FROM ADVOCACY TO MANAGEMENT IN DIVORCE: A WOMEN'S ISSUE ?

MAVIS MACLEAN

1. INTRODUCTION

Current issues in U.K. family law centre around its peculiar nature; the concern with values as well as facts, with the future as well as the past and with its interrelationship with the other systems which intervene in the daily life of those engaged in family disputes, particularly the provision of welfare payments to women and children. The days of debate over the finer points of divorce procedure have been followed by attention to a broader view of family organisation and a concern with the management of cohabitation as well as marriage, with separation as well as divorce, and with the ongoing nature of parenting despite the transitory nature of partnering.[1]

For women, the key issue relates to the disparate impact of motherhood on the ability to maintain an acceptable standard of living independently.[2] This is an issue for women which private family law has been singularly unsuccessful in resolving. As we enter the last decade of the century, however, we are seeing a renewed concern with the basic process of divorce. This is the result of our realisation that divorce, rather than death, is rapidly becoming the usual way to end a marriage.[3] The attention paid to divorce is equally attributable to the growing realisation of the cost of marriage breakdown to the public purse at a time of economic recession, and governmental concern with public expenditure reduction. Social security expenditure on lone parents nationally doubled during the 1980s, rising from £1.4 billion to £3.2 billion.[4] The question has therefore arisen that as we have no-fault divorce (though behaviour can still be used to demonstrate breakdown and is a popular ground, since it is relatively easy and quick to

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1 *See* JOHN EEKELAAR, REGULATING DIVORCE (1991).

2 *See generally* Heather Joshi, *The Changing Form of Women's Economic Dependency, in* THE CHANGING POPULATION OF BRITAIN (Heather Joshi, ed., 1989), where it is demonstrated that the British woman who has two children loses ten years earnings over- time leaving aside pension entitlements, through having three years out of the labour market, four years in part-time work and loss of promotion.

3 The UK divorce rate is still lower than that for many American states, but is high and visible by European standards. *See* L. WERTZMAN & M. MACLEAN, ECONOMIC CONSEQUENCES OF DIVORCE (O.U.P. London 1992).

4 *See Children Come First* (1990), London: HMSO, Cm.1263, Chapter 1.

prove compared with a two year separation) and, in practice, divorce on demand: is it any longer necessary for divorce to take place in a legal setting? Is it time for divorce to become an administrative procedure, properly regulated, with recourse to the court only for dispute resolution?

In sum, is it currently the role of law in separation and divorce to regulate the process of family transition for society as a whole, rather than to assume the task of resolving the issues arising on an individual basis? This paper will argue that this process is well underway, that divorce work is increasingly being taken out of the hands of lawyers and is passing over to mediators and administrators. The paper ends not with a conclusion, but with a question which needs further attention from lawyers and social scientists: what are the implications for women of this change in function? Are divorcing and separating women losing a champion or gaining a new world order in which their entitlement to compensation for financial loss due to marriage or childbearing is beyond dispute, and the parenting costs are equitably divided between both parents (resident or not, married or not) and the community?

2. Origins of Divorce: The Court Trial

The origins of civil divorce law in the U.K. lie in the Protestant Christian acceptance of the dissolubility of marriage which brought with it the construction of the matrimonial offence doctrine. The divorce process took the form of a trial and the divorce decree the form of a punishment for the wrong doer, rather than the present day construction of a licence to remarry.[5] Until the mid-nineteenth century, divorce was only available through an act of parliament and even after the lifting of the ban in 1858, divorce remained the province of the propertied class. It was mainly concerned with clarifying succession to property. Until the Matrimonial Causes Act 1923, there was a double behavioural standard whereby men could divorce their wives for adultery while women were required to prove aggravating circumstances in addition to their husband's adultery. Additionally, the heirs would remain with the head of the family, the father. Prior to the Married Women's Property Acts 1882 and 1883, custody went to the man,[6] the woman usually received the blame and the property accompanied

[5] *See* Roderick Phillips, Putting Asunder: A History of Divorce in Western Society (1988).

[6] The Custody Act 1832 gave children under seven to the woman for the first time.

the heir regardless of which partner had brought it into the marriage.

With guilt and innocence to be established, and property at stake, it is perhaps not surprising that the adversarial nature of the divorce process survived both the divorce explosion of the 1960's and the liberalisation of the divorce laws that accompanied it. Guilt is still a factor within our most recent divorce reform, the Matrimonial and Family Proceedings Act 1989, because it is technically allowed to influence the financial arrangements. In practice, the courts have not been willing to make use of this possibility. With increased economic activity by women during and after the two world wars,[7] we saw the political enfranchisement of the 1920's echoed by the domestic enfranchisement of the 1950's and 1960's as those women, whose expectations of married life were not fulfilled, were better able to petition for divorce.

3. The Development of Women's Access to Lawyers: The Importance of Public Subsidy

With the surge in petitions during the early 1950's came the first attempts to offer publicly funded legal advice, although this advice was intended to aid reconciliation. It was felt that those who had been subjected to the strains of wartime marriage were entitled to some help in obtaining a divorce. The condition for receiving this subsidised help should be the acceptance of guidance in the hope of saving as many marriages as possible.[8] This historical accident has had a very profound effect on women's opportunities to seek legal solutions to the problem of an unhappy marriage. The Legal Aid Scheme, administered by the Law Society (i.e. the profession), was set up in 1950 to enable private individuals of small or moderate means to use lawyers, make a contribution to the cost on a sliding scale according to their means, and ensuring adequate remuneration to the solicitors and barristers involved through public subsidy. The need for publicly funded divorce litigation was a key element in setting up the scheme; and family matters are still the largest single area of civil legal aid work, comprising two-thirds of all Civil Legal Aid Certificates.[9] Once a woman has obtained a legal aid certificate, entitling her to subsidised legal services, she is able to embark upon a divorce petition

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[7] *See generally* K. Kiernai & M. Wicks, Family Change and Future Policy (1990).

[8] *See generally* Sheila Ferguson & Hilde Fitzgerald, Studies in the Social Services (1954).

[9] *See* Legal Action Group, A Strategy for Justice 33 (1992).

and ancillary matters in dispute, with considerable confidence in her ability to stay the course of any commenced action. As the economically weaker party, she is relatively free from the disadvantages of going to law.

In the U.K., there is no tradition of poor quality work in legal aid, although with increasing pressure on law firms, this is perhaps beginning to come into question and of course the most highly paid and successful practitioners will be unlikely to do work of this kind. But overall, there has been relatively little to deter women from access to law in family matters. The high rate of female to male petitioners[10] is not unrelated to this availability. Legal aid has been removed from undefended divorce proceedings under the Special Procedure introduced in 1969 for matters related to the actual petition, but retained for ancillary matters (i.e. children and money). Where property is in dispute, the Legal Aid Board may seek a charge over the property to be realised at the time of sale; this charge bears interest if the woman is successful. The total cost of legal aid exceeded £1 billion for the first time in 1992, and the government is seeking to make serious changes to its eligibility requirements.

4. The Lawyer's Perspective

What is happening to the British legal profession; particularly the branch of the system concerned with divorce?[11] Lawyers feel justifiably threatened, given the deregulation of private relationships, which academic family lawyers have been talking about for over a decade,[12] and the move towards child law rather than family law.[13] We will return later to the question of whether this actually matters to women seeking divorce. The question addressed at present, however, is whether there are tasks that only a lawyer can perform in a divorce, to which, at the moment, the answer from the profession is of course positive. These tasks include offering expert financial advice, packaging of assets, negotiation and finally

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10 The rate is three to one at present. *See* Judicial Statistics, 1991, London: HMSO.

11 The material used in this section of the paper comes from a larger cross-national working group project on the legal profession which is chaired by Terry Halliday of the American Bar Foundation, and includes work on public funding, cause lawyering, transition to the rule of law amongst others and the changing role of the professional involved in divorce (on file with author).

12 *See, e.g.*, Jean Van Houtte, *Individualisation in Family Matters, in* Family, Gender and Body in Law and Society Today 191, 191-196 (Jacek Kurczewski & Andrzej Artur Czynczyk, eds., 1990); Mary Ann Glendon, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe (1989).

13 *See generally* Nigel Parton, Governing the Family: Child Care, Child Protection and the State (1991).

litigation.[14] However, it can be argued that the lawyer is only an essential actor at the far end of this scale.

The U.K. lawyers are having a hard time. They are facing the most serious economic recession (perhaps depression) since the thirties, with major city firms quietly losing partners on salaries of £50,000 to £150,000 and outgoings to match. Cuts in public expenditure are threatening the legal aid end of the market, which currently yields 40% of the costs of 80% of our firms.[15] The profession has recently failed in its attempt to seek judicial review of the Lord Chancellor's recent cuts in eligibility for legal aid and advice. At the same time the profession is undergoing restructuring, with an attempt by the Lord Chancellor to unite the divided profession and reduce restrictive professional practices, such as supporting the Queens Council by a junior member of the Bar and restricting the rights of audience for solicitors. In this market situation, firms which previously did little or no family work in the past, because it was not sufficiently profitable, are now turning to it, relying on the assumption that as commercial activity contracts, the divorce rate remains constant or may even increase.

We expect that one in every three marriages contracted this year will end in divorce. This does not include arrangements which require lawyers in separation agreements, remarriages (which are declining) and re-divorces (which are increasing). Prenuptial contracts, however, never became widely used in the U.K., mainly because the law of contract in the U.K. finds difficulty with the idea of a contract designed to deal with the ending of a contract, and because there are so many variable factors that are not known at the time when the contract is made. Enforcement has remained problematic despite the need for such arrangements, particularly for couples who cohabit in order to avoid the legal implications of marriage and divorce.

Solicitors involved in family work are beginning to feel economic pressures. The top end of the market remains profitable and legally interesting, especially where there are complex property deals to be negotiated or battled over, such as those epitomised by the Royal divorces and separations. Lower down the client social and income scale, however, a movement is developing which may move two substantial branches of work out of the legal

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14 *See* Emily Jackson, et al., *Financial Support on Divorce: the Right Mixture of Rules and Discretion*, 7 INT'L J. L. & FAM. 230, 254 (1993).

15 Communication with B. Bishop.

area of competence in divorce where, until now, the lawyer has been indispensable.

The first area which is moving lawyers out of the profession is Alternative Dispute Resolution (ADR). Divorce mediators are practicioners who offer a service with the powerful combination of the moral high ground at a low price tag. The second area has been removed by the redefinition of a major area of legal activity as non-contentious. Child support, and to some extent spousal support, have been taken right out of the court's jurisdiction, and the responsibility for assessment and enforcement has been given to an administrative agency, which will simply enforce a set of rules in the manner of a tax or benefit system.

5. The Policy Perspective in the 1990's

In policy terms, both these changes fit comfortably alongside the present Government's approach to the family, which has a surprisingly high level of political visibility. When things are not going well, it's usual to hear a great deal about the decline of traditional family life, family discipline and family values. The Conservative Government which has been in power since 1979, continues to have a very clear view of the desired family life, and is not happy with any of the newly emerging family structures. The Government attributes these new family structures to the rising rates of crime, unemployment, divorce and lone parenthood. The work of Charles Murray has encouraged the attribution of social order problems to the lack of paternal control in family life.[16]

But this Government also sees the family as the defender of individual freedom against the undesirability of any form of collective activity or control. The family, not the state or the community, must take care of its members. As Mrs. Thatcher said, "[t]here is no such thing as society, there are individual men and women".[17] This policy has been termed the privatisation of the family. In the field of family law, it has been associated with the rolling back of legal intervention in the family, particularly where there is no public interest. For example, the Children Act of 1989 abolished the concepts of custody and access after divorce, which were held to indicate that children were regarded as property to be "owned," or at least controlled by the custodial parent.

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16 Charles Murray, Losing Ground: American Social Policy, 1950-1980 (1984).

17 Anthony Bevins, *Parliment and Politics: Patten Emerges as "The Guiding Intelligence,"* The Independent, March 13, 1991, at 6.

Problems with the concept of joint custody, which was held to give power without responsibility to the non- or less-resident parent, resulted in a movement towards the concept of parental responsibility, which can continue irrespective of the legal relationship between the parents. As Mrs. Thatcher has put it, "parents are forever." Just because they divorce, there is no reason to expect them to behave any differently from any other parents. Therefore, the law has no part to play unless there is a conflict to be resolved or evidence of cruelty or neglect, in which case there would be legal intervention as for any child. Emphasis on returning the responsibility for making arrangements on divorce to the individuals concerned, with the aid of a mediator if they are in conflict, fits this privatising approach better than having decisions made through the machinery of law.

The policy arguments run along a different track when the interests of the state are involved. The rapidly rising welfare bill for lone parents brought the issue of non-payment of child support to the top of the political agenda, and the failure of the legal system to assess and enforce child support payments led to the search for an alternative strategy. Amounts set by the courts were low, often no more than £10 per week per child, and there was no machinery for effective enforcement. The Government's aim in tackling the problem was to promote the message that parents are forever, and that parents who do not live with their children must continue to share their income with them rather than expect the state to support them. At this point, however, we may see a paradox emerging in the privatisation approach, for the Government which seeks to withdraw from state intervention in family life and promote the acceptance of responsibility of the family for its own members, has no way of achieving this objective other than by developing extremely complex and invasive statutory regulations to secure the enforcement of these private obligations. The state had to intervene in order to be able to withdraw from the responsibility of supporting those for whom the family unit fails to provide. The mechanism chosen was an administrative agency, which completely by-passed both the courts and the legal profession.

Let us now look in more detail at these two developments, the increase in ADR and the administrative regulation of the divorce process, and consider whether there are grounds for concern about the place of the lawyer in the new scenario. These changes in the pattern of performing the work associated with the divorce process, though springing from a number of underlying causes, are being embraced with perhaps undue haste by a government with a

strong interest in controlling public expenditure. The contribution to society of law as an institution and the value to the individual of the lawyer as the professional committed to his service — the only expert champion available to the woman petitioning for divorce — may not be receiving adequate consideration as the pattern of professional involvement in divorce alters.

(a) Alternate Dispute Resolution

ADR, or divorce mediation, is rising to the top of the family law reform agenda in the U.K. Our present Lord Chancellor has expressed enthusiasm for the possibility of financial savings, if mediation were to lead to reduced claims on the Legal Aid Fund for legal services, thus making the matter potentially attractive to the Treasury. This powerful combination of interests should encourage us to see the development as having serious potential backing from government policy-makers. In the U.K., the term "mediation" still carries a broad variety of meanings and is too often confused with reconciliation.

Mediation services gathered momentum during the seventies led by charismatic individuals who secured widespread support for their aim of taking the bitterness out of divorce. Their starting point was the hope of providing a better way of dealing with contested custody disputes and making sure that the interests of the child did not get lost in the parental conflict. The parties would be able to reach their own decision rather than have a decision imposed by the court. These ideas were taken on board by the court-based welfare service, which was already well established, and whose duties included providing expert reports to aid the court in determining the best interest of the child, which has always been central to divorce law in the U.K. This state-sector activity, can be termed "mediation" in many cases, because it involves talking with both sides, thereby ensuring that all relevant information is available and encouraging the parties to reach their own decision, while bearing in mind the needs of the children. The court-based welfare service is staffed by trained professional social workers, whose statutory duty is to give primary consideration to the interests of the child.[18] Of our 160,000 divorces per year, at least 60% require decisions about children or property, and it is estimated that the court-based staff mediate around 15,000 cases. The private mediators see only about 3,000 couples per year. At present, just over 10% of all divorcing couples experience mediation, compared

18 *See* ADRIAN JAMES, THE WORK OF DIVORCE COURT WELFARE OFFICERS (1993).

with 90% seeing lawyers.[19] Private sector mediation is beginning to organise training and accreditation procedures, but these are still at an early stage of development.

Still in practice are a number of what have been termed, "the flopsy bunnies" (the nice ladies who want to help children but refuse to handle money issues), and at the other end of the spectrum are lawyers and judges claiming to practice mediation. The lawyers involved range from socially aware low client income family practitioners, with altruistic motives, to the high powered practitioners who see mediation as an additional skill to be added to their battery of negotiation and litigation techniques. But all mediation practitioners are still sensitive about their newly developing profession and are not yet very willing to address some of the issues of concern, e.g. possible coercion in a three way informalised encounter,[20] or the possibility of special reluctance among women to maintain their position in this setting.[21] However, the concerns are as yet not confirmed by empirical work.[22] The small scale high quality research which is being done is showing the effect of taking the first turn in telling the story of the dispute, and how the best interests of the child tend to be invoked when the mediator needs to take control of the proceedings (selective facilitation).[23] The value of the formality of court proceedings becomes very clear in absentia. And a new problem is emerging as the mediators go beyond their original brief to deal with children issues and become involved in comprehensive mediation, i.e. dealing with financial issues. Here their knowledge base may be inadequate, and they have not yet effectively confronted the problem of the conflict between the interests of the child and the interest of the parents, particularly when the absent parent is making a deal about the family home. Current studies are finding it easier to document client confusion rather than satisfaction, and a recent report describes how most of the mediation clients also saw lawyers and valued their reassurance and support.[24]

Given that mediators are, without a doubt, offering a well meaning and low cost service, and are willing to work alongside the

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19 *See generally* JOHN EEKELAAR & MAVIS MACLEAN, MAINTENANCE AFTER DIVORCE (1986).

20 *See* R. Dingwall & D. Greatbatch, *in* READER ON FAMILY LAW (Mavis Maclean & John Eekelaar eds.) (December 1994).

21 *See* A. Bottomly, *Resolving Family Disputes: A Critical View, in* STATE, LAW AND FAMILY (M. Freeman ed., 1984).

22 *See* Jessica Pearson, *Ten Myths About Family Law*, 27 FAM. L. Q. 279-99 (1993).

23 *See* R. Dingwall & D. Greatbatch *in* READER ON FAMILY LAW (Mavis Maclean & John Eekelaar eds.) (December 1994).

24 *See* JANET WALKER ET AL., 1994 MEDIATION: THE MAKING AND REMAKING OF COOPERATIVE RELATIONSHIPS (1994).

lawyers and deal with only a tiny fraction of the divorcing population, why do the divorce lawyers feel so threatened? The reason is simple, though not yet widely discussed in the UK. The Government is considering the proposals put forward by the Law Commission in 1989, entitled *Ground for Divorce*, which recommend moving from our present ground of irretrievable breakdown (evidenced by one of five grounds including unacceptable adultery, separation, and behaviour), to what is basically an administrative procedure for divorce on request with the only constraint being a waiting period. Under the new proposals, parties would notify the court that they wish to commence a divorce. The clock will start running, with exhortations to make sensible arrangements for property and children, and after a year the divorce will be granted. With such a procedure, what kind of role is envisaged for courts and lawyers? The answer to this question is likely to be a much smaller part. Courts are the appropriate place to deal with disputes, or issues of public interest. They might well be deemed inappropriate fora for recording the decisions of adults about their private living arrangements. An advice service, available to all who are making such a complex change in their personal lives, might be the more appropriate starting point. Then, if there is conflict, the mediators would be the next port of call. Only if there is a serious dispute, amenable to a legal remedy and unresolvable by any other means, might there be a place for the legal profession to negotiate, or litigate, and finally for the courts to adjudicate as part of the divorce process.

This line of thought is based on the assumption that mediation is not only good *per se*, in that it is non directive, enabling and empowering to the individuals concerned, but also, and perhaps above all, cheap. The mediation carried out by court staff, the divorce court welfare officers, incurs costs which are difficult to separate out from total court costs, but the best estimate available is around £250 per case. The out of court agencies are currently reporting costs for comprehensive mediation at around £500 per case, with mediators being paid around one fifth of a solicitor's hourly rate. The solicitor's rate includes the high overhead costs for lawyers, which mediators have so far been able to avoid, often through the goodwill of supportive firms or organisations. Mediation clients, however, are advised by mediators to see a lawyer as well. The clients believed that the mediation process reduced their legal costs, but there is no evidence so far as to whether this is the case, and by how much. It is extremely difficult to measure a hypothetical negative cost. Paying for legal advice concerning financial

arrangements and disputes about the children in divorce is largely the responsibility of the Government, through the legal aid fund, and the average legal aid bill for a divorcing woman is £1,500.[25] Faced with an escalating demand-led legal aid bill for divorce, mediation is clearly a tempting option particularly as an alternative to legal services, though this has never been recommended by the mediators themselves who see their service as an additional option. The Legal Aid Fund however would not be able to add an extra service to its responsibilities at a time when it must seek savings. The unknown quantity in the equation is the impact of mediation on legal bills.

Turning aside from the perceived problems of the profession and the policy maker, what are the implications for the consumer and particularly the divorcing woman? In a small study carried out in Oxford of women seeking divorce, we found that the first need was for information.[26] At the moment we are using lawyers extravagantly, by having them as the first port of call for contemplating divorce. There are other ways of making legal, financial and emotional information available. One very effective route is the series of pamphlets produced by our Lord Chancellor's Department which describe the choices available and enable a couple to do their own undefended divorce. The difficulties for women may arise with respect to competition for public funding. In real terms there is a danger that making mediation available by funding it could reduce the resources available for legal services. I would argue strongly that to lose access to legal advice for the economically weaker party to a divorce would be unwise. Women still need the law. It may, however, be a new kind of law. The function of the law relating to divorce may be moving away from dispute resolution towards regulating and formalising the allocation of property (and debts) for the new post divorce households. But, with 70% home ownership and complex financing of housing and pensions, it is likely that individual technical legal advice will remain essential for divorcing parties in the UK, however amicable their separation. A safer route towards cost control lies in developing the new skill of diagnosis in selecting those cases where general legal advice is not sufficient and where there is a real need for individual legal advice and representation.[27] Mediation is about producing agreements. It is not primarily about the quality of those agreements. Legal

25 *See Annual Report of the Legal Aid Board for 1990-91*, London: HMSO.

26 *See* Victoria Freear, Comment, *DIY and Legal Aid*, 23 FAM. L. 330 (1993).

27 Mavis Maclean, *Divorce and the Professionals*, 23 FAM. L. 3 (1993).

advice is about claims, rights, and enforceability. As divorce becomes an everyday event and we are more familiar with ways of arranging matters it may well be that fewer people will need access to the court to resolve a dispute, but we must not let the apparent cheapness of mediation blind us to the fact that it has limitations and must not let it poach the resources otherwise available to maintain access to legal services or even justice.

So, if we look at the numbers of cases handled, mediation is not actually a threat to lawyers at the present time. But if it were to increase its share of the public funds available for professional involvement in divorce then it would be, and I would be concerned that we would be stepping outside the known public framework of the law into the uncharted territory of individual and private agreements. In the Hobbesian jungle of the divorce, is the neutral and empowering mediator a sufficient protection in the struggle to equalise the bargaining positions of the parties in dispute, or do they need a partisan lawyer? Is divorce a private matter to be left to the guidance of those skilled in producing agreement, or is there a public duty to protect weaker parties? Of course this is a false dichotomy, and the issue should not be discussed in this either/or mode. But in a society where access to law (or even justice) depends on public funding for the majority, and resources are limited, we must be very careful before we throw out the high quality decision-making baby with the costly adversarial legal bath water.

In sum, the legal profession and scholars concerned with women's access to justice, are anxious about the role of ADR in divorce. This may well be unjustified now, but may offer a serious potential threat to the effectiveness of the publicly funded legal services sector on which women seeking divorce rely.

(b) The Child Support Agency

The second and more immediately threatening area to be taken away from the courts and the legal profession is the removal of child support and with it, to a large extent, wife support from the jurisdiction of the courts through the Child Support Act 1991, effective on April 1st, April Fools Day, 1993.

Here, too, Government policy is founded on the twin foundations of doing good and saving money. How can a scheme designed to improve the provision of financial support from absent parents (90% of U.K. absent parents are fathers) to children, regardless of the legal relationship between the parents, be anything but good? The incentive for governmental action was the realisa-

tion of the rapidly escalating costs to the welfare budget of one parent households, 80% of whom are on benefit, and the failure of the courts to either assess or enforce any regular or substantial maintenance. Why should taxpayers, who may have family commitments of their own, pay the bill for needy one parent families if there are non-resident parents who could contribute?

The scheme, first announced by the Government in the White paper, *Children Come First*, in 1990, was based on the link between welfare rates and the levels of child support assessment. It took as its starting point the first part of the approach used in Wisconsin, in the United States and subsequently in Australia, that parents have a legal obligation to share their income with their children who live elsewhere. But as there was no adequate information in the U.K. about the way income is shared in intact families, the Government did not proceed to ask that income be shared after separation or divorce in the same proportions it was while the family was together. Instead the social security allowances were used as the starting point, as it could be argued that these represented a nationally accepted minimum living allowance. If sufficient resources were available, an additional element was added. The assessment was framed in terms of the cost to the state of supporting the lone parent family, including all lone parent households, regardless of the civil status of the parents, if the family were in need of welfare, as 80% are. But it was not assumed that the absent parent would pay all of this amount. He (90% of U.K. absent parents are men) would be allowed a band of income, exempt from assessment by the Child Support Agency, equal to his own welfare allowance and his actual housing costs. Additionally, there would be an allowance for any children of his own with a subsequent partner living with him, though nothing for stepchildren. He would then be asked to pay at a rate of 50% of his available income until the "bill" for the first family was met. If further resources were available, he would pay at a lower rate of 25% until he had paid three times the allowances for the children. The assessment was to be made and enforced outside the court, any appeals other than on points of law would be dealt with by the CSA Appeals tribunals, and no consideration would be given to the value of any property settlement which was benefitting the children.

The features which are causing most disquiet now that the scheme is in operation are the lack of flexibility over property deals affecting levels of child support, the relation of the amount to the ability to pay rather than to the size of family and the complete separation of the process from the courts. In addition, the "mainte-

nance bill" includes the basic allowance for the caring parent payable under social security rules. This, in the writer's view, represents a major step forward for women in linking cash transfers to them after separation or divorce to the indirect costs of child rearing. Such a payment is not spousal support but rather a payment to recognise the impact of child care on earning potential, either through making it difficult to go out to work as there is little low cost child care in the U.K., or by recognising the costs of buying in substitute child care in order to enter the labour market. The feature which caused most concern when first announced was the inclusion of a welfare penalty for women who refused without good cause (most commonly fear of violence or abuse) to name the father. This feature has aroused little comment since implementation, either as a result of sensitive application by officials or simply because it was not as interesting to the press as the hard pressed fathers who had made property deals in the past but are now being rigorously assessed as their former wives claim a welfare benefit.[28]

This assessment is raised and enforced by the new Child Support Agency, which is a semi-privatised agency, with quite extraordinary powers of disclosure and a variety of methods for requiring payment. If the payer defaults, the Agency goes to the court for an order, and imprisonment is an option. In this way, we have removed the burden of taking legal action from the woman's shoulders, and given it over to the agency. There is also a requirement on her to name the father, unless she fears violence, with a welfare penalty for a period if she refuses. But the most important achievement is that for the first time the indirect costs of child rearing are brought into the child support payment. For a woman without professional skills and two children, these amounts have been computed as £140,000, leaving out pension entitlements. The calculation of the maintenance obligation includes the welfare allowance for the parent with care (i.e. about £44 per week out of the average total of £60), to compensate her for the inability to earn if she stays home with the child, or for the costs of substitute child care if she does work outside the home. This remains the case, whether or not she repartners, and until the youngest child reaches school leaving age.

The whole scheme is about parents and children. Other parties are excluded from the calculations with one exception; if the second family is close to the poverty line, the payer can claim a

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28 *See,* Mavis Maclean & John Eekelaar, *Child Support: the British Solution,* 7 INT'L J. L. & FAM. 205 (1993).

protected income at just above the welfare level for that household, as it would be nonsense to take one family out of poverty at the cost of placing the second below the line. But the scheme radically alters the balance of resources between first and second families, equalising them to a considerable degree, seeking equity between children of the same parent.

There is now delegalization in the traditional sense of restricting the involvement of courts in family arrangements following divorce, but at the same time, in order to secure acceptance of these private obligations we have passed a most invasive set of parliamentary regulations, providing increased powers to the state to be exercised by a semi-privatised agency whose accountability to Parliament is far from clear. There is now little room for the lawyers or courts in assessing, reviewing or enforcing child support. Disputed assessments will be dealt with in internal CSA tribunals. Is there a problem, particularly for women? Will the lawyers be missed? Clearly there are small problems with the new scheme which could be solved by changing the rules, e.g. abolishing the welfare penalty for women who do not wish to identify the father. There are also benefits to women, for example, the removal of the burden of taking action to vary or enforce a court order for maintenance away from the woman and placing it on the agency. But what do we lose by taking lawyers out of the equation and placing decisions in the hands of computers and clerks?

In practice, we lose the solicitor's fine skill of packaging the different resources available to a separating couple, to include not just property on the table but also human capital, credit worthiness in the housing market, the resources of third parties whether new partners or others, maximising benefit entitlement, to make the best use of available resources. The new Child Support scheme is compulsory, in that it is the only way to secure an enforceable child support payment. It will no longer be possible, after a transitional period, for couples to make a generous deal on the house in return for no claim for continuing child support, and have such an agreement enforced in a court of law. Furthermore, the scheme could be held to deny access to a court of law to those members of society who have a dispute about how to share their assets on divorce.

6. Conclusion

The part played by lawyers in divorce, for the majority of cases where resources are limited and the legal bill is picked up by the state, is likely to diminish soon, and substantially. Does it matter?

Do we need lawyers in divorce? Do we need divorce law, or simply a procedure (i.e. a licence to divorce), like the licence to marry? If we accept divorce as a private matter, affecting only the individuals involved, then the law can withdraw, if third party interests are covered by other aspects of legal regulation, the interests of children by child protection law and the economic aspects, both income transfers and property settlements, by state regulation. If we use the law to protect all children from neglect or abuse, why make special arrangements for children of divorcing parents? If we are clear about allocating resources to children after divorce or in the absence of a marriage, then why not run it as an absent parent tax? This serves the interest of the state in maximising collection, at the lowest cost. If we are concerned about property rights, there is the law of real property to deal with property interests. If there are disputes, are they likely to be more amenable to mediation rather than formal procedures of the law? In a recent study in Los Angeles, Jessica Pearson and colleagues found that one-third of the families studied had access to one attorney, one-third to two, and one-third to no legal representative.

> The large number of unrepresented or partially represented parents who rely extensively on court services and child support agencies for their family law problems often do not have their interests put forward in the most effective way.... Nevertheless, for many parents attorney representation is not a practical alternative.[29]

In the U.K., if we reduce the availability of publicly funded legal assistance to women seeking divorce we will be following the route described by Pearson. She emphasizes the need for public education, specific assistance with calculation of child support obligations, public financial assistance with work opportunities, health insurance programmes and housing to achieve any real improvement in the lives of lone parents after divorce. A cost conscious government might find legal aid to be a very economical alternative. Access to a legal advisor under current British arrangements offers general advice, reassurance and support at a high cost, but also highly skilled resource management planning and dispute resolution through negotiation, rather than litigation at a reasonable cost. To achieve cost effectiveness in public expenditure we need to develop ways of differentiating between these two kinds of work and to develop access to general advice. At the same time, the de-

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[29] Pearson, *supra* note 22.

velopment of rule based systems for allocating resources offers a great deal to the woman who has no need to make a case, but simply an application involving no specialist knowledge. To set up structures such as publicly funded mediation services for divorcing couples at the expense of legal services (we cannot afford both) could indicate that lawyers are for the rich and the rest must make do with mediation and financial regulations. To take the family out of the rule of law into the private jungle, with welfare experts making a rearguard stand, ignores the nature of power within the family. It is not safe to withdraw while the playing field is not yet level. We do not have full employment, equal wages and pension rights or full sharing of responsibilities for children. Until we do, easy access to the remedies of family law remains a key plank for women in moving towards national acceptance of rules like those now ordering child support in the U.K. as in the U.S.