

ENGLAND

Introduction

The ecclesiastical origin of English family law is still discernible, most noticeably in the pace and nature of its reform. The law which the settlers, colonists and administrators took with them around the world was based upon the Anglican Church's conception of acceptable family formation and functioning. In the previous chapters, examples of the way some Commonwealth countries have modified and altered this law to suit their own needs has been described. Such change has usually followed the achievement of independence and a growing awareness of their own distinctness. The pace of change has gathered momentum during the last two decades. Bearing these circumstances in mind, it is not surprising that reform has taken place more slowly in England than elsewhere.

Much has been written about the family in England during the last fifty years. Generally, the literature falls into two categories - one arising from the concern felt about the inequities in the treatment of individual family members under the law, particularly if there was conflict between them, and the second reporting the results of the investigations of various aspects of family life and functioning by social scientists in a variety of disciplines. Of the two, the latter has had the greater effect. Research findings were instrumental in creating the social theory on which the Beveridge Report was based, and helped to lay the foundation of the welfare state.

The families that tend to come into public notice are those with problems. The operation of the welfare state has the effect of both heightening the perception of problems and of apparently increasing the numbers of families with problems. Perhaps the public perception of the growth of problem families may be in part due to an attitude expressed by the Working Party on Marriage Guidance (Marriage Matters p.23): "There seems to be at the heart of the highly developed welfare state an unreal assumption that solutions exist to all the problems of life..." This problem-oriented view of the family in England is a distorting one. A better perspective of the way families function can be gained from the statistics published in Social Trends. (HMSO 1981).

The Family in England

Demographic changes in the population have noticeably affected marriage patterns. At the ages below those affected by the Second World War, there is a surplus of men over women - a change in the ratio which has all but eliminated the spinsters who were such a feature in the lives of families. The result is that by the age of fifty over 90% of both men and women will be, or will have been married. At present counting, those who are divorced and not remarried are under 5% of the population. The great majority of children will grow to adulthood with their natural parents. Longer expectation of life has helped to change attitudes towards divorce and remarriage and the growing number of women employed outside the home has necessarily affected attitudes to family functioning.

The family was defined in the Finer Report on One-Parent Families p.62) as "an institution which regulates sexual relations, provides for the rearing and socialisation of the young and secures the transmission of property." All these functions have characterised the family over time, but the definition does not give any indication of the differing emphases that have been given to those functions at different times, nor of the changing demands that both family members and society have made upon the institution. The Western model of marriage has changed greatly during the last century. The emphasis has moved from the procreation and rearing of children and the transmission of property to the importance of the conjugal relationship. This is in turn beginning to give way the view that "personal development and satisfaction are core values underlying the contemporary expectation of marriage" (Marriage Matters p.21) It would seem to follow from this that, as the Finer Report remarks: "Today, indissoluble marriage is not compatible with prevalent notions of married love and the right to personal happiness."

This does not, however, mean, that the pursuit of such personal happiness and fulfilment will reduce, for the majority of couples, the importance of having children. A report of a study of Childlessness and

Marital Instability by Colin Gibson (Journal of Biosocial Sciences vol.12 no. 2 pp.121-32) confirms the findings of other researchers that having a family remains a feature of ordinary married life. Failure to have children is often regarded as inhibiting to both personal development and fulfilment.

Patterns of fertility and the size of the average family have changed over the last hundred years. Typically now, a couple will have two children rather than the five or more of a century earlier. Child bearing and the care of small children will be compressed into relatively few years and this has resulted in changes both in the employment patterns of married women, and the timing of child bearing. The better education of women during this period has increased their chances for employment outside the home and changed their attitudes to working. But the greater equality of access to employment and promotion with that enjoyed by men which might have been expected from these developments has failed to materialise fully. The near universality of marriage noted above has caused many to withdraw from employment for varying periods of time, as has the need to give care to the elderly. Rising economic and educational standards throughout the population have meant that domestic help has largely disappeared and all the domestic and caring function, once shared with unmarried relatives and paid help, became the responsibility of the married woman. Some such movement as the one for women's liberation was bound in time to emerge. That men should share the caring and rearing functions in the family is only now beginning to be accepted.

The post 1945 emergence of the welfare state and the popularisation of the social sciences has had a good deal of influence in defining for the community what are acceptable standards of caring and rearing within the family. The casework agencies proved the perfect vehicle for securing public acceptance of the often speculative and frequently contradictory findings of the social scientists. The statutorily defined family is the basis for the work of the benefit-giving agencies and much confusion has been caused by the lack of fit between this and the way many families function.

At present three matters seem to dominate discussion about the way families do or should function. These are the effect of a mother working outside the home, the growing resort to divorce and the increasing need for the care of the elderly.

In his paper for the Study Commission on the Family on "Family Incomes Since the War", Piachaud looked at the contribution of married women. He concluded that (p.13) "The most important single change in the economic circumstances of families since the war has not been any change in benefits for children, but rather the growth of the two-earner family." He points out that the number of economically active married women has grown from 26% in 1951 to 62% in 1979. The growth has been more rapid amongst women with dependent children but most of these work part-time, fitting work in with their domestic responsibilities. The making of practical arrangements for the care of the young, and increasingly, of the old, is often a limiting consideration on the ability of women to take available work. Various view points have fuelled a contentious public debate on the matter. One of the related issues that tends not to be publicly discussed is the effect of the realisation by most women that being economically dependent makes them exceedingly vulnerable should their marriages break down. Since it appears to be conventional wisdom that growth in the number of marriages breaking down is inevitable, the incentive to find some employment outside the home is increased, though this may not be acknowledged. What is obvious is that employment makes choices possible for many women who without it could only react to the choices made by other family members.

The research done for and summarised in the Finer Report provides the best and most comprehensive view of the way families function in these times. It points out that not only have expectations about what is personally achievable within marriage changed, but that some degree of breakdown has always been anticipated and provided for. In the view of the committee, the stability of the institution requires that a second

chance at success within it be provided for people who failed at their first try. There follows a statement which could usefully be borne in mind when assessing the evidence of marital breakdown. After referring to the near-universality of marriage for men and women in these times it goes on "...given what is known about such factors as the distribution of homosexuality and chronic ill-health, psychological as well as physical, among the population at large, it is obvious that the present popularity of marriage must be drawing into the institution large numbers who lack any evident vocation from it. From this point of view, a very high marriage rate will lead to a disproportionately high rate of breakdown." (p.25)

Pertinent to the consideration of the incidence of marital breakdown are two inter-related matters. The first is one of the major trends in marriage noted in Families in Focus (p.15) - the decline in age of marriage during the last century. The other is noted in the statement in Marriage Matters (p.28) that "Many young people view marriage as a goal in itself, a manner of gaining status or an escape from family, without recognising the quality of the relationship." In his survey of Marriage in Britain 1945-80, Domitian points out that since the Second World War there has been an average annual increase of somewhere between five to ten thousand divorces. In 1982 there were 145,000. In looking at the distribution in the marriage cycle, he noted that it was a "phenomenon of the early years of marriage", though it did continue throughout the cycle. The two peaks of divorce are in the first four years of marriage and after twenty years.

Divorce is of course not the only evidence of marital breakdown. The matrimonial jurisdiction exercised by the magistrates provides as important an indicator. The Finer Report (pp.42-3) documented the very considerable increase in the matrimonial orders issued in maintenance and guardianship proceedings in the magistrates' courts from the beginning of the century. It was estimated that about half of the wives who were given these orders went on to become either petitioners or respondents in the divorce courts. The other half could reasonably be taken to include a number of marriages that had broken down. It is interesting in the light of this to observe that evidence given by the Magistrates' Association to the consultative committee which reported in Marriage Matters included the information that in 1976 their courts had dealt with over twelve thousand applications for matrimonial orders, and that this represented a reduction in the number of cases heard since the figures available to the Finer Committee which stood at around thirty three thousand per year. It suggests that some of the rise in the divorce figures may well result from people by-passing the magistrates' courts which can only offer interim remedies, and going straight for divorce. This speculation will be looked at again when considering the different policies toward marital breakdown expressed in the legislation administered by the magistrates' courts and the superior courts. The point has often been made that the cases that come to court do not represent the total of all the marriages that have broken down. The true extent of marriage breakdown has never been known, so a reliable comparison with the past cannot be made. What is certain is that the changed public attitude to divorce has made it more acceptable as a way to end a marriage. The increase in divorce after twenty years of marriage may be in part due to the expectation of a healthy active life lasting into the seventies. The decision to end a marriage that has become unsatisfactory after twenty years may be spurred by the thought that one could try again with the possibility of another twenty or more years with a different partner.

Longer expectation of life has a more obvious effect on family functioning where the care of elderly parents and other relatives is involved. Crisis or Challenge (p.10) documents the increase in the numbers of the elderly, - especially great in those over seventy-five - in Britain and the implications for the provision of care that arise from this. In 1901 one person in every twenty was aged over sixty-five. By 1981 this had risen to one person in seven. Those aged over seventy-five are now one in eighteen persons in the population, and the demographic trends indicate that this figure will rise during the remaining years of this century. (p.14) The study noted that despite the vast increase in the numbers, the proportion of elderly people in institutions remains

about the same at it was eighty years ago, at around five per cent. The figures on household composition in Social Trends show that many elderly people, rising to forty per cent of those over seventy, live alone. Most of the rest live with family members, usually daughters and their families. Many of those living alone depend for help in household tasks and personal care on members of their families.

The care of the elderly is not evenly divided among family members. A recent study of carers done for the Equal Opportunities Commission suggested that about three-quarters of those caring for elderly, dependent persons were women. An indication of the extent of the burden of care on women has been revealed by a study done on the Home Help Service in England and Wales in 1967. It was estimated that between the ages of thirty-five and sixty-four, roughly half the number of housewives could expect to be giving help to an elderly or infirm person. A more recent small study, quoted in Crisis or Challenge (p.75) showed that at any given time in these days there were more people involved in caring for handicapped and elderly dependents than there were mothers with children under sixteen. The difference between the care required by children and by the old should also be borne in mind. The physical care needed by children grows less as they grow older. The reverse is true of the care of the elderly, and this can go on for much longer. Intensive care giving is always a source of stress in family life, and it may be particularly so when the woman accustomed to earning has to give this up in order to give care. It is conceivable that the need to provide care for elderly relatives may well become a factor of some importance in the later years of marriage.

The three developments noted above have all to be accommodated in the way families function. One important influence in the way these adjustments are made is the view of the social services about what constitutes good, or at least acceptable, family functioning. For example, in its role as defender of the rights of children, its officers make judgments about the adequacy or otherwise of parents, often at what may be a time of particular difficulty in the family. These judgments are usually very difficult to overturn subsequently. The confidence of parents in the disciplining of their children has sometimes been undermined through disapproval of their methods, though little effort seems to be made to help find other ways of teaching children to behave responsibly within the family and outside it. The possibility of being entitled to welfare benefits at sixteen may well, with hindsight prove to have done more harm than good. It certainly has become a factor to be taken into account because of the influence it can exercise in determining the lifestyles of some teenagers. The supplementary benefit rules which disentitle both married and cohabiting women from claiming, regardless of their circumstances, have caused much dissatisfaction. While it is accepted that there must be rules for the claiming of benefits, to the extent that some families in need do not fit the prototype statutory family, there is pressure on them to change and conform.

There has been increasing public acceptance of cohabitation before marriage as well as without marriage. There is no evidence available about the degree of stability that such unions are likely to have. There seems to be little doubt, however, that they, along with the rise in divorces, have contributed to the noticeable growth of one-parent families. The economic welfare of families formed in this way has attracted much public concern, and perhaps the best piece of social investigation of the seventies - the Finer Report. Basically the problem was then, and remains now in spite of various welfare initiatives, the provision of adequate economic support. The amount of maintenance that can usually be ordered from the liable relative, is low and often remains unpaid. In addition, the mother of children born outside marriage can make no legal claim to be maintained by her ex-partner. The failure of cohabitation may leave more serious consequences than the failure of marriage.

During the seventies, the issue of domestic violence and what should be the appropriate public response to it attracted much attention. That there is a public responsibility to protect children from cruelty has long been accepted, and a succession of Acts of Parliament have made it possible for them to be removed into the care of statutory authorities. Gradually, the approach to this problem has changed to the point that the

assumption that it is possible to prevent abuse in family life is being widely accepted. Intervention for this purpose is regarded as being desirable in the case of children. the protection of wives from the violence of their husbands or vice versa has tended to be treated as an altogether different matter, even though the two are very often linked. The refuges for battered wives that have come into existence during the last ten years have revealed something of the extent of the problem and of the need to provide protection. The Magistrates' Courts now have the power to make a range of orders to protect spouses and children of the family. If a spouse has been injured and further injury seems likely, a power of arrest can be attached to the order which enables the police to act if the order is broken or there is suspicion that it will be. However, there appears to be some reluctance by both police and courts to make use of this power.

Vigorous public campaigns by small groups who espouse particular causes have become a feature of life in Britain during the last decade. One of these which has directed its force at the family with the aim of influencing attitudes by raising guilt levels is that which espouses the right to life, which involves the maintenance of life at all costs. The caring role of the family is emphasised at the expense of everything else. This takes to extremes the shift in attitude in the public policy toward the family that has been noted elsewhere. An experienced social worker writing for the Study Commission on the Family (V. Macleod, *Whose Child?*) remarked (p.56): "It is as though the relationship aspects of family life now take second place to the caring/nursing aspects and the family is valued for its caring capacity, rather than being seen as a grouping of individuals linked by a network of relationships which locate and provide status for individuals in a complex society." Since, as pointed out above, the burden of care falls on women, it looks as though the battle for some space for development for women within family life may have to be fought all over again.

It would be odd to write about the family in England and make no reference to class. There is still a good deal of talk about class differences even though every indicator points to an increasing blurring of the lines between them. Social researchers seem to have to make more and more strenuous attempts to find definitions to separate and locate them. Though generally of diminishing importance in predicting family functioning, there is one area in which class appears still to be significant. Recent research on those who resort to divorce has indicated that a majority of those in the lower age group come from the working class (Class V and VI). It may be that the freedom to make a choice which had been denied their parents by economic considerations still has a certain attraction.

In general, so far as the family in Britain is concerned perhaps Noble (Modern Britain, Structure and Change p.100) sums up the experience of most people when he says: "From the individual point of view....it might be said that for most of us the first fifteen or twenty years of life are spent in an intensifying struggle to free ourselves from our family which is usually achieved by setting up another one we will spend the remaining years more or less desperately trying to maintain." The British attachment to family life is frequently noted in sociology texts. This may well help to account for the extent of re-marriage among divorced persons which has shown considerable increase in recent years. About thirty-four per cent of new marriages taking place in these days involve a re-marriage for one or both of the spouses (Families in Focus p.44)

The review of the circumstances of family life in England highlights the very considerable and rapid changes that have affected it during this century. The pace of change has, if anything, increased as the century moves towards its close. As individuals are affected by change, so there has to be adjustment in family life to accommodate alterations in their pattern of living. Overall, family life in England has shown itself to have remarkable strength and flexibility. It is in the nature of the welfare state that much attention is paid to the identification of problems and efforts to solve them, and this may have helped to foster a widespread impression that the family is under threat and foundering. "Looked at objectively, all the indicators point to remarkable continuing in England of the family unit based on marriage, with children who grow up to adulthood with their nature parents, and in which the handicapped receive care". But it would be wrong to assume that the battery of voices aiming their particular viewpoints at the family will grow any less, and that there will not be people made confused and uncertain by them. Noble sums up the state of things in this way: "Disinterested observation or an examination of what evidence is available... should convince.... that a clearly articulated

and self-consistent set of beliefs is something of a rarity" (in Britain). (Trevor Noble Modern Britain: Structure and Change p.217)

Implications for the law and the courts

The above brief review of the formation and functioning of family life in England suggests that there are certain matters in which there will be increasing resort to the courts and concerning which there will be changes in the law. There is some evidence to indicate that a plateau in the applications for divorce may shortly be reached. This is not likely to apply to divorce-related matters coming before the courts. The division of matrimonial property and the often related financial provisions for maintenance have become, in changing economic and social conditions, exceedingly contentious matters. New legislation aimed at achieving as great a measure of justice as possible for all parties affected within the limits of the assets and opportunities for employment available is being actively canvassed. It is unlikely that an easy or early solution can be reached, given the conflicting rights and obligations that must be balanced in achieving a fair result. Both an appropriate police and a better way of adjudicating disputes needs to be found. Until this happens, recourse to the courts in these matters is likely to grow.

There is considerable discontent, too, with the way in which custody matters are handled. This is not confined to those arising from divorce proceedings. Custody orders made in conjunction with other matrimonial orders and in affiliation proceedings are now more likely to be disputed. Fathers are beginning to take a far more active interest in at least sharing the custody of their children and it appears that this is a change in attitude that will become more widespread. Custody battles are not only between parents. Increasingly parents may find themselves in conflict with local authorities over the custody of their children. The numbers of children being taken in under care and protection orders is growing. Parental rights, even of those parents who voluntarily placed their children in care, have been sharply curtailed by the Children Act 1975 and the provision of the Child Care Act 1980. They may be asked to pay for the misdemeanours of their children, but have no right to be heard either administratively or in court when decisions about the future of their children in care are being taken. They may not even be informed. It is probably safe to predict that challenges by parents will grow in number, and that courts will be increasingly involved in their efforts to reassert their rights, not only here but in other fields such as education.

There will be some pressure on the police and on the courts to clarify their attitude to the victims of domestic violence. Already the courts have so interpreted the law that protection offered to married spouses and children has been extended to those who cohabit without marriage. Voices on and off the Bench have been heard to put forward the proposition that family matters should be similarly handled before the courts regardless of whether the family was based on marriage or cohabitation. But there is no real sign that the legal distinction which remain will be easily discarded whatever the disadvantages for those who have chosen not to marry and their children.

The Present State of Family Law

The years since the Second World War have seen much change in both the substance and the administration of family law. Access to the divorce courts is now available throughout the country and the use of Divorce Registrars to handle undefended divorces, and the settlement of financial and custody matters, where these can be agreed, has considerably improved the ability of the courts to meet the increasing demand.

There have been changes in the law relating to the grounds for divorce and other matrimonial relief, the occupation of the rights in the matrimonial home and in other assets acquired during marriage, the determination of maintenance rights and, protection from domestic violence. There have been various pieces of legislation intended to give effect to the rights of children and provide for their protection. The extension of the provision of legal aid to a wide range of matrimonial and family

matters has had a very considerable effect on the practice of family law.

The changes in the grounds on which a petition for divorce or judicial separation could be made form part of the Matrimonial Causes Act 1973 (c.18) which consolidates a number of other related enactments. Instead of the list of matrimonial offences, on any one of which a petition could be grounded, the Act substituted the one ground of irretrievable breakdown. However, the ways in which such breakdown could be shown still made reference to adultery, cruelty and desertion, in effect retaining the notion of the matrimonial offence. The introduction of an alternative requirement of showing that "the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with" him or her, has in effect created a new matrimonial offence. Only the separation requirements, of two years with consent or five years where there is no agreement, seem to fit the idea of irretrievable breakdown. Not surprisingly, there has been a good deal of dissatisfaction with the way the law has worked. Its aim of giving dead marriages civilised burial has not really worked in general.

After the changes in the law were made there was an immediate jump in the number of divorces. Many of these involved people who having been in a matrimonial limbo for years took advantage of the five-year separation clause to re-order their lives. The number of divorces has risen each year since 1971, at an average of about ten thousand per year to the present rate of about one hundred and forty thousand. Less than one per cent of these divorces are contested and it could therefore be assumed that much of the bitterness and anger had been taken out of the process. That this not often so in practice may be explained by the grounds on which divorces are sought. The Judicial Statistics of 1980 has a breakdown of the grounds for petition. The largest number alleged unreasonable behaviour (c.65,000). Adultery was next often resorted to (c.48,000), and separation, though not usually opposed only accounted for forty thousand. The two first named grounds allege the kind of matrimonial behaviour likely to give rise to hurt and anger, often on both sides. All those in any way involved in dealing with these matrimonial disputes, whether as lawyer, judge, social worker or counsellor, agree that changes in the law are needed to eliminate unnecessary elements of conflict and give real meaning to the concept of irretrievable breakdown.

The public debate has made it clear that there are many different views on the matter. Some groups and persons, alarmed by the steadily increasing numbers of divorces would like to see restraints placed on the right to petition. Some have felt that making marriage and family counselling more readily available might help in promoting both reconciliation, or conciliation where that is not possible. The Law Society, many of whose members have a great deal of experience in the practice of family law, have put forward a well-argued proposal for making irretrievable breakdown the sole ground for divorce and basing this on evidence of one year's separation. They would place, in the case of new marriages, a limitation on the right to apply for a divorce. This should not be possible within two years of marriage unless there have been consultations with a marriage counselling organisation or there are special circumstances. There does not seem to be any clear public consensus on the matter and it seems unlikely that there will be any change in the near future.

Since the late sixties there has been a good deal of change in the law relating to matrimonial property. This has fallen into two parts, the occupation of the matrimonial home and the adjustment of property rights between the parties to a divorce, judicial separation or nullity suit, and the matter of maintenance which is frequently considered along with this. It seems odd that the two matters should not have been brought together in the Matrimonial Causes Act 1973, since occupation of the matrimonial home is often taken into account when adjusting property rights and fixing maintenance. Also, both reflect the same significant change in policy. It is now accepted that a wife has an interest in the matrimonial home which the law will protect even though she has no legal right of ownership nor has made any contribution to its acquisition other than by her work within the home in the care of the family and in its upkeep. The situation would of course be reversed if it were the husband at home, but in the vast majority of cases it is the wife whose interests are protected.

The most hotly contested matrimonial matters tend to be those associated with property adjustment between the parties and maintenance. Since the fifties, owner occupation of houses has steadily increased. Today more than half the number of house-holds fall into this category. The other large category consists of those who rent from local authorities. For many who divorce the matrimonial home is their one substantial asset. When property adjustments have to be made between the parties, the matrimonial home necessarily plays a large part in the calculations. The law which recognises the right of a non-owning spouse to occupy the matrimonial home only applies during the subsistence of the marriage. An order allowing occupation will not apply after divorce, unless the court has previously been requested and has extended the occupation beyond this date. Where the house is the only substantial property asset, occupation has to be dealt with separately from the division of family assets between the parties. Normally, where there are dependent children, occupation will be assigned to the spouse with custody, with some adjustment to the amount of maintenance to be paid.

When the court's power of adjustment was limited to transfers between the parties or settlement of the rights of one for the benefit of the other or of the children, any real division was likely to be postponed until the children were no longer dependent or there was money available to buy out the share of the non-occupying party. Since 1981, the courts have had the power to order the sale of property when making an order under the Matrimonial Causes Act. In many cases, this now means that assets can be divided without postponement, through the sale of the matrimonial home. This course is not without its difficulties for the parties if they have been legally aided. The matrimonial home is subject to a statutory charge for legal aid costs which become payable if the house is sold. With assets reduced in this way, resettlement in a new home can be made more difficult. An order for sale may, however, have the merit of achieving something like the much desired clean break between the parties.

There has been much discussion about what a wife's share of the assets should be on the breakup of a marriage, how much maintenance she should be entitled to and for how long. The Matrimonial Causes Act sets out the matters which the court should take into account in the exercise of their discretion. Conduct is to be disregarded unless it were so obvious and gross what it would be inequitable not to take it into account. To this extent the matrimonial offence is no longer important. Much more attention is paid to matters such as the age of the parties, duration of the marriage, their resources and earning capacity, their contributions to the welfare of the family however made, the financial needs, obligations and responsibilities of each as much as can be foreseen and the standard of living the family had enjoyed. The court is directed to exercise its powers so "as to place the parties.... in the financial position in which they would have been if the marriage had not broken down" so far as that, in all the circumstances, is possible. This direction has shown itself in practice to be unworkable. Such a result could only be achieved if the parties were so rich that a division of assets and awards of maintenance would not affect their standard of living, or if both were living on supplementary benefit payments. In any other case the support of two households instead of one would result in a lowering of the standard of living of at least one, if not both, households.

Starting from the position adopted by the Church when it was the arbiter of matrimonial matters, that the wife should be, if of good conduct, entitled to one-third of the income they had enjoyed, the courts now generally accept that a half share is more equitable. Where the parties are young and employed or employable or where the marriage has only subsisted for a short time, or where there are circumstances that indicate otherwise, half shares of assets may not be ordered either if both parties are clearly able to provide for themselves, or may be ordered only for a limited time to allow for one to resume income-earning. The presence of dependent children is a factor of considerable importance, for provision for them takes precedence over the needs of the parents except insofar as the one is related to the other. Decisions as to which of them should occupy the matrimonial home is a case in point. All this adds weight to the argument that in the statutory direction to the court far more emphasis should be placed on the need of the parties, and the aim of

retaining their standard of living abandoned. This approach might help the court in reaching a decision on how long maintenance should continue to be paid. For children, the rules are clear, but for a wife, it would be difficult to make any firm rule as circumstances vary so much.

The growing incidence of the remarriage of divorced persons has lent some urgency to the argument. Divorced men and ex-wives have joined forces to lobby for a time limitation to be attached to maintenance orders and favour provision for the "rehabilitation" of the ex-wife in order that she should become self-supporting. Ex-wives who have given up employment or professional careers in order to attend to the welfare of their families are only too keenly aware how difficult it is to re-enter full-time employment at anything like their old level, or even to find employment at all. That a second wife should benefit from the employment and career opportunities of her ex-husband which the first helped to sustain would make such a proposal even more unpalatable. Perhaps something of the North American approach to defining what is family assets might provide a solution. For example, the law in Ontario provides that a wife who has supported her husband while he obtained a professional qualification or skill should have his resultant earning capacity taken into account when assets are divided or maintenance awarded. In various of the states in the USA this principle has been upheld in recent years.

A clean break, however desirable, is rarely attained when there are dependent children of the marriage. Apart from arrangements for their maintenance, there is the matter of custody and of access for the non-custodial parent. There is now greater understanding of the needs of both children and parents to maintain contact irrespective of the award of custody. The management of the consequences of divorce has become more child-centred. Access is usually awarded unless there is any over-riding reason why it should be denied, and joint custody is beginning to be asked for and awarded where the parents can reach a satisfactory agreement about it. Where no agreement is reached there is sometimes a good deal of discontent expressed about the way in which decisions about which parent should have custody are reached. Though welfare reports are sometimes asked for, and are for the information of the court only, there is not much indication that any particular attention is paid to their findings. Much of the research that has been done confirms the general impression that whichever parent has effective custody at the time the decision is made, will be awarded custody. As great emphasis is placed on not disturbing the children unduly, and there is rarely time or opportunity for the spouse who has left to establish another suitable home, the merits of the award of custody apart from provisions for the physical needs of the children seem infrequently to be considered. Clearly, if agreement between the parents can be reached, it will be better for all parties.

There is less likely to be agreement when custody arises in suits under the Guardianship of Minors Act or as a result of matters arising in the magistrates' courts. In these latter, as in divorce and judicial separation, there is frequently a close connection between occupation of the matrimonial home and the award of custody. But the result of making the interests of children paramount and construing this to mean preserving their home base has led to some bizarre results. The Times reported in December 1982 that a mother, and children of whom she had custody, having left the matrimonial home could not regain possession of it as the father now lived there with another woman and her children. Because of the presence of the children the court left the father in possession even though there was evidence to show that his children were effectively without a home. The need for some legislative guidelines seems indicated.

Orders made as a result of domestic violence under the Domestic Proceedings and Magistrates Courts Act of 1978 may also affect the occupation of the matrimonial home. The offending spouse may be excluded in order to protect the other spouse and such children as there may be. The words of that Act suggested that the protection was limited to married persons,

but decisions by the courts have extended the protection to cohabiting persons who live together as man and wife. The protection afforded by the Act does not however extend to ex-spouses.

The really intractable problem in family law is the enforcement of maintenance orders. There is general agreement that those who have children or have taken on the responsibility for them or for a wife should support them and when they refuse or neglect to do so, the law should provide a remedy. Applications for these orders form a large part of the matrimonial work of the magistrates courts. A good deal of research has been done on how such orders are made, the involvement of the courts in both the collection and payment of maintenance and the steps taken to enforce payment when there is default. In general, these studies show that these orders are inadequate to provide support, that at any one time about forty per cent of the orders are in arrears, more in areas of high unemployment, that attachment of earnings is relatively unpopular with liable persons and not always welcomed by employers and that imprisonment for non-payment has almost nothing to recommend it. In many cases where the means of the liable party are small and make no real contribution to the support of those named in the order, enforcement proceedings would seem to be pointless. In these, as in other cases where maintenance is sought, social security benefits provide the real means of support. At one time wives used to be urged to take proceedings against their husbands, it being understood that this would help their claim for benefits. This has now been discontinued but wives may still assign their awards of maintenance to the Social Service Department who can take action if there is default, which a wife might be reluctant or unable to do. Unwillingness to pay maintenance is, it appears, more often directed against spouses than against children, and the longer an order lasts the more likely it is to fall into arrears. The new powers of the magistrates courts to order the payment of lump sums up to Five Hundred Pounds should go some way to meet this problem.

The reports of some conciliation agencies provide a little evidence that where maintenance is agreed between the parties it is likely to be paid. Perhaps more research effort should go into gaining some understanding as to why people do not pay rather than into ways of enforcing payment. It may be that, apart from any ill-feeling about paying, the knowledge that welfare benefit will provide for basic needs removes any element of urgency about making payment.

From a maintenance point of view, the parent of a child born out of wedlock is in the most vulnerable position of all. Even if the mother brings proceedings under the Affiliation Proceedings Act and the putative father is named, maintenance can only be awarded for a child. Those who live together outside of marriage have no obligations to maintain each other.

Until recently the policy of the law administered by the magistrates in matrimonial cases was very different from that administered in the superior courts. So much was this the case that they could be described in the Finer Reports as being different systems of family law. Apart from the financial limits placed on the magistrates' jurisdiction, one of the principal differences lay in the way in which conduct affected the relief afforded to parties. The standards of conduct that the law required from women were higher than those from men. A single act of adultery was sufficient to deny a woman her claim to maintenance, but could be ignored if committed by a man. The Matrimonial Causes Act of 1973 consolidated the changes in the law relating to divorce, nullity and judicial separation, and related matters, that had been taking effect during the sixties and emphasized the gulf between the way family matters were handled in the upper and the lower courts. Recent changes in the law which have allowed magistrates to use much the same criteria in considering matters such as claims to maintenance and the amounts that should be awarded have

brought them closer together.* This, however, is unlikely to last for long as changes in divorce law and proposals such as the co-ownership of matrimonial property are now being actively canvassed.

The two jurisdictions differ in that, by and large, they deal with problems at different stages in the process of family breakdown. Problems very often arise first in ways that can be dealt with on an interim basis by magistrates. Applications for permanent relief and other matters which may also involve considerations of legal status are dealt with in the High Court and courts and registrars having jurisdiction in matrimonial matters. The only matter of status dealt with by magistrates is that of putative father and that only for the purpose of the payment of maintenance for a limited period of time. But custody matters fall within the jurisdiction of both.

Magistrates usually deal with applications which ask for what is essentially interim relief. These are often present as matters of urgency and ease of access and speed in dealing with them are important considerations. Family problems which surface in this way, unless they are among the few that are settled by reconciliation, tend to be the subject of other court appearances, either before magistrates or in other courts. The way they are handled on first appearance may have a crucial effect on the way family relationships subsequently develop. It would seem that the kind of skilled counselling and conciliation for which so eloquent a case has been made in divorce and other matrimonial causes is even more necessary in the magistrates' courts, when there may be a better chance of agreement between the parties being reached. It seems clear that not only is consistency needed in the law administered by the various levels of courts but in the way matters are dealt with by them. The choice of forum would then be dictated by the kind of remedy sought not by the way matters like one's conduct would be likely to be dealt with, at present a relevant consideration.

Legal Aid

There is general agreement that the provision of legal aid in matrimonial matters - first in the High Court and then in the magistrates' courts - has resulted in much more equitable access to the reliefs offered by the courts. Divorce, for example is no longer available only for those who can afford it. Wives who are second or non-earners have been the biggest group to benefit, but there are a growing number of divorce cases in which both parties are legally aided.

In general, legal aid is available where need can be shown for the services it provides, either free, or on the basis of an assessed contribution towards the cost in the following family matters: a defended divorce case, or an undefended one or judicial separation which has for some reason to be heard in open court; matters relating to property, maintenance or any financial matters, contested custody or arrangements for children, hearings concerning the occupation of the matrimonial home, domestic violence and any orders arising from it and the like. Legal aid is now available to children in care as well as in offence matters. But in the provision of legal aid in care cases parents tend to fare less well than children when they attempt to contest care proceedings initiated by a Local Authority.

*The Domestic Proceedings and Magistrates' Courts Act of 1978 provided that either party to a marriage could apply to magistrate's court for financial provision on the following grounds (1) failure of respondent to provide reasonable maintenance for spouse, or (2) failure either to provide or make reasonable contribution toward maintenance for any child of the family or (3) has behaved in such a way that applicant cannot reasonably be expected to live with respondent: or (4) desertion. Adultery of wife is no longer a defence to a claim to maintenance. Also when considering an order for financial provision the magistrate must now have regard to the following: The income, earning capacity, financial obligations and responsibilities, standard of living of the family, age, health, the contributions which each party has made including looking after the house and family and any other circumstances including conduct, which appear to be relevant.

It has been pointed out earlier in this paper that getting legal aid is not without its difficulties where parties are of moderate means. Where the matter in contention concerns property, and the legally aided person has as a result acquired ownership or part ownership, a statutory charge attaches. Upon sale of the property, the portion of the legal aid costs for which he or she has been assessed becomes payable. This has worked particular hardship in those divorce cases where the family home has been the only asset of importance. Courts, in endeavouring to achieve fairness to both parties, have often directed that the home be sold and a division made so that both parties are enabled to acquire homes of their own. That this laudable effort is sometimes frustrated by the statutory legal aid charge that attaches to the proceeds of sale has been cause for growing comment in the courts (See *Simmons v Simmons* C.A. TLR March 24 1983). Clearly a change in the law which would exempt the proceeds of the sale of a matrimonial home under a fixed limit would seem to be indicated. There would seem to be a strong case for ceasing to apply the legal aid rules for civil matters to matrimonial cases and developing other rules to cover these.

The provision of legal aid has no doubt resulted in a considerable increase in the number of matrimonial cases coming before the courts. Those disturbed by the numbers might reflect that this way of handling family disagreements could have considerable benefits for society at large. This depends very largely on the way decisions are reached. The importance of securing agreement between the parties wherever possible seems to be becoming more widely understood. Nothing is gained and much lost if court decisions are rejected and enforcement is in practice either impossible or will worsen the family situation. Since it is hardly ever possible to sever contact between family members permanently, the benefit of skilled conciliation when there are problems is beginning to be recognised.

Conciliation

The case for the provision of adequate conciliation services attached to or working with all courts that deal with family matters seems incontestable. It is not by chance that various experiments in conciliation are now being undertaken in various parts of the country. They differ in various ways. Each tends to reflect the kinds of problem it was set up to deal with and the kind of worker who delivers the service. Some offer help to parents faced with problems over custody or access and who are reluctant to engage in a court battle over their children. Others may concentrate on isolating problems which can be settled by agreement and a few address the financial problems consequent on breakdown. The services they offer may include marriage counselling, though for many who seek their services this is inappropriate. What is clear is that any useful conciliation service has to be prepared to offer a range of responses and of expertise to meet needs as and when they arise.

Though conciliation services where they exist are acknowledged to be helpful, there seems to be a general feeling that the cost of providing such a service generally would be prohibitively high. Yet the experience of the Bristol Courts Family Conciliation Service suggests that it might provide the best possible way yet devised of meeting that hitherto intractable problem of ensuring the payment of maintenance orders where the means to do so exist. The saving in court time and prison space would go a considerable way to meeting the costs of conciliation. Some magistrates' courts have found conciliation useful as do an increasing number of lawyers experienced in family practice.

Perhaps the most impressive support for the idea that conciliation services should become a routine part of the judicial handling of family matters has come from the various associations of lawyers who have studied the matter. It is they who are most keenly aware how the present adversarial handling of matters that go to court can exacerbate family problems, and recognise that the law does not offer a solution to family problems only decisions about status and rights and responsibilities in the circumstances of the cases that are brought to court. Judgments do also put a judicial seal of approval on changes in public attitudes but

usually long after these changes have been generally accepted.

The failure to act on the calls for the provision of conciliation services is due in part to reluctance by successive governments to give any real consideration to the establishment of a family court system.

A Family Court System

The Finer Report included a vigorous statement of the case for the establishment of a system of family courts and also considered some aspects of what this would mean in practice. Since the publication of that report, many groups have given support to the idea. The response of government that this would cost a great deal of money and could not be considered in a time of financial stringency has masked an unwillingness to tackle the resistance that a change in the court systems would be likely to meet from those currently in it, and also to address the problem of how the conciliation and judicial services could be brought together in a working relationship that acknowledged the importance of both.

There seems to be some hope that resistance to the idea of a special court for family matters may be growing less. The split jurisdiction between the county courts and the High Court has meant that litigants in matrimonial cases could indulge in forum shopping in order to seek an advantage for themselves. The Lord Chancellor's Department has recently issued a consultation paper putting forward the idea of giving the jurisdiction in matrimonial and family matters now enjoyed by both these courts to a new family court. This would be a great improvement. But it leaves out any consideration of how the jurisdiction exercised by the magistrates' courts in family matters could be integrated with it. Since there exists much information that many of those who first seek relief in the magistrates' courts subsequently appear as parties in actions in the superior courts, it would seem that such integration would be the next logical step if real improvement in the handling of family matters is to be achieved. Any overall consideration of how a family court system should be structured, and the kind of administration and procedures that would be necessary to make it work, has been inhibited by the practice of considering each of the elements that should go to make up the whole in isolation. Nearly all the elements have been the subject of investigation by a commission, but their terms of reference have precluded any such general investigation as has been needed. There is no indication that there will be any change in this approach at the present time. It is unlikely that anything other than piecemeal approaches, with all the problems inherent in this, will result, in spite of the interest shown by both the public and the professions in the establishment of a family court system.

Welfare Benefits and Taxes

The economic management of family breakdown has received a great deal more attention than the judicial. That this is so is in part due to what seems the overriding concern of the welfare state - the matching of benefits to problems. But it is also due to the acceptance of the fact that the division of property calculations about maintenance and the like offer the courts the only really practical way of achieving some fairness in meeting the competing claims of family members when there is breakdown. It is an irony that since these are the ways in which problems can be dealt with, these are the terms in which they come to be formulated. The most contentious arguments that result from family breakdown are most often about money and property.

Child benefits, family income supplement, supplementary benefit and one parent family allowances are now all part of the financial calculation of meeting the cost of separation or divorce. Applications for benefit and the necessary disclosures of personal circumstances to substantiate them can add to the stress caused by family breakdown. Any plans to improve the way family breakdown is dealt with will have to take this into account. Pensions are an important part of the economic strategy of the welfare state. The entitlement of dependent wives is a matter which the courts now recognise should be taken into account in the financial settlements in divorce.

Any structure of a system of personal taxation has to have at its base a model of the family, composed as it usually is, of wage earners and dependants. Since the accepted model of once married, wage-earning husband, wife not employed with two or three dependent children fits only a minority of families in these days, the tax system tends to work in a way which results in hardship for some, tax loopholes for others. Tax considerations can loom very large in the timing of such matters as marriage and divorce, in calculating the amount of maintenance payments and in decisions about matters such as paying maintenance directly to a dependent child. It is worth noting that where maintenance payments are voluntary - i.e. not the subject of any order and therefore unenforceable - they are ignored for tax purposes. This probably works against their usefulness as a means of reaching an amicable settlement in a difficult matter unless one is rich enough that tax reliefs do not matter. The reason for this is perhaps bureaucratic convenience, but in the light of the known difficulties about enforcing maintenance payments, perhaps this could be reviewed.

Taxation rules discriminate between those who are married and those who are not. While this may work to the benefit of the parents, it may be otherwise with the children. Children born out of wedlock do not come within the rule that maintenance from a separated parent paid directly to them does not attract tax.

Clearly the settlement of money and property problems forms a large part of the matters which an effective conciliation service has to be prepared to tackle. The range of such problems is likely to increase with the prevalence of second marriages and the expected growth in family responsibilities for the aged.

At the present time, as is usually the case in times of rapid change, the family has become the focus of much interest, analysis and speculation. Because there are so many angles from which it may be viewed, it is judged according to different, frequently conflicting, criteria, and this confusion is reflected in legislation and in the courts. "Whose Child" published on behalf of the Study Commission on the Family provides a good example of the way in which social theories influence legislation concerning children, and rights and duties of parents and of public authorities in relation to their care and upbringing. The changing roles of women have caused similar confusion. The morality which public institutions may be required to uphold may in the future have less to do with promoting one generally acceptable form of family formation and functioning and more to do with protecting the right to choose family patterns which promote individual development and happiness. If there is such a shift - and there is some evidence from studies on the family that it is already on the way, - there will be need for flexibility in both policy and administration which most public institutions as they are at present structured would find it difficult to achieve. That this is true of both law - making and the courts in the area of family law has already been recognised.

Notes on the chapter on England

The literature on the family in England, in general and relating to various aspects of its functioning, is extensive, and there seemed little point in listing all the sources consulted. Attached to the study by R. and R. Rapaport: "Fathers, Mothers and Others" there is an excellent bibliography.

Particular use was made of the following sources:

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Whose Child? MacLeod

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Gibson C. Childlessness and Marital Instability (Journal of Biosocial Sciences Vol. 12 No. 2 pp 121-32)

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Legislation

Child Care Act c.5 of 1980

Children and Young Person Act 1969 as amended by Children Act 1975

Domestic Proceedings and Magistrates Courts Act c.22 of 1978

Guardianship of Minors Act c.3 of 1971

Inheritance (Provisions for Family & Departments) Act 1975

Legal Aid Act c.20 of 1979

Magistrates Courts Act c.43 of 1980

Matrimonial Causes Act c.18 of 1973

Matrimonial Homes Act 1967

Matrimonial Proceedings and Property Act 1970, 1976

Protection of Children Act c.37 of 1978

Legislation on Welfare Benefits is two volumes to cite in detail.