

DECISION-MAKING IN THE CHILD'S BEST INTERESTS

Legal and psychological views of a child's best interests
on parental separation

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To my family,
and in memory of
Vaughan Bevan

1952 - 1992

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Preface.

This work has only been possible because of other people, and I wish to thank them. My interest in this area was first kindled as an undergraduate. Kathleen Cox, an educational psychologist, presented a paper to the Family Law students outlining the problems which the children who needed her professional help experienced because of the separation of their parents. Following that presentation, I became convinced that the law could not progress alone in forming an understanding of the issues involved in separation; and that its only way forward in dealing with the needs of the children when the parents separate was by learning from psychology. This belief became the thesis which is explored in this work.

The work was made possible by a training award from the Economic and Social Research Council. I am indebted to the many solicitors, court welfare officers, conciliators, barristers, and psychologists who participated in, and continue to be involved in my work. They all gave up their valuable time and entered into my study with enthusiasm and frank cooperation. Without them, the work would have been impossible. I am also particularly grateful to the couples who allowed me to observe their court hearings.

It is my deepest sadness that this thesis must be dedicated to the memory of Vaughan Bevan. Vaughan was my supervisor until his sudden death in February 1992. He was a splendid tutor, sharing my enthusiasm for the project; standing back to allow me to learn the skills of research, and stepping forward to give expert advice and encouragement. He was also the finest example for academic life: brilliant in his scholarship, and kind and patient with colleagues and students alike. His example will remain with me; it is my hope that I can live up to it.

Since Vaughan's death, I have been indebted to Cathy Williams, who became my supervisor. To step in as supervisor at such a late stage must have been very difficult, and her help during the writing of this thesis has been invaluable. Indeed, I must extend my thanks to all my colleagues at the Faculty of Law in the University of Sheffield for their support throughout this research, and especially when Vaughan died.

Finally, I thank my family, and especially my wife Gillian, for the support they have given to me.

D. M. R. Townend.

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Abstract.

The thesis presented and discussed here concerns the law relating to the decisions made concerning children when their parents separate using the legal process. It is divided into four parts, which consider four separate issues in that legal response. There is an introduction which places the work in a broad academic context.

First, *The Law Relating to Separation and Children* discusses the statutory regulation of the process of making decisions about children of separating parents. It then discusses the body of case law which has developed to attempt to interpret the statutory requirement of the paramountcy of the child's best interests. The Children Act 1989 is considered in this part.

Secondly, *The Institution of Separation Law* seeks to identify the professionals who work in this area of the law. Further, in this part of the work, the theoretical and philosophical positions of the professionals are discussed, especially in the context of the critical literature published in this area. A major theme of this section is the change in the practice of this area of law from an adversarial model to the negotiated settlement, or mediation model.

Thirdly, *The Practice of Separation Law* is a presentation and discussion of the findings of an empirical study undertaken to establish the nature of the practice of the professionals in this area. The empirical study also sought to ascertain whether the professionals adopt any definition of the statutory phrase "the child's best interests", and the theoretical basis of that definition.

Finally, *The Psychology of Separation Law* explores the discipline of psychology, to consider first, the effects of separation on children, secondly, a theoretical understanding of "the child's best interests", and thirdly, the implications on the legal process relating to the parents.

In re B (a Minor) (Irregularity of Practice),

[1990] 1 FLR 300.

In re B (Minors), *The Times*, 5th October 1989.

In re B (Minors: Access), *The Times*, 15th July 1991.

In re B's Settlement, [1940] Ch. 54.

Re B C (a Minor) (Access), [1985] FLR 639.

Re B & G, [1985] FLR 493.

B v. A (Illegitimate Children: Access), [1982] 3 FLR 27.

B v. B, [1971] 3 All E.R. 682.

B v. B (Custody of Children), [1985] FLR 166.

B v. B (Declaration of Unfitness), [1982] 3 FLR 187.

B v. B (Minors)(Custody, Care and Control),

(1991) 21 Fam. Law 174.

B v. M, (1990) 20 Fam. Law 346.

Belton v. Belton, (1987) 17 Fam. Law 344.

Blair v. Blair, (1986) FLR

Bowley v. Bowley, [1984] FLR 791.

Brent v. Brent, [1974] 3 WLR 296.

Brewer v. Brewer, *The Times*, 17th February 1989.

Re C, [1985] FLR 804.

Re C (Custody of Child), [1981] 2 FLR 163.

In re C (a Minor), *The Guardian*, 12th October 1990.

In re C (a Minor), *The Times*, 21st December 1990.

Re C (Minor)(Access), (1991) 21 Fam. Law 417.

C v. C (a Minor)(Custody Appeal),

(1990) 155 JP 43; (1991) 21 Fam. Law 175.

C v. C (Child Abuse: Access), [1988] 1 FLR 462.

Re C (Minors), (1978) 8 Fam. Law 202.

Re C (Minors)(Access), [1985] FLR 804.

In re C (Minors) (Parental Rights),

The Times, 8th August 1991; (1991) 21 Fam.Law 396.

C v. C (Minors Custody), [1988] 2 FLR 291.

Caffell v. Caffell, [1984] FLR 169.

Cahill v. Cahill and Others, (1975) 5 Fam. Law 16.

Chamberlain v. De la Mere, (1983) 13 Fam. Law 16.

Churchard v. Churchard, [1984] FLR 635.

Clarkson v. Winkley, (1987) 151 JP 526.

Clout v. Clout and Hollebone, (1861) 2 Sw & Tr 391.

Codrington v. Codrington, (1864) 3 Sw & Tr 496.

Cossey v. Cossey, (1981) 11 Fam. Law 56.

Re Curtis, (1859) 28 LJ Ch 458.

Re D (Justices' Decision: Review), FLR 158.

D'Alton v. D'Alton, (1878) 4 P D 87.

Dicocco v. Milne, [1983] 4 FLR 247.

Dipper v. Dipper, [1980] 3 WLR 626; (1981) 11 Fam. Law 31.

Doncheff v. Doncheff, (1978) 8 Fam. Law 205.

Re E (a Minor: Access), [1987] 1 FLR 368.

Edwards v. Edwards, [1986] 1 FLR 187.

Emperson v. Dampney, (1976) 10 ALR 227.

Evans v. Jackson, (1986) 150 JP 702.

Re F, (1976) 6 Fam. Law 238.

Re F (An Infant); F v. F, [1969] 2 Ch. 238.

Re F (Wards)(Disclosure of Evidence), [1988] 3 WLR 818.

F v. F, [1959] 3 All E.R. 180.

Faulkner v. Faulkner, [1981] FLR 115.

Fowler v. Fowler and Sine, [1963] P 311.

Re Fynn, (1848) 2 De & Sm 457.

In re G, *The Guardian*, 26th January 1989;

The Times, 6th February 1989.

Re G (a Minor)(Welfare Officer's Report),

(1989) 19 Fam. Law 475.

G v. G, [1985] 1 WLR 647.

Garska v. McCoy, 278 S.E. 2d 357 (W.Va. 1981).

Gillick v. West Norfolk and Wisbech Area Health Authority,

[1986] AC 112.

Godfrey v. Godfrey, (1980)

Greer v. Greer, (1974) 4 Fam. Law 187.

Gronow v. Gronow, (1979) 144 CLR 513.

Guery v. Guery, (1982) 12 Fam. Law 184.

Re H, [1986] 1 FLR 476.

Re H (Conciliation: Welfare Reports), [1986] 1 FLR 476.

In re H (Minors)(Abduction: Custody Rights); In re S

(Minors)(Abduction: Custody Rights), *The Times*, 19th June 1991.

H v. H, [1984] Fam. Law 112.

H v. H (Irregularity: Effect on Order), (1983) 4 FLR 119.

In re H (a Minor), *The Times*, 1st February 1991.
Re H (a Minor: Custody), (1989) 19 Fam. Law 435.
In re H (Minors), *The Times*, 5th March 1992.
Re H (Minors), *The Guardian*, 3rd January 1991.
Re H (Minors)(Welfare Reports), (1990) 20 Fam. Law 338.
H v. H, *The Times*, 4th October 1988.
Hamilton v. Hector, (1872) LR 13 Eq 511.
Heathcote v. Heathcote, (1864) 10 L T 389n.
Hoey v. Hoey, [1984] FLR 334.
Hoffmann (Austria), (1992) 89 *Childright* 5.
Ex parte Hopkins, (1732) 2 P Wms 152.
Hutchinson v. Hutchinson, [1981] 2 FLR 167.

I v. D (Access Order: Enforcement), [1988] 2 FLR 286.

In re J (a Minor), *The Times*, 6th March 1991.
Re J (a Minor), *The Times*, 14th May 1992, (1992) 22 Fam. Law 229.
In re J (a Minor)(Expert Evidence),
The Times, 31st July 1990.
In re J (a Minor)(Interim Custody: Appeal),
[1989] 2 FLR 304.
J v. C, [1970] AC 668.
Jane v. Jane, (1983) 13 Fam. Law 209.
Jenkins v. Jenkins, [1980] 1 All E.R. 148.
Jones (EG) v. Jones (EF), [1974] 1 WLR 1471.
Jussa v. Jussa, [1972] 2 All E.R. 600.

Re K (a Minor),

Lexis Transcript Association, 21st March 1990.

In re K (Infants), [1963] Ch 381.

Re K (Minors) (Children: Care and Custody),

(1977) 7 Fam. Law 179, [1977] 2 WLR 33, 1 All E.R. 647.

Re K (a Minor)(Ward: Care and Control),

[1990] 3 All E.R. 795.

Re K D (a Minor)(Ward: Termination of Access),

[1988] 1 All E.R. 577.

K v. K, *The Guardian*, 13th May 1992;

The Times, 21st February 1992.

Re L, [1969] 1 WLR 886.

In re L (Minors), *The Times*, 12th October 1989.

L v. L, [1981] 2 FLR 48.

Lonslow v. Henning, [1986] 2 FLR 378.

Ex parte Lytton, (1781) 5 East 222.

In re M & H (Minors), *The Times*, 29th July 1988.

M v. J, [1982] 3 FLR 19.

M v. M, [1980] 1 FLR 77.

M v. M, [1980] 1 FLR 327.

M v. M, *The Times*, 27th April 1989.

M v. M (Child: Access), [1973] 2 All E.R. 81.

M v. M (Custody of Children), [1983] 4 FLR 603.

In re M (minors), *The Times*, 11th December 1991.

Merriman v. Hardy, (1987) 151 JP 526.

Morgan v. Morgan and Others, (1974) 4 Fam. Law 189.

Nash v. Nash, [1973] 2 All E.R. 704.

Re Newton, [1896] 1 Ch 740.

Official Solicitor to the Supreme Court v. K, [1965] AC 201.

In re O'Hara (an Infant), [1900] 2 I.R. 232.

In re P (a Minor), *The Times*, 1st October 1991.

Re P (a Minor)(Custody), [1983] FLR 401.

In re P (Minors) (Wardship), *The Times*, 11th May, 1992.

P v. P (Minors: Custody Appeal), [1984] FLR 99.

Philip v. Philip, (1872) 41 LJ P & M 89.

Practice Direction, [1982] 3 All E.R. 988.

Practice Direction, [1984] 3 All E.R. 800.

Practice Direction (Child: Joint Custody Order),

[1980] 1 WLR 301.

Practice Direction (Divorce: Welfare Report),

[1981] 1 WLR 1162.

Practice Direction (Infants: Magistrates' Courts),

[1972] 1 WLR 392.

Practice Direction (Infants: Magistrates' Courts)(No. 2),

[1972] 1 WLR 1195.

Practice Direction (Minor: Welfare Officer's Report),

[1984] 1 WLR 446.

Practice Direction [1986] 2 FLR 171.

Poel v. Poel, [1970] 1 WLR 1469.

Pountney v. Morris, [1984] FLR 381.

Re R, (1986) 16 Fam. Law 15.

Re R (a Minor)(Child Abuse: Access), [1988] 1 FLR 206.

R v. De Manneville, (1804) 5 East 221.

R. v. Sunderland Juvenile Court, ex parte G, [1988] 2 FLR 40.

Registrar's Direction, [1982] 2 FLR 171.

Richards v. Richards, [1984] AC 174.

Richardson v. Richardson, [1989] 3 All E.R. 379.

Riley v. Riley, (1987) 17 Fam. Law 15.

Re S (a Minor)(Custody), [1991] Fam. Law 302.

Re S (an Infant), [1967] 1 WLR 396.

Re S (Minors)(Access: Appeal), (1990) 20 Fam. Law 336.

S v. O, [1982] 3 FLR 15.

S v. S, [1980] 1 FLR 143.

S v. S (Child Abuse: Access), [1988] 1 FLR 213.

S v. W, (1981) 11 Fam. Law 81.

S(BD) v. S(DJ) (Children: Care and Control),

(1977) 7 Fam. Law 109.

Scott v. Scott, [1986] 2 FLR 320.

Sheppard v. Millar, [1982] 3 FLR 124.

Smith v. Smith, (1745) 3 Atk 304.

Stanwick v. Stanwick, [1971] P 24; [1970] 3 WLR 1073.

Stephenson v. Stephenson, [1985] FLR 1140.

T v. T, *The Times*, 2nd August 1991.

T v. T (Minors: Custody Appeal), [1987] 1 FLR 374.

In re Thain, (1926) Ch 676.

Thompson v. Thompson, [1986] 1 FLR 462.

Thomason v. Thomason, [1985] FLR 214.

Townson v. Mahon, [1984] FLR 690.

V-P v. V-P (Access to Child), [1980] 1 FLR 336.

Re W, [1983] 4 FLR 492.

Re W, [1985] AC 791.

Re W (a Minor)(Access), (1989) 19 Fam. Law 112.

Re W (a Minor)(Custody), [1984] 4 FLR 492.

Re W; Re L, (1987) 17 Fam. Law 130.

Re W (Minors), (1992) 22 Fam. Law 561.

Re W & W (Minors), [1984] FLR 947.

W v. A (Child: Surname), (1981) 11 Fam. Law 14.

W v. D (Interim Custody Order), [1980] FLR 393.

W v. P (Justices' Reasons), [1988] 1 FLR 508.

Walker v. Walker, [1978] 1 WLR 533.

Webb v. Webb [1986] 1 FLR 476.

Whitfield v. Hales, (1806) 12 Ves 492.

Wild v. Wild , [1969] P 33; [1968] 3 WLR 1148.

Williams v. Williams, [1985] FLR 509.

Witter v. Drummond, (1980) 10 Fam. Law 149.

Wright v. Wright, [1981] 2 FLR 276.

List of Statutes.

Adoption Act 1976.

Child Abduction and Custody Act 1985.

Child Care Act 1980.

Children Act 1891.

Children Act 1975.

Children Act 1989.

Custody of Infants Act 1873.

Domestic Proceedings and Magistrates' Court Act 1978.

Divorce Reform Act 1969.

Education Act 1870.

Factories Act 1833.

Family Law Act 1986.

Family Law Reform Act 1987.

Guardianship Act 1973.

Guardianship of Infants Act 1886.

Guardianship of Infants Act 1925.

Guardianship of Infants Act 1926.

Guardianship of Minors Act 1971.

Married Women's Property Act 1870.

Matrimonial Causes Act 1857.

Matrimonial Causes Act 1967.

Matrimonial Causes Act 1973.

Matrimonial Homes Act 1967.

Matrimonial Proceedings (Magistrates' Court) Act 1960.

Summary Jurisdiction (Separation and Maintenance Acts) 1895 - 1949.

INTRODUCTION: THE THESIS AND ITS CONTEXT.

A. Separation Law: A Context.

B. The Hypothesis.

C. The Plan of the Thesis.

INTRODUCTION: THE THESIS AND ITS CONTEXT.

"There was never any thing by the wit of man so well devised, or so sure established, which in continuance of time hath not been corrupted". So began Archbishop Cranmer as he observed the state of the common prayer in the Church of England.¹ Hobbes opines that the human condition is "solitary, poor, nasty, brutish, and short".² No doubt, on reflection, all too many people throughout western society, on considering their experience of family life, will find consonance with these two sentiments. The romantic love of the advertisers' world seems to end so soon in the experience of so many, requiring replacement. This transition seems equally dogged by the perils of isolation in nuclear families, and by economic and material hardship, and the decay of other dreams. The culmination, or symptom of these pressures can be the collapse of the family and the separation of the couple.

A. Separation Law: A Context.

It seems almost obligatory to start any discussion on divorce and separation with the seemingly catastrophic statistics. This will be no exception. It is a useful starting point as it gives a sobering context for any discussion, and indeed, the statistics themselves pose interesting questions of perception. It would not, however, be fruitful to rehearse at any length the work of far greater scholars. The most detailed and perceptive account of the history of the family, and especially the history of divorce, is found in the work of Professor Lawrence Stone (1990). His work shows that the problem of separation is not a modern phenomenon, even if it is statistically more prevalent today.

Professor Stone³ shows that the years from 1857 to the present have seen an dramatic change in the divorce rate. In 1860, the rate per thousand of the population stood at about 0.1. This remained constant until the period of the first world war. By the end of the war, the rate had risen to 0.5 divorces per thousand of the population. After a brief decline to 0.3 per thousand in the early 1920s, the rate started to rise steadily upto the outbreak of the second world war, by which time it had reached 0.8 per thousand.

The duration of the war saw a constant period in the rate, but then the immediate post-war years of 1945 - 1950 saw an explosion in the divorce rate, which reached a peak of 6 divorces per thousand of the population in 1946/7, and then saw a tailing off to around 3 per thousand by 1950. This rate remained fairly constant, growing slightly between 1965 and 1970 when the rate had reached about 4 divorces per thousand.

Professor Stone suggests⁴ that the sudden rise in the divorce rate in the immediate post-war periods can be attributed to war-time infidelity (two-thirds of the petitions were made by husbands). It may also be the case that the adjustment of both men and women after the war was too great a tension for many couples to bear. The man would have to make the adjustment to civilian life - perhaps coping with what is now known to be post-traumatic stress. The wife may even have had a greater adjustment. During the war-years women gained considerable power in the industrial and agrarian work-place, and therefore throughout their lives. The end of the war would bring a challenge to this power, in that it required a return to the pre-war attitudes. Jobs were perceived to be rewards for returning men, the heroes. Woman's usefulness in the work-place was over, and woman's place, in the eyes of the post-war economy, had to be in the home.

The link between economic and industrial needs for the work-force, and the

portrayal of the rôle of women and children can be seen as a recurrent theme, especially in English society from the mid-eighteenth century. The industrial revolution changed the power structure from an agrarian base to an industrial one, and this was reflected in the family in a number of stages upto the early twentieth century. The first change was the movement from the family as a unit working equally to provide for itself, to the family as a unit of individuals selling their labour to the factories. Increasingly, technological processes in manufacturing, and a change from primary to secondary industry, could be seen to give the welfare movement an opportunity to influence the legislature over factory conditions (e.g. Factories Act 1833) and educational provision (Education Act 1870). Alternatively it could be argued that the industrial owners were able to use the welfare movement to reduce the work-force, which was no longer needed in such great numbers.

The culmination of these changes in the perception of the equality of the members of the family, which started with the extension of the concept of childhood from the middle and upper classes to the working class through the education and factory legislation, was the change in the perception of the rôle of women. In the early twentieth century, the trade unions agreed the "Family Wage"⁵, which effectively gave increases in the living wage of the family. The hidden effect of the reform was the formal projection of the image of the man as the wage earner and provider. One could argue that the legal notion that the women and children were the property of the man, which was a reality in the middle and upper classes during the nineteenth century, was forced onto the working class. For them, there had been a closer equality of gender until the family wage, forged from the need to overcome poverty.

The two wars of the first half of the twentieth century provided the need to employ women throughout the work-force. At the outbreak of the first world war,

the early women's movement had agreed with the Government of the day to enter the job market in return for the vote at the earliest opportunity, and with the suffrage issue closed, the women's movement lost its impetus after the first world war. The post-war period saw an initial image of motherhood in the home with the male provider, at a time when the work-force could only sustain men. This was challenged with another theoretical movement, starting in the 1960s, with a reassertion of feminism.

The changes of the portrayal of women can still be seen in the late twentieth century, depending on the needs of the labour force. In the early years of Mrs Thatcher's Prime Ministerial office, the positive image of women was of the career-mother. The later years, with deepening recession, saw an attempt at the restatement of the home-mother to free jobs in the market place. The single parent mother was constantly, and still to a large degree is, portrayed as morally unacceptable, the most persistent of Thatcher's images of the scrounger-culture. This could be because the "single parent" offers a tangible model which stands against the nuclear family, and therefore threatens the control over women in the work-place. In reality, however, it is not the single parent family, but the success of women in finding an alternative philosophy and set of images about society, and in moving through the ranks of the male society, which undermines the control of the job market by the manipulation of woman's place in it.

In the period 1955 - 1960, there was a steady increase in the divorce rate. Stone notes⁶ three factors for this rise: first he notes the change in the status of women in that time, and the changes in sexual practices; secondly and thirdly, he notes from the Royal Commission on Marriage and Divorce (1956) that social conditions had a part to play, with housing shortages (causing more young couples to live with parents) and a rise in juvenile marriage, and, more importantly, there was a shift in the general ethic away from a duty ethic to one of

self-gratification. The same conclusions were reached by Burgoyne *et al.* (1987).

After a period from the 1950s to the late 1960s, the divorce rate, with the reforms of 1969, jumped from around six divorces per thousand to 10 per thousand. The rate has continued to climb steadily from 1970 to the present day, reaching a peak of 14 per thousand in 1985, from which point the rate has calmed slightly. Stone indicates⁷ that the actual numbers for this growth went from some 24,000 divorces in 1960 to 151,000 in 1987. This was matched by a similar jump in the number of remarriages after divorce. Richards (1991) suggests that this perhaps indicates not a disenchantment with the institution but with the partner. He also feels that the change in the pattern of divorce reflects a change in the expectations of the spouses towards each other: "There has been a growing expectation that a couple should spend most of their non-working time together and share not only the same interests, but all their thoughts and feelings with each other".⁸ A similar belief in marriage is reported in the survey of Burgoyne and Clark in Burgoyne *et al.*⁹ The study sample indicated that 80% knew someone who was separated or divorced, and whereas the sample indicated that in the 1970s the separated or divorced would have been perceived as "black sheep", by the mid-1980s they were accepted as a part of modern society. The study also indicated that those who were getting married (and many still felt the need to secure a formal relationship when having children, although not necessarily before) believed that their marriage would not break-up. This optimism was shared by those in the sample who were remarrying after divorce. It should be noted, however, that the number of divorced people who do not remarry has risen dramatically, from 284,000 in 1961 to 2,245,000 in 1986.

The statistics indicate that while divorce is on the increase, the optimism for the success of marriage, and indeed the rising numbers of couples formalizing their relationships in marriage tend to give weight to Richards' argument that the

recent studies of the incidence of divorce do not support a view that the reform of divorce law encourages the ending of marriage as an institution. Indeed, "the evidence suggests the opposite, that as divorce has become common, jurisdictions have found it necessary to reform their divorce law and to simplify the process in order to accommodate the growing numbers".¹⁰ This would be congruent with the view of Professor Stone (1990) and of E. P. Thompson (1991) who both see wife sales as popular methods of divorce when the law was inaccessible.¹¹

The other important statistic which should be considered here is that relating to the numbers of children whose parents divorce. This has, of course, also seen a dramatic increase, alongside the increase in divorces. In 1970, Stone¹² indicates that there were approximately 60,000 children under the age of 11 involved in their parents divorce. By 1972, the number had reached 100,000; by 1980 the number was 112,000; and by 1984, when the Law Commission published its paper "150,000 Children Divorced A Year: Who cares?", the number had risen to 144,501. Given the widely accepted fact that parental divorce has the potential for causing emotional harm, the implications speak for themselves.

These statistics have concentrated on divorce. The number of cohabiting unmarried couples has grown enormously since the 1970s. While it has been noted that there is some indication of a desire to marry when a couple have children, Stone (1990) reports that there is an interesting growth in the number of births registered as illegitimate. Until 1955, the percentage of all births registered as illegitimate, hovered consistently for nearly 100 years around the 4-5% marker, in the period 1961-6 the number had grown to some 7%, and then having hovered around the 8% marker until 1981, the rate shot to 12% and then to 21% in 1986. While this does not indicate how many couples then go on and marry, or how many single parent families are found in the statistics, the number indicates a large number of children who are born into families whose parents are unmarried.

(or "un-ceremonied", as their relationship may be as stable and long-term as their married contemporaries, but without a label of the law: a *de facto* if not *de jure* marriage).

The establishment of the same culture which has challenged the duty element of marriage, and acknowledged that individuals can grow apart and therefore need to be able to end their relationship in divorce, has led to a culture which challenges the need to formalize the union at all. Without embarking on the morality of this (and there is much philosophy and theology which would support a view that marriage is a social control mechanism with very little to do with the nature of the union of the couple), the implication of the growth of the un-married family is that there are many more un-ceremonied divorces (the formal ending of such relationships).¹³ While the number of hearings in the magistrates' court, under the only provisions for the un-married couple to settle their affairs, has grown dramatically, it is difficult to find the statistics of the number of such informal arrangements which separate without the help of a system. Thus, the number of children who are open to emotional harm from parental separation does not stop at the divorce statistics. The magistrates' court statistics, and other unobtainable statistics must be included to gauge a true number.

The emotional hurt, it could be supposed, is only with those who can be identified as adversarial cases. This may be the case. It may be that all the cases which do not seek legal help find separation an experience in which they can handle their emotional difficulties and shield their child from the potential harm into a changed, post-separation family. This, it is submitted, must be rare. In divorce, all couples, theoretically with all manner of approaches, seek advice. It is only sensible to assume that some of the children involved in the hidden separations (those which do not go to law) will be emotionally hurt by divorce. The moral

issue is, therefore, whether the law should separate the *de jure* marriages from the *de facto* marriages, and offer the children of the former some degree of legal process designed to help in providing for their best interests, and yet leave out the children of the latter. Separation law has arisen through a need to deal with children once the concept of divorce is admitted. Where marriage is no longer felt to be necessary for some parents, the theoretical implications of enforcing a strict interpretation of the parameters of the legal process become very difficult to unravel.

The research of Elliott and Richards (1991) shows a new set of results which teachers and speech therapists, and indeed many who work with children, have indicated informally for some time. Their work took a sample of children whose parents had divorced and systematically compared them with children whose parents did not. The separation of the parents occurred when the children were between 7 and 16 years. The longitudinal nature of the study allowed an observation of the children before and after the separation occurred. The results showed that the children of the parents who separated scored consistently lower on their ratings than the children of parents who did not separate. As the data which was gathered for the children could be compared for the period before the parents separated, one fascinating outcome of this was that the children who were in the households prior to separation scored lower in the period before the separation: in that period between the breakdown in parental communications and the early stages of marriage difficulty before the legal process of divorce was entered. Depending on their age, the educational potential of the children can be adversely affected by the whole process of pre-separation, separation, and post-separation.

This new material which sits alongside the established work on the child and divorce, which will be explored later in this thesis, is reviewed in Richards and

Dyson (1982). The implication for the law is that not only should it be addressing the question of which children should be helped in a legal process at the time of their parents' separation, but also at what point in the parents' separation should the process begin. This begs the question of what the aim of the legal process should be.

The area is rich in questions for research, and there is a desire to attempt to answer them all in one work: indeed, it feels as though all the questions have to be answered to say anything. This introduction has placed one major issue which has to be addressed in the question of the development of the family generally, and that is the finding of a common sociological language for the family. The analysis of the rôle of women in the work place and the language and imagery of the family which have been presented above, and the moral question of what constitutes a family, and the relationship between that and concepts of sexual and social morality all need to be addressed at an interdisciplinary level. Currently there is a tendency for each discipline to retreat from such questions, except for sociology which has developed important theories of the family through Marxism and Feminism.¹⁴ The law has, as yet, not responded to the challenge from sociology, but continues with the conservative image of the nuclear family which bears little resemblance to the majority of families today. This is a matter for interdisciplinary debate, and not only one for groups of academics. It is one which needs to be presented in a popular medium so as to inform the Parliamentary process, and thereby move the reform of the law to a more radical set of alternatives to those ordinarily presented.

This is one debate which is necessary for the development of the family. A further debate could concentrate on the material implications of marriage and their effects upon separation. Another on finding mechanisms for identifying those who will separate and supporting them through the process. The list begins to become

endless with exciting research ideas.

B. The Hypothesis.

This thesis concerns one small area of the process of separation law. Due to the change in terminology from "custody and access" to "residence and contact orders" under the Children Act 1989, and also because of the availability of these orders to both married and unmarried parents, the term "*Separation Law*" is used in this work as a global term.

The hypothesis under examination is that the legal requirement, to view the child's best interests as paramount in separation law cases, is not interpreted with a theoretical understanding of the child's welfare, and that an understanding of the child's best interests could be found in psychology.

C. The Plan of the Thesis.

The law requires that the child's best interests should be the paramount consideration of the court when it makes decisions concerning the child. The first aim of the thesis is to identify the definitions of the child's welfare in both the statutes and reported cases, and in the practice of the law. This is the major part of the thesis. There are many discussions of the case law and statutes, however, the analysis here seeks to ask if there is any coherent theory of the child's welfare which could be seen to underpin the judges decision-making. While this is not necessarily a novel approach, it does contain recent case-law, and forms the most useful starting point for examining the hypothesis.

The traditional presentation of separation law in the legal text-books relates solely to the interpretation in the case-law, with some reference to the development of the independent conciliation movement. The thesis moves on

from the legal definitions of the child's best interests to an examination of the major professionals who are involved in the system of separation law. This concentrates on the pre-court professionals, as the judges' perception of the child's welfare is apparent in case-law, and the barristers only appear at the adversarial court stage. In discovering how the child's best interests are interpreted, the need is not in the courts, but in the pre-court stage of negotiation and mediation. The second part, therefore, is a discussion of the literature and concepts concerning the three professionals groups: solicitors, court welfare officers, and conciliators. Much of this part of the work is concerned with the development and implications of mediation.

There is little empirical work which systematically seeks to establish how the professionals involved in separation law interpret the concept of the child's best interests. The third part of the study is an empirical survey of a sample of the three professionals groups in two geographical areas. A great amount of the thesis is used to report and consider the data collected in the fieldwork, as its novelty lies in using the same research questions with all the professionals.

The second aim of the thesis is to contrast the legal approach to the interpretation of the child's welfare, with the approach which could be available in psychology. This examines the literature specifically relating to the effects of divorce on children; questions whether there is any theoretical framework which could give an understanding of the child's best interests; and finally whether there are any further implications from psychology which could inform separation law.

1. *The Book of Common Prayer, 1662, Concerning the Service of the Church.*
2. Hobbes (1651), ch. 13.
3. Stone (1990), ch. 13, pp. 401 - 405.
4. *Ibid.*, p. 401.
5. Gittins (1985).
6. Stone (1990), pp. 402 - 403.
7. Stone (1990), p 409.
8. Richards (1991), p. 70.
9. Burgoyne (1987), Ch. 1.
10. Richards (1991), p. 70.
11. Stone (1990), p. 143.; Thompson (1991), Ch. 7. Thompson presents forms of popular methods of social order with the timely suggestion that if the law is irrelevant to the experiences of the people, then the law is neglected in favour of custom in the popular culture.
12. Stone (1990), p. 419.
13. Perhaps a modern example of Thompson's idea, above.
14. See Giddens (1989), Ch. 12; also see Gittins (1985); Elliot (1986); Morgan (1985).

PART ONE: THE LAW RELATING TO SEPARATION AND CHILDREN.

1.1 THE STATUTORY REQUIREMENTS: THE WELFARE PRINCIPLE.

A. Statutory Developments in Different Courts:

- i. historical context;
- ii. the High Court;
- iii. the county court;
- iv. the magistrates' court.

B. The Welfare of The Child:

- i. when custody and access of the child is an issue for judicial consideration;
 - a. Matrimonial Causes Act 1973,
 - b. Domestic Proceedings and Magistrates' Court Act 1978,
 - c. Guardianship of Minors Act 1971,
 - d. *Locus standi*, and other issues,
 - e. Children Act 1989.
- ii. the regulation of that consideration;
 - a. early statutory interpretation,
 - b. Guardianship of Minors Act 1971,
 - c. Children Act 1989: implications.

C. Conclusions.

1.1 THE STATUTORY REQUIREMENTS IN SEPARATION LAW.

A. *Statutory Developments in Different Courts.*

i. historical context.

The issue of the legal treatment of the children of separating parents has a relatively short history. Up to the nineteenth century, the child was seen, along with a man's wife, as a part of his property. The question of separation was, in the eyes of the law, a difficult matter controlled by the man and involving Act of Parliament¹. Evidence shows that the question of separation of parents in a popular, non-legal sense could well have been somewhat easier, employing the vehicle of the wife sale. This, however, was bound up with the economic reality of the period which made a family unit a working unit, the children not simply being owned by the father, but rather a part of a more complex structure². The question of separation only became an issue when the economic constraints on the family allowed it to emerge. This could be seen with the first statute which changed the perception of the family, the Married Women's Property Act 1870. This, it will be noted came in the same year as the Education Act 1870, which heralded the way to a new understanding of childhood, after a more tentative exploration of the idea of children's rights in the work-place and to education in the Factories Act 1833. Indeed the nineteenth century saw a more general acceptance that childhood existed, a view which can be seen within the context of the general moral climate of Victorian England, or as part of a broader economic construction in a more automated, and therefore reduced, work-place.

Alongside this social development, the statutory development of family law in

general is complicated by the historical development of the courts. The Children Act 1989 is the first legislation which brings together the majority of the law relating to children and applies it as one piece of legislation throughout the High Court, county court and magistrates' court, under the workloads allocated by the Lord Chancellor. Prior to the 1989 Act, the law was largely built up of statutes, and therefore powers, relating to separate courts. Thus the development of family and child law is a statutory web, providing the rules for a very complicated game of legal tactics.

ii. the High Court.

The High Court jurisdiction stems from the two branches of the Ecclesiastical Courts and the Courts of Chancery. The Ecclesiastical Courts governed the question of nullity and the doctrine of *a mensa et thoro* - what is now judicial separation - but there was no divorce law under these courts. The Matrimonial Causes Act 1857, in the light of the social and religious developments of the nineteenth century transferred the powers of the Ecclesiastical Courts in the area of the family, to the Divorce Court, which was also given a power of divorce by judicial process. The Act allowed for the first time, divorce without recourse to a private Act of Parliament. Such a divorce would be granted on the basis of adultery.

The attempted rationalization of the court system in the mid 1870s³ transferred the power from the Divorce court to the Probate, Family, and Admiralty Division of the High Court, which later became the Family Division. The power of the High Court under this branch was not only concerned with the administration of marriage and divorce, but ancillary powers allowed the court to provide for the child's financial, custodial, and educational needs. From the power of the Court of Chancery, reordered into the Chancery Division of the High Court, the court

was endowed with the crown's prerogative power of *parens patriae*; the power of wardship. Thus, the High Court, from two branches, had two sets of power which could overlap - for example the request for the custody of a child in a divorce which was already the subject of an order made through wardship⁴.

iii. the county court.

The county court also gained a jurisdiction in relation to the family. Growing from jurisdiction granted to allow the county court to make orders concerning children, by the Guardianship of Infants Acts of 1886 and 1926, the county court has also developed through the rapid growth in the number of divorce actions after the second world war. The growth in applications to the High Court somewhat over-stretched the capacity of that court, and, therefore, "Divorce Commissioners" were appointed, largely from the ranks of the county court bench. These commissioners, it was found in later years, were hearing some two-thirds of all matrimonial causes, at a time when 90% of the applications were undefended. Thus, the majority of the work was being performed by county court judges under the label of the High Court. This therefore denied the advantages, such as solicitors' audience, to the cases, which would have been available in the county court. The Matrimonial Causes Act 1967 responded to these findings by granting the power to hear undefended matrimonial causes to the county court, upon the designation of the court as a "divorce county court" by the Lord Chancellor. This jurisdiction was followed by the allocation of defended applications to the county court⁵. The system, therefore starts all divorce cases and ancillary applications in the county court, moving them to the High Court on the basis of the gravity of the case. Although beyond the scope of this research, the county court has also, historically, been given jurisdiction in the question of public child care.

iv. the magistrates' court.

A third jurisdiction in family law has emerged through the magistrates' court. Concerned largely with crime, the jurisdiction of the magistrates' court grew up from the protection of the wife, and the extraction of financial support from putative fathers⁶. By the Matrimonial Causes Act 1878, the court could relieve the wife of her duty to cohabit with her husband if he was a threat to her safety; further, having the ability to order maintenance for her, and the custody of children under 10 years to her. This power to grant maintenance orders was extended to wives deserted by their husbands⁷. By the Summary Jurisdiction (Separation and Maintenance) Acts 1895 - 1949, the magistrates' jurisdiction was extended to allow orders for maintenance for wives and children, and finally for the husband also. Further reform and extensions of the court's powers were made in the Matrimonial Proceedings (Magistrates' Courts) Act 1960, which granted powers concerning the custody and maintenance of children. Thus, in its study of the jurisdiction of the magistrates' court in the mid 1970s, the Law Commission⁸ saw the rôle of the court as providing "first aid" in families experiencing breakdowns, or more temporary difficulties, by making orders concerning the financial needs of the family members, the custody of the children, and the protection against violence from the members of the family; this alongside the potential of encouraging reconciliation via the probation services. The report was largely enacted in the Domestic Proceedings and Magistrates' Court Act 1978.

This Act brought the magistrates' jurisdiction into line with the philosophy of the Divorce Reform Act 1969, which went some way to removing the concept of the matrimonial offence. The 1857 divorces were granted on the basis of adultery. Matrimonial offences were extended under the 1937 Act to include cruelty, desertion and incurable insanity. The 1971 Act theoretically removed the concept of offences, but effectively retained them within the proof of irretrievable

breakdown of the marriage. Under the 1978 Act, the previous bar to applicants who had committed adultery was removed. The magistrates' court gained powers to make orders concerning children through the Guardianship of Infants Acts of 1925 and 1926, in adoption proceedings, and in care proceedings.

It can be seen that, even though the above descriptions are by no means a complete description of family law from the nineteenth century, there was an almost random development of court jurisdictions. It is against this backdrop that the concept of the welfare of the child emerged in English separation law.

B. The Welfare of the Child.

The concept of the welfare of the child in separation law was first introduced in the Guardianship of Infants Act 1925, having been used in earlier caselaw. The modern statement of the principle is found in the Guardianship of Minors Act 1971, which has been adopted into the Children Act 1989. The concern of this research is the law before the 1989 Act. However, some implications from the new law will be discussed later in this work⁹. Consideration must be given to the statutory provision for separation law on two heads: i) when custody and access of a child is an issue for judicial consideration, and ii) the regulation of that consideration - the welfare of the child.

- i. when custody and access of the child is an issue for judicial consideration.¹⁰**

Ordinarily, there is a *laissez faire* attitude to the care of children, in as much as the law stands as a boundary of acceptable parenting, set at significant harm to the child, within which parents have a freedom to raise their children as they

see fit. The law also sets slightly closer fielders when the parents seek legal separation, and it is that close fielding that is the heart of this study. For the family where the parents remain together, the parents have equal rights¹¹; and must have regard to the wishes of each other in making decisions concerning the child¹². Beyond this, there is very little legal regulation, although Lord Scarman, in the celebrated *Gillick* case, wished to impose a general duty on parents to act in the best interests of the child¹³, this has not been pursued after his initial expression. When a family experiences difficulties needing judicial assistance, there are three separate statutory provisions which have evolved in private law, empowering the courts to make orders concerning the children: i. Matrimonial Causes Act 1973, ii. Domestic Proceedings and Magistrates' Court Act 1978, and iii. Guardianship of Minors Act 1971. Each has different applications and scope which should be outlined.

a. Matrimonial Causes Act 1973.

The 1973 Act governs applications for divorce, nullity, and judicial separation, and applications ancillary to these matters. By section 42, the court has power to make custody orders concerning any children of the family¹⁴, before, alongside, or after matrimonial proceedings under the Act. The applications are only available to married couples seeking matrimonial proceedings, and are made to the divorce county court, which then has the option to refer the issues to the Family Division of the High Court. The court can also make custody orders when considering the question of the failure to provide reasonable maintenance under section 27.

Under section 41 of the 1973 Act, the court was under a duty to consider the arrangements for the children in all cases coming before the courts, and to withhold a decree until the court was satisfied as to the suitability of the arrangements. This stemmed from the acceptance of the inherent risk in divorce

cases for the children. Section 41 was clearly aimed to provide a safeguard for the children of parents who separated without a defended - contested - application. The parents would have to provide a statement to the court outlining the future care of their children. The weight of cases produced administrative difficulties for the courts, and, in effect, the section 41 hearing became a formality; in effect the procedure was maintained to pay lip-service to the statutory requirement.

This intervention was seen as rather invasive to the parents freedom, given that parents who were not seeking separation as partners were not scrutinized as parents. Thus, following the Children Act 1989 principle of non-intervention, section 1(5), the 1973 Act procedure was amended to remove the duty of the court to scrutinize every case¹⁵. This can be justified on the basis that the practice had become offensive to parents, however, as Bromley points out¹⁶, the inclusion of the original section 41 duty was to provide "a means of ensuring that proper arrangements [had been] made for them [the children]", because "it is a notorious and lamentable fact that the persons most likely to suffer when a marriage breaks down are the children". Thus, it could be argued, and this will be developed later in this work, that the need to protect the children is challenged by the move away from the section 41 principle, and that an administrative problem should have been reformed more creatively than by arguing that the principle was distasteful¹⁷. The basic power to make orders relating to children remains after the 1989 Act.

The orders that could be made under the 1973 Act were custody, care and control, and access under section 42; care orders under section 43; and supervision orders under section 44. Care and control orders relate to the day-to-day care of the child, where and with whom the child should live, and the daily decisions that occur. Access relates to the continued contact between the child and the other

parent. Custody, however, changed the parental position from that equal parenting common to all parents under the Guardianship Act 1973, to parental rights vested in one parent alone. Clearly this could cause a great deal of distress between separating parents, who, in seeking to sever their ties as partners found that they could be forced to lose their parenthood in the eyes of the law. This process was rejected by the Law Commission, and altered in the 1989 Act¹⁸. Under the new law, the parents retain parental responsibility, and the orders available to the court relate to the previous issues of care and control. This development must be seen as a positive development in family law. However, the old law did allow for the creation of joint custody orders, but it was found by Priest and Whybrow¹⁹ that courts and practitioners were reluctant to employ joint custody orders as the parties found them to be unworkable. This was also the reaction of the participants in the authors study. This may prove to be a difficulty for the new law, in that the real issue for the parents is not the lack of the largely academic custody of their child, but rather the more immediate and painful care and control of the child. It seems quite likely that there will still be a large number of "fights" over residence and contact orders under the new law as the parents try to remain active parents once they have physically separated from the family home.

The care order allowed the court to place the child of separating parents into the care of the local authority in exceptional circumstances. This power was rarely used, certainly in the experience of the practitioners in author's study, as the courts tended to divert such cases into the orthodox procedure for care under other statutory provisions should it appear to be necessary. The supervision order was more widely used, allowing the court to monitor the progress of families in exceptional circumstances, by either a court welfare officer or local authority appointee, who would help and work with the family and report to the court.

b. Domestic Proceedings and Magistrates' Court Act 1978.

This Act allows for financial orders to be made while the marriage is on foot, as a more emergency or "first aid" measure. Available only to spouses, an application can be accompanied by a request for an order in relation to a child of the family²⁰. Thus, again this does not allow an application solely for the discussion of an order for the child.

The orders available to the court differ from those available under the 1973 Act, above, in that the magistrates' court can only make "legal custody" orders as opposed to "custody" orders. The former are the same as the latter except that they do not confer rights over the child's property, and do not confer a right to apply for the court's permission to allow the child to emigrate from the United Kingdom. No order can be made if an order from any court in England or Wales already exists. If an order for legal custody exists, the court can make care and supervision orders in exceptional circumstances.

c. Guardianship of Minors Act 1971.

The 1971 Act is the most far reaching of the three Acts in relation to the availability of orders for children. Applications can be made to any of the three courts by any parent - biological and not married - specifically for an order of the court in relation to the child. The orders available are the same as those under the 1978 Act. Thus this is an important Act in that it extends the availability of court help to unmarried parents who are separating.

The choice of the court where married parties are involved could, in some circumstances, be a tactical balance between the cost of the proceedings, and the

need for the scrutiny of the higher courts.

d. Locus standi, and other issues.

It will be noted that in each of the above cases, an application could only be made by the parents with whom the child was a "child of the family". Once an application had been made to the court, the court could make an order in favour of a third party to whom it felt custody etc. would be appropriate. Thus, while a grandparent could not apply under the three Acts, a court could grant him or her custody if the parent applied. It could, however, be the case that a child who had lived with his or her grandparents for a time, could become a child of that family. The test is an objective one for the courts to apply on the basis of *locus standi*. It must also be noted that the Family Law Act 1986 sought to avoid the inevitable overlap of applications and orders which arise from a three-headed system such as that outlined above. This has largely been overtaken by the codifying nature of the Children Act 1989 which provides that all applications concerning orders for children must use the process outlined in the 1989 Act.

e. Children Act 1989 21.

In terms of the instances where the issue of the custody of the child can be brought before the court, the Children Act 1989 can be seen, on its face, to change separation law dramatically. As has already been seen, the Act changes the process of divorce, in that parents who have reached an agreement as to the future parenting of their child do not have to present that arrangement to the court before a decree concerning their partnership is granted. This stems from the underlying themes of the Act of non-intervention and parental responsibility. The former is a very old question which hounded the courts of equity - when is it

justifiable for the court to intervene in the family? - and is given statutory clothing in section 1(5): the court shall only make an order if it is better to do so than not intervening, where "better" is defined in terms of the child's welfare. The actions which can be brought in the courts - divorce, separation, etc. - remain largely untouched by the Act, the only major change being the codification of the Guardianship of Minors Act 1971 into the Children Act 1989.

The impact of the Children Act 1989 on separation law can be seen most clearly in the orders which are available for the courts to consider for the child. Gone are the concepts and orders of custody and access, which were considered to inject the proceedings with the idea of winning and losing, and therefore stirring up the fights between the parents. They have been replaced with *parental responsibility* (section 2) and *Residence, Contact, Specific Issue, and Prohibited Steps orders* (section 8). Parental responsibility rests with both married parents, and the mother if unmarried, from the birth of the child. Unmarried fathers are able to gain the responsibility through a relatively easy process. Parental responsibility rests with the parents throughout the childhood, or until broken in adoption. Thus, two concepts emerge: first, the parent no longer has "rights" over the child, allowing the child to become more than a possession; and, secondly, the parenting of the child, while normally conducted uninterrupted, should become a partnership between the parents and, anywhere its intervention is necessary, the state. The parental "rights" under the old law were always difficult to identify, save perhaps the obvious rights over the child's name, and were conceptually very difficult to reconcile with the independent personality of the child. The replacement of the concept with the duties of the parent must be seen as valuable in the development of the child's individual rights, which are increasingly at issue on the wider stages of Europe and the United Nations. However, to the parent, a tension will still be felt in trying to understand the concept, as the child is essentially dependent upon him or her.

Perhaps the most useful part of the concept of parental responsibility is the acknowledgement of partnership in the care of children. This does not simply apply to separation law, but applies throughout child law. Should a local authority intervene in the life of the family, the parents would not lose their parental responsibility, perhaps ironically, strengthening the parental rights over the child. Likewise, on separation, the parents both retain their duties over the child. This is reflected in the orders available to the parents. Under section 8, the court can make orders defining where the child should live, the time it should spend with both its parents, resolution of disputes over particular problems, for example which school the child should attend, or prohibitions on certain actions proposed by one parent against the will of the other. Thus the orders are clearly intended to allow the court to assist the parents in their continued responsibility. As was noted in the consideration of the section 41 changes, this may be fanciful on the part of the legislators. The Lord Chancellor has indicated that he sees the Children Act and its new provisions, not only as "the most comprehensive and far-reaching reform of child law in living memory"²², but also that the Act creates "a new code about the upbringing of children". He envisages that one of the fruits of the success will be "divorcing parents who feel able to take decisions about the children's future without resorting to the courts"²³. There could be a dangerous misconception in adopting such a law-centred perception of the world, in that the reforms may well prove to be irrelevant to the parents whose dispute was not that the court was going to take their legal status away, but rather was borne in the pain and suffering of understanding that so many of their goals and images of the world have been shattered by the collapse of their relationship. Indeed it may well be irrelevant who has legal control of the children, compared with the devastation of having to live separated from them. This is not to say that the law cannot play a part in rearranging family life, it is simply to indicate that the question of reform is not answered by the Children Act 1989.

Thus it has been established that the courts have powers to intervene in family life on the separation of the parents. The issue is therefore opened as to the considerations that the courts must make in exercising their powers of intervention.

ii. the regulation of that consideration.

a. early statutory interpretation

While the outline above gives an indication of when the courts may intervene to make orders concerning the private arrangements for children within a family, the question arises of how the court should exercise its discretion, for, indeed, in this area the courts have considerable discretion. For example the wording of section 42 of the Matrimonial Causes Act 1973 gave the following power to the court in section 42(1):

The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of eighteen ... and in any case in which the court has power by virtue of this subsection to make an order in respect of a child it may instead, if it thinks fit, direct that proper proceedings be taken for making the child a ward of court.

The concept regulating the exercise of the courts discretion is that of the welfare of the child. This is a relatively old and established concept in family law, dating back to the mid-nineteenth century, and arguably stemming from the industrial development of the labour market. A shift occurred in the perception of family life, from the early agrarian family, which was concerned very strongly

with the whole family as an income producing unit, to the early industrial family, in which the children still became working members of the family at an early age, and then onto a more automated industrial work-place, requiring fewer people. This allowed for the emergence of the radical view that childhood was, in some ways special, or at least fragile and different to adulthood, a privilege previously only afforded to the upper-classes. One aspect of this change was the need for a more social education policy, as the families could not support individual teaching for their children. The perception of vulnerability produced the concept of the protection of the child's welfare²⁴.

Before tracing the development of the welfare principle in English law, it is worth noting the adoption of the concept of the welfare of the child internationally. In its report to the Secretary-General of the United Nations, entitled *Parental Rights and Duties, including Guardianship*, the Commission on the Status of Women found, after a general historical introduction in the rights of family life in Roman Law - the *pater familias* - a wide acceptance of the concept of the welfare of the child in both codified and common law systems²⁵.

The statutory regulation of the judicial discretion in making orders concerning the child develops slowly over the period of the late nineteenth and early twentieth century. Maidment (1984) shows the intricate nature of the development of the concept of the welfare of the child, suggesting that the concept grew up in the light of two phenomena, the increasing awareness of childhood, and the question of the rights of the woman²⁶. The statutory inclusion of the concept of the child's welfare stems from the gradual acceptance of the concept in Equity. The concept can be seen in the statutes first, in Serjeant Telfourd's Infants' Custody Act 1839. However, the development must be seen from case law, starting in the eighteenth century. At Common Law, the custody of the child vested in the father from the child's birth. This was enforced through the King's

Bench by the writ of *habeas corpus*, which allowed the legal custodian to enforce his rights against all others. This was rigidly applied, as in the case of *R v. De Manneville* (1804)²⁷. While custody applications by the mother were usually defeated, the courts would uphold access agreements made in Separation Deeds, as in *Ex parte. Lytton* (1781).

Equity, operating in the Court of Chancery, began to develop a judicial interest in the child independently of the common law. In *Smith v. Smith* (1745), the traditional use of *parens patriae* to protect a child's property, was broken to allow a mother to prevent her daughter from marrying. This followed *Ex parte Hopkins* (1732) where the Lord Chancellor, accepting that the common law prescribed the return of a child of 13 to her father, felt that, in Equity, the court should hear the girl's wishes, and ordered she should live in her deceased uncle's property accordingly. The cases as between the mother and father remained generally in favour of the father, however, although the welfare of the child can be seen to be emerging as a doctrine of the court.

By the time of the Custody of Infants Act 1839, it was accepted that a mother could apply for custody and access of her child at Equity. From this, a child's welfare as an independent consideration for the court can be seen to emerge in cases in the mid-nineteenth century. In cases of a mother's adultery, the courts adopted a very strict rule that custody and access would be denied to the guilty woman, as in *Clout v. Clout* (1861) and *Codrington v. Codrington* (1864). This rule can be seen to change, and with it the line of legislation can be seen to change. In *Heathcote v. Heathcote* (1864) a drunken and violent mother was denied access to her child on the grounds that the application was not made out of love and affection for the child, and that her visits were injurious to the health of the child. A similar development came through cases challenging the father's right to custody of his children. *Re Fynn* (1848) stated that the principle directing a

court in removing a father's right to custody was the "welfare of the child", although being such an open-textured principle, it received a very strict reading resulting in few decisions against the father. *Re Curtis* (1859) saw the modification of the principle to define it in terms of physical, intellectual and moral harm.

Philip v. Philip (1872) saw expression of the judicial position that the "leading principle of the court [was] to consider the welfare of the child before the indulgence of the parents....whenever the welfare of children is likely to be seriously jeopardised by that indulgence, the court gives precedence to the interest of the children". The year 1873 saw the acceptance of the welfare principle in statutory form. Section 25(10) of the Judicature Act 1873 held that the rules of equity prevailed in disputes concerning the custody and education of infants; further, the Custody of Infants Act 1873 saw three developments in the statutory expression of those rules, following the case of *Hamilton v. Hector* (1872). By the Custody of Infants Act, the mother could apply for custody of her children up to the age of 16 years, where the bar had previously been at seven years; the rules barring adulterous mothers were lifted; and Separation Deeds giving custody to the mother would only be unenforceable if it was not to the benefit of the child. Thus, in the statutes the development of the rights of mothers and children were apparently moving on. However, the case of *Re Agar-Ellis* (1883) showed the continued acceptance in practice of the "sacred rights" of the father. In that case, the interests of the child were said to be found in "natural law", which dictated that the custody should be with the father.

The outcry against this decision produced further legislation on the rights of the woman. Maidment²⁸ suggests that the Parliamentary debates show that the children's welfare was used to smooth the way of reducing the father's rights. The Guardianship of Infants Act 1886 allowed a mother, in a marriage experiencing

difficulties, to apply for custody of her children, even though the father was still living. The welfare of the child became the first of three conditions to which a court should have regard in making an order, the second and third being the conduct and wishes of the mother and father, which were to be considered equally. The importance of the child's welfare over the rights of his or her parent can be seen in the Children Act 1891. In cases where the parent had given up the child to be brought up by another person, or had caused the same by abandoning the child, then the parent had to satisfy the court that he was a fit person to regain custody of the child. This, therefore, gave a different emphasis concerning the child's rights in their own development as against the parents. Bromley indicates that the power was to be exercised by the court in cases of moral turpitude, and shows cases where the courts did not penalize a parents who passed care to another temporarily because it was best for the child in the circumstances²⁹.

Thus, by 1900, the law showed a twofold change of position. First, the mother and father were to be seen as equals, effectively removing the doctrine of the "sacred rights" of the father, and secondly the welfare of the child became the "paramount" condition. Indeed the term "paramount" was being used in the judgements to describe the importance given to the welfare of the child, as in *D'Alton v. D'Alton* (1878) and *Re Newton* (1896). Thus the courts had prepared the way for the most familiar and enduring procedure for the interests of the child, namely that found in the Guardianship of Infants Act 1925. This directed the courts that in decision-making concerning custody and access of children the welfare of the child should be the first and paramount consideration, and that the mother and father were equal before the law.

b. Guardianship of Minors Act 1971.

The Guardianship of Minors Act 1971 accepted the 1925 Act as the guide for the exercise of the courts' power. Section 1 stated:

Where in any proceedings before any court (...) -

(a) the legal custody or upbringing of a minor; or

(b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof,

is in question, the court, in deciding that question, shall have regard to the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, in respect of such upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

It is clear from the 1971 Act, that the provision is not limited to applications made under that Act, but rather that its scope includes all three of the statutory vehicles outlined above by which the question of the child's custody becomes an issue for the court. The principle is not expanded by parliament in this Act. The courts are directed on the basis that they understand the concept and practical meaning of "welfare" and "paramountcy" without further elaboration.

From the wording of the 1971 Act, it appears that the principle applies to both private and public law: to all issues of custody and the upbringing of the child - the areas of public care and adoption. This is not the case. The Act does not apply to public law, which has its own requirements concerning the child's welfare. The piecemeal development of the law relating to children is highlighted in this respect. In relation to child care, the Child Care Act 1980 indicates, at

section 3(6), that the welfare of the child should be considered in deciding whether a resolution by the local authority to assume parental rights and duties should lapse by virtue of the service of a counter notice. Indeed, the duty imposed on the local authority by the 1980 Act is to promote the welfare of the child. However, this differs from the 1971 Act, in that the consideration is not the paramount consideration for the courts. Again, the welfare of the child is to be considered in the Children Act 1975 and the Adoption Act 1976 when the court is considering adoption for the child, however it is not the first and paramount consideration of the court. In the 1975 Act section 3 and the 1976 Act section 6, the duty of the court is to "have regard to all circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood". Further, as is seen in *A v. Liverpool City Council* (1982) and *Re W* (1985), the courts are reluctant to allow an appeal against the way a local authority exercises its statutory rights through the welfare principle.

On its face, these distinctions appear to be semantic differences; the effect seeming to be the same in each case. However, this has not been the interpretation of the courts, or indeed of the commentators³⁰. The Guardianship of Minors Act 1971 principle is seen as excluding all other considerations beyond the welfare of the child, whereas the other formulations are seen to give a wider opportunity for the court to hear other issues. It remains to be seen, in the empirical study, how the practitioners devising arguments to secure victory for their clients, in the private law, perceive the relationship between the interests of the child and the interests of the parents involved. Further, it may be impossible to detach the consideration of the interests of the parents from those of the child.

The overriding nature of the paramountcy principle as regards the "upbringing" of the child has also been challenged. One could argue, as indeed it was in *Richards*

v. Richards (1984), that the upbringing of the child should include the arguments concerning the matrimonial home in which the child was living. In the *Richards* case, an ouster injunction was sought under section 1(3) of the Matrimonial Homes Act 1967. The defence involved the argument that, given the home in question was that of the child, the court was bound by the 1971 Act to consider the welfare of the child as first and paramount consideration. The court found that this was not the case as the issue before the court was not one which directly concerned the welfare of the child as, for example, a custody dispute would be. Therefore the court could take wider considerations into account in reaching its decision. Lord Scarman, perhaps taking a more realistic view than the rest of the House of Lords, felt that such a detachment could not be made as the question of making an order about where the child lived would necessarily be bound up with considerations about his or her custody.

The difference between the public and private application of the welfare principle is not clear, but falls outside the scope of this study. The law is doing two very different things in public and private law, or it would seem to be doing separate things. In public child law, the emphasis is solely on the intervention of the state to prevent harm to the child by changing the parenting actors for the individual child. For example, moving the child from the natural parent to local authority parenting.

In private law, the traditional explanation for the intervention is on the basis of management of the child's future parenting needs in a changed family dynamic. An alternative explanation could stem from the perception of the harm that parental separation can cause to the child and the need to protect the child, as has already been noted from Bromley³¹. Clearly this is of interest, given the evidence already presented on section 41 hearings, and when considering the number of unmarried couples who separate outside the scope of the law. This

distinction will become a crucial factor in the question of the rôle of the law in family separation: whether separating children need protection, and how the law can or should intervene in family life within the boundary of good parenting.

c. Children Act 1989: implications

The Children Act 1989 embraces the concept of the welfare of the child, adopting it from the 1971 Act, in section 1. The 1989 Act removes the requirement that the consideration be the *first* made by the courts; the Law Commission believed that the term was superfluous, as the concept was expressed in paramountcy. Parry³² indicates that the Law Commission's original purpose was to change the statutory requirement to the welfare of the child being the *only* consideration of the courts, but this was not adopted by the government in framing the Children Bill. It is worth noting that the early sections on the 1989 Act were not questioned in detail, if at all, in the debates in either of the Houses of Parliament at Committee Stage, but were accepted as concepts to be included in the Act. This is interesting, as the concepts, following the 1925 and 1971 Acts are very vague and allow the practitioners and judiciary to make their own interpretations of the nebulous concept of the child's welfare. The Children Bill did not question what the understanding of the concept should be under the new law. Further, the Law Commission, in Working Paper no. 93, decided against producing a detailed definition of the meaning of welfare in their recommendations. With regard to guidelines, the view was that "the only guidelines which could be developed to resolve such cases would have potentially arbitrary and undesirable results"³³. Given their preference that the child's welfare be the only consideration, the Law Commission doubted the need for detailed definition of the concept. The Commission preferred that the courts could be assisted in their decision-making by a checklist of matters which should be considered in applying

the welfare principle. The checklist appears at section 1(3) of the 1989 Act. This instructs the court in considering the child's welfare, to "have regard in particular to -

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.

This checklist will be considered in greater detail in the light of the findings of this research, and the discussion of the meaning of the welfare of the child. It is sufficient to suggest that the checklist is disappointing as it simply produces a further set of terms and concepts which need clarification and an underpinning philosophy before they become informative to the courts in the question of the understanding of "the child's welfare".

Alongside the welfare of the child, the 1989 Act places two further principles. By section 1(5), the courts are only to make orders when such an action would be better than not making an order. The second principle is the retention of parental responsibility. The latter has already been noted in the context of joint orders. The former again suffers from the lack of definition in the welfare concept. It

could be that this will be seen as an invitation for the court to apply a strong managerial rôle in separation law - that the decision of the parents will be taken as final in all cases - but it could equally be interpreted on a "harm" basis - that the courts should investigate the quality of the decisions. The indication from the Act, in replacing section 41³⁴ on a quasi-managerial basis, while not removing the need to resolve the two definitions, is that the interpretation of the child's welfare has a hidden meaning of "the parents know best". If that is the case, which may well be justifiable, it throws into some confusion the requirement that the courts seek the welfare of the child as the paramount consideration, unless one of the guidelines is understood to be "the parents decisions are always in the child's best interests", which clearly invites the courts to make value judgements about the quality of the parents' decision-making. Indeed, Maidment identifies the lack of definition of the statutory provision. She finds, referring to the statutory development, that "there [was no] essential understanding of what the welfare principle meant other than as a reference to existing judicial values"³⁵.

There are two further issues raised in the Act which, although envisaged to have a great impact in public child law, could have effects in the private sphere of separation law, namely "timetables" (section 11(1)), and "provision for children in need" (section 17).

The concept of timetables introduced in section 11(1) is a practical attempt to deal with procedural delays in bringing issues to court. Section 1(2) of the Act indicates the legislative belief that the best interests of the child are fulfilled by expediency in practice. Thus, under section 11, the court is empowered when any question of making a section 8 order, to set a timetable to ensure that the question is heard without delay. Clearly, this is an excellent idea. Delays in bringing custody and access disputes to the court in divorce added

to the distress of the parties. However, there are two issues which suggest a cautionary use of the power should be adopted. First, the timetables must take account of work-loads of the professionals. Clearly, the resources question in the court welfare office is a parallel issue for the welfare of the child. In order that cases be heard more quickly, the child does not need a timetable from the court, rather he or she needs an appropriate number of welfare officers to meet the demands placed on the service. Secondly, the process of conciliation, if it is to work for the parents, must be given a very flexible timescale. This will be most relevant to the court welfare based mediation, as voluntary conciliation most often occurs before a court timetable might be envisaged. The view of the judges as to the propriety of the welfare officers engaging in mediation will clearly influence the judge's view of the timetable needed for the process of welfare reporting, and the conduct of individual cases.

By section 17, the local authority is placed under a duty to safeguard and promote the welfare of children within their area. This, in the section and in Schedule 2, part 1, creates a duty of care, the breadth of which has enormous implications for local authorities. Clearly, under the Act it is envisaged that a very narrow view of welfare will be taken, reflecting that the concept originally came from the public provisions for children. There is, however, a need for help to be extended to children experiencing parental separation, and the number of such children is very high. The "family centre", found in Schedule 2 part 9, would clearly be of great use to such children and their families. Such a radical interpretation of welfare could be supported in the Act. However, the financial resources required would be massive. This, as in so many issues relating to financial provision for children, becomes a question of political will, which would suggest radicalism will not figure on the agenda for the implementation of these sections.

C. Conclusions.

The regulation of the courts' powers to intervene in the family are based around a concept which, from its adoption in the statutes, has been lacking in definition. It can easily be seen that the requirement of the child's best interests, even with the addition of the "checklist", is merely a conduit, carrying the social and moral values of judges, lawyers, para-legals, and parents seeking the courts' ruling at any given time. Having established in the various statutory requirements that the welfare of the child is the court's paramount consideration, the crucial issue at this stage of the work is to develop an understanding of the way in which the statutory requirements are applied in the case-law and practice of separation law.

1. Stone (1990).
2. Anderson (1980).
3. Supreme Courts of Judicature Acts 1873 and 1875. The Divorce Court was reformed by the 1873 Act, s. 34.
4. Bromley (1987), p. 10.
5. Matrimonial and Family Proceedings Act 1984.
6. Affiliation Orders, enabling the court to order maintenance for illegitimate children from their fathers; largely a measure to reduce the burden of poor law expenditure; see Marshall (1968)
7. Married Women (Maintenance in Case of Desertion) Act 1886.
8. Law Commission No 77, para 2.4.
9. *Infra.*, p.^{35.}~~000~~.
10. For a detailed exposition, see Bromley (1987), ch 9; Black and Bridge (1989); or Reekie and Tuddenheim (1988)
11. Guardianship Act 1973, s. 1(1)
12. Children Act 1975, s. 85(3).
13. *Gillick v. West Norfolk and Wisbech Area Health Authority*. [1986] 1 AC 112, at p. 184.
14. For a discussion of the "child of the family", see Bromley *op. cit.* 4, pp. 292 - 294.
15. Children Act 1989, schedule 12, para. 13: see Bainham (1990), para. 2.10 - 2.13.
16. See note 4, *supra*, p. 299.
17. LC 172, para 3.5 et. seq.
18. Children Act 1989, ss. 2 - 4.
19. Priest and Whybrow (1986), part V.
20. *Op. cit.* 14.
21. See Parry, *op cit.* 24, and also Bainham (1990), especially chapters 2 and 3.
22. Lord Mackay of Clashverne, introducing the Children Bill in the House of Lords, 23rd, November, 1988.
23. Lord Mackay, [1991] Fam Law 393.
24. For a discussion of the development of the concept of childhood, see Maidment (1984), pp 90 - 92, and 101 - 105; more generally, see Gittins (1985), and Anderson (1980), *op cit.* 2, *supra*.

25. United Nations Commission on the Status of Women (1968).
26. Maidment (1984), see chapters 4 and 5.
27. A girl of 8 years was returned by the court from the mother to the father - the mother had left the man because of his violence. The courts did not always adopt this view, see for example, *Whitfield v. Hales* (1806)
28. *Op cit.* 26, p. 99.
29. Bromley, *op cit.* 4 at p 312, note 20: In *Re O'Hara* [1900] 2 IR 232. Custody was returned to the natural mother despite an adoption agreement, and the mothers' poor standard of living.
30. H.K. Bevan (1989), at page 85.
31. *Op cit.* 4.
32. M.L. Parry, *The Children Act 1989: A Conflict of Ideologies?*, in Parry (1992), at p. 3.
33. L. C. Working Paper No. 96, part vi-C, para. 6.32.
34. Matrimonial Causes Act 1973.
35. Maidment (1984), p 9.

PART ONE: THE LAW RELATING TO SEPARATION AND CHILDREN.

1.2 THE APPLICATION OF THE WELFARE PRINCIPLE.

A. The Precedent Value of Case Law.

B. The Courts' Interpretation of Welfare: A Thematic Approach:

- i. the interpretation of *paramount*;
 - ii. the interpretation of the *child's welfare*;
 - iii. the themes and considerations of the court in custody, care and control, and access.
 - a. *status quo*
 - b. maternal instinct
 - c. conduct:
 - i. general,
 - ii. conduct and abduction: an issue of enforcement
 - iii. conduct and lesbianism: an issue of prejudice?
 - d. natural parents v stranger
 - e. material advantages
 - f. religion
 - g. siblings
 - h. child's wishes
 - i. joint orders
 - j. court welfare officers' opinions, and other expert testimony
 - k. appeals, and conduct of cases
- Access and Contact Issues:
- l. access: whose right?
 - m. access: enforcement
 - n. access: suitability
 - o. access: removal from jurisdiction

C. The Court's Interpretation of Welfare: A Chronological Approach:

- i. the reduction in reported litigation;
- ii. new themes.

D. Conclusions.

1.2 THE APPLICATION OF THE WELFARE PRINCIPLE.

A. *The Precedent Value of Case Law.*

The reported case law on separation law - decisions relating to custody, care and control, access, and now residence, and contact orders - is interpreted in two main ways. On the one hand it is the concern of the courts deciding new cases, and on the other it is the concern of academic analysis.

The judicial analysis of the case occurs within two constraints or factors. First, the process of separation law and the decision making concerning the children occurs within an adversarial framework. Contrasting with continental models of inquisition, which perhaps offer a more flexible framework within which to examine what are essentially emotional problems, the English courts remain adversarial, despite calls for a new structure within a family court. As the name suggests, the process depends on the presentation of the arguments for each side before the judge who then makes his or her decision on the presented facts and law, the courts only being able to step beyond the issues raised by the parties in wardship cases. Thus, in court, the forum could be said to resemble a battle, soldiered by solicitors and barristers whose weapons are the eloquence of their arguments.

The second factor within which separation law occurs in the courts is that the precedent value of decided cases is slight, in the sense that the courts will not cite decided cases as authority for their new decisions¹. As Professor H.K. Bevan argues, "the circumstances of each case and their possible impact are so variable that earlier decisions should be treated circumspectly, and the older they are the less reliable they may eventually become through changing social attitudes

towards parental responsibility in bringing up children."² This is easily understood when one considers the nature of family cases. The statutory requirement is that the court makes its decision holding the child's welfare as paramount consideration. Clearly this relates to a specific family dynamic; the question before the courts is one of the suitability of different proposals for the child given the individuals involved in the family. Therefore, to accept a previous decision as justification for the proposed arrangements could be akin to fettering the discretion of the courts, given their statutory charge.

The sum of these two elements is that the courts in separation decisions concerning the child, because there is very little "law", are consumed with arguments concerning facts - arrangements - which are presented in the language of the child's "best interests". The lawyers' concern in the cases, given an adversarial system, is to present their clients' proposals to the court as the best available, and hence, the analogy with the battle becomes more prominent as the two sides argue to show the child's welfare lies with their particular perception of the situation. Indeed within such a climate of argument, the interpretation of the child's welfare, as Bevan argues, "is not free from uncertainty and the likely result of its application in a particular case is sometimes difficult to predict."³

While the development of the case law does not show a traditional common law development of the law, with decisions building and accepting the past as conventional precedents, the academic study of the cases classically shows the decisions falling within thematic groups. This thematic approach can show the development of the judicial understanding of the statutory term, "the welfare of the child". Hence, the first part of this analysis of the decided cases centres on the conventional interpretation of the cases, accepting a thematic approach. However, this, it is suggested, may be complemented by a *chronological* analysis

of the reported cases. Such an analysis would allow for a reading of the approach taken by the courts in deciding the child's welfare alongside social concerns contemporary with the courts' activity. It may also clarify the importance which the courts place on certain themes, and indeed chart that impact over time. Alternatively, it may show that the courts are constantly faced with the same themes in the decisions that are reported in the law reports and the journals.

B. The Courts' Interpretation of Welfare: A Thematic Approach.

Two issues arise for consideration here, both concerned with statutory interpretation. First, the interpretation placed on the word "paramount" must be explored, and secondly, and here the issue is more complicated, the interpretation of "welfare" must be investigated.

i. the interpretation of *paramount*.

Described⁴ as the "golden thread" running through the whole of the courts' custodial jurisdiction, the question of "paramountcy" of the welfare principle is central to the understanding of the way the courts make decisions in questions of custody, care and control, and access. A distinction has already been drawn between the statutory requirements in this area and in care and adoption, and indeed in the separation of the issues as *directly* and *indirectly* concerned with the welfare of the child in the eyes of the court. It is clearly a matter of argument as to what is and what is not in the interests of the child, and also what is the interest of the child, and what is the interest of the parent *clothed* in the language of the interest of the child.

Both the 1925 and 1971 Acts, after directing the courts to consider the welfare of the child as first and paramount consideration, go on to include a direction that the consideration of the whether the father's rights outweigh the mother's, or vice versa, are secondary to the main endeavour of the court, which focuses on the child. Maidment (1984) suggests that the thrust for the inclusion of the paramountcy principle was not so much the concern for the child but rather a "play-off" for the inclusion in the 1925 statute of the equal rights of the woman⁵. This may well be the case. The preamble to the 1925 Act was at pains to draw attention to the fact that the legislation brought custody law in line with the Sex Disqualification (Removal) Act 1919. However, granting the power to women as subordinate to the welfare of the child could have helped to secure the passage of the Bill.

Despite the statutory indication that the parental claims were secondary to the child's welfare, the meaning of the terms "first and paramount" were not immediately clear. The classic statement of the judicial interpretation of "paramountcy", and its derivation, is found in *J v. C* (1970). The case, heard prior to the 1971 Act under the Guardianship of Infants Act 1925, concerned the welfare of the child of a Spanish family, born in England. The child had been placed with foster parents, and it was the refusal by the lower court, before Mr Justice Ungood-Thomas, to grant an order to the parents giving them custody, care and control of their son, which was at issue before the House of Lords. The submission of the appellant parents was that the law compelled the courts to find in favour of the natural parents by virtue of that sole qualification, effectively challenging the paramountcy principle of the 1925 Act.

The judgement of Lord Justice Guest concentrated on the issue of the power of the courts to place the welfare of the child before the rights of the natural

parents - essentially, the question of paramountcy. He explained the historical development of the power of the court in custody cases, examining the caselaw already discussed⁵. His exposition of the rights of the parents against strangers will be considered as part of the discussion on the meaning of the child's welfare, however, regarding paramountcy Lord Guest indicated that there had been an initial preference for the interests of the parents before the court was willing to intervene on behalf of the child's interests. However, under the 1925 Act, the emphasis and practice of the court had moved squarely onto a primary place for the child's welfare by *In re Carroll* (1931). Citing Morton J. in *In re B's Settlement* (1940) and Danckwerts LJ in *In re Adoption Application 41/61* (1963) Lord Guest accepted Lord Danckwerts' explanation of the meaning of "paramountcy", that "first and paramount" necessarily implied that all other issues "must be subordinate. The mere desire of a parent to have his child must be subordinate to the consideration of the welfare of the child, and can be effective only if it coincides with the welfare of the child."⁶

While Lord Guest concentrated on the practical application of the principle, and the rights of the parents, Lord MacDermott considered "paramountcy" in a more abstract way, giving what has been accepted in both cases and text-books as the leading explanation of the question.⁷ The appellant parents argued that there was a necessary presumption to be made in the law that compelled the court to decide for natural parents over strangers - in this case foster parents. For Lord MacDermott, "the question of law under discussion is therefore whether there now is such a presumption as that contended for by the appellants, or whether the correct process of adjudication is, instead, to consider all material aspects of the case, including the claims of the parents, and then to decide in the exercise of a judicial discretion what is best for the welfare of the child".⁸

Lord MacDermott rehearsed the line of cases which showed the development of

the right of the Court to intervene on behalf of the Crown, and the acceptance of the welfare of the child over the right of the parent. Therefore, he saw *In re Carroll* (1931) as wrongly decided, as it suggested that the paramountcy principle applied only when the dispute was between the two parents and not in cases concerning the parents and a stranger. In Lord MacDermott's opinion, and following the earlier caselaw, the 1925 Act principle was to apply in all cases concerning the custody or upbringing of the child. However, there remained the second question, the meaning of "first and paramount" consideration. On this point, a simple reading of the statute was required:

"reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed".⁹

He then indicated the practical application of this, using *In re Thain* (1926) as his example. The court, in that case, held the welfare of the child as paramount consideration, but saw that as being met both by the father, and his deceased wife's sister and her husband. The view taken by the court, and supported by Lord MacDermott, was that "first and paramount" consideration did not amount to "sole" consideration. Other considerations should be taken into account and used to inform the welfare of the child. Thus, in *Thain* the court felt that the welfare

of the child would be met equally by her present family and by her father and his new wife, and that in deciding between the two, the fact that the father was unimpeachable would weigh heavily in his favour.

Paramountcy was again given the straight forward meaning of the words by Lord Donovan who felt that "this [was] a statute which is almost refreshing in its clarity",¹⁰ again applying the simple meaning of the words and not contorting them by reference to the preamble, or the statutory reference to the dispute between the mother and the father's views. Lord Upjohn followed this view.¹¹

Given that the welfare of the child is the court's primary consideration to which all others are subordinate, the question of how the rule is interpreted moves to focus on how the court interprets the term the "welfare of the child".

ii. the interpretation of the *child's welfare*.

In *In re McGrath (Infants)* (1893), Lord Justice Lindley explained the interpretation of the child's welfare thus:

"The dominant matter for consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

The crucial element in establishing how the courts move from statements such as this to a decision in the case is the theoretical framework within which the

judges make their decision. It is, however, difficult to find a statement of the framework from the judges. Lord Upjohn, in his comments on how the courts determine the issues and their relevance, opined that the tool was the judge's general knowledge and experience in "infancy matters", and that medical evidence of "physical, neurological or psychological malady or condition" should only be accepted with any weight in cases where the child is being treated for such a condition. For the "normal" child, the judge should be prepared to "take risks" and follow his common sense in seeing what is in the child's welfare. This principle of the ability of the judges to understand the child's needs by hearing the evidence and relying on their worldly experience is also widely accepted in the case law. This is supported throughout the caselaw. Therefore, the theoretical framework is the "common sense" of the judges, and not a theoretical definition of the needs of a child especially in relation to parental separation.

The judiciary are often criticised as aloof from the real lives of the people before them, however it is not always the case that the judges believe they know all things. The eagerness of the courts to encourage extra-judicial settlement of custody disputes could be seen as one reaction to the public feeling that judges do not always understand the dynamics of family disputes. Indeed the courts do not always follow the same, almost arrogant, line expressed by Lord Upjohn. In the American case of *Garska v. McCoy* (1981) the court expressed its reservations as to its competence to determine a child's welfare, saying:

"in the average divorce proceedings intelligent determination of relative degrees of fitness requires a precision measurement which is not possible given the tools available to judges. Certainly it is no more reprehensible for judges to admit that they cannot measure minute gradations of psychological capacity between two fit parents than it is for a physicist to concede that it is impossible for him to measure the speed of an electron."

Close attention must therefore be paid to the beliefs of the judiciary about the needs and welfare of children. Secondly, and further complicating the analysis of the cases by both courts and academics, is the individuality of the actors in each case and the interplay of different interpretations of the child's best interests. Thus, what may appear to be a case concerning, as in the case of *J v. C* studied above, the rights of the natural parents as against the foster parents, will also be about issues of whether the child is settled in one routine, the competence of the parents to offer a better upbringing for the child, whether the child has a circle of friends and contacts which could be broken, and a host of other conscious decisions. There may well also be issues of the subconscious; the approach of counsel for one parent or the other, the appearance of the parties, the judge's personal beliefs about class, nationality, age. These will be imperceptible from the transcripts of the cases, and yet will have as much, if not more relevance about the actual decisions as the stated reasons and the homilies from the bench about good parenting.

The judgements could be, on the one hand and, indeed as they claim to be, an accurate description of the logical process of determining the order of competing interests and therefore the child's best interests. On the other hand, however, the transcripts may be concerned with justifying hard decisions - decisions complicated by the lack of logic and overbearing presence of emotion, the subconscious beliefs and prejudices of all the participants, and the needs of the judges and the legal process to give authority to decisions which are largely based on a guess as to how the parties will react with their changing circumstances. These claims will be explored later in the work, but should be a consideration in the mind of the reader while considering the following exposition which seeks to examine the meaning of the child's best interests. The approach is the thematic analysis of the textbooks, taking the decisions at their face value.

- iii. the themes and considerations of the court in custody, care and control, and access.

The themes represent competing interests of the parties which form the balancing exercise which the court must perform in deciding cases where the parents cannot agree for themselves. The first themes arise under the consideration of custody, and care and control, under the pre-Children Act 1989 law. Custody refers to the parental rights and duties surrounding the child, care and control to where the child lives and the day-to-day decisions for him or her. Exactly what should be included under this umbrella term is not fixed¹², as was seen in the *Gillick* case, however the consensus is that the parent has responsibilities to the child which respect not only the vulnerability of the child, but also the individuality and development of the child towards adulthood. Thus, the responsibility is complete at the child's birth, but by the teenage years, the child should be allowed to participate in decisions concerning his or her life.

The shift which has occurred from parental rights to parental responsibility could be seen as a passage from the child as the property of first the father, and then the mother and father together, to a charter allowing the child progressively to gain ownership of his or her own life under the protection of the family. Indeed this is the philosophy behind the changes to the parent child relationship in the Children Act 1989. Hoggett (1987) indicates¹³ that the question is a "tripartite" relationship between the parents, the child and the state. Professor Steven Cretney¹⁴ argues from a more conservative view point that the parents' authority is observable as a concept throughout English law, but sees it as eroded by the paramountcy of the welfare of the child, the ability of the child to reach his or her own decisions, and by the state's intervention in care proceedings.

Alternatively, the changes could be seen in terms of the focus which is placed

upon the same essential services. Thus both definitions, rights or responsibilities, are concerned with the child's education, religion, care and possession, name and identity¹⁵, health and control of medical treatment, behaviour and discipline, travel, marriage, finance and property, adoption, to act on behalf of the child in legal proceedings, and the day-to-day decisions such as diet and television. Essentially all these issues concern the child's physical well being, but above all it is a question of the control of the environment within which the child will gain the experiences necessary for independent living within society.

A second element, which can be seen clearly in the *Gillick* decision, concerns the relationship between the parent and the child as the child makes the transition from birth to adulthood. *Gillick*, which concerned the right of a mother to determine an aspect of the medical care of her daughter prior to her sixteenth birthday, accepts that over the course of "childhood", the child moves from total reliance upon the parents, to total independence from the parents, and that this should be a gradual development over time. Thus, one of the most important rights for the child, perhaps even a right for the parent, is the right for the child to make the transition to adult. That seems to be what the parenting is concerned with regardless of whether the "services" are rights or duties.

Essentially then, the issues under debate are the elements which each set of parents and child - family - must work out as they experience the years from birth to 16. The law, when considering parental rights, does not provide answers to the question of how the family should interact within itself; it does not seek to prescribe the values which the individuals should develop. Indeed, how could it from both the question of consensus or enforcement? Society does not need to control the family at such a micro level. The question of parental duties or responsibilities stands within the boundary of macro standards maintained by

society. Thus, if the parent decides that the child does not need education, or clothing the state reserves a right to step in and enforce what could be said to be the child's rights, or society's expectations.

Custody is concerned with the major decisions of family life within the boundary of state intervention. The label placed on those decisions does not concern the content of the decisions, in as much as the decisions are unique to each family, and unless they cross the boundary, the state is not concerned with them. Further, if the conflict between the parents and the child becomes such that the parent seeks one end, while the child seeks the other, resolution would not be found in exercising rights in court, but rather in taking action such as leaving home. Thus, if the debate does not concern the content of the rights or duties, the question emerges: why is the law and the political community so concerned with a linguistic issue? This will be addressed later in the work.

Custody concerns the large decisions which parents must make concerning the upbringing of their child. Care and control concerns where the child will live, and the day-to-day decisions which accompany living with children. Custody, on parental separation under the pre-1989 law, would be awarded to one of the parents unless a joint custody order was made, and custody and care and control could be split as was determined in *Wild v. Wild* (1969). *Dipper v. Dipper* (1980), considered whether the effect of awarding custody to one parent effectively excluded the other from all future decisions concerning the child. It was held that the custody order did not give one parent exclusive or "absolute" rights over the child and decisions concerning him or her. Rather, it found that the other parent should always be consulted, and an ultimate right over decisions vested only in the court. However, a winning and losing element could be felt when both parents wished to retain the children. Likewise, and perhaps more importantly, the issue of care and control, determining where the child would live, would be the

most devastating to a relationship with a child, and thus a point of fierce contention between the separating couple. Because the majority of orders did not split the custody and the care and control, the reports concern applications for "custody" of the children, which concerned both. In the vast majority of the cases the endeavour of the parties is to secure the children with them.

The second group of themes concern access, or contact. Again as thorny an issue as custody, the cases represent the attempts of a non-custodial party to retain a relationship with his or her child. Perhaps this is the more difficult as it concerns the continued contact of the parents. It will be seen that the courts on the problem of enforcement of access orders are virtually powerless.

The Themes.

a. status quo

Perhaps the most important factor for the courts is the principle expressed by Lord Justice Ormrod in *Re B (a Minor)* (1983)¹⁶, when he stated that a "fundamental rule of child care is that stability is all important and the maintenance of some sort of routine crucial". Clearly, in the period after the parents have separated a new family order will have emerged. This may be by circumstances or by interim court order. The courts seem to start from an acceptance of the present position and then weigh other factors alongside the basic premise that to disrupt the child's established circumstances would be detrimental. Further, maintaining the *status quo* is accepted as a means of maintaining the continuity of care of the child, as in *S(BD) v. S(DJ) (Children: Care and Control)* (1977) and *Dicocco v. Milne* (1983). This may even extend to the courts accepting that the child is stable within what the courts believe is an unorthodox environment, as in *B v. B (Minors)(Custody, Care and Control)* (1991).

The *status quo* argument is used mainly to protect the custody of the child with one parent or effect the return of the child to a former position. However, in *In re A (Minors: Access)* (1991) the father was denied reinstatement of access after a two year gap, as this would cause distress to the two young children in their newly established family life.

The strength of the arrangements, and especially the length of time that they have been in place, is seen by the courts to strengthen the court's duty to uphold the situation, and resist the temptation to interfere. This is widely accepted in the cases, as in *Re C (Minors)* (1978), and *S v. W* (1981). Again this argument can be seen in *Stephenson v. Stephenson* (1985). Here a young girl lived with her father after the separation of her parents, and a strong bond had grown. The mother left the family home and the child. The father's sister helped him for a time before the father started cohabiting with a new partner, who gave up her work to look after the child. The mother had some access, and after the Christmas period did not return the child, alleging abuse of the child by the father. The courts heard the case in January, and found no abuse, but excellent care and relationships within the father's home. The mother was in a relationship with a convicted criminal, having a child by him. The court ordered custody to the father, care and control to the mother.

On the father's appeal it was found that the judge had erred by failing to give reasons for departing from the welfare officer's advice, failing to give proper weight to the limited access which the mother had exercised over the previous two and a half years, and to the child's established relationship with the father and father's new partner. Further, the mother showed no real interest in the child when she was in her care, and the mother's partner was not to be trusted. The courts accepted a similar argument in *B v. B (Custody of Children)* (1985). Here a young girl lived with her father from birth, and after the parental separation,

the father's sister assisted with the child's care. The mother sought care and control, but the court found that the changes in her life, and the strong bond with the child did not warrant the removal of the child from the father.

In *Stephenson*, it will be noted that the period of time, one month, that the mother had the child after the access visit was too short to allow her to claim the new situation merited preservation. The period of time must be substantial in order to establish the argument. In *Bowley v. Bowley* (1984), a period of two months was described as "almost vanishingly thin" as a period to establish a *status quo* argument. In *Allington v. Allington* (1985), the argument for maintaining the *status quo* was weakened due to the short duration of the arrangement, and the non-custodial parent's regular contact with the child. Here the mother left the child with the father in the family home for some ten weeks, during which time she maintained a high degree of contact with the child. The mother had a new partner and at first instance the *status quo* was preferred to the mother having custody. On appeal, Lord Cumming-Bruce felt that consideration of the child's relationship during the separation from the mother was inadequate, and the presence of the new partner as offering a stronger family situation with the mother was not explored. Given the length of time since the mother had left, the permanence of the *status quo* was questioned, and, on balance, it was felt that the child could and should be moved to the care of the mother. The importance of the maternal love and bond with the child was stressed in theory and applied, perhaps at the expense of the father, who was offering care and love to the child.

The *status quo* will not be upheld in cases where it has been established wrongfully in the first instance, as in *Edwards v. Edwards* (1986), and *Townson v. Mahon* (1984). These cases concerned abduction inside this country (rather than an international abduction) which, as will be seen later in the thesis, is an area

where the removal of the child could be interpreted as a punishment of the offending parent. The court is charged to examine the best interests of the child. In both *Townson* and *Edwards* the period of the new arrangement could be argued to be relatively short. However, the question must arise, given the courts' belief that the *status quo* is one of the most important factors in a child's welfare, whether an abduction which was challenged after a longer period of time would still warrant the removal of the child. This would not happen often, as the practice of a lawyer would be to seek an interlocutory injunction to restore the child before the hearing commenced.

A challenge to a *status quo* agreement may be made as an attempt by a non-custodial parent, who is consistently refused access to his or her child by the custodial parent, to gain an order in their favour for custody. Clearly, a strong case can be made, especially if the non-custodial parent was offering good access arrangements in the future. However, in cases concerning such access "blocking", the courts have shown great reluctance to overturn existing custodial arrangements, as in *M v. M* (1980).

Nevertheless, it is not impossible to convince the courts to change a strong *status quo* argument, as was established in *Greer v. Greer* (1974). Further, if the court believes a change of custody is in the child's best interests, the fact that there is a bond which will be broken should not deter the court from acting, as in *W v. P (Justices' Reasons)* (1988), and *Faulkner v. Faulkner* (1981), where the court accepted that moving the child could entail a "risk". The children had been with the mother for two years after the separation, then lived for six months with their father. The welfare report indicated the children should stay with their father, and the courts accepted this against the mother's *status quo* claims. This case shows that the *status quo* argument is not as clear as Lord Ormrod suggests. There can be contradictions in the cases, using different interests as the

justifications, which show the concern that was expressed above that the courts are not solely concerned with the logical ranking or consistency of interests.

In *Adams v. Adams* (1984) the younger children of the family lived with their father, although the arrangement split up the siblings. The court upheld the *status quo* over the argument that the siblings should remain together. In direct contrast to this, the court in *C v. C (Minors Custody)* (1988) decided that the argument for the siblings to remain together was stronger than maintaining the continuity of care of the children, and made the emphatic statement that the *status quo* should not be upheld in preference to keeping siblings together.

b. maternal instinct

The *status quo* argument can be seen as one of principles which the courts hold to be most important to the interpretation of the child's welfare, but the pull between interests can be seen. Perhaps the other major principle is there is a natural maternal instinct, and that it is in the interests of the child, and especially the young child, to be with his or her mother. Although it is not a rule¹⁷, and is only claimed as one of the interests to be taken into consideration in the balance, the courts clearly accept that mothering is essential to the development of the child, seeing the female parent as provider of "mothering". [This doctrine is not unique to English law. For example, see the Australian case, *Epperson v. Dampney* (1976) and *Gronow v. Gronow* (1979). The principle could be traced to the prominent psychologist, John Bowlby¹⁸, in the 1950s. However, the courts, as part of the reluctance to accept that there are theoretical justifications for their decisions beyond the judge's own beliefs, have not attributed the origin of the principle. The strain between the visibility of a rule and the reluctance to attribute it may well stem from the fact that the

rule would stand against the statutory principle that the parents are equal before the law (from 1925 onwards), or equally it could stem from the fact that the rule is not fully developed, having been assimilated into judicial thinking not by theory but by chance, and with a prejudice that the raising of children is women's work. It is interesting to note the courts view that the father's rôle at best can be fulfilled through access, if there is any developed rule about the rôle of the father at all. It also links to the reluctance of the court to allow the father to give up work to care for the children, whether this is supported by his wife, or drawing unemployment benefit.¹⁹

The evidence for the assertion that there is a preference for the care of children by the mother runs throughout the cases and, essentially, a father must prove that the mother is an unfit person to have custody in order to break that preference. In such cases, the father, as Bevan suggests, will be in a stronger position if he can point to a stable, custodial relationship with his children - returning to the interplay between the interests, and especially the *status quo* argument, to justify a judicial feeling in a particular case. It can be seen that question of maternal preference can be hugely important in custody disputes. It may also have a "knock on" effect in questions of matrimonial property, as in *K v. K* (1992), where the mother, after leaving the father initially gained a joint custody order. Later she claimed the relationship with the father was over, although he disputed this. The Judge ordered custody and care and control to the mother, access to father. The father, still believing reconciliation could occur refused to leave the home and the family lived together in it. The Judge and the mother had assumed the father would leave when the second custody order was granted. The mother then applied to the court for an order under section 11 of the Guardianship of Minors Act 1971, which allowed the court to make a property order in the interests of the child. The court ordered that the property be

transferred to the mother's sole name, as she was made unhappy at having to remain living with the father and, while the children were not unhappy in themselves, their mother's continued unhappiness would not be in their interests. On the father's appeal, a retrial was ordered on the dual grounds that the section 12A requirement had not been observed, as the Judge had not considered whether the father's right to buy the property could have been saved by an alternative order; and that the welfare of the children, the basis of the order, had not been established on the evidence. This is a good example of how the interests of the children can be given a rather contorted definition. Here the welfare report found both the parents to be devoted to the children.

The strength of the mother's position in custody cases is perhaps a reaction in the courts to the structured position of the law prior to 1925. Before the 1925 Act, the child was the property of the father, indeed this position was seen as a "high and sacred right" by the Lord Chancellor, Lord Selbourne in *Syminton v. Symington* (1875). In that case, the father had committed adultery but had stopped, and the court felt it in the boys "material and moral interest" that they should live in the care of their natural and legal guardian, the father.

The extent of the acceptance of the maternal argument can be seen as well established in modern cases. The courts acceptance of the basic principle that the child, especially the young child, is best placed with the mother is clearly stated as a good working rule in *H v. H* (1984), *M v. M* (1980), and *M v. M (Custody of Children)* (1983). In *Cossey v. Cossey* (1981) the court followed a general assertion that girls should live with their mothers.

M v. M (1980) shows the basic principle very clearly. The court found that the parents offered equal love and care to the 4 1/2 year old child, who on the parents' separation had gone to live with the mother. The father had applied for

custody, and had been granted the order, as the court felt that he could provide a more reliable access opportunity for the mother. On appeal, it was felt that this could not justify removing the child. The court felt that there was a "natural link" between the care of children and the mother, and that the mother could give up work more easily to look after the child. Also, regardless of the qualities that the man could offer, he could not offer the mother's rôle to a young girl. The case is interesting in two respects; first, as it accepted that the mother would be more awkward in allowing the child to have access visits, but this should not overpower the balance against the mother as defined access orders could be made, and secondly, because the case depended so heavily on the mother's rôle, rather than the strength of the *status quo* argument.

In *Allington v. Allington* (1985) again the court felt very strongly that young girls need to be with their mothers. An 18 month old girl lived with her father for some 10 weeks, being cared for by both parents to the extent that her bond with her mother was considered to be unimpaired. Lord Justice Cumming-Bruce felt that at that stage in the child's development the fact that a girl needs her mother's care was *prima facie* established. Further, the court felt that had the father continued to have custody, the importance of the *status quo* argument would develop, rendering a later transfer of care more traumatic. In the majority of the cases what is apparent is not just the preference exhibited towards the mother, but the fact that the father's love and care of the child is considered as equal, and yet the preference is applied. *Allington* seems to expose the courts use of a doctrine of the child with the woman in the indication that it was better to move the child now rather than to wait until a *status quo* argument would have to be overturned.

The difficult balance between the *status quo* and the importance of placing a child with the mother is the centre of the following three cases. In *Re C* (1981), the

mother left the family home, and the child remained with the father and the grandmother. The mother brought a custody action, however a joint custody order was made with care and control to the father. This was contrary to the welfare officer's report, which appeared to accept that the mother had a natural quality in the care of children. On appeal, the court stressed both that if the welfare report was not followed, the court must give reasons for the departure, and also the principle of a special maternal bond.

In *Re W* (1983) the 19 month old child lived with the father and his cohabitee, and had only known that home. The mother applied for custody, and the High Court reversed the initial order that the child live with the father. The court felt that, in the father's favour, the child had only ever known that household, which was a stable one. However, it felt that, at the child's age, people were more important than a sense of place, and the mother was willing to undertake the care of the child. Again, in *In re A (a Minor)* (1991) the daughter, K, aged six years, and three of her brothers (the younger was nine years old), lived with her father and their housekeeper, who had cared for the K and her youngest brother since their births. The judge awarded custody of K's 11 year old sister to her mother, and in what he described as an "acute balance of arguments", concluded that the *status quo* argument should give way to the mother's case to have the care of her young daughter. The Appeal Court, having disapproved of the judge's reading of *In re H (a Minor)* (1990), stated that it felt that a bond between a mother and young child which had been unbroken would be difficult to displace, unless the mother's care of the child was unsuitable. If that link had been broken, then there was no presumption for the mother. There is no equal recognition of the possibility of an established paternal bond. The father, even in the position of custodial parent, must show the mother is unfit or has left her children, and essentially broken the primary bond. This is further supported in *Stephenson v. Stephenson* (1985). The effect runs the risk of making the dispute

more acrimonious. The father, seeking essentially the same ends as his former partner, is almost forced to slur the mother. Yet it must be borne in mind that the success of any future arrangements for access for the children, whether he gains custody or not, depends upon the two parents working together.

The need of the child to live with his or her mother is also a potent argument where the father offers custody, but the child would be living on a day-to-day basis with either the father's new partner or a variety of carers. In such cases, despite a duty to approach the conflict from the consideration of the child's welfare, the courts appear to follow the maternal argument. This can be defended by suggesting that the welfare of the child is better protected by the natural mother, however, this suggests a bias which does not examine the needs of the individual children but rather applies a strict rule. The courts are rightly concerned with the presence of a new partner who would have care of the child, as in *Allen v. Allen* (1974), *Hutchinson v. Hutchinson*. (1981), and *Scott v. Scott* (1986).

In *Re K* (1977), when considering the day to day care of the child, the duty of the court was held to be to promote the child's well-being, the court preferring the care of the child to be undertaken by one person on a full-time basis wherever possible. The provision of daily care for the child by the father's new partner was a major factor in the decision in *Re W* (1983). The child spent the day at the father's home not with the father, but with his cohabitee. This was crucial, and despite the welfare report's opinion that there was nothing special in the maternal, biological bond, the court ordered the child to the care of his mother. Thus, there is a strong suggestion in the cases that the mother's care is quantifiably different to that offered by the father, and that the courts are interpreting the need for mothering as the need to be with the natural, female parent.

The position of the maternal preference is however contested by the courts. The courts, and especially the appeal courts have stated that there should be no automatic preference to the mother, which seems to offer a contradictory view to the statements of the courts, including the appeal courts, in the above cases. In *Pountney v. Morris* (1984), *Re W (a Minor)(Custody)* (1984) and *A v. A (Custody Appeal: Role of the Appellate Court)* (1988) the courts stressed that there was no presumption that a young child was best placed with his or her mother.

In *Re S (a Minor)(Custody)* (1991), the parents of a two year old girl lived together for two years before the mother left the father on account of his violence. The girl was left with the father, and the mother sought to gain her custody. Two welfare reports indicated that the girl should live with her mother, but two justices decisions gave custody to the father and access to the mother. On an access visit, the mother failed to return the child, and sought custody. The judge granted the request. However, on appeal, the Appeal Court held that the judge was wrong to overturn the justices' decision, as the domestic court had been best placed to decide the child's welfare. The case was ordered to be heard before a new bench of justices with new welfare reports. Lord Justice Butler-Sloss indicated that there was no presumption as to which parent was suited to caring for the child at any age. However, she indicated that "it was likely that a young child, particularly a little girl, would be expected to be with her mother, but that was subject to the overriding factor that the child's welfare was the paramount consideration". Even where the courts are at pains to rebut the allegation of bias to the mother, the equality of the parties is not wholly convincing.

Perhaps the most distressing of all the cases concerning maternal preference is *Re D W* (1984). The parents separated and the mother left the child with the father. The father remarried and the child lived in the new and, by all accounts, secure

family for some 8 1/2 years. The father and the stepmother then separated and agreed that the child should remain with the stepmother. This was also noted to be the wish of the child who at the time was 10 years old and mature for his age. The court noted that the stepmother offered exceptional qualities in caring for the child and in educating him. The natural mother could offer a better quality of home life, but could not offer the same level of personal or academic stimulation for the child. Lord Cumming-Bruce felt that the issue of giving custody to the stepmother could prove difficult should anything happen to the stepmother. He also felt that the stepmother would not disappear from the child's life should the custody be changed. He further decided that the mother could offer a more secure future for the child, and that the boy was mature enough to cope with the emotions surrounding a move to his natural mother. Here the natural mother argument triumphs over an almost overwhelming *status quo* consideration. It also flies against the child's wishes. The appalling consequences seem to be created by the reluctance of the court to allow the stepmother to become anything more than an outsider - and one is left wondering how such a decision can be justified as the best interests of the child, unless one accepts that the maternal preference is an unshakeable belief that cannot be questioned. This case is difficult to reconcile with any suggestion other than that which asserts that the natural mother has a trump card in any custody proceedings.

c. conduct

i. general

The conduct of the parties has changed its meaning over the last 150 years, however, it can be said to remain important to the interpretation of the child's best interests. Initially referring to the matrimonial offences, the conduct which

is important is now concerned with the lifestyle and behaviour of the parent, as it is relevant to the child.

Initially, the conduct of the parents largely concerned the conduct of the mother. In *Symington v. Symington* (1875), an adulterous father who had reformed his conduct could still retain the custody of his children, and this was a common feature of custody law. Likewise, it was not necessarily the case that violent fathers would lose the custody of their children. This was in marked contrast to the attitude to the mother. In an atmosphere of a patriarchal society, the separation of the parents was largely seen as the fault of the woman, often grounded in her infidelity. Thus, it was the case that an adulterous mother could never, in the eyes of the court, be granted custody of her children, as was the case in *Clout v. Clout* (1861) and *Codington v. Codington* (1864).

The importance of matrimonial conduct can be seen in custody law throughout the first half of the twentieth century, indeed until the reform of divorce law in the late 1960s and early 1970s. As late as 1969, in *Re L*, it was held that the guilty mother should not gain custody against the unimpeachable father. This reflected the fact that, although social attitudes to divorce and indeed to marriage changed after the second world war, the law maintained a stance which was based on a previous morality which was given authority by the reluctance of the Church of England to respond to the change in social attitudes. Following the Archbishop of Canterbury's report on Divorce (1966), the reform of the law to consider irretrievable breakdown allowed a similar reform in custody cases. The shift was made to accepting completely the doctrine of the paramountcy of the child's welfare, rather than fettering it by viewing the care offered by parties guilty of matrimonial offences as second rate *per se*. This acceptance can be seen to make a clear separation between being a partner and being a parent.

The change in the attitude to the matrimonial offence was clear. Matrimonial

conduct is irrelevant unless it is detrimental to the welfare of the child. The welfare of the child depended on a consideration of the present and future arrangements for the child, and not the past, an interpretation stressed by Mr Justice Lincoln in *In re L (Minors)* (1989). Thus, in *Re K* (1977) the father, a parish priest, was left with his child when the mother left him to form a relationship with another man. The court felt that the conduct of the mother had no place in the question of the custody of the child. Lord Justice Ormrod suggested that the justice offered by including marital conduct was simplistic, as it could not be assessed on a superficial reading of the facts offered in custody cases. This line followed the earlier cases of *Allen v. Allen* (1948) and *Willoughby v. Willoughby* (1957), and was followed in *B v. B* (1973), where the woman left to live with her husband's brother.

This line was followed in *S(BD) v. S(DJ)* (1977). The mother had a series of partners during and after the marriage, and then married a 26 year old man. The mother's conduct was relevant to the consideration of the welfare of the children; would the children have a stable life if they lived with their mother? The cases therefore shifted to reading the parents' actions in terms of their fitness to care for the child.

As was indicated in the discussion of the maternal preference cases, the fitness of the mother is often the argument used by the father to attempt to gain access. Therefore the cases of interest turn not on drunken mothers, but on the mother's lifestyle and behaviour. However, a line of cases concerning violence by fathers can be traced from *Re Curtis* (1859). The issue of maternal fitness was not new either, as is seen in *Philip v. Philip* (1872) where an excitable, violent mother was denied access to her child, aged seven, as such visits would impede the child's recovery of health. However, the range of behaviour has changed. In *Stanwick v. Stanwick* (1970), the mother was persistently dishonest. The court

considered that this behaviour amounted to cruelty. Further, in this case the mother had deserted the children, a factor which always casts a slur over the woman's character in the eyes of the court, unless she is in some way provoked, *Re S (a Minor) (Custody)* (1991).

The court has been keen to show that consideration of the conduct of the parents, or their fitness, is focussed on the children and is not concerned with punishment or reward, as in the case of *Re C (Custody of Child)* (1981). Here the parent had a history of brief, unsuccessful relationships. The conduct of the parent was only relevant if it showed inadequacy, negligence, or unsuitability to perform parental duties.

The courts, in assessing the relevance of the parents behaviour to the welfare of the child are presented with three problems. The first difficulty is whether or not the allegation is true. Discussions with solicitors as part of this empirical survey suggested that after the Cleveland sexual abuse cases, the number of allegations of sexual abuse made, especially in relation to access disputes dramatically increased. Secondly, the courts must determine the level of the risk, if they accept that there is a risk. This is not at the boundary which would warrant care proceedings, rather it is part of a balance between parents, and the importance of stability in the child's life has already been noted. Thirdly, neither side is without faults as a parent, and the risks that the child may have in the new home must also be weighed. The last two points are not helped as the courts are largely guessing what will happen. The following are cases chosen to illustrate the factual difficulties experienced by the court. Again, the caveat must be remembered that these are based on the interpretation of the characters involved by the judges and the lawyers, and tend to oversimplify the issues and emotions involved.

In *L v. L* (1981) the mother had attempted suicide by taking an overdose; she was depressed and drank heavily. The child was in the care of his father and aunt. There was evidence, in the form of bruising, that the child was overly chastised. The court in this case awarded custody to the mother, ordering that she be allowed back into the matrimonial home, and making a supervision order to secure the child's welfare. The case of *Re W; Re L* (1987) concerned three daughters born to one mother by two different fathers. The girls lived with their mother, however their fathers sought custody of them under the Guardianship of Minors Act 1971. Before that hearing, the daughters were taken into the care of their fathers, and wardship proceedings were started by one of the fathers.

The father alleged that the mother and her new boyfriend had a drink problem and were unfit to have custody of the children. It was further alleged that the girls were left alone. Two months prior to the hearing, the youngest daughter was the subject of a place of safety order. The judge found that welfare reports would take some three to four months to prepare. However, evidence was given by a social worker that the fathers should have the care of the children. The judge, however, found that the children should be returned to their mother, ordering her not to leave them unattended, and not to bring them into contact with her boyfriend. On appeal the court found that the judge had erred on two issues. The judge did not give weight to the allegations of the danger which the mother presented to the children, or the care that the fathers could offer. While the long term care of the daughters needed investigation, the advice of the social worker for the short term should have been accepted. The undertaking of the mother not to leave the children alone should not have been sufficient to convince the judge of the children's welfare, and further evidence should have been requested. The appeal court made orders in the interim that the children should stay with their fathers before the issue could go to the High Court.

In *Re R* (1986), the mother was originally given custody of the children. She then took them, without the leave of the court, to the Channel Islands, where she met Mr S. She then left the children with their father. The father commenced wardship proceedings. The welfare officer could only see the father and the children, and recommended an adjournment to gain more information. The judge felt that the mother's care had been adequate, but the period with their father had given them stability, their mother having continually moved them from place to place. The judge was also doubtful as to the permanence of the mother's relationship with Mr S, and the children were settled at their school. The father had had drink problems and had a criminal record, but the judge did not have any information concerning these matters beyond 1979. In the mean time the father and the children were re-housed, causing them to change school, and the father was charged with being drunk in charge of a bicycle. The court of appeal felt that they should only interfere where the first decision falls into error. In the first hearing, the material facts were incomplete. The appeal court felt that all reports should be made available to the judge. They were also mindful of the changes that had occurred since the first decision, and granted an interim order to the mother, and ordered a retrial on the grounds of the father's drinking and criminal record.

The case of *Re S (a Minor)(Custody)* (1991), the facts of which have already been outlined above, the father's violence was found by the justices to be an insufficient reason to place the child with her mother, the mother having left the child with the father, notwithstanding the fact that the mother left on account of the father's violence towards her.

While the law claims to have moved on to a view of the behaviour which is solely concerned with the future welfare of the child, two issues, the abduction of children, and the issue of lesbian custody, seem to suggest that the courts can

place the welfare of the child as second considerations to other purposes. In the first instance the effort is to deter parents from abducting their children, and in the second it is as a judgement of the value of the parent's lifestyle. Both are secondary to the quality of parenting, and the needs of the child.

ii. conduct and abduction: an issue of enforcement

The issue of enforcing custody orders on an international stage has become a major concern of the courts over the last decade. It is a problem which is growing. In 1991, according to H.M. Government statistics, there were over 200 foreign abduction cases, which according to workers in the field was a five fold underestimation, which, with the removal of European travel constraints in 1992, is set to increase.²⁰ The issue is: how should the courts react when the child is removed from one parent, especially a parent who may offer better care in all respects except the method by which the custody started? The concept largely stems from ownership, in that an accepted right of the parent is the protection of the child against kidnapping by third parties. Here the issue is complicated in that the kidnap is the work of the other parent against the enforced denial of that basic right by a court.

The 1980s saw three initiatives concerning the difficulties of abduction; the Hague Convention on the Civil Aspects of International Child Abduction, signed on 25th October 1980, the European Convention on the Recognition and Enforcement of Decisions Concerning the Custody of Children, both being incorporated into English law by the Child Abduction and Custody Act 1985, and thirdly, the Family Law Reform Act 1986. This defined in statute the duties between jurisdictions both within the United Kingdom, and on a wider stage. It also caused a flurry of academic activity into what could be seen as a major

development in family law.²¹ Given this interest, it is not proposed that this study should dwell on the issue, however it must be considered in so far as it can be argued to be a new issue of conduct which challenges the paramountcy principle.

Abduction is the removal of the child without right or consent of a person who has the right to remove a child from a jurisdiction. The issue is divided between those jurisdictions which are party to the conventions, and those outside them. Prior to the conventions, and indeed for those places outside the conventions, the issue of whether a child abducted and brought to the English courts should be returned to his or her custodial parents is subject to the normal principles of the welfare of the child as the paramount consideration. In such circumstances, the abduction becomes one factor to weigh in the balance of the child's needs. This was seen in *Jenkins v. Jenkins* (1980) where the child was "snatched" by the non-custodial parent. Although the court strongly disapproved of the action, and ordered the return of the child, it was still a matter to show the child's best interests lay in returning to the custodial parent. Clearly the issue of the abduction is taken very seriously by the courts even outside the contracting states to the conventions. Where the abductions took place prior to the commencement of the Convention, applications cannot be made under the conventions, as in *In re H (Minors)(Abduction: Custody Rights); In re S (Minors)(Abduction: Custody Rights)* (1991).

Concerning the contracting states, the English courts are bound to respect the custody decisions made in other jurisdictions. This is also the case throughout the United Kingdom. Thus, when a court is approached by a custodial parent for the return of their child from within the court's jurisdiction, unless the non-custodial parent can show that the custodial parent was not exercising their rôle at the time of the abduction, or that the child is in "grave risk..of

physical or psychological harm, or would otherwise be placed in an intolerable position"²², the child should be returned to the custodial parent.

The application must be made to the jurisdiction where the child has been taken to. In England, the courts may make interim orders concerning the custody, these are decided on the consideration of the child's welfare and it was established in *In re J* (1989) that there was no automatic return of child prior to full hearing.

The fact that the hearing must take place overseas and could therefore result in considerable costs was considered in *Richardson v. Richardson* (1989). On their parental divorce, the children were made wards of court, with an order that they should only be removed from the court's jurisdiction with an order of the court. The mother took the children to Eire without permission. The court considered whether the mother's assets could be sequestrated while she was in contempt of court, and found that they could, and that they could be sold and the funds could be released as necessary to the father to allow him to pursue the mother through the Irish courts.

The courts are bound to return the child who is not under the risk outlined above, and who was not removed with consent. The issue of consent, the acquiescence of the custodial parent in the actions of the non-custodial parent can therefore be used in argument to justify the actions of the abductor. This is shown in the following pair of cases, one which is general concerning how the courts determine acquiescence, the other which is more difficult as the acquiescence was found by the court in actions made after the child had been initially removed by the mother. *In re A (Minors)* (1991) The question of whether the actions of a person amounted to acquiescence to the wrongful retention of a child was one of fact under article 13 of the Hague Convention. Thus, the judge was entitled to draw her conclusions from the facts before her at the hearing, and the appeal court

supported that reading of them.

In *In re A (Minors) (Abduction: Acquiescence)* (1992) it was held that acquiescence might be active or passive, and could be constituted by a single event, providing the parent was aware of his or her general rights against the abducting parent. Here a father, after the mother had abducted the children and taken them from Australia, wrote to her and stated that while the action was illegal, he would not fight it in the courts. He subsequently sought an order for the return of the children, which was granted. The mother appealed on the basis that the father had acquiesced by writing to her. The mother's appeal was successful, the court finding the father's action had been sufficient to remove his rights under the Hague convention.

Thus, the application of a strict approach to those who abduct children, even, as the cases recognize, out of frustration at being separated from them, must be seen as a separate issue to that of determining the initial decision of where the child lives. If the courts took a softer line, examining the best interests of the child, the effect would be that a last attempt to gain custody would be abduction. Of itself, perhaps the welfare principle is not far away from the courts' reasoning, given that stability is a watchword in custody cases. The risks of further abductions were the court's concern in balancing the welfare issue in *Re K (a Minor)* (1990). The father and mother were, respectively, Pakistani and Irish, both having lived in England for many years. They had one child, born in December 1983. The couple separated, gaining a divorce in 1987. The mother gained an order denying the father any access, and the father appealed on the grounds that it was in the child's interests to know both his parents, even though they were divorced. The court felt that the circumstances had not changed from the trial, and the judge's order was correct. The case showed a history of the father abducting the child. In 1984, when the marriage first hit difficulties, the

father would not allow the mother to take the child with her to her mother's home in Ireland. She went, leaving the child with the father, and while she was away, the father removed the child to Pakistan. The mother, by a wardship action, had the child returned to her custody.

In 1986, during an unsupervised access visit, the father again removed the child to Pakistan, where he remained for 18 months. During that time the mother visited the child for one month; the father sharing in the expenses of the visit. Lord Justice Dillon found it "intolerable that a child should be twice taken away from his mother who was bringing him up and with whom he had, until the first occasion that he was taken away, been living since birth". The father undertook between the first and second kidnappings, that he would not remove the child a second time; an undertaking made in writing and supported by depositing his passport with his solicitor. Lord Dillon summed up much of the difficulty in the area of abduction in his description of the father: "I do not suggest that the father is a bad man or a villain in any general sense, but he appears to be a man who rushes into impetuous action, possibly on the spur of the moment, without thinking what a terrible effect that action may have both on his former wife and on the child". The judge upheld the order of no access, agreeing with the first hearing judge that the issue was a balance between the benefit of access and the dangers of abduction, and finding that the risk of abduction outweighed the possible gains of access. Lord Dillon could not foresee the reinstatement of access until either the child was much older, or the father had a more stable position in England with no desire to return to Pakistan.

iii. conduct and lesbianism: an issue of prejudice?

Whereas the inclusion of one parties abduction of a child can be justified as

ranking before the welfare of the child, as to avoid a courts order would throw the judicial system into chaos, the treatment of lesbian mothers can also be seen as the courts placing the conduct of the parties before the paramountcy principle. In this latter case, it is submitted that the courts have seemed to be little more than prejudiced. This is especially pertinent at a time when even the Anglican Church is beginning to open its mind to the question of recognising homosexuality²³, and mainstream family law journals carry a discussion on the recognition of homosexual marriage²⁴.

There are relatively few cases reported concerning custody disputes where the mother is lesbian, perhaps because the gay community see the reaction of the courts to their applications and are reluctant to pursue, or are advised against pursuing custody actions. The approach adopted by the courts is reminiscent of the tone adopted to mothers accused of adultery in the nineteenth century. Perhaps this is because again women are seen by the judges as avoiding their motherly duties, not only by retreating from marriage, but retreating from the husband's rights; a snub to the judicial ego?

The classic treatment of the lesbian mother is found in *S v. S* (1980) Here the mother after the separation of the marriage, was in a lesbian relationship. The children were thought to be at danger if they were exposed to the mother's deviant behaviour. The deviance argument was again followed in the case of *In re C (a Minor)* (1990, *The Guardian*).

The mother, a lesbian and a prison officer, started a relationship with a woman who was serving 12 months for theft and wounding. The mother left the Prison Service, took a flat and another job, and on the release of the woman, lived with her. Throughout, the daughter lived with her mother and had good, regular contact with her father. The father remarried and applied for care and control of

the child. Following *G v. G* (1985), Lord Justice Glidewell indicated that the House of Lords could intervene in custody issues when the trial judge was "plainly wrong". Concerning the mother's lesbianism, the judge had been plainly wrong. Despite the sexual liberation of recent years, Lord Glidewell felt "it was axiomatic that the ideal environment for a child's upbringing was the home of loving sensible parents, her father and her mother. That ideal could not be achieved when the parents' marriage ended. The court's task in deciding which of two possible alternatives was preferable for the child's welfare, was to choose the alternative closest to that ideal".

The judge felt that while the child would learn the nature of her mother's relationship if she lived full-time with her mother, she would equally learn of its nature if she had staying access periodically. On this point, Lord Glidewell thought the judge to be wrong. Further, he felt a wrong conclusion was drawn over the effect on the child at school if she lived with her lesbian mother - the judge had disregarded the distress and embarrassment it may cause her. Living with her heterosexual father would reduce her exposure to such difficulties. His Lordship, however, did not believe the mother's lesbianism *per se* was conclusive, or disqualified her. A loving, sensitive lesbian home may well be more satisfactory than an unloving alternative. The judge had failed to consider the nature of the relationship, and especially the conviction of the mother's partner for violence.

Lord Justice Balcombe felt that the court's consideration should be the welfare of the child. This was not to be influenced by subjective views, but rather the prevailing morality of society at the time. "in our society it is still the norm that children are brought up in a home with a father, mother, and siblings, if any, and, other things being equal, such an upbringing is more likely to be conducive to their welfare. A very material factor in considering where a child's

welfare lies is which of two parents can offer the nearest approach to that norm". The judge was in error for failing to bring the lesbian nature of the mother's relationship into the balance. The father's appeal was allowed, but the outcome of the retrial did not necessarily follow. Interim care was, however, given to the father. Lord Justice Balcombe's claims here are unsubstantiated by theory: one wonders why the case concentrated on the mother's sexuality, when her partner had been convicted of assault, which was surely an issue of far greater relevance.

When the courts do make an order in favour of a lesbian mother, it is often portrayed as a last resort. *Re P (a Minor)(Custody)* (1983). The child lived with the mother in a lesbian household. The father could not look after the child, so the court had to decide if it was better to place the child in local authority care. Lord Justice Watkins felt that "it was not right to say that a child should in no circumstances live with a [lesbian] mother...it can only be countenanced by the court when it is driven to the conclusion that there is in the interests of the child no other acceptable form of custody".

With the aid of a psychiatrist's report, Mr Justice Callman gave the most positive order in favour of a lesbian mother in *B v. B (Minors)(Custody, Care and Control)* (1991). The mother lived in a lesbian relationship, the father with another woman. The case concerned three children, aged 10, nine, and two. The older two children lived with their father, the younger child with her mother. It was decided that there would be an order for joint custody of the children, with the care and control reflecting the existing arrangements. A psychiatrist's evidence indicated that the fact that the mother was a lesbian did not interfere with her ability as a mother, and the youngest child should remain with her. The court welfare officer was of the opinion that the fact that the mother was lesbian was bad for the child, and if the youngster lived with the father, there would be the added advantage that the siblings would be together. Mr Justice Callman

followed the advice of the psychiatrist who considered that siblings within five years of age should be kept together. Here the children's ages were spread much wider than five years, and thereby justified the possibility of splitting them up. He also found that the mother was not a "militant" lesbian, and otherwise was a faultless mother. He could not justify the removal of the youngest child from her mother, especially as there was a two years and four month bond between them, and the child would go to a child-minder if she lived with her father.

What is being suggested here is that the courts, rather than following the well accepted principle of assessing the custody issues from the point of view of the child's welfare, place the conduct of the mother before them as justification for withholding custody except, in the most exceptional circumstances. This allegation could be justified in two ways. First, in relation to the treatment of parental sexual morality generally, and secondly, with reference to the claims as to the dangers of exposing children to such relationships.

Heterosexual sexual morality does not figure in the case law in the same way that the courts scrutinize lesbians. Only when the parent, and especially the mother, has so many partners that the stability of the child's home is upset, and the child is neglected does it appear relevant. The debate does not explore the potential harm of promiscuity as against a monogamous parent. In relation to lesbians, the whole concern of the courts is their sexual morality. What is missed is that the cases seem to arise where the mother seeks to care for the children within a stable "lesbian household". There is at least a disparity between the views taken of heterosexuals and homosexuals, and this is not in the form of a debate as to the morality of the two positions, but is left to the common sense of the judges.

More influentially, the claims that the courts use to justify the apparant

discrimination have been the subject of numerous studies both in this country and in the United States of America. Tasker and Golombok (1991) studied the caselaw relating to lesbian custody and found that the three arguments advanced against lesbian custody were: first that the child's moral well being would be affected; secondly, that children raised in lesbian households were less masculine or feminine; and thirdly, public prejudice would harm the children.²⁵ They found that "all three arguments against awarding custody to lesbian mothers remain unsubstantiated - or even contradicted - by the empirical evidence currently available".²⁶ [page 184] Following a systematic review of the evidence they conclude "empirical evidence demonstrates that the mother's sexual orientation does not appear to influence the child's well-being. Legal decisions concerning where the child should reside post-divorce should focus instead on the quality of parenting".²⁶

d. natural parents v stranger

J v. C (1970), while offering the definitive statement of the meaning of the paramountcy principle, also offers something of the dilemma which the courts have as to the weight which should be attributed to the fact that an applicant is the child's natural parent. The case concerned the fostering of a child whose Spanish parents had been judged as unable to provide adequate care, and who sought to block the adoption of the child by seeking the custody of their child. Their argument was that they could offer care, but most importantly, that they had a right to the custody of their child which the statutory provision of the welfare principle did not seek to challenge. This, as has been seen, was judged not to be the case; the fact that the applicants were the natural parents did not make them best able to provide for the child. The paramountcy principle should prevail.

This is not a new problem for the courts, as was seen in *In re O'hara (an Infant)* (1900), neither is it resolved. In cases after *J v. C*, the courts have had to consider the value of the biological link between parents and children when considering the welfare of the child generally. The case of *Re K D (a Minor)(Ward: Termination of Access)* (1988) renewed the question of the paramountcy of the child's welfare, using the rights of the parent under the European Convention to the respect for family life. Lord Templeman indicates the understanding of the respect of the family in English law thus, "the best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered".

The issue for the courts concerned the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 8,²⁷ which states that, as per Lord Templeman at page 578:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary... for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The court's intervention is to "rescue the child when the parental tie is broken by abuse or separation", and the intervention is according to the court's perception of the needs and welfare of the child. In the case, the child had been removed from his 16 year old mother and integrated into a foster family. The court felt that it was "distressingly inevitable" that the child's ties to his mother should be severed in preference to the care of his new family; it was in

his welfare that such an order be made. The mother was immature, and was not reliable in the care she offered to the child. She had originally agreed to the fostering of the child, but then sought to retain access when the local authority tried to move towards adoption. Lord Oliver hinted at the emotional despair felt in the courts at this, and so many other family cases, saying: "when I say that it is indeed a case which saddens the heart I shall merely be echoing what has been said by all six judges who, over the past three years, have been called on to consider it".

This case shows that the courts generally accept that parents have the right to determine the direction of their family life, seemingly very willingly, as in the separation cases where the parents present an agreement, as it removes the need to make difficult emotional decisions from the court. However, three areas present themselves where the courts accept that they must intervene in the privacy of family life to resolve seemingly unresolvable disputes. The three disputes are, first, outright orders of custody to third parties - which can occur either between the parents and the local authority, or between the natural parents and third parties, perhaps grandparents or informal foster parents. The other two issues occur within the context of the two parents and their new partners. The courts may have to address the question of the fitness of a parent's new partner to share in the custody of a child. Alternatively, the issue may concern the situation where the daily care of the child is being left to a new partner rather than the natural parent. These three issues are met with three different approaches by the courts, reflecting the ability of the courts to deal with the interpretation of the child's needs. The first issue deals with the legal issue of the authority of the particular body to make decisions, the second concerns the adult character, and the third concerns the question of the child's needs.

The classic position as between the local authority and the parent attempting to

challenge the decision can be seen in *A v. Liverpool City Council* (1982). The courts adopt the line that the local authority has been given the delegated power to make decisions and unless they have erred in the process of making that decision, the content of the decision can only be challenged in the forum prescribed alongside the delegation of the authority. Thus, parents seeking to challenge care decisions through wardship were blocked by the courts. This line has been followed where parents sought to challenge care orders by custody proceedings, as in *In re G* (1989), and in *In re M & H (Minors)* (1988) where it was held that under the Guardianship of Minors Act 1971, the father of an illegitimate child could apply for custody and access, but could not apply for a review of a local authority decision.

Further, *Re K D*, above, indicates that even if the courts have authority, the position of the local authority is taken more as an expert witness than as a defendant. Where the natural parents seek to challenge the local authority the task is very great, the courts being reluctant to overrule the findings of the local authority and thereby open the floodgates to challenges to local authority decisions.

The second situation which occurs under this head of the outright removal of the child from the natural parent or parents tends to involve other family members. The law is clear²⁸ that if the court believes it to be in the best interests of the child, it can order the custody to parties other than the natural parents. This has been held to be the case for grandparents, as in *Cahill v. Cahill and Others* (1975), or aunts and uncles, as in *Morgan v. Morgan and Others* (1974). The cases indicate the importance placed on the maintenance of a stable situation, as in *Re H (a Minor: Custody)* (1989) The mother was able and willing to care for her son, however this could mean a return to India. The boy lived with his aunt and uncle, and attended an school in England. The boy was thriving in his

education. Prior to their divorce, the parents had agreed that their son should go to school in England. The first instance court found that, whilst the mother was capable of looking after the boy (indeed she had found accommodation in the U.K. and was prepared to remain here to look after the child), he was doing well in his new environment, and it was in his best interests to remain there, with custody being granted to the aunt and uncle, and generous access to the mother. On appeal, the court found that the trial judge had acted meticulously and that the decision he had made was within his discretion. The appeal court found that they could not question the decision, following *G v. G* (1985).

The cases under the old law could not be initiated by third parties, but depended on an action being brought by a parent. Thus, many of the cases concerned situations where the child already lived with the third parties, and the challenge was against the *status quo*, a well established doctrine for the child's welfare. Under the Children Act 1989, any person with a genuine interest in the child's welfare can apply for section 8 orders with the leave of the court.²⁹ Bainham feels it unlikely that grandparents or other relatives "would experience any difficulty in obtaining leave where their application is motivated by a genuine concern for the child".³⁰ This may produce a greater number of challenges to natural parents which will require the courts to give further consideration to the question of the importance of the biological link.

In the case of tragedy, the courts can be seen to take the biological link very firmly, as in *Re K (a Minor)(Ward: Care and Control)* (1990) The child's mother took her own life when the child was three, and the child was placed with foster parents, Mr and Mrs E, the mother's half sister. The father maintained regular access, and then applied for care and control of the child, showing that he could care for child with the help of his grandmother. The judge felt that the child had "blossomed" in the new surroundings, having an "excellent" mother, and a family

with another boy and a girl. The judge saw it as no criticism of the father, but much of the care he offered fell on the grandmother. Mr and Mrs E could offer far better care than the father, and it was in the child's welfare to remain with the foster parents.

On appeal, the judge followed the decision in *Re K D (a Minor)(Ward: Termination of Access)* (1988) which held that the best person to bring up the child was the natural parent, provided that the child's moral and physical health are not endangered. The judge at first instance applied the correct principles, in the view of the appeal court, but then erred by asking which *home* would be better materially. The judge had considered three points: that moving the child would cause trauma; that the parental care would not be of the same quality as the foster parent's care; and that the father may find a new partner and change the child's place in the home. The appeal court found that the father was in steady work, had good contact with his son, and had the support of the paternal grandparents. The child would also retain contact with all the parties involved. It was felt that the evidence was not strong enough to displace the natural father, and that the judge had not properly directed himself, but had been very sensitive and child centred. The case is clear, that the question is not who will give the best home for the child, but whether the welfare of the child positively demands that the natural parent's normal rôle in the care and upbringing of the child should be displaced by the foster parents, thus suggesting that the biological link, in cases of tragedy at least, is a very important factor in the balance.

The importance of the biological link in parenting can be seen with devastating consequences in the case of *Re D W* (1984), which was discussed in the context of the maternal preference of the judges. The court took the view that the 10 year old boy who had lived with his step-mother for eight and a half years, would be

better placed with his natural mother than in the same situation on the separation of his father and his step-mother. Here, the quality of care offered by the step-mother was accepted to be of a very high standard, however the courts felt that the natural mother was best placed to care for the child in the long term. Again the courts seemed to suggest that the quality of the care experienced by the child, in this case educational and social stimulation which it was admitted the mother could not match, was the same as material differences. In the situation where the court's intervention is concerned with the physical, moral and emotional well being of the child, the issue of the child's welfare should surely concern the quality of the care available to the child, especially where the alternative also involves the disruption of the stability in the child's life. Again the courts show that they have a difficulty in formulating the questions which need to be asked in understanding the best interests of the child.

The second and third issues differ from the first in that the child is being placed with one of its natural parents as opposed to the other. In the cases concerning the question of the character of a new partner, the courts accept the rights of both partners to form new relationships and families. The courts have limited their intervention into this right first where the new partner is a potential risk to the child, and secondly where the new partner deprives the natural parent of the child.

The "risk" question is relatively easy for the courts to assess, and tends to concern the relevance of the character of a new partner when considering the application of the parent. Another factor in these cases is that the challenge is either to lifestyle, as in the case of an new partner with a drink problem as in *Re W; Re L* (1987), or where the new partner is violent, as in *Hutchinson v. Hutchinson* (1981). Here the mother's new partner was a dangerous man, and this was relevant to the court's consideration of the child's welfare.

When a child lives in a new household, especially with the father, and the care of the child is by a new partner or depends heavily upon the grandparents, the courts are often approached by the non-custodial natural parent who argues that the child should not be in the care of strangers when its natural mother is willing and able to care for the child. This challenge goes to the heart of the man's ability to retain custody of his children, especially when the courts believe that the father's main rôle is to work, while the mother's is to care. These attitudes can be seen in the cases of *M v. M* (1980), *Re C* (1981), and *Re W* (1983). These cases show the reluctance of the courts to leave the child in the daily care of a step-parent when the natural parent seeks the infant's custody. The courts even adopted this principle in *B v. B* (1991), where a lesbian mother with a strong bond was favoured over the father and a child-minder. It is difficult to establish whether the courts are applying a belief that the biological link is always superior, but in the cases which concern a decision between the alternative homes of the two natural parents, the statutory position must be to examine the quality of the care offered in relation to the child's needs.

A pattern could be seen to be emerging in the cases examined so far. Where the courts are involved with technical issues of law, they are trained and on familiar ground. Where the courts are charged with a wide discretion, such as the "child's best interests", it is difficult to avoid personal beliefs and the courts seem to encounter problems. In relation to the importance of care being given by a natural parent the courts are finding the issues particularly complicated. Indeed, there does not seem to be a single interpretation available. The quality of care argument can be relied upon for the families involved in care and the local authority. However, when confronted by a mother displaced by the father's new partner, the quality of the care given by a natural mother seems to be biologically better than that offered by the new partner. This position was

contradicted in *Re D W* however, as the courts admitted that the care offered by the step-mother was better than that which the mother could offer. Again the focus of the courts seems to be away from the child's welfare and more concerned with issues of justice between the parties.

e. material advantages

The influence of the material position of the parents has moved on considerably from *F v. F* (1959) where, following the mother and father's divorce, the mother moved into squalid accommodation. The father was not considered a fit and proper person to have custody of the child. Initially the child lived with his own elder brother and his wife, until the brother moved and there was no longer room for the child to live with them. The boy was not placed with his mother, due to the state of her accommodation, instead being placed into council care. Today, material advantage is held not to carry any weight in the balance of the child's welfare, not that it is no longer a welfare issue, but rather, the courts are keen to attempt to redress this balance through housing and maintenance orders. Whether these are successful or not, and research shows that economic disadvantage is widespread after divorce, the majority of custodial cases hold that the child's welfare cannot be won by material advantages as between parents.

The present position is seen clearly in *Stephenson v. Stephenson* (1985), the court holding that custody cannot be resolved merely on the basis of the standard of living each parent enjoys. The argument is equally applied as between natural parents and foster parents, as in *Re K (a Minor)(Ward: Care and Control)* (1990). In deciding between natural parents and foster parents, the question is not a question of the material standards offered by each party, rather it is that the welfare of the child demands that the natural parents be displaced.

The question of the relevance of material considerations in questions which are peripheral to the custody issue are somewhat different. In *K v. K* (1992), the material effect on the father was considered in terms of the need for the courts to consider all the effects of a particular order. The case concerned the removal of the father from the home, a council house in his name, in the interests of his children. On appeal, a retrial was ordered on the grounds that the judge had erred in his discretion, by failing to consider whether an order could be made which would not result in the loss of the father's right to buy the property, and also due to the force of the submission that the children's welfare was not established on the evidence. Further, the material effect of the order was considered in *Walker v. Walker* (1978), and in *Brent v. Brent* (1974). In *Brent* the husband was a council tenant. By the terms of the divorce, he was ordered to leave the matrimonial home, but after the *decree nisi* he remained in the home. The court had to consider granting an injunction to remove the man from his tenancy. Given the reluctance in other areas of family and property law to oust the property owner, for example in domestic violence, this use of removal from property in the child's best interests is particularly noteworthy.

This radical approach will only be used in a narrow interpretation of welfare however, as was seen in the traditional statement of the law in *Richards v. Richards* (1984). In this case, the proceedings in which such an approach would be available were held to be only those which touch directly the child's best interests. *Richards* concerned the material consideration of who should live in the matrimonial home. As the custody issue was not before the court, the child's welfare was not the paramount consideration of the court, even though it had an effect on the mother and child's enjoyment of the matrimonial home. When seen alongside *Re W* (1983) the claims of the court both to ignore material differences in terms of the question of which parent should have custody, and redress material differences between the parties, in order to provide for the child's

upbringing, could be questioned. Here the mother had to show grounds of violence to gain an ouster order, and the court felt that the mother may lose custody of the child if she could not provide a home having left her own. It would remain to be seen if the courts would hold in favour of the mother who was in local authority homeless accommodation, often no more than a bed-and-breakfast hotel room, should the father seek custody. One would suspect that the application would be served with a counter application for custody and accommodation, which would force the court to examine the accommodation issue. Given the provisions of the court to make orders for maintenance, if the welfare of the child pointed towards the mother being the best parent in all other respects, then it is submitted that the *Re W* decision would be seen as rogue, the courts being in a position never to allow a mother to be unable to provide a home as against the father who has the means to do so.

However, as was indicated in the last section, the courts may be presented with one party who offers the earth to the child in terms of material possessions while the other party offers little in comparison. The temptation would be to see the child's welfare in the material life that can be offered. The cases indicate that courts are less equivocal when presented with arguments of a material benefit for the child than they are when considering how to deal with a higher quality of care from the "wrong" person.

f. religion

One of the elements which the sources agree to be present in the parents' rights over the child is that of the freedom to bring up the child in their chosen religion. This can present a further battleground for the parents to find dispute with each other. The courts are reluctant to become embroiled in debates as to

the relative merits of competing religions, in a similar way to religious cases in charitable trusts. The courts take a view that their intervention should be only where the child faces harm from following a particular creed. Cases tend to concern the "fringe" of religious life, especially rounding on the Jehovah's Witnesses. The courts will not pass judgement on the quality of the faith which a parent chooses to follow, but will examine the repercussions for the child.

The issues for the court can be seen in *Wright v. Wright* (1981). The overreaction of the mother to the father's access visits caused the child such emotional distress that the father's access was terminated. Here there was a religious dimension. The father joined the Jehovah's Witnesses after the marriage ended. The courts would not pass judgement on the faith on that church, but were prepared to accept the mother's fears that the children would be indoctrinated. Similarly, in *Jane v. Jane* (1983) the mother joined the Jehovah's Witnesses, and the father was concerned that these beliefs would endanger the physical health of the children, given that the faith rejected the practice of blood transfusion. The court accepted the father's concern, but would not change the care and control of the children away from the mother. The father was given custody, and thereby effective control over decisions concerning medical treatment of the children.

The courts have been more critical of other churches which the judges perceive to be dangerous. This is the current view of the Church of Scientology, as seen in *Re B & G* (1985). The father was a member of the Church of Scientology, but was the more suitable custodial parent for the children in all other respects. The courts saw the faith as an "evil", from which the children should be protected, and from which they would be at risk in the care of their father. The faith would effectively isolate the children, amongst other difficulties. The courts felt it in the children's interests to remove them from their father and place them with their mother.

The difficulty is not only faced by the English courts as can be seen in the Austrian case of *Hoffmann* (1992), where the European Convention of Human Rights is being invoked to allow religious freedom. The mother, a practising member of the Jehovah's Witnesses is, at this time, challenging the decision of the Innsbruck Regional Court which overruled the custody order granting her custody of her children, and placing them with their father. The court held that the sect's education programme violated the Religious Education Act, and that the effect of the sect upon the children risked their becoming socially marginalized and, further, risked a potential danger to their health by the refusal of blood transfusion. The mother's appeal is based on her right under the European Convention of Human Rights articles 8, concerning religious freedom, and article 9, allowing her to educate her children according to her religious beliefs. The Commission found a breach of her religious and family rights, and referred the matter to the European Court for Human Rights. Should this be successful, there may be a resurgence of pressure in an area of separation law which has largely accepted the judge's views of the sects.

g. siblings

Where the family contains two or more children, the courts generally see a need to keep the siblings together, rather than make orders which separate the children. The general principle can be seen in *Cossey v. Cossey* (1981), *Guery v. Guery* (1982) and *C v. C* (1988) where the court accepted that it was best to keep siblings together, if possible, as a family unit. This, however is not always the case in practice, and the strength of the *status quo* can be seen in some cases to prevail where the siblings are separated. This argument prevailed in *Adams v. Adams* (1984).

As in all the issues accepted as arguments for the welfare of the child, avoiding sibling separation is not a theoretical position held by the courts, but has emerged from judicial common sense. However, the court, in *B v. B (Minors)(Custody, Care and Control)* (1991), accepted the opinion of a psychiatrist who testified that keeping siblings together was important only if the siblings were no more than five years different in age.

h. child's wishes

The courts have always seen the wishes of the child as a difficult consideration to place in the balance. In some cases, some being very early decisions, the child's views have been taken into consideration. Other judges refuse to place any weight on the child's views. Under the Children Act 1989 section 1(3) the courts will have to "have regard in particular to... the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)". The reported cases stress, in the perception of the higher courts, that normally the wishes of the child should be ascertained by the Court Welfare Officer, and that the child should not be placed before the court. The practice is, however, unclear and is the most important in a set of difficulties of practice and ethics concerning the wishes of the child which will be discussed later in the work.

The early case of *Ex parte Hopkins* (1732) shows what could be seen as a very modern view of the participation of the child. The court had to decide the custody of a girl aged 13 who had lived with her uncle until his death. Her father now sought custody by *habeas corpus*. The Lord Chancellor, Lord King, considered the duty on the court at common law, which was to grant the father's request. However, the court being the Court of Chancery, Lord King considered he was

not bound by common law, and took the view that the girl's wishes should be considered by the court. On the strength of those wishes, he ordered that the girl be allowed to remain living in her uncle's house, and that her parents be given access to her.

Cases prior to the Children Act 1989, while accepting the principle, are more likely to suggest that the views of the child were to be treated with caution both as to the content of what a child would say, and from the impact that the weight of decision making would have on the child. The latter point is shown clearly in *Re C* (1985) where the first court hearing postponed the decision concerning access until the child could give its opinion, essentially making the decision for the court. This was held to place too much of a burden upon the child by the appeal court. The cautious nature of the court can be seen in *Doncheff v. Doncheff* (1978), *Cossey v. Cossey* (1981), and *Re S (an Infant)* (1967). The issue may arise when a child is reluctant to continue to see a parent. The court in *B v. B* (1971) accepted the child's wish. The child did not wish to continue access to the non-custodial parent, and the wish was supported even where there were no other objections to the access.

The courts will not always follow the wishes of the child, which will in turn need to be explained to the child so that the child will understand his or her rôle. The decision of *Re D W* (1984) is particularly notable for the participation of the child and the action of the court against his wishes. In *In re B (Minors: Access)* (1991) the children aged 12 and 11 expressed the view that they no longer wished to see their father, whose behaviour was described as eccentric and bizarre. The welfare officer, however, felt that contact should continue, lest the father became an unknown quantity to the children. The court held, it was in their best interests that they should come to know their father and become acquainted with his attributes, without being ashamed of him.

In *In re P (Minors) (Wardship)* (1992) the court saw that it had a duty to listen to the child's wishes. However, it stated that they were not binding on the court, and, where the court felt the child's welfare lay elsewhere, it should disregard the child's wishes. The duty to consider the child's wishes was imposed by the Children Act 1989 in all family cases. In *In re P (a Minor)* (1991), the boy, a "mature" 14 year old, wished to remain with his father and continue to attend a day school, rather than become a boarder at a major public school. The original plan which had been taken to the first hearing, had been for the boy to go to the boarding school, having gained a music bursary, but the father claimed in court to be unable to pay the fees. The court did not accept his protestation, and ordered the child to the school. Between the first and second hearings, the boy met the headmaster of the day school, and was persuaded as to its charms. Via the welfare officer, the boy informed the court that he wanted to attend the day school and live with his father so that he could spend as much time with him "to make up for the five years he had lived with his mother". The court gave effect to the boy's wishes, having accepted that it was under a duty to listen to and pay respect to his views. The Appeal Court felt that "older children often had an appreciation of their situation that was worthy of being respected by adults and by the courts".

Re J (a Minor) (1992) indicates that the checklist in the Children Act 1989, does not place any priority between elements of the checklist. That the need to ascertain the wishes of the child are noted first does not give them any priority. The implications of the process of ascertaining the wishes of the child will be considered below.

Another interesting departure in the child's rights to be heard in the process of family breakdown is the child's right to initiate proceedings. The first of a small number of cases of children "divorcing" their parents was seen in Autumn, 1992. The case attracted much media interest. However, it was noted³¹ that the

case was settled quietly when the 14 year old girl was reconciled to her parents.

i. joint orders

The quantitative evidence of the reluctance of the courts to give joint orders has already been noted in the work of Priest and Whybrow (1986), even though the courts have attempted to regulate joint orders so as to produce a uniform geographical approach in *Practice Direction (Child: Joint Custody Order)* (1980). However, given the imposition of joint parental responsibility, which is effectively an unspoken joint order, it is worth noting the reactions of the courts in the reported caselaw as an indication of how the courts must change their approach when dealing with the new legislation. In the reports, the courts are sceptical as to the value of the joint order, even though according to Halsbury's Laws [Halsbury's Laws of England, 4th Edition, para. 936.] it is no longer exceptional to grant joint orders. Perhaps sensibly, in *Jussa v. Jussa* (1972), the court felt that joint custody orders could only be a reality where the parents were in real agreement. Mr Justice Bridge indicated that joint orders needed parents "capable of cooperating sensibly". *Caffell v. Caffell* (1984) shows a similar approach to the order. Here, although Lord Justice Ormrod indicated that in many cases it was sensible to say that joint custody orders would not work, and they ought not to be made unless there was a chance that they would work, such an order was upheld where the parents were acrimonious and unable to agree.

Very recently, in *In re J (a Minor)* (1991) Mr Justice Scott Baker held that, save in the most exceptional circumstances, joint care and control orders should not be made, as the "vice" of such an action would be that the children would not know where he or she was really based. However, in this case the court made a joint

order as the parents had agreed terms which left the child in no doubt as to where she would be based. Moreover, there were advantages to the parents in reflecting their agreed equality. It was in the best interests of the child to approve the parents request. Given this description, the courts will have to move a long way to approach parental responsibility with the same hope as the Law Commission.

The courts are particularly concerned to see split orders, where the care and control of the child is shared. The position is seen in *Riley v. Riley* (1987) where, on the separation of the parents, a joint custody order was made for the child. The parents shared care and control of the child: the child lived with the mother for a week and then with the father for the next week. After some five years, the mother sought a care and control order alone. The judge felt that it was *prima facie* not in the child's best interests to move so frequently, and that given the girl was a teenager, she needed the care of her mother. The order was made for joint custody, and for care and control to the mother and access to the father. The editorial comment in the journal points out the difference between English joint custody, which concerns the legal decisions concerning the child, and the American interpretation of joint custody which is concerned with the joint day-to-day care of the child. *Riley* proposes that the child should have a home base, and that two homes can be confusing rather than progressive.

j. court welfare officers' opinions, and other expert testimony

Parties to the proceedings can rely on expert witnesses to support their claims. The courts seem to be sceptical of any fettering of their general discretion, but some judges have relied upon expert testimony to justify their findings, as has already been noted in *B v. B (Minors)(Custody, Care and Control)* (1991). The court in *In re J (a Minor)(Expert Evidence)* (1990) outlined the duties of the

expert witness. It was felt that they should only express genuinely held opinions which were not biased in favour of one party. Further, they should not mislead the court by omission. Beyond this, the practice as will be seen later, is largely in its infancy in separation cases, and the constraints and potentials are still very much to be explored.

The Court Welfare Service, however, is a well established expert service for the court, although the precise direction of its work is also currently developing, as will be discussed later. The courts are very keen to maintain the traditional rôle for the welfare officer, that of gathering information for the court. In *Scott v. Scott* (1986) the Court Welfare Officer saw his duty primarily to attempt conciliation between the parents. The court held that this was not the primary duty, which was to provide factual assistance to the judge. This follows the perception of the welfare officer's rôle in *Practice Direction (Divorce: Welfare Report)* (1981) where it was established that when ordering a court welfare report, the court should indicate to the officer the matters on which the report should be based, and the welfare officer should attend the hearing. Thus, the report should concentrate on the areas about which the court is unclear.

Webb v. Webb (1986) accepted that the court welfare report, in order to do its job, will necessarily contain hearsay evidence, and in *Re H* (1986) the court in a similar way accepted that the report would have to contain the officers' opinions. However, in *Thompson v. Thompson* (1986) where a report gave 21 peoples' opinion of the individuals and not the Welfare officers' own opinions, the report was considered unreliable.

Two issues emerge in the reports which are of concern to the practice of court welfare reporting. First is the issue of whether the reports are necessary, which carries with it the question of whether the courts are committed to decisions or

to process in separation law; and, secondly, how the reports are used.

In the first instance, the courts are not discussing the changes occurring in court welfare practice, but are imposing the traditional model of fact finding. In *M v. M* (1989) the appeal court decided that up to date welfare reports are not always needed on appeal, except where the first instance finding is plainly wrong. This simply reflects the fact that on appeal the concern of the court is the legality of the process adopted by the first judge. If the facts must be reheard, then that is for the lower court. If an emergency measure is needed, then the courts could order a report, or call on the welfare officer who made the original report.

In *Re H* (1986) the courts found that where a court welfare officer had been involved in conciliation with the parents, then another officer should gather the evidence and make a report should a report remain necessary. This was accepted as good practice by the court welfare officers in this study. Further, concerning conciliation, *Registrar's Direction* (1986) indicates that good practice dictates that if there is a local conciliation service, referral should be made to that agency before a report is ordered. The practice of in-court conciliation, involving a discussion of the custody issues informally between the parents, the registrar and the welfare officer were set up at the Principal Registry by *Practice Direction* (1982) a practice which was extended by *Practice Direction* (1984), to cover section 41 cases and guardianship and wardship proceedings.

The case of *Re H (Minors)(Welfare Reports)* (1990) poses more difficult issues. It concerned three children, two born to the mother by her deceased husband, and the third born to the mother and her new partner. The family lived together in the mother's house for some five years before the relationship broke down, and the mother sought to remove the father from the house. Proceedings for custody of

the children were started in June 1989, when a registrar ordered a welfare report. In August 1989 the mother sought an injunction ousting the father from the house and restraining him from seeing the children; it was acknowledged that the three children were fond of the man. The order was refused by Mr Justice Ward who set a hearing date for 6th November 1989. In September, the father's solicitor realised that there was no welfare report and before Mr Justice Kirkler, the hearing date was set back. The mother appealed on the ground that the welfare report was not essential.

On appeal, Lord Justice Balcombe found that Mr Justice Ward was concerned that the hearing should be before Christmas, and that the local welfare difficulties meant a delay in proceedings until the New Year. Lord Balcombe was not prepared to say that the welfare report was not essential, even though the parents in the case had points of agreement. The welfare officer may not forge an agreement, but could indicate the extent of the parental accord. The welfare report also gave the court the views of the older children, which Lord Balcombe thought to be essential. The issue for the court was the best interests of the child. He accepted that the tension within the house was undesirable, indeed, detrimental, and the case should ideally be completed by Christmas. Given that the issue was not simply the custody of the children, but the father's property right in the home, it was felt that the hearing should proceed. However, the judge should delay it for the welfare reports, should it be impossible to continue without them. Clearly a six month delay would be detrimental, but it must depend on the type of welfare approach which is adopted.

The Children Act 1989, s 1(2) indicates a general philosophy that delay is not in the child's welfare. Section 11 of the Act seeks to aid this by requiring a timetable to be drawn up for the passage of a case through the court, outlining the expectation for when parts of the process, for example reports, will be

achieved. Clearly, there can be a tension here between the focus of the court and that of the court welfare officers. If the court adopts an investigative understanding of the welfare officers' job, then timetables would have a fixed nature. If however, a mediation approach was taken, the timetable would have to allow for a more fluid approach to sessions. The danger is that the court is one step removed from the families and the professionals, and therefore the manner in which the timetables are implemented could have a serious implication on the mediation process in court welfare teams. It is not clear that all judges are sympathetic to such an approach by the court welfare officers.

The problem of how the report and the officer are used by the court is an issue which concerns the credibility of the officer. In the first case, concerning the necessity of reports, the issue was solely about the tactical relationship between the lawyers, judge and officer. However, in this second issue confidentiality of the report, and therefore the integrity of the process of compiling the report, is challenged. In *In re C (a Minor)* (1990) the mother and father were unmarried, and the mother refused to allow the father access. The welfare officer felt that it would be correct to recommence access, but the mother's express feeling was that it would be better to go to prison than to allow the father access. Given that the question of imprisonment was before the court, the judge did not want to raise certain questions in open court.

Four Court of Appeal cases were cited. *In re K (Infants)* (1963), which was applied in *Fowler v. Fowler and Sine* (1963), Lord Justice Upjohn held that a party had a right to hear and comment on all information before the judge. Lords Justices Davies and Harman suggested in *K* that there may be exceptional circumstances which would overrule this principle. However, Lord Harman felt that he could not envisage such circumstances at that time. Lord Justice Willmer followed Lord Upjohn in *Fowler*. In *H v. H (Irregularity: Effect on Order)* (1983)

the principle of justice being seen to be done was invoked, a principle that was followed in *In re B (a Minor) (Irregularity of Practice)* (1990). These cases seemed to overlook the appeal of *K, Official Solicitor to the Supreme Court v. K* (1965). The House of Lords considered that the Welfare of the child was the paramount consideration, and that circumstances may arise which could require the judge to use his discretion to see parties in private, but this was only to be undertaken with great circumspection. In the case before the court, Lord Justice Dillon felt that the action of the judge had not been correct, and that the welfare officer should have been questioned in open court. The case was set aside for a rehearing.

In *B v. M* (1990) the proceedings related to the use and confidentiality of the welfare report. The plaintiff, the divorced husband, sought to show that the defendant, the wife's father, had intended to give him a share in the matrimonial house which the father had purchased. The defendant had intimated to the Court Welfare Officer that, on purchasing the property, he had intended to give his wife and son-in-law an interest in the property as their matrimonial home. The plaintiff sought to rely on this statement, the defence claiming it to be inadmissible as the remarks were made in a confidential discussion which should not have been shown to a third party without causing a contempt of court. The judge granted an injunction to prevent the use of the welfare report in the property case. On appeal it was suggested that the confidentiality of the report referred to the child and not to the property issues, and that the material could be included in subsequent hearings, with the leave of the court. Further, the welfare officer should be called in reference to the ancillary matters if the evidence was of great relevance to the proceedings. The matter did not affect the welfare of the child, and the risk of the breach of confidentiality was slight and did not amount to a justification for excluding the relevant evidence. The concern of the judge at first instance was that the court welfare officer should be given

full and frank information; that the decision concerning the admissibility of the report should not impede the reporting process. On appeal, Lord Justice Ralph Gibson felt that the issue was for the court which was involved with the custody dispute as that was the only court which could consider the appropriateness of making an order for the release of the document, and it was to that court to which any contempt would be committed. That court should consider the relevant factors, particularly including the importance of the evidence which was to be released, and whether justice demanded the release. Thus, the appeal would not allow disclosure, but removed the injunction; it became a matter to be pursued in the custody court.

In his comment³², Nigel Lowe points out that the discretion to allow disclosure of reports is unfettered in wardship proceedings - *Re F (Wards)(Disclosure of Evidence)* (1988) - and for the juvenile court to disclose Guardian ad Litem reports - *R. v. Sunderland Juvenile Court, ex parte G.* (1988) Here, however, the confidentiality of the welfare report is prized, and indeed seems strong in law, given section 12 of the Administration of Justice Act 1960, and the *Practice Direction (Minor: Welfare Officer's Report)* (1984). The position seemed to be accepted in *Re G (a Minor)(Welfare Officer's Report)* (1989). However, *B v. M* seems to drive straight through this. Thus, the courts will be interested to define when the balance of the need to maintain the welfare report system and the welfare of the child against the needs for evidence in other cases where the welfare principle will not guide - *Re F (Wards)(Disclosure of Evidence)* (1988).

k. appeals, and conduct of cases

The conduct of the cases includes many threads of the development of separation law. One of the most important factors in good practice as perceived by the

courts, and accepted into the Children Act 1989, s. 1(2), is that cases should be heard as expeditiously as possible³³. Clearly there will be constraints, not least the question of the time that is necessary to produce a welfare report or pursue conciliation. However, the courts clearly see the early hearing of cases as in the child's best interest, *In re A (a Minor)* (1991). This is the case at first instance or on appeal, *Re W & W (Minors)* (1984). Likewise, where an application is made for a divorce, if an interim custody order is sought under other proceedings, these should be heard without delay, *Jones (EG) v. Jones (EF)* (1974). The courts must give reasons for their decisions after considering all the relevant factors and must state all the findings of fact, *Hoey v. Hoey* (1984).

The courts have given special consideration to the appropriateness and practice of interim and *ex parte* injunctions, matters which seek to avoid delay in protracted proceedings and emergencies. When making interim orders the courts' concern must be the child's welfare. Challenges to this can arise where a child has been snatched and wrongfully retained by a non-custodial parent. In such cases the issue of justice between the parties should not concern the court, only the child's welfare. Hence, in *In re J (a Minor)(Interim Custody: Appeal)* (1989). the court held that there is no automatic rule that the child should be returned prior to a full hearing. This is not an unconfused position, as both the cases of *W v. D (Interim Custody Order)* (1980) and *Witter v. Drummond* (1980) held that when child is snatched, he or she should be returned to the custodial parent prior to the full hearing by an interim order. The courts would now favour the paramountcy test, given the changes in abduction law already discussed.

When faced with an *ex parte* application, the court of appeal in *In re H (a Minor)* (1991) wished to apply a strict rule that only in exceptional circumstances should the custody of a child be transferred on an *ex parte* application. Such exceptional circumstances, according to Lord Justice Butler-Sloss, would need strong evidence

and require the child to be in immediate danger, or exceptional circumstances as would justify a place of safety order. In the meantime, in the particular case the order was not reversed, but was left until an urgent *inter partes* hearing could be arranged. However, the father - who had gained the *ex parte* order by 'phone - would not be able to rely on a *status quo* argument.

Likewise, the issue of which jurisdiction, *forum conveniens*, has been held to be a consideration in the child's welfare and therefore governed by the paramountcy rule. In *In re H (Minors)* (1992), the question was said to be inevitably one in "respect to the upbringing of the child". Further, on this point, orders from other jurisdictions cannot be resurrected once superceded in the English court, as in *T v. T* (1991) where an order made in an English court superceded an order made in the Scottish courts. The English courts had no jurisdiction to entertain an application to enforce a Scottish order, under the Family Law Act 1986, section 15.

A further and important development in the court process occurred in the early 1970s concerning the judges who hear family cases. Prior to that time there had been little formal recognition that family law required a particularly different approach. By *Practice Direction (Infants: Magistrates' Courts)(No. 2)* (1972) children's hearings at the Royal Courts of Justice were to be allocated to specific Circuit Court Judges. Further, by the practice direction, appeals concerning children were similarly allocated to certain High Court Judges. While the effect was far, and remains far, from the provision of a family court, the recognition that family law needs special skills from the judiciary downwards is a crucial development.

In terms of the conduct of cases, the courts have given most consideration to the

question of the rôle of the appeal court. The deliberations have produced an accepted understanding of the questions which an appeal court should consider. The temptation would be in an area of law which is so unregulated and based on discretion for appeals to rake over the content of the decision. The courts have been asked to assess the merits of particular custody or access decisions made in the lower courts. However the consistent line is explained in *G v. G* (1985) where the House of Lords held that appeals should be confined to questions of law and not fact. Thus, the court can and should ask if the discretion of the courts has been exercised within general principles of public law, however the courts must not ask whether the decision itself would be the one which the appeal court would make. This stems from the widely accepted theory that the court of first instance hears first hand evidence and is charged with the authority to make the balance according to those facts as the judge sees fit. The appeal court does not share that insight, and to question the exercise of discretion would undermine the authority of the lower court and effectively open the floodgates through which would pour the parties who did not agree with the decision, and who were trying to overturn orders.

This principle can be seen very clearly in a selection of cases made below which show the courts' approach to the findings of fact of the lower court. The rôle of the appeal court was outlined in the case of

J v. C in a discussion initiated by Robert Alexander, who appeared for the parents. Alexander opened thus, "if the courts below applied the right principles, their decision cannot be altered"³⁴, accepting that the appeal was available to question the process adopted by the court in reaching its decision - the use of the discretion - rather than questioning the actual decision which the court made. This understanding of the purpose of the appeal was accepted by Lord Justice Guest: "Counsel for the appellants accepted that he could not ask the House to overrule the discretion which has been exercised by the trial judge unless he

could show that it had been exercised upon some wrong principle. This could not have been withheld. It is not for this House to retry the case on the facts."³⁵ The court had a discretion to consider what was in the child's interests and it was the concern of the appeal to examine the method the court had adopted in determining the facts pertinent to the decision, not the facts themselves. If the court had made the appropriate inquiries, the outcome it adduced could not be challenged by way of appeal. In that situation, the correct procedure would be to seek a new order on the basis of a fresh case.

Hutchinson v. Hutchinson (1981) again applies the principle. Here the trial judge heard evidence to the effect that the step-father was a danger to the child, but left the child with the mother. The court held that it was within his discretion to interpret the facts. The issue was further discussed and accepted in *P v. P (Minors: Custody Appeal)* (1984), in *T v. T (Minors: Custody Appeal)* (1987), and *In re B (Minors)* (1989) where the court held that in appeal cases, the appeal court should not find the first instance court wrong on matters of fact. In *Re H (a Minor: Custody)* (1989), on appeal, the court found that the trial judge had acted meticulously and that the decision he had made was within his discretion, and they could not question the decision.

The question of the correct weight given to certain factors can, however be seen as a question of the correct application of the law, as in *Blair v. Blair* (1986). Here the court found that, to interfere with the decision of the first instance judge, the appeal had to show that the judge was clearly wrong in the decision or in the method used to reach the decision. The basic issue was did the judge err in his discretion, or did he simply reach a different decision to that of the opinion of the appeal court judges.

In cases where the courts feel the judge is clearly wrong in his decision the

appeal courts have been willing to intervene, as in *Re R* (1986). In the first hearing, the material facts were incomplete. The appeal court felt that all reports should be made available to the judge. They were also mindful of the changes that had occurred since the first decision, and granted an interim order to the mother, and ordered a retrial on the grounds of the father's drinking and criminal record. Similarly, the judge at first instance was found to have erred in his judgement in *Re W; Re L* (1987) by making an inappropriate decision as to the weight to be given to evidence of dangers to the children.

In *Re W (Minors)* (1992), Mrs Justice Booth indicates that the Family Proceedings Courts (Children Act 1989) Rules 1991, r 21(5)(6) apply throughout the system of courts. Therefore, an order made without giving reasons and findings of fact must be set aside.

Access and Contact Issues.

The remaining four issues all concern access. While the concept of access has been removed by the Children Act, contact orders will be very similar as in both cases they are the means by which a parent with whom the child does not live will retain a relationship with the child. There is an enormous amount of bitterness surrounding access, and indeed research shows that access orders very often collapse as the situation is so difficult to maintain. The courts response is initially to make orders in the imposing solutions or one-off remedy approach. However, ultimately the courts accept that they are relatively powerless in the face of access which has collapsed.

The four issues to be addressed here are: whose right?, enforcement, suitability, and removal from the jurisdiction.

l. access: whose right?

Alongside the movement to see parental rights in terms of parental responsibilities, there has been a corresponding change which suggests that the right of access belongs no longer to the parent, but to the child. This could also appear to be semantic as the question arises as to how a parent who will not turn up for access visits and will not respond to letters can be made to have contact with the child, let alone a relationship with him or her. This, however, is not the concern of principles which are largely academic. It is a good thing to see the contact in terms of the benefit it has to the child, and the relation it has to the child's welfare, as this could be a point of leverage in dealing with parents whose own conflict is such that they see the access in terms personal to the breakup of their partnership. Perhaps the only value the principles of parental responsibility and child's right to access is this potential they offer in negotiation with parents.

The courts acceptance that access is the right of the child is clear in the cases as in *M v. M (Child: Access)* (1973). (which contrasts well with the right under Children Act 1975, section 65(1).) The acceptance of the principle comes from a perception that it is in the child's welfare to maintain contact, as was explained in *Re B (a Minor)(Access)* (1984) where the contact between a child and the non-custodial parent was considered by the court to be very important to the child's emotional health.

Access should be seen as such, and not concerned with the development of a relationship between the parent and the child which is on a par with the custodial parent. This difficult concept is seen in *Re C (Minor)(Access)* (1991) Here the Child was born to unmarried parents who never lived together as a family with the child, having separated before the birth. The father had always had contact

with the child, however the mother placed the child with a child-minder when she worked, thus reducing the father's contact with the child. A magistrates' court gave the father weekly access of one afternoon, and half of each weekend. The mother appealed, on the grounds that this was excessive for the child. Mr Justice Ewbank felt that the concept of access was not, as the justices had reasoned, to allow the child to get to know the non-custodial parent as well as the custodial parent. Rather, he felt it implicit in the differentiation between custody and access that the relationship was weighted towards the custodial parent. Here the stress was too greatly weighed in favour of the father, especially as the parents were not married, and the judge agreed that access was excessive. He changed the order to one afternoon and alternate weekends. Gillian Douglas³⁶ sees this as indicative that the blood tie carries little weight in assessing the custody or access. Perhaps that is the case, but here the difference is highlighted between the rights of the unmarried father with a history of contact with the child and no strong "new family" argument for the mother, and his counterpart seeking to have access with his child where the mother has a new partner.

The issues appear to be the same regardless of the parents' marital status, as in *S v. O* (1982). Here the order was granted even though the parents had not lived together. It was felt to be in the best interests of the child that the father's interest in the child and his continued payment of maintenance be maintained. As the child had no father figure, Sir George Baker, President of the Family Division, saw the father's access as a benefit to the child. Further, in *Re C (Minors)(Access)* (1985) the mother and father were unmarried, and the mother had married a new partner. The argument for maintaining contact with the father depended upon the depth of the relationship between the father and the child.

The unmarried parent can be presented with problems in that they may not be

able to exercise access rights immediately. This should not preclude the granting of an order. In *In re C (Minors) (Parental Rights)* (1991) it was held that the unmarried father of two boys should never be refused a parental rights order under section 4, Family Law Reform Act 1987, simply on the basis that he could not exercise the rights immediately. Here the mother and father had split up, and the mother refused to allow the father access to the boys. Similarly, in *Re H (Minors)* (1991) where the children were in council care, and were to be placed for adoption, effectively removing some of the rights for which the father had applied. The council sought an order to release the children for adoption, having stopped parental access. The father sought a parental rights order. The council's order was granted. On appeal, the father's request was granted, but the council's request was also upheld. Therefore, the father's order would give certain rights to him, whilst the order freeing the children for adoption was in place.

The courts favour respecting the wishes of the child where the child does not wish to have access. In *B v. B* (1971) the court would not force a child to have access visits with the non-custodial parent where the child was implacable to it. The court felt that this would be the case even if there were no other objections to the access. Similarly, in *Churchard v. Churchard* (1984) boys aged 10 and eight had taken their mother's "side" in the marital conflict, to the point that they were implacably opposed to seeing their father. The court also took the view that in this situation it was correct to end access. It also took the opinion that where a parent was obstinate over refusing to allow access to take place, it would be unlikely to be in the child's best interests to imprison him or her.

That the child's welfare is the guiding principle in deciding who should be granted access to the child can be seen in *Dicocco v. Milne* (1983), *Re F* (1976), and *Scott v. Scott* (1986) where the courts held that they should look to past, present and future attitudes to access in determining the best interests of the

child. In *H v. H* (1988) the court extended its thinking concerning the child's best interests, where the court found no principle in law that prevented a father who sexually abused the child from having access to the child. The court saw that contact was still desirable, and granted supervised access to protect the child.

Where access has lapsed and the non-custodial parent is attempting to reassert an arrangement, the courts take the new situation of the child into consideration in determining his or her welfare, and have not been afraid to suggest that a biological link here is not necessarily a justification for disrupting a new home. This is seen in *In re A (Minors: Access)* (1991). The father lost contact with two children when they were 21 months and four months respectively. Two years later he attempted to restart access. The Judge held that notwithstanding the principle of law and nature that a child had a right to benefit from contact with both his or her parents, in exceptional circumstances this should not be applied. Here, it was in the children's best interests to deny the father's application and thus preserve the "peace and security of their home life with the mother, without the disruption of the father's reappearance. A similar line was taken in *Re W (a Minor)(Access)* (1989). Here, the natural father wished to have access to his child to build their relationship. The mother had remarried and there was stability with the new husband. The court held that it was in the child's best interests to have a clean break from the father and concentrate on the stability of the new marriage.

m. access: enforcement

Closely linked to the major difficulty of establishing exactly who has the right to access is the difficulty of enforcement. This stems from the cases where due to fear or simple obstruction, the custodial parent will not allow access to take

place. The courts are divided between admitting that they are powerless as their ultimate sanction, a fine or imprisonment, is opposed to the child's best interests, or making orders in the hope that organised access might produce a workable situation. Here the courts rely heavily upon the court welfare office and some conciliation services to supervise access visits.

Numerous cases display the first position. In *B v. A (Illegitimate Children: Access)* (1982) the mother's fear of the father was a sufficient ground for her to stop the access, if that fear affected the quality of the mother's care of the child. Again, in *Sheppard v. Millar* (1982). the mother would not cooperate with access for the father. The court took the view that access should be refused as it was not in the five year old child's best interests; the child was upset by seeing the friction between the parents. The child did not want to offend the mother. The court was forced to admit that access failed, indeed it had never really started.

Further, in *Re B C (a Minor) (Access)* (1985) The courts found that the father was using access, not as a vehicle to develop his relationship with the child, but rather to get to the mother as he could not accept the relationship was over. The mother's fear of the father was to be considered. And again, in *A v. C* (1985) the court showed that it will refuse access to a non-custodial parent if the custodial parent fears that such access impedes the care of the child. In *Wright v. Wright* (1981) the overreaction of the mother to the father's access visits caused the child such emotional distress that the father's access was terminated.

However, the courts will take a hard line on some occasions, and order that access be attempted. In *Re E (a Minor: Access)* (1987) the court felt that an access order should not be considered inimical by the mother's refusal to comply therewith, nor by the emotional harm that her actions caused to the child. The court thought that

it may be advantageous to remind the uncooperative parent of the court's power to enforce the order. Here the mother had refused to allow the father access, in breach of the order in his favour. Similarly, in *Evans v. Jackson* (1986) the court ordered access to the father despite the complaints of the mother and her new partner. The court found that it must have good reason to stop access, not just the complaints of the other party.

The courts find their power to fine and imprison difficult to reconcile with the welfare of the child, as in *Churchar* (1984) and *I v. D (Access Order: Enforcement)* (1988). In *Brewer v. Brewer* (1989) the court was clear that a committal to prison for a first breach would be exceptional. Further, the courts are divided as to the value of indicating that a custody decision could be changed in the face of an obstinate custodial parent and an able non-custodial parent. In *Re E (a Minor: Access)* (1987) and *V-P v. V-P (Access to Child)* (1980) the courts felt it may be useful to remind a parent of the power to reorder custody, a line that was accepted in *Williams v. Williams* (1985). Here the children were aged five and four, and lived with their mother who was uncooperative to the father's access. The mother also indoctrinated the children concerning their father, stimulating fears in the children concerning him. The court felt that it was in the children's interests to terminate access, due to the climate it created in their lives. However, it also felt that threatening to reassess custody decisions may be useful in such cases.

The prime concern of the courts is not to punish, *Thomason v. Thomason* (1985), but is the welfare of the child. In *M v. M* (1980) the courts challenged the use of threats as against the child's welfare. The attitude to access is no reason to remove the child from the custody of, say the mother, if in all other respects she is the person most suited to have custody. Clearly this must be correct in the light of the welfare principle. However, the courts seem to use the threat to

lever the parties towards an agreement over access.

The difficulty faced by the court can be seen in *Re S (Minors)(Access: Appeal)* (1990). The parents separated when the children were five and two years old respectively. An interim custody order was granted to the mother with reasonable access to the father. Access was difficult, the mother being terrified of the father; there were allegations that the father beat and abused her. The access having failed, the father applied for an access order, and was granted a defined order. The mother, having consented to the order, then refused to comply with the terms of the order, remaining terrified of any contact with the father. Two months later, the older child went to live with his father. Shortly after this, the mother commenced cohabitation with another man, and gave birth to his child. Her first partner then sought custody of both his sons. The judge found no reason to move the older child from the father, however it was felt that moving the younger child would cause serious disruption in his life. This was an acute concern, as the father had not seen the child for some two years, and the mother was unlikely to seek access to the child. The judge at first instance felt that there was no point in making an access order in favour of either parent, as the history showed that it would not be implemented. In effect, the judge felt that he should admit the reality of the relationship. The question of access to the younger child was appealed by the father. Lord Justice Balcombe felt that the judge was plainly wrong in principle and in the exercise of his discretion. The principles were well established that the concern of the court was the child's welfare, and that access was the right of the child and not of the parent. The child had a right to know the non-custodial parent, and an even greater right to know his or her siblings. The first judge's order effectively denied this right. It was felt to be more appropriate to make orders of reasonable access for the father to see the younger son, and the mother to see the older boy. The welfare of the child should have been considered objectively, and, regarding the older boy, it did not matter that the mother had not sought access. If the mother remained

obdurate, it was his Lordship's opinion that the court should consider moving the custody from the mother to the father, after the sanction of imprisonment was attempted. Hence, the appeal court ordered reasonable access to both parents.

Nigel Lowe³⁷ draws attention to Maidment's work on the issue of whether or not this is the court's view - that access is the child's right - and then further tackles the issue of changing the custody order as a method for enforcing access, given that the consideration would have to be the welfare of the child, and the courts have already made a decision that custody should rest with the intransigent parent. Lowe sees this case as a "neat reminder that the child's perspective is of real importance". He indicates that courts should only deny access if it is in the child's best interests to do so, and the court should not allow any problems the parents might pose to detract from this principle. This case further raises the question as to the merit in alleging that the right is the child's when the court is relatively powerless to control the parents' actions. If the right is truly the child's, would the court seek to punish the access parent who loses contact with the child?

n. access: suitability

Clearly, if the right of access is the child's, stemming from an interpretation of his or her welfare, the suitability or fitness of the parent to participate is crucial. This, again, is a problem which the courts have addressed for many years, as in *Philip v. Philip* (1872). The court refused to grant access to an excitable, violent mother. In the opinion of the court the seven year old child's recovery of his health would be impeded by her access. Today, the issue of suitability can be helped by the facilities for supervised access which greatly reduces the risks to the child. However the issue may concern the custodial parent to the point that

the tension surrounding access is detrimental to the child's well being.

In *M v. J* (1982) the parents had lived together for two years, during which the father had a drink problem and attempted suicide. The court felt in the consideration of access, that there must be some positive and compelling evidence to justify refusing access. In *In re B (Minors: Access)* (1991) bizarre and eccentric behaviour on the part of the father was insufficient to stop the access. It had been argued that the behaviour distressed and baffled the children. However, the overall assumption that the child should be allowed to enjoy the benefits of access to the parent was not negated. The court granted supervised access to the father. The children had expressed the view that they no longer wished to see the father. However, the court welfare officer believed that contact should continue to stop the father becoming an unknown quantity.

While the issue of alleged abuse does not always warrant the termination of access, as in *Re R (a Minor)(Child Abuse: Access)* (1988), *S v. S (Child Abuse: Access)* (1988) and *H v. H* (1988), the courts will not always allow access to continue in serious cases. In *B v. B (Declaration of Unfitness)* (1982), the father had sexually abused the mother's child by a previous marriage, aged nine years, and then the child of their own marriage, aged six years. There was a fear that such abuse would continue in the future if he took on the care of a child. A section 42(3) declaration of unfitness was passed against him. Further, in *C v. C (Child Abuse: Access)* (1988). The father was suspected of abusing the child, therefore access was terminated.

o. access: removal from jurisdiction

There are a large number of cases where the parents have found new partners,

and then made plans for a "new life" in another country. The concern of the courts have been torn between the desire to respect the integrity of the new family, and not to add to the sense of bitterness against the ex-partner and the system by destroying the opportunities for the new family, while on the other hand seeing the integrity of the ex-partner's desire to remain a parent for the child, which is seen as an equally important principle. Thus, the courts seek to justify their hard decisions by allotting weight to the quality of the two elements. The central dilemma again appears to be, how can the child's interests be isolated from those of the people around them, and one is left with the inevitable feeling that, since the judiciary are relying solely on their own intuition to determine the individual child's needs, the presentation and personalities of the actors within each case become the guiding factor. Thus, the rhetoric of the merits and demerits of a particular request appears to depend as much on the external factors of presentation as the internal factors of content, solely because the judges are not equipped with the necessary tools to discern the welfare of the child on the internal issues alone. The fine distinction approach used to determine these cases are perhaps more pronounced in this area, because the impact of the decision is most immediate; the family essentially gains a clean break away from the other parent or its plans are dashed. Perhaps not surprisingly, given the impact a negative result would have on the family, the tendency seems to favour granting the departure.

In *Poel v. Poel* (1970) the mother had custody of the two year old daughter, had remarried and was carrying the child of that marriage. She and her new husband wished to emigrate to New Zealand. The father had regular access to his daughter, but the judge felt that where the new family had been established, the strain on that new relationship would be very great should the plan be denied, and that would have a detrimental effect on the child's welfare. The new partner was ordered to make a financial contribution to the father's access in New Zealand. In

Lonslow v. Henning (1986). The judge observed the bitterness in such cases which could be created by the judge interfering with the new family's decisions and chances.

Similarly, in *Nash v. Nash* (1973), the mother and her new partner had the opportunity to live and work in South Africa. The father had written against apartheid, and was concerned that the child's moral welfare was endangered, and that because of his views, he would be unable to visit during the proposed stay. The court felt that it was a major decision to interfere with the custodial parents plans, and that the father's fears were insufficient grounds so to do. Again the courts in *Chamberlain v. De la Mere* (1983) saw the bitterness that the denial of the application to emigrate to the United States of America would cause, and that it would adversely affect the welfare of the child. The appeal was granted, allowing the emigration to go ahead. *Belton v. Belton* (1987) indicates that the courts should not hide from making the decisions. The court should not adjourn its decision as this too would add to the bitterness, and make separation harder.

However, the cases do not always favour the new family. In *Godfrey v. Godfrey* (1980) the father's "real and substantial" access reduced the usually strong argument that the family be allowed to leave the jurisdiction. Similarly, in *In re M (minors)* (1991) an order allowing the children's removal from England to go to France could not stand, as the judge had not taken into account the father's justifiable fears that he would lose contact with his children. The matter was to be reconsidered in a retrial. The request of the mother was a reasonable one, and the criteria for refusal should be the child's welfare. The balance which the judge had undertaken did not take account of the father's inability to afford the trips to continue contact with his daughters, and neither did it take account of the one-sided view that growing up with only the mother may give the girls of

their father.

Each of these cases highlights the dilemma which was identified in the introduction to this section (o.). It can be seen that the courts are placed in a stalemate situation in each.

C. *The Court's Interpretation of Welfare: A Chronological Approach.*

The classic statement of the case law on the interpretation is the thematic approach outlined above. If one adopts a *chronological* approach, a number of insights are more easily available.

i. the reduction in reported litigation.

The most obvious chronological observation is that there is very little reported activity in the area of separation law from the mid-1980s, concerning the interpretation of the welfare principle. Two elements would seem to account for this. First, the majority of the basic elements on which cases would be brought were settled by this time. The above analysis of the cases, when attention is paid to their chronology, shows very few issues emerging after the early 1980s. The newer cases seem to accept the principles from the 1970s, when, possibly in the rush of cases following the reform of the divorce law, and certainly the case of *J v. C* (1970), many of the principal themes were established, which reflected the new ethos. For example, by the mid- to late-1970s the issue of conduct in separation cases was settled; "divorce" conduct was accepted as irrelevant, and conduct had to have a direct bearing on the child's welfare. Likewise, the

understanding of *status quo* and the importance of the mother's rôle were equally consolidated.

The overall effect of the litigation up to the early 1980s seemed to have a settling effect on the law. The judges did not have any coherent justification for the different approaches, but the broad themes and approaches were fixed. The shift in practice moved more firmly onto the presentation of evidence within the guidelines the courts had indicated that they would accept. The second impact on the case law was the emergence of conciliation from the early- to mid-1980s. The process of mediated disputes took the interest away from the case law and placed it onto the alternative fora. In a strange way this shift could be seen to allow the courts further to consolidate their position. The focus of the problems arising out of the adversarial process for dealing with separations had been directly on the interpretations given by the court. With the advent of mediation the courts could be seen to deal with the hard, non-conciliated disputes, while the scrutiny now fell on the process, as it changed to accommodate the new procedures.

With the establishment of the basic heads under which the courts will hear disputes, litigation on certain areas can be predicted with a greater degree of accuracy. This, it is suggested, occurred in separation law. Issues such as religion, which had been argued in the early 1980s, became non-issues, as they were predictable. Therefore negotiation could be more forceful.

ii. new themes.

The new issues in the case law tend to reflect two elements. First, the implications of change in the system. Thus the courts need to establish how the

wishes of the child will both be found and presented, and the impact that they should have on the decision has once again become an important issue in the reported case law. Another example is courts' examination of the rôle of the court welfare officer in the light of the officers increased mediation techniques.

The second new element concerns changing social circumstances. Thus, in recent reported decisions the courts have been required to address the issues of lesbianism and motherhood. Another important issue has been new court activity in the area of child abduction. The conventions signed during the 1980s are now being used increasing frequency, and require the courts to examine the efficiency of the sanctions available to them.

The conclusion which can be drawn from this analysis is that it reinforces the notion that the courts have very little by way of a theoretical understanding of the child's best interests upon which they can base their interpretations of the law. The new issues cause the same theoretical problems. Using the thematic analysis perhaps makes the law appear more settled. It will also be noted that despite the thematic establishment of the reluctance of the judiciary to make joint orders in favour of the parents, which was established by the mid-1980s, and found convincingly in the Priest and Whybrow study of 1985, and accepted in the courts up to 1991, the Children Act 1989, effectively overturns the case law on the point in the form of continuing parental responsibility. But it will equally be noted that this is the only issue on which Parliament has chosen to speak.

D. Conclusion.

There is a difficulty in understanding the caselaw, as was indicated at the beginning of the analysis of the cases, in that too much cannot be drawn from the language or a fine analysis of the law which is the meat of other legal analysis. Being centrally concerned with finding a solution which the courts believe is workable in a particular case, having seen the individual characters before the court, the decision must, to a certain extent, be an attempt to tell both sides what they want to hear, so that both sides retain their integrity as parents and can move forward to maintain their relationships with the child. Thus, what is said in one case may appear to be contradictory in another. What is apparent is that the dependence on the judges common sense can lead to the development through successive cases of folklaw rules, and, as Lord Justice Ormrod points out in *S(BD) v. S(DJ)* (1979), the "rules" and phrases may be used too casually, blinding the courts to the true circumstances of the situation. The statute compels the courts to strip away the rules, but the practice of the adversarial law cannot work without rules upon which to hang arguments. This, as has been argued, overshadows the child's welfare, although the language is always able to justify any decision as being in the child's best interests.

There are a number of interpretations, which could be drawn from the cases. There could be a welfare interpretation: that all the cases are resolved in the child's best interests, and reading the cases, this is the belief that the language of the law portrays. There could be a conflict resolution approach: that the aim is to enable the parents to find their new roles. A Bureaucratic efficiency model: that all the cases have to be resolved, which is effective when they do not return to the law and regardless of the consequences, whether that is because the families live in peace with the new order or because the parents have

run out of emotional and financial resources to maintain the fight. There could also be a social control model: that the law seeks to maintain a subservient work-force, and this is achieved by focusing the language of the marital and family problems away from the economic hardships such as bad housing which are at the root of so many separations, and on the ability of the individuals to be good parents. A final approach could be the "game theory": to suggest that the law is irrelevant in the goals of developing a structure for the new family to exist within, as the families only submit to the legal process for the duration which they perceive a need of it in acting out the drama of their separation - effectively the couples are in total control of the situation; the law is a battle ground for as long and deep as the parents wish to play the game.

Against all these models must run chaos factors which one could cast in the roles of "conspiracy theory" and "cock-up" theory. Conspiracy elements must be woven into the description, in that all the players in the drama from the judge through the legal personnel and para-legals, to the parents and their families and friends, are prejudiced. Each player holds a value system which reads like a DNA; some will be gay, some will hate gays, some will be feminist, others misogynist, others racist, and then below such conscious beliefs will be the sub-conscious layers of schooling and life experiences, good or bad, which make the individuals human. The cock-up elements will act as "wild cards", acknowledging that the players are very much human and prone to failure and irrational behaviour. The last two chaos factors could be seen as models, but they are more useful if they are seen as the impurity which the theorists are reluctant to admit. They could stand as models, but to isolate them implies that the models run with perfect human behaviour. Which model one subscribes to will largely be a philosophically and politically led choice.

A further difficulty in the classical representation of separation law is that it

seems to indicate that all cases are argued before the courts. The truth, as shown in statistics, is far from that. The hard, log-jammed cases which have been discussed above are the minority. It could be easy to suggest that in a study of the best interests the minority are unimportant, but that is not the case. All the cases which go to lawyers to some extent must be affected by the legal perception of the child's best interests as presented in the courts. Thus, there is a body of belief which is held at the centre of the system which largely relies on the chance interpretations of the judges.

Two investigations become necessary. First, do those who service the vast majority of uncontested cases interpret the law in the same way as the courts? Secondly, the question is clearly, are there any guides other than common sense? In addressing the first question, the question emerges as to who are the professionals involved.

1. Bevan (1989), p. 86.
2. *Ibid*, p. 87.
3. *Ibid*, p. 86.
4. Lord Justice Dunn, *Re D (Justices' Decision: Review)* FLR 158, at 163.
5. Maidment (1980), Ch 5.
6. [1963] Ch. 315, at 329.
7. Bevan (1989), p. 86.
8. [1970] AC 668, at 702.
9. *Ibid*, at 710.
10. *Ibid*, at 726.
11. *Ibid*, at 726.
12. Hoggett (1987), pt. 1.
13. *Ibid*.
14. Cretney (1987), Ch. 13.
15. *W v. A (Child: Surname)* (1981). To change his or her surname, it must be shown that it is in the child's best interests, and this is a matter for judicial discretion. The court must think of the embarrassment to the paternal family, and the mother's new family link.
16. (1983) 13 Fam. Law 176, at 177.
17. Bevan (1989), para. 3.06, p 88.
18. Discussed at length, *infra*, part 4.2.
19. *M v. M* (1980) *infra* p. 61.
20. *Childright*, v. 89, p. 9.
21. Bevan (1989), pp. 153 - 182; Everall (1992).
22. Bevan (1989), para. 3.112, p 168.
23. Spong (1988).
24. Barton (1990); See also Graycar and Morgan (1990), pp. 251 - 255. For an American perspective, see Note (author's name not given) *Custodial denials to parents in same-sex relationships: an equal protection analysis*, (1989) 102 Harvard Law Review, p. 617.
25. The same justifications are found in an unattributed note in the Harvard Law Review, 1989. These also included fears about the sexuality of the child. A celibate homosexual or a homosexual not in a relationship could not be denied solely on the grounds of homosexuality under the

constitution.

26. Tasker and Golombok (1991), at p. 187.
27. Rome, 4th November 1950; TS 71 (1953); Cmd 8969.
28. As in the Matrimonial Causes Act 1973, s 42.
29. Children Act 1989, s 10(9).
30. Bainham (1990), para 3.40, p 48.
31. *Home Alone*, Comment, (1992) 22 Fam. Law 517.
32. (1990) 20 Fam. Law 347.
33. Halsbury's Laws of England 4th ed para. 937.
34. *J v. C* [1970] AC 668, at 673.
35. *Ibid*, at 692.
36. (1991) 21 Fam. Law 418.
37. (1990) 20 Fam. Law 337.

PART TWO: THE INSTITUTION OF SEPARATION LAW.

The Development of Out-of-Court Negotiation.

- A. Lawyers.
- B. Court Welfare Officers.
- C. Conciliators:
 - i. terminology;
 - ii. in-court and out-of-court conciliation;
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PART TWO: THE INSTITUTION OF SEPARATION LAW.

The Development of Out-of-Court Negotiation.

The work thus far has presented a picture of the law which relates to making decisions about children in separation law. What is apparent is that the picture does not indicate the daily practice of the law; so far the image is that separation cases are concerned with the courts, and that in some cases the courts are presented with an agreement made by the parties which the courts will accept. Statistically, the vast majority of cases do not concern the courts and the traditional presentation of the law can give an indication that they are not the concern of the law. The impression thus far could be that the parents are either forging their own agreements, or are relying upon the courts to impose an agreement for them.

This picture does not reflect the importance of the wider institution of separation law. Between the two poles, or minorities of parents, the vast majority forge their agreement with the help of lawyers and para-legals. The range of the negotiation which can take place is very wide. As Jane Hern (1989) indicates: "The parties may themselves go to their solicitors with matters already agreed. Solicitors may be able to sort something out that will be acceptable to both parties. It may be necessary to go to an independent third party to facilitate discussions". This is the institution of separation law; the various professionals who attempt to facilitate the parents' agreement without recourse to the courts. This part of the thesis seeks to describe the institution, and to establish their expressed rules and philosophies of practice.

The emergence of the middle process of para-legals is chronicled widely in the context of the development of the conciliation movement. John Westcott (1989)

gives a succinct history of the development of the middle ground of the negotiated settlement. He indicates a threefold pressure to move away from the excessive formality of separation cases which could be seen up to the 1970s. The pressure came from the clients themselves, who believed that there was "no reason why marriage breakup should not be arranged in a more civilized way and without unnecessary conflict"; from family lawyers who saw it to be in the interests of parents and children to find a less contentious vehicle for the resolution of separation issues; and thirdly, a simple pressure to find alternative fora to the court process came from the rapid increase in clients between 1970 and 1976, when divorce petitions doubled. The professionals which have emerged (in an unstructured and largely unregulated way) in the middle ground of dispute resolution are lawyers, court welfare officers, conciliators, and mediators.

A. Lawyers.

For the vast majority of couples who seek a divorce or other separation related problem, the solicitor is the first and primary consultant, beyond which, the other para-legals are commonly seen as an adjunct.¹ Davis (1988a) reports² that in the various pieces of research of contested cases in which he has been involved, of the 299 persons interviewed only two had not sought the advice of a lawyer. While the traditional lawyer has always been involved in door-of-the-court style and inter-solicitor bartering, many family solicitors have responded to the pressure to change their practice by a movement towards the "conciliatory approach". This has largely been developed through the Solicitors Family Law Association, which was founded in December, 1982. The group adopted a Code of Practice, which recommends the adoption of a style of advice, negotiation and conduct "calculated to encourage and assist the parties to reconcile their differences", encouraging the client to see the "advantage to the family of a

conciliatory rather than a litigious approach as a way of resolving the disputes". To achieve this conciliatory approach in the solicitors practice, he or she should avoid language inferring a "contest" either with the client - for example, avoiding opinions on the conduct of the other party - or with the other solicitors, especially in correspondence. The children should be seen as the first and paramount consideration, accepting in the negotiation stages of a case the principles binding upon a court. Further, the issues of the child should be kept separate from issues of property and money, suggesting that "it is often helpful to deal with these two topics in separate letters".

In practice, the solicitors are placed in an awkward position, because they are the first professionals the parents are likely to consult, and because they are also the professionals who could ultimately steer the case through an adversarial court hearing. Further, the clients are not starting the process at the time they seek the advice of the formal process of separation. The parties have been engaged in an informal process of separation in which the formal process could be seen as a new chapter. They will be influenced by a folklaw of divorce, with preconceptions of the drama which the law involves fuelled by the media - as solicitors were keen to point out to this researcher at the start of the work: "we have to tell them it isn't *L.A. Law!*" - and most importantly, by their family and friends.³ This produces two elements in the clients expectations. First, they have an idea of the law which, especially in the light of the changes in the Children Act 1989, is likely to be wrong and need, as Masson (1991) points out, careful correction. Failure to do this, she indicates, will "produce an impasse in individual cases, with clients unable to give instructions or make decisions because they are locked into ideas based on the old provisions", and one must be able to add, on incorrect perceptions.

Secondly, the lawyer will be come one of the "partisans" either alongside or, as

Davis suggests⁴, against the family and friends. Advice and opinion as to the partner and the separation will have been offered, which can be used to strengthen the resolve of the fainthearted, or to push them down avenues which they do not wish to travel. There may also be an element of "she got X and I'm entitled to the same". Thus, the solicitor is presented in each case with an on-going process of divorce which may be fuelled by hate or reason, and may be following the direction which the client wishes to pursue or may not.

In this situation, the crucial element will be how the solicitor responds to the history which the client gives, or indeed covers up. The research of Murch (1980), and of Mitchell (1981) as reviewed by Robinson (1989), indicates that the majority found their solicitors services satisfactory, while over half found them to be "approachable, helpful and friendly". The finding was common that the clients' perceptions of their own solicitor depended on whether he or she was partisan, and their spouses' solicitor was often seen as "obdurate" and "inflaming the conflict". Further, Robinson notes the six types of lawyer⁵ found by Kressel (1985) in the United States of America. The range of approaches runs from the technical and anti-emotional to the therapist, who accepts the process as emotional, and to the moralist who places his or her own moral perception of the outcome on the case. He further argues that the lawyer is unprepared by training for the emotional minefield of divorce, seeing the lawyer-client relationship as strained by the clients emotional and financial circumstances; the adversarial nature of the case requires a combative approach against the lawyers' colleagues. This adversarial approach could make a supportive community of lawyers difficult to achieve, contrasting other areas of practice.

The English lawyer, at the earliest development of the conciliation movement, saw it as a threat to business (Westcott, 1989.) However, this attitude has changed. [See for example the description of practice by Pemberton (1991). The

preliminary interviews for the author's study indicate that there are a core of lawyers whose practice is predominantly child and family law, and who subscribe to the Solicitor's Family Law Association. There are also a very small number of general practitioners who may or may not follow the views of the S.F.L.A., this group being subjected to a great deal of peer pressure to adopt the "conciliatory" approach.

The question is, therefore: what is the conciliatory approach? Clearly the solicitors have three elements to their work. They are the first point of contact in the progression from informal to formal separation, they negotiate with the solicitor for the other spouse, and if that fails they take on a third rôle of preparing the case to go for a full hearing. The code of practice above indicates that the conciliatory approach could be described as non-combative or non-inflammatory. The code concerns making sure the client is informed about what the solicitor is doing, and negotiating and preparing the case in a non-aggressive manner. Hern (1989) is vociferous in making the distinction between the conciliatory approach and conciliation. Conciliation is a process which requires "specific and additional training". The solicitors are "gatekeepers" [Newcastle] for conciliation but are not in themselves conciliators. Lawyer based negotiation is largely between the lawyers and at armslength. Davis and Roberts⁶, and this author⁷ found that the lawyers would not, indeed could not, act as lawyers for the both parties who were separating, and were very reluctant to engage in roundtable discussions with the couple and both sets of lawyers. This was seen as the function of conciliation.

The lawyers hold a great deal of power in terms of the process through which a separation case will proceed. Davis (1982) described it thus:

The whole tenor of matrimonial proceedings is to a large extent

determined by solicitors. They are responsible for translating their clients' problems into legal terms, and also advising them to the limits within which they can operate in this framework. Since the client has no point of comparison, it is difficult for him to question the way in which his situation is interpreted.

Because they are the first contact, they have to assess the needs of the client, and perhaps the couple, and then encourage the client to move down a particular track. The control of the lawyers, as Davis and Roberts (1988) point out⁸ focusses "primarily on the issues of access, care and control, and to a lesser extent upon reconciliation". He asserts that the lawyers see this as "messy", whereas he indicates that the conciliators are happy to deal with what is a familiar social work type of area, while the lawyers are keen to separate and run the property and finance side of the proceedings, an area that the conciliator is not as happy to deal with. Thus the separation occurs between the two parts of a dispute.

Davis notes two further problems with this separation. First, given the solicitors unease with the emotional aspects of the cases, the clients observed felt that the solicitor was attempting to rush them into decisions about what they wanted from the law and which process they would follow. The clients felt that they lost control of the situation to the lawyer, even to the extent of turning a preliminary inquiry as to the legal position, into a divorce, when the parties did not feel that they were yet ready to take decisions, and certainly not to go onto divorce. Secondly, he notes that while on the issues relating to the child, the solicitor was encouraging the clients to negotiate through the conciliation process, in the area of finance and property the solicitor was in control and would often be preparing for litigation.⁹ This dichotomy is somewhat encouraged by the S.F.L.A. code of practice, which suggests separate letters should be used for issues of children and finance.

It will be noted that the code of practice for solicitors recommends that solicitors should indicate to the parents that the focus in child issues is the welfare of the child, which is of paramount consideration. The code at 6.1 recommends that "the solicitor should treat his work in relation to children as the most important of his duties". What is apparent from the research is that there is very little which seeks to establish how the solicitor perceives the child's welfare both in terms of the meaning of the concept and its relation to the rest of his or her work. The published research tends to focus on the perception of the clients as to how their separation was handled.

B. Court Welfare Officers.

The courts may request welfare reports in any custody and access disputes, whether it be in the High Court or county court¹⁰, a divorce court¹¹, or a magistrates' court¹². Under the new law, the court retains a power to order that a welfare report be made.¹³ The report should be requested of the courts' own officers - the courts welfare office - which is a branch of the Probation Service. A court is not bound to request a report, indeed in uncontested hearings they are rare and in contested hearings there is a considerable variation in court practice as to the circumstances in which a report would be requested.¹⁴ Factors which may influence this, beyond individual judicial preferences, may be the different working approaches of the officers, and the weight of work in different areas.

The request for the report can be for a specific issue, for example how the children relate to their father, or, what appears to be more usual, a wider request which will assist the court by indicating the character of the family, and increasingly recount the wishes of the children. Thus, the traditional approach is to produce an investigative report on aspects of the family's life. The court

welfare offices are presently involved in a debate as to the correct practice method. This has resulted in a lack of uniformity in both reports and services geographically, as James (1990) has observed. He found a wide variation in the length, style, and content of the reports and of the types of service provided.

The service is under the joint control of both the Home Office, as it is a branch of the Probation Service, and the Lord Chancellor's Department, as it is an office of the court. This leads to problems of funding, but more fundamentally, to problems in theoretical control or direction.¹⁵ The offices are run in geographical areas corresponding to the division of the courts, but each area and to a certain extent each office is free to develop its own practice method. As the National Association of Probation Officers indicate in their policy document on the rôle of the welfare officer: "in the past ten years the service has been in a state of flux as officers have attempted different approaches to the work in order to minimise the polarity and bitterness between the parties which have been compounded by the adversarial legal system".¹⁶ The policy statement does not extend to outlining the relationship between the child's welfare and the welfare officer's duty, or between conciliation and reporting. The debate over practice stems from the fact that the service has only recently become a specialism within probation social work, having been a part of the general workload of all probation officers. This, coupled with the lack of central direction from the split masters of the service, has allowed the new specialists to see their work in the context of other para-legal developments in conciliation and also in the developments in family therapy. Thus, the philosophy differs from area to area as different theoretical beliefs develop different practice methods.

This can be seen as particularly exciting, or it can be a further indication that there is no recognizable norm in separation law. The different interpretations of the interests of children have been seen in the caselaw, and here, the type of

court welfare approach which will be followed will differ according to geographical area. The courts are largely unhelpful on the direction of the court welfare office, perhaps because the courts are legally minded and the issue of a welfare report is basically a social work endeavour, and therefore the courts look to the welfare reporters not as servants to the courts request, but as experts who will provide an authoritative statement of the needs and potential welfare of the child.

This is not admitted directly by the court, as this would undermine the authority of the court, but it can be seen in the importance placed on the welfare report. If the report was simply, as it purports to be, an evidential aid to the court which did not give the court the answer to the welfare problem, but rather gave the court the material to base its decision upon, then the cases would reflect this. The cases, as has been seen, indicate that appeal courts will require full arguments from the judge which justify the departure from the welfare officer's recommendations. This gives a very strong indication that the welfare officer is seen, not simply in the fact finding rôle by the court, but rather as a surrogate judge. The courts, in the opinion of the welfare officers interviewed in this study, see the welfare officer as an expert whose training gives him or her an ability to answer the question of the child's best interests. The problem only becomes more difficult because the welfare officers are keen to indicate that their knowledge does not allow them to make judicial decisions, and they are not empowered to make the judges' decisions for them.¹⁷

The courts, in the light of this confusion of authority, send out rather contradictory signals. The courts claim that they do not have power to instruct a welfare officer how to conduct the investigation,¹⁸ but the courts have been keen to offer the view that the welfare officers duty is to prepare a report which will assist the court, on the basis of a detailed investigation.¹⁹ The court's reaction

to the movement of court welfare officers towards conciliation rather than reporting can be seen in *Clarkson v. Winkley* (1987) and *Merriman v. Hardy* (1987). Here the courts were faced with welfare officers who engaged the families in conciliation and, in the case of *Merriman*, when that conciliation failed after two sessions, the welfare officers reported the fact to the court: the extent of their inquiry was that the parents could not agree arrangements for the children. The court held that the welfare officer's duty was to provide a full report as requested by the court within the traditional model, and that the rôle of the court welfare officer and the conciliator should not be confused. The contradictory signals come when the courts indicate to the officers that they may "encourage the parties to settle their differences if the likelihood of a settlement arises during his enquiries".²⁰

Thus, the dilemma of the court welfare officers is not aided by the courts, or from codes of practice from the centre. Under the section 7 of the Children Act 1989, the Lord Chancellor "may make regulations specifying matters which, unless the court orders otherwise, must be dealt with in any report under this section". As yet, there have been no such directions, nor any guidance as to what is expected of the court welfare system. What is clear from the Newcastle Report on conciliation is that the court welfare offices are engaged in the practice of conciliation as well as reporting, and are one of the valuable services offering the process.²¹ The debate has, however, been lively in the journals between academics and officers attempting to understand and evaluate the potentials of competing systems.

The traditional approach of preparing a report has received attention following the Law Commission's view that there should be a more objective or standardized procedure in gathering information and presenting it to the court.²² The check-list in the Children Act 1989 has been indicated²³ to leave open the

question of the best method to use in preparing reports. Two examples of responses made by court welfare officers to this have indicated that a check-list could give the basis of a report. Davies (1992) suggests that the Law Commission's proposal was no more than existing good practice, and that the crucial issue was to move reports away from "soft" impressionistic reports, towards "hard" information. Thus, he presents a comprehensive check-list which could form the core of the report and allow the courts to make its discussion on the basis of clear information. The impressions of the officer could then be placed alongside a more standard presentation: the check-list would be a tool for "monitoring and supervising welfare work" and for a more "systemic approach". The layout which he suggests would move away from the tendency to attempt to find the "best parent". Davies argues that "a form of welfare inquiry which takes shared responsibility as axiomatic should, in our view, focus on child care issues which are agreed and ask questions which anticipate agreement".

This is very much the view expressed by Gibbons (1989) who suggests that the presentation of "explicit criteria" in the welfare report would serve the end which he sees both conciliation and welfare work as serving, namely "helping parents improve their communication to the point where the children can move from one to the other without feeling guilty or disloyal to either". While the check-list is not as developed as Davies's example, by including evidence under eight headings - the *explicit criteria* - Gibbons argues that the welfare report would have three benefits: to clarify the boundaries for the courtroom discussion, indicate to the parents the evidence which the court was using to make its decision, and to improve the communication between the officer and the judge. These benefits would help to break the logjams in communication which can make the proceedings long and harmful, especially to the children.

The potentials offered by a more systemic approach to forming the actual report

would be accepted as valuable by the vast majority of welfare reporters, and rejected only by those who argue that if the parents cannot agree then no-one has the right to impose a settlement upon them. This is an extreme position. A slightly more moderate approach was found in the author's study where the officers reported that the experience of conciliation work with the families made the officers reluctant to make recommendations to the court. These officers sought to present a clear account of the facts but did not wish to make judgements, responding to the reversal of rôles which the judges appeared to wish to make. The judges, for the latter group of officers, had authority to make decisions.

The most difficult debate in court welfare practice, as in the solicitors' dilemma, stems from the understanding of the "conciliatory approach". There is a strong indication from the case law, which has already been discussed, that the Court Welfare Officers should be engaged in the enterprise of preparing reports for the court. Even where this is the accepted aim for the officers, the value of conciliation seems to muddy the waters. Latham (1986) indicates the separation of the two issues and the desires which have created the overlap thus: "Welfare officers will naturally and desirably wish to assist the parties to come to realistic agreements, especially in respect of issues relating to their children. However, it is important that a clear distinction be drawn between the functions of a welfare officer attempting conciliation and the duties of such an officer when appointed to investigate the case with a view to making a report to the court".

Judge Nigel Fricker Q.C. eloquently expresses the belief that the business of welfare reporting is far removed from the job of conciliation. At various places²⁴, he indicates that welfare reporting is a function of the court, and that the officer is empowered to investigate and has a duty of disclosure to the court,

whereas, conciliation is voluntary, controlled by the parties, and is accepted as legally privileged. This would be clear; that welfare officers should not, on these arguments engage in conciliation. However, despite strong words aimed against the welfare officers who are using the opportunity of the welfare report to conciliate between the parties - he suggests that the "remit of, and limitations on the authority being exercised in each case must be respected",²⁵ having said that the remit is to report and not to conciliate - he, with Coates, argues that a 'conciliatory approach' "can and should" be adopted by welfare officers.²⁶ This view is also expressed by Latham: "the welfare officer may, therefore, approach his investigation in a manner indicating his readiness to assist the parties to resolve their differences".²⁷

Fricker and Coates (1989) argue that "provided that the fundamental distinction between conciliation and welfare reporting is respected, the authors contend that a court welfare officer may encourage parties to resolve their differences". Subject to the parties being aware that the court welfare officer is making an investigation for the court, he or she should explore the likelihood of parental agreement. The officer, then, can adopt the conciliatory approach and make the report to the court. This is termed a "consecutive approach", which gets around the problems of privilege and confidentiality, because the parties have agreed to any disclosure by a signed form.

The consecutive approach flies against the accepted principles of conciliation and confidentiality as expressed by both the Booth report²⁸ and by Sir John Arnold, as President of the Family Division²⁹ Both indicate, as has been accepted in caselaw and Practice directions, that conciliation and reporting must be performed by separate officers. Fricker and Coates (1989) argue that the distinction need not apply with the permission of the parties, and that the direction of the court has always suggested that in reporting, a conciliatory approach should be adopted.

Although they do not express the view directly, one wonders how much of an influence on this stance the argument that Fricker and Coates quote from Pugsley *et al.* has.³⁰ This suggests: "[the separation of reporting and conciliating] does not provide a rationale for the costly division of welfare officers into separate teams on the basis of a separation of tasks that is inherently artificial and unhelpful".

The greatest problem in the inclusion of the "conciliatory approach" when welfare officers should not engage in conciliation, is one of drawing the line between the two practices. How is an officer to investigate the possibility of an agreed settlement without resorting to conciliation techniques? Fricker is not clear on this point. It is not clear whether the investigation of the possibility must end should the parties indicate they do not wish to participate in conciliation, or whether it should be a thread running through all of reporting technique. Reference is made to a "switch from a facilitating role in conciliation to an investigative role, in which settlement is still encouraged". This may be appropriate to the work which a welfare officer may be required to do in-court, where the assessment as to the likelihood of agreement has to be made quickly, but the difficulty of how an officer encourages the parties to agree without stepping into conciliation, especially out-of-court, seems to remain unclear.

The difficulty can be seen clearly in a short article by Pugsley and Burns (1991) Here, a system of welfare reporting is outlined which is based upon meetings where the parents are seen together by two court welfare officers, one with the couple, the other observing and making suggestions as to "how best [the family] may be helped", from behind a two-way mirror. The workers write the report if the conciliation fails on the basis of the parties' consent and the theoretical view that using new workers would be costly and probably would not give such a detailed report. Clearly this method has advantages over a single worker seeing

the individuals separately and on the individual's home ground; advantages discussed in the article. What is apparent is that the process of investigation involves the discussion of the issues of the breakup, and does so unashamedly:

"those of us who work in this field continually find ourselves moving into an area that overlaps with 'conciliation'. We cannot ignore the emotions which parents exhibit: the anger, the grief, the wish to re-write history. In many interviews the parents hardly talk about their children, but talk about themselves. It is not useful to argue that these matters should be dealt with in 'conciliation'. Court welfare officers deal with ten times the cases handles by voluntary conciliation agencies. Because most people may not have opted for 'conciliation', are we to say that we should not address the central issue of their relationship, past and future?" (p 254)

Thus, from Fricker's initial statement that the welfare officer is not engaged in conciliation, but should adopt a conciliatory approach, the practical difficulty of understanding how that difference is applied is very clear. It could be argued that, because the parties are consenting to the process and the officers are ultimately reporting to the court, then what has been described is a conciliatory approach. However, it could equally be seen as conciliation, given the methods it is using. To argue that this is a conciliatory approach rather than conciliation simply because of the report back to the court seems to justify a difference between two methods which are the same, simply on the grounds of who is offering the service. It is suggested that the "conciliatory approach" argument does not move the dilemma on very far, as welfare officers are still left to interpret how they should encourage parties to agree between themselves, which is conciliation. Indeed, given the pressures on couples to conciliate, one wonders if they can chose not to.

Two approaches have already been indicated as to how the report should be made, first on the basis of a check-list of crucial information, and secondly through joint meetings exploring emotions and wishes of the parents. These could be seen as *report-centred*, and *conciliation-centred* models, although they are not pure as there is overlap between the two. Cantwell and Smith (1990) argue that a third model - *systemic, family conflict-centred* - can be seen in welfare work. In an earlier article, Cantwell (1986) indicates that the conciliation process and the welfare process are different as the officers are charged with the duty of "addressing the best interests of the child". He indicates the difference between the two services thus: "in almost every contested custody and access case, the greatest risk to the child's welfare is that posed by the conflict between the parents. Accordingly, the service cannot in my view maintain, with any real consistency, an involvement that is both voluntary and privileged".

Cantwell pushes the rôle of the welfare officer towards a very different kind of process, thus: "much past assessment by welfare officers..has leant on moral judgement rather than any serious analysis of why conflict is now taking place between former parents. To be resolved, or at least eased, for the sake of the children, post-marital conflict needs first of all to be made sense of; it is rarely stupid or senseless, even though it may seem thus to those outside at first sight". Further, he maintains that "the welfare officers first priority is to identify and assess the emotional damage that post-marital conflict between parents is causing to their children. Then, using his professional social work skills, the officer's duty is to seek to assist the family towards a speedy resolution of that particular conflict, or towards less damaging management of that conflict (in so far as it affects the children)".

These opinions are worth reporting in full as they seek to move the welfare officer away from the reporting rôle and even from conciliation, and introduce a

compulsory therapy element into conflict between adults, using as its justification the welfare of the children, on the basis that the welfare of the child is the reduction of the conflicts between his or her parents. In a more developed account of the position, Cantwell and Smith (1990)³¹ indicate that the court should be included as the formal authority in separation law. The feeling is that the Court Welfare officers should use the courts when they perceive it to be necessary: "we believe that the key is to be more precise about how and when the active engagement of the Court is to be encouraged". The central theory underpinning the position of these authors is a family systems approach, that tensions and conflict arise naturally in the life cycle of a family, and therefore separation may be a response to a problem rather than a problem in itself. The difficulties appear when the family in family therapy "cannot deal with the changes successfully and are in many respects 'stuck'".³² Within the systemic divorce, the welfare officers must accept that they are dealing with a system, of which the family and court are a part, that anger may be a necessary part of the parents separation, that there is a conflict in the legal system between authority and the family as the state's primary socializing unit. The authors assert that there is a continuum of parenting; some parents will be unable to parent through the emotions of separations, others will have worked through this. The first job of the welfare officer is to place the family on the continuum by meeting the whole family; secondly, the officer should engage in systemic therapeutic techniques to help the "resumption of co-parenting"; and thirdly, to report fully to the court, and advise the court within the context of the family's position on the continuum. The separation must be seen as part of the process, and the professionals should remain neutral to the process.

The process of the welfare report would take the following shape. A first interview would take a detailed history, including a "geneogram"³³ which the children may help to prepare. The workers would gather impressions about the

emotional states of the parents and the relationship of these states to the separation. A second session would be planned "based on a positive connotation of both parent's attitudes". The session would be based solely on the impressions of the workers who would control the questioning in order to achieve a certain end - for example, Cantwell and Smith (1990) drawing from one case example the points (reproduced here) - to draw a "firm contrast between the children's normal response to the mother's guidance and their response with regards to the access issue, where they indicated that they needed a great deal of advice and guidance from their mother but were not getting it". It will be noted that the whole family is involved in the process and is involved in the questioning. It will also be noted that the mother reacted by "leaving the meeting". Further, what in voluntary family therapy would be a difficulty in "re-engaging" the parent, "in the context of post-divorce conflict, a report to the Court at this stage can be used as an intervention and can be very powerful".

The report should not be critical in the traditional sense, but rather should allow the family to find its own level in the problem that has been addressed, which it is likely to do regardless of the court order. The court should therefore be acting so as to minimize the stumbling blocks it places before the parties. In the report, Cantwell and Smith attempt to show, using an individual case report, how they give a starting block from which parents can negotiate, but it is seen that the welfare officers are dependent on their interpretation of how the family has reacted to the therapy, and on their assessment of the family's problems: "the report was left deliberately unclear in order to see if the family ..could accommodate each other" around the proposition that the children needed more guidance to develop their relationship with the father more fully. The court is used very much to reinforce the assessment made by the court welfare officers, and the report is geared to a particular view of the family's position.

Clearly these are radical views when placed against the views of Judge Fricker. Also, there are difficulties in this approach. The adoption of the family therapy technique removes any sense of the individual - it is the family that has a problem, and not the individuals. As a therapy technique it is suggested that this may not always allow the individuals to realise their problems in relation to the family. There is a difficulty in the approach outlined, as it is dependent upon the court welfare officers' interpretation of the family dynamics on the basis of one meeting. It is submitted that the tensions and reactions exhibited by the family may have histories which are not disclosed within the context of the sessions, or may be based on individuals characteristics which are wrongly assessed. Further, the judgements are not the court's but seem to be the property of the welfare officers who choose when to involve the courts and how to frame the reports so as to gain a desired outcome.

Perhaps most dangerously, the decision making is not owned by the parents in this context but rather it is based on the impressions of the welfare officers. One wonders why a family in this therapy should be any better equipped to make future decisions unless it was predisposed to the outcome that was suggested. Essentially, this method will only work with a small number of families. Yet if it is a standard practice, how can it be imposed on all families? Had the mother left the second session and was not in an emotional state to hear what was being said, however accurate, it is suggested that this model would not empower her to make new assessments of her attitudes. This final difficulty of ownership has presented the model with its most damaging criticism, that the parents are being manipulated through a compulsory therapy, when this is not what the welfare team are empowered to do, and this is therefore a violation of civil liberties. This would have the effect of returning the argument full circle: a welfare officer is empowered to report, but should encourage the parties to arrive at their own settlement - but how should they do this?

C. *Conciliators.*

The next group of para-legals within the institution of separation law are conciliators. The *conciliatory approach* has been discussed at length with reference to the court welfare officers and the confusion as to what it should entail is clear if not answered. The term used to describe the approach has been used in this analysis because it has been adopted in the debate as to its content. It will be noted that a distinction has been drawn by many of the contributors to the debate about "conciliatory practice" and "conciliation". It is constantly suggested that the two are very different processes. Conciliation, it will be seen, is in principle voluntary and confidential, whereas the relationship with the court demands that the welfare reporting process of conciliatory practice, cannot be. The reluctance of the welfare service to become conciliators as a matter of reporting practice has been seen in the writing of divorce court welfare officers, other critics, and in the recommendations of both the Booth Committee and Sir John Arnold.

The difficulty of the relationship of conciliation and the conciliatory approach can be clarified in a semantic sense, if the work done by court welfare officers is called *mediation*, in the opinion of Jackson (1986). This stems some of the confusion as it reflects that welfare work which seeks to allow the parents to decide the arrangements for their children, while respecting the relationship between the officers and the court, is not conciliation. This helps to clarify the relationship between the work on court welfare procedure, and the next section on conciliation. It does not, however, resolve the central question of how mediation within the court welfare service should be practiced. Unfortunately, while making the distinction between court welfare work and conciliation, *mediation* is a term which has been adopted by a practice which has developed out of conciliation involving co-working between a lawyer and a conciliator. Thus,

for the purposes of this study, the court welfare mediation will be referred to as *CW-mediation* while the other form will be known as *mediation*.

Perhaps the single most important change in the practice of divorce and separation law since legislative changes of 1970 has been the emergence and development of conciliation as part of the process of the law. This is remarkable not only because it seems to answer the cry of both practitioners and clients for a more civilised way to separate, but because the process is completely outside the legislative process, and yet is fully accepted within it. Thus, today there is a National Association of Family Mediation and Conciliation Services³⁴ which regulates voluntary services throughout England and Wales, and a standard practice has emerged which the vast majority of services adhere to. This consideration of conciliation will concentrate on terminology, the distinction between in-court and out-of-court conciliation, the findings of the Newcastle Conciliation Project Unit, funding, and criticisms of conciliation.

i. terminology

Terminology in this area of the system has been somewhat misleading. The Finer Committee (1974) distinguish the terms *reconciliation* and *conciliation*. The former concerns the question of reuniting the parties, whereas the latter concerns assisting the parties to deal with the consequences of the established breakdown of the marriage. Two further distinctions must be made at the outset. Conciliation, as it has developed, does not concern *counselling*. Conciliation concerns decision making, whereas counselling concerns helping the families in difficulty and involves therapy.³⁵ The researchers of the Newcastle Conciliation project Unit expressed the idea thus: "Conciliation is an informal, but structured, process in which the parties to a dispute meet with an independent

third party to explore the possibilities of reaching an agreement".³⁶ It is not to be confused with "reconciliation" which seeks to reunite the couple in their relationship as partners. This was something which caused confusion to the families engaged in conciliation.

Further, a distinction must be made between conciliation and the recent development of lawyer and conciliator co-working known as *mediation*. This produces a clash of terminology with Jackson's definition of the work of court welfare officers. The clash is largely from the fact that the terminology has not been accepted at large. As has been noted, for the purposes of this study *mediation* will refer to lawyer / conciliator work, and *CW-meditation* refers to the court welfare process. In conciliation, the couple use the trained conciliator as a channel to make arrangements concerning the future of their children. In the latter, the parents discuss all the practical issues of their separation with a conciliator-mediator and a lawyer-mediator, to arrive at their own arrangements without resorting to the courts.

Terminology, while fixed in the context of this thesis, is however still in flux. The "mediation" problem has been identified already. However, that term is still open to different meanings which should not be confused. His Honour Judge Forrester-Paton Q.C., in his submission to the Booth Committee, makes a distinction between mediation and conciliation where mediation refers to an attempt to arbitrate a limited workable solution by a professional working as a go-between, whereas conciliation is much deeper, seeking to help the couple to reach an understanding of the elements of their relationship which promote disputes between them. Conciliation would therefore allow a resolution to the dispute, implying genuine agreement or harmony, whereas mediation would allow a "settlement".³⁷ Clearly, this is a matter of the philosophy of systems within conciliation practice, namely the "in-court" and "out-of-court" approaches, which

will be discussed later.

Gwynn Davis also presents a difficulty of terminology in that his research on conciliation always refers to the process as mediation. The emergence of Family Mediation has led the conciliation movement to challenge what it understands by the terms conciliation and mediation. It has already been noted that the National Family Conciliation Council has changed its name to include the term mediation. This is not to encompass the Family Mediation Services alone, but rather it is to assert a new terminology upon services. Fisher (1992) describes what was conciliation as "mediation", saying: "mediation itself is a creative problem-solving process; disputants are helped by a third party, the mediator, to extricate themselves from their conflict and find creative joint solutions to their problem. Family Conciliation Services are creative problem-solving agencies; themselves the creatures of co-operation between concerned people in the professions and local communities, they offer a fresh and clear focus of help to divorcing parents and their children". Parkinson (1992), along with Roberts (1988), uses the term "mediation" to describe the service offered in conciliation. Given this change, here the terms will not reflect the change in approach for the purposes of describing the range of services: mediation will be used to distinguish the concept of Family Mediation

Roberts and Roberts (1991) indicate the wider European stage, where mediation is becoming widely accepted as in England. They report on the first European Conference on Family Mediation, that the philosophy underpinning conciliation is much the same throughout Europe. At the congress, Michele Andre, the French Secretary of State for women's rights described the process thus: "mediation gives speech back to the man and the woman". Roberts and Roberts comment: "in saying this, she neatly highlighted the importance of dialogue, mutual respect and equity that constitute the ethical basis of mediation". Further, they report the

contribution of Jacques Barrot, a Deputy and former French Secretary of Health: "mediation is premised on an essentially humanist philosophy. Human beings are unique and free individuals, not social categories. Mediation is founded on an optimism about people, what Barrot called 'a positive prejudice about the future'".

ii. in-court and out-of-court conciliation

In 1982, the Lord Chancellor established an Inter-Departmental Committee "to review the conciliation services then existing in England and Wales and to consider whether they should be promoted or extended".³⁸ This was following the development of conciliation, and earlier studies, notably the report of the Finer Committee (1974) and the Booth Committee (1985) which both supported the concept of conciliation in helping to reach settlements in cases concerning custody and access of children. The Inter-Departmental committee could not, having acknowledged that conciliation, and especially in-court conciliation was valuable to the process, reach specific conclusions as to future policy, but did recommend a more rigorous study of conciliation should be undertaken. The University of Newcastle successfully won the tender for what could be seen as the most important, and certainly the most expensive, research into conciliation in 1984. The results were reported in 1989.

The Newcastle research project.

The aims of the research were to measure the "cost and effectiveness" of conciliation services in England and Wales. The terms of reference for the research were devised specifically by the Lord Chancellor's Department, thus³⁹:

1. *The overall remit of the Conciliation Project Unit is to submit a report to the Lord Chancellor which will enable him to decide*
 - i) *whether a publicly funded national family conciliation service should be established; and*
 - ii) *if so, how such a service might best be organised and funded.*

2. *Within this general framework the Unit's detailed terms of reference are -*
 - i) *to collect information from all in-court and out-of-court conciliation schemes in England and Wales about their organization, staffing, funding and procedures, and on the basis of this to produce a classification of different types of conciliation schemes;*
 - ii) *to assess and compare the costs of different types of conciliation schemes, having regard to the costs of operating schemes, the effect on legal aid costs and lawyers' fees, and the cost of processing divorce cases through the courts;*
 - iii) *to assess the effectiveness of the different types of conciliation, with particular reference to the nature and durability of agreements reached, reduction of conflict, the satisfaction and well-being of parties, and the professional skills and training of successful conciliation; and*
 - iv) *to act as a clearing house for new ideas about conciliation developed in other countries.*

What is apparent from the terms of reference is that this could be seen as a constraining way of funding research. Davis (1989) is highly critical of this

approach to research. He is concerned that researchers must be free to address the problems as they see fit through their study, rather than being tied to a perception of the problem, especially when the perception is from a government. Further, he sees the granting of one very large bounty to one successful institution as a difficult step, in an area where he sees the need for small scale research to allow the researcher to understand a "field which is bedeviled by imprecision of language, by acknowledged differences in degrees of coercion, and also by differences in the aspirations of the various professional groups involved".⁴⁰ However, he stresses that these are problems made by the Lord Chancellor's Department and not the Conciliation Project Unit (CPU).

The CPU found that there were essentially two types of conciliation: either in-court conciliation, or out-of-court conciliation. The CPU found that 83% of Divorce county courts had conciliation available, and the vast majority of the services were offered by the court welfare office. Typically, the in-court process involved one meeting centred exclusively on the particular practical problem, for example, access. The CPU also found that 42 independent conciliation services operated out-of-court services. Here the process typically entailed more than one meeting, which allowed the parents to explore some of the issues surrounding their separation.

Of these two processes, two further divisions could be made according to the degree of authority involved in the conciliation. The resulting four categories formed the basis of the study. Thus, in the in-court conciliation, Category A were services which had a high degree of judicial involvement, with a judge or registrar participating at either the beginning or the end of the conciliation. Category B was again an in-court service but differed from A in that there was little judicial involvement. Thus, in A the judge or registrar would perhaps interview the couple and then suggest a conciliation meeting, or even participate

in the conciliation, whereas in B, the meeting would be under the authority of the court welfare team, perhaps set up on the basis of a court welfare officer inviting couples to conciliation on the basis of their application papers to the court.

The out-of-court services were again divided on the basis of the involvement of "authority" figures. Thus, category C encompassed any services where the conciliation was independent of the court, but the link with the judiciary or the court welfare team went further than a simple involvement on the management committee. Here the funding, premises, and even staffing of the service was strongly bound up with the court welfare team. It is interesting to note that this category did not produce a large enough sample for statistical purposes. In category D, conciliation was offered by a completely independent service. Here the funding was often charitable and the "authority" figures of judiciary, registrars, court welfare office, were confined to holding seats on the management committee. In both out-of-court processes the referrals were made by solicitors or perhaps self-referrals by the clients.

Having established a distinction, the approach and philosophy of the two main methods of conciliation should be examined. Broadly, in-court conciliation arises where a meeting is held immediately before or during a court hearing for custody and access, or divorce, at which the couple and a conciliator - most usually a court welfare officer, and sometimes with the registrar, attempt to come to an arrangement concerning the children. Out-of-court conciliation occurs where there is a series of meetings during the negotiations as to the terms of the separation with an independent conciliator. Both processes use the same techniques, only the timing and expectations can be said to differ. In the former the process may last over a number of sessions, and could be likened to plea-bargaining at the door of the court.

In-court conciliation simply seeks to give the parents a "last chance" to make the decisions about their children for themselves. Usually, the process involves the parties arriving at the court for a full hearing before a registrar or judge, and being instructed to leave with the welfare officer to discuss the arrangements for the children. The meeting will either produce a set of arrangements which the courts largely accept, or it will quickly allow the welfare officer to report to the court that agreement is impossible between the parties. In this respect, the process could be likened to His Honour Judge Forrester-Paton's mediation, in that it is an attempt to arbitrate a limited workable solution. Clearly, there is no time for analysis of the parents feelings, the issue is one of 'will this solution work?' As a process, it is very close to the negotiation which occurs between solicitors or barristers on the day of the hearing. If the parents cannot meet face-to-face, the solicitors act as go-betweens, offering ground to the other side in a negotiation of their relative positions.

For example, the mother may wish to have custody with no access, the father may be attempting to regain custody. Alongside this, there could be a dispute about maintenance; the father may be in arrears and the mother may be wishing to get an increase. Thus the initial position, which could not be solved in the negotiations between the solicitors, will be brought to the court. The lawyers will then start to argue. The father's solicitor will realise that the custody claim will be an uphill struggle, so the offer will be made to drop the custody issue in exchange for some access. This may be accepted by the lawyer who then offers this to his or her client as acceptable. The lawyer returns having convinced the mother, and offers one day per fortnight in return for a sum of £x for the maintenance. The father's lawyer could then argue for a greater amount of access against the maintenance issue. Ultimately the final result will be a settlement which the parties have been persuaded to accept, or the judge will view that enough time has been spent and the parties should argue in court. In which

ever situation, if the parents are unable to argue face-to-face, the agreement will be imposed on the basis of the judgements of the professionals. In-court conciliation allows those parents who, confronted with the reality of the courtroom, can face each other and attempt a very similar negotiation for themselves.

The mechanics of the in-court conciliation will differ from court to court. However Mr Registrar Price of Wandsworth County Court gives a useful account of the practice at Wandsworth, and a philosophy which shows the value of the in-court conciliation.⁴¹ At Wandsworth, all applications for an order concerning the children, whichever channel they should emerge through, would be given a "preliminary conciliation appointment" with the welfare office. The effect of sending all applicants to conciliation caused two developments. First, the welfare office started an out-of-court service and prepared reports, and an independent service emerged. Secondly, the solicitors started to send the clients directly for conciliation before making an application. The result of these developments saw a drop in the number of applications, a greater number of direct referrals to conciliation, and a finding that the cases that did come to court were more entrenched, with unsolvable situations needing imposed arrangements. While Mr Registrar Price finds a short in-court conciliation rarely successful, he feels the preliminary meeting can explore the nature of the dispute and whether the parties can make arrangements alone, or with the help of conciliation, or whether a full hearing is needed with the preparation of welfare reports.

The in-court appointment could be seen to have a dual function in Price's view. While not conciliation as such, it can be an effective method of ensuring that information about the services available to the clients is known to them, although this function should have been dealt with by the solicitors before an application is made to the court. But more importantly, it will give the court an

indication of the correct process for the case. For example, a case where the main dispute concerns the finances with the children as a secondary issue, may benefit from being instructed to try conciliation, whereas a case where conciliation has failed, or would be inappropriate, could be sent for welfare reports and a full hearing. This is suggested as a great saving on court resources, however, it could be seen as a reflection of the historical development of conciliation.

Initially, the courts were a major influence in the use of conciliation. Solicitor reluctance to involve conciliators could be remedied by the courts stepping in and suggesting, if not ordering a conciliation meeting. Today, the position has changed immeasurably. Solicitors refer to conciliation in the majority of cases, although there seems to be a remaining belief that some cases are too hard to conciliate, and therefore the screening nature of in-court conciliation is not as important, if practised at all. However, such meetings were a valuable catalyst along the way to a conciliated separation. In some areas they still exist, largely as the last chance to settle, although the success of these hearings will be limited as the cases themselves are only coming to court when conciliation has failed.

As the Newcastle study indicated, while the courts and court welfare officers have developed what are essentially emergency sessions to attempt a negotiated settlement at the door of the court, independent individuals, especially from the social work discipline, developed the same basic concept of parental, face-to-face negotiation as an alternative to the preliminary process of solicitor-centred negotiation. The desire to respond to the needs of the couple outside an adversarial battle can be seen in many of the professionals involved in separation law. Unlike the solicitors and court welfare officers, the out-of-court conciliation process became regulated by its own professional body, the National Family Conciliation Council, very quickly after its emergence.

iii. the Newcastle Conciliation Project Unit findings

To study the differences between the categories of conciliation defined by the CPU, and with two control areas which had no conciliation services, the CPU adopted a twofold approach. To establish the costs of the process, the team gathered extensive data from the couples, conciliation services, lawyers, judges and courts. To establish the effectiveness, the team used questionnaire surveys of the couples at three stages in the process and some interviews with the lawyers to establish the value and appropriateness of the agreements made. This formed the core of the study.⁴²

The central concerns of the CPU study, as has been noted, were cost and effectiveness of conciliation. The cost was measured in real terms to show the impact of funding a service over and above the cost of the existing, non-conciliated system, with a view to examining the thesis that conciliation would reduce the cost of litigated settlements. Effectiveness was examined in terms of the effects upon and duration of settlements, client satisfaction with the outcome, the reduction of conflict, the impact on the health and well-being of the clients, and the clients satisfaction with the process. This, it was acknowledged would be a necessarily short-term view of the perceptions of the clients, as the study would only last for 18 months.⁴³

Cost. In answer to the question of what the cost of a national conciliation service would be, the conclusions of the CPU are bleak. The Unit could find "no support whatsoever for the hypothesis that the 'beneficial' effects of conciliation on cost more than outweigh, or even substantially mitigate, the resource costs of providing the service".⁴⁴ The result of the statistical analysis, using methods designed to isolate the impact of variables upon the overall result⁴⁵, showed that conciliation involved a significant net addition to

the cost of providing separation law. When the costs from the conciliation areas were analysed against the costs of the non-conciliation control areas, conciliation could be seen to increase the cost of separation law by between £150 and £250, including an increase of between £25 and £40 for the couples. The projected cost of providing a national service, based on 15,500 conciliations added between £1.9 million and £3.2 million to the present costs of providing the non-conciliated service. The importance of the findings on cost cannot be underestimated. Thus, it is alarming that the results are subject to criticism on many levels.

The scope of the research could be criticised in that the costs and effects which were studied over a particularly short period were used to establish the long-term effects of conciliated separation disputes. However, the understanding of "cost" which was adopted by the CPU causes more difficulties. Both Davis and Fisher question whether any additional service could achieve a saving in overall costs, and thereby call into question the usefulness of the questions being asked of conciliation.⁴⁶ If one accepts that an issue in the public provision of conciliation is the cost of such a service, even if its introduction on a cost free basis is questionable, then the study still has to answer two major difficulties in its findings on costs. The research rejects what could be the real savings of a conciliated system in two fundamental ways. First, the Unit organised the costing of conciliated divorce by analysing those cases which went through conciliation, but then required a court hearing, as opposed to those cases which only required a court hearing.⁴⁷ Clearly, this disregards the implications for costing on the cases which are resolved at conciliation and do not require further court work. Fisher (1989) expresses this concern thus: "in the words of one person, 'they [the findings on cost] seem to defy common sense' by excluding the strong probability that much out-of-court conciliation prevents lengthy and costly disputes or even any court hearings at all, especially in the case of post-divorce

access disputes". Given the numbers of cases involved, and that this is the central plank of conciliation, that cases may be resolved without further recourse to the courts, this is a very damaging omission when considering the findings.

Secondly, while the first problem concerned the omission of visible cost implications, the study also found that they could not evaluate the hidden cost implications claimed for conciliation. The CPU state: "of course, given the time constraints of the study, it was impossible to address claims that conciliation generated longer-term beneficial effects, such as a reduction in National Health Service costs, an improvement in the educational attainment of children or a reduction in juvenile delinquency".⁴⁸ To these costs, the possible reduction of lost days of employment and other emotional factors could be added. While difficult to study, the CPU seem to accept that there may be benefits, but then do not admit them in their cost analysis of conciliation. Thus, the two main areas where conciliation may have an impact on the cost of providing a service for separation were not investigated. The figures, and especially the projected costing of a national conciliation service, are presented as authority for the fact that the overall effect of a national conciliation service will be a greatly increased cost to the public and private purse, and yet earlier in the study, the CPU admit that the analysis may not reflect the true costs. In this light, the claims of million pound additions to the cost of separation are unhelpful to the question of the value of the process, and dangerous given the study's political value.

Davis (1989) suggests that it is fanciful to imagine that a service can be added to an existing system without incurring extra costs. Indeed, he argues that it is not a simple system to which the conciliation is to be attached, but a system which is controlled by the lawyers, and who therefore have a vested interest. Clearly, he argues, the implication of a cost saving implies a change in the

system of separation law, and therefore a reduction in the number of lawyers or their salaries. Lawyers are in control of the range of disputes and this control remains unchallenged. The implication of these arguments suggest that a much more radical research frame is needed to challenge the fundamental assumption that the lawyers service the disputes, rather than manipulate them as a means of generating income. It has already been noted that the introduction of the Children Act 1989 was warmly received by the profession. This is interesting when compared to the outcry of the legal profession over the planned introduction of licenced conveyancers which would directly eat into the lawyers' income. In the Children Act, the extent of the vested interest of established practitioners is not challenged. This is worrying, given that the research frame was devised for the CPU by a government department. An alternative costing analysis could have been devised to challenge the lawyers' position rather than the conciliators, giving very different results, especially if the legal aid bill for prolonged access disputes was considered.

Effectiveness. The CPU, therefore, held that a national conciliation scheme could not be "justified on *economic* grounds alone, since the hypothesis that conciliation generates a *net* saving in social costs has effectively been rejected".⁴⁹ The second issue of the research, the effectiveness, becomes central to the question of whether the additional cost is acceptable, given the benefits of conciliation.

The effectiveness of conciliation was largely measured by researching the perceptions of the couples who used the systems offered under the four categories. In terms of the narrow goal of dispute resolution, the CPU found that 71% of the cases agreed on some of the issues of their separation, and of that group, 74% felt satisfied with the agreement. It was found that Category A - in-court with a high degree of authority control - were less likely to reach an

agreement, and the couple were significantly less likely to be satisfied with the agreement reached, especially access arrangements. This supports the view expressed above that in-court conciliation is a last chance, and as much concerned with giving authority to the court to impose decisions upon a couple.

The broader goals of conciliation beyond simple decision-making brought more mixed reactions. While the research showed that couples reported an improved quality in their relationship after conciliation, there was no significant difference in the quality reported by the couples in the non-conciliation areas. This could indicate a difficulty in research which relies upon the participants of a system assessing their feelings when they have only experienced the one system. While the sample size was large, each couple had a limited experience against which to measure "satisfaction" and "quality of relationship".

The CPU found three areas emerging from their qualitative study of effectiveness, namely confusion, pressure, and setting. The Unit found confusion over the terminology of both the mechanics of the process and the law itself; over the personnel involved in the process, especially in the in-court services; over the objectives of conciliation, most notably couples confusing conciliation and reconciliation; and over related processes with couples reporting confusion as to the objectives of the related processes of the law. The research showed that female respondents felt a greater pressure to attend conciliation, fearing prejudice if the "option" of conciliation was not taken. Likewise, the time available for conciliation caused pressure, with respondents likening their experience to "being pigeon-holed". It was felt that conciliation had its own agenda of decision-making and norms into which the participants were pushed. Pressure was also felt from the authority held by other individuals to impose a settlement; a passive authority which would be activated should the parents continue with their dispute. As to the setting of the conciliation, in-court

conciliation was associated with the anxiety and waiting for a full court hearing.

Of the samples, 15% were dissatisfied with the process of conciliation and 75% would recommend it to others. Category A again received less favourable rates of satisfaction to the other categories, and was generally less successful than the other categories. As to the overall conclusions, the CPU found that the research was inconclusive as the severity of cases presenting to each category and the control areas were not uniform; the category A cases may have been more difficult than category D, and hence the data could not be reliably compared. It was clear to the Unit that in-court conciliation was less successful than out-of-court systems.

Conclusions. The CPU found that, given the inconclusive nature of the effectiveness data and the increased cost of introducing conciliation, the decision was a policy decision, and therefore a political decision which was not for the researchers to make. They suggested three models for a national service: maintain the *status quo*, introduce a national service on the basis of the best features of all the categories, or introduce a national service on the basis of a new model. The CPU indicated that it would favour a "Family Advisory, Counselling and Conciliation Bureau"⁵⁰ which would offer a range of services to the family alongside, and separate to, the legal service. Thus, by accepting the research frame which indicated that conciliation had to pay for itself, and by costing the systems on the basis that conciliation would be additional to fixed costs, their detailed "effectiveness" research is somewhat dulled by the presumption that the service will cost more than the court structure.

The reluctance to challenge the position of the lawyers in relation to separation law has been noted above. The findings and reluctance to make recommendations by the CPU, given the political origin of the research, could be fatal to the

national provision of conciliation. Indeed, for such a large piece of research, the government has been notably silent in the three years since its publication. It is notable that the Law Commission No. 192 in the recommendations for the reform of divorce law - perhaps the golden opportunity to introduce a system of national conciliation - said little to encourage hopes of a national service.⁵¹

iv. Family Mediation

Conciliation, as it emerged in the early 1980s, focussed upon the single issue of arrangements for the child, and avoiding the issues of finance and property. This sat well, as it has been observed with the social work training of the conciliators and the legal background of the lawyers. However, this has increasingly been seen as an artificial separation of what are essentially disputes which stem from the separation of the parents' partnership. The response has been the development of the Family Mediation service, largely under the direction of Lisa Parkinson. It is increasingly accepted within the frame of the para-legal services, although as will be seen, its relationship with the solicitors remains uncomfortable.

Despite its relatively recent emergence as a process in the English system, Westcott (1992) points out that mediation is available in fifty local services, increasingly in centres offering a range of techniques for family separation.⁵¹ Parkinson (1989) shows that the development of the FMA has its concept in the Finer Committee indication that conciliation should cover all areas of dispute, and in the practical link between child issues and financial issues in separation.

From Parkinson's (1990a) description of the first year of the Family Mediation Association, it can be seen that Family Mediation seeks to address all the issues

which a couple would formerly have addressed through a solicitor, within the process of conciliation. Mediation therefore addresses both child issues and financial problems, and is termed by the FMA "comprehensive mediation" to denote that the mediation covers all the practical areas of the conciliation.⁵² Thus, the focus is to give a forum to couples where they can negotiate their own separation settlement.

The process is facilitated by two mediators, one with skills in social work, the other a solicitor. The mediation is in the hands of a professional with expertise in child matters and one who can advise in the financial aspects; it should be noted that this joining of skills is the primary rationale. The mediators undergo the same training in the techniques of conciliation and therefore a secondary aspect of the process is that effectively there are two conciliators co-working throughout each case. Westcott points to the rigorous training and selection of mediators and the interdisciplinary nature of the concept as factors in the rapid success of mediation.⁵³

The relationship with the existing solicitor based process is difficult. The Law Society has been dogmatic in its insistence that the solicitor mediator, as with any solicitor, cannot act for both parties, following the "conflict of interest" rule. Parkinson (1990b) describes the position of the solicitor-mediator clearly in relation to this rule, as offering a service throughout the separation negotiations, gathering evidence and informing the couple's solicitors of what is disclosed. Its most recent statement on the position of the solicitor-mediator points out that a client will be referred to his or her own lawyer, and that the mediated settlement is not legally binding.⁵⁴ The referral to the individual's own solicitor seems to fling the couple directly back into adversarial corners, having reached the arrangements through face-to-face negotiation.

This could be seen to undermine the very principle of the system as part of a range of fora from which the clients chose. However, it is justified on the basis of protecting the interests of the individual client. Further, it protects the position of the conventional solicitors within the process of separation. Westcott states that "mediation ought not to be seen by family lawyers as a threat to their work, but as an opportunity to develop new areas of work with other disciplines, eventually offering our clients a greater more flexible range of ways of handling their problems".⁵⁵ The position of the legal profession in insisting in referral to the individual parents solicitors in the event of any settlement and the generally luke-warm reception to mediation, could alternatively be seen as protecting its income as the logic of the mediation is that the parents are encouraged to see their settlement as workable without outside reference.

The central concern of Family Mediation, as with conciliation, is the reaching of arrangements, or settlements. This very practical approach is seen in Mediation when Parkinson (1990a) states that: most disputes centre on financial and property issues and may also involve conflict over arrangements for the children". As was noted in the discussion of conciliation, the "problems" are arrangements rather than the making of the arrangements. Family Mediation again serves as a vehicle by which couples in disagreement can seek a solution. The similarity between this and the court as another vehicle is very great. It is clear that mediation is not primarily concerned with the ability to make the decisions, but rather offers a service to couples who are at a level of communication which will allow them to benefit from negotiations with mediators. There is a feeling generated by the large cost of FMA sessions, which do not attract legal aid support, that the process is one for the *Guardian* reading couple⁵⁶ who are attuned to "sensible discussion". The danger is again, that if a couple cannot respond to such a format, then they could be seen as a troublesome case.

The CPU report has not produced a government response to the funding of conciliation. The debate as to how the system should proceed does not remain dormant and, within the context of the expansion of conciliation to encompass mediation, a number of writers and units are presenting a similar solution to the difficulty of funding the para-legal services.

The CPU suggested that the way forward for conciliation would be to move towards an all encompassing family centre, which would offer an alternative starting point for the family experiencing separation problems. The "Bureau" would encompass many of the facilities of the para-legal spectrum, and also provide opportunities for counselling and "Relate" type facilities. This theme has been used in Cambridge under the direction of the Cambridge Family and Divorce Centre. Richards (1990) describes the work of the Centre, which offers a spectrum of services for the separating family, indicating that "we aim to assist in the creation of workable arrangements by attending to psychological difficulties that many spouses experience when a marriage ends". Thus, if the couple need legal information, then a joint meeting with a solicitor will be arranged. If the individual needs psychological help, then the centre can offer "short-term focussed work which would deal with issues such as coming to terms with the consequences of the ending of the marriage and moving forward in the divorce process".

Such an approach to the organization of para-legal services is reflected in the thinking of Fisher (1992) and of Parkinson (1992). Both these writers, highly influential in the conciliation and mediation worlds, separately indicate that the range of negotiating services which are an alternative to the courts, should be offered through a centralized clearing house. This would allow the correct

channelling of the resources available to the couple. Further it would allow for a coherent explanation of the services to be offered to the couples. Further, Fisher sees a need for a central professional body to regulate the development of mediation. These are advocated on an independent level, requiring some degree of government funding over and above the legal aid funding to separation. The issue that is left out of many of these discussions concerning funding, and indeed the philosophy of the negotiated settlement sector, is how the law should respond to the developments.

vi. criticism: Davis, and Dingwall and Greatbatch

A difficulty in the approach to conciliation, especially by the courts, is reflected in the language of describing couples able to use conciliation. Price indicates it in his article (1989) when he says: "I suggest that these factors - *together with the fact that people stick better to agreements in the making of which they have played a substantial part -*". This is often the phraseology of the assumption. However, it could make for a problematic assumption. The assertion that parents who make agreements for themselves keep them better than those on whom decisions are imposed seems to claim that if the latter parents went through conciliation then they too would keep to their agreements better. The difficulty is simply that there is no proof between the two parts of the statement that conciliation breeds acceptance of agreements in all couples, and yet this is the image presented. All that it can be said to show is that couples who go through conciliation accept their own arrangements better than couples who go through the courts: the emphasis being on the couples. The assumption rather indicates that all couples, if channelled into conciliation, could make their own agreements and follow them. This is not proven. What could be the case is that couples who go to conciliation are at a level of communication which

allows them to profit from the conciliators intervention, while other couples are at a level which allows them to make their own agreements, and still others are at a level at which they cannot communicate with the aid of anyone, and for whom the way forward is a court order. This is largely the objection which critics such as Davis hold to the wholesale acceptance of the rhetoric of the conciliation movement. Davis argues throughout his work that the need is to respect the position of parents. Ownership of the dispute, for Davis, rests squarely with the parents in whatever communicative state they are in as they seek to separate or fight over their children. He argues that what is needed by parents is an appropriate forum within which to develop a position for the future. This could be solicitor negotiation, conciliation, or the courts. The crucial element which Davis sees in the development of the modern law concerning the child in separation cases is that there are a substantial number of parents who cannot agree, and they need and have a right to the courts as a vehicle of justice which has safeguards of due process. Davis sees the conciliation developments as a way for the courts to avoid the difficult cases by funnelling the couples into a quasi-court process which equally imposes a settlement on parents who cannot control the conciliation process, but imposes the agreement without the safeguards of justice.

The recent work of Dingwall and Greatbatch⁵⁷ presents the conclusion that the claims of the conciliators are not met in reality. The study which they undertook examined recordings of "mediation"⁵⁸ sessions in both independent and court welfare settings. The research was primarily concerned with the claims that the process was encouraging "party-controlled settlements" - that the agreements were created by the separating couple rather than by third party intervention - and that the process was more identifiably "child-centred" than other fora.

In relation to the ownership of the settlement Dingwall and Greatbatch found that the "mediators in all settings studied routinely exert pressure in favour of some options and against others"⁵⁹. They formed the opinion that the mediators identify with some parties, and generally use a great deal of power to pursue goals which the mediator perceived as good. They point to techniques the mediators use to avoid certain discussions in favour of others. They conclude that "by a variety of direct and indirect means, mediators exercise considerable influence over the shape of any agreement"⁶⁰. Ownership of the settlements does not vest solely with the parents.

As to the child-centred claim, the research indicated that references to the child tended to be in pursuit of a particular outcome, "a means of applying moral pressure rather than urging the parents to consider their children's well-being in an objective fashion"⁶¹. This is not to deny the experience of the mediator in identifying outcomes more likely to succeed, and the child-centred ability of mediation may rest in this expertise, rather than in an essentially procedural advantage in the system to determine the child's welfare, as against other fora.

They conclude that, while not fulfilling the claims of child-centred neutrality or settlements owned by the parents, the actual value of mediation is in the expert guided settlement and the efficiency in reaching the settlement. Such research suggests that there is a need to clarify the effect of the paramountcy principle on the para-legal fora.

D. Conclusions.

What is clear from the examination of the para-legal developments in separation law is that over the past 10 years the focus of the intervention of professionals into the private arena of family life at the crisis of separation has changed from the protection of the child to parental decision-making. This is not a complete shift. The court system is still the dominant feature of separation law, with the language of para-legal dispute resolution justifying the development as an "alternative" to a court imposed settlement.⁶² Thus, the conventional justification of the child's best interests remains for the court system, and is not clarified by the involvement of the para-legal systems. The only definition which could be said to emerge from the philosophy of the new separation professionals is that the parents are best placed to decide the child's welfare. In its pure sense this is an unassailable statement, and its acceptance by the alternative separation processes seems to give them an edge over the process of a court imposed settlement. This assumes that the alternatives offer the parents control.

The research of Dingwall and Greatbatch begins to crack open the façade of parental control. What is clear is that the alternative processes do not necessarily offer the parents control over their separation, rather the processes offer a range of fora where decisions can be imposed. The imposition will have a degree of parental involvement, and indeed, where the parents are strong enough to use the forum through which they pass, the arrangements may be designed by the parents. However, the evidence is emerging that the control is not with the parents. This confirms Davis's argument that the problem with para-legal systems is that they provide the same function as courts but do not have the safeguards.

The question emerges then, in the changed provision of services for separating

families, essentially the same as it emerged from the caselaw. The law consistently challenges the professionals involved with the determination of disputes over the children of separating couples, to hold as the paramount consideration the welfare of the child. It is clear that some investigation is needed into the practice of the law of separation to determine what is understood by the child's best interests in a day-to-day sense.

1. Davis and Roberts (1988), p. 28.
2. Davis (1988a), p. 85.
3. *Ibid.*
4. *Ibid.*, pp. 35 - 47.
5. Kressel (1985): He saw the lawyers as one of six types: *undertakers* - who see the situation as a thankless mess with clients in emotional turmoil, *mechanics* who see the task as pragmatic, assuming the clients know what they want, *mediator* - a rational negotiator seeking an agreement especially with the opposing lawyer, *social worker* - concerned with the client's social welfare and adjustment, *therapist* - who sees the lawyers understanding of the client's requests within the emotional experience of the client, and *moral agent* - where the lawyer adopts a subjective appraisal of the justice necessary in the situation.
6. Davis and Roberts (1988), pp 31 - 32.
7. *Infra*, p. 296.
8. Davis and Roberts (1988), p. 29.
9. Davis and Roberts (1988), p. 28 - 33.
10. Guardianship of Minors Act 1971, under the Guardianship Act, 1973, s. 6.
11. Matrimonial Causes Rules, 1977, r. 95.
12. Domestic Proceedings and Magistrates' Court Act, 1978, s. 12(3) & (9), and Guardianship Act, 1973, s. 6.
13. Children Act 1989, s. 7.
14. Priest and Whybrow (1986), para's. 4.18 - 4.19.
15. Cantwell (1986).
16. N.A.P.O. (1990), para. 1.1.
17. See for example, Cantwell (1986), at 280.
18. *Re A (a Minor)* (1979).
19. *Re H (Conciliation welfare reports)* [1986].
20. *Practice Direction* [1986] 2 FLR 171; see Bevan (1989), pp. 135 - 141.
21. University of Newcastle upon Tyne Conciliation Project Unit, *Report to the Lord Chancellor on the Costs and Effectiveness of Conciliation in England and Wales* (1989), which identified two types of court welfare led conciliation: in-court conciliation, where the couple and the welfare officer, sometimes with the registrar, attempt to reach an agreement at the time of the court hearing; or during the reporting process, the welfare officers engage in conciliation between the parties to seek an agreement. see paras. 2.18, 2.27 - 2.33, chapters 7 and 8, and the separate "overview of the research, pp. 1 - 5.

22. Law Commission No. 172, para 3.17.
23. Wells (1989).
24. See, for example, Fricker (1989), and Fricker and Coates (1989).
25. (1989), at 257.
26. (1989), at 56.
27. Latham, 1986, p. 195.
28. Booth report, para. 4.62.
29. Letter to Mr A.B. Wells, Secretary to the Civil Work Committee of the Association of Chief Officers of Probation, (1986) 16 Fam. Law 197.
30. Pugsley *et al.* (1986) 16 Fam. Law 164, at 166.
31. Cantwell and Smith, 1990, p 125.
32. *Ibid*, p. 126.
33. Geneogram: a family chart used to plot the members of the family during whole family sessions.
34. Formerly the National Family Conciliation Council, as of the A.G.M. on 21st October 1992, see (1992) 22 Fam. Law 275.
35. See for example S. Roberts, reported in *Conciliation Issues: Report of the third Bristol Family Law Conference*, (1987) 17 Fam. Law 119.
36. Newcastle CPU, overview of the research, p. 1.
37. Reported in Kleanthous and Kane (1987).
38. Newcastle Conciliation Project Report, 1989, para 1.1.
39. *Ibid*, para 1.4.
40. In his contribution to the Newcastle conference, reported at Davis (1989), at 216.
41. D. Price, *Conciliation and the Judicial Process*, Paper presented at the Newcastle Conciliation Project Conference, University of Newcastle, 11th April, 1989, and published at (1989) 19 Fam. Law 277, at p. 278.
42. For the complete account of the methodology, see Newcastle Report, chapter 7.
43. It was noted that, some retrospective interviewing of clients who had divorced in the previous year to the study extended the study to show whether the settlements last over time.
44. Newcastle overview, p. 8.
45. See Newcastle Report chs. 11 & 12; also see Ogus *et al.*, (1990).

46. Davis (1989); Fisher (1989).
47. Newcastle, overview, p. 8.
48. *Ibid*, p. 3.
49. Ogus *et al.* (1990), at 74.
50. Newcastle, overview, p. 14.
51. Richards (1990); *Conciliation Oxford Style*, (1990) 20 Fam. Law 410.
52. Parkinson (1990b).
53. Westcott 1992 p 279.
54. Law Society Information, *Mediation Services Available in Family Disputes*, (1992) 22 Fam. Law 262.
55. Westcott, 1992, p. 279.
56. Burgoyne *et al.*, (1987), p. 18.
57. Dingwall and Greatbatch (1989) and (1990).
58. The term "mediation" was used to describe the process which was essentially the conciliation approach outlined above in this paper.
59. Dingwall and Greatbatch (1990), p. 5.
60. *Ibid*, p. 9.
61. *Ibid*, p. 10.
62. Mr Justice Ward, speaking to the Family Mediation Conference, London, March 1992, opined that there would always be a court process for those couples who need their "day in court" and the courts' traditional rôles of dispensing justice, adjudicating on irreconcilable issues and protecting the weaker party against the stronger: as reported by Westcott (1992), p 279.