1 1 Changing Divorce

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Introduction

The period in which this book has been produced could well be characterised as one which has seen a 'phoney war'. During the debates which led up to the passing of the Family Law Act 1996 (FLA) battle lines were drawn and 'real' battles took place in both Houses of Parliament. On one side were those who wished to 'protect' marriage and 'the family'; on the other, those who argued that irreversible changes have taken place in those institutions and that the best law can do is to provide procedures for organising and managing the ending of failed relationships in ways that are least detrimental to all. There were battles between those who wished to further the best interest of children in one way and those in another; and between those who argued for widening 'support' for separating people and those for whom reducing public expenditure was the main priority. These hostilities apparently ended via the acceptance of various amendments to the Bill, enabling it to become law.

But, we would argue, the war is not ended. Those skirmishes in Parliament, though influenced by pressure groups and various swathes of public opinion, have simply defined and consolidated the boundaries for the next offensive which will be conducted over questions relating to the implementation of the Act's provisions. Within those boundaries there is still much to say and much to fight for: the disputed territory of the meanings and significance of marriage, the family and the welfare of children has been circumscribed by a range of dominant discourses, with the result that much is left unsaid. The contributors to this book have each identified important undercurrents which have been hidden in these public debates. These undercurrents have included knowledge about the psychological effects of separation on the spouses involved, about risks to children other than those explicitly used to legitimate reform, and about neglected issues in relation to dividing the family assets. At another level, the undercurrents discussed have been those which have implicitly informed rhetorical strategies and legislative outcomes; for example,

the construction of new ideas of what constitutes a 'good' post-divorce family and the emergence of particular notions surrounding heterosexuality. Thirdly, these undercurrents include those ambivalences which persist within the dominant discourses, notably about the autonomy of children and about the nature and relative importance of domestic violence.

Since the FLA was given the Royal Assent in 1996 pilot projects have been set up, researched and discussed. The particular formats for information sessions, the detail in Legal Aid Board working guidelines, the preferred structures for state-funded mediation provision and the timing and type of state-funded legal advice have all yet to be decided. Decisions will be made on the basis of the outcomes of the pilot schemes, in the context of available resources. Such decisions will determine not only the nature of divorce law and procedure for the future, but will also set the limits within which the protection of the more vulnerable family members will be possible within the legal framework of Parts I-III of the Act. These decisions about the precise implementation of the Act are also likely to have at least as much impact as the letter of the Act. One could reasonably anticipate real battles over those decisions.

These battles are already taking place, but not fully in the public arena. The pilot projects are being assessed and discussed in relative secrecy; the Lord Chancellor's Department has issued only minimal information, and discussion, so far, has been of particular issues with particular audiences. It seems that large scale engagements are carefully being avoided. At the conclusion of the phoney war, there may or may not be a public battle over the implementation of the Act; further hostilities may be precluded by a range of small scale peace treaties with the various parties to the engagement. This is an unsatisfactory state of affairs if it means that neglected issues remain hidden.

Anecdotal evidence would suggest that there is some confusion in the minds of the general public as to what the current attitude to divorce and divorce reform now is. We know that divorce procedures are changing, but neither the extent nor the nature of that change is yet clear. Contributors to this volume have been at pains to identify the dominant messages framing the divorce debate, but there is also a sense in which there is currently no message, at least not one that can easily be grasped. If there is any message at all, it is that the public debate ended in July 1996, and all that remains to be done is for the Lord Chancellor to make a range of procedural rules based on the outcome of the pilots and the authority of scientific research. Yet, the ideas which have framed the debate persist, with their unacknowledged undercurrents.

It seems to us that this period of phoney war, together with the early years of implementation of the FLA, constitute a crucial time in which to make explicit, and to debate, these ideas and assumptions. In that process those undercurrents of divorce which are currently inadequately known or understood, should be made visible, for they have a real bearing on how the provisions of the Act should be put into operation. All the contributors to this book have had that aim in mind, and the ambiguous title of this chapter reflects that aim: our book offers a contribution to the divorce debate which we hope will broaden its scope and so influence the nature and direction of change.

In our introductory chapter we outlined four themes which have characterised the dominant discourses surrounding divorce and with which contributors have engaged. We have also referred above to the range of undercurrents which contributors have identified. In addition, issues of practice have emerged which cross chapter boundaries and which have implications for future policy and practice. It is on these, and also on those issues which space has forced us to neglect, that we focus in this final chapter.

The Divorce Professionals

Not surprisingly, several chapters in this book have focused on the ways in which legal and social work trained professionals operating within the current divorce process respond to legal criteria and workload pressures. There has been discussion of the role of solicitors, divorce court welfare officers and the judiciary in relation to issues of domestic violence, ascertaining the child's wishes and feelings, 'mediating' conflict and setting norms for post-divorce family life. These professionals have been, and will remain, influential in determining the nature and outcome of divorce for individuals with whom they come into contact though that influence has changed and will change over the years. However, the dominant messages about divorce - for example those communicated in the Consultation and White Papers (Lord Chancellor's Department (LCD), 1993 and 1995, respectively) preceding the Family Law Act - have attributed particular roles to these professionals, roles necessary for the construction of a particular story about the 'old' divorce procedure. The courts are portrayed as places of last resort: as places where an impersonal judge decides and as places that are bad for children because they are adversarial and conflict ridden. Solicitors are portrayed as litigious and likely to foment conflict

by their methods of working; divorce court welfare officers are perceived as conduits for the views and welfare of children and mediators as facilitators of harmony.

> The present system of divorce law is based on the adversarial model for litigating disputes through the civil courts. .... in a large number of cases the separating couple and their lawyers act, at least initially, as if the divorce petition will be defended (LCD, 1993, p.49).
>
> Mediation is an alternative to negotiating matters at arm's length through two separate lawyers and to litigating through the courts' (LCD, 1995, p.39).

In contrast to these negative images of legal professionals, mediation is presented as offering 'a constructive framework ... for consideration and reflection' (LCD, 1993, p.51). The succeeding White Paper accepted that there might be some 'good family lawyers ... who do their best for their clients' (LCD, 1995, p.41) but noted that the 'backdrop of allegation and counter-allegation' exists `[e]ven in circumstances where the parties and their solicitors approach negotiations in a constructive manner' (LCD, 1995, p.9) and there was no movement from the idea that solicitors can only work 'at arm's length' with other solicitors (pp.41 and 71). Mediation, on the other hand, continued to be presented as able to deal with 'issues' and not be concerned with allegations (LCD, 1995, p.39).

Solicitors

Research referred to in this book reveals professional approaches and attitudes which do not tally with that dominant picture of how the divorce system operates. The research on solicitors conducted at the Universities of Bristol (Bailey-Harris *et al*, 1998), Brunel (Piper, 1998; King, 1999) and Leeds (Neale and Smart, 1997) shows solicitors who very rarely operate within a strictly legal discourse in relation to disputes about the children of the marriage. Their working practices and notions of client care are related to the welfare of the child and to the welfare of 'the family' as a whole. They have reconstructed the interests of their clients in ways which downgrade the client's legal rights - and the use of an adversarial system to pursue them - but upgrades the welfare needs of his or her child and family. As a result, the normative framework within which they work is one which goes beyond general principles of law but is very

influential in settling disputes (King, 1999):

> Disputes about children are referred, in growing numbers, to lawyers and courts. What then happens to them is rather curious. In the absence of legal rules, other than procedural rules, disputes tend to be settled by reference to norms. These are not in essence legal norms other than in the limited sense that they are employed within a legal context. Legal knowledge is hardly relevant. It is essentially 'welfare' discourse expressed as legal principle (Bailey-Harris *et al,* 1998, p.27).

In this normative framework certain parents are constructed as acting with common sense and taking the sensible approach to divorce. It is these parents who are co-operating with the other parent and are able to 'sort out' their family problems who are seen to be acting in the best interests of the child: those parents who refuse to co-operate and wish to use the courts are unreasonable (King 1999). Lawyers convey to their clients that they should agree outcomes with their spouse, that they should not make applications to court and that they should allow contact to the other parent. This elision of the needs and interests of the different family members means that a dominant discourse - in which contact between the child and the non-residential parent and increased co-operation within families are given top priority - goes unchallenged by solicitors. A comment of a solicitor, acting for the mother, from the research of Smart and Neale illuminates this development:

> The only time I lay down the law and I'm heavy handed is if I've got a mother who's not allowing contact ... I try to beat everybody into submission. ... In those circumstances I am prepared to overstep the line a bit and upset clients sometimes. ... The prospect of a court ever backing [a contact order] up with [committal proceedings] is very unlikely, but I would never tell the mum that. ... What you hope is that the judge will be strong enough to frighten the socks off mum ... I've got a particularly difficult case at the moment where the mother has ... been subject to what seems to be some nasty incidences of violence and fled the area specifically to get away. ... Now persuading her to get contact up and running again is very, very difficult. And in fact we [the two lawyers] were able to arrange that.... It's a question of building up mutual trust again. (S.H. Male, SFLA [solicitor]) (Smart and Neale, 1997, p.392).

It is not, therefore, surprising that a mediator should quote 'My solicitor won't try to see my case' as a typical comment of clients who want professionals to

uphold their point of view (Richards, 1998, p.488) or that an observer should gain 'an impression of solicitors acting in concert in the face of one (or two) difficult parents' (Bailey-Harris *et al,* 1998, p.29).

Solicitors depend on retaining clients and so, while explaining to parents that the law should not be used, must successfully give the impression that they, as lawyers, are the ones who know when to move from the non-use of law to the use of law (King, 1999). Solicitors then present themselves as good managers of the divorce process. What all three research projects therefore conclude - despite the different geographical locations and the different methodologies for data collection - is that being a family lawyer is 'primarily about client handling' (Bailey-Harris, 1998, p.33).

In order to do this, solicitors have reconstructed ideas of justice and fairness in relation to family law (Neale and Smart, 1997). And yet, as we have seen in Kaganas' chapter, their use of the welfare discourse in order to encourage settlement is a selective one in line with the dominant discourse about divorce: the Brunel interviews revealed solicitors who used their knowledge of what was good for children in order to persuade the implacably hostile mother to allow the non-residential father contact, but only one professed to encourage the non-residential father to maintain contact. Clearly there are legal reasons why they should do one and not the other, because section 8 of the Children Act gives parents a right to apply for contact but does not give parents a right to force the other parent to have contact. Yet this should not preclude solicitor pressure on fathers to sustain contact because, as we have seen, solicitors do not normally operate within a 'pure' legal discourse and often eschew an instrumental role for law. Bailey-Harris *et al* also found courts unprepared 'to intervene in cases where the parent with care is seeking to have the absent parent play a more prominent part in the child's life' despite this appearing to be in keeping with the welfare principle (1998, p.24). It would seem that particular welfare norms are harnessed to settle a dispute which might ultimately be the court's responsibility, but not to do so if no legal 'trigger' exists as, for example, when there is denial of contact by the non-residential parent against the wishes of the other parent. The dominant welfare discourse may not, therefore, deliver even on those desired outcomes which it promotes.

Judges

Just as the divorce debate utilised out-dated images of family law solicitors, so

we find similar distorted images of the judiciary. In the White Paper, the place where judges operate - the court - is the site of 'battle' (LCD, 1995, p.62) and in popular ideas of the judiciary they are presented as the final arbiter, the people who make decisions about children and who ultimately decide the fate of families. Of course this is what judges do in the last resort but, what is not at all clear from popular debate about divorce, is that very rarely do judges decide. They, like their solicitor colleagues, are in the business of encouraging settlement. And, just as solicitors divide clients into the sensible and the unreasonable, so do judges appraise the solicitors appearing before them:

> District judges become familiar with solicitors appearing in their courts: ... Judges assume that proposals made by certain solicitors will be sensible. They are less likely to accept proposals advanced by solicitors whom they ... consider to be inexperienced or lacking sound judgement. Judges expect solicitors to control their clients' (Bailey-Harris *et al,* 1998, p.29).

The Bristol researchers refer to the 'family days' at the courts they observed - when the courts dealt with first and subsequent appointments in relation to section 8 applications - as *'negotiating opportunities'* [emphasis in original] (Bailey Harris *et al,* 1998, p.23) and note the continuing reluctance of courts to proceed to formal adjudication. 'The analogy that comes to mind is that of the butcher's shop which won't sell meat; district judges tend to be convinced vegetarians. ... Typically, scheduled "final hearings" turn out to be no such thing' (Bailey Harris *et al,* 1998, p.24). Even the anti-delay principle within the Children Act 1989 'conflicts with, and so inevitably gives way to, the much more powerful principle - powerful within legal proceedings - that cases should be settled rather than adjudicated' (p.26).

Barristers have rarely been the subject of research' and there has been little reference to their role in this volume, but the above research on section 8 applications suggests that in practice family law barristers also adhere to this principle. Within the judicial setting, 'barristers' advocacy skill is seldom required and the other functions come to the fore', their functions as negotiators and 'in supplying reinforcement' of 'unpalatable advice'. Because of their distance from the client they can, more so than the solicitor, be 'dismissive of the client's particular preoccupations' (Bailey-Harris *et al,* 1998, p.30). Barristers, in other words, add further weight to the welfare discourse espoused by judges and solicitors.

All the above legal professionals, who have been presented in talk about

the current divorce process as adversarial , as upholding or adjudicating on the interests and legal rights of clients, seek, therefore, to be non-adversarial and to instill the dominant messages about the welfare of children. Yet their publicised 'shortcomings' have been used to justify reform in order to produce a new non-adversarial, settlement-orientated and welfare based divorce process. Even accepting a political need to justify reduced expenditure on courts and legal services, this is bizarre. It is also dangerous. People cannot make real choices about 'their' divorce process unless they are provided with knowledge which is not filtered by these misleading images of professional practice. It is also of concern that a settlement-seeking, homogeneous family justice system is being produced without clearer discussion of the interdisciplinarity which is being promoted - a theme we will return to.

Court Welfare Officers

Lastly, talk about the divorce process rests on a distorted view of the work of divorce court welfare officers. Their role is to draw attention to those aspects of the childrens' welfare that the court needs to take into account, in view of the checklist in section 1(3) of the Children Act 1989 and, when implemented, that in the FL A section 11(4). Nevertheless, the chapter on the wishes of children shows that court welfare officers do not always see children, talk to children alone and attempt to ascertain what those children would like to happen to them. What is determining the practice of solicitors, court welfare officers and the judiciary is the dominant attitude - drawing on legal, social and welfare concepts - to the responsibility of parents. What is seen as in the best interests of the child above all else is that the parents are co-operating and that they, not the court and not the child, make the decisions. This allows for professional approval of an outcome which may not be in the optimum interests of the child but which upholds the importance of the idea of parental responsibility - an importance perceived as not just being for the children of the marriage but also for their children and for society:

> If the children of today's divorcing parents are to develop into well balanced adults, capable ... of being responsible parents, then it will be desirable to ensure that their development is not weakened by the way in which the divorce process works. This is a crucial factor in ensuring the stability of the family and family life after divorce (Lord Chancellor's Department, 1993, p.16).

Therefore, as several chapters have shown, the apparent focus on children in the debates, and in the sections of the FLA, does not necessarily mean that in practice the traditional divorce professionals place the needs of the `real' children very high up the list of priorities. Yet pressure for change in this respect has been muted because the divorce debate has placed the solution elsewhere. As chapter 4 pointed out, the hope of legislators, mediators and many divorce professionals is that mediation can, and increasingly will, provide the site where children's wishes can be ascertained and their needs adequately addressed. Whether that hope is realised depends on several developments, one of which is the nature of the process which becomes accepted as 'real' mediation.

Mediation

Talk about the new divorce process has usually presented mediation as something established, known and defined and as the 'way forward'. The Consultation Paper, for example included the following apparently unproblematic description of the mediation process as one which 'aims at encouraging parties to come to terms with the past, look to the future, meet each other on equal terms and, with the assistance of a neutral third party, reach decisions' (LCD, 1993, p.41). The debate has, therefore, been framed as a choice between a process which relies on the involvement of traditional divorce professionals and one which uses mediators.

Only a decade ago 'mediation was a peripheral pastime practised in church halls, voluntary centres and the occasional solicitor's office' (Walsh, 1997) and mediation is still supply, rather than demand, led. Worldwide, mediation is not yet a unitary entity: it is accepted in various forms in different jurisdictions. Even North America, with a longer history of mediation provision than the UK, exhibits a wide range of forms. A recent review of Canadian research concludes that 'family mediation is far from a monolithic field of professional practice: the process of family mediation comprises a wide spectrum of variations, and a plethora of practice models are being applied with mediation clientele' (Kruk, 1998, p.195).[2] There are are currently tensions amongst UK mediation providers, arising from different approaches and concerns (Pigott, 1996; Roberts, 1997, pp.30-38 and 64-66). Chapters in this volume have revealed a range of approaches in practice, specifically in relation

to issues of domestic violence, the involvement of the child and the division of family assets. There is no compulsory registration of mediators in the UK and, as a recent article points out, 'It seems that the area of mediation is open to all those who fancy themselves as mediators' (Black-Branch, 1998, p.39) though the Legal Aid Board will set out standards for those services to be publicly funded.[3]

One undercurrent of divorce is, then, the existence of diverse views on what mediation can and should achieve and what techniques and knowledges can legitimately be used in the process of mediation. In order to secure government funding for mediation these differences have had to be played down. But there are still battles to be won in relation to these often conflicting ideas as to what mediation 'is'. The outcome of these battles will determine the mediation experience for clients and so will influence outcomes and protections for family members.

Professionalisation

The continuing undercurrent of debate about the nature of mediation is linked to a more public project on the part of mediation organisations - that of establishing mediation as a profession. 'Today, the degree of professionalism amongst mediators is perceived as being very ad hoc' (Black-Branch, 1998, p.40) and mediators believe that the acknowledgement of professional status is necessary to establish mediators as having equal status to the 'old' divorce professionals.[4] As Dame Margaret Booth said, before divorce reform proposals had been enacted, of the possible amalgamation of National Family Mediation (NFM) and the Family Mediators' Association (FMA),

> Such a body should in no way obstruct flexibility in working methods or prevent each couple receiving help in the way best suited to their needs. It would, however, achieve for the service a professional status at a national level which is essential if it is to undertake the work envisaged for it in the Green Paper. Without that status there is always the danger that mediation will be left on the sidelines ... (Booth, 1994, p.661).

As part of this, as yet, unresolved struggle to establish mediation as a profession in its own right, NFM (operating in England and Wales), the FMA and also Family Mediation Scotland did form the body envisaged by Dame Margaret Booth. The resulting UK College of Mediators has developed rules to govern

entry to the mediation 'profession' and to control the conduct of its members. Their hope is that the College's system of accreditation and Code of Practice are accepted by those who need to fund and to use mediation so that one traditional aspect of a profession - self-regulation - is established.

The recent book by Marian Roberts (1997) is also part of this process of bidding for professional status by providing a clear - and particular - knowledge base for mediation, with academic credentials and self-awareness of limitations.

Definition and Practice

In the 1980s strong claims were made for a form of mediation which used techniques from a family systems approach and acknowledged a therapeutic focus (see Parkinson, 1986). Several passages in Roberts' book (1997, pp.14-19) specifically discredit approaches using particular counselling and social work techniques: 'it is not for mediators to decide that a quarrel over children is really a quarrel about finance or vice versa or an excuse to act out inter-personal emotional issues' (Roberts, 1997, p.84). Mediation - as taught by NFM - is specifically delineated from social work and from family therapy (pp.10-19) and Roberts argues against interventions by mediators which are too directive or based on systems theory (pp.124-125).

A perhaps more fundamental split in the history of mediation has been that between court-based and out-of-court services. Indeed, a major research project on mediation decided on samples and categorised its data in terms of the `distance' or otherwise of mediation from the court (Conciliation Project Unit, 1989). In the 1980s, researchers as well as mediators in 'independent' services fiercely criticised 'mediation' on court premises as being no such thing (Davis and Bader, 1985). That criticism is still being made:

> Mediation tied to the court is inevitably infected with the court's settlement-seeking values. There is nothing 'alternative' about it: mediation becomes almost indistinguishable - other than in form - from bilateral negotiation conducted by lawyers. ....
> What is one to make of the re-invention of mediation within court proceedings? ... If the intention is primarily to divert and deflect, then it seems hard to justify the subversion of the core values of mediation in order to serve the courts' rationing strategies (Bailey-Harris *et al,* 1998, p.26).

This would suggest there is, therefore, no agreement over 'core values': whilst some commentators and mediators refer to 'core values' as an agreed entity, others are practising what they refer to as mediation but which clearly does not subscribe to these particular values.

Marian Roberts has been responsible for training within National Family Mediation and her book reflects the views about mediation which have been disseminated by that body - the longest running independent mediation organisation in the UK. Those views may be challenged by a new breed of lawyer-mediator - already numerous in North America - and evidenced in the UK in the establishment of BALM (British Association of Lawyer Mediators) and by the Law Society's publication of its own rules relating to the practice of mediation in 1993.[5] More specifically, the Law Society is planning to establish schemes by which lawyers who are members of the Law Society can become mediators through a Law Society accredited course, which will be separate from, and not necessarily totally in line with, the views and wishes of the UK College (see Roberts, 1997, p.66). The SFLA is also organising training for its solicitor members. This division of opinion as to whether a `solicitor-mediator' is a valid practitioner of mediation is linked to the vexed question of how and to what extent comprehensive or all-issues mediation (AIM) should include legal input and advice. Various structures for making legal advice available to the clients of mediation have been set up and researched (Walker *et al*, 1994)[6] and are still under review. Currently, all issues mediation is experienced by very few divorcing couples. The decision as to which particular roles for solicitors in and around mediation will be publicly funded may well be the biggest influence on whether the solicitor-mediator becomes ubiquitous. It is agreed by all concerned that legal advice is necessary in relation to participation in mediation: the blurring of these distinctions between mediating and acting as a source of legal advice and representation is, we argue, not a helpful development.

Roberts' book is, therefore, a timely argument in favour of a particular form of mediation as 'true' mediation. The form described is conceptually more coherent as a result of nearly two decades of arguments within the mediation movement about practise issues, often fuelled by academic criticism from outside. Roberts is well aware of the dangers stemming from power inequalities, the existence of domestic violence, the power of the dominant welfare discourse and the possibility that mediators can manipulate those engaging in mediation. We would, therefore, prefer that this narrowly defined

form of mediation - which sets out exceptions to the rule that mediation is suitable and a beneficial process for all couples - should become the basis for standard practice. Many of the concerns of feminists in particular might be abated. With wider or different definitions of mediation those concerns will not go away: identifying relevant undercurrents of divorce becomes crucial if forms of mediation which are less rigorous in their approach to practice boundaries in general and to screening procedures in particular are to be allowed to develop in the UK.

Interdisciplinarity

Despite the images of solicitors, judges and court welfare officers constructed through the dominant discourse of divorce we have seen that in practice there is a fudging of the lines between professional activities and boundaries. This practice is, paradoxically, in line with a professional discourse - backed by the messages from government enquiries in the child protection field' - that stresses interdisciplinarity. It is taken for granted in all training materials and comments on the operation of what is now called the family justice system (see Murch and Hooper, 1992; Walsh, 1998), that those working within it should take a multidisciplinary approach to problems and cases and that, therefore, the system should exhibit interdisciplinarity at all levels. Practice that has been pioneered in juvenile justice and child protection is now extended to divorce:

> In the course of our observations we witnessed many instances of bi-partite or tri-partite discussions between lawyers, welfare officers, and district judges. We were struck by the degree to which these discussions resembled 'case conferences' ... To the uninformed observer it might have been difficult to identify the status of each performer; there seemed to be no difference in the nature of their contribution or in the language employed ... These were, it seemed to us, almost hybrid practitioners' (Bailey-Harris *et al*, 1998, pp.32-33).

What is meant by interdisciplinarity is not entirely clear. Murch and Hooper, reporting their research on the family justice system (1992), use the term 'cross-disciplinary' in relation to professional training and collaboration. Their focus is the implications for training of the 'urgent need to ensure that practitioners .... understand more fully the functions, roles, techniques,

assumptions and language of other professional groups' (p.110). We have no problem with that perspective: it is difficult to critique the advantages of an understanding of the information and evidence provided by those other disciplines which enable law to make decisions which are otherwise beyond its competence (King and Piper, 1995, pp.31-55). Murch has argued that the autopoietic nature of law is not an obstacle to the collaboration envisaged - the problem is rather institutional barriers that could be reduced or removed by learning and training which itself crosses disciplines (Murch, 1995).

But other commentators appear to view inter-disciplinarity as more than `understanding' each other. Mr Justice Wall, for example, refers to the 'multi-faceted discipline which is family law' (Wall, 1995, p.52) and the research referred to above suggests there is a self-denying ordinance by lawyers not to `talk law' and unwritten rules which deem as 'good' the solicitor who whole-heartedly operates within a welfare discourse. In relation to divorce, there has been a convergence, not only of the normative framework of lawyers and mediators (Piper, 1996) but also of lawyers and court welfare officers. Bailey-Harris *et al* note their intention to explore further the nature and extent of this convergence (1998, p.33).

This inter-disciplinary 'discipline' is of theoretical interest: its existence in other contexts, for example the youth justice system, is leading to similar discussion of the nature and ethics of such developments.' It is also a practical issue: in the area of public law relating to children it has been used as a reason not to impose a common law duty of care on local authorities. Therefore W v *Essex County Council* [1997] 2 FLR 535 distinguished *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 on the ground, *inter alia,* that the multi-disciplinary tasks had been completed before the placement of the fostered child which formed the basis of the action (see Oliphant, 1998). A similar case in New Zealand, *Attorney General v Prince* [1998] 1 NZLR 262, has distinguished the New Zealand legislation from the English/Welsh Children Act 1989 in relation to the issue of whether multi-disciplinary decision-making is 'mandated' by rules and guidance.' These detrimental undercurrents of an unthinking acceptance of the benefits of an ill-defined interdisciplinarity need considerably more attention.

Listening to Children

As several contributors to this book have pointed out, the divorce reform debates and the justifications for particular forms of change have been heavily influenced by a child-saving agenda with particular ideas about the welfare of the child in this situation. Despite this focus on the children and the inclusion of statutory provisions for children's views to be taken into account, their voices are rarely 'heard' in practice. Much reliance is being placed on the opportunities afforded by mediation but, in practice mediators rarely talk to children (Dasgupta and Richards, 1997).' Even where professionals do interview children, there may be considerable problems in interpreting what they say and, as Hall argues, the context of the interview may also be problematic:

> Formal interviews are rarely encountered by children in contexts other than disapproval or reprimand. It is easy to imagine therefore that as a majority of children will be likely to experience being interviewed as a somewhat intimidating event and certainly not one in which they will easily feel that their views are genuinely being solicited (1996, p.69).

Hall advocates that it is only within a psychological framework that children's views can be elicited 'sensitively' and that if this does not happen, there is a danger that views are facilitated which do not properly represent the child's own meanings.

There have been a number of cases where the children's wishes and feelings were elicited, but not followed (see, for example, Bell, 1993; Jones, 1992). In these cases, according to Sherwin (1996), the law draws a distinction between what the child wants and what is in the best interests of that child. Where the two coincide, the decision will reflect the child's wishes; where they do not coincide, the judge's view prevails. The Association of Lawyers for Children (ALC) argues that these current procedures and practices do not meet the requirements of Article 12 of the UN Declaration of Human Rights for Children. As a result:

> Many children are often powerless to effect plans and decisions made by their parents in respect of them. However, intervention by the court or an authorised representative is often seen as unhelpful and intrusive as well as being contrary to the philosophy of the Children Act 1989 (ALC, 1998, p.406).

The image of the child, the 'semantic artifact' with which the law operates in these proceedings (King and Piper, 1995), is that of a vulnerable victim to be protected and not an autonomous, reliable participant." During the debate on the FLA Parliament did air the possibility of making the Official Solicitor or a new children's officer available to represent the child's interests but no amendments to this effect became law. Section 64 of the FLA allows for the provision of separate representation for children and the debate on these issues continues (Timms, 1997), [12] but the likelihood of the extra funding being made available is slim.

It will not be an easy task to formulate policy which does ensure that the wishes of the real children involved become part of the decision-making process. Davis has recently remarked, 'One might conceive the Family Law Act 1996 as an attempt by the Lord Chancellor's Department to change a culture' (1998, p.66); the task, therefore, becomes that of creating a counter-culture. The recent formation of NYAS (National Youth Advocacy Service), by the amalgamation of IRCHIN and ASC, has been accomplished with that aim in view. The hope is that its members can help to create a culture where children are listened to, clearly heard, involved and have their views acted upon.'

Others have argued that there does not have to be an exclusive focus on mediation or on the judicial/legal arena to secure the implementation of Article 12 of the UN Convention (Eekelaar, 1992, p.234). Douglas, Murch and Perry (1996) argue, for example, that the best site is not the legal system but the mental health system and Kroll (1996) similarly advocates facilities to treat the child as in 'crisis' and needing to be listened to in the interests of ensuring psychological health. The USA has seen the development of 'seminars' especially for children of divorcing parents" and, in the UK, the first Child Counselling Services have been established (Pitrusu, 1998). These initiatives may well be necessary and beneficial for some children but should be part of better and wider provision of services for all children 'in need'. To attach them to the process of divorce simply further problematises and pathologises divorce and solidifies constructions of children as 'victims'. Such developments inevitably downgrade the views of the child as important in their own right.

The current policy emphasis on the importance of 'good' parenting' is also of concern to us. First, it may further divert attention from the child as a legitimate participant. For example, the Parenting Plans currently being piloted encourage parents to take children's views and feelings into account, but there is a danger that this will be seen as sufficient, therefore perpetuating children

as dependent and vulnerable. Secondly, such policy initiatives may be seen as part of a development of the 'therapeutic state' whereby social problems are addressed through individualised psychological techniques.

Conclusions

This book has sought to explore a range of what we have called 'undercurrents of divorce' which, hitherto, have been neglected or ignored in the debates. In this chapter, we have discussed these issues more specifically in relation to the implementation of the FLA and to professional practices, since these undercurrents affect the actual experience of divorcing people and their children via the practices of divorce professionals. There are, however, a range of outstanding issues, relevant to both policy and practice, which have yet to be brought into the public arena. Broader questions, such as those relating to 'race' and ethnicity, have been notable for their absence in both research and policy-making (Day Sclater, 1995; Irving and Benjamin, 1995; Taylor and Wang, 1997): a situation which can only be seen as lamentable. There is some evidence that these issues are being addressed (see, for example, Gale, 1994; Schutz, 1996; Shah-Kazemi, 1996) but this research is surely long overdue.

In the meantime, it is likely that the implementation of the divorce reforms will be predicated on a very particular model of 'the family' which may have little to do with the diversity of ways the majority of folk, including those in minority ethnic groups, organise their domestic lives. Such research as we do have on this issue (see, for example, Dallos and Sapsford, 1995; Gelles, 1995; Hutter, 1991) indicates that family life is characterised by diversity, across a range of cultures, classes and ethnic groups, and that the dominance of the white, middle class 'nuclear' ideal (see Smart, 1997), assumed by so much British social policy, accords with the experience of an ever-decreasing proportion of people. The issue is further complicated by the persistence of racial stereotypes and the neglect of within-group diversities. As Taylor and Wang (1997) argue, in an American context, much early research on processes and patterns in ethnic minority families was guided by an assumption that minority families were 'pathological', or was conducted in the context of intervention and prevention efforts. Thus we know little about the ordinary lives, meanings and values of people who do not readily fit the white, middle class model so valued by our society.

There is, then, a critical lack - which we hope will be addressed as a matter of urgency - of culturally sensitive research in the area of marriage and divorce to inform any sensible social policy in Britain. It is essential, however, that future research should not start with an assumption of a dominant mean from which some families depart or deviate. Separation and divorce, for all people, are replete with a multitude of meanings, which have cultural origins as well as personal significance; a humane and 'fair' social policy would be one which respected those meanings. Family Law in other jurisdictions has gone some way towards making provision for the kinds of diversities we have mentioned here (see, for Australian developments, Bordow and Gibson, 1994; Moloney *et al*, 1996; Love *et al*, 1996; for developments in New Zealand, see, Maxwell, 1989a, 1989b).

The dominance of particular models of family life, both in research and in the divorce debates, also has the effect of marginalising, or even excluding, some people (for example, gay and lesbian families) from consideration altogether, and of downplaying the significance of wider kin and step-relationship networks: a prime example is the question of grandparents. Research at the end of the 1980s (Kaganas and Piper, 1989, 1990) [16] showed that court welfare officers and mediators believed that grandparents were of great help to children in their psychological adjustment to divorce and in their sense of belonging to a family but, nevertheless, felt unable to promote such links if those links were not wanted by the parents. Again, particular dominant ideas about the benefits to children of parental autonomy and co-operation outweigh other benefits and risks. Similarly, the recent research on solicitors found that solicitors would not mention grandparents unless either the client raised the issue or the solicitor felt that a grandparent might be the resource which would solve a contact or even residence problem, or might be a resource to ensure continuity of care by the residential parent. The dominant attitudes to contact and parental responsibility, therefore, make the role of the extended family in the child's welfare at least partially invisible.

Changing Families, Changing Law

We have discussed a range of undercurrents of divorce which family law and policy ignores at its peril. In some cases they are the very stuff of professional practice, in others of family life. The Right Honourable Mrs Justice Hale (1997) has pointed to the futility of any attempt to turn back the clock: families have

changed and will continue to do so and laws must be formulated with that fact in mind. As Jones *et al* also argue,

> Only one thing is certain: there is no turning back. The future will contain many kinds of families ... And those families will not be like families of the past. More than at any time in the past, our personal lives will reflect the powers of our imagination and the state's willingness to support variety (1995, p.157).

This process will involve tensions: new ones are likely to arise as old ones are resolved. The contributors to this book have brought to the surface some of the undercurrents which can be taken into account in future debates and in the many decisions still to be made. We have identified the dominant discourses of welfare and harmony, together with an implicit model of family life, as constraining the debates to date in particular ways. It is crucial that we continue to subject these discourses, and the practices which flow from them, to critical scrutiny if family law is to be any other than as a crude mechanism for social control.

Notes

1. But see, Barnett (1998).
2. In the USA 'A unique mediation service using the telephone to help parents resolve conflicts [over contact]' was terminated solely for budgetary reasons and the concerns expressed focused, *inter alia,* on 'the lack of non-verbal cues' rather than whether 'the series of telephone calls to the individuals involved' rightly deserved to be called mediation (Coltri and Hunt, 1998, p.183).
3. Family Law Act 1996 section 27. The Mediation Working Group of the Lord Chancellor's Advisory Committee on Legal Education and Conduct funded a review in 1998 of relevant literature on the education requirements applying to lawyer-mediators and non-lawyer mediators in England and Wales and comparable jurisdictions with a view to deciding on standards to be applied to family law mediation.
4. Whilst it is possible to question what is meant by the notion of professionalisation, this is not relevant here: for whatever reason, mediators want to be considered as professionals. For a brief discussion see Black-Branch (1998).
5. See Chapter 22 of the Guide to the Professional Conduct of Solicitors.
6. For a summary of developments and views up to the publication of this research report see Fisher, 1994.

7. A notable example is the Butler Sloss enquiry into the events in Cleveland (Report of the Enquiry into Child Abuse in Cleveland 1987 (1988)).
8. Note, for example, the the workshop entitled 'The Ethics of Interdisciplinarity' held at Brunel University, 20 November, 1998.
9. I am grateful to Geoff McLay (Victoria University of Wellington) for bringing this to my attention.
10. The same would appear to be true of practice in the Australian family courts: 'Although most family mediators do not seek directly the views of children in the mediation process, some have advocated the limited involvement of children in mediation to ascertain their views and to check that parents arrangements are in accord with the children's wishes' (Pryor and Seymour, 1996, p.240).
11. Even when the child's liberty is at stake, as in an application for secure accommodation under section 25 of the Children Act 1989, the child has no right to attend (see *Re W (minor)(secure accommodation order: attendance at court)* [1994] 2 FLR 1092.
12. See also the debate between Judith Timms and Michael King in the pages of *Family Mediation* (1997), vol 7 (3) and (1998), vol 8(1).
13. See the comment in `Newsline' (*Family Law*, 1998, p.448).
14. These are a spin off of divorce education programmes for parents: their genesis is in the USA (see Di Bias, 1996).
15. Two examples of this emphasis are the Government's support for the National Family and Parenting Institute and the provision in the Crime and Disorder Act 1998 of a power by which courts can make a Parenting Order.
16. See also, for other research on grandparents in the divorce process, McCarthy and Simpson (1990).

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