

In whose best interests?

**Two studies of divorce in the
Cape Town Supreme Court**

DEBBIE BUDLENDER

LAW, RACE AND GENDER RESEARCH UNIT
University of Cape Town

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Enquiries to:
Law, Race and Gender Research Unit
University of Cape Town
Private Bag
Rondebosch 7700
South Africa
Tel: (021) 650 3914
Fax: (021) 686 2577
Email: lrg@law.uct.ac.za

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CONTENTS

<i>Introduction</i>	1
1 Race, class, gender and divorce in the Cape Town Supreme Court	9
2 Rule 43 applications in divorce cases in Cape Town	37
<i>Appendix A: Interdicts in terms of the Prevention of Family Violence Act</i>	66
<i>Appendix B: Child support in the Maintenance Court</i>	69

INTRODUCTION

The Law, Race and Gender Research Unit at the University of Cape Town has as its major brief an examination of race and gender bias in the law, and possible programmes to counteract this bias. Within this broad brief, the Unit chose divorce as a focus of its research because family matters, rather than criminal or other civil matters, constitute the area in which women are most likely to confront the law directly. The circumstances before, during and after divorce reflect the lived experience of many women in our society. The events leading up to the divorce reflect the problems confronting the women concerned as well as many others who do not reach the divorce courts. The women's experience of the divorce process itself shows some of the difficulties women experience in gaining a just solution to their problems.

The studies are based primarily on an analysis of 200 files in the Cape of Good Hope Provincial Division of the Supreme Court. Virtually all divorces are traumatic, both psychologically and materially, for those concerned. In the initial stages the research focussed on divorce actions which included an enquiry by the Family Advocate or a so-called Rule 43 application because we expected these cases to highlight two of the most problematic aspects of marital breakup – the economic implications and the rulings regarding children. For each category we extracted a sample of cases from the records of the Cape Town Supreme Court.

The first sample consisted of 50 cases involving a Rule 43 application. Rule 43 of the Uniform Rules of Court provides for a party to a divorce to seek relief in respect of –

- a) maintenance pendente lite (i.e. pending the resolution of the dispute);
- b) a contribution towards the costs of the pending matrimonial action;
- c) interim custody of any child; and/or
- d) interim access to any child.

The action is thus intended to determine the 'ad hoc' arrangements to prevail pending settlement. It is intended for cases where a lack of relief would prejudice, inconvenience or be unfair to either party. It is particularly necessary where a divorce is contested because of the long waiting period for court

dates for these cases. It is also, according to practitioners, often used as a weapon to encourage the other party to settle more quickly.

The second sample consisted of 50 cases investigated by the Family Advocate. The Family Advocate's office was established in late 1991. Since then Family Advocate staff have been required to monitor all divorces involving minor children and to investigate any case where they or the Court are concerned that the arrangements that are proposed may not be in the best interests of the child. Parties to a divorce can also request an investigation if they are concerned about what arrangement will be best suited for them and want expert advice.¹

In looking at the 100 cases involving Rule 43 applications or an investigation by the Family Advocate, we were aware that the method of selection might mean that these divorces differed in significant respects from other divorces where the Family Advocate did not investigate and in which Rule 43 relief was not sought. In particular, cases with Rule 43 applications are skewed towards couples who are better-off financially and Family Advocate cases are skewed towards those which are more complicated and adversarial. To see whether some of the patterns we had picked up applied more widely, we looked at the characteristics of 100 "standard" divorce files.² In particular we wanted to see whether the alarmingly high reporting of domestic assault was peculiar to certain types of divorce actions. The remaining 100 cases were therefore selected so as to exclude any case involving a Rule 43 application or anything beyond cursory examination by the Family Advocate.

In addition to perusing the files, over 20 in-depth interviews were conducted with legal practitioners. Through these interviews we hoped to fill some of the gaps of the case-based approach and thus avoid some of the bias introduced by looking only at documentary sources. The comments and perceptions of the practitioners are included within each of the three reports, but particularly in that relating to the 100 "standard" divorces.

The practitioners, all with experience in family law, were mostly attorneys, but included a few advocates. The group included men and women who had been practising for many years, as well as some still doing their articles. It included those with predominantly wealthy clients, as well as those dealing mainly with clients on legal aid.

1 A paper discussing the results of the work on cases involving the Family Advocate has already been published: F Kaganas and D Budlender *Family Advocate: Issues in Law, Race and Gender* (Law, Race and Gender Research Unit, University of Cape Town: 1996).

2 We use the term 'standard' to describe cases in which neither a Rule 43 application nor an investigation by the Family Advocate was involved.

As we hoped, the practitioners' views threw light on some of the patterns found in the more quantitative data. In particular they highlighted the class differences suggested by the statistics. What is less easy to measure from the evidence is the extent to which the views, attitudes and choices of the practitioner towards different classes determine the outcome or, on the other hand, to what extent the circumstances of the client limit the choice for a practitioner and client.

Finally, several practitioners commented that women would not get a fair deal until they themselves were convinced of their own worth, knew about their rights, and were prepared and able to stand up for them:

"You need a metamorphosis to explain that although she is treated like dirt, in the eyes of the law she is equal. But that becomes a problem because if she is afraid of the man she thinks she will encounter hassles and so she opts for the path of least resistance. It is like an ostrich with its head in the sand. It is particularly if she is not from a very wealthy family and not a breadwinner."

I GENERAL COMMENTS

The 200 cases each represent a "slice of life" of a unique couple with all the idiosyncrasies of their own particular histories and relationship. The legal papers themselves can reflect only limited elements of the history and relationship. There is an obvious question as to whether the limited details in the papers provide an adequate basis for fair decisions by the presiding officer. The papers cannot in any way deal with the heightened emotions and psychological complexities invariably involved in marital breakdown. Judgments on the basis of these "slices" of life, taken out of context, cannot but invite generalisations, prejudice and stereotypes, as the judge must fill in the gaps for him or herself. These difficulties are no doubt one of the factors which cause many judges to exert pressure on parties to settle out of court.

This research relies on the same limited evidence, and is therefore subject to the same criticism of limited knowledge of the lives and relationship of the parties. In extracting those details considered relevant, the papers decontextualise the facts even further.

A second problem with pleadings and affidavits is that the "stories" have been structured and constructed by the legal advisers. The research databases contain much "missing" data, in that information contained in one case is not necessarily included in another. Nevertheless, there is a remarkable degree of standardisation in the type of information supplied, given the wide variety

of life circumstances and experiences of the fifty parties. This standardisation strongly suggests the significant role of lawyers in determining what an acceptable story-line for such an application looks like, which facts are relevant and which not. The research is therefore also an implicit study of the biases, inclinations and world views of lawyers in the field of family law.

A third limitation of the research is that it looks only at what happens up to the time of divorce. So, for example, several of the case studies illustrate the extremely small proportion of their salary which most men are required to pay in terms of child maintenance. But it does not examine what happens in practice in terms of child maintenance – whether the agreed amounts are paid, whether the parent with custody makes successful applications to the Maintenance Court, where the true burden of caring for and rearing the children falls. All of these are important given the acknowledged difficulties with the operation of the current maintenance system, the ineffective implementation of maintenance orders, women's generally poorer prospects in the job market, continuing inflation and the absence of any provision for automatic cost of living increases. It also does not look at the relationship – and particularly assault – between the parties post-divorce, and whether this results in further compromises or effective changes in the way the divorce order is implemented.

Given these gaps, silences and biases, over the 200 cases there are some recurring themes. At least some of the problems and patterns are not addressed, or even acknowledged, in South African family law.

The two areas in which the most striking gender patterns which emerge are domestic violence and the differing economic, or financial, situations of women and men.

II FINANCES

The table below reflects the composite statistics on earnings or income recorded for applicants and respondents across all three sub-samples. The sample is divided both by sex and by an indication of whether the person concerned was the applicant or respondent in the divorce action. The statistics exclude parties for whom no income is recorded. The numbers in brackets indicate the number of people in that category for whom there was an income figure. In some cases no income is recorded because there are no earnings. This happens more often in the case of women than men. In some cases no income is recorded because the other party does not have the necessary information. This happens more often in the case of men than women. Both

these reasons for missing data mean that the gap between women's and men's earnings in the table is understated.

	<i>Applicant</i>	<i>Respondent</i>	<i>All parties</i>
Women	R1 386 (85)	R2 035 (15)	R1 483 (100)
Men	R2 442 (42)	R4 390 (76)	R3 697 (118)
Total	R1 735 (127)	R4 002 (91)	R2 692 (218)

Table

The table shows clearly that applicants generally earn less than respondents and women generally less than men. The two tendencies reinforce each other because more applicants are women than men. However, even women who are respondents are generally poorer than men who are applicants.

The pattern mirrors that found in other countries. The figures above reflect incomes at the time of the divorce. Although this research does not provide post-divorce figures, overseas research suggests that the gender disparities increase over time. "Settling Down" is the second report on an Australian research project which looked at the situation and experiences of divorced parents of dependent children. Five hundred in-depth interviews were conducted with the parents, both soon after separation and five to eight years later.³ The calculations of household income used in this report included any maintenance received from the other parent, and excluded any maintenance paid by the respondent. When the researchers returned to the parties for the second measurement, they found that, overall, the income of fathers had returned to pre-divorce levels, while the income of mothers was, on average, 26 per cent below the previous income.

The data from our cases reflect income, rather than wealth more broadly. Unfortunately other aspects of property are too complicated to allow easy comparisons and tabulations, and were dealt with less comprehensively. Nevertheless, some of the case studies illustrate the importance of housing, in particular. So, for example, a woman might flee the shared home on account of battery, leaving the children. When she files for divorce, however, she has no home to offer the children, is earning less than the man, if earning at all, and has no housing subsidy or assistance. Furthermore, she might have left the children at the common home when she fled, and the legal preference for not disrupting children's lives by, for example, changing their school, will

³ Kathleen Funder, Margaret Harrison and Ruth Weston *Settling Down: Pathways of Parents After Divorce* (Australian Institute of Family Studies, Melbourne: 1993).

militate against their moving. While, in our sample, some of the settlements in respect of the wealthier clients provided for housing for the mother and children, at the lower end of the socioeconomic scale this was very unusual.

III VIOLENCE

The research revealed an alarming rate of spousal abuse. Physical assault was listed as one of the causes for the breakdown of the marriage in at least 19 of the Rule 43 cases, 33 of the Family Advocate cases, and 35 of the "standard" cases. Thus it was an issue in at least 87 – or 43,5 per cent – of all the cases. In the overwhelming majority of the cases it was the woman who alleged that her husband assaulted her – 18 in the Rule 43 cases, 28 in those involving the Family Advocate and 35 in the remaining cases. Men accused their wives far less often – only one of the men in the Rule 43 cases, eight in those involving the Family Advocate, and none in the standard cases. In three of the cases in which men accused women, their wives also accused them of violence. In virtually all the cases, the woman alleged that the assault was continuous rather than a once-off incident.

The statistics above are shocking in themselves. What was even more shocking was the fact that abuse was seemingly not taken into consideration when determining final settlements and orders. So, for example, in a case such as that described above in the housing section, the fact that the woman left the house on account of abuse would not be considered relevant. Or, to take another example, unrestricted access, or even custody, would be awarded to a man despite the fact that he had repeatedly assaulted his wife. Finally, even continued assault did not usually appear to be considered adequate grounds for forfeiture of property.

IV CONCLUSION

Economic inequality and violence against women are endemic in South African society and not restricted to divorcing couples. They are part of the systemic gender inequities in our society. Divorce obviously cannot undo societal inequalities. The concern of this research is that those involved in the divorce process, and the process itself, by ignoring those societal inequalities, often wittingly or unwittingly exacerbate them.

Again, the housing cameo above is illustrative. Another example would be a battered woman who, because of the trauma she has suffered, does not appear to be the ideal, "balanced", "rational" mother in her interview with the Family Advocate, and perhaps even suggests – to keep the peace and

because she cannot afford legal advice and assistance – that her husband can have access or custody or all the property.⁴

The research revealed clear differences between couples at different socioeconomic levels, often reflected in race differences. These affected the types of settlement, as well as the way in which settlements were made. So, for example, wealthier clients were more likely to make a Rule 43 application, and were also more likely to settle the divorce by means of a consent paper. These patterns reflect the wealthier clients' greater access to, and ability to pay, lawyers, and the more extensive property which they needed to divide.

In virtually every divorce both parties suffer to some extent, and their children usually suffer with them. Given the class differences across the parties, however, the facts and "stories" suggest that the suffering within divorces often bears more heavily on one party than the other. In many cases it is not the terms of the divorce alone which cause the disadvantage, but rather the disadvantage is caused by the unequal positions of men and women in the society more broadly, as well as in their marital relationships.

Very often the adjudicators, practitioners, and even the clients, accept these inequalities as given. Yet, in the interviews, acknowledgment of the problem sometimes came from unexpected quarters. One of the practitioners worked mainly for less well-off white clients. This practitioner was among those who spoke least about bias against women. In several instances, for example with regard to child maintenance, he felt that the law operated harshly against men. In respect of the effect on post-divorce living standards, however, he clearly saw the disadvantages for women:

"Both parties will always be financially worse off. A lot of them don't realise that. Especially the women are worse off.... A large proportion of the women are people from Ruyterwacht, where the woman has not worked for 10 to fifteen years, and her chances of employment are slim."

This paper is not intended as a policy document. It does, however, suggest necessary improvements to the system. It supports moves towards a more integrated system – one which expands the ambit of the Family Advocate system so that, in giving advice on the best solutions for children, it can make recommendations in respect of property, and take assault against women and the possible effect on children, into account. It supports greater involvement

4 For a discussion of the role played by stereotypical views of women in South African law and for references to similar work elsewhere, see M O'Sullivan 'Stereotyping and male-identification: "Keeping women in their place"' in *Gender and the New South African Legal Order* ed C Murray (Juta, Cape Town: 1994) 185.

of a wider range of professionals in the Family Advocate system, including psychologists, and even economists or accountants.⁵ It supports clearer guidelines for child maintenance in the Supreme court, and the need for wide-ranging improvements in the operation of and implementation of the system by the Maintenance courts. It supports a concerted campaign, by government and civil society, against the epidemic of violence against women – an epidemic that is so serious that a staffmember in the Family Advocate's office said that the reason that they could not take violence into account in their recommendations was the fact that if they did virtually no fathers would get access to their children.

5 See, in particular, Kaganas and Budlender *Family Advocate* pages 10 ff.

RACE, CLASS, GENDER AND DIVORCE IN THE CAPE TOWN SUPREME COURT

I INTRODUCTION

This paper is based on an examination of 100 divorce cases from the Cape Town Supreme Court. It also draws heavily on interviews with family law practitioners in Cape Town. The purpose of the research was to provide a picture of the kinds of matters that are raised in divorce cases and the economic and social position of parties.

The cases were selected by choosing an arbitrary starting point in the middle of 1992 and extracting all divorce cases which involved neither a Rule 43 application nor intervention by the Family Advocate until the target of 100 was reached. Ten cases were heard on circuit in the Southern Cape. The rest were heard in the Supreme Court in Cape Town.

Because of the nature of the divorce files, the database compiled from the files contains a fair amount of "missing" data. Documents appeared to be missing from a few files. In other cases the papers did not give details of all aspects in which we were interested. There are some details – for example date of marriage – which are required in all divorce proceedings. Many other details are discretionary. Employment and earning details, for example, are often not given, or not given in full. Nevertheless, there are standard formats for divorce pleadings which are followed by most lawyers. For the most part it was these details which were sought, coded and analysed.

Coded analysis of this sort obscures the particularity, complications and uniqueness of each case. The idiosyncracies of private life cannot easily be codified. In addition, reliance on legal documentation rather than interviews limits the information presented in this paper. For example, there are commonly-accepted justifiable grounds for "irretrievable breakdown of the marriage" and commonly-accepted ways of expressing these. The words are

1 Cases involving Rule 43 applications or interventions by the Family Advocate were excluded because they formed the basis of separate pieces of research. See F Kaganas and D Budlender *Family Advocate* (Law, Race and Gender Unit, University of Cape Town 1996) and the second paper in this collection 'Rule 43 applications in divorce cases in Cape Town'.

unlikely to be the words of the plaintiffs or defendants, but reflect the lawyer's coding of the client's story into standardised categories.²

Some aspects of a divorce which are essential for a real understanding of the situation of the people involved were omitted from the papers. Housing is obviously crucial in terms of the economic standing of the parties both before and after divorce but was rarely mentioned. Child support was sometimes included in the pleadings and sometimes not. From the files we could not tell in how many cases the custodian parent had approached the maintenance court instead and, if so, how much she had been granted.

The limited information available to us is the same as that on which judges and the Family Advocate must make at least their first assessments of the justice of claims and settlements. Where, on reading the papers, the Family Advocate feels that the situation might be unsatisfactory, he or she can request permission from the court to launch an enquiry. However, judges will ordinarily have access only to the information in the files – the same information on which this analysis is based. The judge can ask for further details at the divorce hearing. In practice, however, an uncontested divorce is very swift and the questions asked rarely extend beyond the facts included in the papers. The absence of information on crucial areas thus raises the question of the ability of the court to judge whether settlements are fair and reasonable.

II DEMOGRAPHICS

(i) Men and women

Over two-thirds (69) of the plaintiffs in the 100 divorce cases were women. This proportion accords well with overall divorce statistics.

All the practitioners who were interviewed said that they had more women divorce clients than men. Several suggested that the woman has to take responsibility for getting the divorce because men have less interest in the relationship than do women. Thus one explained that "the man is more complacent. [The woman] views the relationship seriously and acts immediately. The man sits back." Several attorneys said that the man was often "sitting back" in another relationship.

Nevertheless, the male-female breakdowns varied between attorneys. In some practices the clients were virtually all women, while others estimated a

60-40 split. A few of the attorneys suggested that women prefer a male lawyer and vice versa. A woman attorney noted that men came to her because they, mistakenly, felt that she, as a woman, would understand their wife and thus assist in strategising the approach. Nevertheless, the two attorneys with the highest proportion of male clients were both men. One seemed to have a reputation for getting a good deal for male defendants. The other, one of the longest practising lawyers in the sample, had not realised that there were more women divorce clients overall until I raised it in the interview.

(ii) Occupation and income

Occupational details were given in respect of 87 men and 82 women in the sample. Of these, 22 men and 16 women were unemployed. Two women were designated as housewives. The remainder covered a wide range of occupations. Income of the parties was specified in fewer of the cases – for 46 men and 43 women.

The available information clearly indicates the disadvantaged position of the women compared with men. While the couples in the sample are generally somewhat better off than the average South African, the male-female differences reflect the relative disadvantage of women in the society more generally. The following table gives the breakdown of the men and women according to the occupational categories of the official South African census. The final two columns give the mean salary for each occupational-gender category as well as, in brackets, the number of cases on which the mean calculation is based. (The three unemployed women for whom income is recorded were receiving state grants.)

The table indicates not only that women are concentrated in the less prestigious and lower paid sectors – clerical, secretarial, service and sales – but also that within all but one of the occupational groupings the average salary for women is lower than that for men. The mean for women "artisans" is skewed by the inclusion of a computer consultant earning R7 000 per month. She might better be classified as professional.

² There are obviously a number of reasons for this standardization: formal legal requirements, the habits of lawyers and the approach of judges all contribute.

	Women	Men	Women - sal	Men - sal
Professional /semi-professional	9	6	2 427(7)	3 782 (4)
Management / executive	1	9	-	8 812 (4)
Clerk / secretary	13	1	1 763 (8)	10 000 (1)
Transport	0	4	-	1 147 (3)
Service /sales	22	7	1 005 (14)	1 235 (4)
Farming	0	-	-	-
Artisan	3	8	4 750 (2)	1 945 (6)
Supervisor / production foreman	10	28	874 (7)	2 047 (22)
Other	0	1	-	1 700 (1)
Not economically active	8	1	-	-
Unemployed	16	22	601 (3)	-
Total classified	82	87		

TABLE 1

The next table gives the mean, median, maximum and minimum income for plaintiffs and defendants and women and men. It suggests that on all measures plaintiffs are generally worse off than defendants and women worse off than men.

	Plaintiff	Defendant	Women	Men
Mean	1 741	2 996	1 504	2 781
Median	1 300	1 904	1 300	1 750
Maximum	7 000	20 000	7 000	20 000
Minimum	80	700	80	700
n	59	30	43	46

TABLE 2

The two divisions in Table 2 interact because plaintiffs are more likely to be female. Table 3 is an attempt to separate the two effects by calculating the mean figures separately for each sex-protagonist grouping. The number of women defendants is too small to be reliable, and is also skewed by one unusually high earner. Nevertheless, the table suggests that it is predominantly the gender difference which produces the pattern in Table 2.

	Plaintiff	Defendant
Women	1 398 (40)	2 912 (3)
Men	2 462 (19)	3 005 (27)

TABLE 3

The difference in income cannot be explained by age differences. The women were, on average, only very slightly younger than the men. The mean age of the men was 36 and the median 35. The mean age of the women was 34 and the median 33.

(iii) Race

Race is not always recorded in the files. For each divorce there is an official form and this includes a question on race. However, in some cases the form was missing from the files. In other cases the race question was unanswered. Nevertheless, from surnames, place of residence, and other clues it was usually possible to guess the race of the parties.

Just under two-thirds (62) of the couples appeared to be "coloured", about one-third (31) were white, four were African and two were "mixed" in the sense that one party appeared to be "coloured" and the other African.

There was often a significant difference in the characteristics of black and white couples. Overall average male white income for both defendants and plaintiffs was R5 338 (15 with data) and black income R1 544 (31). For women the white average was R2 441 (10) and black R1 200 (33). Because in South Africa race can be taken as a proxy for class, the race breakdown is useful when looking for class differences.

One of the more obvious race/class differences was in the marital regime. White – and generally better-off – couples were more likely to have an antenuptial contract. This is probably a reflection of the fact that people in this group are more likely to have access to legal advice and a significant amount of property. Eighty of the couples in the sample were married in community of property and 16 had antenuptial contracts. Fifteen of the 16 with antenuptial contracts were white. The remaining couple with such a contract was one of the two mixed couples.

The antenuptial contract pattern accords with the statistics given by Sinclair for 1981 marriages. Her statistics show that 50 per cent of all white marriages in that year involved an antenuptial contract, compared to only 2 per cent of "coloured" marriages.³

Practitioners raised another class difference explicitly. It was that better-off clients are more likely than poorer clients to settle by means of a consent paper: "Where there is a divorce and money, there is generally a consent

3 J Sinclair "The Financial Consequences of Divorce in South Africa: Judicial Determination or Private Ordering?" (1983) 32 *International & Comparative Law Quarterly* 788.

paper.... I am hesitant to generalise, but consent papers are usually where it is upper middle class, where people will either fight radically or agree easily."

In 35 of the 89 cases in the sample which were finalized, agreement was reached by the parties outside court. These agreements, which are sometimes styled consent papers or memoranda, are documents drawn up and signed by the parties in which arrangements concerning the distribution of assets, custody, maintenance, etc are set out. Thus, in over a third of the cases the judge's role was merely to check the agreement of the parties.⁴

Table 4 compares the average incomes of plaintiffs and defendants along several class-related lines. The data is not complete as income was not recorded for all individuals. Nevertheless, the table shows clearly that among both defendants and plaintiffs whites are better off than blacks, those married with an antenuptial contract are better off than those married in community of property, and those who settle by consent paper are generally better off than those where an order is made. All these categories are, of course, cross-cutting, but they bear out the observations of practitioners.

	Plaintiffs		Defendants	
	Average (R)	n	Average (R)	n
Black	1 081	41	1 655	21
White	3 242	18	6 124	9
Community of Property	1 385	47	1 815	23
Antenuptial Contract	3 573	9	6 687	5
Order	1 219	30	2 246	15
Consent Paper	2 625	19	3 075	10

TABLE 4

III THE COSTS OF DIVORCE

(i) Practitioners' fees

Divorce is not cheap. Most attorneys appear to have two different systems of charging for divorces. Firstly, there is a flat fee for a simple, and uncontested, divorce. One firm interviewed offered a special deal whereby, if the divorce came through within three months, there was an all-inclusive fee of R1 400. Other attorneys mentioned figures ranging from R1 500 plus disbursements to R3 000 for uncontested divorces, and did not speak of any time deadline.

⁴ Nine cases had not yet been finalised at the time of the research, one had been removed from the roll and one postponed sine die.

Once a divorce becomes more complicated, attorneys seem to prefer to use the second system of charging fees which is to charge for hours worked and costs incurred. Under this system, which is the one most commonly used in legal matters generally, an hourly rate is charged for negotiations, drafting and other work involved and the client is also charged for any other expenses incurred in the process. All practitioners said estimates were impossible: "How long is a piece of string?" The costs mount up quickly and were seen by most attorneys as one of the more significant factors leading to settlement. The rising costs also account for the extremely small number of cases which reach the courts as contested matters, and the even smaller number where the case runs its full course. Several attorneys described how they warned clients that they would lose more than they gained by going to trial.

One attorney said that only two of his cases had gone to trial in his five years of practice: "Both were settled during the first day of the trial. In both cases the entire estate went down in legal fees. It was totally against the advice of both sides' attorneys." A younger attorney who has practised in poorer communities – and predominantly in family law – for close on five years, has not had one case which was not settled. A third attorney said he had practised for 20 years and in this time there had been only one or two cases where the judge actually made a decision.

The financial constraints are obviously greater where the parties are poorer. Thus one practitioner noted that "it is finances which force people to settle, and often without the parties being happy. You look at the Family Advocate report and that is it."

In at least two cases the applicant did not have an attorney to assist. However, in both these cases the parties had drawn up and signed consent papers. These were accepted by the court, although one required an amendment. In some other cases the defendant's attorney withdrew during the process. Sometimes the withdrawal would have been to save money and because settlement had been reached. In other cases it seemed likely that it was because the defendant had not been paying.

(ii) Defending the divorce

In nine of the divorces instituted by a woman the husband gave notice of his intention to defend. The woman gave notice of intention to defend in six cases. The nature of the defence was not usually evident from the files. Our other research suggests that few defendants contest the grounds of divorce. More often they oppose details in the applicant's particulars of claim.

Table 5 separates the parties by gender, by whether they were plaintiff or defendant, and by whether they notified an intention to defend. It gives the mean incomes for each of these groupings. The number in brackets is the number of cases for which we had the necessary income information.

	Plaintiff		Defendant	
	Women	Men	Women	Men
Defended	1 605 (4)	2 498 (5)	3 000 (1)	2 869 (2)
Not defended	1 375 (36)	2 449 (14)	2 537 (4)	3 086 (23)

TABLE 5

We would expect that it would be those with higher incomes who would be able to defend. We would also expect them to have more wealth to fight over. Because the table excluded the unemployed – who have zero income – the patterns are not completely reliable. Nevertheless, the figures are, with one exception, as expected. Men generally earn more than comparable women and those in defended cases earn more than in undefended cases. The exception is the cell containing the two men defendants in defended cases. We would expect these men to earn more than the woman in that position, as well as more than the men in the undefended cases. The anomaly could be due to the small number of cases in many of the cells, and particularly the defended cells. Or it could be that our supposition is incorrect.

(iii) Legal Aid

In at least thirteen of the cases in the sample at least one of the parties had legal aid.⁵ Some of the attorneys interviewed had a large legal aid practice. One attorney estimated that 70 to 80 per cent of his large family practice was legal aid. Some of the attorneys received regular clients through the Legal Aid Office's roster. Others sent clients to Legal Aid when they were likely to pass the means test. However, some practitioners said that clients perceived the legal aid system as so cumbersome, slow and inconvenient that they preferred to pay off the fees in instalments. Finally, a few attorneys served mainly middle-class clients and had virtually no legal aid clients.

At the time of the research Legal Aid was paying a sum of R750 plus disbursements for a divorce. This amount was exactly half of the cheapest

5 One of the couples was mixed, one white, and the rest "coloured". A further case was done in forma pauperis.

ordinary rate for a straightforward divorce encountered among the attorneys interviewed, although the latter rate sometimes included disbursements.

A flat fee for divorce is advantageous to the client and to the Legal Aid Office as it allows them to budget more easily and accurately. It can, however, backfire in more complicated cases because practitioners may be unable or unwilling to put in the necessary (unpaid) time and effort. Where the divorce is paid for by the client, many attorneys cover the possibility that the case may be complicated by stipulating that the flat fee then falls away. The legal aid system does not allow this flexibility.

One or two attorneys expressed their distaste for doing legal aid divorces. The low payment was no doubt responsible, at least in part, for this distaste. Bureaucracy and form-filling compounded it. The following observation is typical: "There is a tendency on my part not to do legal aid because it is time-consuming. You are not paid in relation to the amount of work. Then there is the never-ending delay. You get the cheque six or seven months afterwards...." Interestingly, this attorney felt that legal aid worked better in respect of criminal cases: "Criminal payments from legal aid are much quicker, perhaps because of the quicker turnover. They get greater attention."

According to the *Report of the Legal Aid Board*, assistance was given for a total of 11 620 divorces in the 1991/2 reporting year. This was 20 per cent of the total number of legal aid applications granted, and 33 per cent more than during the previous year. Divorces were the biggest single category of legal aid after criminal cases.⁶ Nevertheless, there is a perception that it has become more difficult for people to get legal aid for divorce:

"The guidelines have become very strict. Before it was very easy. Now, if there are no minor children, it is 'no'. Even if she has no job and there are older children and the husband is abusive. So she tries with the help of her family to get the R500 for the deposit and stamp."

The seeming anomaly of an increase in awards together with a perception of increasing difficulty in securing legal aid, could be explained by the simultaneous increase in the divorce rate and an ailing economy which means that many of the parties to a divorce are unemployed.⁷

6 *Report of the Legal Aid Board for the period 1 April 1991 to 31 March 1992.*

7 *South African Statistics 1994* (Central Statistical Services, Pretoria) 3.10 and 3.13 gives the following figures:

Marriages: 1980: 45 165	Divorces: 16 543	36.6%
1985: 44 840	17 035	38.0%
1990: 45 660	20 031	43.9%

IV CAUSES OF MARRIAGE BREAKDOWN

"Substantially more women than men seek to become divorced ... and marriages fail more as a result of the unacceptable behaviour of husbands than of wives." (Milton Kinkel, a leading Johannesburg divorce lawyer, quoted in *Personal Wealth*, supplement to *Financial Mail*, First Quarter 1993)

In seeking a divorce the plaintiff must substantiate the allegation that the marriage has broken down irretrievably. Where the other party contests the allegations in the particulars of claim, he or she again advances reasons. Despite the complexity and variety of relationships, individuals and circumstances, reasons tend to fall within a limited range of categories. In terms of the law it is necessary to prove only sufficient grounds for the breakdown. The stated causes do not, therefore, cover all the circumstances of a case. Nevertheless, a breakdown of reasons given in the pleadings reflects patterns which provide food for thought.

Table 6 reflects the number of times each of the standard causes was cited in the 100 cases. It also indicates whether the cause was advanced by the woman or man.

	Female plea	Male plea	Total
Assault by partner	35	0	35
Repeated assault	30	0	30
Abusive language	23	3	26
Absence without reason	18	3	20
Assault of children	2	0	2
Undue intimacy with others	26	8	34
Alcohol abuse	34	2	36
Drug abuse	12	0	12
Not supporting wife and children	36	0	36
Not performing duties	0	1	1
Lost love and affection	38	19	57
Partner said lost love	26	17	43
Not living as husband and wife	36	22	58

TABLE 6

In all categories, except the gendered one of the woman not performing her domestic duties, the women complainants outnumber the men. The disparity is, to some extent, explained by the high proportion of women plaintiffs.

Because more women are plaintiffs and not all cases are defended, men do not have the same chance of advancing what they see as the causes of breakdown. As noted above, in this sample 69 of the plaintiffs were women. In at least 15 cases in the sample there was a notice of intention to defend. But even these did not all get to the stage of drawing up a separate plea. Nevertheless, the female:male proportions in most of the categories in the above table support Kinkel's suggestion quoted at the beginning of this section that the man is more often at fault. This is because the proportion of complaints in each category is greater than the 7:3 female:male proportion in plaintiffs. It is only with the less accusatory causes – "loss of love", and "no longer living together as husband and wife" – that women complainants do not far outnumber men.

In discussing causes, the observations of practitioners were often influenced by the class of client whom they were serving. It is, therefore, useful to construct a table similar to Table 6, but this time broken down by race (as a proxy for class). In Table 7, the first column of numbers shows in how many of the 30 white cases a particular reason was advanced. The second shows in how many of the remaining 70 (black) cases that reason was advanced. If there were no class bias, we would expect a uniform black:white ratio of 2,33. To facilitate comparisons with this hypothetical non-bias situation, the third column gives the black:white ratio for each cause.

	White	Black	Ratio
Assault by partner	3	32	10,7
Repeated assault	3	27	9,0
Abusive language	2	24	12,0
Absence without reason	3	17	5,7
Assault of children	1	1	1,0
Undue intimacy with others	4	30	7,5
Alcohol abuse	5	31	6,2
Drug abuse	2	11	5,5
Not supporting wife and children	6	30	5,0
Not performing duties	1	0	0,0
Lost love and affection	17	40	2,4
Partner said lost love	14	29	2,1
Not living as husband and wife	20	38	1,9

TABLE 7

The table shows substantially higher reporting of abusive language, assault, drug and alcohol abuse, non-support and absence from the home among black divorce parties than white. The more sanitised 'loss of love and affection' and 'no longer living together', on the other hand, are more likely to be cited in white cases than are other reasons.

The interviews and the figures provide further insight into some of the more important reasons given for divorce. Below we focus, in particular, on assault, as it was the high incidence of assault in earlier work on divorce that prompted this analysis.

(i) Assault

(a) Incidence

Assault covers a wide spectrum. In the interviews it ranged from the man who "pushed [his wife] away with a flat hand – the low end of assault" to the husband who threw his wife out of a second-floor window and then went to the hospital and harrassed her there. The statistics show assault as a gender-biased phenomenon. In all cases in this sample the alleged assailant was a man. In 34 of the 35 cases in which assault was alleged, the plaintiff was the woman. With 69 woman plaintiffs in total, this puts the incidence of allegations of assault in divorces initiated by the woman at virtually half.

In terms of race and class, the sample shows assault being alleged across the board, but concentrated among black, and thus lower class, parties. Of the 34 cases in which assault was alleged, 29 involved "coloured" couples, three white and two African. Thus both the African cases and half the "coloured" cases had this allegation, compared to only one in ten of the white cases.

The overlap suggested here between race and class is supported by the limited information available on income. The mean income of the 14 men accused of assault for whom we have income recorded was R1 320, compared to R3 420 for the 32 with no assault recorded. The mean income of the 19 women accusers was R988, compared to R1 912 for those not making this accusation.

Table 8 divides male assaulters and female assaulted into income categories. (Both exclude unemployed people, and thus almost certainly underestimate the differences.) The table illustrates the lower earnings of women. Eight of the 43 women and none of the 46 men earn less than R500 per month. On the other hand 15 of the men and only six of the women earn over R2 500 per month.

<i>Income category (R)</i>	<i>Assaulters</i>	<i>Assaulted</i>	<i>Total</i>
Up to 500	0	8	8
501-1000	10	12	22
1001-1500	10	7	17
1501-2000	10	7	17
2001-2500	1	3	4
2501 plus	15	6	21

TABLE 8

The income statistics exclude those who were unemployed, and not earning. Allegations of abuse were higher for unemployed men than for the sample as a whole. Fifteen of the 22 unemployed men were accused by their wives of assault. On the other hand, six of the 14 unemployed women accused their husbands of assault.

The statistics show that assault is a very common phenomenon. At the bottom end of the scale, attorneys reported horrifying rates of assault. I asked the attorneys whether they asked all clients about assault and whether they thought they were told about all cases where it occurred. Some said that many clients reported the assault immediately and spontaneously. With others, they said, they recognised regular patterns: "If she has told me she wants a quick divorce and says he drinks, then I ask about violence." Another noted that "it is not difficult to establish when she takes her sunglasses off, and her eyes are blue".

Some of the interviews suggested that it is even more common than indicated by the statistics as a decision to include allegations of violence in divorce pleadings is usually a strategic one. Some of the attorneys said they had no reservations about including allegations of assault in the particulars of claim. Others said that they did not include all allegations and the files would thus underrepresent the true figures, even for the less affluent.

An advocate acting primarily for richer clients said in discussing assault as a factor in divorce cases that he "always thought there was some sort of class factor involved". However, he now realised that this "is not so. It permeates all echelons." The interviews revealed some of the reasons why there might be a perception that less violence occurs at the higher end of the socio-economic scale.

One attorney described the way she discussed whether or not to include the allegations with clients who reported assault:

"A lot of them are still living in the same house.... I always say, if I put it in [what will happen]? They will say that if he gets the summons, he will be very abusive. So, if there are other ways to say it, I do it.... [On the other hand] sometimes the woman is what you might call 'empowered' and says she wants to stand in court and say it and make him ashamed. I generally leave it to them. I explain it is not necessary. They can tell the world, but if he will be abusive, it is not worth it."

For another attorney with a poorer clientele, including the allegation constituted protection for the woman: "I always put assault in the papers. I do that because, inevitably, he will beat her up constantly while the matter is on. So then I can phone the police and they say it is a civil matter, so I read out the summons."

At the top end of the scale different considerations operated. Firstly, as with less well-off clients, the attorneys said they could not tell the true incidence of assault as clients might be ashamed to report. One was sure that "white women are more ashamed to mention abuse". Others suggested that clients might have agreed with their partner not to report.

One of the attorneys reflected on social and psychological reasons why many women would not report assault. Her comments support the evidence in the literature about the reluctance of women to report domestic violence:

"There are definitely more cases than is admitted. Unquestionably. Women are embarrassed because they have endured it for so long. They are embarrassed even to admit it to themselves. I asked a coloured woman and she said she had not been assaulted. Then later she said something about being hit. I queried, and she said it was just 'n paar klappe'.⁸"

It appears that her father hit her mother. There is a distinction made between what she feels he is entitled to do and what happened to her friends.

Even where wealthier clients do tell the attorney, allegations of violence are often not included in the papers. Practitioner after practitioner pointed out that including these allegations would only annoy the alleged perpetrator, and thus make a favourable settlement more difficult: "You blow the deal if you say there is assault." Leaving out the allegations becomes the reward for a reasonable settlement: "The man gets a bonus for being a mensch. They are 'incompatible' means that there was an affair and he feels terrible."

⁸ English: "a few slaps".

Where the man has the money to defend, the attorney might also be stricter about the amount of "evidence" or "proof" the client can bring forward: "If she claims assault, the next question is whether she has laid a criminal charge, or has a witness, or has gone to a doctor. If she can't say yes, I say let's not make the allegation. Forget about it."

Nevertheless, one of the high-end attorneys said that assault, where alleged, would be included in particulars of claim, even if not mentioned in court:

"If there is a consent paper – and that is sometimes even before you get to particulars – or if it is imminent, you might word it in very general terms, or allege assault in the papers and lead evidence on the rest. So the judge will read and know you are not leading so as not to embarrass, not because it is not true. The chances of leaving it out of the papers are low."

Generally, however, it seems that, particularly at the high end, statistics based on particulars of claim will underestimate the true extent of assault.

(b) Assault, alcohol and drugs

Assault is just one indicator of a "sick" society in which people abuse drugs and alcohol as well as people. Very often substance and people abuse happen together.

In 24 of the cases in which assault was alleged there were also allegations that the husband abused alcohol. Twelve of the 15 unemployed men accused of assault were also accused by their wives of alcohol abuse. In each of the nine cases in which the woman alleged that her husband abused drugs there were allegations of assault. In eight of these cases the woman alleged that her husband also abused alcohol.

(c) Characteristics of divorces with assault

The preceding discussion has looked at the incidence of assault in terms of class, race and substance abuse. We can also ask whether there are other distinguishing characteristics in terms of the marriage or divorce itself.

Table 9 gives the duration of the marriages in the sample, from date of marriage to date of divorce, for those cases for which we have both these dates. About a fifth of the couples were married for three years or less. While the majority – over half – of the marriages lasted under ten years, some were much longer. The table also provides, in the final column, the duration for those cases with allegations of assault. Although there are no marriages of

longer than 21 years in this category, the distribution is otherwise very similar to the total sample. What we do not know is at what stage in the marriage the violence started.

<i>Duration</i>	<i>Total</i>	<i>Assault</i>
Up to 3 years	18	5
Above 3 and under 6	12	6
Above 6 and under 9	18	4
Above 9 and under 12	15	5
Above 12 and under 15	6	2
Above 15 and under 18	7	4
Above 18 and under 21	4	2
Above 21 and under 24	4	0
Over 24	3	0

TABLE 9

Table 10 makes a similar comparison for the time – in months – between the issuing of summons and the final divorce.

<i>Months from summons date</i>	<i>Total</i>	<i>Assault</i>
Up to 2 months	42	13
Over 2 and up to 4 months	20	10
Over 4 and up to 6 months	7	1
Over 6 and up to 8 months	6	1
Over 8 and up to 10 months	5	1
Over 10 and up to 12 months	0	0
Over 12 and up to 14 months	0	0
Over 14 and up to 16 months	1	0
Over 16 months	6	1

TABLE 10

Table 10 suggests that, if anything, cases involving assault reached finality more quickly than the average case. Eighty-five per cent of the assault cases were settled within four months, whereas only 71 per cent of the total was settled within this period. Only one of the settled assault cases took longer than 16 months. This shorter time could reflect the class difference, as divorces involving less property, and with less well-paid attorneys, are usually done much more simply.

Of the 35 cases involving assault, only four were settled with a consent paper. This is not surprising. Firstly, the drawing up a consent paper requires communication between the parties. Further, because consent papers are more commonly found in wealthier divorces, the pattern again reflects the class bias in reporting of assault.

(ii) Undue intimacy with others

Table 6 shows far more women than men claiming that their partners engaged in adulterous affairs. The difference is greater than can be explained by the proportions of male and female plaintiffs.

One attorney said he applied the principle of avoiding damaging allegations, mentioned in connection with assault, to adultery: "If we have brokered a settlement, we would leave it out. I avoid it if possible. If it looks like a fight, I would definitely put it in." Thus again the numbers in the table are probably an undercount, particularly for the wealthier couples.

Practitioners made it clear that the judicial attitude to adultery was gender-biased, and that a double standard operated in respect of men and women who engaged in extra-marital affairs. A relatively young attorney reported: "I had two cases recently where the women moved straight out into adulterous relationships. My boss said don't even try for personal maintenance. Forget it. No judge will do that. Especially Judge X. He hates adultery." One of the most experienced practitioners, serving a wealthier clientele, stated: "Fault is the biggest discrimination. The women go mad. He can have as many affairs as he likes. In reality, she gets [only] the divorce. That is where fault counts for men. [On the other hand,] if the woman has an affair, there is no personal maintenance and perhaps a huge knock to the capital claim. It is major discrimination."

V CHILDREN⁹

(i) Demographics

Children were involved in 76 of the cases. There were 150 minor children involved altogether in the 100 cases. In two cases the woman was pregnant at the time of divorce proceedings. The next table reflects the number of children in each of the relationships. Three-quarters of those with children had only one or two children. Only six had four or more.

⁹ Because the sample excluded cases involving intervention by the Family Advocate or a Rule 43 application, the information in this section may be skewed.

Number of children	Number of cases
1	33
2	24
3	13
4	4
5	1
9	1

TABLE II

The oldest children ranged in age from one to twenty. In 31 of the cases the oldest child was under six.

The youngest children ranged in age from under one year to 18 years. In 48 cases – well over half of those with children, and nearly half of all cases – the youngest child was under six. In 70 cases the youngest child was not yet a teenager.

(ii) Early pregnancies

Some commentators ascribe the increase in the divorce rate and the large number of unhappy marriages to the fact that people marry at too young an age. In particular, it is sometimes claimed that forced marriages – where couples marry because the woman is pregnant – are particularly at risk.

In at least 15 of the cases, the marriage date and age of the oldest child imply that some children were born premaritally. Because of the crudity of this measure – by year rather than exact date of birth and marriage – this could be an undercount. It excludes children born in the same year as the marriage, as well as those who were pregnant at the time of the wedding. The 15 are spread across the racial groupings – 10 “coloured”, two white, one African, one mixed and one unclassified.

In at least 11 of the cases, the oldest child was born while the mother was still in her teens. Nine of these women were “coloured” and two white. There did not appear to be a significant difference in the duration of marriage of those with teenage mothers and those without. There also did not appear to be a higher likelihood of assault. Assault was alleged in five of the 11 cases – four “coloured” and one white. Thus, if anything, assault was less common for the marriages with teenage pregnancy.

Ten of the 15 cases in which at least one child was apparently born premaritally involved allegations of assault. This is about the same proportion as in the overall sample and does not suggest that these marriages are more vulnerable to violence.

(iii) Child abuse

Table 6 shows that there were two cases in the sample where child abuse was alleged. In both cases the woman alleged that her husband assaulted the children. That there are any cases of child abuse in the sample at all is interesting, because these cases were specifically chosen to exclude cases investigated by the Family Advocate.¹⁰

(iv) Child support in divorce

In 65 of the cases the particulars of claim included an amount in respect of child support. In 13 cases the plaintiff (12 men and one woman) offered to pay something. The amounts here ranged between R50 and R500 per child per month. In the remaining cases in which the plaintiff claimed maintenance for children, the amounts ranged between R20 and R1 250.

Forty-three of the divorce orders specified the sum to be paid as maintenance for children. In ten the order was given against a plaintiff, with amounts ranging between R50 and R450 per month per child. The amounts awarded against the defendant ranged from R50 to R800.

Child support is a crucial item in any divorce in which children are involved. It is a deeply gendered issue as usually “the wife holds the baby”. Thus, unless there is some arrangement whereby the man pays for the children’s expenses, the mother is the one who bears the burden both of childcare and in financial terms.

As with so many other aspects of divorce, there are distinct differences between the approach and outcome for rich and poor. The starkest difference is that the issue of child support will usually be dealt with in the Supreme Court – as part of the divorce – for the wealthier couples, while it will be dealt with by the Maintenance Court for the less well-off.

Many of the practitioners interviewed assumed that the Supreme Court provides better assistance and the research did not explore this issue. However, analysis of the sample of 100 cases bear out some class basis in the method in which maintenance is treated. Firstly, of the 13 defendants voluntarily offering maintenance, six were white and seven black, proportions very different from the overall race breakdown. Secondly, child support was included in the divorce orders of 14 of the 15 white women who asked that

¹⁰ The divorce order in the first case was in terms of a consent paper. The second case involved a white South African woman and visiting Japanese national who had since disappeared. The order specified that the woman would get guardianship.

their husband pay maintenance. But it was included in the divorce orders of only 17 of the 36 black women who made similar requests.

Thirdly, while the award was in no case for a larger amount than requested by the plaintiff, the average award was R259, more than the average of R235 in the particulars of claim. This apparent anomaly is explained by the court's not awarding any maintenance at all to those with the smaller original claims. Out of the 23 claims for R150 per child or less, only 11 – fewer than half – resulted in awards. Conversely three-quarters (21 out of 28) of the claims for over R150 per child resulted in awards.

Some of the attorneys serving the lower end of the scale accepted that the Supreme Court should not deal with child support. They argued that their job was to get the divorce through, and that including support would delay matters and add to costs. They said it was not appropriate for the Supreme Court to become involved in detailed investigations: "The judges don't have time for an in-depth inquiry into the finances. The Maintenance Court is there for that."

These practitioners argue that the Maintenance Court was established for the specific purpose of assessing maintenance and that by excluding the question of maintenance from the divorce proceedings they reduce tension, time and expense:

"If I see they can't come to an agreement, I put it in the consent paper that it will be regulated by the Maintenance Court. My argument is that he can agree to R1 000 now, but not acknowledge the debt. If you make a case for dropping it, you can reduce unnecessary anxiety now."

Others would have preferred the Supreme Court to deal with maintenance, but felt that "the Supreme Court tends to shirk its duty when it comes to maintenance". Nevertheless, several of the practitioners said they included a plea for child support, even for poorer clients: "We always ask for maintenance, in spite of whether [the husband] works or not.... We put it in because you can't leave it out. You can't make those decisions." The same practitioner continued:

"I always ask if the woman knows about what he earns or what she can afford if he assists. If there is a lot of money, it is about a third of his salary. The maximum is a third If he earns a good wage [the court will give it], else it is too much and they reduce."

Another attorney serving mainly poorer clients complained that "judges rarely grant maintenance, unless there is evidence of employment and that

he can afford it.... I feel it is wrong not to put it in. It is important, even if the man is unemployed."

Where child support was included in the divorce order, the practitioners felt this was often inadequate:

"They don't take in the hidden expenses. If a child is with you, they don't take that into account.... There is a fixed amount set and things like school are not added on. The woman picks up that cost.... The lawyer or judge argues the income is so low that it is not practical to have the other payments."

But even in relation to wealthier clients practitioners spoke of the lack of recognition of the real cost of raising children. They felt that women, men and judges all erred in this way:

"We are looking at three times what she thought it was, and double what her husband can afford. R5 000 for two kids at this level does not touch sides. Few people can afford that after tax. I ask for R5 000. I can justify R10 000."

In the sample there were 27 cases in which child support was included in the divorce order, and where we have details of the payer's income. By multiplying the amount per child by the number of children, we get a total amount due per month. The median percentage was just over 20 per cent of the payer's income. There did not appear to be a pattern between the relative wealth of the paying parent and the proportion of the income he or she was required to pay.

(v) Escalation clauses

Cost of living allowances are rare and were included in only five divorce orders. All of these cases were settled by consent papers. Practitioners all agreed that judges would generally not include cost of living allowances unless the parties agree that they should. However, one said that the occasional judge might ask why the practitioner had not included the plea.

Practitioners themselves seemed to regard the cost of living plea as an extra. One explained her reluctance to include it by her perception of the judges' "antagonism". More often the practitioners referred to the reluctance of the paying party: "I don't ask for a cost of living increase unless it is upper class and there is a lot of money. Then it is relevant."

Several practitioners said they use the cost of living plea as an expendable bargaining counter: "If you hit the jackpot, the man says cpi [consumer price index]. If I act for the guy, I never agree to that."

The divorces in the sample took place when South Africa had a double-digit inflation rate. Where the divorce order did not include an escalation clause, its omission sentenced the women to repeated trips to the Maintenance Court and/or to severe and ongoing reductions in the real value of the award. If the women did, indeed, take the theoretically recommended route and apply to the Maintenance Court for regular increases, there would be a cost to her in terms of time, energy and money. There would also be a cost to other women and society in terms of an added load on an already overburdened court.

VI SPOUSAL MAINTENANCE

In 15 of the cases – two men and 13 women – the particulars included a plea for spousal maintenance (alimony). In one case the amount was a nominal R1. In the others it ranged from R50 and R1 000. The median amount was R150. In terms of race, one of the applicants was African, nine were "coloured" (one from the mixed couple) and five white. Whites were thus somewhat overrepresented.

Spousal maintenance or alimony was awarded in six cases – in all cases to women. The nominal R1 was awarded and the amount of other awards ranged between R50 and R300. The mean amount, excluding the nominal R1, was R166. Five of the cases in which spousal maintenance was originally requested but not included in the final order were settled by a consent paper. The applicants concerned had presumably been persuaded – either by satisfactory alternative settlements or by the fact that the courts are not keen on spousal maintenance – to give up this plea.

The race breakdown of awards is interesting – one African, and five "coloured" women received maintenance. This profile accounts for the low value of the awards. It also suggests that lawyers at the top end of the market are suggesting different sorts of settlements.

Several practitioners working at the top end of the market described the way in which different financial and economic packages could be arranged if sufficient capital and assets were available. Thus one, in talking about spousal maintenance, said she had an "informal rule. At 45 you are entitled if you have been married for ten to 15 years and have not worked for 25 years. Then you are beyond rehabilitation. Also, it is difficult for white women at

present [in the job market]." The practitioner noted that "our country is happier with spousal maintenance than elsewhere. Here, because we have maids, there is more of a trend." Nevertheless, she, like other lawyers at this level, said she preferred capital settlements: "Capital is better and she does not have to hold out her hand.... If I act for the man I do everything possible to get out of (spousal maintenance). It is a lifelong sentence."

The last quote suggests that alternative arrangements suit both women and men. They suit men because they do not have to continue paying and they suit women because they do not have to beg or worry constantly about whether the order will be observed. Other attorneys, across the economic spectrum, said that many women were opposed to personal maintenance – and sometimes even to maintenance for their children. They said the opposition stemmed from pride and/or an accumulation of frustration and anger which made them want to avoid any further contact with, or dependence on, the man:

"A lot of women say they don't want personal maintenance, against our advice. You have to sit down and explain that they are going through a bad experience but that there is a bad job market. They start being noble and talking of principles."

Overall the interviews suggest that where there is no spousal maintenance the man gains economically. Even where there is an alternative settlement, it will often be for less than the real financial worth of spousal maintenance because the woman will trade some proportion of the value for the benefit of avoiding enforcing regular payment.

Women at the lower end of the economic scale are thus doubly disadvantaged. Firstly, there are insufficient assets on which to base an agreement which avoids maintenance. Secondly, spousal maintenance awards are usually premised on the woman's not having worked for the duration of the marriage. For poorer people, a non-working wife is less of an option than for those who are richer and the woman will usually have been working before the divorce if she was able to find work. Nevertheless, because women generally earn less than men, because their jobs are less likely to include benefits such as housing, and because women usually bear more of the extra work of looking after the children, when a woman and man each have to rely on their separate incomes, the woman is likely to be hit harder.

6 PROPERTY

Analysis of the details of settlements in terms of property is very complicated. Firstly, there are differences between those married in community of property, those married by antenuptial contract, and those subject to the accrual system. Secondly, there are the vast differences between the couples in terms of the overall wealth and the items which constituted the property of the marriage. The discussion below can, therefore, only point out a few of the issues involved.

(i) Forfeiture

Section 9 of the Divorce Act 70 of 1979 stipulates that the court may make an order that one party forfeits all or part of the "patrimonial benefits" of the marriage in favour of the other when it "is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited".

In nearly a fifth of the cases in the sample forfeiture was requested. One of these was in respect of a marriage out of community of property.

The attitudes of the practitioners towards forfeiture varied widely. This was one area in which the differences did not appear to be related to the socio-economic class served. One of the practitioners serving less well-off clients said: "I get forfeiture most of the time. I ask in a lot of cases because the client is the sole breadwinner. It is not a problem to get it." Another pointed out that "if there is no property, it is useless to include that clause". A third had yet another approach: "I generally ask for forfeiture where I feel it is reasonable ... even if there is very little to forfeit. It is almost a symbol. Sort of a punishment."

Forfeiture was granted in only six cases in the sample, all in respect of marriages in community of property. In one case it was specifically noted that the house, rather than other property, was to be forfeited. In other cases there were no details in the file as to what forfeiture entailed.

In seven of the cases with allegations of assault the applicant asked for forfeiture. Four of the six cases in which forfeiture was granted were assault cases. Assault thus does seem to affect chances of forfeiture being awarded once it is requested. Cases involving assault accounted for under half of the forfeiture claims, but for two-thirds of the awards. On the other hand, forfeiture is requested in surprisingly few of the cases involving assault despite the fact that the Act speaks of "substantial misconduct" as the ground for forfeiture.

(ii) Housing

Housing is a major component of most couple's assets. A plea that the house be transferred into the woman's name was included in one particular of claim in the sample. Three orders specified that the house was to go to the woman while one stated that it was to go to the man. In other cases the files did not provide information on the housing situation and/or settlement. This very limited reference to housing is strange given the importance of shelter, its high relative cost in the expenditure of most households, and its physically indivisible nature.

At the higher end of the scale, the house is usually owned by one of the parties. Where there is adequate wealth, the property can be retained by one party, and the other paid out an equivalent share in some other form. At this level, there seems to be general agreement among practitioners that the custodian parent, usually the woman, has a greater claim on physical property: "The mother and the children keep the house. That is the golden rule. It is of primary importance. I say that to the male clients as well."

At lower levels of wealth, the attorney might take the same theoretical approach as those serving the slightly better off – "the rule between attorneys is that the person with custody is entitled". However, "the other party is paid out a half share. There is always a quid pro quo." Problems arise when there is not sufficient wealth to allow the women to keep the house. As another attorney explained, "the main thing is not who gets the house, but who can afford it. If there is a house, 80 per cent of the women can't afford it on their own. The husband won't stay in the house because he doesn't need that big place." In practice, at this level the property is often sold, the proceeds divided, and each party must then organise their own accommodation.

The arrangement usually entails greater difficulty for the woman than for the man. She needs a bigger dwelling than the man as she usually has the children. She is also less likely than the man to have a housing subsidy from work. One attorney described the recurrent problems where there is non-Council property:

"Then it is a headache. There, speaking on the basis of women, even if she is left with the minor children, if the man paid the contribution, he wants to keep the property and pay a half share and he expects her to do miracles with R40 000 to R50 000 in terms of a home. The women are never in a position to do the opposite. Especially with self-help schemes, where there is not too much equity, and the woman has three

minor children, and the lump sum is R10 000. She has somehow to get another accommodation with that."

Housing difficulties can cause women to cede custody to their husbands, or even to abandon divorce proceedings. As one practitioner explained, the woman will say "now I still have a house and I would rather [remain in the marriage] and live in unhappiness".

The most severe housing difficulties occur at the lower end of the scale. Firstly, there is both an absolute shortage of available housing, and often a lack of money to pay for it. Secondly, many of the couples are in Council housing, whether rented or owned. There is a lot of confusion as to what Council policy is. Different attorneys also adopt different approaches. The approach seems to depend, to some extent, on the socio-economic level served. Those serving clients who own rather than rent, often take a more active interest in housing. One suspects that some attorneys also pay greater attention to housing with paying clients than with those on legal aid.

The different approach to owners and renters, and to poor and less poor, is fairly explicit in the explanation of a young attorney:

"If it is purchased, one would include it in the consent paper. If they are renting, they must make their own arrangements with the Council. We don't interfere unless we receive specific instructions. It is usually in the man's name.... If the man does not abscond, they must make an arrangement between them. I don't know how the procedure works with the Council for the married and divorced people. The paragraph (in the draft particulars of claim) is for if the house is purchased and the wife paid the deposit. Then we ask for it to be changed. We ask for an order in substitution. If the husband fails to sign, then the sherrif can sign instead. But the majority rent, especially with the lower class."

This attorney said he was ignorant of the details of Council policy. Other attorneys had conflicting understandings of the policy. One attorney said he had

"not received problems in feedback from clients in terms of Council property. The feedback is that they assist the woman if she has minor children. I try to build it into the order, to substitute her as the lessee. They take the final order to the Council and the formalities are done there."

Others said that, whereas this approach had applied in the past, it had now changed:

"The Council had a policy previously that whoever had custody got the house. Lately it is an open policy. Now you must ask for an order in Court on tenancy because they say the husband signed the lease. You can't ask the Court to make an order on someone else's property, but because the Council insist on an order, I put that in.... The judges are prepared to make the order, but strictly speaking they can't if the Council is not party. Some do and some don't."

Another informant described the same shift in policy in terms of African housing. He put the date of the change as January 1990.

The new policy described above entails particular problems for women. The Council is probably prepared to transfer where there is an explicit agreement between the parties. But, as the statistics show, the majority of divorces in the lower socio-economic groupings are by order rather than agreement. Housing is a "hot topic" and "the Council is scared". Unless the orders contain a clause that the house be transferred into the custodial parent's name, the Council will not act. It is thus not enough to say that those who rent "must make their own arrangements with the Council".

A few attorneys described a practice in terms of which some men agree that the woman and children may remain in the house, although the property remains in their name. One informant saw this as a good compromise:

"We must work hard for [a male client] as well. We can twist a little bit when it comes to housing, to get it for the wife or to make a settlement, if it is not registered, to consult so that she can stay till the children are over twenty-one or she remarried. We sometimes did that so that everybody could smile."

Others who described this practice said that it invariably caused problems later, even where the agreement is included in a consent paper. "She will become my client again. He will knock on the door and say: 'Dis my huis'.¹¹ This lawyer was clear: "He should not remain the owner."

CONCLUSION

This paper analyses some aspects of typical divorces. The sample, by excluding cases with a Rule 43 application, excludes the bulk of those with litigation.

11 English: "It's my house".

By excluding cases where there was investigation by the Family Advocate, it excludes those with particularly problematic issues regarding minor children.

Within these legally straightforward divorces, there were, nevertheless, issues of concern. One focus of this paper is the economics of divorce. There is evidence of distinct class/race differences in the experience and handling of couples of differing wealth. Another focus is divorces in which there were allegations of assault. These divorces account for approximately a third of all divorces, and a half of divorces instituted by women.

Both the economic and the assault foci illuminate gender differences. In virtually all of these cases women start off in a disadvantaged position, as illustrated graphically by the employment and income data. The paper suggests that the process does little to rectify the situation.

Divorce obviously cannot undo societal inequalities. The concern of this paper is, however, that by ignoring those societal inequalities, those involved in the divorce process may exacerbate them.

RULE 43 APPLICATIONS IN DIVORCE CASES IN CAPE TOWN

I INTRODUCTION

(I) Background

Supreme Court Rule 43 allows a party to a divorce to seek relief in respect of

- (a) maintenance pendente lite (i.e. pending resolution of the dispute);
- (b) a contribution towards the costs of the pending matrimonial action;
- (c) interim custody of any child; and/or
- (d) interim access to any child.

The action is thus intended to determine the arrangements to prevail between the parties to a divorce pending the hearing.

An application is made by means of notice and an affidavit stating the relief claimed and the grounds for the claim. The affidavit is served on the respondent, who has ten days in which to file an affidavit in reply. The case then appears for summary hearing "[a]s soon as possible thereafter".¹

This paper examines Rule 43 proceedings with a view to exploring the issues that emerge as contentious in divorce cases. The reason that Rule 43 cases were chosen for the research was the relative ease of documentary research. It is in the nature of these applications that all the information appears on paper in the form of affidavits.²

The majority of divorces are settled before reaching court – either privately between the couples, or in private discussions and negotiations between the couple, their lawyers and other advisers. Yet other divorces are settled in chambers, where the judge calls in the couple and/or their lawyers before the case and encourages them to reach an agreement. All these cases are difficult to research because of the confidential nature of the negotiations. Although

¹ Rule 43(4) *Uniform Rules of Court*.

² The affidavits should be relatively short. The "rule of thumb" in terms of length is 15 to 20 pages maximum (in the usual double-spaced legal format), unless there is some explanation as to the need for longer papers. In one case in the sample the judge in fact complained that the length of the affidavits filed exceeded the Rule 43 limits.

divorces involving a Rule 43 application might differ somewhat from the "average" divorce case because of a bias towards wealthier couples, the affidavits expose issues, particularly relating to finance, which are otherwise hidden.

Rule 43 applications are instituted in a variety of circumstances. They may be used in cases where conflict is high. This is suggested by the fact that the parties are often involved in litigation over a number of issues. They may also be used as a strategy to encourage early settlement.

One attorney explained how a Rule 43 application can be to the benefit of both male and female clients:

"Very often I provoke [a Rule 43] if I act for the man. I get him to pay less (in maintenance) so she brings the Rule 43. I do that because (a) it often gets it settled quicker and (b) if not, it is cheap and (c) if she does not bring it, he has got away with murder. But the latter is not the motivating factor. It is a cheap way to reach settlement quickly. It is more common for people to negotiate on the day of the Rule 43 than to come to the office to negotiate."

The judgments in Rule 43 proceedings are based on relatively short affidavits. Although there is provision for the hearing of evidence, the cases are always set down for hearing at the end of the (long) list of uncontested divorces, and are generally dealt with speedily. Rule 43 procedures provide interim relief to deal with immediate needs. It is thus in the nature of the application that there should not be extended and complicated argument to delay proceedings. The absence of extended arguments in court means that the files should provide a fairly full picture of the issues involved in a case.

(ii) Methodology

The paper is based on a sample of 50 Rule 43 cases heard in the Cape Town Supreme Court during 1993.³ The 50 cases in the sample were set down for a period of just over two months. During the same period approximately 1 500

³ The cases were chosen by starting at an arbitrary date and extracting the case numbers for the subsequent period until the requisite number of cases was obtained. Fifty-three case numbers were extracted in this way. Two of these turned out to be repeats of earlier case numbers. One case had been incorrectly recorded on the roll and was not a Rule 43 application. This left 50 cases, of which one, although appearing on the roll for the period, had no corresponding file. This last case had either not yet reached the court or had been withdrawn. In a few cases the full set of documents was not available. In two cases the divorce files could not be found by the Court officials. In several of the other cases the divorce had not yet come to court at the time of the research.

divorce cases appeared on the roll. If this period is representative, Rule 43 applications are brought in just over 3 per cent of all divorce cases.

The research method was to read through all the documents for the Rule 43 application and in the corresponding divorce files where these were available. A database was used to assist in analyzing patterns in the 50 cases. The database recorded demographic details, details of the Rule 43 applications and of the divorce, details of the outcomes of both the divorce case and the Rule 43 application, and so on. The reporting of the statistics and patterns of the various variables below is interspersed with case histories illustrating certain points.

The data from the case files was supplemented by information from in-depth interviews with over twenty legal practitioners. The practitioners included those with predominantly middle-class clients, as well as those who deal mainly with clients on legal aid. It was mainly the former who spoke about Rule 43 applications because, as shown below, it is used more often in cases where clients are better off.

(iii) Structure of this paper

The different aspects of Rule 43 and divorce proceedings cannot be easily separated. It is, for example, not possible to separate financial settlements from the decisions regarding children, as custody of children requires the custodian parent to have sufficient resources to support them. The division between sections in the paper is thus not clear-cut, but rather serves to highlight the major themes in Rule 43 proceedings and divorce.

Section II looks at the forensic details of the Rule 43 and divorce applications. It considers different aspects of the process as well as the legal role-players. Section III reports on basic demographics of the couples and marriages in the sample. It looks at "race", age, length of marriage and marital regime. Section IV looks at the reasons which plaintiffs and defendants cite for irretrievable breakdown of their marriages. Section V looks at the financial situation of the parties at the time of the Rule 43 and divorce applications. Section VI considers those aspects of the proceedings involving children. Section VII again looks at finances, but this time in the context of demands, counter-offers and awards in the Rule 43 and divorce applications.

II FORENSIC DETAILS

This section describes the claims made in the cases in the sample and discusses the process of instituting a Rule 43 application, including the cost, representation of the parties and the outcomes in the cases in the sample.

(i) Claims in Rule 43 applications

Forty-two applicants asked for maintenance of some sort. Eleven of these claims were for spousal maintenance only and the other 31 involved children. Some of the remaining 31 included claims for spousal maintenance. Twenty-three of the cases involved a claim for custody. Of these, five explicitly did not claim child maintenance

(ii) Fees

There are set fees for both attorneys and advocates in Rule 43 applications "unless the court in an exceptional case otherwise directs" (Rule 43(7) and (8)). In 1993 the fees for unopposed applications were R300 for the attorney and R80 for the advocate. In opposed matters the fees were R350 and R170 respectively. The setting of a standard amount is intended to make the action available to those in economic difficulties whom it is designed to help. In successful applications the respondent is required to cover the costs.

The profile of Rule 43 applicants is, however, skewed towards the better-off. This may be explained partly by the fact that applications for maintenance and a contribution to costs would normally be instituted only where the respondent has means; where a respondent has no access to property or even a basic income, there is little sense in bringing an application. However, both better-off and poor divorcing parties might want to use the Rule 43 procedures to deal with custody and access problems. In such cases, the fee, while relatively low, is beyond the means of many potential applicants and may partly explain the bias in the sample towards better-off couples.

(iii) Legal Aid

In a few of the cases in the sample one of the parties was receiving legal aid from the state for the divorce. This type of assistance is, however, notoriously difficult to secure. In 1993 the means test for legal aid was a maximum monthly income of R500 after certain deductions had been made. If income exceeded this amount, the Director of Legal Aid still had the discretion to

grant legal aid if the applicant "subjectively judged, [was] indigent and ... deserve[d] sympathetic consideration on account of special circumstances".⁴

The Legal Aid Board does provide assistance for Rule 43 applications. If the applicant is likely to succeed in an interim application for a contribution towards costs in terms of Supreme Court Rule 43, legal aid is granted for the application. The applicant must reapply if legal aid is sought to finance the final divorce proceedings. The outcome of the Rule 43 application is taken into account in reconsidering the application for legal aid.

To obtain financial assistance for Rule 43 proceedings, the applicant for legal aid has to satisfy the same criteria as those applied in relation to divorce proceedings.

Legal aid is *not* granted for a divorce if:

- (a) there is a "reasonable possibility of reconciliation";
- (b) the applicant has previously received legal aid for a divorce;
- (c) the applicant has previously received legal aid for a divorce, subsequently failed to proceed with the action, and did not recover the Legal Aid Board's expenses;
- (d) there are no children involved; or
- (e) "taking all the circumstances into account, it does not appear to be a deserving case".⁵

In deciding on a divorce application, the legal aid officer is required to ask for a report from a social worker "dealing inter alia with the socioeconomic conditions and matters referred to ... and saying whether or not the applicant or the applicant's children are in danger of being physically and/or psychologically abused by the other spouse".⁶

If the officer feels that the delay in obtaining a social worker's report will cause the applicant to be "seriously prejudiced, or that the welfare of the applicant or the children of the applicant will be endangered", she or he can refer the matter straight to the Director of the Legal Aid Board.

If the other party in a divorce has to be traced, the applicant must do this at her or his own expense.

In 1993/4 10 354 applications for legal aid in divorce were granted. This was 13 per cent of the total number of legal aid applications granted. Divorces

4 *Annual Report of the Legal Aid Board* for the period 1 April 1991 to 31 March 1992 (1992) para 2.2 p 7.

5 *Legal Aid Board Guide* 1993 para 3.3.1(e) p 14.

6 *Legal Aid Board Guide* 1993 p 20.

were the biggest single category of cases receiving legal aid after criminal cases, which alone accounted for over three-quarters of all cases. Twenty-five per cent of the grants for divorce were to African people, 35 per cent to "coloured" and 34 per cent to white.⁷ The relatively low percentage of grants to African people, despite their predominance amongst the poorer sections of the community, is at least partly explained by the fact that they still have access to Black Divorce Courts. Divorces in these courts are much cheaper, in particular because most occur without the assistance of either attorney or advocate. Although theoretically legal aid could be made available for these divorces, in practice it probably seldom or never is.

In summary, although the cost of a Rule 43 application is prescribed and legal aid is possible, in practice the fees are beyond the means of the majority of people going through a divorce and legal aid is difficult and time-consuming to access.

(iv) Attorneys

The parties were represented by a wide range of lawyers. No firm represented applicants in more than four of the cases. No individual lawyer represented applicants in more than two of the cases. As was to be expected given the nature of such actions, the majority of the applications – 44 of the 50 – were opposed.

(v) Process and outcome of the Rule 43 application

The final outcome of each case is recorded on the cover of the file. The notes are often cryptic. They also do not usually reflect discussions in chambers or other negotiations.

From the notes it appears that orders were made at the first Rule 43 hearing in 16 cases. In another case it was specifically noted that the order was made by consent.

A further 18 cases were marked as withdrawn, removed from the roll or settled. It was stated on three of the cases removed from the roll that the divorce had been finalized. The judge's jottings on a fourth noted that the appellant was "geregtig"⁸ to what she was applying for and there was no reason why they could not settle the divorce without further costs. This couple signed a divorce consent paper on the day set down for the Rule 43 hearing.

⁷ *Annual Report of the Legal Aid Board for the period 1 April 1993 to 31 March 1994* (1994) p 23.

⁸ In English: "entitled".

A further case similarly went straight to divorce on the same day. Yet another case was noted explicitly to have been withdrawn in chambers.

Six cases were postponed at the first hearing. This probably indicates that negotiations were entered into between the parties. Two of these cases came back to court, where an order was granted. In another case the parties agreed to let the matter stand over. In yet another the judge wrote "no order", but gave no reason for this decision. One case had not yet reached the courts by the time of the research. It is possible that this case was dropped.

It appears that Rule 43 applications can facilitate negotiations and speed up agreement between the parties where there is some room for movement. A few attorneys commented that the fact that the application takes place in court often gives the procedure the necessary significance to push the parties to effect settlement: "[A Rule 43 application goes to] court. It is psychological. The woman gets all dressed up, and then they can settle."

(vi) Process and outcome of the divorce

At the time of the research – at least six months after the Rule 43 proceedings – eight of the divorce cases were still pending. Thirty had been settled and a consent paper signed. Two divorces were awarded unopposed. In one case an action for discovery of documents had been instituted. Another case had been postponed sine die (indefinitely).⁹ The proportion of cases which were settled with consent papers, when compared with overall figures for divorce supports the claim that Rule 43 applications encourage settlements.¹⁰ The high proportion also reflects the fact that Rule 43 proceedings are more often used in the higher socioeconomic brackets, as both the practitioners interviewed and the samples in our studies suggest that consent papers are also more common among the relatively wealthy.

It was not possible to locate the remaining seven divorce files. Either they were being heard that day, or they were lost. The absence of these files means that the statistics below in respect of issues such as cause of the breakdown of the marriage, claims in the divorce, and divorce orders will be undercounts as not all Rule 43 files contained the divorce pleadings.

⁹ A judge may postpone a case sine die when there appears to be a good chance of reconciliation between the parties. Should the parties wish to proceed with the case at a later date, the same papers can be used.

¹⁰ See 'Race, Class, Gender and Divorce in the Cape Supreme Court' in this volume at page 14.

III DEMOGRAPHICS

In this section I give basic descriptive data on the parties to the marriage, and the marriage itself. The sample suggests that divorces which involve Rule 43 applications have a somewhat different profile to divorces overall. These differences manifest themselves, for example, in the length of the divorce process, the marital regime, and – importantly – the class or economic standing of the parties. In many other ways Rule 43 applicants and respondents are very similar to the women and men involved in divorces in general.

(i) Applicants and respondents

Forty-three of the Rule 43 applications were brought by women and six by men. While the sample is too small to allow extrapolation, this suggests that women involved in divorce are more likely than men to be in urgent need of relief.

In ten cases the Rule 43 application was instituted by the defendant, rather than the plaintiff, in the divorce. Seven of these were in respect of divorces instituted by the men.

Case 13 is an example of the circumstances which can prompt a wife to institute a Rule 43 application. The wife in this case was a housewife. She said that she had made the decision not to work outside the home at her husband's "insistence" and so as to be able to care for their two children. The husband was the owner of several businesses with a gross income of R12 000 per month.

The husband had suffered a stroke, which had left him partly paralyzed. He said he left the common home because his wife did not look after him properly after the stroke. The wife said that he had left the common home saying that it was unsuitable, and had gone to live with his mother. He had subsequently gone to live with his mistress. The wife claimed that he was putting all his assets in the new partner's name.

The husband did not deny having said his wife should not work previously, but felt she should now work. She, in turn, said that his disability did not affect the type of work he did, and that he affected poor speech when it suited him.

(ii) Length of marriage

The average length of the marriages in the sample was 12 years. Table 1 gives a more detailed breakdown of the duration of the marriages. It shows a slight clustering in the early years, but a fairly even spread.

Duration of marriage	Cases	Cumulative
Less than 3 years	4	4
3 to under 6	8	12
6 to under 9	9	21
9 to under 12	6	27
12 to under 15	7	34
15 to under 18	3	37
18 to under 21	5	42
21 to under 24	3	45
24 to under 27	1	46
27 plus	2	48

Table 1

The figures in Table 1 differ from the overall figures for divorce. Thus, for example, in 1991, 34 per cent of all divorces were in respect of marriages of less than five years and another 28 per cent between 5 and 9 years. Thus 62 per cent were of 9 years or less duration. In the Rule 43 sample only 42 per cent were of 9 years duration or less, and only 18 per cent shorter than five years. Many of the marriages in the sample would therefore fall into the category of long-standing relationships.

The difference in the profile of the sample and divorces overall in terms of length of marriage could, at least to some extent, be explained by the nature of the relief sought in a Rule 43 application. Spousal maintenance, for example, is rarely granted in shorter marriages, and a Rule 43 application for financial relief would often be instituted in cases where spousal maintenance was claimed in the divorce proceedings. The parties to a longer marriage are also more likely to have built up assets.

(iii) Race

Race was not recorded in most of the files. Nevertheless in the majority of the cases it was possible to make an informed guess as to the racial grouping of the couples on the basis of indicators such as name and the area in which they lived. It appears that 30 of the cases involved white couples, ten "coloured", one Indian and two African. Another three couples could have been white or "coloured". In the Indian and all the "coloured" cases the applicant was the woman. One of the African cases was brought by the wife and one by the husband. Five of the white applicants were men.

Black people outnumber whites in South Africa. In the Western Cape, in particular, "coloured" people outnumber whites and outnumber them also in

the overall divorce statistics.¹¹ Nevertheless, the high overall figures for white couples in this sample is not surprising. The main reason for the predominance is probably economic. Rule 43 applications are more common among wealthier couples.

(iv) Marital regime

Twenty-one couples were married in community of property, and 26 out of community of property. This bias towards antenuptial contracts reflects the middle-class nature of the "typical" Rule 43 couple.¹²

IV CAUSES OF THE DIVORCE ACTION

The South African system is a "no fault" one. The plaintiff in a divorce action need only prove that there has been an "irretrievable breakdown" of the relationship. The reasons supplied for this breakdown in the pleadings are very unlikely to tell the full story. All the plaintiff is required to show is that there is a good reason why the divorce should be granted.

Two factors, in particular, militate against some of the more serious allegations being included in pleadings. Firstly, people will not want to wash more dirty linen than necessary in the public arena. Secondly, attorneys often will not include allegations in the pleadings if these could anger the other party and thus diminish the chances of a good settlement. Those attorneys who serve the upper end of the economic scale are particularly hesitant to include damaging allegations because of the more substantial assets involved. In the words of one attorney: "You blow the deal if you say there is assault." Because this study is biased towards wealthier couples, this hesitation was almost certainly a factor in some of the cases in the sample. The statistics on the various causes below, and particularly the more damning ones, are therefore probably undercounts.

Evidence of breakdown is given, in the first instance, in the plaintiff's pleadings in a case. Because women are more often the applicant in Rule 43 proceedings and the plaintiff in divorce proceedings, and because the breakdown is often attributed to some "fault" of the other party, there is a bias in

11 Central Statistical Services *Marriages and Divorces Whites Coloureds and Asians* No 03-07-01 (1991 Pretoria) page 65.

12 Antenuptial contracts are more common among white, middle-class couples, both because they are more likely to seek legal advice on marriage and because they have, and anticipate, more wealth for which they must make provision. (See 'Race, Class, Gender and Divorce in the Cape Supreme Court' in this volume at page 13.

the original affidavits towards blaming the man. However, in virtually all cases the respondent or defendant prepares an answering affidavit. In most cases this does not raise any opposition to the divorce itself but rather contests the allegations made by the applicant. In doing so, defendants will usually apportion blame or fault so as to persuade the court to view their cases sympathetically.

(i) Physical and verbal abuse

Physical assault was listed as one of the causes for the breakdown of the marriage in at least 19 of the cases – nearly half. In 18 of these clear-cut cases the male was alleged to be the offending party. In the nineteenth case (case 40), the woman threw boiling water at her husband.

There were several other cases in which abusive behaviour was a factor. In one, although assault was not explicitly mentioned, the "story" revealed by the affidavit suggested that it had occurred. In case 45, physical assault did not occur but the woman alleged that her husband had threatened her physical safety. He had stopped his threats only when her lawyer threatened him with an interdict. Verbal abuse was mentioned in 15 cases. Eleven of these were cases where physical abuse was not specifically mentioned.

(ii) Substance abuse

Alcohol was mentioned as a cause of the breakdown in 15 of the cases. In 12 of these the man was said to have abused drink, in two cases the woman, and in one case both parties accused each other. Drugs were mentioned in fewer cases – six. However, as drugs are illegal, this is likely to be less than the true picture.

Alcohol and drugs often went together with physical and verbal abuse. Of the 19 cases with allegations of drug or alcohol abuse, 12 also included allegations of assault. Conversely, of the 19 cases with allegations of assault, 12 also included allegations of substance abuse.

(iii) Extra-marital affairs

Nineteen women and nine men said that the other party had been engaged in extra-marital affairs. In a further case (case 11) the woman said her husband did not have affairs, but he made physical advances, and exposed himself sexually, to family and friends. As with assault, there is probably under-reporting in respect of extra-marital affairs because attorneys do not want to

jeopardize reaching agreement: "If we have brokered a settlement, we would leave it out."

Nevertheless, extra-marital affairs are often an important reason for the breakdown of a marriage. In case 9 one of the wife's principal reasons for suing for divorce was that her husband "gedurig geflanker (het) met ander dames".¹³

V ECONOMICS

Finance is a major area of conflict in many divorces. The papers provide many illustrations of the unequal economic position from which women and men usually bargain in divorce matters.

In case 9, for example, the husband was a wealthy businessman, co-director of a large supermarket chain, with a gross monthly income of R34 050. The wife was not in formal employment. The couple had two adult children. The husband complained that his wife was "ambisieloos en maar net 'n huisvrouw wil wees".¹⁴ He stated that he had started married life much poorer than he now was, and was wealthy only through "loyalty, application and devotion to duty" and the long hours he had worked. His wife did not need to spend all she claimed. She made her own clothes and had short hair: "Her tastes are simple, her requirements moderate and albeit we have in the past several years lived a comfortable existence, we have certainly not pursued an extravagant life-style."

In case 20, too, the husband stressed that he had built up his wealth through his own effort. This couple also had two adult children. This man was the director and sole owner of a construction company. The woman meanwhile earned an average of R300 per month through selling items that she knitted. The man said he was not "very wealthy", but also admitted he was not a pauper. However, he had "in no ways been assisted by Applicant in building up or accumulating such assets of which I am possessed".

Financial affairs, reflected in the cases by employment, earnings, and attitudes towards the women's contributions, reflect the gender patterns both in society and in divorce very clearly.

¹³ English: "constantly flirted with other women".

¹⁴ English: "without ambition and merely wished to be a housewife".

(i) Employment

The primary source of income for most couples is employment. Table 2 classifies the occupations of applicants and respondents according to the standard industrial classifications. (In two cases the male respondent's place of employment was given, but not his occupation.)

	Applicants		Respondents	
	Women	Men	Women	Men
Professional / semi-professional	4	3	-	6
Management / executive	2	-	1	15
Clerk / secretary	19	-	2	2
Transport	-	2	-	2
Service /sales	9	-	-	5
Farming	-	-	-	1
Artisan	-	-	-	4
Supervisor / production foreman	3	-	1	3
Other	1	-	2	-
Not economically active	4	1	-	3

Table 2

The patterns show clear gender differences. Men were far more likely to be in professional and semi-professional jobs. Two of the four women classified in this way were nurses, the third was a primary school teacher and the fourth a clinical psychologist. All but the latter are among the poorest paid professional categories. Men were also far more likely than women to be owners of businesses or in management and executive positions. One of the two women applicants in this category owned a florist. The other was market coordinator for brokers. The woman respondent so classified was a qualified teacher and businesswoman.

On the other hand, women were far more likely to fill clerical, secretarial, sales and service positions. Twenty-eight of the women applicants and none of the men applicants fell in this category. Of the total of seven men respondents in these two categories, two were in "senior" or "chief" positions. All the women applicants who were not economically active were unemployed housewives. All the non-active men were retired, and in receipt of pensions from their previous employment.

These patterns are a reflection of those in the wider society, as well as those for the total divorcing population. Thus, for example, the 1991 statistics for divorcees of that year shows 2,5 per cent of women in management or

executive positions compared to 9,1 per cent of men. Conversely 38,0 per cent of women fell into the clerical category, as opposed to 18,3 per cent of men. Compared to 2,6 per cent of men, 21,5 per cent of women were not economically active.¹⁵

Rule 43 figures also, however, differ in some respects from the overall statistics for the divorcing population. So, for example, a much higher proportion of the Rule 43 parties were in the management and executive bracket and a much smaller proportion not economically active (unemployed). This underlines the relatively privileged position of Rule 43 players. In short, they must have both the money to launch the case and, in cases relating to maintenance and costs, the assets which make the emotional and financial cost worthwhile. Overall the figures show that this group was a privileged group in the South African situation of extremely high unemployment. In virtually all cases at least one of the partners was earning. In a significant number both were.

The nature of the Rule 43 applications is also reflected in the difference between the profiles of applicants and respondents. Respondents cluster in better-off positions – in management, executive, and artisanal positions. Applicants cluster in less well-paid positions – clerical, secretarial, service and sales. The lower earnings implied by these positions and therefore their precarious financial positions explains why many of the women applicants felt in need of interim relief.

(ii) Earnings

It is impossible to give definitive figures for earnings of either the applicant or respondent. Comparisons are thus inexact. Firstly, where both the earner and the opposing party gave estimates of earnings, there was often a discrepancy. Second, in some cases there was only a gross figure and in some only net. There may be a significant difference between gross and net earnings, particularly for men as deductions for pension, housing and similar benefits are often made from their salaries. These benefits constitute an important part of the assets of the person concerned.

In the figures below, the gross reflects the highest believable figure given – either the true gross, or a credible figure given by the opposing party. The net reflects the lowest believable figure – usually the net figure reflected on the pay-slip or given by the party concerned.

15 Central Statistical Services *Marriages and Divorces Whites Coloureds and Asians* No 03-07-01 (1991) pages 46-52.

Figures for gross earnings of applicants were recorded in 28 of the cases. These ranged between R300 and R4 983. Net figures were also recorded for 28 cases, although not necessarily the same ones. Here the range was between R300 and R2 841.

Gross earnings of respondents were recorded in 37 cases and ranged between R650 and R40 000. Net earnings for the 27 recorded cases ranged between R750 and R26 500. Non-recorded earnings reflect both non-earners and cases where no figures were given.

Tables 3 and 4 categorize gross and net earnings of applicants and respondents by the sex of the earner. Earnings figures were available for 36 women (32 applicants and four respondents) and 38 men (35 applicants and three respondents). The tables show the usual gender discrimination in earnings. Nine women earned a gross amount of under R1 000 per month, and eleven under R1 000 net. Only three men earned such a low gross amount and only two such a low net. At the other end of the scale only one woman grossed over R5 000 monthly, while 14 men had gross earnings this high. Five were at this level even after deductions.

Applicant earnings (R)	Gross amount		Net amount	
	Women	Men	Women	Men
Under 1000	7	2	10	0
1000-1999	9	1	9	0
2000-2999	7	1	7	0
3000-3999	1	0	0	0
4000-4999	2	0	0	0
5000 plus	0	0	0	0
Total	26	4	26	0

Table 3

Applicant earnings (R)	Gross amount		Net amount	
	Women	Men	Women	Men
Under 1000	2	1	1	2
1000-1999	1	6	1	8
2000-2999	0	6	0	5
3000-3999	0	2	0	3
4000-4999	0	4	0	2
5000 plus	1	14	0	5
Total	4	27	2	25

Table 4

Table 5 gives the average gross and net earnings for men and women applicants and respondents with non-zero amounts recorded. Again the pattern is as expected, except in respect of the two male applicants for whom only net earnings were given. Even here, the fact that the difference in gross earnings is in the direction expected, suggests that the unusual pattern could be accounted for by deductions. These in themselves usually reflect wealth in the form of housing, pension, etc. For male respondents, the average difference between gross and net earnings where both were recorded was R3 767, compared to R225 for women. For male applicants, the average difference between gross and net was R800, compared to R578 for women.

	Gross		Net	
	Women	Men	Women	Men
Applicant	1 899	1 958	1 388	603
Respondent	2 225	7 808	975	4 175

Table 5

In 13 of the cases, the applicants, all women, had fixed property in addition to any earnings. Twenty-four respondents, of whom all but one were men, owned fixed property.

What cannot be measured in this way is the future earning power of the parties. For most people income from earnings is the major source of income. Future income depends, in large part, on past work experience. Many of the case studies on which this paper is based point to women's interrupted participation in the labour force. Women stop working in order to raise the children and to care for the family. By doing so they free their husbands to work long hours. The breaks in employment affect the immediate earnings of the women. They also affect their chances of significant promotion, and thus increases in salary, in the future.

(iii) Unpaid and underpaid labour

The lesser earning ability of women is often inadequately acknowledged. Their disadvantage lies both in the overall disadvantaged position of women in the employment market and in the extra burdens which they carry in terms of unpaid labour with respect to home and children. In several of the cases in the sample the woman was working in the husband's business. Although it was not always explicit, it seems that in most of these cases this work was unpaid.

In a number of the cases the husband asked why his wife could not support herself better. In many the husband appeared to accord insufficient importance either to the work which his wife did in respect of the children, or to the experience and opportunities she had foregone in past years of home-making. Because of the centrality of finances in Rule 43 and divorce proceedings, it is worth presenting a few of these cases here.

In case 33 the husband was a prison warder, with a gross monthly income of R3 245. The woman had not worked for the duration of the three-year marriage as she was looking after the three children. The youngest – in respect of whom the husband denied paternity – was just over two months old at the time of the Rule 43 hearing. The woman claimed that the husband, since leaving nine months previously, had paid a total of R600 towards the maintenance of the children and herself. Despite the very new baby, in his affidavit the man asked why his wife could not earn: "Applicant is a healthy young woman and has made absolutely no attempt to find gainful employment."

In case 8 a husband, who worked for the post office, claimed that his wife was "gesund"¹⁶ and questioned her inability to work. He did so, despite the fact that they had a five-month child and that she had originally stopped working on his insistence.

In case 49 the husband was a retired South African Defence Force commandant. The woman, who was much younger than her husband had fallen pregnant, and married, while at university, and had not completed her studies. The couple had four children, between the ages of six and thirteen. The wife had enrolled as an estate agent but said she was able to find very little work. The husband felt his wife now had the "freedom" to work and earn as she and the children were living with her mother.

(iv) Financial power and control

In general, men have greater control over, and knowledge of, family finances than women. In at least 28 cases one of the parties – usually the applicant – did not know details of the financial situation of the other party. Twenty-seven of these people were women. Typically the woman would describe those assets which she did know about – the cars, boats, fixed property, etc. And typically the husband would list the ways in which all this property was encumbered, and assert that, in essence, he was near bankruptcy.

¹⁶ English: "healthy".

The party with the greater financial assets often appears to have a great deal of power in the negotiations. In case 46 the wife claimed that her husband was refusing her access to his credit card in order to force her to accept his proposed settlement. In case 47 the woman's friends told her that her husband had said he wanted to "break her financially" so she would have to return to the marriage.

(v) Claims of "extravagance"

The men often accused their wives of inability to handle cash and/or extravagance. In seventeen of the cases claims of financial incompetence or extravagance were made. Only two of these accusations were directed against men. In a third case the parties accused each other. In all the remaining cases – over a quarter of the sample – the man accused the woman. The accusations occurred particularly in cases where the parties had higher levels of income.

The woman in case 40 reported that she had lost 23 kg in weight and was "embarrassed" by her heavy reliance on an uncle, friends and others for food for herself and the children. In his answering affidavit, her husband replied that she "compulsively spends [his] money".

In case 4 the husband – a lithographer with a gross income of R4 510 per month – said it was unnecessary for his wife to buy at "relatively expensive shops" such as Edgars and Garlicks. Further, their child was only two and a half years old. As such the child did not need much medical care and would not notice a "small drop" in the standard of living.

The husband in case 23 – a dentist – claimed that since the separation his wife had tried to spend "vast amounts" on luxuries so as to inflate her claim for spousal maintenance.

Many allegations of extravagance referred, in particular, to overuse of the husband's medical aid. The couple in case 15 had been married for 23 years. The husband was transport manager for a large firm, earning R6 820 per month gross. At the time of the application the wife had recently started a playschool with her daughter, but they were not yet making any money. The woman suffered from several chronic illnesses – Conns Syndrome, Chusings disease, and had also had a breast lump. Doctors' certificates testified that many of her medical problems were stress related. From November 1992 the husband refused any further medical payments, claiming that the woman was abusing his medical aid.

In case 26 it was the wife who was faced with a claim for maintenance. She, like the husband in case 23, felt her husband was trying to live "rojaal"¹⁷

so as to push up expenses. His medical expenses were high, she claimed, because he went to the doctor "vir elke onbenulligheid"¹⁸ of the children and himself. In general, however, because the husband is the primary earner while the woman is more often engaged in unpaid and/or poorly paid work, it is the husband who complains about the woman's extravagance in spending the money which he feels he has earned.

(vi) Housing

Access to housing is an important component of one's economic situation. The sample was a relatively privileged one and a high proportion of couples appeared to own their homes. Nevertheless, control and ownership of these homes was not equally shared by men and women.

In 21 of the cases, the woman left the marital home, in 13 the man, and in one case both. Eighteen of these women and ten of the men had care of minor children. From the details of the cases it is clear that in many cases the women who left home experienced great difficulty in securing alternative accommodation for themselves and their children. Often they went to live with their mothers.¹⁹

Sometimes one parent will agree to the other's having custody of children because they themselves cannot offer suitable accommodation to the children. Housing can also be a reason for refusing to agree to a divorce. In case 41, for example, the husband said he would lose his housing subsidy should they divorce.

VI CHILDREN

The second major area of conflict in divorce proceedings generally, and in Rule 43 applications in particular, is children. When seen in conjunction with financial information, the figures also suggest that where women take up a matter, they usually do so on financial grounds, while men often take up issues related to children. In five out of six cases involving a male applicant, the dispute revolved around children.

Some of the most vicious attacks were launched in the cases in our sample where issues around children were contested. Often the parties were trying

17 English: "lavishly".

18 English: "for every trifle".

19 In many cases women stay in bad relationships far longer than they would like to because of the lack of alternative accommodation. Over half (12) of the 21 women in the sample who left home alleged that they had been physically assaulted by their husbands.

to prove that their partners were morally or otherwise unfit to care for the children.

There were minor children involved in 40 cases, with a total of 74 minor children among them. In 14 of the cases there was one child, in 18 cases two children, in six cases three children and in one case four. In the fortieth case there was definitely one child of the marriage and a dispute as to whether the husband was the father of the second child.

There were major children in at least five of the cases – two cases with one child; two with two children and one with four children.

(i) Family Advocate

In all divorce matters involving minor children, the plaintiff is required to complete a special form which is submitted to the Family Advocate.²⁰ If the Family Advocate staff finds something which appears to require further investigation an application can be made to court for permission to initiate an enquiry. Either party to the divorce can also specifically request a family advocate investigation. In the majority of cases the matters in dispute are access and custody.²¹

Thirteen or fourteen of the cases in the sample were investigated by the Family Advocate's office. Eight or nine of these – more than half – were cases where the applicant was the man. The proportion of cases investigated by the Family Advocate is extremely high compared to the overall statistics of approximately one in a hundred divorces. The high proportion reflects the degree of conflict which drives an applicant and/or the lawyer to institute Rule 43 proceedings, as well as the fact that Rule 43 is specifically designed to deal with interim arrangements in respect of custody and access.

(ii) Access

Access was raised as a problem in at least seven of the cases. In two of these cases the male partner was the applicant. Access was particularly problematic when couples were living some distance apart. In case 10, for example, the woman was living in Pretoria while the husband had gone to live in the Northern Cape. In case 16 the wife lived in Walvis Bay and the husband in Cape Town.

²⁰ Mediation in Certain Divorces Act 24 of 1987.

²¹ For a fuller discussion see F Kaganas and D Budlender *Family Advocate: Issues in Law, Race and Gender 1* (Law, Race and Gender Research Unit, University of Cape Town:1996) and the references cited there.

In several cases there was evidence of the woman's using access as a bargaining counter to force the father of their children to pay maintenance. In case 19 the Family Advocate's report noted that "South African courts have generally taken the line that [this] is not acceptable". However, the interviews and anecdotal evidence suggest that in many cases the non-custodian parent justifies non-payment of maintenance by the alleged reluctance of the custodian parent to provide adequate access to the child or children.

(iii) Custody

Custody was explicitly claimed in 25 of the cases. In all these cases custody was claimed in respect of all the minor children of the relationship. Custody was claimed by the applicant in four of the six cases where the applicant was a man. In the fifth case with a male claimant the man asked for greater access, but not custody, in respect of two minor children. In the sixth case there were no minor children. In all five male applicant cases where there were children, the Family Advocate was involved.²²

In at least one of the cases there is a strong suggestion of custody being used as a bargaining counter. The husband in case 29 was at first totally opposed to the divorce, and contested custody of the two minor children. His wife claimed that her husband had seen the children only three times since she left home at least three months previously. After seeing the Family Advocate, the husband retracted his custody demand, and, unwillingly, agreed to the divorce.

In general the cases of contested custody were not settled with the apparent ease of case 29. In case 26 the couple had two sons aged five and seven. The woman said the marriage had broken down because her husband had assaulted her to the extent of breaking her ribs. She had left home, with the children, when he became drunk and aggressive and threatened further assault. She had later returned the children to the home because she had no place for them to live. The woman admitted that she had signed a paper saying her husband could have custody but said that she had done so because of her emotional state after the assault, because of family pressure, and because he had said he would lose the house if he did not have custody. He had also promised that her signature would ensure no further financial expenses for her. She said that she now had plans to get her own home and wanted to contest her husband's claim for custody.

²² In one of the cases in which the man was applying for custody, the lawyer, obviously unused to such a situation, drew up the papers as if he were ceding custody to the woman.

The couple in case 37 met when the woman was still in standard nine, and living in a foster home. After meeting her future husband she moved in with her sister. The sister ran an escort agency, and the woman worked for her while continuing with studies. She later moved in with the man. During the marriage the husband had an affair with his wife's sister.

During the divorce proceedings the couple had intercourse when he visited her lodgings one night. The husband claimed that the sex was consensual. The wife claimed he staged a "brutal assault" and raped her. She said she "reported the incident to the police on that day, who advised me that this was a domestic situation in which they did not wish to become involved". She went to an attorney and an interdict was served on her husband.

In both the Rule 43 and divorce affidavits the husband and his witnesses made much of the woman's background – that she had worked in the escort agency, that she and the man had sex before they were married, that the woman's brother used alcohol "to excess", and that both brother and sister smoked dagga. These were all put forward as reasons why the woman should not have custody of the child. She, on her part, said her sister's business was a massage parlour, and that she did not engage in prostitution. She said that she had anyway performed only telephonic duties. The outcome of the Rule 43 application was that custody was awarded to the man.

In the above case the husband tried to blame the wife by associating her with the "undesirable" characteristics of her brother and sister. In case 2 the husband brought up his wife's own term in jail in the contest for custody. Of interest here is the fact that the sentence was for debt, rather than a criminal matter. Further, the husband was himself in arrears with agreed maintenance payments.

Custody orders were recorded in 19 cases. In all but one custody was awarded to the applicant in respect of all the minor children. In the remaining case (case 12) the male applicant was granted custody of one child and the ex-wife custody of the other. In recommending that the husband be awarded custody, the Family Advocate's only complaint against the husband was "sy disrespekvolle optrede teenoor die verweerderes".²³ The disrespectful behaviour included severe and repeated assault and harassment.

(iv) Child maintenance arrears

In at least 17 cases the husband was said to be in arrears with regard to child maintenance at the time of the Rule 43 proceedings. In many of these cases

²³ English: "his disrespectful conduct towards the defendant".

the close link between the emotional and financial aspects of the breakup was only too clear.

In case 31, for instance, the woman refused permission for her husband to take one of their two children to Durban on holiday until he paid the outstanding money. The husband claimed in the papers that his wife's behaviour was "irrational".

VII FINANCIAL EXPENSES, DEMANDS, OFFERS AND ORDERS

The sections above have examined the economic circumstances of the parties and demands in terms of custody and access to children. This section looks at the financial aspects of demands, offers and orders. Before doing so, however, it is important to situate the Rule 43 application as one stage or strategy within the "divorce battle".

Over and above the stated aims of the Rule 43 application in relation to finance, there are other reasons for bringing a Rule 43 application. As noted in the introduction, lawyers regard a Rule 43 application as one of the weapons to be used in the divorce battle to speed up proceedings. Very often a Rule 43 application leads to almost immediate settlement of the whole divorce.

When there is no Rule 43 application, a party with resources can try to force a favourable settlement by drawing out the negotiations and so "squeezing" the other party into submission. A party without resources might bring a Rule 43 application to try to avoid being squeezed in this way. If the Rule 43 ruling is onerous enough, it can act as pressure on a better-off partner to reach a settlement in the divorce proceedings so as to ease the burden somewhat. In at least five of the cases in this sample the applicant asked for a larger amount of child maintenance in the Rule 43 application than in the divorce. In a further two the wife asked for a greater amount of personal maintenance.

However, it would be wrong to view all Rule 43 applications as merely tactical manoeuvres. Many of the cases described below point to the very real need of the applicants. It is common knowledge that both parties to a divorce usually suffer some financial or economic lowering of their standard of living. This can be particularly acute immediately after separation.

(i) Expenses

Affidavits of applicants usually include a breakdown of the expenses of the party claiming financial support. In at least 37 of the cases in the sample women gave detailed breakdowns of their expenses and those in respect of

their children. Thirty-four of these were cases in which the woman was the applicant.

The amounts for total expenses varied widely – from R814 to R15 341 per month. The average amount was R3 538 and the median R2 809. The amounts are not easily comparable. Firstly, some women included housing expenses, while others did not. Secondly, in some cases women listed only their own expenses. Others budgeted for children as well. Nevertheless, the detailed breakdowns show vast differences in expectations and living styles even among the relatively select group involved in Rule 43 proceedings.

A list of expenses can be used against an applicant in several ways. Quite often the respondent takes issue with specific items of expenditure – which shops the applicant frequents, how much she needs for food, how much is needed for extramural activities of the child, and so on. A different twist occurs when the husband argues that the woman has obviously found the necessary funds during the past months, and that there is therefore no reason that she should not continue to do so. In case 38 the husband, a deputy director of finance in local government, was explicit in his affidavit: “I respectfully state that if applicant could afford R2 500 in four months, that her financial affairs cannot be that bad at all.”

The enumeration of expenses is both difficult and demeaning. It is difficult because the applicant has to remember and cater for all eventualities. It is particularly difficult to cater for emergencies and unforeseen events. It is demeaning because the listing of expenses exposes each detail of the woman’s life style to scrutiny, while that of the man is rarely examined as closely.

A common complaint from women is that while they are scraping together money to pay for day-to-day necessities, and while their husbands are contesting their own liability for these expenses, the husbands are spending unnecessary amounts on luxuries. In at least some of the cases women see these unnecessary expenditures as attempts by their husbands to win the favour of their children. In case 39, for example, the husband referred in his affidavit to a judgment debt against him as evidence of his poor financial state. The wife complained that he had paid R250 for a party for the child, and that this money would have been better spent on maintenance.

(ii) Financial claims in Rule 43 applications

(a) Maintenance

Differences in expenses are mirrored in a disparity between amounts claimed for maintenance. These are found in respect of both child and spousal

maintenance. The monthly amount claimed per child in the 26 cases which gave figures ranged from R150 to R1 167, with an average of R476. The amount in the twenty-two spousal maintenance claims ranged between R300 to R10 000 per month, with an average of R2 157.

Spousal maintenance claims were significantly higher where there was no claim for child maintenance. The average where child maintenance was claimed was R1 160, compared to R3 154 where there was no such claim. Five of the spousal maintenance claims were in respect of marriages in which, from the papers, it appears that there were no children. The average claim of R2 640 for the cases with no children was significantly higher than the R2 015 average for those in which there were children. These statistics are interesting as spousal maintenance is often justified on the basis that the woman’s earning power has been impaired by her duties in respect of children.

Cases in which there was a claim for spousal maintenance involved marriages of fairly long duration, with an average of 13 years, compared to 10 years for those with no such claim. This is understandable because a clean break might not be appropriate in cases of older women who may have been out of the work force for a significant period. However, there is an anomaly in the cases in the sample in that the average duration of the marriage in the five cases with claims for spousal maintenance where there were no children was only five years.

Case 23 was a typical example of a case involving a claim for spousal maintenance as the couple had been married for over 20 years, and the woman was 45 years old. The husband was a wealthy dentist and the woman had worked sporadically in her husband’s surgery, in other low-paid secretarial jobs, and as a sales representative. Even here, however, the husband contested the claim. He said she would find no difficulty in earning because she was well-groomed and had interior decorating skills. He had also paid for her to attend a PR and computer course. Moreover, when she worked for him, she had been “efficient and satisfactory”.

In six cases a joint claim was submitted in respect of child and spousal maintenance. These claims ranged between R650 and R8 706 per month, with an average of R3 032. These amounts can be compared with computed amounts for total maintenance in the 23 cases in which separate amounts are stipulated. There the overall average was R1 896, with a minimum of R350 and a maximum of R1 000. In general, therefore, it seems that the poorer applicants specified their needs in greater detail and, perhaps, with greater accuracy.

(b) Costs

Applications for costs were made in 36 cases. The average amount applied for was R4 532 for the 31 cases for which actual figures were given. The average was skewed by a few cases where large amounts were involved. These included one claim for R18 000 and one for R10 000. Twenty-five of the 31 applications were for R5 000 or less. The median amount was R3 000.

In 31 cases the applicant asked that the other party pay for the costs of the Rule 43 application. In two cases the applicant asked for the costs to be shared. In cases where this relief is not sought, the applicant bears the cost.

(iii) Claims, offers and orders

Apart from the applicant's claim, discussed above, there are several further steps involving cash amounts in divorce proceedings. Firstly, there can be a counter-offer from the respondent in terms of Rule 43. Then there is the Rule 43 order itself. Finally, there are the claims, counter-offers and awards in respect of the divorce. Table 6 summarizes the data in respect of all the figures. Each cell of the table gives, firstly, the average amount for all cases where a figure was recorded, then the maximum and minimum figures in respect of the category, and, finally, the number of cases for which figures were recorded. (The table does not include the exceptions where the respondent asked for maintenance from the applicant.)

The relatively small numbers in respect of Rule 43 orders is a result, in part, of the fact that a good number of the cases were settled out of court. These settlements would not be recorded on the court's records. Other Rule 43 applications were withdrawn and the cases proceeded straight to divorce.

		Child	Spousal	Joint	Costs
Rule 43 apply:	Average	476	2 157	3 032	4 532
	Maximum	1 167	10 000	8 706	18 000
	Minimum	155	300	650	500
	Number	26	22	6	31
Rule 43 offer:	Average	296	1 757		
	Maximum	550	4 500		
	Minimum	40	.46		
	Number	15	6		
Rule 43 award:	Average	398	2 329	1 950	
	Maximum	1 167	2 500	4250	10 000
	Minimum	125	300	950	1 500
	Number	7	7	4	10
Divorce apply:	Average	532	1 967	1 500	-
	Maximum	1 500	7 000	1 500	-
	Minimum	125	10	1 500	-
	Number	29	22	1	20
Divorce offer:	Average	344	1 000		-
	Maximum	500	1 500		3 000
	Minimum	200	500		2 500
	Number	8	2		3
Divorce award:	Average	421	1 280		-
	Maximum	1 000	2 500		10 000
	Minimum	100	0.5		500
	Number	22	5		14

Table 6

(iv) Rule 43 orders

At least one of the practitioners interviewed felt that the individual judge had a significant influence on the level of the financial award: "There is a big difference in judges.... Some are more sympathetic to women... especially with the Rule 43. Some tend, if the woman wants R800 and the man offers R300, [to split] the difference. Others are quite harsh to make sure the woman is okay."

The sample suggests that the counter-offers by respondents are considerably lower than the amounts which were claimed. The average difference between the amount applied for and the amount offered in respect of child maintenance in the Rule 43 application in the twelve cases for which both figures were available was R243. In light of the fact that the average claim was R476, this suggests that respondents offered approximately half the

amount claimed. With spousal maintenance, the average difference between application and offer was R2 720. Thus the average offer was significantly lower than the average application.

The average difference between claims for child maintenance and the amount awarded for the six cases for which there was data was R104. We can compare this with the R243 difference between amount claimed and the amount offered. We find that the orders more or less "split the difference". The average difference between spousal maintenance claims and amounts awarded was R1 461. Here again comparison with the R2 720 suggests a splitting of the difference.

One practitioner suggested that the terms of the Rule 43 itself can pressure the woman into a disadvantageous final divorce order:

"If the papers are not proper, not high enough [there is a problem for the woman]. The judges do it at the end of the roll, so it is rough and ready i.e. 75 per cent. A lowish Rule 43 [award] forces the woman into a low settlement. You get an early Rule 43. The divorce is twelve months down the track if they don't settle. The danger is to settle at the Rule 43 if there is not full disclosure. The wife lives off the maintenance for a period of a year and it is so onerous that she goes for a cheaper settlement."

The Rule 43 decision can include an order for costs in the divorce as well as towards the costs of the Rule 43 application itself. Costs in respect of the divorce were awarded in ten cases in the sample. The amounts varied between R1 500 and R10 000. In an eleventh case the costs were split between the parties. The costs of the Rule 43 application were awarded to two woman applicants (case 1 and case 6), and split between the male applicant and female respondent in a third (case 10).

In all but one of the cases where the order specified custody, interim custody was granted on the requested basis. These included one case (case 37) where the applicant was male.

The exceptional case (case 6) was one in which the applicant, the wife, asked for custody of all three children while the husband asked for custody of one. The husband in this case was a farmer near a small Western Cape village. The wife worked in a factory in the village. She said she had worked full-time from the beginning of their marriage as her husband did not give her money for food, clothing or household necessities. Her husband said she had chosen to work because "sy die stimulasie van 'n beroep wou ervaar.... [Sy] het haar beroep verkies bo die plaas en haar familie."²⁴ After repeated assaults,

the woman went with the children to live in the village. The children continued to make regular and extended visits to the farm. The interim arrangement was that requested by the husband.

(v) Divorce demands and orders

One of the applications for spousal maintenance was for R10 per month. This application was obviously a nominal amount to allow later applications to be considered should this be considered necessary.

Two plaintiffs asked for rehabilitative maintenance. These applications were for spousal maintenance over a limited and pre-specified period to allow the person to establish themselves on a sounder financial footing. One woman asked for an amount of R400 per month for four months. One man asked for R600 per month for a period of twelve months.

Rehabilitative maintenance was awarded in two cases. The male plaintiff was awarded the R600 he claimed, but for four months rather than the twelve requested. A woman plaintiff who asked for R500 until remarriage or death was instead awarded R200 for six months. The woman who applied for rehabilitative maintenance was awarded R500 in respect of the child and nothing was awarded for her.

VIII CONCLUSION

What the facts and "stories" in the Rule 43 cases suggest is that divorce often disadvantages women more than men. In many cases it is not the terms of the divorce alone which cause the disadvantage, but rather the structural inequalities that affect men and women in society more broadly, as well as the unequal nature of their marital relationships. A practitioner serving mainly poorer black clients pointed out the implications in her practice: "You have to explain that divorce will make them poorer. Some people don't divorce if they realise there will be no house and maintenance will stop because the man gives up his job maliciously."

24 English: "she wanted to experience the stimulation of a career.... [She] chose her career above the farm and her family".

APPENDIX A

INTERDICTS IN TERMS OF THE PREVENTION OF FAMILY VIOLENCE ACT

In December 1993, the Prevention of Family Violence Act 133 of 1993 introduced a system for obtaining interdicts in the magistrates' courts with regard to family violence.¹ The Act allows parties to a marriage, including men and women living together as husband and wife, to seek an order from a magistrate's court prohibiting their partners from, among other things, threatening or assaulting them or their children or entering their home. It provides for a speedy and inexpensive method of obtaining the order and, because a suspended warrant of arrest is issued with the order, a speedy and effective method of intervening should the order be breached.

Although the Act has been criticised,² agencies involved in its implementation claim that it has played an important role in protecting women from violent partners. Statistics reflecting its increasing use bear this out.

Although the interdict provided for by the Act was not intended specifically for divorce and can be used at any stage of a marriage as well as for unmarried couples, practitioners see the interdict as a way of lessening violence during the difficult days of the divorce. In addition, the fact that the woman has been granted an interdict serves as potential evidence for the divorce itself. As a result, virtually all attorneys interviewed in the divorce study said that they were using the new prevention of family violence interdicts regularly in their handling of divorces. This appendix briefly records their views on the interdict.

Most practitioners were happy with the measure – or at least happier than with the previous Supreme Court interdicts. The main complaint about the Supreme Court actions was the expense involved. It "was not that good

1 For a discussion of the Act see Tonia Novitz *Interdicts in the Magistrate's Courts – An analysis of the content and implementation of the Prevention of Family Violence Act 1993* Law, Race and Gender Research Unit, University of Cape Town (1994)

2 See Tonia Novitz 'Interdicts in the Magistrate's Courts' above, D Hansson *Comments on the Prevention of Domestic Violence Draft Bill 1993* Institute of Criminology, University of Cape Town March (1993) and F Kaganas and C Murray 'Law and Women's Rights in South Africa: An overview' in C Murray (ed) *Gender and the New South African Legal Order* (Juta 1994) pp 24 – 5.

because it was easier for a man to fight, because it involved a long fight with an advocate. The money meant that people were squeezed out for the wrong reasons."

One group of attorneys, in particular, also argued that judges did not take family violence seriously. They said that the interdicts were introduced because judges felt, unfairly, that some attorneys were using Supreme Court interdicts as a "money-spinner". A further practitioner agreed that the new interdict procedure was introduced so that judges could avoid these matters. He, however, felt that there was some truth in the allegation that certain law firms had misused the previous system. The judges themselves were reported in the press as saying that certain attorneys were unnecessarily bringing the interdicts over weekends.

Despite the relatively easy availability of interdicts under the new Act, practitioners and their clients were still experiencing many problems with the new orders. Many complained about the attitude of the police: "The police don't take it seriously. The police say to the women the paper means bugger all and they might as well tear it up." In this respect the new interdict was seen by some as inferior to Supreme Court interdicts because the police took a Supreme Court order more seriously.

Some attorneys have adopted strategies to reinforce the interdict's gravity. One said that he writes a letter to the perpetrator warning him that he will be reported to the police. A copy of this letter is given to the woman. When the woman shows this to the police, they know the man has been warned and do not "shrug it off as domestic and say they don't want to be involved". The attorney reported that "the feedback is that it is a very sobering letter".

There were also reports of a reluctance on the part of some magistrates to grant the required interdict. The crudest example was in connection with influential white couples in more rural areas. "It does not work in a small town sometimes – if he is a wealthy farmer and he has pull with the magistrate and prosecutor."

One attorney also felt that some magistrates were becoming more reluctant as they became used to the measure.

"It worked like a bomb.... On the first I did, in Kuilsriver, I persuaded them on the basis of one open-handed smack, with no history. I said the Act is for prevention, so you need the potential only. The magistrate fell for it. There is now a hardening against that line of argument. In the first days, if the procedure was okay, you got orders like lollipops. Now you must demonstrate a history of abuse."

In particular, practitioners claim that magistrates are very reluctant to interdict the man from entering the family residence. Practitioners spoke about the resultant difficulties for the woman. Usually she will not want to abandon her children. She also has nowhere to go: "The man abuses the woman, but for financial reasons the woman is forced to stay. I advise a woman sometimes to get out immediately, but she asks: 'Where must I go?' [in pathetic voice]. The men use that."

One attorney described a case in which the prohibition against the man's entering the house was set aside. He described the impracticality of the final order: "So he could enter, but was ordered not to go into the bedroom. How could that work in practice?"

A few practitioners sympathised with the reluctance of the magistrates. For example, one remarked that the fact that the man can oppose the order is in very fine print. He found that "unfortunate: If people don't know their rights, they find themselves in the street." However, another practitioner argued against this. She referred to the law in the United States. There, she said, the man can be "booted out" for up to ten days and then only is he given the right to explain. She said she had asked how the law-makers reconciled this measure with their emphasis on rights and was told that domestic violence was regarded as so serious that all other rights took second place.

APPENDIX B

CHILD SUPPORT IN THE MAINTENANCE COURT

The majority of custodian parents have to rely on the Maintenance Court, rather than the Supreme Court, for child support. Most practitioners interviewed in the divorce study were critical of the Maintenance Court and criticism differed according to the wealth of a practitioner's typical client.

At the top end of the scale, although the woman might be able to afford private representation, attorneys argued that women are disadvantaged because the average magistrate cannot conceive of the costs involved in their clients' standard of living:

"There is probably a bias against women.... The biggest problem is [that] the woman received more [in the divorce order] than [magistrates] earn and then she wants an increase. She is seen as a rich bitch, who doesn't work. But there is the need of the children, because of the standard of living, the motor car, the private schools. The magistrates can't comprehend [that level]. It is a disaster. For a domestic servant it is probably okay."

Another top-end attorney remarked simply that at "the level I deal with, I don't recommend they put themselves at the mercy of magistrates".

But those serving domestic servants also had serious complaints. Several commented on what they saw as the outright bias against women. They alleged bias in terms of the burden of proof: "There is a bias towards non-support. They will not come towards your assistance. The onus is on you - you must prove he is earning and what it costs." They alleged bias in whose voice bears greater weight: "The whole system and the attitude of the magistrate is against women. If there is no money, that is the woman's problem. If the father can show his expenditure is more than his income, you can't invoke an order." They alleged that maintenance officers lacked sophistication in their understanding of financial matters and the cost of raising children: "If he works you might get an order for R100 to R150 per month per child. It is impossible to support a child on that. But these people are accustomed to it and can do it." The officers also lack understanding of

commerce and accounting – they “are usually fooled by a fancy certificate or documents with the auditors”. The practitioners alleged bias in the failure to recognise the unpaid labour and expenses of the principal childcarer:

“The maintenance court is very mathematical about it. They adjust for the relative earnings, but don’t take into account that the children are being looked after by the woman. That is seen as a benefit, which is how the women see it. But the value of the child care is never taken into account.”

A woman applying for a maintenance order or increase is required to go through a maintenance officer. The maintenance officer calls the two parties together and attempts to reach an agreement between them: “Usually the maintenance officer listens too much to the men – ‘Shame, you can’t afford it.’ It is bad to have men officers. They are too sympathetic to men. But what must the woman do?”

If the parties do not settle, the matter goes to court. Here the structure and process introduce further bias. In court, the maintenance officer acts as the representative of the (usually female) applicant: “The maintenance officer doesn’t represent the woman as an attorney would. They don’t care. They get the figures and try to bully the applicants. If they will not be bullied, it goes to the court and the bully is the representative.”

The law allows for private representation if the woman wants, and can afford, it. However, most attorneys said that it was the exception rather than the rule for them to assist women with maintenance cases: “Generally, if you need more maintenance, you can’t afford a lawyer. It will cost R2 000 a day for a maintenance case, all in, for the first consultation, initial enquiry, phonecalls, attending the trial and preparation.”

Apart from these two examples, practitioners dwelt more on the ongoing problems with which the custodian got saddled. They explained that “maintenance cases are never resolved”. The granting of the order is not a final solution for most women: “With 80 per cent of the divorces, they land back in the office with problems with maintenance.... I don’t know what to do. There is a court order, but enforcing it is a problem.”

The practitioners described the different ways in which men avoid payment. They spoke of the men who saw payment of child support as an “admission ticket” for greater access. Several told of men giving up their job when they heard that their wife was instituting divorce proceedings, so as to avoid an order for child support. They spoke of the corruption and bribery among officials which prevented the following up of defaulters. “At present

it is boetie-boetie. If you are known, the woman suffers.” They spoke of a lack of interest in following up maintenance offenders: “You phone the investigating officer and they don’t take the domestic situation seriously. It is not car theft. That thief would be in court.” They spoke of drunkenness and outright neglect of duties by officials.

The long delays, the small chance of success, and the bitterness cause many women to abandon all demands for child support. Some practitioners nevertheless encouraged their clients to persist. “I argue with the woman: ‘It is not your money. It is the children’s. Don’t say you don’t want it. Don’t be proud about someone else’s right.’”

While the sympathy of most of the practitioners lay overwhelmingly with women in respect of child support, at least one attorney was more inclined to take the side of men. This particular attorney practised in a somewhat poorer white neighbourhood. He was also the practitioner who had the largest proportion of men among his clients. He explained the reasons why his clients sometimes did not pay. He also described how he saw women abusing the system:

“The man is despondent [when he doesn’t get custody] and doesn’t pay maintenance. That is the only way the man has to express his views. Eighty per cent of the time the men don’t pay because they feel the mother squanders the money and denies access. It is a no-win situation. He is dragged to the Maintenance Court.... In a lot of cases mothers abuse the court process. If they are at a stage in the process at Goodwood and she moves, there is an informal arrangement to save the bother and pay direct to her. Usually there is not a signed statement. Then she says he has not paid.... Obviously she is lying. I must prove her bad character. They must decide on the balance of evidence.”

Another attorney, while less sympathetic towards the men, nevertheless could sometimes see their side. Sometimes, he said, that man did not pay because he did not want to. But there were also cases “where he genuinely can’t afford it.... Often, especially with our type of client, he starts with a criminal charge because he has arrears of R1 000 so it is difficult to negotiate because his back is against the wall.”