

THE ROLE OF THE MENTAL HEALTH

PRACTITIONER IN DIVORCE AND

CUSTODY LITIGATION

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ABSTRACT

Two elements have been isolated as having a profound effect on the adjustment of children and families to post-divorce life. These are the hostility expressed and experienced before, during and after the divorce, and the losses experienced as a result of the final settlement terms.

Based on a review of the historical development of family law and the more recent reforms adopted throughout the Western World, the present shortfalls of the South African system of family law in providing for the needs of children and families in divorce have been identified.

A model of dissolution is presented which aims primarily at the reduction of the hostility and loss thus experienced. This includes the evaluation and updating of the 'best interests' standard used by the courts for arriving at custody/access settlements and a detailed discussion of the role played by the mental health professional at each stage of the dissolution process. The roles explored here include that of counsellor and facilitator in the pre-divorce, mediation and post-divorce stages; and the role of investigator/consultant and expert witness in the court process.

SUMMARY

Historical Perspective

Laws governing family relationships have evolved from the early status of a civil contract reflecting social conventions and customs, through the ecclesiastical systems of laws which sought to preserve the marital relationship by imposing a punitive system of fault on the 'guilty' spouse, to a system of law which, with the protestant revolution, came under judicial control.

Until the late 18th Century the father's rights over his children remained paramount. It was the social upheaval of the industrial revolution which stimulated a growing awareness and concern for the vulnerability of children both on the labour market and as developing individuals. This resulted in the assumption of the role of 'parens patriae' by the Courts and a spate of child protection laws which marked a move away from paternal supremacy to looking at the needs of the child. Talfourds Act of 1839 finally set the stage for what then became the powerful 'maternal preference' rule which assumes that children are better off with mothers who are believed to be the natural caretakers.

Recent reforms: Over the last decades three important reform movements emerged as an attempt to mitigate against the destructive, traumatic and inappropriate nature of the adversarial system of marital and custody/access resolutions.

- (1) The no fault divorce reforms, which were adopted by most western states, rejected the concept of fault as a ground for divorce as inappropriate and adopted either in whole or in part a 'breakdown' ground based on failure of the marital relationship. This went a long way to mitigating against long, protracted and hostile court battles for the purpose of showing fault in the spouse and 'winning' the case.
- (2) The conciliation/family Court movement focused on the psychological factors of divorce. It initially provided an investigatory service, but later reconciliation, divorce counselling and conciliation services were introduced and developed to assist parties to reach agreement on the ancillary issues. Where they have been applied, they have proved to have held significant relevance in the resolution of divorce issues for families.

While these services have not been denied to families in South Africa, the courts have shown great reluctance in becoming involved in psycho/social issues and have not adequately provided the machinery to put such services into effect. The problem remains therefore that families are left to themselves to find independent support and guidance in this area.

- (3) Provision for legal representation for the child which recognizes the child's undeniable interests and rights in court adjudicated cases has gradually evolved in most Western judicial systems. This safeguard, however, which is also incorporated in

the South African Divorce Act 70 of 1979, remains dependent on the discretion of the court and once again adequate protection for these children has not been secured..

Pre-divorce Counselling

With the recognition that the divorce was simply the end product of a long history of frustrations and hostility and that this final step served no purpose unless there was an understanding of the cause and the conflicts of the parents were resolved, the role of the mental health professionals broadened beyond the confines of the consultant within court-adjudicated disputes.

Lawyers are the essential link between troubled marriages and divorce and are currently in America acquiring the necessary training in certain law schools to enable them to assess the couples' motivation for reconciliation counselling.

The role of the mental health professional, through a brief crisis intervention and conflict-resolution approach, is one of helping couples and/or families to understand their contribution to the dysfunction, reduce the hostility and increase co-operation in order that both parents might continue in their responsibilities as parents during and after the divorce.

After the decision has been made to proceed with the divorce the role of the mental health professional changes to one of helping parents to inform the child of their decision, to express their feelings, to cope with and understand the child's responses, to explain the legal process and financial aspects of the procedure, and to motivate couples for mediation.

Mediation

This is the approach which best assures stability and continuity of the family relationship after the divorce. It provides a procedural structure which aims to foster co-operation and resolve conflict in the settlement of ancillary issues by the parents themselves, out of court, and should be readily available at any stage of the dissolution process.

Mediation is a new and separate speciality requiring specialized training in both psycho/social and legal elements. It includes principles of negotiation and bargaining and conflicts resolution and might involve a certain amount of necessary emotional ventilation to allow blocked negotiation to continue.

Mediated settlements have many advantages over adversarial settlements. These include a reduction in time, cost and post-divorce litigation and increased co-operation between parents.

The Adversary Solution

Child advocacy As an estimated 10% of families fail to reach agreement, adjudicated settlements need to be made by the court. The concept of child advocacy has become central. It implies knowing the child and his needs and being competent, knowledgeable and sufficiently objective to represent the child's interests in the dispute.

As neither the parents, their counsel, nor the court, with all the constraints of the adversary system, are able to fulfill this role and as neither the child's legal representative nor the mental health professional alone has the knowledge and skills, true child advocacy requires at least a team approach.

The Best Interests Principle

Another concept central to the adversary solution is that of the 'best interest' principle against which parents need to be assessed.

This standard moved from the still strongly held maternal preference assumption to more sex neutral sets of guidelines which focussed primarily on the affectional attachment between parent and child. Watson (1969) for the first time considered the 'process' by which a result could be achieved in terms of the 'best interests' principle. A suggestion which attempted to provide such a process was the replacement of the 'unfitness' test by 'the most able parent' test.

The choice between two able parents, however, remained difficult and often arbitrary.

The growing belief that the child's post-divorce adjustment is directly related to the maintenance of sound and loving relationships with both parents is supported by recent research and has been expressed by mental health and legal professionals and the court.

The best interests of the child therefore point to a system of shared parenting in which both parents share the responsibility, rights and substantial amounts of time with the child.

The adoption of this standard has been retarded by the guidelines proposed by Goldstein et al. (1973) which stressed the child's need for a stable and continued relationship with one parent and, in order to minimize loyalty conflicts, the severing of access with the non-custodial parent unless the relationship between both parents is a positive one. This unfortunately helped to shape some commonly held beliefs that,

- (1) free access inevitably causes children to be treated as pawns by conflicting parents,
- (2) the effect of living in two households is disruptive to the adjustment of the child and
- (3) that it only works when parents get along.

None of these potential difficulties are restricted to joint custody or free access arrangements, or indeed have been demonstrated to be true, and none take cognisance of the important contribution of limited post-divorce counselling.

The possible adjustment difficulties that are required to be made by joint custody families may be far less problematic than the negative aspects of sole custody which represents for the child the effective loss of one parent, a resulting sense of guilt and self-blame, untested fantasies, possible gender identity and behaviour difficulties; for the custodial

parent the frustration, emotional pain and overwhelming sense of loss and poor self-image as a parent.

The research in this area has, however, been limited to small, highly selected samples, and generalizations are therefore limited. The prognostic indicators that have been suggested are: the desire for joint custody, commitment to the concept, mutual co-operation between parents, mutual support of parenting ability, capacity to negotiate and remain flexible, agreement of the implicit rules of the system, proximity of residence, and a receptive attitude towards counselling.

The Investigative Process

The choice of custody/access settlement is entirely dependent on the individual needs of each family. This requires a thorough knowledge and understanding of the child as an individual, the relationship between each parent and the child, the child's family system and the child's socio-community system.

1. The initial contact should clarify and establish the briefing and basis upon which the consultant is prepared to work.
2. The Investigation or fact finding is achieved through direct interviews with the child, parents and significant others, school and medical records, where appropriate psychometric testing and direct observations and home visits.

3. The evaluative process requires the synthesis of all the data and formulation of a life plan for the child based on a thorough basic knowledge of child development and parenting characteristics and environmental ties which facilitate the child's healthy development from birth to adulthood. This stage also incorporates the conveyance of findings and recommendations to parents so that once again the potential for a mediated settlement is provided.
4. Report Writing. Reports need to communicate the findings and opinions in a clear and concise manner and should be able to substantiate all statements by factual data and back up conclusions by a sound psychological knowledge.

Confidentiality is a problematic issue, there is no clear rule about what is regarded as confidential and what may be used in reports in court. Opinions vary as to what should be disclosed to whom. In general, as a guide, it is important to consider the impact of the report or evidence on the family and child and if necessary bring the Court's attention to strictly confidential material.

The Expert in Court. The reluctance of experts to appear in court has been recognized. The need to subject such "opinion evidence" to cross examination has however clearly been stated. Experts have also been criticized for their defensive and argumentative attitudes in court. Some practical suggestions have been provided. Briefly stated they advise the expert to keep accurate records, be honest in giving evidence, listening carefully to questions before answering, request permission to elaborate where necessary, avoid reacting defensively, remain objective.

Training is clearly required by psychologists to include the workings of the legal system and to cope with the emotional demands of this work.

Post Divorce Counselling

Possibly the most important role of the mental health professional in terms of prevention of the serious sequelae of divorce is the provision of limited post divorce counselling which has been found to make a considerable difference to the single parent's ability to cope with the many demands made on them.

This is justified by the observations that emotional divorce may fail to occur, parents need to continue as parents, and the children's welfare depends on the parent's ability to cope with this experience. It is at this stage that the impetus for change is strongest, since old relationships are not ended, merely changed.

The goals include helping parents arrive at a mutually acceptable working settlement, open up blocked communication channels and work through the mourning process. They need to be helped to delineate their roles as spouse and parent, educated regarding the sensitivity of the child to conflict and also need to be able to recognize serious symptoms and help the child cope with difficult feelings in constructive ways.

There is always a normal period of stress and readjustment which requires counselling appropriate to the child's age. At times, however, it may be necessary to refer for more intense psychotherapy.

Because of the importance of peers for most children, groups have been enthusiastically advanced as an ideal medium. These children's groups need to be carefully structured and to centre on concrete activities.

Interventions are also focussed at the parent-child relationship level and may include other members or entire families.

Intervention for the sake of the children can also focus on the parent who needs to primarily resolve his/her own feelings of loss.

Post Divorce Community Support Systems are essential to help the parent cope with full parental responsibilities of single parenthood. These include different forms of self-help groups. Schools are central resources for children in providing possible groups and support systems. Education is the central preventative focus through books, television, films.

TABLE OF CONTENTS

	Page
ACKNOWLEDGEMENTS	i
ABSTRACT	ii
SUMMARY	iii
INTRODUCTION	1
1. <u>HISTORICAL PERSPECTIVE</u>	9
1.1 Marriages and Divorces	11
1.2 Child Ownership	13
2. <u>RECENT DEVELOPMENTS</u>	18
2 Recent Developments in Family Law	20
2.1 "No fault divorces" Reforms	22
2.2 The Conciliation/Family Court Movement - Evaluative Studies	27
2.3 Legal Protection for Children When to appoint	38
3. <u>THE PRE-DIVORCE STAGE</u>	44
3.1 The role of the referral agent	45
3.2 Pre-Divorce Counselling	47
3.2.1 Aim	48
3.2.2 The Family Approach	49
3.3 Divorce Counselling	50
3.3.1 Aim	50
3.3.2 Existing Programs	54

4.	<u>DIVORCE CONCILIATION/MEDIATION</u>	56
4.1	Mediation - when?	58
4.2	Mediation - who?	59
4.3	Mediation - a separate specialization	61
4.4	Mediation - Ethics	62
4.5	Mediation - Length of Sessions	64
4.6	The Settlement	64
4.7	Mandatory and Voluntary	64
4.8	Mediation Advantages	65
5.	<u>THE ADVERSARY SOLUTION</u>	67
5.1	Child Advocacy	68
5.1.1	Parents as Child Advocates	69
5.1.2	Parents Counsel as Child Advocates	70
5.1.3	The Court as Child Advocate	72
5.1.4	The Child Legal Representative as Child Advocate	77
5.1.5.1	A true Advocacy Model	80
5.1.5.2	The Team Approach	82
5.1.6	The Clinician as Child Advocate in Disputed Custody-Access Cases	85
5.1.6.1	Objectivity	85
5.1.6.2	Knowledge and Competence	91
5.2	The Best Interest Principle	93
5.2.1	Evaluation	93
5.2.2	Alternatives - Shared Parenting, Joint Custody and Free Access	106
5.2.2.1	Effect on the Child	113
5.2.2.2	Effect on the Custodial Parent	115
5.2.2.3	Effect on the Non-Custodial Parent	117
5.2.3	Indications of Successful Joint- Custody Arrangements	120

5.3	The Investigative Process	125
5.3.1	The Initial Contact	125
5.3.2	Investigation	125
5.3.2.1	Getting to Know the Child	126
	i. Personal development and family history	126
	ii. Interviews with the child	127
	(a) To inform them	127
	(b) Provide an opportunity to state preference	127
	(c) Assess needs	130
	iii. Longitudinal and current school observations	131
	iv. Psychological and Educational Achievement testing	131
	v. Medical evaluation	131
5.3.2.2	The parent-child/child-parent relationship	131
5.3.2.3	The Family System	133
5.3.2.4	The Child's Social and Community System	134
5.3.3	Evaluation	134
5.3.3.1	Synthesis of Data	134
5.3.3.2	Formulation of a Life Span	134
5.3.3.3	The Interpretative Process	145
5.3.4	Report Writing	147
5.3.4.1	General Approach	147
5.3.4.2	Form and Length	148
	i. Introduction	148
	ii. Background Data	148
	iii. Formulation or assessment of Control Issues	149
	iv. Opinion and Recommendations	149
	v. Further Questions and Problems	150
5.3.4.3	Confidentiality	150
5.3.5	The Expert Witness in Court	151
5.3.6	Training	156

6.	<u>POST DIVORCE COUNSELLING</u>	157
6.1	The Need for Counselling	157
6.2	The Goal	160
6.3	Children's Responses to the Divorce Experience	162
6.4	Intervention Models	164
6.4.1	Assessment	165
6.4.2	Individual approaches	166
6.4.3	Children of Divorce groups	168
6.4.4	Parent centered Interventions	172
6.4.5	Parent Counselling	174
6.5	Post Divorce Community Support Systems	178
6.5.1	Self-help Groups	178
6.5.2	Schools	180
6.6.1	Education	180
6.6.2	Books	181
6.6.3	Television	181

APPENDICES

- I Divorce Act No. 70 of 1979
- II The Los Angeles Husband and Wife Agreement
- III Adversarial and Mediatlional Approaches to Divorce - a Comparison

<u>REFERENCES</u>	189
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INTRODUCTION

Divorce in the Western world has increased steadily during the 20th Century. The white population figures in South Africa for 1977 showed that there was one divorce for every 3.9 marriages and 13 019 minor children were involved in divorce. In 1981 the statistics rose to 1 for every 2.7 marriages and involves 22 167 minors. (Department of Information and Statistics, News Release, 1981). Figures for the other population groups in South Africa tend to be unreliable and were therefore not included here.

In America in 1978 there were 1 million divorces involving more than 1 million children and the prediction made was that 45% of children born in 1978 will live part of their lives before the age of 18 years in a single parent family (Hammond, 1981). This comprises a huge proportion of the population and indicates an increasing problem.

The present study developed as a result of a need to examine and clarify the status goals and role of the clinical psychologist and other mental health professionals who have in recent years been called upon to play an active part in marital and custody/access litigation.

Divorce, for the Court, represents the legal step taken by a couple in terminating a marriage which for one reason or another has irretrievably broken down. It is the termination of one legal relationship between the husband and wife and the

beginning of another legal relationship in which agreements have to be reached by both parties in five major areas. These include division of property, maintenance of the spouse, maintenance of the children, custody of the children and access of the non-custodial parent to the children and vice versa (Kressel et al., 1979).

Custody, in essence, involves the practical care and control of the minor's person (Hahlo, 1975). This includes the right to:

- (i) the physical presence of the child,
- (ii) the control of his daily life,
- (iii) decide all questions relating to his training, education and religious upbringing,
- (iv) determine what home or house the child may or may not enter,
- (v) provide consent to surgical operations in cases of emergency,
- (vi) in a proper case to exercise custody vicariously (Roberts, 1979).

Ideally, despite the dissolution of the spousal subsystem, parents should be able to continue their role and obligations as parents, maintaining objectivity in their relationships with their children and separating fact from feelings in negotiating and settling post divorce custody/access arrangements with the best interests of the children remaining paramount. Indeed, where marital conflicts have been contained and parents have

not imposed too great a stress on the child, so that good parental care and a close relationship with both parents are maintained, it is theoretically possible for a child (and parents) to emerge from the dissolution process minimally scarred (Littner, 1973). However, divorce inevitably contains an element of hostility and for most of the children an entirely cooperative approach by parents to final settlement does not occur.

When hostility becomes uncontained and parents are no longer able to negotiate and reach agreement on the settlement of the ancillary issues, it becomes necessary for an outside agent in the form of a judicial officer to take the responsibility for resolving the issues between the parties judicially, a process which normally fails to resolve the emotional conflicts.

Custody decisions are accepted and openly acknowledged by judges to be, of all their tasks, among the most painful and difficult that they face.

"A Judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders".

B. Bokin, Trial Judge (273) 1952.

A Judge traditionally makes decisions relating to issues of innocence and guilt about which definite standards exist which are explicitly defined. His task in custody disputes is very different. Here, where neither parent has committed a crime, the concepts of guilt and blame have no place. Despite the fact that he is dealing with a sensitive, delicate and emotional issue which

relates to the prediction and determination of a child's life, the only assistance he gets from the legislature in South Africa, as in most Western countries, is that the interests of the child be paramount. This, in fact, is where the agony lies.

Judges arrive at their decisions by evaluating and weighing up the conflicting evidence from advocates and attorneys representing the parties, in the form of affidavits and cross examination of the parties and their witnesses, and special reports obtained from expert witnesses employed by them.

This evaluation is done against a background of standards based on legal precedent and case law and is thus deeply embedded in traditional cultural attitudes which often fall short of the needs and attitudes of our modern changing society, and do not necessarily reflect current findings in child and family research.

Changes in the law relating to matrimonial disputes as also the comments of Judges in reported cases indicate that the judiciary is aware of the shortcomings of the adversary legal system in this area and has looked towards the expert for assistance. A strong feeling has developed, however, to the effect that the experts, psychologists, psychiatrists and social workers have failed in their purpose of making the task of the Judge any easier, and have not, in fact, represented the best interests of the child (Mlyniec, 1978).

The reasons for this would seem to be twofold. First, because of the nature and structure of the process of law, the value of

the experts would seem to have been limited, for the specific reason that currently in this country they are employed by the parties who give them a specific contract. This immediately brings into question their objectivity as assessors and consultants in a case, requiring that the best interests of the only unrepresented party be paramount.

The second problem would seem to lie in the fact that up to the present in South Africa, no specialized training exists for such experts. They are insufficiently versed in the law, their rights within the adversary system, the effects of the process of litigation and adversarial divorce on the child and their familial relationships as a whole, their duties and responsibilities towards the child and his family, the needs for and requirements of pre and post-divorce counselling and mediation, method of investigation, the best interest standard, writing of reports and their presentation in court.

As an advocate for the child this professional must understand that his responsibility is first and foremost towards the child; however by logical extension, because the welfare of the child is largely dependent from that of his parents, his responsibility is also towards a healthy working parent-child unit. His objectives and guidelines in broad terms, therefore, are to promote a healthy renewed family life after the divorce has been finalized (Woody, 1978).

For the parents and children, the dissolution of the family unit and the restructuring of new post divorce family units and

relationships, constitutes a major life crisis in which all the emotions associated with significant loss are experienced, shock, pain, grief, anger and need to be resolved (Grote and Weinstein, 1977).

Although a great deal has been written and suggested, the question of exactly how divorce affects the child has not really been answered. Much of the literature has tended to look at clinical populations, with conceptual and methodological problems that have made the validity of these findings problematic (Levitan, 1979). Some exceptions were the various studies undertaken by Hetherington et al., and Wallenstein and Kelley which have influenced the more recent studies undertaken.

Two factors, however, stand out in the literature as highly significant determinants of post divorce adjustment in both children and their parents. These factors are

- (1) the amount of interpersonal hostility and conflict to which the child is exposed prior to, during and following the divorce procedure (Littner, 1973; Hetherington et al., 1976; Jacobson, 1978) and
- (2) the loss of contact or the breaking of affectional bonds with a parent after the divorce (Littner, 1973; Jacobson, 1978 and Hess and Camara, 1979).

These findings have direct relevance for workers in the field of family law, as they imply that healthy family relationships and adjustments after the divorce require the minimal of inter-parental hostility throughout the process of dissolution and

the provision of adequate meaningful contact with both a mother and a father after the divorce.

The aim of this dissertation is therefore limited to examining the role of the mental health professional through all the stages of divorce in terms of his potential for reducing trauma by facilitating mediated divorce, or if necessary adjudicated settlements, which assure the child continued and positive relationships with both parents after divorce. This will be done by:

- (1) Reviewing the historical development of family law through history in order to gain some understanding of the legal and social context of the area in which divorce and custody/access decision making belongs.
- (2) Critically examining the recent legal reforms.
- (3) Examining the role of the mental health professional as a facilitator of mediated settlements of divorce related issues at each stage of the divorce proceedings.
- (4) Critically evaluating the concept of child advocacy within the traditional and proposed ideal model.
- (5) Reviewing and updating the concept of best interest of the child.
- (6) Proposing practical guidelines to assist the investigating consultant to conduct his investigation, evaluation, and presentation of his evidence in a way which is maximally helpful to the court.

- (7) Finally proposing a model which outlines a progression of steps through which dissolution should move to ensure the least detrimental results both in the process towards such a dissolution and the outcome to families.

It must be borne in mind that this study can never presume to be a definitive work on matrimonial and custody disputes. We are looking here at two at times unrelated disciplines, that of the mental health professional and legal practitioner. It is not possible within the confines of a study of this nature to examine in depth the whole body of psychological knowledge and of the legal concepts past and present which must be applied, which are presumed to be relevant in such disputes. For example it has been largely assumed that marital conflict detrimentally affects the socio/emotional development of the child but there is no attempt within the scope of this thesis to elaborate on this theme.

Insofar as only a general overview can be given, focussing on central issues germane to the role of the mental health professional, practical guidelines have been suggested.

CHAPTER 1

HISTORICAL PERSPECTIVE

Working with families undergoing marital dissolution requires first and foremost an understanding of the current attitudes, guidelines, developments, approaches and difficulties experienced within the legal context of family law.

The first chapter therefore attempts to locate family law in its historical perspective and to consider the social forces which have shaped its development.

The South African Roman Dutch system of laws, with its roots in the early Roman, German and later Dutch systems, has developed over time to the position it holds today through a process of assimilation by which aspects of other legal systems, which have more appropriately reflected social conditions and served social demands, have been incorporated by the South African Judges into the law. This process has been particularly evident in the system of Family Law.

Attitudes surrounding the divorce process and custody and access matters primarily reflect the social and legal attitudes of divorce held by society. An understanding of current social and legal attitudes in this area requires an evaluation of the history of legal systems within those social contexts which have influenced their development.

Laws regarding relationships between parents and between parents and children did not exist in the early legal systems. An early prototype of such laws is the "patria potestas" of the Roman Law which gave the patriarch absolute control over all family members. When the patriarch died his eldest son took over the running of the extended family from which members were never freed, with the exception of daughters, who on marriage passed into the "patria potestas" of their husbands (Spiro, 1971).

The "patria potestas" as such, was never adopted by the early German and English systems. It did however have far-reaching influence in the later systems by providing that parents, as the natural guardians of their children, have a duty to support them and look after their interests during their minority (Wessels, 1908).

In the early German system, women and children were still largely considered part of the man's household. Although women held certain parental rights these remained very much subordinate to those of her husband and even with his death, although she maintained a great deal of control in matters concerning the children's education, marriage and personal welfare, a guardian was usually appointed by the father, before his death, and later by the state, who would administer the property of the minor and assist in legal proceedings (Franklin and Hibbs, 1980). Children, on the attainment of their majority or on marriage, were free to do as they saw fit (Wessels, 1908).

1.1 MARRIAGES AND DIVORCES

Marriages in these early systems constituted private civil contracts of sale arranged by the families, either between the bride and/or guardian of the bride, and the bridegroom. Similarly divorces by voluntary act (Chloros, 1978) were simple, informal, private arrangements between the parties concerned which were governed by social conventions, customs and ethics (Glendon, 1977).

The advent of Christianity signified an important milestone in the evolution of Family Law. Marriage was placed on a higher plane, the consent of the bride was insisted upon, and betrothal and marriage considered a sacred institution in which the bride was expected to remain true to her husband. The principle of indissolubility of marriage became established in the Roman Empire during the reign of the Christian convert Constantine from 306 to 337 AD, when it then became extremely difficult to acquire a divorce except in special cases of adultery or gross misconduct of a party. It is as a result of this practice that the concept of 'fault', which has had a major influence in all matters pertaining to the process of divorce, became firmly established.

For centuries the church retained control over marital matters until the Protestant revolution of the 16th century, when the view of marriage as a "wordly institution" challenged the ecclesiastical courts and led to divorce being brought under legal control (Hahlo, 1979; Brown, 1982).

During the French Revolution, divorce by unilateral request became possible and formed part of the original Civil Code, until concern for family stability resulted in a tightening up of the law, requiring a period of separation as a measure of control over impetuous divorces (Foster and Freed, 1974).

In England the Roman Catholic view of marriage as a sacrament, indissoluble except on death or by ecclesiastical courts on the grounds of adultery, persisted long after the breakaway of the Church of England (Zuckerman and Fox, 1973).

The early American system, again largely influenced by Protestant settlers, granted courts jurisdiction to dissolve marriage on specific grounds which were carried over from the ecclesiastical courts.

Russia, during the revolution, became the first and only European country to provide a purely administrative procedure for the dissolution of marriage, requiring registration at the States Registry of status. There was an attempt to introduce a stage of reconciliation into the procedure, however, voluntary divorce was reintroduced in 1968 (Chloros, 1978).

In South Africa the strong Calvinistic influence from the Netherlands determined the State's assumption of regulating marriage and family matters through its courts and judges (Wessels, 1908).

1.2 CHILD OWNERSHIP

With the influence of Christianity the role of the father towards his family changed from one of absolute authority and master to one of protector.

Childhood, however, was still not perceived as a separate phase of life and once weaned, and having acquired a minimum of skills to care for themselves, children were considered, and in all respects treated, as "small adults" (Mussen, 1969), and were expected to provide service and an income from the age of 7 years (Franklin and Hibbs, 1980). A major change in attitude towards children came with the Reformation of the 16th and 17th centuries. Encouraged by the clergy, philosophers and humanitarians of the time, the notions that childhood was a separate phase from adulthood, that children needed protection from the corrupt adult world, that rich and poor needed to be educated according to their age and that all education should be linked to religious and moral teachings, were being established throughout society (Mussen et al., 1969).

Throughout this period, in matters of child custody the law did not interfere with the father's right to the children's services once the marriage was dissolved (Franklin and Hibbs, 1980).

During the late 18th and early 19th centuries, the entire Western World was caught up in the social upheaval of the Industrial Revolution in which basic rural cultural societies changed to industrial urban societies.

These years of rapid change challenged traditional social roles and values of men and women. As men were required to pursue work opportunities outside of the family home, at work centres, women took over the control of the family and became the primary child rearers and home makers (Title, 1974; Lomax, 1978). This divided the wage labour of men from the private labour of women (Roman and Haddad, 1978).

Society also became aware of the vulnerability of children. The obvious and growing need to protect children from the exploitation of the child labour market resulted in the promulgation of the Child Labour Laws of the 19th Century (Houlgate, 1980). Furthermore, the work of such philosophers as John Locke (1632 - 1704), who stressed the importance of the early experiences of children for their future health and welfare, was influential, and there was a revival of interest in the rearing, training and social needs of children (Mussen et al., 1969). This brought about a revolutionary shift in the consideration of relationships between parents and children, away from the concept of parental rights and towards the concept of parental responsibility for the care and welfare of their children (Derdeyn, 1976).

These changes of attitude brought about fundamental changes in the laws. To this point the paramount rights of the father had not been interfered with by the law. However, in England the doctrine of "parents patria" was now established (Franklin and Hibbs, 1980), and the court, as the upper guardian of all minors, assumed power to exercise discretion in matters of custody and guardianship where the father could in any way be proved corrupt or a source of danger to the child (Mlyniec, 1978).

One of the first men to lose custody of his children for what was termed "vicious and immoral atheistic beliefs" was Percy Shelley, the poet (Derdeyn, 1976).

For the first time, it now became possible for women to gain custody of their children where fathers could be proved unfit as a parent. Little regard, however, was given to the actual benefits that a mother could give her child (Oster, 1965).

In America, during the early 1800's, article 146 of the Civil Code, based on the French Civil Code, provided that on separation, provisional custody be given to the father whether plaintiff or defendant, but stipulated "unless for the greater advantage of the child it be otherwise ordered" (Title, 1974). In matters of permanent custody there were no guidelines; article 157 of the Civil Code simply provided that awards be left to the judge's discretion to either party irrespective of guilt (Title, 1974).

Judges dealt with this situation by adopting the principle that the right of ownership of the children belonged to the parent who financed their maintenance and education. An 1926 judgement explicitly stated that, "...in consequence of the obligations of the father to provide for the maintenance of his infant children...he is entitled to the custody of their persons and the value of their labour and service" (Derdeyn, 1976, p.1370). Some American courts held that there be no onus on the father to support and maintain children over which he no longer had custody (Derdeyn, 1976). Clearly the man's assumed superior competence, and control over financial and property matters gave him the advantage that perpetuated his paramount rights (Oster, 1965; Derdeyn, 1976).

It was Talfourd's Act of 1839, in England, which empowered the courts to give custody of infants under the age of 7 years to the mother and in so doing, set the stage for one of the main governing principles of custody decisions, the Tender Years Doctrine (Franklin & Hibbs, 1980). This was followed by the Custody of Infants Act in 1886 which extended this age to 16 and then later to 21 years.

Gradually mothers' rights started gaining ground. In the early 1900's, in America, the father was finally held responsible for maintaining his children whether in his custody or not, thus removing an important financial constraint against awarding custody to mothers. Further, as a result of the socially dynamic, albeit precarious, social order in America, it was thought important that children be given a good solid start in life which would serve them for their future.

Consequently, as the importance of maternal care in early development was being stressed, so women's rights in custody were increasing and the paramount rights of the father were slowly eroded (Derdeyn, 1976).

This was reflected in 1921 with the amendment of article 157 of the Civil Code which provided that the judge, in all cases of separation or divorce, award custody to the party, regardless of sex, who would "best promote the best interests of the child" (Title, 1974).

This development was reflected in other social systems. In England the Guardianship of Infants Act, in 1925, finally established the equality of both parents in the eyes of the law as well as the principle of the best interests of the child (Bradbrook, 1971; Sornarajah, 1973). The Canadian

system closely followed developments in England (Bradbrook, 1971).

In the South African Roman Dutch system of law, as long as the marriage remained undissolved, it was traditionally held that the father's rights, as the nucleus of the family, prevailed. Where divorce was granted, (as a deserved punishment for such matrimonial offences as adultery, desertion or cruelty), the punitive policy was adhered to of awarding custody (for virtue) to the "innocent" spouse, except where the child's life, health or morals were threatened (Sornarajah, 1973; Hahlo, 1979).

CHAPTER 2

RECENT DEVELOPMENTS

Having traced the developments of the early roots of family law, this chapter will examine the three major reforms that arose within the modern legal systems as an attempt to meet the needs of families for protection within the adversarial practice of law. These included the no-fault divorce reforms, the conciliation/family court movement and the provision of legal protection for the child who finds himself the subject of custody/access disputes between parents.

It also examines and evaluates, in the light of these reforms, the provisions made by the new South African Divorce Act No. 70 of 1979 within which the mental health professional must work.

In the second half of the 19th century, a number of child protection acts were promulgated. They specifically referred to the protection, care, welfare, removal of and supervision of children.

The Child Protection Act of 1913 was an attempt to consolidate the law in this area. It was later replaced by the Children's Act of 1937 (Spiro, 1965).

In matters of custody, however, the interests of the children remained subsidiary to the traditional principles. Nevertheless judges would seem to have had great difficulty in applying these principles. For example, in 1907 a judgement by William Solomon

stated that the court use its discretion in granting custody to either parent regardless of guilt and even consider a third party where neither of the parents are considered fit and proper (Roberts, 1980).

In 1943 the Court in *Milstein vs. Milstein*, ruled the guiding principle to be "what is best for the children" (Sornarajah, 1973, p.135). It was not until 1948, however, that the Appeal Court acknowledged and accepted the departure from the Roman Dutch principle in these matters when it stated, "no apology is required for citing the practice under the English or any other modern legal system, and questions of custody may properly be decided in relation to human needs and values as they are assessed in civilized countries generally at the present day" (Sornarajah, 1973, p.135). The Matrimonial Affairs Act of 1953 finally and firmly established the interests of the child as the paramount consideration in both cases of divorce and separation of spouses (Spiro, 1971).

2. RECENT DEVELOPMENTS IN FAMILY LAW

The family, whatever form it takes, has remained the basic and primary economic and socializing unit in all societies. It provides, through the parent-child relationship, the physical, emotional and educational care of the child in a stable environment thus providing the basis for the child's future relationships as an adult.

The dissolution of the family unit, through divorce, constitutes a highly emotional crisis, not only for the divorcing couple but for all the members of the nuclear and extended family system and represents substantial economic losses to society each year (Foster, 1966).

Inevitably, therefore, the strong interest of the State and public in the stability of the family unit, makes the protection and preservation of the institution of marriage the primary object of the legislature and the courts of law (Kay, 1968; Watson, 1969; Levy, 1972). Their attempts to achieve this goal have traditionally relied on the same basic principle as was used by Constantine in the 4th Century, that is, to make divorce difficult to obtain by strictly limiting the grounds on which it was granted, and applying the concept of 'fault' and punitive measures to marital misconduct.

As divorce is obtainable only by judicial decision through the legal model of the adversary system this process inevitably involved an inherent principle of contest between two opposing parties. Traditionally each spouse with his other legal team defends their rights, while the success of the battle depends on allegations and evidence as proof of 'fault', which is exposed in court.

Zuckerman and Fox, 1973, describe this process vividly:

"The oppression of the fault system is magnified at trial by the adversary system. No one connected with the court proceedings is spared. In a contested case, the emotional trauma experienced by the parties as a result of the breakdown of the marriage is heightened by the armed camp atmosphere. The one labelled 'at fault' will be stigmatized and may lose rights in the matrimonial property and custody rights to the children of the marriage. In an effort to 'win', the parties are forced to demean themselves, their Counsel and the Court by parading in public the sordid aspects of their relationship, too often by engaging in personal vilifications and even perjury. Friends and neighbours of the wrong parties may be brought into the sordid little drama to provide 'corroboration' of the defendant's or cross defendant's wrong doings and testimony of the plaintiff's good character". (p.524).

The recognition of the inadequacy of the adversary system as a means of resolving divorce, custody and access issues has been strongly expressed by many judges, counsellors, academics and practicing lawyers (Mnookin, 1975; Derdeyn, 1976(a); Westman, 1979; Brown, 1982).

Their objections are based upon the manner in which the adversary system creates, perpetuates and deepens hostilities between family members, such that it finally becomes impossible to deal, in an objective, reasonable and realistic manner, with the settlement of the divorce and its ancillary issues such that the best interests of the child are ensured (The S A Law Commission Report, 1975).

As a result of these expressed needs, three significant movements arose which gave rise to the 'no-fault divorce' reforms, the conciliation/family court movement, and legal protection for children.

2.1 "NO-FAULT DIVORCE" REFORMS

As early as 1932, Prof. Vernier pointed out that it was "incompatibility which induced married persons to do the specific things which statutes name as causes for divorce" (Zuckerman and Fox, 1973, p.541).

It was only much later, however, that the approach of attributing guilt and innocence, which takes no account of the real complexities of the marital relationship, assuming that marital breakdown results from the specific acts recognized as grounds of divorce, and granting dissolution only for marriages proved to have suffered such acts, was recognized as simplistic and inadequate (Kay, 1968; The SA Law Commissioners Report, 1975).

It also became clear that couples, determined to dissolve their marriages effectively and with the minimum of pain to both themselves and their children, found themselves forced to subvert the system by making their case fit the law (Hahlo, 1979/80). By selecting the least offensive ground for the defendant and committing perjury the couple would build up a plausible case and by "collusive agreement" (Zuckerman and Fox, 1973), or "mutual consent" (Foster, 1973), obtain a "consensual-perjured divorce" (Levy, 1972). Lawyers had no choice but to play the game and Judges, finding these divorces difficult to detect (The S A Law Commission, 1975), also became party to the farce played out at these uncontested hearings (Zuckerman and Fox, 1973).

Most divorces that were ostensibly based on fault, were in fact divorces by consent, thus making a mockery of the law and its institutions (Hahlo and Sinclair, 1980).

Foster, 1966, observes that, "in the typical uncontested divorce case, proof is by formula and the entire proceeding may be disposed of within minutes" p.355.

An estimated 90% of divorces in South Africa (Hahlo and Sinclair, 1980), 95% in England (Mortlock, 1972) and 90% in America (Foster, 1966), were uncontested under this system.

It was also suggested that the interests of the children and society might be better served by allowing the legal termination of marriage relationships which for all intents and purposes have ceased to function as such (Kay, 1968; Hahlo and Sinclair, 1980).

Commissions set up in England, Canada, the USA and later in South Africa examined the 'fault-based divorce systems and suggested alternative suggestions. The concept of divorce as a remedy for marital relationships which have irretrievably broken down was a concept voiced by Archbishop Cramer in the 16th Century who suggested that where "such violent hatred as rendered it in the highest degree improbable that the husband and the wife would survive their animosities and ever love one another again", divorce be granted (Foster, 1973, p.186).

Chloros (1978) comments that the recognition and adoption of a single break-down ground for divorce which replaces guilt by failure (Hahlo and Sinclair, 1980), would render it unnecessary for judges to make value judgements on issues of innocence and guilt and therefore for spouses to allege such guilt.

Many attempts have been made globally to recognize a single breakdown ground. This has been attained in most Eastern European countries while the West European countries have tended to adopt a dual system where the new and traditional grounds exist side by side.

In England although the single breakdown ground was recommended by the Archbishop's group in 1966 (Mortlock, 1972), the tremendous conservative opposition to this resulted in a compromised Divorce Reform Act of 1969, in terms of which the single irretrievable breakdown ground had to be proved by evidence of such acts as had constituted the old traditional grounds of divorce. There was a further need to show that these acts were symptomatic of, or necessarily a sufficient cause for, breakdown (Zuckerman and Fox, 1973). The result therefore defeats the purpose of the reform by retaining the need for proof of fault and makes divorce, theoretically, even more difficult to attain. The Canadian Divorce Laws of 1968 resembled the English System (Foster, 1973).

Of the Western World Countries, by far the most liberal reforms in divorce laws evolved in the United States of America.

In America each State was responsible for the promulgation of its own divorce laws. Several investigations had been undertaken by independent States which sought to develop a set of proposals which would guide the recodification of divorce laws. An important step in this direction was the promulgation of the Uniform Marriage and Divorce Act (UMDA) in 1970 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), which attempted to reform and unify the existing laws which varied tremendously from State to State.

It contained widespread, revolutionary proposals which were based entirely on the 'no-fault' principle. Briefly, it proposed to replace all existing 'fault' based grounds for

what it termed the 'dissolution' of marriage by a single, all encompassing 'irretrievable breakdown' ground and abolished all defences preventing such 'dissolution' from taking place. In ancillary matters 'no-fault' mechanisms or standards of assessment were proposed in coming to decisions. In property and maintenance matters, such factors as past, present and potential future contributions, resources and needs of each spouse were considered and replaced punitive decisions based on fault. In matters of custody and access it specifically prohibited any evidence of fault except where it has relevance to the parenting ability and relationship with the child of each parent. In matters of custody and access it specifically prohibited any evidence of fault except where it has relevance to the parenting ability and relationship with the child of each parent. In matters of custody it permitted parents to reach settlements outside of the Court which, except where found to be unconscionable, could not be set aside by the Court (Foster, 1973).

Although not automatically adopted, a redrafted form which included provision for the establishment of breakdown in terms of past and present separation and efforts at reconciliation served as a blueprint for the different states. California was the first state in 1970 to establish 'no fault' divorce reforms and by 1973, 20 States, and by 1976 all but 3 States, had instituted divorce reforms based on the UMDA proposals.

By 1975, the Australian Family Law Act and by 1979 the New South African Divorce Act had also introduced the single new ground.

In South Africa, the Law Commission of 1975 proposed the adoption of the concept of irretrievable breakdown by unilateral request to replace the two main existing grounds of adultery and malicious desertion based on fault. The Commission defined irretrievable breakdown as the point at which "the marriage relationship of the spouses had degenerated" such that "their marriage no longer existed as a marriage in the true sense of the word, and there is no reasonable prospect of a normal marriage relationship between them being resumed" (The South African Law Commission, 1978, p.11). This was adopted in the Divorce Act 70 of 1979 (Appendix I).

2.2 THE CONCILIATION/FAMILY COURT MOVEMENT

"The judicial system has a singular opportunity at the time of divorce to play a preventative rather than a corrective role by detecting families with serious problems that are not solved by the divorce, but are carried over late into the separate lives of one of the parties or of both and into the lives of their children" (Bodenheimer, 1971, p.727).

This represents the views of many workers in the field (Musetto, 1978; Sinclair, 1979), and has helped to focus the attention of legal professionals on the emotional and psychological needs and issues involved with the aim of reducing and avoiding unnecessary stress and promoting the best alternative solutions for the child and his family.

The Family Court movement arose as an attempt to remove family problems from the framework of the advisory system to specialized

courts or conciliation services attached to courts. In essence it attempted to defocus from the contestation of rights and focus instead on the family, its welfare and problems. It was motivated by the success of the Juvenile Courts (Kay, 1968), which replaced the punitive approach by a process of investigation, diagnosis and treatment for child offenders and juveniles (Zuckerman, 1969).

The hope was that these specialized courts would form part of the Superior Courts and would have integrate jurisdiction over all family problems, be presided over by Judges with specialized skills and interests in family problems and equal in status to Superior Court Judges, be staffed by fully trained, investigatory and counselling professionals who could advise the court, and where hearings could be conducted in a non-adversary, therapeutic environment (Foster, 1966; Dyson & Dyson, 1968; Kay, 1968).

The first prototypes of the 'Family Courts' were the Domestic Relations Courts whose functions it was to fully investigate the history, character and circumstances of all parties in a divorce action (Zuckerman, 1969). The first was established in New York in 1910 as part of the Magistrates' Court.

The Domestic Relations Courts of Wisconsin and Ohio, established in 1935 and 1938 respectively, were the first to attempt to counsel and reconcile couples who were filing for divorce. There are currently in America many reconciliation programs offered by the Court. These include "The Divorce Experience"

run by the Domestic Relations Staff of the Minneapolis Family Court in Minnesota (Fine, 1980) and others run by the Family Courts of Toledo, Utah, Los Angeles, New York, Milwaukee (Foster, 1966).

The first Conciliation Court was established in Los Angeles in 1939. Conciliation has been defined by the Fine Report in 1974 as:

"Assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or separation, by reaching agreement or giving consent or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees and every other matter arising from the breakdown which calls for a decision on future arrangements"

(Stone, 1977, p.106).

Over recent years the counselling programs in conciliation and family courts have evolved from being concerned with reconciliation and focussing on the marital difficulties to assume a service for the resolution of custody and visitation disputes through a process of mediation. Mediation has been defined by Brown (1982) as:

".....a voluntary, task orientated process in which a third person, a mediator, functions in a non-judgmental capacity in helping a divorcing couple improve their communication through fewer distortions and misunderstandings, being more open and direct with each other, thereby changing their interaction from a potentially destructive, competitive, win-lose confrontation to a co-operative, collaborative, negotiating, problem-solving endeavour for dealing with their differences" (p.9).

Some of the States that have ensured that the mediation model becomes the standard include Massachusetts, Connecticut and California, where 12 out of 15 courts provide some form of conciliation or counselling (Brown, 1982).

In 1974 the Conciliation Court of Los Angeles County Superior Court, at the request of the Judges who recognized the need for counselling in families who were returning to court to solve their post divorce disputes relating to custody and access difficulties, set up a post divorce counselling service (Elkin, 1977).

In 1959 the National Council on Crime and Delinquency proposed a Model Court in its Standard Family Court Act, the result of which was the mushrooming of Courts all over the States which called themselves 'Family Courts'. Dyson and Dyson (1968) point out, however, that "most of them fall short of the model

described, lacking one or more of the three essential characteristics of 'integrated jurisdiction', investigatory staff and 'counsellors trained in social work'". It named the States of Ohio, Rhode Island, Hawaii and New York as being the only four to have succeeded in this goal.

EVALUATIVE STUDIES

Foster (1966) has reviewed the surveys that have been undertaken. It is apparent that these services have filled a need and have yielded uniformly positive results. The Family Court in Toledo, Ohio, which functioned almost as an independent agency, received up to 4 000 calls in one year from troubled families not yet involved in litigation. The 1963 statistics showed that of couples that had filed for divorce, 717 individuals had avoided or refused voluntary counselling and 626 had accepted. Of the 1 337 cases that had been closed, reconciliation was achieved in 439 or 30% of these. Perhaps of greater importance is that conciliation on the ancillary matters of custody and divorce was achieved in 326 and 383 cases respectively. The results indicate that a selective process either through screening or self-referral increased the success rates for reconciliation. In Utah 44% of self referrals opposed to 9% of Court referred clients were reconciled. In Los Angeles where screening was quite thorough the reconciliation rate was 64.2% in 1963 and 58.9% in 1965. The problem with rigid screening is that only a very small percentage of troubled families have any contact with the available counselling services and this is an important consideration when in a place like New York, 90% of conciliation efforts were directed at the resolution of

ancillary matters, while 10% were aimed at actual marriage saving or reconciliation. Maine and New Jersey were also reported, while having had limited success with reconciliation, to have been extremely successful in resolving custody/access disputes and helping the family plan for the future.

By 1977 the Los Angeles Conciliation Court had seen about 300 families of which 90% were in conflict regarding access matters only. The results of a survey have shown that one out of two couples referred to post divorce counselling were able to reach an amicable agreement (Elkin, 1977).

Foster (1966) concludes that what successful court systems have in common are able Judges, competent professional staff and widespread acceptance of the need for conciliation approach by the legal profession.

In England the reconciliation services that existed fell under the probation or welfare officers attached to the divorce courts who were also responsible for the investigations that were undertaken. It was not until 1969 that a provision for reconciliation became incorporated into the law. By 1973 solicitors acting for a petitioner in divorce were required to certify that the possibility of reconciliation had been discussed and the sources for such a service provided (Stone, 1977). The Finer Report of 1974 suggested the establishment of Family Courts in England and although this has not yet been implemented, the Family Law Sub-Committee of the Law Society in 1979 again came out in full support of such a system, which to date has been turned down on the grounds of cost (Richards, 1981).

The Family Court of Australia, based on the American concept of a specialized integrated court, was established by the Family Law Act of 1975.

In South Africa the courts have indicated great reluctance in becoming involved in the social and therapeutic aspects of the divorce process. The South African Law Commission felt that reconciliation could not be forced on people and felt that an assessing process of all cases for the purpose of assessing the potential for reconciliation would be too costly and would not be necessary in all cases. The Commission concluded that "a Judge should be able to tell at a glance in which cases it would be unnecessary to take steps with a view to reconciliation" (The S A Law Commission, 1978, p.26). The Divorce Act, No. 70 of 1979 therefore provides that at the discretion of the court (on the basis of an enquiry into the irretrievable breakdown ground), proceedings be postponed to provide the opportunity for the parties to seek reconciliation counselling with independent agencies (Section 4(3)).

One of the problems with this approach is that by the time divorce matters get to court, parties are so committed, both psychologically and financially, to going through with the proceedings, that it is no longer possible to intercede. Another problem stems from the feeling that Judges may not be the right people to make such an assessment. Prognosis requires detailed investigations into the circumstances of the divorce and judges from the nature of their commitment to a heavy workload of diverse matters, are unable to comply.

Without a system which allows Judges to develop the specialized expertise to adjudicate in sensitive, social issues, the probability exists that the assigned Judge, without reflecting on his judicial integrity, may not have the necessary commitment. A third problem is that the conflicting material usually presented to the Judge where ancillary matters are in dispute are far from adequate in the assessment of the potential of the relationship.

Foster (1966) points out that the opportunity to succeed with reconciliation efforts is at its maximum before litigation is commenced.

On the subject of conciliation, the new Divorce Act provides for the incorporation of a negotiated settlement relating to custody and access in the divorce order, if the Court is satisfied that the proposed arrangements are in the best interests of the children (Hahlo, 1975), but again does not provide the machinery required to encourage mediated settlements within the legal structure.

Based on the recommendations of the Commission, Section 6(2) of the new Act provides that the court may, at its own discretion, call for any investigation it deems necessary in order to come to an informed opinion. Although this clearly enables the court to examine more objective, comprehensive and unabridged reports, it has been cautioned that where such a provision remains discretionary only lip service will be paid

to it (Sinclair, 1979). There is no provision made in the act for post divorce supervision and support.

Where courts have not provided the necessary services, parties and legal professionals have looked to independent mental health services for such assistance, not all of which are suitable to carry out the demands made on them.

(a) Individual therapy in the field of marital breakdown, has many disadvantages.

- (i) it focuses on individual dynamics and behaviour and feelings rather than the marital relationship (Benedek & Benedek, 1979),
- (ii) the skills and expertise of the therapist are seldom specifically divorce related and supervision is not always available (Benedek & Benedek, 1979),
- (iii) when called as an expert witness by one party there are inevitable difficulties with regard to the objectivity of his testimony (Frederick, 1975),
- (iv) an individual approach is further accused of actually contributing to the adversary process in that when one of the spouses enters therapy alone, and as insight, sensitivity and a new language is learned, the gap between the spouses is widened rather than narrowed, thus increasing the probability of an adversarial dissolution of the marriage.

(b) Marriage and Family therapists on the other hand are committed and trained to working with the marital and family system. This enables the sharing of insight, equal growth possibilities, maintenance of primary bonds between spouses during the pre-divorce or reconciliation stage so that even when divorce becomes inevitable, essential communication is encouraged (Steinberg, 1980). Therapists are also exposed to both points of view and thus more likely to gain an objective and realistic understanding of the situation for indication purposes and as expert witness. FAMSA is a specialized subsidized service which has 18 branches throughout South Africa. It provides marriage and family counselling in an attempt to prevent marital breakdown before the damage is irreparable.

(c) Public Mental Health Clinics such as Child Guidance Clinics again tend to have no specific focus on marital and divorce issues.

(d) Mediation Services (Brown, 1982). The Family Mediation Centre, established by Coogler in Atlanta in 1974, became the first formal private divorce/family mediation centre in the United States. At the same time a similar conciliation project was being pursued in Toronto in which a form of mediation in which counsellors with both spouses and their lawyers worked in 'open forum' or conference towards a voluntary, mutually acceptable agreement.

In 1976 Lohman set up a private Family Mediation Service in McLean, Virginia, and it was at this time that mediation work took off in America. In 1980 the Family Mediation Association, an organization concerned with the development and advancement of divorce mediation as a viable alternative to the adversarial system was established by Coogler and in the same year the Academy of Family Mediators was established by Irving, Lohman and Heynes in New York.

(e) Other independent sources include special projects founded by grants or community based voluntary groups, for which the public are not charged. These have tended to focus on post-divorce problems and are run by specialized and experienced teams. The Children of Divorce Project (Wallerstein & Kelley, 1977) comprises a comprehensive research program dealing with post divorce conflict. Others include voluntary community (Guerney and Jordon, 1979), school supported (Wilkinson and Black, 1977; Hammond, 1981) and experimental (Green, 1978) post divorce groups for children and seminars for parents (Granvold and Welch, 1977; Young, 1978(a); 1978(b)).

Although of great benefit to participants these projects are still at an experimental stage and thus are limited both in length of operation and availability to the general population.

Evaluation studies. Brown outlines several projects being undertaken in the USA for the purpose of evaluating the different aspects of the mediation process in order to provide an empirical base for the practice of divorce/family mediation.

Preliminary surveys indicate that more than 2/3 of contested custody/access cases in Connecticut between 1977/1979, 8/10 in Denver, the great majority in San Francisco and 85% to 90% in Greater Washington were successfully mediated (Brown, 1982).

Clearly these private services can fulfill the needs for families; however there are 2 inherent difficulties in all independent private services:

- (1) Unless amply subsidised they are limited to the affluent sector of the population. Swerdlow (1978) notes that medical aid schemes still restrict payments to specific diagnostic categories in which divorce related problems are not included.
- (2) Contact requires referral which as a result of ignorance is often not made until it is too late.

The courts have consistently been looked to to take responsibility for litigating families in distress. In many respects they have substantial advantage over independent and private services which include early, automatic contact for all families without the need for pathology to be identified, access to a wide range of services from investigation to therapy, and the assurance of quality and direct recommendations to the court in all cases of post divorce litigation (Benedek and Benedek, 1979).

2.3 Legal Protection for Children

When mediation efforts fail, the dispute between parents for custody of or access to the child becomes a function of the parent-centred adversary system which requires spouses to defend

their "principle rights of custody, guardianship, access, maintenance and property that need to be distributed" (Roberts, 1980), illustrating that most decisions stated to be in the best interests of the child, are in fact basically ones of parental right (Derdeyn, 1976(a)), asserted by default to the parents (Foster and Freed, 1974).

The Yale Law Review (1978) notes: "as the subject of the custody dispute, the child of divorcing parents has immediate and lasting interests in the custody decision before the court. The choice of custodial parent will influence the child's personality and personal attachments, and the process of litigation may itself put the child's well-being in jeopardy" (p.1129). Clearly therefore this situation constitutes a serious cause for concern.

Wilcox (1976) states in support that "to the extent that standards and procedures are inadequate, the child becomes a pawn in a dispute which may affect his financial and psychological well-being. No judge would admit to treatment of the minor as a chattel. Yet when the court accepts the settlement of parties as binding on the child or withholds from him the safeguards afforded parents, the child enjoys all the rights of the family car" (p.927).

The first attempts made to protect and promote the interests of the child in legal matters evolved during the First World War in 1919 with the creation of the 'Friend of the Court' who was required to contact divorcing parties and gather such information as might not be exposed by either party or their counsel, and advise the judge on problems concerning the children (Benedek et al., 1977).

In 1960 the Wisconsin Family Code imposed on the court a duty, in all cases where child custody was in dispute or wherever the welfare of the child was in question, to appoint a separate and independent attorney to serve as 'Guardian ad litem' for the protection of the interests of the minor children (Foster, 1966). This provision as well as permission to consult with child care experts, and interview the child in chambers rather than in open court, were included in the UMDA proposals (Foster and Freed, 1974; Zuderman and Fox, 1974).

The final 1973 amendment of the UMDA of the Family Law Section for the first time provided for the mandatory appointment of an independent counsel to represent the interests of all minor or dependent children (Foster, 1973).

The position at present, in most western states, is that children as the parties most affected by custody/access determination still fail to be granted full party status or mandatory representation by the courts and unless mandatorily required by the court are not granted independent representation by the courts (Mnookin, 1975; Wilcox, 1976; Mlyniec, 1977-78; Hahlo and Sinclair, 1980).

When to appoint:

Certain writers in the field have stressed the need to appoint an advocate for the child in all cases (Goldstein et al., 1973). Others have specified that an advocate should be appointed at the request of the court, parents, child or other qualified or interested party (Wilcox, 1976; Alexander, 1977) where custody is undisputed but a threat to the welfare of the child may exist. Most support the appointment of such

a representative at the very least in all contested cases (Coyne, 1969; Watson, 1969; Wilcox, 1976; Yale Law Journal, 1978).

Mlyniec (1977/78), in line with the principle of minimal interference by the Courts, suggests that a child's legal representative be appointed only where a dispute arises and the child has stated a preference (thus placing a choosing child with a wanting parent). Where there is no dispute and the child's wishes match the custodial arrangement, and there is no suggestion of a possibility of harm; or where the child states a preference but the parent is unwilling; or where the child has not stated a preference and there is a dispute between the parents both of whom have been assessed by psychological investigations as fit; then the legal representative is not appointed. The child here is seen as having full party status and the role of the legal representative is the traditional one of furthering the child's case (Bersoff, 1976-77). Bersoff also sees a need for representation where custody is not in dispute but where the child's preference is at odds with the parental agreement, and where the child refuses to live with either parent, as in both these situations the interests of child and parents are in conflict.

Alexander (1977), proposes that this question should be based on the mental health professional's assessed level of disagreement between the parties, such that the consideration of the best interests of the child take either the form of mediation through an expert, or litigation through an attorney.

The question therefore remains unresolved. However, experience has shown that where the appointment of a legal representative for the child has not been a mandatory requirement in specific circumstances, appointments left to the discretion of the court or other parties, are seldom made (Yale Law Journal, 1978; Hahlo and Sinclair, 1980). Furthermore few minors have the sophistication or financial resources to secure the services of an attorney (Wilcox, 1976). The right to retain is therefore not sufficient.

The new S A Divorce Act 70 of 1979 for the first time provided that courts "may, at their discretion, appoint a legal representative for a child".

This can only be seen as a dismissal of responsibility for the children by the South African courts. The courts in South Africa need to take more responsibility for the social role they play. Independent court services which involve counsellors, expert witnesses and legal representatives for the child, go way beyond the reach of the average man's resources and becomes a luxury for the rich (Schäffer, 1981).

Although new and important concepts have been introduced there is a feeling that the law has not gone far enough. It has provided the opportunity that because of the Commission's insistence on not curtailing the discretion of the Court, it has not provided the machinery nor the procedure to give effect to its provisions. Though the act has restated the position of the court as the Upper Guardian of all minors (Section 6(1)),

thus in theory safeguarding the paramount interest of the child, it has contented itself to allow the court to exercise this inherent status without compelling the Court to do so.

Whereas parental rights over property and maintenance could be dealt with by lawyers, divorce and custody arrangements, where the welfare of the children and therefore the family is paramount, have no apparent place in the adversary system.

In considering the question of cost, it is not sufficient to dismiss more costly procedures without carefully evaluating and weighing the cost to the state of the inevitable divorce related problems that are created and perpetuated by the present system. The initial cost of a more socially orientated system may indeed be higher, but the long term results, of having provided the necessary means for families to deal with the crisis constructively and resolve the problems adequately so that they can continue functioning as emotionally balanced members of society can, in the long term, only be of great benefit to the state, both financially and with regard to stability.

CHAPTER 3

THE PRE-DIVORCE STAGE - INTRODUCTION

The previous chapters have illustrated how the legal systems have, in various degrees, progressively become aware of, and taken the welfare and needs of the parents, families and the child into account with recent legislation. They have also illustrated the clear unsuitability of the adversary system for the resolution of family disputes.

The lack of sufficient machinery to provide the family with necessary safeguards in the adversary systems, however, does not remove from mental health professionals in this area the responsibility to assure the families of these services.

The demands on mental health professionals within the process of marital dissolution have been varied. In general it has required involvement in a non-legal way as a counsellor or therapist to either one or both parents, the children or the family as a whole in order to resolve stress prior to, during, or following the divorce. It has also required direct participation in the legal process either as a mediator or as an investigator and expert in court to give opinions in custody and access disputes.

The following chapters will attempt to define the role of the mental health professional at each stage of the dissolution process from the first contact with the client or attorney, through reconciliation, mediation, investigation and legal adjudication and the post divorce stages, as well as to derive guidelines based on the perceived needs of the child within his family.

The pre-divorce stage is possibly the most important stage in the divorce proceedings, as the manner in which the couple is handled will determine the atmosphere within which the divorce settlement is reached.

This chapter will examine the roles of both the legal and mental health professional at this stage and will describe goals and process of pre-divorce counselling.

The frustrations and hostility of divorce start long before steps are taken to dissolve a marriage. The active search for and contact with an attorney represents a public admission that the marriage is in trouble (Herman et al., 1979). Sabalis and Ayers, (1977), warn however that it is an error to assume that every client who consults an attorney is necessarily serious about wanting a divorce. In fact where a marriage has failed, "divorce serves nothing unless it includes an understanding of the causes of the marital breakdown" (Steinberg, 1980, p.261). For this reason then, the roles of both the Counsellor and attorney in the pre-divorce period are crucial.

3.1 THE ROLE OF THE REFERRAL AGENT

The role of the lawyer, as the link between the client's motivation for a divorce and the action itself is vital in determining the final outcome for the family. Ideally it requires certain abilities and qualities. Sabalis and Ayers (1977), identify the following abilities:

- (1) to assess the prognosis of reconciliation efforts through a clear understanding of the permanency of the precipitating factors and the purpose that the action is serving for the clients;

- (2) to motivate and encourage the couple into counselling where appropriate and necessary;
- (3) to understand the psychological make up of the client in order to anticipate and defuse the problems that arise;
- (4) to encourage realistic expectation of outcome by keeping the client informed, and ensure that all information remains reality based and concrete, especially in period of stress.

Herman et al. (1979), generally define the need to be able to deal with the emotional and legal demands placed on him by the client.

Where reconciliation attempts are refused or fail, the goal of the lawyer then is to make conciliation or mediation available to the client (Podell, 1973).

The fact is that to a large extent the legal profession has, except in the role of expert, been reluctant to involve mental health professionals in the dissolution process (Woody, 1978). They have also been noted to lack both sensitivity to the emotional needs of clients and/or the knowledge and skills to be able to deal with this role (Duquette, 1978; Herman et al., 1979).

In a recent survey of 22 experienced attorneys in Georgia, attorneys put forward specific suggestions which they felt would improve their role performance as divorce lawyers.

These were:

- (a) the need for formal training in counselling;
- (b) the need for a better knowledge of referral services
and
- (c) the need for increased sensitivity to the trauma of
divorce (Herman et al., 1979).

Law schools in America have given increased attention to the interface of law and therapy in the process of divorce. They have begun to incorporate interviewing and counselling courses into their curriculae, to publish interdisciplinary text books, to offer an increased number of law degrees combined with degrees in psychology or social work and more than 120 law schools participate in an annual client counselling activity coordinated by the American Bar Association (Steinberg, 1980). They have clearly moved from a symbolic level of academic recognition of the need to the pragmatic level of practitioner acceptance.

3.2 PRE-DIVORCE COUNSELLING

The question of mandatory counselling has raised certain objections. These are that counselling efforts with unmotivated parties are futile, that it may violate the integrity of the persons concerned, and that it becomes a practical impossibility in the over-burdened courts and public services in heavily populated areas (Foster, 1966).

Rosen (1978) feels, however, that counselling should be an essential feature of the divorce process, to be offered at the institution of proceedings irrespective of whether conflict is in evidence through a custody or access dispute or not, as the fact that 90% of divorces are settled before trial effectively reduces the number of families receptive for counselling.

3.2.1 AIM:

Pre-divorce counselling is aimed at helping the marital couple resolve their conflict and where appropriate, preserve or restore the marriage (Brown, 1982).

Steinberg (1980, outlines the purposes as being:

- (1) Understanding through insight of the role that each spouse has played in the relationship in order that these dysfunctional patterns become less likely;
- (2) Increasing the likelihood of reconciliation;
- (3) Reducing some of the hostility and bitterness in the relationship and thus,
- (4) Increasing the likelihood of constructive communication and negotiation in the settlement of the ancillary issues where divorce is inevitable.

The basic therapeutic model used in divorce counselling has drawn on brief crisis intervention, conflict resolution and problem solving methods.

The position taken by the counsellor is one of strict neutrality regarding the divorce decision. He does not impose his values and beliefs on the clients. He simply helps the clients gain information and insight so that they can best decide what to do regarding their marriage (Gardner, 1977).

Fine (1980), proposes that 'fence-sitting' by couples is a justified position as they may need the time to explore the problem and its alternative solutions.

An interesting feature of the Los Angeles reconciliation program is the 'husband and wife agreement' (Appendix II). This is a contract, drawn up by the spouses themselves following a set number of interviews with the counsellor, which deals with issues of contention between the parents and specifies the manner of dealing with them should cohabitation be resumed. This contract is then signed by the parties and the counsellor and then approved and made an order of court by the Judge. Where reconciliation attempts fail, the goal of counselling then shifts to the conciliation or mediation of collateral issues (Foster, 1966).

3.2.2 THE FAMILY APPROACH

Musetto (1978) bases his pre-divorce approach on systems theory. He states that "emotional functioning is interdependent and reciprocal, causes of behaviour are circular and not linear, that personal motivation factors involve the covert expectations and loyalty obligations implicit in being a member of a family"

(p.60) and that each member plays a role in maintaining the status quo such that despite actual separation or divorce, destructive family relationships may endure in the form of custody/access disputes. As the problem is a conjoint one, the responsibility in bringing about a solution is therefore also conjoint. Families must therefore be given the opportunity to generate solutions to their problems.

Therapy therefore focuses on helping the family to understand what factors in family functioning have contributed to the dysfunction. Parents are encouraged in their responsibilities as parents and to understand the children's difficulties in coping with and maintaining their loyalty ties.

Working with the family as a whole, including the children, as the parents attempt to cope with the conflict of interest between the child's need for continuity of the family system and the parental wish to dissolve the family structure, affords the advantage that this show of respect and acknowledgement of the children's needs and feelings helps them to feel cooperative, considered and loved, rather than helpless and abandoned (Salk, 1977).

3.3 DIVORCE COUNSELLING

3.3.1 AIM.

When parents make the decision to terminate the marriage the focus of the pre marital therapy switches to that of

- (1) Helping the parents with the task of telling the children,

- (2) helping the parents to express their feelings appropriately to the children;
- (3) helping the parents to cope with the feelings expressed by their children;
- (4) educating parents as to the natural and inevitable responses of children at this stage;
- (5) educating parents on the legal and financial aspect of divorce and
- (6) referring them to a competent attorney and preparing them for a mediated divorce settlement.

These tasks are elaborated below.

- (1) Gardner (1977) has set out guidelines for parents in telling their children of their decision. Briefly he suggests that both parents need to tell them together, approximately one to two weeks before the actual separation in order to allow time for adjustment, but not sufficient to encourage reconciliation fantasies. The child should be told the real reason for the divorce or separation at his level of understanding. Secrets finally result in a lack of understanding, distorted fantasies and possible mistrust of parents, when the children most need a trusting relationship. Gardner does not discourage parental criticism of each other in front of the children, as he feels the children are not unaware of their parents' disillusionment with each other and would be distrustful if their parents hid their

real feelings. He also feels that children need to see both their parents' strengths and weaknesses as a way of learning tolerance of deficiencies in others. Musetto (1978) adds that children need to see that neither parent is solely responsible for the breakup, scapegoated or idealized. Parents find this a difficult task to achieve. Rosen (1979) found that of the 92 children she had interviewed in her study, 35 felt that they had not been given satisfactory explanations regarding the reasons for the divorce.

- (2) The manner in which the parental models express their feelings to the child will determine the way the child's expression or suppression of feelings is encouraged or limited (Gardner, 1977). Parents should be encouraged to be emotionally open to their children.
- (3) Children should feel free and be encouraged to question the situation, repeatedly if necessary, and feel safe that in doing so their parents will continue to be available to them. Parents should therefore be prepared for this and be supported by the counsellor (Gardner, 1977).
- (4) Parents need to be educated as to the natural and inevitable reactions and feelings they can expect from their children at this time (Gardner, 1977).

Seagull & Seagull (1977), suggest three factors that could ease the transition for the child.

(a) Being reassured that he was in no way responsible for the divorce, and that both parents still love him despite it. This needs to be reinforced, particularly when it emerges through the child's fantasies, that he feels he should be able to change the situation.

(b) Being assured the right by both parents to love the other parent,

(c) Being presented with clearly defined sets of values and rules by each parent in their own home without being faced with challenges by either parent of the other's rules which could exacerbate a loyalty conflict.

(5) Gardner (1978) urges that parents wishing to divorce be warned of the dangers of courtroom litigation as a method of resolving their dispute and impressed that the decision as to where the children live would best be made by themselves. They should also be helped to "view their lawyers as their servants and advisors, not as people who rule them or make final decisions for them regarding custody".

3.3.2 EXISTING PROGRAMS

Young (1978(a); 1978(b)) describes a four hour compulsory pilot educational program set up by the Allen County Court in Indiana over a period of nine weeks for pre-divorce parents which focussed on the instruction of parents in didactic groups on

- (a) the legal-financial aspect of divorce,
- (b) coping with children during divorce and
- (c) understanding their own feelings during the divorce process.

Its purpose was to prepare them and encourage them to seek further help where necessary.

The immediate responses to this program indicated that those who were particularly concerned about their divorce before held higher hopes for the usefulness of the workshop and were pleased with the overall result. 91% of the women participants felt that they would voluntarily attend such a workshop again and 90% felt that they could recommend it to others. The authors felt that such a program provided both emotional/supportive information-problem solving resources at a time of distress and contact with a judge/lecturer tended to have a desensitization effect of the Court system. On a three month follow up, the 31% of participants who responded expressed some decline in the satisfaction previously expressed. 34% and 50% felt respectively that the experience had been of 'great' value and of 'some' value to them, 37%, 25% and 21% felt respectively

that information on children's reactions to the divorce, the legal and the personal experience aspects of the experiences were most useful.

The Family Court in Minneapolis runs a similar program of educational seminars over three sessions for divorcing parents, but in addition to this, children are invited to group meetings which are divided into age groupings in which divorce related issues are discussed (Fine, 1980).

Watson (1969) stressed the need to explain as much of the procedure of divorce as was possible to the children.

CHAPTER 4

4. DIVORCE CONCILIATION - MEDIATION

Once the decision has been made by the couple and divorce becomes inevitable, divorce conciliation or mediation becomes the method or procedure of choice in the settlement of all the ancillary issues. It is the approach which is most congruent with the belief that families need to maintain their autonomy and privacy and take responsibility for the expeditious resolution of disputes in order to maintain stability and continuity of the relationships of the children with both their parents (Mnookin, 1975; Mlyniec, 1977-78; Harvard Law Review, 1980; Brown, 1982). The point is also stressed that decisions made by people have an increased chance of compliance resulting in reduced litigation at a later stage (Elkin, 1977).

Mediation, in which a neutral third party helps two disputing parties to resolve their conflict, is an extremely ancient method of conflict resolution which has been successfully used in modern times for labour management disputes in industry. Its use in divorced family disputes is still however very new and as a result is still struggling to define itself in this field.

"Mediation does not cause, support or encourage divorce. Rather it simply provides a means for resolving disputes, restructuring family relationships, and promoting the best interests of the children once divorce has become inevitable" (Brown, 1982, p.9).

Mediation provides a procedural structure to certain conflict areas and to foster cooperation and settlement. The primary focus is conflict resolution by the parents themselves (Weiss & Collada, 1977), out of court (Fine, 1980). The issues dealt with in mediation cover "the assignment of properties and goods to each party; dissolution of the dependency relationships between the marital couple and how, for example, they are going to react to mutual friends, arrange church, clubs and sports group affiliations; discussions of the caring for the children where each parent draws up two programs (for whether he or the spouse gets the children). It is found that there is remarkable agreement on how the children should be cared for and only finally is custody discussed" (Fine, 1980, p.356).

It has been shown that standards used by parents in negotiating custody arrangements were largely the same as those considered by the courts (Alexander, 1977) and as parents inevitably know better their own qualities and capabilities they are clearly better suited to make decisions in the child's best interests.

The process of mediation varies. Rubin and Brown (1975, in Brown, 1982, p.14) work at "reducing irrationality in the parties, by preventing personal recriminations and focussing and re-focussing on actual issues, by exploring alternative solutions and making it possible for the parties to retreat or make concessions without losing face or respect, by increasing constructive communications between the parties, by reminding the parties of the costs of the conflict and the consequences of unresolved disputes, and by providing a mediator model of competence, integrity and fairness".

Others have placed more emphasis on the need for dealing with a certain amount of emotional material. Weiss and Collada (1977) see the need, in order to enable parents at times to adopt a cooperative spirit, to remove a blockage which may be caused by hostility, by allowing appropriate ventilation of these feelings. They also encourage focussing on the positive facets of each parent's wishes and concerns, thus promoting the mother and father roles. Duquette (1978) adds the need to provide the parents with insight into the child's psychological needs. For Weiss & Collada (1977), this includes the need of the child for a continued relationship with both parents.

Derdeyne (1975) stresses the importance of parents' understanding of how their continued conflict hinders the ways in which the child copes with his conflicts of loyalty.

Mnookin (1975) suggests that mediation in a family therapy situation with a therapist and arbitrator lawyer would also serve the purpose of stopping the destructive games that are played out so that decisions can be based on affection for the child and mutual self interest.

4.1 MEDIATION - WHEN?

The stage in the dissolution procedure at which mediation is attempted depends largely on the system within which one works.

Spencer and Zammit (1976 in Brown, 1982, p.16), proposed a mediation-arbitration model consisting of 3 elements:

"(1) The use of a mental health professional or marriage and family counsellor who would assist the couple in drafting a custody/visitation agreement,

- (2) participation of the same specialist in a required mediation process to deal with issues that arise in working out the agreement, and
- (3) submission of any post-mediated unresolved issues to arbitration".

Such an approach supports the principal goal of mediation which is to see that only cases where settlements cannot be achieved by the disputing parties themselves be referred to court (Mnookin, 1975).

The program used by the Child Advocacy Unit (CAU) of Philadelphia works on a 4 stage model in which mediation constitutes the second stage and follows the discovery phase (O'Shea and Connery, 1980).

Suggestions have been made that referrals for mediation be made by the judge at the time disputed cases are set down for hearing (Duquette, 1978), or after the first session with the lawyer (Steinberg, 1980).

Basically, however, the mediation model should be available to the family at any stage during the process of dissolution, whether this be after an adversary action has been set in motion, or after the divorce order has been granted, where disputes need to be resolved and parents are willing to use this approach.

4.2 MEDIATION - WHO?

On the question of who should take the role of pre-divorce counsellor and mediator there exists a tremendous lack of

consensus. The fear has also been expressed that with the rising rate of divorce, the increased need for this service and the lack of adequately qualified persons, the probability of charlatans posing as marriage counsellors will increase (Kaplan, 1969).

Professionally, this role has been considered the function of both mental health workers and legal practitioners. In practice many attorneys, while seeing a conflict between the two roles, adopted the elements of both the role of the traditional stereotyped attorney who sought maximum benefits for their clients, striving to win and de-emphasizing the emotional and social issues, and of the lawyer-counsellor, attempting to seek solutions fair to both parties with an aim to a reasonable settlement (Harman et al., 1979). In a survey conducted by these authors, 86% of the attorneys who participated stated their doubt about their ability to reduce conflict and strain in divorce and felt reluctant because of a lack of training and skills in counselling. They thus tended to avoid dealing with the emotional issues or focussing on the child and dealt instead on the efficiency of the process and economic matters.

Another problem faced by lawyers attempting to practice law and mediation is the difficulty of working with spouses and the ethical question of advising two parties with inherently opposite interests (Brown, 1982). A solution to this problem may well lie in the appointment of a legal representative for the child, which can also occur within a team approach, as at the Child Advocacy Unit (CAU in Philadelphia (O'Shea & Connery, 1980).

Kay (1968, p.121) suggests that the inclusion of mental health professionals would "free the lawyer from his present role as an

amateur family therapist and allow him to devote himself to the legal aspects of family dissolution such as division of property, establishment and enforcement of support and the protection of the children".

A prediction has been made, however, that lawyers will increasingly object to counsellors as divorce mediators as this involves them in the unauthorized practice of law (Woody, 1981, in Brown, 1982).

The point to be made, however, is that mediation involves both psychosocial and legal components and problems, and thus requires interdisciplinary cooperation and teamwork. Collaboration by an attorney-therapist team (Steinberg, 1980) and the team of legal and social professionals of the CAU of Philadelphia (O'Shea and Connery, 1980) are attempts to incorporate this concept.

4.3 MEDIATION - A SEPARATE SPECIALIZATION

While the question of who mediates remains unresolved, the feeling has been expressed that mediation represents a qualitatively different service from either legal representation, or therapeutic counselling and marriage and family-therapy (Koopman and Hunt, 1981, in Brown, 1982). Thus divorce/family mediation should not simply be tacked on to existing disciplines but should become a separate and complementary profession to the legal and mental health professions, "free of all conflicts of interests in professional loyalties, professional philosophy and professional function" (ibid, p.4). The need for specialized training has therefore been raised (Richards, 1981).

Those presently involved in the field in America have received at least some training in the mental health, and/or marital and

family therapy disciplines. Specialized training in divorce/family mediation and conflict management programs have developed very rapidly and short term training is widely available. More than a dozen divorce/mediation groups or associations provide short term training, and 6 long term programs in the form of academic courses and degrees at universities exist in the United States of America (Brown, 1982).

Brown (p.22) has suggested that such topics as "principles of negotiation, bargaining, and conflict resolution; understanding the process and stages of divorce, survey of legal, financial and tax aspects of divorce; surveys of laws relating to divorce and review of the judicial process; assessment of the divorcing couple and family; effects of divorce on children; factors in child custody/visitation disputes; systems theory in family dynamics; and behavioural reinforcement marriage therapy principles", should be included in training programs.

4.4 ETHICS

The need to establish a set of standards, qualifications, and a code of ethics in this new field has been proposed. Brown (1982) suggests that a list of ethical principles should include:

- "(1) Divorcing couples should be given the choice of mediation or adversarial representation based on a thorough explanation of the respective processes;
- (2) For couples who decide on mediation, a written contract should be used which specifies the cost, procedures, guidelines, and desired outcome of the process;

(the above points have previously been made by Duquette, 1978).

- (3) Mediation should not be conducted with a client when the mediator is seeing, or has seen them, in individual therapy or for legal representation;
- (4) Impartiality should be maintained throughout the process;
- (5) The mediator should determine whether both parties are capable of informed, independent, reasonable decisions about all aspects of their divorce as well as the negotiation process;
- (6) The mediator should require a full and complete disclosure by both parties of all relevant property, investment, tax and other financial data;
- (7) Confidentiality of the mediation process should be maintained at all times, subject only to requirements of the law;

(Duquette, 1978, takes this point one step further but suggests that mediation material should not be subject to subpoena even where arbitration is called for).

- (8) Clients should be encouraged to seek specialized help such as financial or tax consultation if needed during the course of mediation as well as an outside, legal review of the proposed settlement prior to finalizing the agreement;
- (9) Mediation should be discontinued if, in the judgement of the mediator, either party is being exploited or harmed by the other; and

(10) The mediator is obligated to maintain current knowledge of developments and participate in continuing education experiences relevant to legal, judicial, legislative, and psychological factors affecting the practice of divorce/family mediation" (p.23).

4.5 LENGTH OF MEDIATION PROCESS

The number of sessions per case has varied greatly but would seem on the average to be between 6 to 7 sessions for successful cases and 4 sessions for unsuccessful cases. The duration of sessions tends to vary greatly, from 1 to 4 hours. Family sessions of up to 5 hours in length have also been reported.

4.6 THE SETTLEMENT

Once negotiated and mutually agreed upon, Weiss and Collada (1977) propose that each party present the terms of the settlement as they understand them to their attorney, who then prepares a draft which is presented to court for approval to finally become a court order. Only custody arrangements that could harm the child should be intervened with and then only when there is sufficient cause shown (Harvard Law Review, 1980).

4.7 VOLUNTARY OR MANDATORY MEDIATION?

Frederick (1975) feels that the creative 'explorer' has no difficulty in accepting court enforced conciliation as it is directed towards helping the family formulate their own guidelines for the conduct of their post divorce relationships.

Mnookin (1975) in addition emphasizes that the 'bite' that such a mandatory system possesses would go far in ensuring compliance to such family formulated resolutions.

4.8 THE ADVANTAGES OF MEDIATION over the adversary process have been tabulated in detail by Brown (1982) (see Appendix III).

Some of the major advantages include the following:

- (1) Reduction of time taken to arrive at an agreement (Steinberg, 1980; Brown, 1982). Parker (1980 in Brown, 1982) found that mediation required less than 1/2 as long as the adversary approach to arrive at an agreement.
- (2) Mediation is based on co-operation rather than competition between parents, as it focuses on problem solving of present issues rather than blame and revenge based on past behaviour; it aims to reduce emotional trauma for parents and children and encourages continuity of relationships, beliefs and values (Duquette, 1978; Steinberg, 1980; Brown, 1982). Mnookin (1975) notes that the attainment of agreement between spouses reduces the sense of losing and winning, and any animosity and hostility that might have been present.
- (3) As a result of a decreased need for court hearings the cost to the state and clients is substantially reduced (Mnookin, 1975; Weiss & Collada, 1977).
Mediation at the Los Angeles Conciliation Court was

estimated at approximately 1/4 of the cost of the adversarial approach and saved the court thousands of dollars annually (Brown, 1982).

- (4) Post divorce litigation was greatly reduced in mediated cases (Weiss & Collada, 1977; Steinberg, 1980). Brown (1982) estimated that mediated cases were 3 times less likely to return to court for post divorce litigation. The reasons suggested were that,
 - (a) decisions reached by the parents themselves were more likely to be respected and worked on than those imposed by a court (Elkin, 1977, Brown, 1982), and
 - (b) that negotiated terms were bound to be more reasonable (Steinberg, 1980). In a comparative study by Bahr (1981, reported by Brown, 1982), 100% of mediated couples felt the monetary/property settlement was fair as opposed to 49% of the adversarial sample. On the custody/access issue, 96% of mediated as opposed to 86% of the adversary sample felt satisfied with the arrangements.

CHAPTER 5

5. THE ADVERSARY SOLUTION

Despite all the opportunities and encouragement provided in order that parents make their own compromise to resolve their divorce related disputes through mediation, an estimated 10% of families will fail to reach agreement (Weiss and Callada, 1977).

These are the parents who, for whatever reason, either to win at any cost, for revenge or embitterment or genuine concern for the children's welfare, are not able to settle their disputes themselves and require intervention of an outside arbitrator to impose a solution on them based on the best interest of the child. It is the Court as upper guardian of all minors that takes on this function.

The court in turn commonly turns to psychiatrists, psychologists, pediatricians and social workers for assistance. The mental health professional brought in at this stage has a very different role to play from either counsellor/confidant or mediator, although all mediatory attempts to settle are never abandoned.

In this chapter the concepts of child advocacy and the best interests principle, two central features of the adversary system and the role of the mental health professional as investigator, evaluator and expert will be examined.

The first section will attempt to define the concept of child advocacy and compare the ideal to the way child advocacy has traditionally been practiced. It will examine the legal team approach and attempt to clarify the role of the mental health profession based on this model.

5.1 CHILD ADVOCACY

The child advocate ensures through thorough investigations, evaluations and carefully considered opinions, that the child's best interests remain adequately protected.

The term 'child advocate' has already been used with reference to the legal representative for the child. It is therefore appropriate and necessary at this stage to define briefly the concept of child advocacy and on this basis evaluate the traditional child advocacy system before presenting an ideal model of child advocacy in the true sense of the word.

Very briefly the Child Advocacy approach exposes the world as the child experiences it. It involves

- (a) knowing the child,
- (b) knowing the child's needs and
- (c) possessing competence and knowledge to speak for the child (Westman, 1979)

and, above all,

- (d) an ability to objectively assess what constitutes the best interests of the child (Goldstein, 1973; Wilcox, 1976; The Yale Law Journal, 1978).

For the majority of children caught up in divorce disputes the responsibility for ensuring that their best interests are protected, both in the outcome or final settlement and the process by which this is achieved, is entrusted to the parents,

their counsel and the Court except when at the discretion of any of the above a legal representative is appointed for the child or when expert advice is sought.

5.1.1 PARENTS AS CHILD ADVOCATES

The delegated authority and responsibility of parents for their children forms the basis of the concept of child advocacy. Ideally, in families held intact by affectionate bonds and mutual dependency, the interests of parents and their children remain largely complementary and parents are presumed best suited to represent their children's best interests (Goldstein et al., 1973). Even in dissolving marriage the vast majority of parents (90%) are able to negotiate and resolve the issues of custody and access reasonably and in the best interests of their children (Mnookin, 1975).

When disputes between parents over these issues arise and reach the stage where litigation becomes the only recourse, the atmosphere, usually highly emotionally charged and fuelled by the stakes of each in the outcome, results in parents getting caught up in the further upsetting and confusing damage of accusations, exaggerated demands and frenzied bargaining which tend to constitute the legal games played by Counsel, the rules of which are not always understood by the litigants (Bradbrook, 1971; Harvard Law Review, 1980).

The end result is the loss by the parents of all ability for cool objective reasoning in which the interests of the child are protected (Wilcox, 1976).

Many support the observation that a great number of children, in disputed cases, form part of the bargaining process in which they are disposed of in exchange for advantageous property and support terms or as a means of punishment and revenge by the parties (Hansen, 1964; Watson, 1969; Bodenheimer, 1971; Goldstein, 1973; Alexander, 1977).

Clearly, in this situation, parents are no longer able to act as advocates for their children in the true sense of the word.

Other situations in which the same could be said are when the psychological needs of the parent for the child becomes so intense that the relationship no longer permits the necessary process for the child of individuation and growth towards self fulfillment (Mlyniec, 1977-78; Westman, 1979), or when a third party becomes involved in the dispute for custody (Alexander, 1977).

1.2. PARENTS' COUNSEL AS CHILD ADVOCATES

It has been suggested that if legal representatives for the parties were more responsible, separate representation for the child would be unnecessary (Schäffer, 1981). It is further stated that lawyers are ethically bound to represent the best interests of the child in disputed custody/access cases (Westman, 1971). It has become quite obvious, however, that the role of the child's advocate and that of counsel for the parties are quite incompatible.

The attorney's role is one of an agent who manages the prosecution or defense of a legal claim processed by a client, so although he may render advice, the authority to make decisions rests entirely with the client (Galligan, 1973). His role is also determined by the nature of the adversary system so much that as Counsel for one party he acts to prove his client 'fit' and 'good' while attempting to show the other as being 'unfit' and 'bad' as a parent for the child (Watson, 1969).

As advocate for the child he is expected at all times to give paramount consideration to the child's interests, both in outcome and in the process of such determinations.

In the first place, Galligan (1973, p.11) points out, "it is unreasonable to anticipate that counsel will be able to detach themselves from the interest of clients who retain them....to view objectively the welfare of the children", and further that it might be "in breach of 'Counsel's' ethical duty to his client to advance what he may objectively think is in the best interests of the children if that is contrary to his own client's interest".

This conflict has been recognized and expressed by others, (Watson, 1969; Westman, 1971; Foster, 1972; Foster and Freed, 1973-74n; Derdeyn, 1975; Wilcox, 1976 and Brown, 1982).

A second reason for a lack of confidence in a lawyer as advocate for the child has been the noted insensitivity of many to the emotional results of the procedures used (Watson, 1969) and their lack of training in the field of behavioural science.

Duquette (1978, p.193) quotes Robins (1975), a past Chairman of the Family Law Section of the Michigan State Bar Association: ".....nor do I know of any area of the law where there is such a dearth of expertise among the lawyers who try the cases and the Judges who hear them. Certainly the law school curriculum does not prepare the student for this type of litigation, other than purely procedural aspects. Guidance must be obtained from the behavioural scientist".

This situation has clearly started to change in the United States over the past 2 years with the inclusion of counselling courses in law school curricula.

.1.3 THE COURT AS CHILD ADVOCATE

In the adversary system of law, the Judges' role is that of neutral triers of facts as presented by counsel for the parties (Coyne, 1969). They hear evidence of proof and argument by counsel in favour of their clients. This evidence of past events is assessed and evaluated against articulated and described legal presumptions and standards as judgements are made.

Judges are first and foremost lawyers learned in the law and versed in the rules and procedure in order that the purpose of the law may be made effective and the individual's rights respected (Zuckerman, 1969).

In disputed custody/access determination certain essential differences are noted:

- (1) Determinations are person rather than act orientated. Persons are evaluated as social beings based on their attitudes, dispositions, capacities and shortcomings.

- (2) Determinations are based largely on present events and relationships rather than past acts.
- (3) Determinations are based on predictions of future events for the child and
- (4) Determinations affect the continued social and psychological relationship of the parents (Mnookin, 1975).

The Judges function is also clearly twofold. He is firstly required to act as an arbitrator in a private dispute settlement where he is expected to choose between two or more private individuals, each of whom claims an associated interest in the child, and secondly as an advocate for the best interests of the child to see that the standards of parental behaviour thought necessary to protect the child are enforced (Westman, 1979), each of which requires the consideration of different sets of standards. "Many times, they seem to be saying one thing and doing another - espousing the supremacy of the child's interest but subordinating it to the parent's rights when the two conflict" (Rothenberg, 1981, p.135).

The role of the Judge therefore has significant inherent problems.

- (1) The Court in reaching its judgement relies on the presentation of a comprehensive and objective data base. The problem, in a system of law geared towards asserting the rights of parents is that, except where the Court has undertaken or requested

an independent investigation, the evidence which is exposed is highly selective (Dyson & Dyson, 1968), often incomplete (Westman, 1979), presented out of context, inaccurate, or exaggerated or distorted (Mnookin, 1975).

A survey of judicial attitudes revealed a statement by Judge Moorhouse that "the real problem for the judiciary is that they never get a true unbiased picture" (Watson, 1969). One of the adversary Court's basic problems is therefore a lack of necessary and relevant information.

(2) Judges are often faced with complicated issues and technical information from experts which they are expected to weigh up in the process of predicting the best alternative for the child. Unfortunately, an impression repeatedly expressed has been that on the whole they lack familiarity with the contributions of the social sciences concerning the psychological mechanics of divorce and child development (Kay, 1968; Watson, 1969; Foster, 1972; Goldstein et al., 1973, Wilcox, 1976; Duquette, 1978, Rothenberg, 1981). Finlay and Fold (1971, p.90), ask "How can a Judge untrained in the behavioural sciences assess the real effect upon the developing psyché of a child who is the subject of a custody order, of the arrangements therein proposed".

This has become an increasing problem as the traditional system of rules and standards has broadened and become highly

individualized, often resulting in an impossible choice between two fit parents (Cyne, 1969; Westman, 1979), which requires increased discretion on the part of these Judges. The result of this state of affairs is judgements, made by intuitive evaluation based on unspoken personal values and unproven prediction (Mnookin, 1975) which give token reference to the best interest rule (Wilcox, 1976).

(3) The difficulties experienced by Judges in this field, combined with their noted desire to be quite correct in their decisions, as well as perhaps their inability to cope with their own and the litigant's responses to such painful decisions may result in either 'a decision paralysis' or the forcing of settlement of cases by counsel even before they come to court (Watson, 1969; Mnookin, 1975). This avoidance of responsibility for making such decisions is seen as a failure in the duty of the court towards their minors to making such determinations based on adequate hearings directed to relevant issues (Podell, 1973).

(4) Despite the earlier expressed reluctance on the part of Judges to look to the psychological professionals as expert witnesses for assistance in these matters (Foster and Freed, 1964; Bradbrook, 1971; Rothenberg, 1981). Swerdlow (1978) in a more recent survey undertaken in California, found that, although only 160 Judges

responded to a questionnaire which was distributed to 509 Judges, 66% of these indicated that they utilized mental health services in connection with family law proceedings, mainly on a selective discretionary basis.

- (5) Another real problem is the pressure of time in often crowded courts. Wilcox (1976) concludes that with such over-crowding, insufficient training and limited resources "the child's predicament does not receive sufficient scrutiny thus resulting in the 'rubber stamp approach' of accepting agreements reached by counsel for the adult parties.

Many suggestions have been made to remove or reduce the responsibility of the court in custody/access determinations considered a social rather than a judicial problem. Kubie (1964) proposed the formation of a committee of professionals in the field of child development appointed by the parties to make decisions for the family, but this had practical difficulties and was never adopted.

This solution has again been raised by Rothenberg (1981) who expounds the need for the creation of an agency with staff qualified from the psychological, social and educational fields who would function as arbitrators whose findings would be final. The obvious advantages are that decisions would not be hurried, procedures could be informal, cooperation would be strived for and decisions would reflect qualified and knowledgeable opinions.

Watson (1969) proposed that behavioural science professionals sit with the divorce court Judge much as experienced assessors sit with Judges in civil and criminal matters. Solow and Adams (1977) suggest that the most qualified to make such evaluation is the investigating clinician. The courts however guard their decision making power and society itself continues to look to them for legal solutions to family problems. Westman (1979), however, suggests that where the true advocacy approach has been adhered to, the court removes itself from the process of making personal decisions for families and concentrate instead on monitoring processes at an administrative level.

The questions he feels the court should be asking are:

- "(1) Was there a full and fair opportunity for exploration of facts and opposing views?
- (2) Was there adherence to the requirements of the law?
- (3) Was information rationally applied to reach the ultimate conclusions?" (p.288).

It has also been argued that due to the potentially high emotional nature of such decisions there must be a figure of authority to ratify and enforce the final decision or settlement. This is seen as properly vested in the Courts (Derdeyn, 1975).

5.1.4 THE CHILD REPRESENTATIVE AS CHILD ADVOCATE

It is of significance that in South Africa (as in most other systems) the child who is most affected by a dispute has no party status in such litigation. Some Courts have become more

aware that the best interest of the child may not be best represented by parent orientated advocacy and have made genuine attempts at considering the best interest of the child as primary (Franklin and Hibbs, 1980).

The evidence of tension between on the one hand, the rights of children and on the other, their parents, their counsel and the compromised position of the courts, demands that the right of children to due process, equal protection, appropriate care and treatment be met, (Westman, 1979). One person able to fulfill such needs is the legal representative for the child. Many different titles and role conceptions have emerged in America for what is termed the legal child representative, which has left this position sadly lacking in definition and clarity.

The role of the legal representative for the child is dependent on the status given to the child as a party in the dispute. Where statutes have conferred full party status on the child, the role of the adversarial attorney becomes that of advocate for the child's stated preference (Wilcox, 1976; The Yale Law Journal, 1978). Westman (1979) warns, however, that the simple extension of adult rights to children is in fact tantamount to abandoning them completely unprepared to their rights. He argues that inherent to legal rights is the assumption of the capacity for assuming responsibility for one's own life.

As most children are unable to articulate their own needs and possess a limited capacity to function as mature independent members of society, their legally protected rights should include "protection against their own immaturity so that they have the opportunity to develop the capacity to make mature choices" (p.249).

At the other extreme the 'fact finder' sees himself primarily as an impartial investigator who assures that all considerations regarding the child's best interests are brought to the court's attention, including, as one of the factors, the child's preference (Frederick, 1975).

In practice, however, it was found that most lawyers took on characteristics inconsistent with their formal role so that at times, 'advocates' tended to protect the child even when this counteracted with the child's expressed views, counselled the parents and attended to the child's emotional needs during litigation, attempted mediation between parties to facilitate understanding and acceptance. 'Fact finders' also found it necessary at times to attempt to persuade the Judge and to hold back information in order to reduce conflict.

The role of child advocate cannot simply be restricted to 'fact finder' or 'advocate' as each on their own preclude the very protection sought by the provision of legal representation for children.

The unique and quite powerful position of the child's attorney would both enable the uncovering of different kinds of information and the motivation and even pressurizing of parties and their counsel towards mediation of conflicts and settlements out of court, as suggested by the Yale Law Journal (1978).

Nevertheless, the dangers of this very power have also been recognized. The legal representative who possesses the authority, as suggested by Podell, 1973, to gain access to all parties and information, to subpoena witnesses, argue, and make representations to court, possesses a power effectively greater than either that of the traditional attorney or Judge, and potentially threatens

a situation where a stated or actual interest of the child may be ignored, while the interest, as perceived by the guardian, often psychologically untrained, is presented (Mlyniec, 1977-78).

1.5.1. A TRUE ADVOCACY MODEL

With the advocacy model envisaged by Westman (1979), this problem would largely be resolved. Westman has listed what he would consider to be the central characteristics of a child advocacy approach:

- (1) Systems Bridging which involves the building up of a thorough understanding about all the systems that make up the child's world in order to see the child as an independent part of the family, society and culture. It follows from this understanding that in each child the problem is a combination of emotional, intellectual, cognitive-behavioural, family and social problems differing in degree, and that any categorization of the child leads to a fractional and disconnected management of a part of the child's problem by professionals.

In child custody problems bridging requires collaboration with others in the child's sphere, mediation and finally the adversarial system where opposition is brought to bear through pressure and coercion.

- (2) A Developmental Orientation which takes into account the age of the child, his current dependency needs and stage of individuation, and aims to facilitate child development and adaptation.

- (3) Conflict Resolution for both inevitable conflict within the divorce situation and optional conflicts based on hostility. Conflicts between the child's wishes and ultimate interests all need to be resolved.
- (4) Fact finding so that resolution is based on knowledge of individual children and their life circumstances rather than on generalizations.
- (5) Interdisciplinary team work requiring interdisciplinary integration and coordination.
- (6) Protection and promotion of the equal rights of children

Westman states however that advocacy cannot represent the rights and needs of the child apart from the parents, it requires the capacity to provide the child's interests and the congruent interests to those who are essential to the child's welfare.

He concludes that there is no one professional person "with sufficient knowledge and background to put together the facts about the child's life experience, bridge the legal and mental health system, and make convincing argument for the termination of parental rights in court" (p.189). True advocacy as defined above requires at least a team approach.

A lawyer can provide for the child the authority required to ensure the implementation and monitoring of reasonable life plans for children. However, the training and skills required to evaluate, assess the child's emotional state, needs, and

the developmental stage of each individual child as well as the system impinging upon them, falls within the purview of the mental health professional.

- 5.2 The team approach in which each professional offers their own expertise in working for the child is one that has gathered much support (Watson, 1969; Duquette, 1978; Woody, 1978; Wamer and Elliott, 1979; Felner and Faber, 1980; Steinberg, 1980; Bentovim and Gilmour, 1981).

The Child Advocacy Unit of Philadelphia has established collaborative strategies within an interdisciplinary team of legal and social service professionals whose approach is non-adversary with respect to parents and whose goal is to preserve the family unit where possible, while their primary responsibility remains the protection of the personal safety of the child client (O'Shea & Connery, 1980).

Ideal as this approach is, certain problems remain inherent in this working relationship. The major barrier that both professionals face is their vastly differing philosophical orientations, traditions and values, lack of trust in each other, their pursuance of different goals (Steinberg, 1980).

Mental health professionals are not trained to understand legal procedure, philosophy and phraseology, and lawyers are untrained in psychological teachings, techniques and interpretations of psychometric and behavioural material (O'Shea & Connery, 1980). Lawyers also need to see therapy as medicine and clinical evaluation as X-rays (Alexander, 1980).

Despite these not unsurmountable difficulties and challenges, there are a great number of advantages of such a 'collaborative'

approach both in the mediation, investigation and evaluation stages, with which Steinberg (1980) has dealt in detail. To summarise, these include:

- (1) Better information gathering in which selectively presented information from clients is shared so that each gains more accurate insight on which to base settlements.
- (2) Timely referrals would be more likely as the tendency to postpone interdisciplinary referrals would be reduced. Referrals would also lead to increased professional potency as
 - (a) lawyers would be spared with having to deal with emotional issues which complicate the legal resolutions and
 - (b) clients heading for marital breakdown would be referred to lawyers who would serve to introduce a sense of reality into the process and deal with the legal issues for which the therapist is not qualified.
- (3) Creativity in the solution of problems of divorce is fostered by use of such interdisciplinary referrals and consultations.
- (4) The timing or modulating of the process of divorce is best coordinated through interdisciplinary consultation so that spouses are not taken through the process at a pace with which they are not able to cope emotionally.

- (5) The uncovering of the real issues that may be blocking the resolution of divorce or ancillary matters is facilitated.
- (6) Mutual support which serves to avert the adversary process and protects the client's progress and interests avoids a sense of isolation.
- (7) Replacing cynical expectations about the legal system and the therapeutic process which are largely the result of stereotyping, abstractions and ignorance transmitted by each profession about the other, with knowledge, experience and concerned people.
- (8) Exposing in each and for each profession those prepared and suited to work in this field.
- (9) Exposing each profession to the other sets up a continuous process of education and sensitivity to the other's values, capabilities and appreciation of the other's function. Contact develops familiarity and understanding (O'Shea & Connery, 1980).
- (10) Creative changes introduced by an interdisciplinary team become sponsored by the client who then becomes responsible for gradual changes in social values, which, when generally accepted, become incorporated into the legal system.

Westman (1979) adds, with legal and mental health collaboration even the courtroom proceeding can be conducted in a supportive and therapeutic manner.

Bentovim and Gilmour (1981) stress the support and sharing of responsibility that teamwork provides in the often stressful and difficult role with which both professions are faced.

They further advocate the differentiated approach of team work by which different points of view are brought to bear on the evaluations of each situation.

.6 The Clinician as Child Advocate in Disputed Custody/

Access Cases

In terms of Westman's Child Advocacy model the court can only come to an informed decision by weighing all the relevant information. The objectivity of such data in the form of reports and evidence is therefore an essential requirement. Investigations need to be fair, impartial and free of prejudice and investigators, as independent witnesses and free of the confines of parental legal rights, should not act as auxiliary advocates for either side (Nichols, 1980). This model also requires the possession of competence and knowledge in order to qualify the expert to speak for the child.

- .6.1 Objectivity The observation that too many experts are biased in favour of one of the parties, and try to act as advocate for this party without having any real ground for their view (Bradbrook, 1971, p.561) is supported by many (Solow and Adams, 1977; Woody, 1977; The Yale Law Journal, 1978; Nichols, 1980; Stock vs. Stock, 1981) and clearly constitutes a serious problem for the child. The source of such bias therefore requires careful scrutiny.

(a) The investigator/evaluator - client relationship

Unlike the therapist/counsellor whose clients come to him and voluntarily express their thoughts, feelings and experiences, parents being evaluated naturally fear that what is revealed may result in deprivation of the custody of or access to their child.

Investigators are perceived as powerful and needing to be influenced, swayed and impressed (Foster, 1966). As a result parents remain very cautious and selective in what they expose and even with the best interests of the child at heart may distort or withhold information they feel will adversely affect their case (Gardner, 1977; Rothenberg, 1981).

Over and above the fear, Court-adjudicated cases generally tend to reflect the parent's inability or difficulty in relinquishing emotional ties related to the marriage, which are then acted out in negative ways making such cases difficult and complicated, and the work atmosphere one of guarded hostility (Rosen and Abramovitz, 1975; Warner & Elliott, 1979).

Salk (1977) stresses the need for a positive and constructive approach. This includes the need to interview parents rather than interrogate them (O'Shea and Connery, 1980), as well as to reduce stress and being open to all contacts on both sides, keeping views and thoughts open to review, listening and willingness to learn (Frederick, 1975).

Warner and Elliott (1979) see the need in investigations not just to gather data but to build upon alliance with the parents through which they are helped to

- (i) experience and express their feelings associated with the gain or loss of custody,
- (ii) understand the separate needs of the child and
- (iii) become aware of their own needs of the child and of the previous marriage.

In the process of resolving some of the stress the clinician becomes aware of the defensive styles employed by parents and other information he requires for his assessment.

(b) The appointment of experts

Problems clearly exist in the appointment of experts. Traditionally, experts are appointed and retained by one of the parties engaged in the adversary process (Rosen, 1977) who tend to 'shop around' for experts to support their claim (The Yale Law Journal, 1978). Responsible experts should not be affected by the fact that one of the parties has employed him and is paying his fee. The tendency, however, for experts to become emotionally invested with the parent who engages them has been noted (Derdeyn, 1975; Duquette, 1978).

The more unscrupulous professionals are also aware that their reputation to testify for the side that pays them, assures them of a very lucrative practice (Gardner, 1977). A consequence of this approach is the introduction of a parade of experts by both sides either as a delaying tactic (Watson, 1969),

or to show evidence of proof and to disprove particular points (Gardner, 1977) which effectively cancel each other out and finally proves useless to the court, which is not compelled to accept contradictory expert evidence, having the power to seek their own evidence through a court appointed expert (Derdeyn, 1975; Finlay and Gold, 1977), thus making pointless a very costly exercise.

There have also been many who have strongly objected to the use being made of clinicians, by the legal profession, as pawns to help their case (Selzer and Benedek, 1965), and the frustrations of working in a system which they find inconsistent with the psychological and emotional best interests of the child and in which they have no impact (Duquette, 1978).

(c) Limited access to sources of relevant information has proved to be another problem area (Benedek and Benedek, 1972). Often opposing parties are not willing to be interviewed (Rosen and Abramovitz, 1975) or limits are set down by counsel on either side (Derdeyn, 1975). The result is that often controversial opinions have been ventured on the basis of incomplete and inaccurate information (Rosen and Abramovitz, 1975; Stock vs. Stock, 1981). Bradbrook (1971) observed that 10 - 25% of reports are made on the strength of an interview with only one of the parties, which can only be seen as highly irresponsible and destructive.

(d) The manipulation of objective reports is another source of bias when the report and recommendations

made do not find their way to court (Derdeyn, 1975). Experience has shown that where expert opinion does not support the client's side he may either not be called as witness, or only the most favourable testimony may be selected to be presented (Duquette, 1978).

The blame is not entirely that of the lawyers who wish to make use of experts, but also of the experts themselves.

It would seem as though experts have either adapted or taken advantage of the system for their own purposes or that they have allowed themselves to be intimidated and dictated to by the system and thus failed in their duties to the child, the family and the court.

Suggestions forwarded to improve the situation on these points include the following:

- (1) A consultant/expert should be appointed by the court as a special officer of the court, who is "equally accepted by both parties because he is non-aligned with either of them or their attorney, and who makes his recommendations direct to the court, or both sets of attorneys simultaneously" (Rosen and Abramovitz, 1975, p.79-80).
- (2) Consultants should be appointed by the attorney for the child which would help to orientate him better to his responsibilities towards the child (Derdeyn, 1975; Westman, 1979).

- (3) Consultants approached by either side should be sufficiently committed to their role as child advocate, and assertive enough to firmly establish their neutrality and conditions with referring agents from the beginning (Fredericks, 1975; Jenkins, 1977; McDermott, 1978; Rosen, et al., 1978; Fine, 1980).

Their conditions should assure free access to all parties, children, and significant others in the child environment, and that any report, whether it supports or opposes the client's case, be freely available for the scrutiny of both parties and the court (Foster, 1966; Watson, 1969; Derdeyn, 1975; Jenkins, 1977; McDermott, et al., 1978; Bentonim and Gilmour, 1981).

A further suggestion is that should these conditions not be agreed to by the parties, experts should feel compelled to refuse to carry out the investigation (British Medical Journal, 1971).

- (e) A source of bias inherent to the task is the inevitable necessity for subjective evaluation of factors through the personalized value system of the consultants (Westman, et al., 1970; 1979; Rosen and Abramovitz, 1975; Woody, 1978).

The sort of values that could blur the objectivity of consultants towards divorce include the view that long marriages and intact families are 'good' and disrupted families are 'bad' as opposed to an emphasis on the rights of people to determine their own lives; that divorce

inevitably 'ends' relationship rather than alters them in such a way that there is often more parent/child contact following divorce, and blindness to the often constructive aspect of divorce (Westman et al., 1970). This view of divorce also affects the way that the parent who initiated proceeding is perceived by the consultant.

The earnest suggestions made are that consultants in this area be aware and develop sources of checking and controlling such idiosyncratic bias in judgements (Rosen and Abramovitz, 1975; Woody, 1978; Westman, 1979). Here we see how working as a team would again be an advantage in overcoming and controlling this problem as points are argued and reasoned from different perspectives. The added advantage of a male and female team would be that it provides a balance of sexes and perspectives based on sex (Brown, 1982).

1.6.2 Knowledge and Competence

The mental health professional/consultant is a professional specifically trained in the method and skills required when working in the sensitive area of human relationship and personal dynamics and must therefore be seen as the ideal person to deal with these highly sensitive emotional issues.

The discipline of human behaviour as an area of knowledge, however, still lacks a tremendous amount of empirically based 'fact' and relies to a large extent on unproven hypothesis and theories. Certainly the concept so often bandied by all, "the best interest of the child" is not a quality ascertainable by formulas or certainty as the court would so often wish.

The point has been taken to suggest that where mediation has failed, and neither parent is unfit, their equality and the ignorance of experts should be openly acknowledged by the use of the flip of the coin to determine final settlement (Mnookin, 1975).

It is, however, precisely because of this problem that the need for careful investigation and assessment by persons trained in the skills arises where the aim is not to impose general formulas on families, but to look at each family on a case by case basis and ensure the best fit between each family system and its custodial arrangement (Felner and Faber, 1980).

Westman (1979) supports this view when he states that generalizations about child developmental stages are less helpful than information about specific children within their specific life situation.

The nature of this work makes this a responsible and emotionally taxing role which involves the practical problems of possibly having to attend sometimes gruelling court hearings which are very time consuming and disruptive to a private professional practice. Not all professionals are capable, or inclined, to take on this type of work. Rosen and Abramovitz (1975) suggest that before accepting an appointment to such a case, one should be aware of exactly what this entails.

Despite all proposed reforms, the reality of the situation is that at present the demands most often made on the mental health professional are in the form of investigating consultant in a very destructive adversarial system. The consultant would simply be abrogating his responsibility in refusing to

work within this imposed structure, as notwithstanding the defects and shortcomings of the legal system, they do have the power by their conditions and methods of work and convictions, to assure the child and family the choice of appropriate alternatives which are in their mutual best interests.

The last section specified the need for child advocates to be competent and knowledgeable. This implies some understanding of what constitutes the best interests of the child. This section will therefore present the evolution of current best interests, standards used by the courts, and in the second instance present an alternative standard of shared parenting which is based on the belief that child adjustment following divorce is largely dependant on the child's undisturbed relationship with both parents. It will consider the myths that have developed concerning shared parenting, the disadvantages of sole custody for the children, the custodial and non-custodial parents and will present guidelines for assessing potentially successful shared parenting arrangements.

2.1 The Best Interest Principle - an Evaluation

The first task facing a consultant approached by either an attorney or the court, to investigate and provide a professional opinion in terms of a life plan for the child (and thus the family), requires a basic understanding of what the best interests of the child means.

With the introduction of the best interests principle in the first half of this century, Judges were forced to abandon their previous well defined traditional standards. As the study of child development was very much in its infancy and the majority of Judges had little knowledge and/or training in the area, they were left to make intuitive guesses about the welfare of the child, based on moral and popular assumptions of the time which have unfortunately not always kept abreast with the findings of empirical research (Kay, 1968; Watson, 1969; Goldstein, Freud and Solnit, 1973). With a growing source of knowledge in the field and changing social needs, the concept has gradually changed over time.

The 'tender years doctrine', granting the custody of infants in their early years to their mother, was the first real move by the Court in considering the well-being of the child (Franklin and Hibbs, 1980). It was based on the assumption that fathers were the natural providers and protectors of the family and that the mothers, by nature and culture, the child-bearers and providers of love, affection and nurturing care (Foster, 1965; Title, 1974; Salk, 1977; Franklin and Hibbs, 1980), and was closely linked to the needs of society at the time, which required such divisions of labour. This doctrine was the first tangible legal issue on which the developing rights of the mother was based.

Such judicial reasoning was portrayed by the statement:

"There is but a twilight zone between a mother's love and the atmosphere of heaven, and all things being equal, no child should be deprived of that maternal influence unless it be

shown that there are special or extraordinary reasons for doing so", by a 1938 Judge (Derdeyn, 1976, p.1372), serves to illustrate the trend of thought which was evolving in the field at the time.

It became clear that until the mother was "clearly proven to be morally, physically or emotionally unfit to be entrusted with the care of the child" (Title, 1974) the courts were not concerned with the qualifications of the father as care giver to the children.

In 1951, Bowlby published his W H O monograph in which he stated that "prolonged breaks in the mother-child relationship during the first three years of life have a characteristic impression on the child's personality". He went on to suggest a strong relationship between maternal deprivation during the 2nd and 5th year of life, and the development of an affectionless personality and/or delinquent misconduct. Ainsworth (1979) also concluded that maternal deprivation in infancy and early childhood could have far reaching and detrimental results on child development.

These theories lent strong support to the maternal preference stand so that despite legislative or statutory language as to the equality of parental rights and the detailed set of criteria developed by the Courts covering economic, social, moral, religious and emotional considerations, against which potential custodians were to be assessed, the best interests of the child principle was effectively based on the presumption that "between two natural parents, the mother is preferred" unless proved at fault or unfit (Bratt, 1978, p.168).

Because of the absolute and uncontrollable rights of both parents to the custody of their children, the Court in its role as "parens patriae" acquired the right to determine the fitness of the parents seeking custody (Mlyniec, 1977-78), and the unfitness test became the approach of choice.

This test is determined by the proof of fault or misconduct which includes gross immoral behaviour, excessive use of intoxicants, neglect, desertion or cruelty of husband and/or child, impaired physical or mental health, or conviction of a crime (Foster & Freed, 1964; Title, 1974; Bratt, 1977).

The application of the unfitness test was, however, no assurance that the father would succeed in a custody action for two reasons. Firstly, the importance of the misconduct would generally be weighed up in terms of how this would affect mothering ability. Secondly, "just as the father could present evidence of fault to cut off the maternal presumption so the mother could present evidence of equal or greater fault with the father, thereby restoring the presumption" (Bratt, 1977, p.169).

Bratt goes on to state that in order to gain custody the father would have to prove that he was an exemplary father, a faultless husband and then find grievous fault in his spouse. He would then have to overcome the obstacle of a society which generally disfavours paternal custodians, in Courts that perceive him as an 'unnatural' guardian and lawyers that dissuade him from seeking custody (Richards, 1981). The destructive nature of the adversary process in which such fathers were virtually forced to show how degenerate their spouses were, was another obstacle (Salk, 1977) which dissuaded most fathers from even attempting it.

As a result the extreme mother preference rule still dominates Court decisions in most Western countries. Statistics today show that 90% of contested cases are awarded to women (Oster, 1965; Derdeyn, 1978; Weiss, 1979; Franklin and Hibbs, 1980), and one could safely assume that this percentage increases in uncontested cases.

The maternal presumption has been severely criticized over the last two decades, especially in view of the many changes and demands that society makes on parents which have blurred the traditional roles of men and women, and the recent research which indicates a lack of scientific basis for such a presumption.

Roles: As a result of the continuing women's equal rights movement, the gap in earning capacity between the sexes has narrowed tremendously and an increasing number of women are presently employed outside the home. By the mid-1970's, 40% of all married women in America were employed (Titico, 1974, note 22) and by 1976, 50% of all single mothers were working, a third of them on a full time basis (Stack, 1976).

Accompanying this was the increase in the percentage of fathers willing and wishing to assume primary responsibility for the socializing of their children and the adoption of a more equal role in domestic duties (Stack, 1976; Franklin and Hibbs, 1980).

Child care is a culturally determined concept. Titico (1974, p.200) states: "The prenatal ties of a child to its mother is biological, but after its birth the tie is socially and culturally described".

Research: Empirical research has also failed to provide scientific evidence to show that mothers are more important than fathers even in the early stage of development. On the contrary, studies tend to show that both mothers and fathers have direct and important influences on the psychological development of their offspring, (Lamb, 1977(a); 1978, 1979). The absence of fathers have also been associated with a wide range of disruptions in their social and cognitive development (Hetherington and Deur, 1975). The father's role in the personality development of their daughters is significant in the process of femine identification, personality and social adjustment (Biller and Weiss, 1970), especially in heterosexual relationships later on (Hetherington, 1973). In sons fathers play a vital role in their development of masculine self-concept which tends to be of greater importance before the age of 5 years (Biller and Bahm, 1971).

Anderson (1968) stresses the importance of the father's role in the early object relations in ego development especially during the 4 years to 7 years period. Lamb (1979) notes that the child's attention towards the same sexed parent starts at the beginning of the second year. Research by Greenburg and Morris (1974) in Parke (1981) identified a developing bond between fathers and new borns before or by the first 3 days after birth. Parke (1981) notes that while there is little difference between the way mothers and fathers involve themselves with their newborn at the beginning, the traditional division of roles is found to occur very soon after this although there is great variation

among individual families. This seemed to depend on such factors as the father's masculine self-concept and the wife's expectations. In terms of their abilities as early care givers, Parke (1981) found that fathers were just as sensitive to the child's signals as mother and responded appropriately.

Studies in post divorce adjustment have also shown that there is no significant difference in the progress and adjustment between children in the custody of mothers and those in the custody of fathers (Rosen, 1977; Richards, 1981).

Despite the changed demands of society and the growing body of research, Western cultures continue to teach that mothers are the primary parents (Seagull and Seagull, 1977). Despite the fact that under American, as in English and South African law, neither parent should be given preference because of sex in custody cases, the Equal Rights Amendment Movement has found the need to note in Section (1) of its proposed amendment:

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" (Myricks, 1977, p.321).

The demand is that Courts award custody of children "according to the individual parent's capabilities and situation in relation to how these will affect the child's needs and desires" (Tritico, 1974, p.886). Salk (1977) reports a major step taken by the American Psychological Association's Council of Representatives in January 1977 which approved the following resolution which has far reaching implications in matters of custody:

"Be it resolved that the Council of Representatives recognizes officially and make suitable promulgation of the fact that it is scientifically and psychologically baseless, as well as in violation of human rights to discriminate against men because of their sex in assignment of children's custody, in adoption, in the staffing of child-care services, in personal practice providing for parental care in relation to childbirth and emergencies involving children, and in similar laws and practices.

Further it is recommended that suitable promulgation of the resolution.....include specific mailing to the Chief Justice of the United States Supreme Court in his capacity as the chief administrative officer of the Federal Court System, to the presiding Judges of the various State Court System, to the Attorney General of the United States, and to the Attorneys General of the States" (p.50).

The shift by the Courts away from a maternal to a primary care-taker preference, which might include a third party (Hudson, 1970), as well as a move away from parents' rights towards the rights of children in custody awards, as in all attitude change, has inevitably been much slower in evolving than legislation (Mlyniec, 1977). As a result, maternal preference has unfortunately, to the present, remained a major factor in the determination of custody awards, both in South Africa (Sormarajah, 1977) and other Western systems (Franklin and Hibbs, 1980).

Over the past 15 years many attempts have been made to achieve a sex neutral application of broader, best interest guidelines

in terms of looking at the most effective ways possible of rearing children congruent with their needs.

Perhaps the most encompassing and detailed set of criteria requiring an evaluation of emotional and psychological factors in quite concrete terms was provided by the Michigan Child Custody Act of 1970, which deems the best interests of the child to be assessed by considering the sum total of the following factors:

- (a) The love, affection and other emotional ties existing between the competing parties and the child.
- (b) The capacity and disposition of competing parties to give the child love, affection, guidance and continuation of the educating and raising of the child in its religion or creed, if any.
- (c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care and other remedial care.
- (d) The length of time the child has lived in a satisfactory, stable environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home.
- (f) The moral fitness of the competing parties.

- (g) The mental and physical health of the competing parties.
- (h) The home, school and community record of the child.
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
- (j) Any other factor considered by the court to be relevant to a particular child custody dispute".

Foster and Freed (1973-74, p.487).

Another example is the set of factors provided by the Uniform Marriages and Divorce Act. They include:

- (1) The wishes of the child's parent or parents as to his custody;
- (2) The wishes of the child as to his custodian;
- (3) The interaction and interrelationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interests;
- (4) The child's adjustment to his home, school and community; and
- (5) The mental and physical health of all individuals involved. The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Podell and Peck (1972).

Each of these provide that no one factor be decisive in itself

and that some in fact are more relevant than others and therefore more heavily weighted. Generally the material factors beyond those required to satisfy the simple needs are not amongst the most important.

McDermott et al., (1978), found, in a survey that they undertook at the Department of Psychiatry of the University of Hawaii, that consultants tended to consistently use 8 major categories of criteria in deciding on custody issues, the first of which were practical and reality based and constituted the actual deciding factors in the final outcome. These are:

- (1) Caretaking arrangements in terms of parents availability for child care, level of physical care each could provide, the stability of the home environment for child development.
- (2) Parenting skills and commitment based on present and past involvement of caretaking, and capacity to provide emotional support and understanding.
- (3) The child's wishes to live with a particular parent, sibling, or in a particular neighbourhood as well as an assessment of the interpersonal relationships with these significant individuals.
- (4) The child's adjustment and functioning and social and academic performance at school.
- (5) The parents' own interpersonal relationships and attitudes towards the other parent, relatives and potential spouses on both sides.

- (6) Parents motivation for custody and evaluation of their practical justifications.
- (7) Parents as functioning adults, their emotional state, maturity, stability and antisocial tendencies.
- (8) Assessment of alternative caretakers in each home, baby sitters, creches, relatives and potential step-parents.

Despite the comprehensive nature of these standards therefore, they have nevertheless remained broad and vague and limited in practice (Sornarajah, 1973; Wilcox, 1976; Mnookin, 1978; The Yale Law Journal, 1978) and open to misuse by courts who still relied on traditional presumptions and procedures to come to decisions.

The kind of generalized presumptions which still tend to be used by the South African Courts include the belief that:

- (a) the custody of a child of tender age should be given to the mother;
- (b) custody of a son should be given to the father and that of a daughter to the mother, so that better guidance can be provided to the child.
- (c) Custody should not be given to an immoral parent.
- (d) Antagonism of the child towards a particular parent should be considered.
- (e) The child's existing associations and environment should not be lightly disturbed.

(Spiro, 1971; Sornarajah, 1973; Mahlo, 1975).

Watson (1969) had introduced the 'psychological best interests of the child' concept. His definition, stated in very broad terms, included not only the standards or criteria against which assessments are made, but for the first time the manner or procedure by which this is achieved.

The most strongly supported approach in decisions of disputed custody and access has unfortunately remained the 'unfitness test', a test open to parental manipulation. The labelling of parents as 'unfit' or 'undesirable' has been recognized as undesirable in itself, as it tends to reflect on and create even more stress for the child.

Woody, 1978, proposed a more positive approach by replacing the concept of 'unfit' parent by the 'most able parent'. The advantages being clearly that it maintains the integrity of both parents, and discourages the need to advocate for parents. The aim is to determine "which parent will optimise the child's opportunity for growth, development and life style without the connotation that one parent is unfit or unsuitable" (Woody, 1978, p.84).

While still considering the different aspects of fitness (moral, physical, mental...) the purpose is not to punish the culpable or infirm parent, but simply to assess how these aspects relate directly to their parenting capacity and relationship with the child from the child's perspective (Wilcox, 1976).

2.2 Alternatives - Shared Parenting : Joint free access/custody

No matter how one approaches the problem, the task of choosing between the merits of a mother and father, especially where a large range of factors need to be weighed up and where both are clearly able and willing as parents and are attached to the child, is an extremely difficult and often arbitrary one (Stack, 1976).

Over the last few years studies have focused on the effects on children of the process of separation and the structure and relationships within the post divorce families.

A fundamental aspect of the trauma of divorce appears to be the threat of loss of primary bonds or actual separation from one of the parents, as the disruption of these bonds interferes with the child's developmental progress socially, emotionally, cognitively and intellectually (Wallerstein and Kelley, 1975; Hess and Camara, 1979).

Hess and Camara (1978) found that the "family relationships that emerge after divorce affect the children as much or more than the divorce itself" and that the child's relationships to their parents are more significant in this adjustment than the level of cooperation or discord between these parents.

Access: The child's relationship with both his parents, custodial and non-custodial, is important to his well being and separate from his relationship with the other parent. The importance of children to maintain sound and loving relationships with both psychological parents after marital dissolution, by the provision of open and free access to both parents for the child, has been consistently expressed over the years both

by mental health and legal professionals, and the court in mitigating the negative effects of divorce for children (Watson, 1969; Bates, 1974; Bates v. Daly, 1976; Kramer et al., 1976; Benedek and Benedek, 1977; Seagull and Seagull, 1977; Grote and Weinstein, 1977; The Yale Law Journal, 1978; Grief, 1979; Roman and Haddad, 1979; Richards, 1981; Stack vs. Stack, 1981).

In 1967 an Ohio Court suggested that children's rights assume that the child should receive "the totality of the benefit that should have been expected if divorce had not occurred" (Mlyniec, 1977-78, Note 28, p.5). This clearly implies the right of the child to the company of both parents after the dissolution of the marriage. Courts have in fact clearly stated their opposition to depriving the child of access to either parent unless it is entirely satisfied that the emotional or physical welfare of the child is being threatened (Hahlo, 1975; Soni, 1976; Richards, 1981) and in South Africa the General Law Amendment Act No. 93 of 1962 specifically renders a custodian parent guilty of an offence if he or she "without reasonable cause refuses or prevents access by the other parent to a child in contravention of an order of Court" (Germani v. Herf and Another, 1975, p.898).

Despite these clearly stated standards however, Courts remain reluctant to grant orders which would effectively provide these rights to children (Hahlo, 1975). Richards (1981) estimates that in England an order of access is awarded in

one quarter to one third of all custody orders. Many South African Court orders provide access in such broad terms, 'reasonable access' as not to secure the adequate provisions for the child's needs (Rosen and Abramovitz, 1975). Judge de Villiers in 1960 defined 'reasonable access' as being "aimed at the preservation of some degree of parent-and-child relationships between the non-custodian parent and the child for the benefit of both, but in a manner not incompatible in substance of the care and upbringing of the child by the custodian parent" Roberts (1980).

In practical terms this effectively places the relationship between the non-custodial parent and child in the hands of the appointed custodian. Richards (1981) stresses the need, where custody orders are made, to carefully work out an access arrangement to suit the needs of the family and not simply to allow it to go by default.

Joint Custody

Much of the settlement in divorce is influenced by what the attorney advises his client, which is in turn influenced by what the attorneys believe the courts will accept (Weiss, 1979). As the law stands at present primary importance is given to the stability of the child's relationship with one sole custodian parent while granting access rights to the other.

The granting of sole custody orders is regarded by Richards (1981, p.17) as a "public acknowledgement that the role of the non-custodial parent is expected to be reduced". It is a declaration that one parent is superior to the other in the

eyes of parents, child, family and friends (Grote & Weinstein, 1977). Richards suggest that what is needed, and is within the Judges power, is a public affirmation that in spite of the adult separation, parental duties and obligations, as opposed to looking purely at parental rights, persist. He suggests, therefore, that orders of joint custody become the norm. In other words, that the custody of neither parent be terminated unless strong and specific reasons relating to the child's welfare or the inability or unwillingness of parents to undertake this role presents itself.

Benedek et al., (1979) have defined Joint Custody as the aggregate of 3 characteristics they believe distinguishes it from traditional or sole custody arrangements:

- (1) The acknowledgement that both parents assume equal responsibility for the physical, emotional and moral development of the child,
- (2) the sharing of the rights and responsibilities for making decisions that directly affect the child, and
- (3) that the child lives with each of his/her parents for a substantial amount of time.

The practical arrangements are normally made to fit in with the needs of the family (Boum, 1976) and not to disrupt the child's routine activities, but generally an equal amount of time is spent with both parents who during that time minister to their daily needs. Usually a 3½ days per parent per week system is adopted where clothes, toys are duplicated or split up (Dancey, 1976).

The ambivalence among legal professionals regarding the concept of shared parenting, which is used here as a general term, following divorce, has been largely influenced by the views expressed by Goldstein et al (1973), who at the time filled a need for psychologically backed guidelines for legal professionals which unfortunately was welcomed, widely read and uncritically/unquestioningly adopted.

These authors argue that continuous relationships are essential for children, and as they require stability and continuity, children who wander from one environment to the other cease to identify with any set of substitute parents. They go on to state that they may have contact with more than one adult only where these adults feel positively towards one another. Where they are not in positive contact, loyalty conflicts arise which may have devastating consequences for the child and result in destroying the child's positive relationship with both parents. They conclude therefore that contact with the non-custodian parent following divorce should only be permitted at the discretion of the custodial parent where a positive relationship exists and that once granted, an order be final.

As a result certain beliefs have evolved which require careful evaluation. Unfortunately a major difficulty in this area is the lack of sufficient empirical data to prove or disprove these beliefs as the available research is based on a few studies of small, highly selective samples and experiential reports.

One of these beliefs is that with such arrangements the child becomes a pawn in continued marital disputes. It has been

pointed out, however, that the inherently unequal distribution of power between parents in sole custody settlements is far more likely to result in conflict, hostility and resentment between the parents. Such arrangements encourage parents to fight bitter custody battles for something they fear losing (Grief, 1979). Continued custody battles and maintenance withholding are often used by non custodials as a way of regaining some sense of control.

In joint-custody situations on the other hand, where both retain satisfactory relationships with their children, the motivation for such hostility is substantially reduced.

It must be recognized that even for parents committed to promoting contact of the child with the other parents, contact periods do provide fertile ground for the expression of unresolved parental conflict or of intolerance of practical snags inherent to this situation which do result in loyalty conflicts being stirred up in children (Derdeyne, 1975; Benedek & Benedek, 1977; Jenkins, 1977). The periods before and following visits are also difficult periods for the children when they commonly act out their expressions of loss, hurt and hostility relating to the divorce and overall situation and conflict of loyalty which are distressing to the parents and often misinterpreted as negative reactions to the visits themselves (Benedek & Benedek, 1977).

These expressed feelings of distress on the part of all the family are by no means limited to the joint custody situations, they are not avoided by the awarding of sole orders or the

elimination of contact with one of the parents. An important point to make is that where they do exist they need not remain permanent patterns of interaction. As the post divorce adjustment relies entirely on how the feelings of the members are resolved, the period immediately following the divorce is a critical point for appropriate psychological intervention which will help parents to avoid using children as weapons.

A second misconception is the belief that it is disruptive for a child to have two different homes. In all post divorce situations there is an inevitable period of adjustment which may vary from approximately 2 years with the period of highest stress occurring after 1 year (Abarbanel, 1979), to 3 years (Brown, 1976), during which both parents and children work through their felt anxieties. Grief (1979) reports that the children in her study were not confused about where they spent their time. She points out that children are shuffled to and from school and care centres daily yet this is called consistency and schooling. Baum (1976) felt that the problems that did tend to arise were of the organizational, practical every day type of problems. Dancey, (1976, p.71) found that in her sample "most children seemed to feel pleasurable anticipation about alternating homes rather than resentment or sadness at leaving one home for the other". Ricci (1980) has published a practical guide to help parents develop a working relationship after the divorce even when parents are not on friendly terms.

A third misconception reported by Grief (1979) is that shared parenting only works when parents get along and therefore is not likely to work for parents who can't stay married. She reports,

however, that many parents in her survey, despite tremendous hostility towards their ex-spouse, were able to separate their parental responsibilities from their marital problems. They also found that once freed from the conflictual marital relationship they were better able to fulfill their parental roles. This is supported by others (Dancey, 1976; Baum, 1976; Abarbanel, 1979).

Finally, while supporting the need for maintaining continuity for the child, Bentovim and Gilmour (1981) define this concept in far broader terms and stress the need to avoid separations to which children are sensitive, as with a primary presenting figure.

Having dealt with some of the "myths" that have evolved it is necessary to remark on the noted negative aspects of traditional sole custody arrangements in which access is clearly demarcated and limited and then to consider how free access to both parents for both the children and the parents in reconstructed families aids the adjustment process.

.2.1 Effect on the Child

An order of sole custody has been described as a restructuring of relationships such that one parent is 'shut in' and the other is 'shut out' of the life of the child (Grote and Weinstein, 1977; Ramarand Haddad, 1978).

- (a) When a parent is 'shut out' his relationship with and availability to the child is for all intents and purposes terminated. The Harvard Law Review

(1980) refers to the 'legal death' of the non custodial parent. The child's response to this loss is much the same as it would be to the death of the parent. These responses include distress and suffering and intense longing for the departed parent (Wallerstein and Kelley, 1979); depression often masked by aggressive acting out at home and school (Lawrence, 1968); the fear of loss of both parents (Dancey, 1976; Richards, 1981); and feelings of rejection, abandonment and loss (Dancey, 1976).

- (b) They were also found to firmly believe that they were to blame for the divorce and no amount of verbal affirmation to the contrary altered this as the absence of the non-custodial parent served to confirm this belief (Abarbanel, 1977). Increased contact with the non custodial parent helped to decrease these feelings in the child (Littner, 1973) and confirmed for the child that he was loved and wanted by both parents (Abarbanel, 1979).
- (c) Contact also helps the child to deal with unconscious and conscious fantasies about the absent parent. In terms of psychoanalytic theory the need of the oedipal child to test the reality of his fantasies, in order to resolve their competitive feelings and resulting fears of retaliation from the same second parent, seems

devious in order that these untested fantasies do not take on neurotic proportions at a later stage.

Children also need to test out glorified or vilified fantasies of the absent parent (Mc Dermott, 1968) as well as those impressions that might have been communicated to him (Derdeyn, 1975; Benedek & Benedek, 1977; Abarbanel, 1979).

- (d) Single parent children have been noted to present gender identity difficulties (Hetherington, 1972; 1973; 1975; Bernstein, 1977). Again, here, access to both parents provides the important sexual identification models as well as living experiences required for healthy development (Littner, 1973).
- (e) Where access to one parent has been limited, the death of the other custodian faces the child with the problem of having to readjust to a relative stranger. Where parenting has been shared, the transition and readjustment is far less traumatic (Benedek & Benedek, 1977).

2.2. Effect on the Custodial Parent

The welfare of the child can never be considered in isolation from that of his parents who so closely affect his life.

Therefore the affect that the system has on the parent also has a direct affect on the child. While sole custody 'shuts out' the non custodial for the child, it also 'shuts in' the custodial parent.

- (a) This represents for the custodial parent being faced with having to provide for all the child's daily needs, material and emotional at all times. Often too as a result of lowered income and failure on the part of the non custodial parent to provide adequate maintenance, this parent is faced with the further demands of employment.
- (b) Emotionally 'shut in' parents are expected to cope with their own feelings which they are required to put aside for long enough periods in order to deal with the child's process of mourning and provide them with the support and reassurance they require. Contrary to popular belief the denial or frustration of access by the custodial parent impairs rather than secures their relationship with their child, as frequently they are blamed for the divorce and bear the brunt of the child's negative feelings (Beal, 1979), while an often unnatural and undesirably intense relationship with the non-custodian may develop (Benedek & Benedek, 1977).
- (c) As a result of these incessant demands with no reciprocal support, this parent may become lonely and depressed such that the children feel the need to take on parental roles during this period (Westman, 1979). The obvious benefit for parents who share the parenting role is the reciprocal support they provide for each other, which allows for each of them the time and opportunity for the recharging of emotional batteries (Richards, 1981).

5.2.2.3 Effect on the non-custodial parent

For the 'shut out' parent (usually the father) the situation is even more emotionally complex. A sad observation is that where limited orders of access exist, non-custodial fathers have tended to drift away from their children (Roman and Haddad, 1978; Rosen, 1977; Richards, 1981).

- (a) Their first barrier to the children takes the form of 'legal advice' from the traditional lawyers, and the advice of others who view the father's wish to maintain contact with his child as a selfish, private indulgence (Richards, 1981; Baum, 1976).
- (b) Practically the visits may prove too trying, where an ex-spouse uses her power of custodianship as a weapon to prevent or frustrate access arrangements (Grote and Weinstein, 1977) or where the non-custodian has moved away in order to start again (Richards, 1981).
- (c) The emotional factors tend to play a major role. Grief (1979) attempted to explode the myth that fathers walk away from divorce and their families unscathed and carefree. She found that 57% of her sample of non-custodial fathers developed symptoms of depression, psychosomatic complaints, alcohol and sexual problems following separation from the family. They referred to feelings of loss, being devalued as a parent and some of a need to distance themselves from the child in order to cope with the

pain. Some felt that the pain when returning or fetching their children from their home would be sufficient to overcome the wish to continue their relationship. The withdrawal was a form of emotional protection (Seagull & Seagull, 1977).

They expressed feeling overwhelmed not only by the loss of their wives and children, but also of their friends, home and their fantasies, dreams, hopes and lifestyles (Dreyfus, 1979).

- (d) The self image of the father changes drastically with an assigned non-custodian status. Seagull & Seagull (1977) looked at the average non-custodial father who had not been involved with the housekeeping and care giving roles in the marriage. For this father, the new demands being made on him, his lack of experience, the tendency for the children to run to the custodial-mother with their problems, comfort and support, added to the depression and frustration he may feel in his attempts to master the new parental role in limited periods of access confirm his often already felt failure as a parent.

Grief (1979) found that the less opportunity these fathers had for involvement, the less they saw themselves as parents and the less motivated they were to be with their children and the more they eventually acted in accordance with their assigned role as 'non-parent'. Grief further looked at the quality of

relationship between the child and non-custodial fathers and reported that although they were genuinely concerned with their children's distress they were often not there at times of stress, and when stress was perceived they found mutual difficulty and reluctance to open up emotionally which resulted in the development of more superficial relationships. As 'weekend fathers' they felt that the limited time that they spent together with their children should be enjoyed and not spoilt by anger or painful topics.

There was always the fear on both sides of angering the other, with the child fearing that an angry or hurt father would not come back, while the father, often complicated by feelings of guilt about the impact of the divorce on the child, tended to overcompensate and displayed poor limit setting for fear that an angry child would not want to return. Richards (1981) describes the "Father Christmas syndrome" where picnics, gifts and treats become the accepted way of relating to the children.

- (f) Where several children were involved fathers found it difficult to find time for intimate relationships with any of them individually after the competitive demands had been met within the limited available time.

Joint Custody fathers on the other hand reported being able to continue normal, open spontaneous and full emotional relationships with their children and felt that there were ample opportunities for intimacy. They learned the routine and how to care for the child, they felt involved and satisfied with their relationships.

- (g) Other factors were resentment from the children, from new spouses, a feeling that visits may be upsetting to the children, a new spousal relationship, disinterest and as a means of escaping payments for maintenance (Richards, 1981).

Indicators for successful joint custody arrangements

Despite the strength of the case being made for the shared parenting ideal through liberal access or joint custody, its general applicability to all dissolving families must be viewed with some caution at this stage. The knowledge has so far been based on a small selected middle class, educated and extremely motivated sample of families, which places limits on the long term predictability and generalizability of these findings.

Ideally families choose this alternative because it fits in with their basic value system and are clearly committed to making it work even before they approach the attorney. It is more likely however that parties will have some vague ideas or no knowledge of this concept at all. One of the functions of the attorney or counsellor is to classify this concept for the parties as part of the educative process and assessing the possibility with them of adopting this option.

Although there are no definite formulas, certain common, useful and consistent elements have emerged which could be used as prognostic indications or guidelines in assessing the appropriateness of this alternative for each family.

- (1) Desire for joint custody is judged by assessing the strength of the intention, the rational basis for decisions, understanding of the concept and of alternatives, the child's preference, and financial feasibility (Aberbanel, 1979; Benedek et al., 1979).
- (2) Personal Commitment to the concept as judged by the ability and willingness to focus on the child's best interests, parental maturity and disposition towards personal sacrifice (Abarbanel, 1979); Benedek et al., 1979). Grief (1979) found that the parents in her sample had to resolve personally certain issues in order to make joint custody succeed:
 - (a) they had to face their own mixed feelings about this arrangement,
 - (b) they had to keep separate perception of their ex spouse as a mate and as a parent,
 - (c) they had to stick to their resolution not to use the children as go-between or weapons, and
 - (d) they had to accept partial loss of control over daily decisions in their children's lives, especially the parent who had taken the role of primary caretaker before the separation.

- (3) Parents mutual co-operation, as judged by the parental disposition towards and record of co-parenting and sharing of responsibilities (Benedek et al., 1979). Grief (1979) states that it is not the degree of amicability, but the ability of parents to separate out their parental responsibility from their marital problems. The bitter custody battles and hostility are therefore no indication per se that Joint Custody won't work.
- (4) Parents' mutual support, as judged by the parents' mutual tolerance of parenting ability, lifestyle and values and mutual support of their child's active and separate relationship with the other parent, while endorsing and sustaining each other's availability to the child (Kramer, et al., 1977; Abarbanel, 1979; Benedek, et al., 1979).
- (5) Capacity to negotiate and remain flexible, as judged by their ability to face each other, discuss, and come to a mutual decision on a plan of action, and then the ability and willingness to change the plan when it becomes necessary, i.e. maintaining a good working relationship where there is a need to co-ordinate a multitude of routine details concerning the daily care and responsibility and intermittent and emergency tasks (Kramer, et al., 1977; Abarbanel, 1979).
- (6) Agreement on the implicit rules of the system, which involves the agreement on issues of power autonomy and control, the pacing and expression of the process of

separation and the basic rules by which the two families will interact (Abarbanel, 1979).

- (7) Proximity of Residence, as judged by the intention to remain in the same neighbourhood (Benedek et al., 1979).
- (8) A receptive attitude towards counselling. These families may well need support to help them over the initial adjustment period and should be willing to request or attend counselling sessions when required (Benedek et al., 1979). There is no reason why a joint custody settlement can't be conditional on both restructured families attending post divorce counselling sessions in the initial stages.

These are definite situations which mitigate against joint custody settlements. These include a parent's choice to surrender their parental rights, where one party consistently contests the other's access to any parental right.

Certain circumstances are thought to mitigate against joint-custody settlements.

- (a) When parents are disinterested and by choice surrender their parental rights (Grief, 1979).
- (b) When it is seen as a compromise solution in a disputed case because neither parent, for their own selfish needs, is prepared to lose (Richards, 1981; Beal, 1979; Abarbanel, 1979).

- (c) Where parents live in separate geographical locations. The goal is to maintain continuity within the child's context.

The joint custody or liberal access alternative is clearly a solution which attempts to meet the needs of children and families in terms of how they have been defined by the recent research. The overall feeling of those who have adopted this alternative is that it does work. However, there are still many unknowns in this relatively new and rare practice. In England joint custody settlements are granted in less than 5% of cases. Clearly this arrangement may not satisfy the needs of many families. The choice of custody/access arrangement remains a very personal one which should not be imposed upon by unsubstantiated blind beliefs of outsiders. More research is needed across a wider spectrum of the population and over longer periods of time. For this to happen, however, this alternative needs to become more readily accepted by both the mental health and legal professions and promoted to the public at large. Only then will the problems be clarified and the system refined.

Having established the requirements of a thorough knowledge and understanding of the child and his needs by the consultants as child advocates, the following sections attempt to outline an investigative procedure to be followed, provide a basic model of child development and an understanding of the optional primary caretaker and environmental characteristics at each stage of development against which to evaluate the data in order to formulate a life-plan for the child, offer a format

for medico legal reports and guidelines for the conduct of experts in court.

The Investigative Process

.1 The Initial Contact

Before the consultant undertakes an investigation a brief specifically stating the issues that require investigation and assessment, should be obtained in writing from the source of referral (Rosen and Abramovitz, 1975; Thring, 1982).

The conditions under which he is prepared to work need to be clarified. He needs to assert

- (a) his free access to all relevant sources of information,
- (b) his neutrality vis-a-vis the parties but commitment to the child and the family's welfare as a whole,
- (c) the free availability of the final report for both sides and the Court,
- (d) an adequate period of time within which to complete this assessment and
- (e) how costs will be calculated and establish by whom they will be paid.

.2 The Investigation

What is being asked of consultants in disputed custody cases is to provide an opinion, based on their understanding of the specific child and his needs within his family and social context, as to which of the two parents will be better able in the future to take full responsibility for caring for the child.

This requires a thorough knowledge and understanding of:

- (a) The child as a fully functioning individual.
- (b) The parent-child interaction system.
- (c) The child's family system.
- (d) The child's social/community system.

Such an understanding can only be gained through a synthesis of a comprehensive set of information gained by thorough investigation.

The most effective technique used is the direct interview in which the most basic and valuable factors are the sensitivity, insight, experience and knowledge of the consultant, which operate from the first moment of contact.

2.1 Getting to know the child requires information from many different sources.

- (i) The personal development and family history of the child is the information by which the clinician gets to know the child through the eyes of both parents (Fredericks, 1975).

Through this, he acquires information about the child's basic constitution, early physical development, the important primary interpersonal relationships and patterns of behaviour, psycho-social development, especially the duration, intensity and present status of his relationship with the competing parents and other family members, his emotional capacity and expression and styles of coping with life events and

stresses at different stages, his intellectual/ educational development, achievements and opportunities.

(ii) Interviews with the child potentially serve three effectively different purposes:

(a) To inform them as participants in the process - as it is felt that the child should know as much about the procedure as possible (Derdeyn, 1976). They should be openly spoken to about their parent's divorce, and the custody or access dispute within which they find themselves (Frederick, 1975), and should be invited to participate and be provided with any explanation they may desire or be able to cope with while at the same time his/her desire not to participate should be respected (The Yale Law Journal, 1978).

(b) To provide for them an opportunity of stating their preference - Judges have long been aware of the difficulties of relying on choices expressed by children in chambers or in court because of the pressure brought to bear on these children as a result of

- (1) the emotional nature of the situation in which they find themselves;
- (2) the influences of parents who may bribe, make promises and threaten the child (Bradbrook, 1971; Galligan; The Harvard News Review, 1980) and

(3) the fear of rejection by the unselected parent (Sugar, 1970).

The judiciary, except in Michigan where the interests of the child are so protected that the child representative may even interfere with the freedom of parents to divorce, and in Georgia where the child's preference is absolutely and presumptively controlling unless the selected parent is deemed not to be a fit and proper person to have custody of the child, (Bersoff, 1976-77) views the child's choice as one of the many factors that need to be considered (Coyne, 1969), often using it to reinforce the correctness of a decision based on traditional factors (Mlyniec, 1977-78).

The need, however, to consult with the child and seriously consider his reasons and respect his perceptions of which parent really cares more about him and is more dependable, as well as which he would prefer not to see, has been strongly expressed (Rosen and Abramovitz, 1975; Benedek and Benedek, 1977; Jenkins, 1977; The Yale Law Journal, 1978; Westman, 1979).

The child's ability to make rational choices is defined by his state of egocentricity and level of intellectual functioning, which determines his perceptions and understanding of the world, and his expression depends on his language development, articulation and sense of consequence of doing so.

However, most children's evaluations are coloured by loyalty conflicts and their tendency to respond according to how they feel at that moment, and their current developmental needs. Expressed choices should, therefore, not automatically be taken at face value but should be tested thoroughly for consistency.

Choices may, for example, reflect a preference for a lenient, easy to manipulate or less effective parent where a more dependable, stable, effective parent is needed (Jenkins, 1977), or a choice based on a subtle or not so subtle priming by the parent (Rosen and Abramovitz, 1978).

Although the principle method of gauging the choice of the child remains the direct interview, it often becomes necessary, when children have difficulty expressing their true feelings, to use a more indirect technique as an adjunct to the interview, as a way of gaining some insight as to the true feelings that are not being expressed.

This includes the use of play material, especially with small children, and projective techniques such as the thematic aperception test or the child's version of the same test, incomplete sentences and the Bene Anthony test of family relations.

Despite the provision of this opportunity, the child may still not be able to indicate a preference, either because he has a close attachment to both parents (Jenkins, 1977) or because the burden of choice is too great in an anxious child already affected by the stress of the situation (Mlyniec, 1977-78).

The purpose of the intervention with the child then becomes:

- (c) To assess the child's physical, social, intellectual and emotional needs, and although much of the relevant information will already have been acquired through interviews with the parental figures, interviews with the child sensitizes one to the world through the child's point of view. One learns what is important to that child (Westman, 1979).

It is important to accept the uniqueness of each child's personality and background, to listen and discover the child's emotions, fantasies, urges and interests, to understand what the child is saying, the goals of his/her behaviour, the true meaning of his/her assertions, to evaluate conflict wishes and to deal with the ambivalences towards the parents as well as his guilt or conflicts about expressing his true feelings (Westman, 1979; Rosen and Abramovitz, 1975).

Jenkins (1977) proposes that the significant questions to ask are: To whom does the child turn when hurt or in trouble or has a problem?

In whom does the child confide?

Who does the child trust?

Westman (1979) stresses the need for consultants to be sensitive to the issues and needs that are important to the child and aware of each child's unique personality and background.

- (iii) Longitudinal and current school observations are an important source of collateral observation from parents and teachers and provide crucial information about the child's capability with school and classroom situations and peer relationships.
- (iv) Psychological and educational achievement testing may be used selectively when there are specific queries that require further investigation and indicate possible specific needs of the child which need to be considered. There is definitely no basis for which to test these areas routinely (Solow and Adams, 1977) and when required should be used as an adjunct to the basic direct interview technique only.
- (v) Medical evaluations again are not required routinely but are indicated when a potential problem presents itself.

3.2.2 The Parent-child, Child-parent relationship and interaction

Because of the tremendous inconsistencies one is faced with by distorted information from competing parents, collateral evidence from family, friends, neighbours, school doctors and so on is often very useful to place the parent's reports in context and perspective. Another useful method for the cross-checking of historical data is by making use of life-line charts with parents.

Interview techniques are used to assess the parents' capacity and disposition to give the child love, affection and guidance (Foster & Freed, 1973-74) and to meet the child's developmental

needs from dependency through the individuation/separation stages of development from the personal and family history of each parent. It is also necessary to understand clearly the parents' motive for wanting custody/access which should never be taken at face value. This is also assessed.

An important source of information on this relationship is the observations that are made of 'actual parent-child' interactions.

McDermott et al., (1978) devised a parent-child interaction test to measure the child's attachment to the parent. They filmed and observed parents working together with their children on set tasks appropriate to the age of the child and evaluated them on two sets of interactional dimensions.

- (1) The child's attachment to the parent was measured by the degree of comfort, initiative, spontaneous fantasy, expressions, range of feelings and separation behaviour he/she exhibited and
- (2) the parents' attachment to the child was measured by their empathy, sensitivity, discipline, guidance, consistency, patience, intellectual stimulation, facilitation of emotional expression and spontaneity, physical closeness, encouragement and acceptance.

Assessing family members in structured settings tends to induce anxiety resulting in distorted behaviour already complicated by the stress induced by the divorce procedure. Swerdlow (1978) points to the unnatural and strained nature of the situation.

McDermott et al., (1978) talk about the possible staged performance that might result.

Rosen and Abramovitz (1975) suggest that, ideally, observation of the parent-child dyad should take place in the home environment of each parent. The merits of this are that they provide a second opinion either confirming or contradicting the already available information or evaluation. They may provide a cue as to where the investigations should focus and as a method of reducing the parent-child relationship to close scrutiny.

3.2.3. Family System

This assessment is based largely on direct observations of these interactions with the family system as a whole or as sub units thereof for both potential custodial parents.

Bentonim and Gilmour (1981) describe a process of assessment of the family system in a variety of combinations working on tasks set by the consultant to foster interaction in a clinical setting in which one member of the evaluation team remains with the family while the consultant observes behind a one-way mirror.

What is assessed includes:

- (1) the 'surface action' or "characteristic pattern of interaction which normally nurtures and socializes the members of a family or system through adequate communication, atmosphere, parenting, affective status, boundary integrity and decision making in relation to the outside world" (p.68).

- (2) Attachment behaviour, nature of relationship and parental competence, insight, limit setting, separation and reunion and stranger reaction.
- (3) Non-verbal behaviour of the children involved with play material and each other and adults in the family.

They felt that stress aroused enabled clear enactment of adaptive behaviour but agreed with McDermott et al. (1978) that such structured observations may well be distorting the picture through greatly heightened anxiety and stress, thus making it difficult to interpret.

.3.2.4. The Child Social and Community System

Both interviews, and home, school and such visits would provide the information in both potential environments against which the child's needs could be measured.

.3.3 EVALUATION

This stage consists of 3 specific tasks.

- .3.3.1 (1) The synthesis of all the information into a formulation and understanding of the child within his social context, from which opinions as to the needs of the child and the potential of each reconstituted home are based.
- .3.3.2 (2) The formulation of a life-plan or recommendations involves the prediction of the effect that certain factors will have on the development of the child (McDermott, et al., 1978). This involves the weighing up of the available alternatives and

assessing priorities based upon certain criteria which determine their detrimental and beneficial effects on the child (Westman, 1979). Rosen and Abramowitz (1975), emphasize the need to recognize the relative merits and demerits of each party relative to the needs of the child, bearing in mind that very seldom do all the merits lie with one and none with the other party.

Once this knowledge has been gathered together evaluation requires that the consultant needs to be able to measure it up against a solid basic knowledge of the stages of development of childhood and the needs and the ideal role of the primary caretaker at each stage which will enhance the development of the child into a socially competent, responsible, secure adult. Each stage must be approached from the cognitive, emotional, social, intellectual and behavioural points of view.

Briefly summarised below, based largely on a model set out by Westman (1979), are the tasks that are required to be mastered by the child at each stage of his development and the prevailing qualities required to encourage this development.

Infant Stage.

The child at birth is entirely dependent on others for his survival and to provide all his physical, social, emotional and intellectual needs. The most important task to be mastered is the formation of an unbroken, continuous and meaningful primary attachment with a responsive, consistent,

regular and available primary caregiver who is committed to his welfare and to provide comfort, relieve tension, regulate his environmental stimulation and interact socially with him. (Bowlby, 1951; 1969(a); Rutter, 1972; Goldstein, et al., 1973; Westman, 1979; Srouffe, 1979). A child may have more than one attachment figure (Ainsworth, 1979). This first attachment forms the basis for his later relationships (Bowlby, 1969(a)). Successful attachment during infancy precedes successful bonding, which provides the basis for later successful social development (Rutter, 1972).

Rutter (1972) considers disturbed interpersonal relationships as the single most important indicator of childhood and adult psychiatric disorders. He estimates that despite the lack of conducive evidence there would seem to be a 'sensitive period' during the first two years of life, during which initial bonding occurs and the later this develops the more difficult it becomes to achieve.

This close relationship when it is regular and reliable fosters the development of a sense of confidence, trust and security (Benedek, 1938; Erikson, 1960). Where it is inadequate or frequently interrupted it becomes fragile and the child becomes vulnerable (Bowlby, 1969). When the relationship becomes too intense the child tends to become over secure and self content and strong exclusive attachments to single individuals tend to develop which are not socially adaptive (Mead, 1954).

Bowlby (1959) focussed on the role of the mother figure which he stressed need not necessarily be the biological mother nor,

in fact, a mother at all but rather a parent or other adult person who "mothers" or cares for the child on a regular daily basis. This may include more than one parent or person (Bowlby, 1969(a)).

The biological connection should not however be lightly discarded as the parent/child relationship of biological origin has the highest potential for providing the child's needs. While dismissing 'maternal instinct' as a generalizable concept, the mother child relationship is in fact a product of a whole series of physiological feedback mechanisms which, under 'normal' circumstances ensures the mother's interest in her child from birth which builds up a 'psycho-physiological' dependence, drawing them into an intimate, mutual need satisfying relationship (Watson, 1969).

Psychological parenting, however, must be supported over failed biological parenting (Bentovim and Gilmour, 1981). The research indicates that the deprivation or loss of this relationship at this stage results in serious complications for the child in his development (Rutter, 1972; Hess & Camara, 1979). The results of this are largely dependent on the quality of the relationship, the age of the child, and length of separation. (Srouffe, 1979; Ainsworth, 1979).

This has specific relevance in the area of custody determinations, as these primary attachments should as far as possible not be disturbed (Antonucci, 1976). Loss in early life has been linked with depression and suicide in adult life, and more subtle and complex forms of vulnerability in the child

to certain stresses which may become manifest in later life, when these individuals attempt to establish adult roles or engage in parenting themselves (Srouffe, 1979).

The American Orthopsychiatric Association passed a 'position statement' by a 97% majority vote on the importance, in decisions about child custody, of the actual existence of deep bonds of mutual attachment such as normally grow out of parent-child and child-parent relationships (Jenkins, 1977).

Toddlers (18 months to 3½ years).

This is the stage where the child starts moving around and attempts to master the task of self control, gaining an awareness of himself as separate from the outside world. Venturing out from his familiar and secure base to cope with unfamiliar environmental hazards, he gains a sense of self-confidence. This corresponds to Erikson's stage of autonomy vs. shame and doubt.

At this stage the child needs a trusted adult to be available to selectively protect and expose him to a widening world. Supervised freedom requires frustrations, however, from limit setting to enable a familiarity with the constraints of both physical and group reality.

This is a difficult (and mutually ambivalent) period requiring the facilitation by the parent of the process of individuation.

Early Childhood 3½ - 4 years.

The child at this stage needs to individuate and experience separation from primary attachment figures (Bowlby, 1979). Children are now able to carry an internal image of these figures thus allowing separation to occur.

Sexual identification develops and models of both sexes become important. There is also a tremendous amount of physical energy that needs to be given the opportunity for expression so that large open spaces need to be provided or made available. The active participation with fantasy requires the parents to help the child distinguish between often frightening fantasies, reality and action.

Although the child is still very egocentric, group experiences become important learning grounds where, through confrontations resulting from rivalry for the exclusive attention of adults or toys, a sense of sharing and friendship is developed, and through play social and cultural patterns are discovered and practiced.

The peer group provides the opportunity to discover and identify their status and social identity outside of the home, thus expanding self concept and differentiation from the family, subordinating self interest and becoming sensitive to group approval and developing a "we feeling" (Westman, 1979).

This stage corresponds to the play age where the child struggles between 'initiative vs. guilt' (Erikson, 1960). The parental role here requires the facilitation of this individuation, provision of models of both sexes, opportunities for peer play and physical and emotional self expression as well as to provide routines to gain a sense of regularity and anticipation of events (Westman, 1979) and provide firm support and clear rules and values in order to facilitate management of impulses (Srouffe, 1979).

Middle Childhood 5 - 8 years

The school age of industry vs. inferiority (Erikson, 1960) follows the development of cognitive judgemental and motor function to the point where the child can take greater personal responsibility for himself in the neighbourhood and school where he needs to establish his place. Models are now assimilated and idealized and peer groups become the important socializing institution where techniques of sociability, self assertion, competition and co-operation are learned and sensitivity to the expectations, censure and approval of the groups provides a sense of values and standards.

Although attachment behaviour continues as a dominant strand in the child's life, it is weakened as emotional support is increasingly provided by the peer group (Bowlby, 1967(a)).

The parental role here is one of facilitating peer group interaction and recognizing and encouraging his physical, intellectual and social effects. The relevance that this knowledge has for custody determination is the need to consider the importance of continuity for the child of his peer group relationships in the neighbourhood, school and other activities, his close attachment figures and adult models.

Late Childhood 9 - 13 years

This is seen as an important stage by Westman (1979), which he calls culmination of childhood. It is the stage in which rules and laws of society are mastered and confidence and leadership experiences are gained. This enables them to loosen the emotional ties from their parents' control often in the

form of revolting and testing the adult role.

The greatest need of parents at this stage is to recognize their seniority in childhood and facilitate their integration with peer groups. Often at this stage there is a felt need by the child to initiate contact with an adult friend.

Adolescence 13 - adult

This is ideally a time to devote to perfecting physical, social and intellectual skills "to explore ideas, ideals, roles, beliefs, theories, commitments and all sorts of possibilities at the level of thought" (ibid, p.128). The thought process is still very egocentric. "Decentering" occurs through interaction with the peer group and the acquisition of responsibilities. Attachments to the parents at this stage is subordinate to that of peers and sexual attachments extend the picture (Bowlby, 1969(a)).

This is the stage of identity vs. identity diffusion (Erikson, 1960). The parents' role is that of providing the adolescent with the opportunity to expand his personal skills and resources in the preparation for assuming responsibilities for others, which serves to refine his sense of identity and self-esteem.

In general terms therefore, "parenting required for healthy personality development seems to consist largely of a willingness to assist and enjoy the normal maturation of a child"...and... "where a parent views the situation from a child's standpoint, and understands what is needed, no serious distortion follows, regardless of child rearing techniques employed" (Westman, 1979, p.114).

"Psychological parents want their children and are able to care for their needs. They provide support, stimulation, guidance and limits. They take care of their children's physical well-being. They help the children master their instinctual urges, provide the children with a motive for incorporating a moral conscience and concern for the rights and feelings of others, and with models for identification. They value the children as members of the family and as individuals in their own rights.

Psychological parents recognize the importance of affirming their children's intrinsic loyalty ties to both parents, they encourage as positive contact as possible with the non-custodial parent. They do not use their children to further their own aims; to seek revenge on the other parent; to justify their own position; to serve as a mediator between parents; to parentify children into emotionally caring for them or taking on the primary responsibility for other children; to scapegoat children for the marital failure or personal unhappiness. Psychological parents encourage their children's connectedness with grandparents and extended family on both sides. They are willing to acknowledge their own contribution to the family problems. They allow their children to express genuine feelings even if these feelings may be painful to the parents. Psychological parents accept the responsibility for being parents and expect some fair consid-

eration from their children for their efforts, neither infantilizing them into fixed dependent positions, nor parentifying them into roles that surpass their capabilities. Nor do psychological parents want custody in order to force an unwilling spouse to stay in the marriage; to secure financial aids; or to replace another child lost by death or separation (Musetto, 1978, p.63-64).

The contextual approach views the child in a social and cultural context. From early in its development the child becomes attached to more than one significant object figure, these include the rest of the family, siblings, grandparents and extended family, peers and other significant adults, and later to groups, schools, ideas, beliefs, prejudices and things like the home, motor car, neighbourhood and towns. For the child the removal of any of these to a greater or lesser extent entails a sense of loss of attachment for the child. In decisions of custody, although the strength of the attachment bond between the parents and the child should be a major consideration, the continued access of the child to as many of their attachment objects as possible needs to be considered (Krasner, et al., 1976).

Caldwell has identified 15 optional child rearing environmental experiences which could be used as another measure against which assessments could be made. These are:

- "1. Gratification of physical needs and providing for the health and safety of the child.
2. A high frequency of adult contact, preferably with both sexes and with a small number of adults.

3. A positive emotional climate permeated with trust and with assurance to the child that the parents will be there when the child needs them.
4. Recognition and acceptance of individual differences in children by significant adults.
5. An optimal level and pattern of need gratification which is not too much, nor too little, not too immediate, nor too late. This includes opportunities for joy, group contact, quiet and solitary reflection.
6. Variation within patterned sensory and informational inputs that are neither too strong nor too weak.
7. People who love and support a child and provide cues regarding appropriate behaviour and their adult values.
8. Limited restrictions on a child's exploratory behaviour to avoid snuffing out curiosity.
9. A rich and varied cultural experience based upon family background and each individual's heritage.
10. Careful organization of physical and temporal environment so that a child can develop expectancies and predictability in order to provide a cognitive map through which children can interpret space and time.
11. Simple play materials to facilitate the development and coordination of sensory-motor processes. Someone also needs to invest the toys with value, for example, a boy who says "I don't have anything to play with" may pick up a toy that his mother has handled and

indirectly suggested he use.

12. Gradual exposure to and participation in the world of work not as a passive recipient but as an active contributor.
13. Opportunities to share talents and skills without destructive criticism. Adults must control destructive peer criticism, for example, laughing at mistakes and teasing each other.
14. Overlap between different environments in which the child is expected to function, for example, between home and day care centre by interaction between parents and staff.
15. Adults who find children to be satisfying and rewarding."

(Westman, 1979, p.124).

Probably the most important guideline to be held in mind is the one that would seem the most obvious and that is that each individual child is unique as is each family system, so that minimum use should be made of general principles per se.

Here again the advantage is clear at this stage of a team approach in which a combination of mental health professionals contribute their views before evaluation is finalized, thus contributing a variety of perspectives.

3.3.3 The Interpretive Process

The third task is the interpretive process. Warner and Elliott (1979) insist that once finally decided, the findings and recommendations, with reasons, be conveyed to each parent.

O'Shea and Connery (1980) see this as a stage at which a further opportunity for a mediated settlement can be provided.

Both the above authors, and Bentovim and Gilmour (1981) see the need to share with the parents, individually and in line with the principles of confidentiality, the rationale for the recommendation and the difficulties that exist with each in their relationships with the child.

Warner and Elliott (1979) suggest that the parent not being recommended for custody be told first in order to prevent him being told in a destructive way by another.

The role of the consultant is one of

- (a) understanding the experience of loss of primary caretaking responsibility over a child's life on a day to day basis and loss of self-esteem in the parent,
- (b) confronting and
- (c) permitting the grieving process to begin,

but where this is not possible, to relinquish the wish to help as the parent may need more time to accept this decision. The sense of loss may also be expressed through anger often directed at the consultant who is required in this instance to "maintain cognitive awareness of the parents' position as one that defends the parent against hurt. Evaluators who misunderstand this communication are likely to be drawn into a debate around the adequacy of the team or evaluator" (p.380).

This is a difficult, painful and intense experience for

consultants who, if inexperienced, might be tempted to revise their conclusions as a defence reaction to the sadness they share with the parent rather than as a consideration for the psychological needs of the children.

Evaluation also requires the provision for continuing supervision and support for the children and families.

3.4 Report Writing

3.4.1 General Approach

The purpose of the report is to communicate clearly to the court or attorneys the honest opinion of the expert, based on his knowledge and his investigation. It must provide all the relevant material required by the lawyers in order to conduct an appropriate examination and cross examination (Watson, 1969).

In order for it to make a constructive contribution it should be clearly understandable, accurate, logical and modest (Gibbens, no date). Bradbrook (1971) has criticized the use of 'impractical, formalized double talk' and Nichols (1980) reports on the tendency of experts unfamiliar with the court to produce technical reports, poorly understood by lay readers which do not answer the legal questions raised. Fredericks (1975) suggests that ideally, reports should make minimal use of technical language or vague terms, they should be clear and concise and should have no room for guesswork or interpretations by others. Both Gibbens (n.d.) and Nichols (1980) stressed the need to express any doubt felt.

3.4.2. Form and Length

Gibbens puts it succinctly by stating that the recommendations or opinions form the heart of the report and all that precedes them demonstrates that they are rational.

The following format has been found to be useful:

1. Introduction includes:

- (a) the circumstances of the dispute
- (b) the conditions of appointment
- (c) what investigations consisted of - interviews with whom, observations of what and where,, affidavits.
- (d) the criteria of 'central issues' that need to be considered which would include the specific question as posed by the referral source which inevitably includes the 'fitness' or 'unfitness' of the parents.
- (e) the problems encountered in the process of the investigations hostility, limited access, limited time.

2. The next section provides the background data to the dispute. Here the highlight of

- (a) the personal history of each contesting adult,
- (b) their courtship, marital and family history and
- (c) the personal and social history of the child, are succinctly presented.

3. This section deals with the formulation or assessment of the 'central issues' that require consideration, which includes
 - (a) the issues and allegations raised by both parties, such as neglect, poor mothering, caretaking, abuse and so on, and
 - (b) issues considered central by the consultant based on his understanding of the case and knowledge of the child's developmental needs, in terms of current and projected marital, family and social circumstances.

4. Opinion and Recommendations answer the questions posed in the brief and correspond to the formulation of a life plan for the child. Recommendations may be definite and specific, and may suggest alternative possibilities. Rosen and Abramovitz (1975) specify the need to carefully specify custody and access arrangements as rulings of 'reasonable access' are vague and may lead to endless abuse.

There would seem to be two general principles to which to adhere:

- (a) to be able to substantiate all statements by reliable factual data and
 - (b) to be able to back up all conclusions drawn by a sound knowledge of the psychological field.
- Gibbens states that Judges want to know the basis for opinions.

5. The final section may raise questions and problems which might not have been answered and may suggest further observations or information which would reduce or support the consultant's confidence in his expressed opinion (Fredericks, 1975).

3.4.3 Confidentiality

A contentious issue is that of confidentiality and whether information regarding the child should be withheld from parents and whether information regarding parent should be withheld from the other parent.

Solow and Adams (1977) recommends that findings regarding parents should be withheld from the other in order to prevent the misuse of information by the parties and in order to allow greater self revealing. They felt, however, that information regarding the child should be given to parents as this obvious break of confidentiality would be greatly outweighed by potential increased awareness and understanding by parents for the child's needs.

Westman (1979), on the other hand, feels the need to protect the privacy and confidentiality of the child and family and to deal with sensitivity to generational differences in needs and interests.

Gibbens suggests that this issue be dealt with by carefully considering the impact of the report on the family. It is important to consider whether the report is fair or whether anyone could be resentful or surprised by some of the information

(e.g. discovery of illegitimacy) which might create further problems for the family. He suggests that very sensitive issues be marked as confidential.

Rosen and Abramovitz (1975) stress the need for a balanced representation of the situation which is never 'black or white'. They also see the need to set the report out in such a way as to lessen the blow for the parent who loses custody.

Ideally reports should be handed to the lawyer appointed to the child, the court and the contesting parents, all of whom should be at liberty to question the validity of the findings expressed.

Again it is important that, once the opinion of the expert is known, a further opportunity be provided for a settlement to be reached by the competing parties on the basis of the report. One spouse may be sufficiently assured by the other spouse's fitness as a parent that they can at this stage accept custody being granted to them. The assessment made of them as a fit parent may be sufficiently face-saving as to allow settlement to proceed on a more practical basis.

3.5 The Expert Witness in Court

The tendency for mental health professionals to avoid court-work in which their methods, opinions and conclusions are disputed and challenged has been recognized (Derdeyn, 1975; O'Shea and Connery, 1980).

As a result many avoid taking a definite stand by asserting that the data was inconclusive, or providing an opinion so guarded, focussing on irrelevant aspects and providing such impractical solutions as to render their opinions useless for

the purpose of assisting the Court (Benedek and Benedek, 1972).

Clearly, in view of the vulnerability of the consultants to bias within the adversary system as well as the inevitable subjectivity of such assessments, the need to subject the expert's 'opinion evidence' to the critical analysis of cross examination is central to due process of law (Duquette, 1978). It provides the consultant with opportunity to specify "the criteria used, the definitions thereof, the academic rationale for selecting them, the reliability and validity of the evaluation, the safeguards against bias and unjustified subjectivity, and the best method for interpreting and communicating the data" (Woody, 1978, p.86). It is therefore a safeguard against unquestioned, automatically adopted opinion of someone who could otherwise develop into a very powerful expert (Duquette, 1978).

The Court has criticized experts for defensive and argumentative attitudes in court (Selzer and Benedek, 1965; Stock vs. Stock, 1981). Unfortunately, however, experience has shown that while direct examination by the 'supported' counsel tends to be gentle and kind and designed to support the opinion reached, the opposing counsel attempts to strike, probe and penetrate into the areas not covered in order to uncover blind spots and generally discredit the expert's evidence (Bernstein, 1977), a process which is aggressively threatening for any expert.

Very often, persons approached to provide expert opinion have little experience or knowledge of the judicial process that must be followed.

In South Africa, the normal procedure would seem to be that once the report has clarified towards whom the opinion of the expert leans, he becomes a witness for that side and then relies on that parent's counsel to represent what he has assessed to be the best interests of the child and family to the Court. The disadvantages of this system have been previously discussed (Section 5.1.2).

Ideally the child would be represented by an independent attorney whose role it is to coordinate and present the case ensuring the protection of the child's best interests. Whatever the system, however, the primary aim is clearly to present an honest objective opinion.

Nichols (1980) offers a set of very practical guidelines for experts to follow in the Courtrooms. These include:

1. As records used in Court may be kept as exhibits, copies rather than originals should be handed in. Records should never be altered, destroyed or withheld. Nothing forbids the handing in of a supplementary record in order to correct or modify a previous report.
2. The expert in the witness stand should, after stating his name and professional address, provide his credentials qualifying him for expert testimony which could include an updated curriculum vitae.
3. He provides a list of do's and don't's.
 - (a) Always tell the truth as one falsehood destroys the credibility of the testimony (evidence).

- (b) Listen carefully to the question and answer only what is being asked.
- (c) If your answer requires further explanation in order to place it in proper context, request that this be permitted.
- (d) Wait to hear the whole question before attempting to answer.
- (e) Do not start to answer before knowing what the answer is going to be. If it is not clear ask for it to be repeated or clarified so that you have understood.

It has been suggested that experts avoid attempting to answer questions outside of their field of knowledge.

- (f) Do not look to counsel for support or guidance before answering.
- (g) Dress neatly and professionally.
- (h) Be polite and non-defensive. Brodsky and Robeys (1972), in Nichols, 1980, observe that inexperienced professionals tend to react to cross examination with resentment, anger, confusion and stubbornness, and tend to be easily manipulated, while more experienced professionals tend to remain steady while conceding minor points. They tend generally to accept the need for a thorough review of all aspects of their contribution (Frederick, 1975).

Benedek and Benedek (1982) suggest that it may be necessary for experts to consider, explore and even suggest alternative solutions.

- (i) Be prepared to supply information on the cost and time taken to date on the investigation.
- (j) Do not be the advocate for either party per se. However, Brodsky and Robeys (ibid) do observe that professionals unfamiliar with Court proceedings tend to provide an objective presentation of clinical data, while 'Court orientated professionals' aim at persuasion, teaching and mild advocacy of their findings and direct this testimony at the Judge.
- (k) Having concluded the examination, the Judge should be thanked if he has allowed the consultant to give evidence out of order.
- (l) The expert should not remain to listen to the rest of the testimony unless asked to do so by the Court or attorneys.

On the question of confidentiality the expert finds himself in a 'catch 22' situation particularly for the therapist who has been seeing the parent, parents, family or child in therapy and is subpoenaed to court as a witness to give evidence.

Jenkins (1977) advises that such professionals contact the Judge concerned and explain that they are not the best possible source of data for determining child custody and admit to any bias held, and if necessary arrange for more useful investigations to be undertaken.

Costs need to be assessed on actual time spent in investigating, evaluating, reporting and courtroom time based on regular private practice fees (Nichols, 1980).

The reluctance expressed by lawyers to refer clients to private counsellors and consultants (Selzer and Benedek, 1972), could be largely overcome if clinicians were engaged by the Court. This would in addition open the services to all sectors of the public (Rosen, 1978).

6 Training

Felner and Farber (1980) recognize that if social science and legal professionals are to work together constructively for the best interests of the families in divorce and to develop a social policy for the settlement of custody and access issues they should first of all gain a clearer understanding of each other's operating paradigms and goals.

Much as the legal professional needs to familiarize himself with the psychological and social aspects of custody/access disputes, so too the psychological consultant, given the complexity of his role, needs appropriate training, including academic knowledge in child custody in general, and practical familiarity with the working of the legal system which relates to children and families in specific, as well as some understanding about general legal issues and values.

Over and above the legal orientation there is a need to cope with the specific emotional demands of this work (Derdeyn, 1975), as well as to understand the possible influence of personal/professional characteristics and values on the evaluation process itself. This aspect of training can only really be achieved through experience with close supervision.

CHAPTER 6

The previous chapters have stressed the need of the child for continued contact with both parents as an important determinant in their healthy emotional development. We know however that conflict does not end with the divorce and that such contrast provides a 'convenient vehicle for the expression of post marital malice' (Weiss, 1977) which is disruptive to family relationships and causes, debilitating loyalty conflicts for the child. Jacobson (1978) states that 60% of such exchanges between parents involve conflict. We are also aware that even when contact with one parent is severed hostility is not necessarily terminated.

This chapter examines the need for post divorce interventions as a way of helping both parents and children resolve their conflicts and feelings relating to the separation and loss. It defines the goals, forms of intervention and the role played by counsellors. Also considered are the various ways in which communities could facilitate post divorce adjustment by families.

Post Divorce Counselling

The need for counselling after divorce

In terms of the true Child Advocacy model, formulation, opinion and referrals need follow-up by case managers who provide support for the family and supervision of the proposed life plan (Westman, 1979). This service corresponds to the fourth stage of the CAU program as described by O'Shea and Connery (1980).

Such follow-up recognizes that problems arise and adjustments need to be made by families in the post divorce period which require both time and support. It also recognizes that many couples are not, for many reasons, able to resolve the divorce experience and thus become involved in post divorce 'angerism', described by Elkin (1977, p.56), as "a destructive mixture of deep-seated unresolved anger, dependency, anxiety, fear and at times a degree of irrationality, and an inability to set aside the anger long enough to do what is necessary for the best interest of all concerned, particularly the children". This becomes the source of distress and suffering for both the parents and the children concerned. The followup therefore also serves the purpose of assessing and distinguishing between families who have not, through divorce, been able to resolve their conflict, and use the Courts to punish each other and support their polarized positions, and those for whom changes in arrangements need to be made.

It further recognizes that the unnecessary removal and transplanting of children should be discouraged (Finlay and Gold, 1971; Jenkins, 1977).

Many of the painful sequelae of divorce can be greatly reduced by the provision of a counselling service which helps parents to understand and cooperate with the terms of the agreement and to promote growth and emotional health of the restructured families.

Rosen (1978) found, in a Canadian study of post divorce families, that the presence of emotional support, practical advice and guidance during the stressful period immediately following divorce, made a considerable difference to the single parent's ability to cope with the many demands made by their new role.

The reason and justifications, goal and procedures proposed by various workers in the field have evolved from clinical experience and observations over the years. The findings of two prominent contributors in the field, Elkin (1977), the Director of Family Counselling Service, Conciliation Court, Los Angeles (which helped over 300 families during its first three years of service) and Wallerstein and Kelley who have worked with 60 families and 131 children over a period of five years at the Children of Divorce Project in California, are combined and summarized on the basis of common views expressed.

The need for post divorce counselling has been justified by the following observations which are central to the development of any post divorce program.

- (1) "The divorce experience does not stop with the final decree....more important than the legal divorce is the emotional divorce, (Elkin, 1977, p.55). The divorce experience shares with death a deep sense of loss for both parents and children which requires a process of mourning by the family members. When this fails to occur, neither the children nor the parents are able to 'let go' of the pre-divorce family.
- (2) Although the marital relationship is terminated, parents continue to be parents to their children.
- (3) The way children cope with the divorce experience will depend on the divorce process and the way the parents cope with this experience both as individuals and as parents.

- (4) The immediate post divorce separation period, when the impetus and direction for change is strongest, seems the most effective time to provide the opportunity for intervention efforts which focus on the parental relationship with the child and the spousal relationship.
- (5) Divorce, as in any crisis, constitutes a process of disorganization and reorganization in which the original families are dissolved and re-structured in the form of new and separate families of the father and the mother. Old relationships are never ended but merely changed.

Grote and Weinstein (1977) put it succinctly. "A post divorce family is still a family, and a family by any definition is a unit of intimate interdependent relationship. Even though the man and the woman are no longer husband and wife, they are still, and must be, mutually dependent upon one another, in very special ways as father and mother to their children. This mutual dependence is shared in turn by the children in their relationship with their parents, and the whole unit of interdependent relationship is psychologically irreducible and inseparable. The reality of this interdependence is thus the ground of either continued pain, bitterness, hostility and resultant courtroom battles, or it is the ground for acceptance and regeneration", p.46.

The Goals

The general goals of such services are therefore:

- (1) To help the parents arrive at a mutually acceptable working settlement. The Los Angeles Conciliation Court incorporates the mutually acceptable decisions into a written agreement (see Appendix II; Elkin, 1977, p.59).
- (2) To open up channels of communication that may be blocked by unresolved anger.
- (3) To assess at what level the parents are still emotionally married and work through the mourning process with them in order to achieve detachment and reduce or eliminate the suffering and distress.
- (4) To help the parents separate the spousal and parental issues and recognize that their roles as parents are forever.
- (5) Help the parent become aware of the impact their conflict may have on their children and provide information regarding the developmental and psychological needs of their children and the type of symptoms that may develop which might indicate the need for professional help.
- (6) Provide the opportunity for children to express and resolve their feelings and learn constructive ways of coping with problems.
- (7) To refer to more appropriate sources where necessary.

6.3 Children responses to the divorce experience

Benedek and Benedek (1979) stress that divorce related problems are not necessarily symptomatic of serious mental illness, although they may become forerunners for such emotional disturbances as depression and anxiety at a later stage.

Despite adequate support there is an inevitable period of 'normal' or expected stress and adjustment for both the parents and the child which is not indicative of pathology and simply has to run its course over time. For the purpose of counselling, therefore, it is important to recognize what is expected and what is pathological behaviour. Wallerstein and Kelley have looked at non clinical populations and made an in depth study of what they considered normal responses of children to the divorce experience at different stages of development. These are briefly summarised.

The pre-school children tend to use denial extensively as a way of coping with the separation. Regression, confusion, irritability and anxiety was also often observed (Wallerstein and Kelley, 1975).

The children in early latency tend to suffer openly. No longer able to use denial effectively they tended to become distressed, immobilized and vulnerable to regression. They evidenced sadness, grieving, fear of the present and future situation, they felt deprived and became excessively demanding, experienced a strong sense of loss for the non-custodial, absent parent, to whom they had difficulty expressing anger openly, but became angry towards the custodial parent (usually the mother), or displaced this

anger on peers, siblings and the school. They held strong reconciliation fantasies (Wallerstein and Kelley, 1975-76).

The later latency and pre-adolescent children being more mature clearly recognized the reality of the situation. They actively attempted to master their conflicts and fears and to gain control of the disorder in their lives. Courage, bravado, seeking support from others and increased activity were evidenced as means of dealing with their feelings of loss, rejection and loneliness. The single clearly distinguished feeling in this group was focussed and clearly expressed anger towards both parents together with realistically based fears (Wallerstein and Kelley, 1975; 1976).

The Adolescents felt the hurried need to achieve independence in a shortened time with an insecure home base and changing parental roles and little control and guidance. They felt vulnerable to their own sexual and aggressive impulses, anxious about parents' sexuality and sexual and marital issues generally. The divorce exaggerated their already felt sense of loss as a result of their appropriate moving away from family and childhood. Anger was a common response and loyalty conflicts were apparent as parents turned to them for support. Many gained greater maturity and sense of responsibility (Wallerstein and Kelley, 1974; 1980).

Gardner (1976) suggests that children should only be referred for psychotherapy when it is clear that social relationships have become dysfunctional. Ordinarily, preventative counselling should be used to aid the process of resolution. For adults too, the need is not to effect major personality changes but to provide

brief, readily available, versatile, goal directed, problem orientated, educational, advisory and supportive counselling.

6.4 Intervention Program Models

Benedek and Benedek (1977 (a)) proposed a broad comprehensive model including a multi-disciplinary staff to provide specific divorce related education, individual, conjoint and family interviews, small didactic groups which make use of films, videotapes and other stimuli and educational material, directed counselling and short term group therapy. They promote the involvement of all family members as the need arises and provide for referrals to such outside sources as long term psychotherapy and self-help groups and other community services. They include in their program the task of training and educating judges, attorneys, behavioural scientist and students.

Workers in the field have drawn largely on crisis intervention theory directed towards the resolution of conflict, as the basic approach, on the assumption that divorce constitutes a time limited crisis in the life of the child and his parents in which adaptive and coping mechanisms are in disarray and the adults' capacity to parent is diminished. This has been combined with attachment, loss and mourning, cognitive, behavioural, educational, family and group theory.

The optimum period for intervention was estimated by Wallerstein and Kelley (1977(a)) to be between one month and six months following parental separation. Prior to this, the state of initial shock and denial of the individuals rendered intervention ineffective, and beyond this period symptomatic behaviour and parent child allegiances are often already consolidated and strongly defended and it is unnecessary to extend the state of confusion and suffering.

4.1 Assessment for counselling

All programs begin with the necessary diagnostic, evaluative interview upon which the intervention strategies specific to the individual needs of the family are based and planned. Even for children's groups it has been suggested that leaders have some basic information regarding the environmental context of the child (Sonnenstein - Schneider and Baird (1980).

Wallerstein and Kelley base their planning of intervention strategies on an assessment process which encompasses "the child's overall response, including capacities and strengths in the child and his environment, as well as indications of difficulties and vulnerabilities" (p.25).

The assessment process consists of:

- (1) A developmental assessment based on
 - (a) a brief developmental history of the child from the parents,
 - (b) information about his level of functioning from the school setting as well as
 - (c) information obtained from actual observations of the child.
- (2) A divorce specific assessment of the child's specific response to the divorce experience based on:
 - (a) his understanding of the divorce, information acquired, thoughts and fantasies,

- (b) his emotional affective responses and defenses used,
 - (c) the pervasiveness of behavioural responses or defenses in various setting,
 - (d) the emergence of new behaviours or 'symptoms' in response to the separation.
- (3) An evaluation of the support systems available to the child (or lack thereof), which includes the current parent-child relationship, sibling, extended family, school, peer group and other activities.

This information leads to a formulation or understanding of the interaction of divorce induced stresses with the developmental and personality achievement of each child which suggests the appropriate level, issues and techniques of intervention with each family, interventions being child-centered, relationship-centered or parent-centered.

4.2 Individual approach - children

In recognition of the fact that the responses of children to both the parental separation and intervention strategies are specifically determined by their developmental stage, Wallerstein and Kelley (1977(a); 1977(b)) have developed two models of intervention with children. One is for younger children in which the therapist worked intensively with the parents and another for older children and adolescents who were able to benefit from brief intervention which focussed on reality testing with an outsider, reassurance and encouragement.

Preprimary Children below the age of 6 years, are too young to understand and integrate a focussed crisis intervention approach. These authors found parents to be ideally suited to the task of providing children of this age with the much needed explanations which require frequent repetition and to observe and interpret their responses to divorce related events. The child centered intervention with parents therefore focussed on educational and advisory issues:

- (1) Teaching parents specific techniques of communication with children in order to promote the discussion of divorce and related events so as to enable resolution and mastery of divorce related feelings.
- (2) Advising parents on the handling of divorce related symptomatic behavioural responses and providing explanations and support.
- (3) Making parents aware of the aspect of their behaviour which may cause distress and suffering, as with limited access.

Children in early latency pose different problems as their immature ego with their ineffective use of denial and their awareness of reality make it difficult for them to integrate and discuss this painful experience. There is a need to respect the defences of this age group, who need to work their stress out for themselves. The authors found, however, that a 'divorce monologue' by the Counsellor who "recounted for the child what things were like for other 7 year olds whose parents divorced" (ibid. p.33), sharing examples which the Counsellor intuitively felt corresponded to what the child would be experiencing based

on the initial assessment, helped the child to work on his conflict while not threatening his defences.

Parental intervention at this level focussed on educating the parents as to the presence in the child of strong loyalties for both parents and the resulting difficulty of their forming new relationships or accepting substitute parents at this stage.

Children in later latency and pre-adolescence were found to possess an acute sense of reality, which urged them to validate their reality testing by discussions with family outsiders who were not involved in loyalty conflicts, and anger which complicated their relationship with the parental figures. They were able to make use of brief intervention which focussed on resolving feelings, planning ahead and solving problems. The focus of intervention with the parents took the form of education and setting the stage for more productive communication later on.

6.4.3 Children's divorce groups have been enthusiastically advanced over the past five years as an ideal medium for children as young as 6 years onwards. The basic principle is that much of children learning at this stage occurs in his peer groups. The support of a peer group that shares the empathy of a common reality, in terms of needs, feelings and life experiences, under the guidance of a trained counsellor, facilitates the sharing and exploration of feelings and modification of attitudes, so that children are better able to deal with both their divorce specific and general developmental problems (Green, 1978; Sonnenshein-Schneider and Baird, 1980).

The specific aims of such groups as defined by the various authors have been notably similar.

- (1) To clarify, recognise and understand feelings pertaining to the divorce experience (Wilkinson & Black, 1977; Green, 1978; Hammond, 1981).
- (2) To help the child understand that he is not alone but that others share his feelings and experiences (Wilkinson & Black, 1977; Hammond, 1981).
- (3) To facilitate interaction and support (Green, 1978) and thus provide peer group membership (Sonnenschein-Schneider & Baird, 1980) to children who at this time generally feel isolated from friends and fear rejection from peers (Hammond, 1981).
- (4) To provide an opportunity to confront their problems and to learn new communication and coping skills through modelling and behavioural practice (Wilkinson & Black, 1977; Green, 1978; Guerney & Gordon, 1979; Hammond, 1981).
- (5) To help the latency child gain a realistic perspective of the divorce situation (Wilkinson & Black, 1977) and develop rational, correct thoughts regarding themselves and divorce (Green, 1978; Guerney & Jordan, 1979).
- (6) To provide the opportunity for adolescents to clarify attitudes related to future love and marriage relationships (Hammond, 1981).

- (7) To help children develop a positive self image and broaden their range of interests (Green, 1978; Guerney and Jordan, 1979).
- (8) To help children change their existing negative behaviour patterns to more positive ways of acting (Green, 1978).
- (9) To provide emotional support and new coping skills at a time when many adjustments have to be made and parents are often not available to meet their children's needs (Guerney & Jordan, 1979).

In the groups described by the above authors, the number of sessions varied from 6 to 10 and the sessions themselves varied in length from 20 to 30 minutes for the younger children to 45 minutes for the older groups.

These groups were carefully structured. Each session was divided into two or three stages.

- (a) The first part of the session consisted of a fun, warming up, icebreaking activity.
- (b) The main part of the session consisted of a stimulus activity around which discussions were held which facilitated the sharing of personal feelings and,
- (c) The closing stage tended to consist of a summary of what had been learned with evaluation and feedback by the children, the assignment of homework and, to end off, the serving of refreshments.

For all groups, the topic for discussion in the session were anchored around concrete stimuli or activities. This helped the children especially the younger ones to 'see' the point being made thus making it more cognitively valuable to the children (Sonnenshein-Schneider and Baird, 1980) and making the sessions less threatening for them and facilitating communication in the groups (Hammond, 1981).

Examples of such activities or stimuli include: puppets, books, films, videos, drawing material and other creative materials, games, relevant statements and sentences, role playing, role rehearsal.

As with all groups the goal and rules such as taking turns to speak, listening to others speak, the confidentiality of material and so on were clearly stated and discussed from the beginning.

Evaluation of the program run by Guerney and Jordan (1979) for 9 to 13 years old indicated that the children enjoyed the experience and it had helped them to talk about and understand different aspects of their experiences. Parents felt that the children had maintained strict confidentiality and had shared relatively little with them. The leaders felt that the children had been interested and open from the beginning. This they felt was facilitated by

- (a) the empathic approach,
- (b) content summaries
- (c) a few verbal open children who served as models.

They felt that most had come to terms with their family situation and were less involved with active problem solving than consolidating their position and reviewing gains.

An important point made was that participation of the child depended on parental motivation to a large extent, which made it important that parents understand and support the need for such groups and not feel threatened by them.

4.4 Parent-Child centered Interventions

A second focus of intervention was defined by Wallerstein and Kelley (1977(a)) as the parents' capacity to respond effectively as parents to their children. The parents' relationship with the child is extremely vulnerable to the intra-psychic and interpersonal pressures and ambivalence of parents when old marital conflicts become installed in restructured families. Where this occurs and results in the child being drawn into a continuous, conflictual relationship between his parents, intervention is aimed at

- (1) explaining the underlying dynamics of the child's behaviour to the parents,
- (2) consistent and accurately times interpretation and difficulty in exercising proper parental functions and
- (3) supporting the painful, slow beginning efforts at changing and regaining parenting capacity of both parents. The aim is to disengage the child from the marital struggles and validate for both parents their continuing importance to their children.

This goal can also be achieved through family sessions. Both Weisfeld and Laser (no date) and Baideme et al., (1978) proposed a family therapy model in which the absent, non-custodial parent, often ignored or seen separately in the traditional therapy process is included. Both Weisfeld and Laser argue that the non-custodial parent as much as the other parenting adults, is an active participant in the "Corrupt Contact" that facilitate "neurotic patterns of relating". When left out he alone remains unaware of the changes that are being instituted which potentially threatens the progress of therapy and change. Baideme et al in fact encourage the inclusion of all members of the divorce family system including step-parents and grandparents when indicated.

Where family therapy is the intervention of choice and children need to be included it must be made perfectly clear to them that the reconciliation of his parents is not the purpose of the intervention.

Baideme et al also suggest that two therapists instead of one would provide a show of strength to the clients and a safe environment for them. For the therapists it would provide mutual support.

Baideme et al. used a three stage procedure: a contact stage, an evaluative stage and following a commitment by the clients, a 6 - 8 session treatment stage. They worked with the adult parental system where possible, shifting the focus from the child to the adult relationship, encouraging the expression of hurt and angry feelings to the therapist, attempted to resolve the conflict and reduce the stress and re-establish the parents as effective parental figures to the child.

4.5 Parent Counselling

The manner in which children adapt to their post divorce life is almost entirely dependent on the manner in which their parents resolve their disputes and constructively create post divorce homes and foster a working relationship with each other and their children.

The fact is that many adults persist in engaging in malevolent conflictual relationship for sometimes years following the legal divorce. The reason for this seems to stem from the inability of one or both parties to 'let go' of the marriage.

The process of 'letting go' or 'decathexis' or 'detachment' is comparable to the mourning process which follows loss through death and is necessary in order to separate from the former marriage (Seagull and Seagull, 1977). The process of divorce consists of three stages, the stage of disorganisation, the stage of acceptance and the stage of reorganization (Elkin, 1977) and it is towards the facilitation of this process that parent-centered intervention must aim.

Thweatt (1980) has used the attachment model to understand this process and on which to base a therapeutic approach.

Attachment behaviour is the form of behaviour that keeps people close to another differentiated and preferred person. It develops and becomes more varied from childhood and is evident throughout life. The permanent loss of an attached relationship, as in death, results in a predictable sequence of behaviour evident in both children (Spitz and Wolf) and adults. The first phase of denial is characterized by a sense of numbness, difficulty in accepting the loss and periodic bursts of tearfulness. This, followed by a second phase of protest, characterized by attempts to recover the

lost object and dependency needs thorough preoccupation with past memories and tension, weeping and anger. The third phase is of despair, characterized by disorganization of normal life patterns, aimlessness and an inability to see any purpose in life and a general social withdrawal which is finally followed by the detachment phase. This fourth phase is characterized by a reduction in affective responses and renewed interest in the present.

The divorce process as with death constitutes the loss of attachment objects, the spouse, children (for many the non-custodial fathers), friends, family home, beliefs, values, fantasies, aspirations and the process of grieving is similar. Unlike death, however, the divorce does not constitute a complete and final loss. The result in many cases, essentially where the persons have not themselves instituted divorce proceedings, is that progress through certain phases may be prolonged such that the emotional marriage persists.

This model has direct implications for brief therapeutic interventions which correspond expounded by Dreyfus (1979) for divorcing fathers.

In phase I of his model the role of the therapist is to respect the need for denial initially and respond with support and empathy and then slowly and gently confronting this defence.

In phase II possible threats of violence or suicide should be taken seriously and confronted as well as the potential consequences. Hospitalization may be necessary, but generally frequent shortened periods of support are sufficient in helping

parents to deal with their emotions of anger, resentment and anxiety.

In phase III depressive symptoms may appear but distractions are possible. The focus of therapy here is on providing structure and planning, correction of cognitive distortions and rebuilding and recreation of a social network.

In phase IV the parent is able to look at the factors that contributed to the malfunctioning of the marriage and to prepare for future post-divorce relationships and a role as a single (or joint) parent.

Dreyfus (1979) stresses the importance, in between sessions, of assigning the parent tasks related to particular problems being encountered in order to reinforce the belief that they can do something positive themselves, thus accepting some responsibility for their lives and reducing the possibility of a dependency relationship developing.

Counselling may also require working with both spouses (Gardner, 1977, 1978; Fine, 1980). Swerdlow (1978) suggests that where this is required, each spouse should be assigned a therapist before conjoint sessions are held. It is suggested that new spouses who resent this approach should be helped to understand that as long as the emotional/psychological break has not been made, the new marriage and children's interests are clearly compromised.

Granwold and Welch, 1977, describe a problem orientated seminar approach in which cognitive - behavioural treatment methodologies are applied to various post-divorce adjustment problems in large group settings.

The program included,

- (a) A seminar format which, each week, presents a subject topic
- (b) A group process which facilitated the sharing of experiences and self-disclosure, brought a realization of the participants' commonality with others, provided the means for vicarious learning to take place and provided participants with understanding and support, which functioned as social reinforcers
- (c) A cognitive restructuring process which made use of the rational-emotional model of therapy as used by Ellis, based on the assumption that change can be brought about by the modification of assumptions and expectations or 'cognitive set'. Individuals were taught the basic tenets of rational judgement through instructions, group discussions, homework assignments and practice.
- (d) Modelling and behaviour rehearsal helped the participants incorporate the desired behavioural response which was modelled by the leaders, rehearsed by the participants through the play situation and feedback in the group.
- (e) Homework assignments required the performance of the behaviour in the natural context to promote behavioural transfer and generalization for highly specific, realistic goals, to which individuals committed themselves to attempt and

report back to the group.

Therapy groups have recently started in Cape Town which are being run by two social workers in private practice (Judge and Van Wyk).

Post Divorce Community Support Systems

Despite the growing trend in the upsurge in divorce and the concern that goes with it, many couples in Western Societies continue to struggle through this crisis on their own. Some may find support and advice from friends or family, through counselling or from the few divorce specific groups which have been established. The majority, however, find themselves with their full parental responsibilities to bear, alone and isolated. Clearly the community has a very significant role to play here.

5.1 Self help groups

Stack (1976) draws from cultures from non-industrialized cultures of the world and black American culture to illustrate support systems of friends and kin, which help parents in different ways to carry out their parental duties in the midst of crisis. She also draws on recent studies which show how, over recent years, single white American mothers, widowed, divorced and separated have formed support networks through communal groups in which their child caring and emotional burdens are shared on a reciprocal basis.

'Parents without Partners' is an international group which, through such social activities as rap groups, informal discussions and conversation, make a very meaningful contribution

towards post-divorce adjustment by providing single parents with:

- (a) socially acceptable substitutes for some activities of married life,
- (b) potential for new growth and social patterns as coping strategies are learned,
- (c) companionship which neutralizes the solitary character of divorce,
- (d) practical information and advice, moral support from others in the same situation,
- (e) role models for children through planned family activities and as a result of living with a more satisfied and coping parent (Benedek and Benedek, 1979).

Several centres exist in Cape Town for single parents including

- (1) Parents without Partners, which tends to focus on the social activities and mutual support and in overcoming the loneliness experienced by the parents.
- (2) The Divorce Workshop Group in contrast to the Parents without Partners focuses on academic interests and the adjustment to singleness and single parenthood through regular monthly workshop-type sessions with speakers and trainers from Life Line and a monthly social gathering.

- (3) The Christopher Robin Residential Hotel provides accommodation and creche facilities for children and parents. Implicit to this arrangement is a sense of companionship (De la Hunt, 1982).
- (4) The very recently formed Cape Town Divorce Workshop (Short, 1983) has evolved, although at present takes a more academic approach in the form of lecture meetings.
- (5) Gardner (1977) suggests the need for the support of the elderly in the community, who could at this time provide the support needed by parents by taking the role of parental surrogates for the children.

5.2 Schools are ideal resources for providing the need for male and female models for single parent children (Gardner, 1977). They are also in an ideal position and rich in potential for the provision of divorce related education and supportive groups for both children and their parents (Benedek and Benedek, 1979).

Experimental groups for children have been successfully run by elementary school counsellors (Wilkinson and Bleck, 1977; Hammond, 1981).

6.1 Education Teachers, attorneys, advocates, psychologists, doctors and others who work so intimately with families, as well as the general public, clearly need to become aware and sensitized through education programs to the reality and nature of the problems faced by families of divorce (Guerney and Gordon, 1979).

The feeling is that the tremendous resistance to talking about divorce, because of its often emotionally unpleasant and sensitive nature, especially when children of divorce are present in class, must be overcome, as it simply denies understanding by peers and support for the child.

.2 Books Richard (1981) expressed the need for instruction booklets for divorcing parents, which contain sensible advice for parents about children and for children and parents detailing what could be expected and how they can cope. There is in fact a noted increase in the quantity of divorce related literature for all ages coming on the market.

.3 Television with its tremendously powerful potential influence is an ideal education medium. So far it has tended to exploit the sensational, unusual and dramatic aspects of divorce and tends to provide a romantic and often misleading impression. It should aim at familiarizing adults and children with more reality based issues relating to the financial, emotional and social consequences of divorce (Benedek and Benedek, 1979(b)) and how these issues can be constructively dealt with, stressing the need for a mature, cooperative approach.

CONCLUSION:

This study does not attempt to provide a model which can simply be incorporated into the present legal structure. It has provided a model which seeks rather to meet the needs of the family.

On the basis of what has been said it is clear that the mental health professional as an unaligned party has a major role to play in the determination of marital dissolution and custody/access disputes. His function is in the prevention of the establishment of longlasting or pathological consequences which might potentially follow the divorce experience.

His role in this model of dissolution has been indicated in the following areas in which he should be thoroughly versed.

- (1) Orientation - in this area the mental health professional should be thoroughly familiar with the background and workings or proceedings of the legal system within which dissolution and custody/access determinations take place.
- (2) Reconciliation - This area requires an ability to work within the brief crisis intervention model, and to apply conflict resolution and problem solving methods, maintain a neutral stand with either the couple or family, educate and facilitate the gaining of understanding and insight by the family about their relationships and the process of divorce.

- (3) Mediation - As a newly developing speciality this area requires specialized training in the divorce and family mediation process which involves conflict management. It further requires a knowledge of the process and stages of divorce, the effects of divorce on the children, an understanding of what constitutes the best interests of the child and an understanding of the advantages and commitment to mediated settlements where at all possible.
- (4) Child Advocacy - This is the role that needs to be adopted by the mental health professional who becomes involved in an adjudicated settlement between parents concerning their custody or access to the child. It requires a thorough knowledge of the child's needs at each stage of development and the factors which constitute the child's best interests, competence to objectively assess and evaluate the parental situations against this standard, an ability to work within a team approach and assert his conditions within the adversary system in order to provide a competent service to both the family and the court, an obligation to conduct thorough comprehensive investigations, and willingness to communicate his findings in a clear and useful manner to the court both in written form and as verbal evidence as expert witness. He should also be aware of the problems of confidentiality created for the helping professionals by the adversary system and above all his commitment to the child to provide a solution in his best interests but congruent with the welfare of the family.

- (5) Post-Divorce Counselling - This area requires the mental health professional to be able to recognize the sequelae that arise in the process of normal adjustment to divorce by the child and his parents and those which could be considered as pathological and persistent. He is required to provide education concerning possible consultation advice and support to families.
- (6) Community support requires of the mental health professional active involvement in the setting up of support systems within the commitments such as self help groups and educational programs which help to minimise the strain and trauma and facilitate readjustment for all the family members.

It has unfortunately not been possible within the range of this study to explore all the associated areas in the same amount of detail. They nevertheless all have considerable relevance to the mental health professional working in the field and it is assumed that any professional wishing to play an effective role in this field will have at least the basic knowledge, awareness, interest and commitment in this area as has been proposed above.

In our present adversarial system of law in which the courts have effectively dismissed their responsibilities for the children and families of divorce, an obvious argument against the involvement of the mental health professional is that of cost which can also be perceived as a justification for maintaining the status quo. It is submitted that all divorcing families should be provided with the opportunity to carefully consider

the possibilities of reconciliation, and where that fails, to be assisted through a process of mediation to amicably resolve the ancillary issues arising from the dissolution of the marriage.

The costs of such outside intervention should be borne at least in part by the state as should the cost of the equally important child advocate, the role suggests for the mental health professional acting either alone or preferably as a member of a multi-disciplinary team, who should preferably be appointed by the court.

"The law specifies its responsibility for protecting the psychological best interests of the child when families are divorcing. A framework for this protection of the rights and needs of children must be developed" (McDermott, 1970, p.427).

Sinclair (1979) cautions, "the unsuitability of the adversary procedure for the resolution of family conflicts is receiving attention the world over.....South Africa could do worse than take heed of what is occurring in other places. Children of today are parents of tomorrow - their physical and moral well-being is crucial", p.62.

**DIVORCE ACT
NO. 70 OF 1979**

[ASSENTED TO 8 JUNE, 1979]

[DATE OF COMMENCEMENT: 1 JULY, 1979]

(Afrikaans text signed by the Acting State President)

ACT

To amend the law relating to divorce and to provide for incidental matters.

1. Definitions.—(1) In this Act, unless inconsistent with the context—

“court” means the provincial or local division of the Supreme Court of South Africa, or a divorce court established under section 10 of the Black Administration Act, 1927, Amendment Act, 1929 (Act No. 9 of 1929), which has jurisdiction with respect to a divorce action;

“divorce action” means an action by which a decree of divorce or other relief in connection therewith is applied for, and includes—

- (a) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
- (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application.

(2) For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court, as the case may be.

2. Jurisdiction.—(1) A court shall have jurisdiction in a divorce action if—

- (a) the parties to the action are domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
- (b) the wife is the plaintiff or applicant and she is ordinarily resident in the area of jurisdiction of that court on the date on which the action is instituted and has been ordinarily resident in the Republic for a period of one year immediately prior to the said date and—
 - (i) is domiciled in the Republic; or
 - (ii) was domiciled in the Republic immediately before cohabitation between her and her husband ceased; or
 - (iii) was a South African citizen or was domiciled in the Republic immediately prior to her marriage.

(2) A court which has jurisdiction in terms of subsection (1) (b) shall also have jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned.

(3) A court which has jurisdiction in terms of this section in a case where the parties are not domiciled in the Republic shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted.

(4) The provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law.

3. Dissolution of marriage and grounds of divorce.—A marriage may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are—

- (a) the irretrievable break-down of the marriage as contemplated in section 4;
- (b) the mental illness or the continuous unconsciousness, as contemplated in section 5, of a party to the marriage.

4. Irretrievable break-down of marriage as ground of divorce.—(1) A court may grant a decree of divorce on the ground of the irretrievable break-down of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

(2) Subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence—

- (a) that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;
- (b) that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship; or
- (c) that the defendant has in terms of a sentence of a court been declared an habitual criminal and is undergoing imprisonment as a result of such sentence,

as proof of the irretrievable break-down of a marriage.

(3) If it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings in order that the parties may attempt a reconciliation.

(4) Where a divorce action which is not defended is postponed in terms of subsection (3), the court may direct that the action be tried *de novo*, on the date of resumption thereof, by any other judge of the court concerned.

5. Mental illness or continuous unconsciousness as grounds of divorce.—(1) A court may grant a decree of divorce on the ground of the mental illness of the defendant if it is satisfied—

- (a) that the defendant in terms of the Mental Health Act, 1973 (Act No. 18 of 1973)—

- (i) has been admitted as a patient to an institution in terms of a reception order;
- (ii) is being detained as a President's patient at an institution or other place specified by the Minister of Prisons; or
- (iii) is being detained as a mentally ill convicted prisoner at an institution or hospital prison for psychopaths,

and that he has, for a continuous period of at least two years immediately prior to the institution of the divorce action, not been discharged unconditionally as such a patient, President's patient or mentally ill prisoner; and

(b) after having heard the evidence of at least two psychiatrists, of whom one shall have been appointed by the court, that the defendant is mentally ill and that there is no reasonable prospect that he will be cured of his mental illness.

(2) A court may grant a decree of divorce on the ground that the defendant is by reason of a physical disorder in a state of continuous unconsciousness, if it is satisfied—

(a) that the defendant's unconsciousness has lasted for a continuous period of at least six months immediately prior to the institution of the divorce action; and

(b) after having heard the evidence of at least two medical practitioners, of whom one shall be a neurologist or a neurosurgeon appointed by the court, that there is no reasonable prospect that the defendant will regain consciousness.

(3) The court may appoint a legal practitioner to represent the defendant at proceedings under this section and order the plaintiff to pay the costs of such representation.

(4) The court may make any order it may deem fit with regard to the furnishing of security by the plaintiff in respect of any patrimonial benefits to which the defendant may be entitled by reason of the dissolution of the marriage.

(5) For the purposes of this section the expressions "institution", "mental illness", "patient", "President's patient" and "reception order" shall bear the meaning assigned to them in the Mental Health Act, 1973.

6. **Safeguarding of interests of dependent and minor children.**—(1) A decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances.

(2) For the purposes of subsection (1) the court may cause any investigation which it may deem necessary, to be carried out and may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance.

(3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.

(4) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.

7. **Division of assets and maintenance of parties.**—(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may

be relevant to the break-down of the marriage, and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

8. Rescission, suspension or variation of orders.—(1) A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor.

(2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.

(3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to any order referred to in subsection (1) given by a court in a divorce action before the commencement of this Act.

9. Forfeiture of patrimonial benefits of marriage.—(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

(2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.

10. Costs.—In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.

11. Procedure.—The procedure applicable with reference to a divorce action shall be the procedure prescribed from time to time by rules of court.

12. Limitation of publication of particulars of divorce action.—(1) Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgement or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action.

(2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information—

- (a) for the purposes of the administration of justice;
- (b) in a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or
- (c) for the advancement of or use in a particular profession or science.

(3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act.

(4) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

13. Recognition of certain foreign divorce orders.—(1) The validity of a decree of divorce granted in a country or territory in which the husband was not domiciled at the time of the granting of the decree shall be recognized by a court in the Republic if that country or territory has been designated by the State President by proclamation in the *Gazette* for the purposes of the recognition of such decrees.

(2) The State President may designate a country or territory for the purposes of subsection (1) if he is satisfied that the law of that country or territory provides for the exercise of jurisdiction which substantially corresponds to the jurisdiction referred to in section 2 (1) (b) (ii) and (iii).

(3) No proclamation shall be issued in terms of this section unless the State President is satisfied that the law of the country or territory concerned makes sufficient provision for the recognition by the courts of that country or territory of a decree of divorce granted in the Republic in terms of a jurisdiction under section 2 (1) (b) (ii) or (iii).

(4) A proclamation issued in terms of this section may be withdrawn at any time.

14. Abolition of orders for restitution of conjugal rights and judicial separation.—It shall not be competent for a court to issue an order for the restitution of conjugal rights or for judicial separation.

15. Application of Act.—This Act shall not apply with reference to a divorce action or proceedings for the restitution of conjugal rights or for judicial separation instituted before the commencement of this Act.

16. Amends section 5 of the Matrimonial Affairs Act, No. 37 of 1953, as follows:— paragraph (a) substitutes subsection (1); paragraph (b) substitutes subsection (2); paragraph (c) substitutes subsection (3); and paragraph (d) substitutes subsection (6).

17. Amends section 72 of the Administration of Estates Act, No. 66 of 1965, by substituting that part of subsection (1) which precedes paragraph (b) thereof — see title ESTATES.

18. Repeal of laws.—The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

19. Short title and commencement.—This Act shall be called the Divorce Act, 1979, and shall come into operation on 1 July, 1979.

Schedule

No. and year of law	Short title	Extent of repeal
Act No. 32 of 1935	Divorce Laws Amendment Act, 1935	The whole
Act No. 22 of 1939	Matrimonial Causes Jurisdiction Act, 1939	The whole
Act No. 17 of 1943	Matrimonial Causes Jurisdiction Amendment Act, 1943	The whole
Act No. 35 of 1945	Matrimonial Causes Jurisdiction Act, 1945	The whole
Act No. 37 of 1953	Matrimonial Affairs Act, 1953	Sections 6, 7, 8, 9 and 10
Act No. 70 of 1968	General Law Amendment Act, 1968	Sections 21, 22 and 23
Act No. 42 of 1974	Publications Act, 1974	Section 47 (2) (f) (iii) and (3)

THE LOS ANGELES HUSBAND AND WIFE AGREEMENT

Superior Court of the State of California for the County of Los Angeles

Conciliation Court

_____ Petitioner No. CC _____

and

_____ Respondent No. D _____

Post Dissolution Agreement
Re Custody/Visitation

The aid of the Court having been requested to effect an amicable settlement of the controversy existing between the above named parties, and a court conference having been held thereon in which it was indicated that certain conduct is deemed necessary to maintain an amicable relationship between the parties for the best interests of the children, the parties hereby agree, each with the other and with the Court, as follows:

In entering into this agreement, each acknowledges that it is necessary to do so for the best interests of our children.

In the event that further difficulties arise, and either one or both of us believe that the services of this court may be helpful in solving them, we agree that we will contact the counsellor named below and arrange for further conference(s).

Each of us agrees to return to the Conciliation Court for a 6 week evaluation conference. If at any time we desire to continue this agreement, it is understood by each of us that the referring bench will be asked to sign this agreement, making it an order of the court.

Each of us acknowledges that we received a copy of this agreement.

Dated _____, 19____. _____ Petitioner

Approved _____ Respondent

Marriage Counsellor

It is so ordered the matter heretofore continued to _____ (date) is placed off calendar.

Date _____
Judge (or Commissioner)

ADVERSARIAL AND MEDIATIONAL APPROACHES TO DIVORCE

<u>Factor</u>	<u>Adversarial</u>	<u>Mediational</u>
Definition of the issues	Strongly influenced by attorneys	Defined by divorcing parties
Legal framework	Marital dissolution: John Doe <u>vs.</u> Mary Doe	Marital dissolution: John <u>and</u> Mary Doe
Who is the client?	The husband <u>or</u> the wife	The family (divorcing couple and children)
Relationship of divorcing parties to each other	Focus on past; blame, mistrust, revenge; communication minimal or nonexistent	Focus on current issues, restructuring family relations; communication preserved
Relationship of divorcing parents to their children	Creates conflicts, adjustment problems, divided loyalties	Focus on preserving parent-child relations and postdivorce co-parenting arrangements
Children	Not the concern of attorney; focus not on parent-child relationships	Primary concern of mediator; focus on "parents are forever"
Child Custody/Visitation	Court decides	Parents decide
Anger, hostility	Rekindled, tend to increase and intensify	Defused, tend to decrease and weaken
Stress, emotional trauma	Prolonged, tend to increase	Shortened, tend to lessen
Expense of divorce to parties	Usually more, sometimes much more	Usually less, sometimes much less
Time to reach settlement	More, longer delay	Less, as rapidly as couple desire
Court costs and time	More time and more tax dollars	Reduces time and saves tax dollars
Confidentiality	Not maintained; public exposure in court	Maintained; no public exposure
Expectations re: settlement	Strongly influenced by attorneys	Those of the divorcing parties
Goal and desired outcome	Win: give as little as possible and get as much as possible	A fair, equitable, mutually acceptable agreement made by the parties themselves
Decision re: final settlement	Made by a judge	Made by the divorcing parties themselves
Adherence to terms of divorce by the parties	Less likely, since the terms are imposed by outside authority (judge)	More likely since the terms are those agreed to by the parties themselves
Postdivorce disputes and litigation in the future	More likely	Less likely

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