel on duty to assist juveniles and parents, and access to the service is provided where possible at other locations such as institutions and welfare clinics. The extension of legal aid to civil matters has also benefitted spouses involved in divorce or other matrimonial causes who have been unable to afford legal help. It is mainly women who have benefitted since, in these circumstances, they are usually the ones without financial resources when there is family discord or breakup. In these matters adequate representation on both sides tends to make for a fairer result, and may well have helped to bring about the change in the attitude of judges towards women which has been noticeable in these cases during the last decade.

Need and the merits of the case determine whether legal aid is given. Need is determined as a result of an assessment by the Assessment Unit of the Ministry of Community and Social Services. The client may be asked to pay some part of the costs, a lien on property may be taken or other financial agreements entered into where this seems appropriate. While final decision on the grant of aid is done within the Legal Aid organisation, clients may choose their own legal representatives within the permissible scale of fees. This is one of the very considerable merits of the scheme in Ontario.

With the passage of the Family Law Reform Act and the extension of rights and obligations under it, not only as between spouses, but also between those co-habiting without marriage, it can be expected that greater demands for legal aid will come from this section of family court work.

In child welfare matters legal aid generally comes from the Official Guardian, though the work of this office is not limited to this. It is the duty of the Official Guardian to act on behalf of people under a legal disability. These may be minors, the mentally incompetent or persons who are out of the province and cannot be heard when they are involved in court actions. In order to discharge the responsibilities of guardian ad litem for children involved in custody, access, abuse or wardship and increasingly adoption cases, a large staff of social workers is employed to do the necessary investigations for reports to the court. Property interests of minors are also protected by the Official Guardian.

The Official Guardian

There has been some discussion in recent years as to the nature of the role that the Official Guardian should play where the matter before the court is custody and access, adoption, wardship and the like. The official view is that he is a reporter to the court rather than an active participant on behalf of the child. It was dissatisfaction with the results of this approach that led the Ontario Law Reform Commission in its report on Children in the Family Law Series to recommend the establishment of the office of Law Guardian who would have the responsibility for forming an independent opinion on the best interests of the child and assisting the court to reach its own conclusions on those interests. This proposal has not been adopted. Instead in section 20 of the Child Welfare Act 1978 there is provision for the child to be separately represented if the judge feels that this is desirable in a particular case. But there was uncertainty about the operation of even this, and proclamation of this section was delayed.

Separate local representation for children

Most provinces seem to agree that in certain cases such as custody proceedings, the child should be separately represented where this seems necessary. But this raises several problems if there is no official body set up to provide this service. The instruction that counsel receives will largely depend upon who retains him. In protecting a child's interests, how much weight should he give to a child's preferences if the child is not of an age or mental capacity to make this sort of judgment? Contested custody matters are conducted adversarially; and it is difficult to see how counsel for the child can function effectively in this atmosphere, especially if it is obvious that the best interests of the child demand that satisfactory contact be maintained with both parents. Custody is mostly about continuing relationships between both parents and children and it does not seem that the introduction of counsel for the child into an adversary proceeding is likely to bring about the desired result. Perhaps what is needed is a fundamental change in the nature of the proceedings and a change in the time in the separation proceedings at which hearings and decisions on this matter are taken. It may then be clearer what sort of intervention on the part of the child would be most helpful.

It is perhaps in child welfare cases that the need for separate representation for the child may most clearly be seen. The Child Welfare Act enumerated the situations in which a child must be so represented, for example, where the parents of the child are disputing the opinion of the Children's Aid Society that the child should be removed from their custody. In such cases the court used to be regarded as the protector of the rights of the child. This seems no longer enough, and the rights of the child have to be seen to be separately protected. It will probably take some time for this to be satisfactorily worked out in practice.

Areas of likely increase in family matters before the courts

At the beginning of this chapter reference was made to some of the demographic changes which affected the way families function. Lengthening life expectancy, a fall in the birth rate, a growth in the number of one-parent families are all important indicators. The fact that both partners in a marriage or other relationship are more likely than not to be working has probably done much to change social attitudes towards the rights and obligations of each toward the other and emphasized the partnership aspect of marriage. Attitudes towards children have changed too based largely on an assertion of their rights as human beings, modifying parental rights but not their duties, and making the problem of discipline a much debated but unresolved question. The law reform programme of the Province of Ontario in the family law field is based upon these perceived changes in society and in social attitudes.

Considered together these give a fair indication of the kinds of cases that will come increasingly before the courts in the next decade.

Longer life span, increased expectations of personal fulfilment and marriages, especially among the young, being entered into because of pregnancy, all suggest that the rate of divorce will show a small but steady increase. This would be the likely situation if there were no change in the present divorce law. The law still emphasizes matrimonial fault as the ground for divorce, and the only alternative ground requires separation for so long a period - from three to five years depending on the circumstances - that a person without financial resources would find it difficult to use this ground. Collusion and condonation are still bars and are applied to prevent divorces even though the breakdown of marriage and the couples' wish for separation is obvious, and all they may have wished to do is to lessen the stress by agreement. There is general agreement that the grounds for divorce, and the adversarial nature of the proceedings by which these grounds are established whenever contested, increases the ill feeling between the parties. Even where there is no contest, the person found guilty of the kind of matrimonial fault that needs to be established, is hardly likely to feel co-operatively disposed toward the applicant. Yet in many cases where there are maintenance and custody matters, divorce results in a change in, not an end to, a relationship, and the way it is at present handled does not provide a satisfactory basis for the carrying out of continuing obligations.

If there are changes to the Divorce Act along the lines of the recommendations of the Law Reform Commission of Canada - who seem to favour marriage breakdown as a single basis dealt with by a type of non-adversarial process which emphasized reconciliation, and where this was not possible, negotiation and agreement on justiciable issues - it can be expected that there would be a sharp increase in divorce. On the Australian pattern this increase would be followed by a drop in the numbers after the first couple of years. Any such change in the law would probably increase the number of second marriages, already a significant trend in Ontario. Where maintenance, custody or even property matters still link divorced couples, the impact of a second marriage is likely to be considerable. This is likely to be reflected in increased resort to the courts.

The importance of agreement between the parties in potentially controversial areas has been recognised by the provisions relating to domestic contracts in the Family Law Reform Act. The provisions for marriage, cohabitation and separation agreements give to the partners who use them a considerable say in ordering their own affairs. Agreements such as these have not normally been part of the ways families function in common law jurisdictions. Though it may be some time before parties regularly think of entering such agreements before or during marriage, they obviously provide a most useful tool for family and marriage counsellors called upon to give help where there is family conflict. The utility of separation agreements is even more apparent, though there must be some question how well these will work when divorce is based upon the proving of matrimonial fault and collusion is still a bar.

The legal recognition extended by the Family Law Reform Act to couples living together outside of marriage and the extension to them of support rights and obligations, property and parental rights normally only the prerogative of married partners, will most likely mean an increase in the number of cases brought to court, except, perhaps in the area of child support, some of which may be replaced by custody matters. The Act sets out a long list of circumstances (see 18(5)) which the court should bear in mind in determining the amount of support that a respondent should be asked to pay for a dependant spouse, and these are the same whether the parties have been married or not. The only real difference is that those who are not married will have had to live together for at least five years or have a child and a relationship of some permanence. There will therefore still be relationships from which children are born which will not fall within this category and in these cases mutual obligations to support between spouses will not arise, though child support cases will.

Two of the circumstances set out in sec. 18(5) of the Act are of particular interest. One is "(g) the measures available for the dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures;". Adults not incapacitated by age or handicap or special circumstances are expected in Ontario to support themselves. Dependency that may have existed during co-habitation is not expected to last much beyond the cessation of it. If the parties are spouses the dependant is expected to take steps to become financially independent, the respondent to help provided the means for doing this, such as paying for retraining or the acquiring of skills which would be likely to make this possible. Where the dependant is a child, the emphasis is on the acquiring of an education with self-sufficiency as the objective. While the latter provision continues the old pattern, the former shows a marked change. Dependency for life is no longer accepted as the condition for women who have been married. While acceptance of this may be no real problem to many Canadians, a number of the immigrants with different cultural backgrounds may find this very hard to accept, and to have this provision work as is intended in their case may require quite a lot of help and support from counselling and other services.

The second circumstance is "(j) a contribution by the dependant to the realization of the career potential of the respondent;". It has become fairly common for young people to marry before they enter upon courses of study leading to a qualification or while doing so. In many of these cases one partner, more often the wife, becomes the chief or only wage earner, subsidising the studies of the other. Such marriages show a high percentage of breakup after the qualification has been obtained and its financial rewards begin to be earned. Clearly such qualification is now to be regarded as an asset to be shared. The question is at what point this sharing should take place - at the point of breakup when the increased earnings may only be just beginning, or later when the partner is established and earning substantially more, or should the "qualification's" earning potential be assessed and shared. An interesting ruling in the New Jersey Superior Court on this topic sets out what could be a fair and acceptable approach to this problem. Briefly stated the facts were as follows: two medical students married, the husband continued his studies, the wife went to work and supported him until he obtained his licence to practice. They separated shortly after and later divorced. The judge ruled that in addition to support payments from her husband she was entitled to a 20 percent share of the work of her husband's medical licence. It was the only considerable asset acquired during their marriage, and she was awarded sixty thousand dollars as her share. It is likely that under this head, the courts in Ontario will be faced with some very difficult decisions, but its inclusion is to be welcomed as it is manifestly fair and may even have the salutary effect of making people think about the obligations they incur when pursuing career objectives in this way. It does however appear that the kind of solution offered by the New Jersey judge will because of its limited jurisdiction not be available in the Provincial Court (Family Division), though it may be in the Unified Family Court, a county or district or the Supreme Court.

Provisions in the Family Law Reform Act concerning property sharing and the matrimonial home on the cessation of cohabitation should enable the court to get more expeditiously through this part of the hearings particularly if adequate conciliation services are available for use either before or during hearings. Experience elsewhere suggests that conciliation can be of considerable use in reaching agreement where property matters are in dispute. At the present time the experiment with conciliation units has been taking place largely in Provincial Courts (Family Division) where matters concerning property and the matrimonial home (apart from temporary occupation) are not dealt with for constitutional reasons. Since, without being explicitly stated, these affect the question of the amount of support obligation, it seems a pity that considerations of these matters have to be, except in the case of the Unified Family Court, divided. It would seem that the limited nature of the conciliation service attached to the Provincial Family Courts is not a particularly useful test of the contribution

that it can make to the settling of family disputes in this very contentious area.

Applications for maintenance orders, their variation and enforcement form a large part of the work of the family courts. It is pointed out above that so far as support for spouses is concerned, it is expected that these will mostly be limited in time. Support orders for children are likely to last much longer and the enforcement of these will continue to be a major and growing problem for the courts. That there is defaulting on a large scale has already been mentioned, and it can be expected that the procedure of automatic enforcement by the family court, set out in the Family Law Reform Act available to both persons and agencies, will be much used by them.

The practice of agencies providing support assistance when there is need has undergone a change. Where it was possible to make an application to the court for an order for maintenance, assistance would normally depend upon this step being taken, even though there was often great reluctance on the part of spouses to pursue this course. Not only is such an order now assignable to the agency but an application for a spouse or a dependant child may be made by the agency itself. There seems to be no available evidence to indicate whether those thus ordered to pay support do so more or less regularly when an agency is involved. Since a benefit under the Family Benefits Act or assistance under the General Welfare Assistance Act will be given whether or not the support money is paid, it would seem that defaulters could find a ready-made excuse for not paying.

Enforcement costs time and money in tracing defaulters and bringing proceedings against them in court. Automatic enforcement shifts some of the burden, though court services are not usually geared to the tracing of persons who do not wish to be found. While this change in the way the services operate can be an improvement in the delivery of services to those in need, it is not obvious that it is an effective way of securing payment from those obliged and ordered to support their dependants. It would need to be demonstrated that defaulters will be found and made to pay and perhaps an intensive short-term programme set up to do this might have good long-term effects.

Custody matters in the family courts are also likely to show an increase in the future. These fall under two main heads - custody claims arising from the separation of parents, whether married or not - and those arising out of child welfare matters. While perhaps the majority of parents who divorce will continue to have the custody of their children settled under the provisions of this in the Divorce Act, there will be a number of married parents who separate or who fail to get the divorce asked for or whose children are not children of the marriage who will have their custody matters settled under the provisions of the Family Law Reform Act as will parents who have not married. As was suggested earlier even those wishing to divorce where there was no foreseeable difficulty in obtaining a decree, could use these to their benefit, before the divorce hearing.

The legislative approach to custody differs in these Acts. In the Family Law Reform Act the power of the court is stated in sec. 34(1) in these terms: "Upon application, the court may order that either parent or any person have custody of or access to a child in accordance with the best interests of the child..." The Act also provides that parents who have cohabited but have separated may enter into an agreement on, among other things, "the right to custody of and access to their children;" but that in the determination of such a matter the court may disregard the terms of the domestic agreement where "in the opinion of the court, to do so is in the best interests of the child". The Act gives no indication of what the best interests of the child will be deemed to be or how those interests will be ascertained. The Rules of the Provincial Courts (Family Division) provide that the court may order an investigation by a person or agency in order to help them reach a decision. Clearly the financial status of the parties involved in the custody issue is of importance for the rules require that a financial statement must be filed

and notice to the child of ten or over of a court hearing in any matter concerning him as well as provision for separate legal representation for the child show a considerable change of emphasis in the handling of care and protection matters. Indeed the inclusion of circumstances in which the child must have legal representation unless the court is satisfied that his interests are adequately protected without it, underlines the change. The Official Guardian protects the interests of the mother if she is under eighteen years.

Access is an important consideration when the child is removed from the custody of his parents and becomes either a ward of the Children's Aid Society or a ward of the Crown. Society wardship is limited in time - no order may normally be made to last beyond twelve months and in no case beyond twenty-four. If the long term objective is to return a child to his parents the link must be kept and fostered. The effect of Crown wardship is normally to keep a child as ward of the Province of Ontario until his eighteenth birthday. The Children's Aid Society which is responsible for his care under such an order is mandated to try and find adoptive parents for him if this is adjudged to be in the best interests. It effectively ends the parents' rights to custody of their child.

To help the court reach its decision as to what should be done after the finding that a child is in need of protection, it may order a range of assessments to be done, both of the child and of the parent or guardian. These may be medical, emotional, developmental, psychological, educational or social. While such assessments of children in trouble or in some kind of obvious need are more or less taken for granted now, the assessment of parents or guardians is likely to be unfavourably looked upon by them. Any sense of injury this causes is likely to be aggravated by the provision that the court may make what inference it thinks appropriate in the circumstances if they refuse to subject themselves to the assessments ordered. This provision does serve to underline the difference in the court approach to custody matters between those arising from child welfare matters and those involving separation and disagreement between parents.

Family violence has become a matter of public concern. Perceptions of the nature of the relationship between parents and children have been changing fairly rapidly through the last half century. Increasing concern over child abuse is likely to lead to more widespread intervention and more cases in court. There is a good deal of debate but no consensus yet as to the kind of intervention that would effectively deal with the problem, helping parents and protecting children, and the stage at which intervention should take place. Between doctors, social workers and courts the issue of the confidentiality of information has often prevented aid being given in time to help parents and children. The arguments for confidentiality are usually based on the need to preserve the confidence of the client even though in the long run it may be the client who suffers most through insistence upon it.

It is only relatively recently that domestic violence and harassment - except as ground for divorce - has been perceived as in essence no different from the injury that persons not married or not related as parent and child could inflict on one another, and that therefore, the protection of the law should be as fully extended to people who were its victims. There is no longer any immunity of suit between husband and wife or between parent and child, and matters so arising can be expected to increase the workload of the courts. Section 34 of the Family Law Reform Act provides that a spouse may apply to the court for an order "restraining the spouse of the applicant from molesting, annoying or harassing the applicant or children in the lawful custody of the applicant ...". To enforce this the court may require the person so ordered to enter into "such recognizance as the court thinks appropriate". This may include requiring that person to move from the matrimonial home. The power to make orders of this kind is a very useful way of buying time so that disputes between parties can be conciliated and dealt with after calmer consideration.

The change in the attitude of the law and of the courts to domestic disputes of this kind ought also to be reflected in a change in the attitude of the police who notoriously dislike interfering in domestic matters. An ability to claim protection from the courts which can be pursued independently of them may have the effect of making them more helpful when called upon.

The present situation

In review it can be seen how much the work of the Ontario Law Reform Commission has provided the basis of a legislative programme that has transformed and simplified the law relating to families. Families based on monogamous, polygamous or no marriage are brought within one framework. Rights and obligations between family members have been clarified and the bases of these changed to recognise both the individuality and the interdependence of family matters. The legislative programme for improving the handling of family law cases, insofar as it lies within the constitutional competence of the province, would seem to be about complete. Further improvement would lie with the federal government and in co-operation between the federal and provincial governments. One improvement that could be achieved without too much difficulty would seem to be statutory clarification of the doctrine of paramountcy as it applies in the area of family law. As mentioned earlier recent cases have interpreted it to mean that federal legislation on a topic does not exclude provisional legislation on the same topic, but that federal legislation will override the provincial where they contradict each other. Dicta of this kind always leaves room for argument and the making of distinctions. Certainty in this area would, from the point of view of clients, be highly desirable.

The social approach to divorce that is expressed in the Divorce Act is now very different from the one on which the law reform package of Ontario is based. Since many of the matters that are heard in the family courts arise in contemplation of or as a result of divorce or nullity, the attitudes and choices of the parties in those cases must be largely determined by the grounds for divorce and the still operative bars to it. It is true that the Divorce Act 1969 recognised that counselling for couples embarking on divorce could be useful either in effecting a reconciliation or in helping the court to reach the conclusion that the marriage was beyond repair. The Act placed a duty on lawyers and courts to inform the spouses that counselling services were available for their use, and a Divorce Counselling Unit was set up by the Department of National Health and Welfare to provide this service. There has been general agreement that this has not worked well. Not only did it appear to be too little, too late, but there appeared to be more conflict than co-operation between the professionals involved - the lawyers and the social workers - an understandable reaction when no one seemed to be very sure how they fitted into the new scheme.

Federal and provincial legislation differ basically in the manner of the handling of family disputes. Provincial handling of matters is designed to reach agreement if this is possible between the parties on matters in contention between them. The federal approach is adversarial. It is the feeling of the Law Reform Commission of Canada expressed in their 1976 Report that this should change. A shift of legal policy should be made, they said, towards focussing on the social and economic implications of family breakdown with the emphasis on fair and constructive solutions to the problems that arise from this. The emphasis they place on the importance of the time sequence in the handling of these matters is equally valid for other family law cases. The aim should be, they argue, to provide the opportunity for reconciliation where this is possible, for conciliation where it is not, but not occasion unnecessary delay where matters should be handled speedily. Flexibility is important, and so is the provision for the making of interim orders which could help to defuse a situation. They advocate a single ground for divorce - marriage breakdown - and a suggestion that a year should be enough to apply for a divorce but that the proceedings, taking into account the need to provide enough opportunity for counselling and conciliation, should

last about a year. As elsewhere, there will no doubt be a good deal of argument about what is the appropriate length of time from which marriage breakdown could be deduced, but whatever the decision reached, it will not be a satisfactory test unless the contribution that the services for counselling and conciliation can make in matters such as custody, maintenance, the sharing of family property and the like is properly made use by both the parties and the courts. Obviously the range of skills that would have to be provided would be wide and would include proper advice on tax and financial matters as well as help with personal relationships and such knotty problems as custody and access.

This range of expertise should ideally be available where people first meet the system - usually in the Provincial Courts (Family Division) - for much of this help would be most effective if given before the decision to take action is made, not after. Clearly the Unified Family Court would seem to provide the best answer to this problem. But the provincial family courts are now, and it is likely that they will continue to be in the foreseeable future, the main forum for the handling of family law cases, so that public access to the services would be easiest there. There would seem to be need for the rather specialist service of the family court clinics, with its emphasis on assessment, to continue as a separate agency, as it would not be easy to build the kind of wide-ranging service visualised on it. The experiments at conciliation referred to earlier limited themselves in financial matters mainly to securing agreements about maintenance and a good deal more financial and legal expertise than was available to them would seem to be necessary to help people make sensible decisions on their economic affairs. This would seem to be especially necessary when a second marriage was in contemplation. It is clear that such services will be needed at a variety of stages in the hearing of a matter, not only at the beginning, and there would be considerable benefit to clients and to courts if it were the same service, or branches of the same service, throughout.

Much thought has been given to the improvement of the services available to family courts, but at the present access to them depends largely upon reference by courts and sometimes lawyers. When matters have reached that stage the possibility of reaching satisfactory agreement is already reduced.

The way family courts have developed in Ontario has meant that it was the judges who determined not only the style of the courts but the way in which social services were used and experiments in helping families and people tried. Now that legally trained judges are routinely being appointed to the Provincial Courts (Family Division) some of the insistence on the dominance of the judge's role in all aspects of the court's work may diminish and it may be possible to establish overall a generally acceptable pattern of social service input, so that the spirit as well as the letter of the new legislation may inform the work of the courts.

Notes on the Chapter on Ontario - Canada

Much of the sociological research on the family done in Ontario, and in Canada generally seems to concentrate on ethnic groups, and sometimes on classes within these groups. As remarked in the chapter, it is difficult to get an overall picture of family functioning. Particular use was made of :

The Making of the Modern Family - E. Shorter

Canadian Society: Sociological Perspectives edited by Burshin et al.

Divorce and its effects, including the effect on children, has been the subject of a number of studies.

The Government of Ontario, following on the Reports of the Law Reform Commission, initiated public discussion about family law reform and then moved on to the discussion of the family in relation to social policy. The following proved useful:

The Family as a Focus for Social Policy: A Discussion Paper

Compendium which accompanied this made up of brief description of Government of Ontario programmes that assist families

A number of Journals devoted to various aspects of family law and practice have come into existence, particularly in the latter half of the Seventies, and these provided a view of what matters caused most concern.

The following Reports were extensively used:

The Family Law Reports of the Ontario Law Reform Commission 6 vols.

The Report on Family Law of the Law Reform Commission of Canada 1976

Report of the Task Force on Family Court Clinics

Legislation

Federal

B.N.A. Act as of 1981

Canada Pension Plan (Amendment) Act 1977

Divorce Act R.S.C. 1970 CD - 8

Ontario

Children's Law Reform Act

Child Welfare ACT S.O. c.85 of 1978

Family Benefits Act Cap.157 R.S.O. 1970 as amended to 1974

Family Law Reform Act 1978 S.O. c.2 amended 1979 c.96

General Welfare Assistance Act R.S.O. 192 as amended to 1980

Legal Aid Act R.S.O. c. 239 as amended by 1973 c.50

Marriage Act

Married Women's Property Act R.S.O. c. 262

Matrimonial Causes Act R.S.O. c. 265

Succession Law Reform Act

Unified Family Court Act (1976) S.O. c.85 as amended by 1977 c.4