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DISSOLUTION OF MARRIAGE:
PUBLIC POLICY
AND
“THE FAMILY-APART”

A thesis submitted in partial fulfilment
of the requirements for the degree of
Master of Arts

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ABSTRACT

Policy making is a process which involves negotiation and reconciliation of the economic interests and well-being of citizens. Similarly dissolution of marriage is a process of negotiation and conciliation. At the level of the family, economic resources and the social and emotional needs of adults and children are negotiated. This thesis applies Considine's value-critical model of the policy process to the laws which have governed dissolution of marriage for families in Aotearoa New Zealand since 1840.

The study has a dual purpose. One purpose is to illuminate the values which underpin dissolution policies and the second purpose is to explore the impact that contemporary policies have on family members. This qualitative study examines the policies in the context of the experiences of seven mid-life Pakeha women from long term marriages with dependent children. Legal professionals, judges and political actors share their respective professional experiences of implementing and making dissolution policy.

Literature is analysed within a policy framework that includes policy actors, the policy culture, the political economy and policy institutions. Policy documents, statutes, court cases, parliamentary debates and research studies are examined and integrated with themes that have emerged, in chronological order.

In this study the participants experiences and professional observations identify two important policy principles, gender equality and economic independence following dissolution. Those two principles are reconciled by policy makers at the level of the law and family members at the level of daily life. Some women from long term traditional marriages find that economic outcomes are not equal on dissolution when they have foregone employment to provide primary care giving for the children of the marriage. During the study it emerged that some men find custody and care arrangements difficult when they have foregone parenting for paid employment during marriage. The equal sharing of these advantages and disadvantages of marriage are at the heart of disagreement during the transition from a nuclear family to a family-apart.

Drawing from the literature and the findings seven key areas for the consideration of families and policy makers emerge. They include the interests of the children, equality, economic independence, property, maintenance, conflict, and the legal process.

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CHAPTER ONE
AN INTRODUCTION

Policy making is not simple. It involves the values, experiences and perceptions of actors in political and legal institutions, lobby groups, and incorporates the popular effects of any sensational media commentary relevant to the issue.

From time to time and issue to issue governments impose new or amended codes of practice, processes, regulations or legislation on a population. Frequently Parliament is catching up with popular practice and social realities in legislating for change. On occasion it leads the country and the world in innovative and remarkably perceptive legislation. In other situations the courts have signalled change.

Citizens bring their multitude of different experiences to the new legal environment. Inside this framework, courts, bureaucrats and advisers begin to administer the new regime, and to *make new policy*. They have to. The social, economic, legal and political environment is not frozen in time. Nowhere is this more the case than in the field of human relationships, where the need for policy making is particularly obvious when the underlying principle involves a concept such as equality.

In this thesis the test of equality is one of substantive equality. Substantive equality views advantage and disadvantage from the perspective of the social, economic, political and historical impact of laws, policies and practices on citizens. The philosophy of substantive equality rejects the notion that treating all people in the same way accommodates equal outcomes. Substantive equality is sometimes known as outcome equality.

The case study for this research is the division of matrimonial property on dissolution of marriage. The issue assembles the complex and different individual experiences of those seeking dissolution, with the politicians responding or resistant to social and political pressure, as they assess the political mileage to be made in promoting change. The courts have to interpret the statutes, and in New Zealand's history when Parliament has failed to act, they have made policy until they could stretch the parameters of the law no further. On occasions when they have been forced to find for glaring injustice, they have not been quiet in their judgments about the need for legislative change.

My interest in this research evolved from undergraduate work as a student of public policy, where I was puzzled by the absence of commentary on the courts as policy makers, and the absence of debate about the influence of the growing body of international human rights law on New Zealand's legislation and policies.

I then spent two years as an electorate agent for a Member of Parliament. Individuals who needed the assistance of the law came to the politicians office. The policy process and legal systems were not clear to them, especially in cases involving family law. They came seeking information about custody, access and guardianship disputes, domestic protection, separation, dissolution, counselling and mediation. The office was in an affluent urban area with little unemployment, a range of legal offices, a well staffed police station, a Citizen's Advice Bureau, a Women's Refuge, a legal aid clinic and a Family Court which was across the road. These enquiries were often made by people with a good education. But they were bewildered about where they should go, who they should talk to, who they could trust and how much it would all cost. My role was one of advocacy, translation of the policy process and referral.

My interest also reflects my own experience. In 1996 after twenty four years of a traditional marriage, my husband and I dissolved our marriage. We had married in 1972, an eighteen year old trainee teacher and a twenty one year old trainee surveyor, each with \$1000 in savings. We had operated a joint bank account and shared all of the resources of the marriage. Following the birth of our first child in 1978 the relationship reflected a specialisation of gendered roles. The male was the sole breadwinner. The female primary care giver was involved in the unpaid work of the household and the community. The decision to maintain this arrangement was made jointly; there was no need for a second income and the male partner was involved in an industry which required long hours and weekend work. We believed the three children would be advantaged to have one primary care giver supporting their education, extra curricula interests, social and emotional well-being and health.

At dissolution, two years following separation, I was aged forty two years and my husband forty four. The legal process and legislation which governed the division of matrimonial property was underpinned with the contemporary principles of formal equality in marriage, and a clean break split at divorce to enable the partners to get on with their own lives.

Our agreement was made at a private legal conference, after we had asked our legal advisors to leave the room. My ex-partner would meet all of the financial costs of the children's health care and education in recognition of the employment opportunities that I had foregone to provide primary child care during the marriage. For my part, I would not make any claims for spousal maintenance under the Family Proceedings Act 1980, or child support under the Child Support Act 1991. The children would continue to live with each parent on a week-on/week-off basis. The matrimonial home, chattels, cars and other real estate would be divided equally. Company shares would remain the property of my husband. Any personal gifts remained the separate property of the partner who had received them. This arrangement seemed fair to both partners of the marriage.

The agreement outcomes were as satisfactory as could be expected without requiring the intervention of the court. We were empowered by a superficial knowledge of our entitlement to half of the property of the marriage and this concept of equality was applied to our parenting plan. Both of us felt that we had a high regard for the safety of our children and an understanding of some of the implications of dissolution for children. The children were supported during the dissolution process with the additional help and interest of extended family members, significant other adults, friends and expert counselling. Adequate capital, financial resources, employment and legal knowledge cushioned the outcomes for all involved.

However my experience as an electorate agent taught me that for many other 'families-apart',¹ employment, speedy resolution and economic resources were not available. Economic outcomes are not always equal for the adults of the marriage. For some children the economic issues could overshadow other family values such as affection, loyalty, caring and love.

There were 10,008² other dissolutions of marriage in Aotearoa during 1996 and a similar average during the preceding ten years.³ Each year, forty eight

¹ The term 'family- apart' came from a statement that my daughter made. When her father and I separated, she said: 'I still belong to a family it's just a little bit different because the adults live apart'.

² Statistics New Zealand, New Zealand Official Yearbook, (Wellington,1993),p. 97.

³ Dissolution trends since the passage of the Matrimonial Property Act 1976, indicate two specific phases. Between 1976 and 1980 the number of decree absolute per annum hovered around 5,500 and 6,500. In 1982 one year following the commencement (Oct. 1981), of the Family Proceedings Act 1980, there was a sharp rise to 12,395 thereafter the number has hovered between 8,500 and 10,000 pa.

percent of those families included one or more children. I wished to clarify the impact of public policy, the law, action in the courts and the legal process on families. I planned to examine dissolution experiences in the context of matrimonial property division.

From my electorate office experience I also wished to examine the possibility of taking a more holistic approach to the implementation of the Child Support Act 1991, the Guardianship Act 1968, the legal procedures governed by The Family Proceedings Act 1980 and the Family Courts Act 1980. It was clear that 'clients' during their process saw the interconnectedness and relationships between all of the issues they were facing. But in my activities on their behalf it was not clear that those interests were reflected in the legislation, the policy process and practice.

In the following chapter I explore theories of the public policy process relevant to policies governing dissolution. I argue for an approach which acknowledges the interactive nature of policy making, identifies the value positions of, and relationships between, policy actors, policy institutions and the policy culture in the context of the political economy. A value critical perspective of the policy system provides the analytical framework.

Chapter three discusses the methodological approach taken in the thesis and the issues that arose in the course of this work. Part one of the chapter outlines feminist ethics and methodology. The second section of the chapter reflects on the research design and the fieldwork. There I explain the importance of triangulation as a strategy for establishing robust research findings.

Chapters four to nine report the findings from secondary data collection and in depth interviews with women participants, legal practitioners, judges, policy advisors and politicians. I have utilised the themes gathered from the primary data to integrate a secondary literature survey throughout. Relevant policy documents and case law have frequently been the impetus for policy change, and this has highlighted the commentary.

Chapters four to seven track dissolution policy in chronological order moving from 1840 through to the current contemporary New Zealand policy landscape. The chronological approach helps the reader to understand 'what is' as a result of 'what was'. These chapters trace historical, socially constructed, cumulative advantage and disadvantage in the framework of a

gender analysis. Chronology is an approach specifically chosen to reflect the involvement of the courts as law evolves from precedent. The journey through time provides a way of understanding what has been valued in Aotearoa /New Zealand society, and why policy embodies those values.

In chapter four I argue that dissolution policy, from 1849 -1963, evolved in political and economic circumstances which were governed by patriarchal legal norms. In chapter five I examine the family law reforms from 1963-1980 where an overwhelmingly male policy culture legislated for formal equality on dissolution of marriage. Under formal equality men and women are treated the same. Throughout the thesis I claim that gender neutral treatment can disguise inequality.

In chapter six I investigate the process of dissolution in the Family Court and compare policy principles with practice. I argue that the interpretation of the clean break principle from 1980 until 1999 has been in opposition to the core policy objective of equality. This is debated in the context of long-term marriages where women have foregone employment opportunities to raise children.

In chapter seven I suggest that the welfare of the children can be disguised by adult agendas. The interests of children are not adequately protected from what appear to be gendered battles. I highlight a disjuncture between policy and practice in the interests and welfare of the children during the dissolution process.

In chapter eight, I examine the current policy process. There I posit the possibility of judicial policy making, in the absence of legislative reform of dissolution policy principles. I suggest the application of international human rights norms in domestic jurisprudence could provide the vehicle for substantive equality in the future. In chapter nine I conclude the study, highlighting future policy possibilities and making recommendations for the direction of future research. These are presented as a submission to the Parliamentary Select Committee currently considering the Matrimonial Property Amendment Bill 1998.

CHAPTER TWO

PUBLIC POLICY: ENGAGING VALUE-CRITICAL THEORY

Policy emerges from identifiable patterns of interdependence between key social actors and citizens.¹

INTRODUCTION

In this exploratory research no one theoretical construct initially appeared to provide the framework for an investigation of the historic, economic, social, cultural, emotional and legal issues, on dissolution of marriage. An examination of the implications of people's experiences for legal policy could have been viewed from a socio legal approach.² However the law operates in a specialised framework of legal principles and rules which don't always consider the political and economic realities of day to day life. I understood policy as an integrated system. I wished to examine how policies influenced individual well-being during the transition from nuclear family to a family-apart. This required illustration through people's stories as well as an examination of the law and the policy system.

Analysis of the principles underpinning dissolution required an approach that incorporated public and private systems. The impact of public laws and regulations on the private lives of adults and children would be examined. As family members experienced the grief and loss of intimate human relationships, property and economic security, the dissolution process would be compared with policy objectives. The theoretical framework needed to encompass the macro view alongside the micro perspective.

The policies which guide the dissolution process are underpinned with the concept of gender equality in statutory and common law. The notion of gender equality is therefore central to this study. Interpretation of how equality is understood calls on theory from law, the arts and the humanities. A value-critical approach provided a framework which cut across disciplinary boundaries.

The first section of this chapter discusses value-critical theory critiquing the functional approach to public policy analysis. The chapter concludes with an examination of Considine's framework which advocates an analysis

¹ M.Considine, *Public Policy A Critical Approach*, (Melbourne, 1994), p.1.

² J.Eekelaar, and M. MacLean, *The Parental Obligation*, (Oxford, 1997), p. 2.

of the interdependence between key actors, culture, institutions and the political economy.

ENGAGING A THEORETICAL FRAMEWORK

Initial reading of the group of laws and relevant cases pertaining to the dissolution process suggested that history would be an important starting point for the analysis because the doctrine of precedent determined legal outcomes. History would provide a lens for viewing the 'wisdom' and 'power relations of the past,' and illustrate how the values and beliefs underlying the laws and policies governing dissolution had evolved.³ This would explain why 'patriarchal forms of organisation which assumed male supremacy were unquestioned and replicated in common law'.⁴ Historical, cumulative, and structural disadvantage for divorced women was a consistent theme of policy, legal text books and case law.⁵

Just as history was important to the understanding of common law, the past provided a window for understanding other policy arenas. Reflecting the indigenous Maori perspective in New Zealand, Cheyne et al. noted the importance of looking backward into the future:

*Through exploration of New Zealand historical development we identify patterns of social policy which allows us to situate present debate and provide some predictive tools for the future.*⁶

Considine linked the cultural understandings of key players to policies and, affirmed an historical approach. He identified shared understandings and

³K. Mahoney, 'Gender Issues in Family Law- Deconstructing Husband Privilege.' *New Zealand Law Society Family Law Conference* (Wellington,1995),p.3. p.3.

⁴K. Mahoney, p.3.

⁵See: L.Weitzman, *The Divorce Revolution:The Unexpected Social and Economic Consequences for Women and Children in America*, (New York, 1985)

L. Stone, *The Family Sex and Marriage in England 1500-1800*, (London,1977)

B. Aitkin et al, *The Report of the Working Party on Matrimonial Property*, (Wellington,1988)

R. Phillips, *Divorce in New Zealand: A Social History*, (Auckland,1981)

I.Jalal, *Law For Pacific Women, A Legal Rights Handbook* , (Suva,1998)

J.Krauskopf and C. Krauskopf, *Comparable Sharing in Practice: A Pilot Study of Results Under the Matrimonial Property Act 1976*, (Wellington,1988)

M.McPherson, *Divorce in New Zealand*, (Palmerston North,1995)

K.Funder, *The Economic Consequences of Marriage Breakdown*, (Melbourne,1985)

C.Bridge, 'Reallocation of Property After Marriage Breakdown', in M. Henaghan, and B.Aitken, *Family Law Policy in New Zealand*, (Auckland,1992)

J.Eekelaar, and M. McLean, *Maintenance After Divorce*, (New York,1986)

Hoffman v Hoffman [1965] NZLR 793

Pettit v Pettit [1970] AC777; [1969] 2 All ER 385

E v E [1971] NZLR 859

Haldane v Haldane [1975] 1 NZLR 672

Moge v Moge [1992] 3 SCR 813 Supreme Court of Canada.

Z v Z (1996) 15 FRNZ 88, [1997] NZLR241(CA)

⁶C.Cheyne,M. O'Brien, and M. Belgrave, *Social Policy in Aotearoa, New Zealand*, (Auckland, 1996),P.16.

values as the source of agreement and disagreement for the analyst who was tracing policy patterns and trends.⁷ In the context of the law this would demand an examination of the values of judges, lawyers, politicians and key activists who played a part in the reform of dissolution policies in New Zealand political and legal history.

Martin Rein, discussing the theory fact value relationship known as policy 'framing,' posited that 'value-critical inquiry' was needed and it should be politically interested in the past but remain focussed on the implications for current and future issues.⁸ For this study an understanding of women's struggle for equality in the law and political participation would identify values, policy themes and trends which have contributed to current interpretation of law, policy and government.

My research was initially designed to explore the impact of matrimonial property policies and legal practices for *women*. In historical readings, property issues were the focus of the policy debate. But in the contemporary context, it was immediately apparent that division of property did not paint a complete picture of the impact of dissolution on people's lives. Interviews with participants identified that the economic and social outcomes for women, *or any other family member*, could not be viewed simply from a legal or matrimonial property perspective. It emerged that the work should encompass an examination of the 'group of policies' governing marriage dissolution for the *family*.

The state governed various sites of family life at dissolution. Boyd from a feminist legal perspective agreed:

An analysis of "the State" is necessary in order to understand legal developments related to "family" that are relevant to efforts to combat oppression of women .⁹

The state played a role in the dissolution process through the courts and governed the redistribution of resources in respect of spousal and child maintenance. Policy trends would identify central themes which influenced the lives of individual members of the family-apart, in particular financial support for spouses parenting alone, the guardianship of children, and property ownership for the non-earning partner in the marriage. The analysis would therefore include an examination of policy which emerged

⁷ M.Considine, p.8.

⁸ M. Rein, *Value-Critical Policy Analysis* in D.Callahan, and B.Jennings, [eds] *Ethics, The Social Sciences and Policy Analysis*, (New York, 1983,)p.100.

⁹ S.Boyd, (Re)placing the state: *Family Law and Oppression*, Canadian Journal of Law and Society, 39. (1994), p. 39.

from the courts the legislature and associated ministries and departments.

THEORIES OF PUBLIC POLICY

One approach to public policy analysis has been to separate the discipline into two groups, 'analysis of policy' and 'analysis for policy'.¹⁰ This study required an understanding of both. An examination of the content and context of dissolution policies would reflect an analysis 'of policy'. Understanding would also be gained through an analysis of the policy making process. Ultimately the work would present alternative ways of viewing issues 'for policy' makers and provide advocacy for families. This study is therefore inclusive of both categories, the study 'of' and 'for' policy.

Scott posited a similar conceptual model to describe this distinction but used different terminology, defining the nature of public policy as 'descriptive' or 'prescriptive'. She identified the former as concerned with examining 'what is' and the latter as having a focus on 'what should be'.¹¹ This was a theoretical view echoed by Hill, but he contested a clear division between types of policy analysis. 'It [wa]s impossible to maintain rigid distinction between prescription and description because so many of the authorities on the policy process ha[d] combined the two'.¹²

In my analysis, I aimed to paint a multi dimensional picture in which 'description' was interpreted, textured and layered for a presentation of a variety of viewpoints. The policy possibilities for policy makers and options for families would not merely be a 'prescription' for change but would also include ideas for innovative choices, which encouraged co-operation, consultation and resolution of conflict during the dissolution process.

History had demonstrated that traditional power imbalances - male/female, adult/child, a competition for resources, conflicts of interest for physical and emotional well-being, had been mirrored institutionally. Historically, prescribing for policy change had assumed the authority of one dominant viewpoint. In 1999 I anticipated that the findings would involve complex options and that no one 'prescription' could claim to resolve or explain policy issues applied to the myriad of individual cases.

¹⁰ I.Gordon, J.Lewis, and K.Young, "Perspectives in The Policy Process," (2nd ed) in M.Hill,(ed), *The Policy Process* (Herfordshire,1993),p. 5.

¹¹C.Scott, 'The Nature of Public Policy', in Miller, R. (ed) *Politics In Transition*, (Auckland,1997), p. 248.

¹²I.Gordon, J.Lewis, and K.Young, in M.Hill, p.26.

Research that examined the policy process and advocated possibilities for change, aimed for what Lindblom referred to as 'an education and an enlightenment and liberation for leader and citizen alike'.¹³ My objective was to inform policy makers and empower ordinary families. This work could therefore be theoretically positioned in the tradition of critical policy action research. Rein noted that 'policy ... [wa]s grounded in [political] action, not as an afterthought, but as an essential feature of policy'.¹⁴ He identified that one of the tasks of analysis was 'to bring evidence and interpretation to bear in decision making and social practice'. Henaghan and Tapp confirmed that 'critical legal studies scholars believe that the law is not an entity of its own but is a part of the body politic'.¹⁵ If the work was to be of use to both policy makers and citizens, an understanding of decision making practices would require an approach which cut across disciplines and was conducted in more depth than simply description or prescription.

Green, from a sociological perspective, advised readers that the analytical aim was one of critical analysis across theoretical boundaries:

*The purpose of the social science exercise is to encourage you to reflect on your own perspective and deepen your understanding of the issues ... If, as a social problems analyst, you proceed by expanding your critical capacity to understand and reflect on problems from rival and conflicting theoretical perspectives, your growth and your depth of understanding should be greatly enhanced.*¹⁶

A similar call for breaking down the boundaries between disciplines came from Boulding, who lamented the constrictions of theoretical approaches imposed by academic disciplines:

*I have been gradually coming to the conviction, disturbing for a professional theorist, that there is no such thing as economics - there is only social science applied to economic problems. Indeed, there may not even be such a thing as a social science - there may only be general science applied to problems of society.*¹⁷

A cross cutting, or multi-disciplinary approach to theoretical literature was required in order to identify the consistent themes of theoretical paradigms. Economic and social theory, public policy and political literature were

¹³ C.Lindblom, "Who Needs What Social Research For Policy Making," *Evaluation Studies Review Annual*, 12. (New York,1987), p.177.

¹⁴ M.Rein, p.8.

¹⁵ M.Henaghan, and P. Tapp, 'Legally Defining the Family' in *Family Law Policy in New Zealand*, M.Henaghan, and B. Aitken, (eds) (Auckland,1992),p.1.

¹⁶ P.Green, *Studies in New Zealand Social Problems*, (Palmerston North,1990),p.26.

¹⁷ C.Boulding, in Waring, M.*Counting For Nothing :What Men Value and what Women are Worth*. (Wellington, 1988), p.263.

generally divided into three main themes: structural determinancy, rational actor theory and meaning systems. Pal¹⁸ proposed a useful explanation of the three theoretical perspectives. She differentiated according to actors, behaviour and structure. She identified 'structural determinancy' as an example of behaviour determined by structural forces influencing actors in the system. The examples she cited were feminism and marxism with their 'focus on the power of primary structures'. Secondly, she identified rational actor theory as 'self interest maximisation of benefits and accurate information of self'. She linked 'mainstream micro - economic theory' to this model as a 'quintessential example of rational actor theory'. Here the rational actor made decisions according to individual choices and weighed up structure and options with his/ her own needs. Implicit in this theory was the assumption that those 'actions would be replicated by other individuals under the same circumstances and that market forces would determine options'.¹⁹ Finally, Pal referred to a group of theories or 'meaning systems' as 'a family of theories'. This combination of theoretical positions gave the rational actor more autonomy and was focussed on the 'origins of people's choices', from a plurality of social, economic and political factors.

In the context of this study, structural determinancy as a framework on its own could not be satisfactorily applied, due to the complexity of social structures and values in the modern state. While the social structures governing outcomes would no doubt explain particular disadvantages, society was not clearly defined by the power struggles of class, ethnicity, gender or labour. Other textured factors at a micro level such as education, age, technology, social mobility, skill, time, responsibilities for childcare, property ownership, work place policies, and state benefits suggested that structural determinancy would provide a simplistic explanation of the emerging issues. In the wider context external international forces at the macro level such as technology, communication, economic depression, economic growth and environmental forces influenced outcomes of policy. These issues also deemed structural determinancy unitary. A structural analysis would need to incorporate the more immediate micro issues experienced at the day to day level of the individual family, and the external influences of international forces at the level of governance. A consideration of both was necessary.

Rational actor theory, with its central focus on market forces, was an unworkable framework as it appeared that some people were disadvantaged no matter what choices they made. Specific economic indicators vulnerable

¹⁸L.Pal, *Public Policy : An Introduction*, (Ontario, 1992), p.28 -33.

¹⁹ L.Pal, p.28-33.

to the vagaries of the competitive market, such as levels of unemployment, clearly reinforced structural inequality. The theory did not provide a framework through which to view the competing values and agendas of the policy institutions or policy actors who legislated for gender equality, and who interpreted and implemented policy when marriage dissolved. Rational actor theory was silent about historical, cumulative, structural disadvantage.

Pal's third major theme of 'meaning systems', which acknowledged a plurality of contested relationships, was most applicable, as complex interactions could be analysed. Considine, who viewed policy making as a complex process with its own history, also defined public policy systems as 'meaning systems'. He noted that policy systems 'contain[ed] means by which issues, problems and solutions [we]re evaluated and valued'.²⁰

Rein's inclusion of competing frames similarly acknowledged diversity. He identified similarities and differences, policy overlaps, intersections, omissions and conflicts as critical to the analysis. Towards a more profound understanding of public policy he said:

*We must continue to yearn not for a theory of politics or sociology or economics but for a theory of political economy that takes account of the historical and social contexts. In the absence of such a unifying theory, we are faced with multiple perspectives as a description of the world we inhabit at present Increased knowledge deepens the perspectives and exacerbates the problem of multiple perspectives. Perhaps we can elevate the disagreement to a higher level of understanding, where we can appreciate why the disagreements we hold are important.*²¹

An examination of contested positions was important in the context of the conflict experienced during the dissolution process. Rein's position not only acknowledged diversity and complexity but also asked why contestable positions evolved.

Policy analysis that was simply descriptive or prescriptive was at risk of focussing solely on the role of government. In the New Zealand context Scott had acknowledged that, 'ideology, international trends, historical and cultural factors,'²² influenced policy making. Such an analysis could acknowledge diversity and complexity while remaining silent about issues of social need and social impact. Scott also located public policy as 'fundamentally defining the appropriate scope and role for the government

²⁰ M. Considine, p. 48.

²¹ M. Rein, p.95.

²² C.Scott, p. 248.

²³ C.Scott, p. 247.

and the public sector'.²³ This could be viewed as an instrumental position which focussed from issue to issue, on a cost benefit exercise, the costs to government, and excluded analysis of social impact. March and Olsen argued that such an approach constructed policy theory as rational theory, one of 'choice and a study of costs'.²⁴ The risk of exclusion for disadvantaged groups was high when interpretation excluded analysis of the processes of consultation and underpinning values of decision makers. In the context of this study a functional approach would have focussed on the cost to the state of social support systems such as the domestic purposes benefit and legal aid, and remained silent about the consequences for citizens. The instrumental perspective failed to view the wider systemic picture and often failed to address social impact. External factors could be excluded from the analysis.

Considine's systems approach and Rein's frames departed from this instrumental view. The critical difference was the complexity of relationships between the consultative roles of policy actors with citizens and interest groups and institutions. Considine in particular argued against defining policy as simply a governmental authority for the allocation of resources toward specific values because such an approach was:

*... likely to see policy as a game to be assessed by a scoreboard rather than through an understanding of what happens on the field of play, or for that matter in the audience The policy world appears as a game played by a few specialists and their elite patrons. The social environments or contexts which give meaning and support to these players is often obscured, and regularly omitted altogether.*²⁵

Conversely when decision making processes were transparent, relationships between policy actors could be evaluated. Considine's focus on policy systems was more than a theory of relationships between elite actors.²⁶ He argued for a deconstruction of institutional and cultural processes to uncover communication patterns that exposed 'streams of attachment' which then 'informed decisions and explained innovations'.²⁷ Such a deconstruction could also identify sites where policy had been silent, as well as active, assisting exposure of policy decisions.

²⁴ J. March, and J. Olsen, in M. Considine, p.3.

²⁵ M. Considine, p.3.

²⁶ The classical elitist position... maintains that political elites achieve their position in a number of ways: through revolutionary overthrow, military conquest, the control of water power...or the command of economic resources... Where it does this elite theory begins to merge with another important approach to the study of power - Marxist theory.' M.Hill, p. 42-45.

²⁷ M. Considine, p.4.

While Scott had acknowledged that public policy often extended beyond the direct activities of a government 'because of its concerns about the interface between private and public actions',²⁸ Considine suggested that the private public interface was more complex than the language suggested. He claimed the distinction between private and public was an oversimplification and stressed that the two were intertwined. 'Markets used money as the measure of value, however in families values may have been based on affection and common interests or beliefs'.²⁹ Recognition that values differed between the two sites of action provided the bridge from the macro world of policy to the micro context of family systems.

Values would intersect and overlap at dissolution. Dissolution of marriage was a life transition when public rules regulated private behaviour. In the public sphere values were 'intimately located in the framework of rights'.³⁰ At dissolution contributions to a marriage, previously given out of love, loyalty and caring were redefined as contributions of a monetary value. When marriage ended, private values were measured against public rights and resource allocations were central.

Considine's approach was a critical consideration for my study. I wished to explore the relationship between family values and rights. I wanted to know how family relationships influenced peoples access to legal rights. I aimed to investigate whether the legal 'rights claimed' were different in any way from the 'rights available' and how choices were influenced by specific family values, beliefs and legal practices.

Where resource decisions were made to balance advantage and disadvantage, Lindblom separated the analysis of policy into two separate areas. He believed 'there [wa]s a place for knowledge' and there was 'a place for commitment or choice ... in the making of public policy'. He posited that, 'knowledge involved research, choice involved politics and the two should not be confused'.³¹ When decisions were made that had the effect of advantage or disadvantage, Lindblom argued that even the Pareto efficient solution³² 'was not necessarily the best choice',³³ and the 'protection of the

²⁸ C.Scott, p. 248.

²⁹ M. Considine,p.5.

³⁰ M. Considine,p.5.

³¹ C.Lindblom, (1987), p.166.

³² Pareto efficiency : "An increase in total welfare occurs in conditions when some people are better off as a result of change, without at the same time anyone being worse off."Pareto,V.*The Penguin Dictionary of Economics*, (London,1984),p.339.

³³C.Lindblom, (1987), p.166.

³⁴C.Lindblom, (1987), p.166.

civil liberties of minorities was an example that he applied'.³⁴ This was an argument for affirmative action. Affirmative action was a political decision to provide opportunity or advantage for a particular section of society, in recognition of disadvantage. Equality could be achieved by balancing the allocation of resources to recognise opportunities forgone, crisis events or disability. When policy research focussed on available resources and revenue, and excluded interpretation of political and personal agendas, policy making became the work done by groups of policy actors who 'use public institutions to articulate and express the things *they* value'.³⁵ This was in direct contrast with policy analysis that investigated linkages between diverse values, authority and resources. Considine's value-critical model embraced the total policy picture, values, authority and resources.

VALUES

*The reality today is that law is just as much about choosing values as it is about choosing precedents. This is particularly so as you move up the judicial chain to the appellate level which is concerned not just with its error correcting function but also with its law making function. Today more than ever before judges are called upon to weigh and balance competing values in reaching decisions.*³⁶

For the purposes of this study, identification of competing values would require an examination of policy alongside analysis of the values of key legal and political actors. Scott claimed policy was 'normative and very much centred on addressing policy priorities of the government of the day'.³⁷ Value-critical analysis would investigate wider consultation processes and the contested values of the main actors in other institutions, examining priorities and comparing them with the policy making agenda of the government of the day.

Identifying values as 'the building blocks of culture',³⁸ Considine reminded analysts of the need to seek information that was excluded as well information that was included when searching sources such as speeches, debates and submissions. Purposeful omission was a strategy to 'avoid controversy'.³⁹ As an example he advised the analyst to identify gendered speech as a way of understanding 'unstated assumptions'.⁴⁰ Such tools of analysis called attention to the policy culture, linked values and assumptions

³⁵ M.Considine, p. 4.

³⁶Hon. Catherine Fraser, Chief Justice of Alberta, *Judicial Awareness Training*, 29th Australian Legal Convention, Brisbane, 25 September, 1995.p.13.

³⁷ C.Scott, p. 248.

³⁸ M.Considine, p.14.

³⁹M. Considine, p.14.

⁴⁰ M. Considine,p.14.

together into regularly used categories and gave the analyst evidence of values being communicated. These were valuable models for the purposes of this study, as I looked to compare legislative objectives with social, legal and economic consequences.

Rein had confirmed that repeated themes should be identified, as these painted a more transparent picture of the underpinning values of the actors, institutions and citizens in policy systems. To Considine this was critical if contemporary analysis was to address the need 'for a type of policy response where the complexity of the problem [wa]s matched by the complexity of the solution'.⁴¹ When policy actors were made aware of the values which underscore conflict, difference and diversity, then there was potential for innovative policy negotiations, which in turn resulted in superior policy solutions. Hon Catherine Fraser Chief Justice of Alberta agreed, she said:

*Judges cannot ignore the fact that in all areas of law, values often influence the judicial decision making process. That is why an understanding of the values of others and an awareness of how one's values affect the judicial decision making process are the key to judicial fairness.*⁴²

Considine's view of policy making is useful as it illustrates the interwoven nature of policy making. It acknowledges that judges, parliamentarians citizens and lobbyists are included in the process. His model of public policy as a system is an abstract frame illustrated as a diamond, (see Figure 1). The four interrelated sub-sets of the policy system are represented and linked. Interactions and negotiations may be visible to the public, yet the framework is deemed invisible as an identifiable system in every day life. This idea that the policy system emerged from a group of identifiable 'sub-systems' evolved from organisational theory and has subsequently been applied to political science and public policy.

SYSTEMS THEORY AND THE PUBLIC POLICY PROCESS.

*The complex relationships between human beings, material conditions of life, social institutions, and the various discourses and practices, including law, that emanate from within the state must carefully be analysed. The question is, how best to seek to understand the complexities of these relationships?*⁴³

⁴¹ M. Considine, p. 254.

⁴² Hon. Catherine A. Fraser, p.15.

⁴³ S. Boyd, (Re)placing the state: *Family Law and Oppression*, Canadian Journal of Law and Society, 39 . (1994), p. 40.

Systems theory evolved as a method of explanation of the complexity of communication systems. In the social sciences, systems theory emerged from organisational theory. The open systems approach viewed institutions as a 'whole biological or organic systems', working towards equilibrium with the external and internal environment.⁴⁴ This was one way of understanding complex relationships between bureaucracies and the wider social, legal political and economic environment.

Easton transposed a systems approach to political science theory. He saw political systems as similar to 'biological systems' in an environment which contained other systems including 'social and ecological systems'.⁴⁵ The political system, to put it simply, was a conversion process for turning inputs, (demands and support) into outputs (decisions and actions), a functional approach. Easton argued that political activity sought equilibrium in order to adapt and survive.

Considine took a different view from Easton. He questioned the ability of systems to make choices about circumstances and suggested that systemic responses to external forces should be clarified so that 'the real actors could be identified'.⁴⁶ This idea was central to my study. The relationship between the legislature and the courts, statutory and common law, judicial policy making and discretion was at the heart of this enquiry.

As an explanation of the policy process Considine developed a model which evolved from open systems theory. The framework clarified interrelationships by breaking them into working parts for closer scrutiny. Policy emerged from formal and informal negotiation and decision making, with the most formal interactions involving the state. This simple framework provided a structure for the study of a complex and sometimes invisible process. Easton's input output model was more functional and exclusive to formal negotiation and authority. Considine suggested that Easton had omitted 'the social basis of conflict' and claimed it was a 'top down view of organisational theory'.⁴⁷ The analysis of power relationships in social conflict could not be omitted. Gendered power imbalances were played out in the courts, in private legal offices, in the media and in Parliament. Power imbalances were located at various sites of, money, knowledge, employment status, age, the gendered division of labour and the legal process.

⁴⁴ M.Considine, p.169.

⁴⁵ D.Easton, in Hill,p.20.

⁴⁶ M.Considine,p. 27.

⁴⁷ M.Considine,p.173.

Imbalance in power relationships were also evident inside the state institutions. Political power over the policy system was deconstructed by Edelman. He noted that political actors manipulate the policy climate to suit their own agenda, rather 'than tackling social problems'.⁴⁸ Rhetoric and action were not always linked. A comparison of speeches and debates with policy initiatives would expose linkages between rhetoric and action. Dye similarly highlighted the flaws of policy analysis that focused 'primarily upon the activities of governments, rather than the rhetoric of governments'.⁴⁹ The policy process could be traced through formal documentation and the media. If political rhetoric was followed by silence or action was deemed inappropriate, competing agendas were voiced and could be monitored.

One critique of open systems theory was the lack of focus on decision making processes. Hogwood and Gunn broke decision making into stages, and Braybrook and Lindblom agreed the 'process was incremental'.⁵⁰ Considine drew on this idea of an more incremental approach. He focussed on policy analysis which explored decision making processes, power relationships, values and streams of communication.

SYNTHESIS OF THE THEORETICAL FRAMEWORK.

Considine proposed that policies emerged as innovations from complex policy systems. His framework incorporated policy actors, policy culture, policy institutions and political economy. Exploration of patterns and relationships between those sectors clearly transposed to a research framework for this study.⁵¹ Each of the social, legal and institutional areas to be explored was mirrored in the Considine diamond.⁵² In the context of this research the policy institutions to be examined included the Family Court, High Court and Court Appeal, Parliament, Select Committees, Ministries and Departments. These would be sites which explained resistance and change in policy making. While these institutions controlled the authority and resources needed to sustain and implement policy, other institutions would also need to be involved. These would include organised lobby groups, from the New Zealand Law Society to the National Council of Women and Fathers Rights and Equality Exchange (FREE). And the wide range of informal societal 'values' reflected as views in the media.

⁴⁸ M.Edelman, in M.Hill,p.22.

⁴⁹ Dye, in M. Hill, p.22.

⁵⁰Braybrook and Lindblom in M.Hill, ,p.23.

⁵¹ See Figure-1.

⁵² See Figure-1.

An examination of the political economy within specific time frames would clarify the boundaries between state and private provision, intervention and regulation. The role of cultural values would be examined through 'the expression of assumptions, categories, and languages'.⁵³ Women's stories, legal cases and law reports would provide illustration in the analysis. Judges, politicians, policy advisors, and legal professionals were the policy actors who linked with individuals and institutions. They would contribute to an understanding of the implementation of policy.

In the Considine model, material choice and the targeting of resources was cross referenced with the analysis of power. The cross cutting of theoretical perspectives allowed examination of outcomes for families alongside an analysis of the specific policy and practice. The inclusion of processes, resources and values recognised that material issues could not be explained without consideration of the cultural and political issues involved. No one policy initiative or sector existed in isolation.

The strength of Considine's model lay in the interface between theory and practice. He had observed that innovative policy making emerged from 'co-operative action among those with a stake in a valued outcome, even when that stake was different from one actor to another'.⁵⁴ Likewise Hill had acknowledged 'the validity of competing frames of reference'.⁵⁵ The idea that contestable viewpoints could work in policy co-operation was one which acknowledged difference as a valuable component of multi-dimensional policy making, at the level of the state, or when couples divorced.

This framework provided an holistic approach in which 'none of the organs c[ould] be viewed as indispensable'.⁵⁶ The way in which each of the 'organs' were defined can now be discussed in direct relationship to the fieldwork and design from the data gathering components of this research.

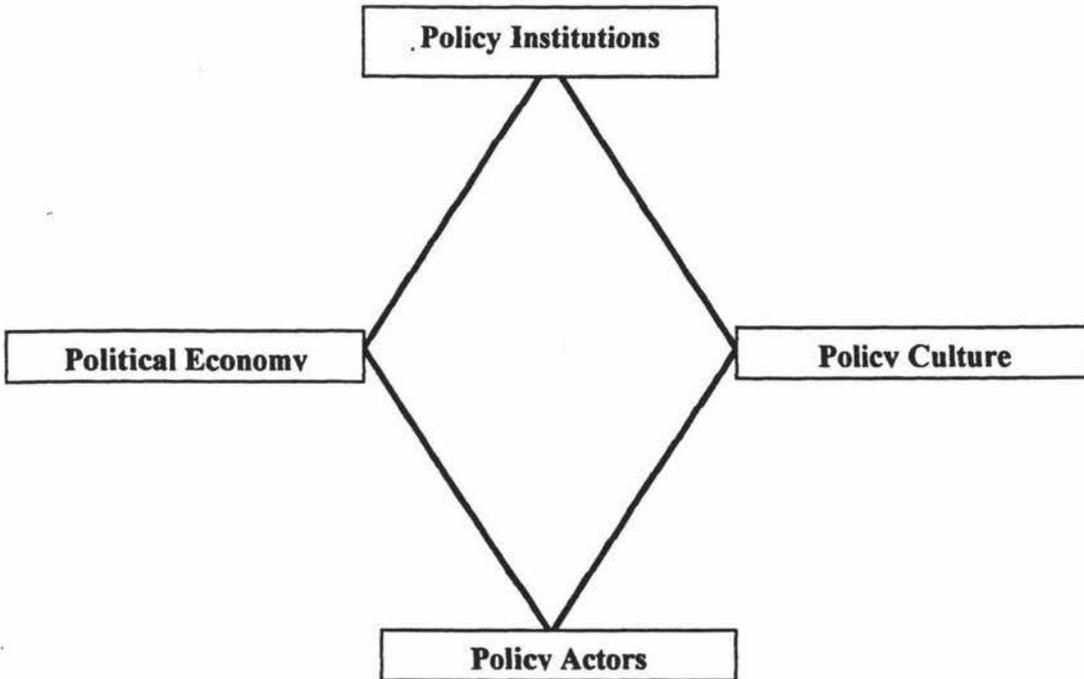
⁵³ M.Considine,p.14

⁵⁴ M.Considine,p.23.

⁵⁵M.Hill, (ed),*The Policy Process* (Herfordshire,1993),p.25.

⁵⁶ M.Considine, p.170.

POLICY SYSTEMS: Considine 1994:9



POLICY SYSTEM: Dissolution of Marriage

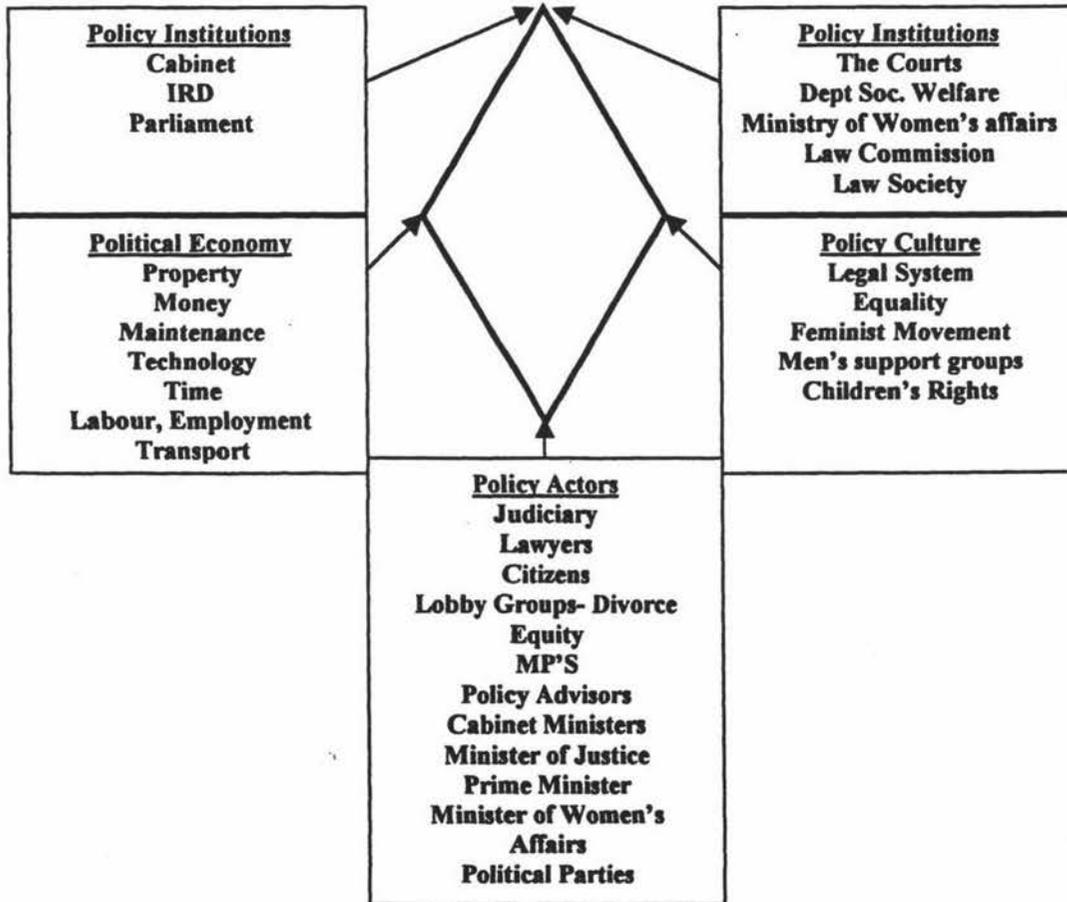


Figure 1.

CHAPTER THREE

THE METHODOLOGICAL APPROACH

The economics of marriage must be viewed qualitatively rather than quantitatively.¹

INTRODUCTION

This chapter outlines the research methodology, design, ethics, and the fieldwork approach of the study. Firstly I argue the relevance of qualitative feminist methodology in the context of the ethical considerations for this research. In the second section of the chapter, I outline the research design and multi method fieldwork approach, utilising the guidelines for gender analysis from the New Zealand Ministry of Women's Affairs. Finally I explain triangulated data analysis in the context of Considine's value-critical framework of public policy systems. Throughout this chapter I reflect on the implementation of the research.

QUALITATIVE RESEARCH

Qualitative research methods have become increasingly important modes of inquiry for the social sciences Feminist research and critical ethnography, as well as action and participatory research, all intended to radically change fundamental social structures and processes and to reconceptualise the entire research enterprise.²

The nature of this study required a qualitative approach which would 'emphasise the reality and the details of how people organise[d] their lives'.³ Tolich and Davidson noted that qualitative research sought to understand, 'human social action' while recognising the influence of 'the beliefs and intentions of the actors in terms of the meanings which those actors attributed to them'.⁴ Like Rein, Lindblom, and Considine, whose views were discussed in the previous chapter, Tolich and Davidson saw human action as reflecting 'value' or 'meaning' systems.

The collection of qualitative data was a research strategy which would enable me to explore the complexities of the dissolution process from a variety of

¹ Judge Abella, 'Economic Adjustment On Marriage Breakdown,' in *Moge v Moge* (1992) 43 R.F.L.(3d) 345 at 52. Supreme Court of Canada.

² C.Marshall,& D. Rossman *Designing Qualitative Research* , (California, 1995), p.1.

³ J. Finch, *Research and Policy: the Uses of Qualitative Methods in Social and Educational Research*, (London,1986),p. 79.

⁴ D. Tolich, and C. Davidson, *Starting Fieldwork: An Introduction to Qualitative Research In New Zealand*. (Auckland,1999),p.25.

perspectives. An holistic view recognised that the dissolution experiences of families were complex, socially constructed journeys. People's private experiences could not be explored without consideration of the external influences of the political economy, policy culture, policy institutions, or the decisions of policy actors. The qualitative paradigm 'assert[ed] that no problem c[ould] be understood or solved in isolation from its greater environment'.⁵

I adopted the qualitative technique of semi structured, in depth interviewing and participant observation. But I was conscious that the transition, from conceptualising the research topic to 'real world' qualitative research in the field, required mediation of the tensions between ethical practice and critical analysis. Finch articulated that tension thus:

*Enthusiasm for promoting qualitative research as being of direct usefulness to policy makers must be tempered by a recognition that this is a situation in which ethical issues are raised in a sharp form.*⁶

I planned to interview divorced women, female and male policy and legal professionals. When considering the objectives of the interview process with women, I was sensitive to the need to create an equal relationship between the interviewer and the interviewee. I was aware both of the pain and trauma that might surface for the participant during the interview, and that such questioning could be viewed as an invasion of their personal lives.

When interviewing legal professionals and policy makers I aimed to be mindful of my position as an outsider to the legal system and policy process. I was aware that the issues being discussed might have been politically sensitive. The employment of policy makers may have been contingent on their serving the interests of the government of the day. The judiciary was guided by the democratic convention which maintained a separation of powers. They could not appear critical of the legislature.

The inclusion of participants from the grass roots of the community, legislators, policy advisors, judiciary and legal professionals, was what Finch referred to as 'direct engagement' with policy making from an 'up, along and down model'.⁷ This blended well with Considine's model of the policy process as an interactive system. While such research could provide a diverse range of policy possibilities, the collection of information from differing standpoints required a careful consideration of ethical issues before I could begin.

⁵ Tolich, and Davidson, p.27.

⁶ Finch, p. 72.

⁷ Finch, p.89.

FEMINIST ETHICS

Having experienced dissolution of my marriage I was a participant observer in this research, passionate about exploring the outcomes of dissolution for women and children. In Rein's terms, I had a "value" position:

Our values give us the energy to think. They inspire our curiosity because they offer attachment, concern and commitment. The more we try, as an ideal, to root values from our inquiry, the more uninteresting and pointless the inquiry becomes.⁸

I was transparent about my values and my lack of clinical detachment. Validating this position Denzin had concluded that 'value free interpretative research [wa]s impossible'. Of more importance he also believed that 'unless these values [we]re clarified, their effects on subsequent interpretations remain[ed] clouded and mis understood'.⁹

As an undergraduate student, I had conducted pilot research about the division of property for women on dissolution of marriage. I had investigated four case studies of women's property settlements and reported the findings in the context of a submission to the New Zealand Human Rights Commission. The submission concerned potential breaches by New Zealand of international human rights conventions when outcomes under the Matrimonial Property Act 1976 did not reflect the equality rights under the Human Rights Act 1993, or the United Nations Convention For the Elimination of Discrimination Against Women (CEDAW), which New Zealand had ratified and was signatory to. That study raised many questions which required a detailed investigation of the complex interactions which influenced the outcomes I had observed. I was interested in the issues in the context of public policy making and the implementation of policy.

After submission of my initial ethics application for this research, I was advised that the Massey University Human Ethics Committee wished to question me about my proposal by telephone conference. It was compulsory to participate in this process as the Ethics Committee did not meet in Auckland, and without a meeting to resolve the issues permission to proceed could not be granted. During the conference call I perceived the interview in both form and substance to be an ethical paradox.

As a participant in the Ethics Committee telephone conference I discovered the potential power inequalities inherent in interview techniques. As a student I was interviewed by twelve professionals. I also gained an

⁸ Rein, p.90.

⁹ D.K. Denzin, *The Research Act In Sociology*, (3rd ed) (London 1970),p.23.

understanding of what it might feel like if a researcher requested participation without providing the participant with adequate information in a timely manner. I was not provided with clear verbal or written information about the issues on which committee members wished to question me before the conference.

The conference call lasted for forty five minutes. Committee members were present at the Palmerston North Campus. I was at home alone. Initially they suggested several minor format changes, but some of their latter questions referred to three more critical matters, which I will now use to discuss significant ethical issues.

Firstly, they identified the issue of 'partisanship', and queried my personal involvement in the topic. They suggested the topic was too close to my experiences. They feared the work could be viewed as biased. Secondly, they were concerned that I had claimed a 'feminist methodology', they asked what feminist method was. Thirdly, there were fears that my idea to offer to babysit for women in exchange for time, and the provision of a small gift or morning tea for professional participants, may have been perceived as 'enticement' to participate.

In response to the issue of partisanship, I explained that I was openly partisan, and that this was not uncommon in social science research, or other so called objective disciplines. Neutrality was not in evidence in any of the background reading in legal or social science texts. Action research was passionate, and of its nature, partisan. Specialists endorsed such an approach:

In recent years, some qualitative researchers ha[d] abandoned the pretence of neutrality and developed research that [wa]s openly ideological and had an empowering democratising purpose.¹⁰

Lindblom suggested that partisan studies were of no less value in policy making than non partisan enquiry:

Research and analysis can at best be no more than a part of the social problem solving, and the short comings to be feared from partisan analysis are really inevitable limitations on any and every attempt to reach an outcome through research and analysis.¹¹

Marshall and Mossman suggested that the trustworthiness of qualitative data was more important than partisanship:

Far from the dispassionate scientist of the past, the qualitative researcher cares deeply about the substance of the inquiry at hand.

¹⁰ Marshall, & Rossman, (California, 1995), p.3.

¹¹ Lindblom, C. *Who Needs What Social Research For Policy Making*, (London, 1987), p. 173.

*This should not suggest that the researcher is biased or subjectivist Rather, qualitative inquiry acknowledge[d] that all social science research may well be subjectivist and shifts discourse to a discussion of epistemology and strategies for ensuring trustworthy and credible studies.*¹²

Political science literature confirmed that this was an acceptable position in the field of policy research. Lindblom argued for the valuable role that partisanship contributed to the public policy making process thus:

*Partisans tend to develop alternative versions of the public interest rather than ignore it. That is often the best a society can do: acknowledge conflicting versions and work out - politically, not analytically, - a resolution.*¹³

Secondly, in respect of feminist methodology, I outlined the basic principles of feminist research practice. I noted that feminist methodology involved a multiplicity of theories, methods, perspectives, ethics and was a totally inclusive approach.¹⁴ Cook and Fonow had described feminist research as 'challenging objectivity' and 'consciousness raising'. They refuted the notion that personal experiences were 'unscientific' and noted that feminist research focussed on 'ethics'. They also acknowledged that feminist research was a 'political activity'.¹⁵ Other important features of feminist methodology were mutual respect, an equal relationship between the researcher and the researched and reciprocity.

I explained that a feminist methodological approach aimed to effectively engage the researcher's personal involvement, encourage mutual respect and an equal relationship between the researcher and the researched. As Ann Oakley had written:

*Personal involvement was more [important] than dangerous bias - it [wa]s the condition under which people c[a]me to know each other and admit others into their lives.*¹⁶

Finally, I confided that my understanding of reciprocity was explained through the notion of gratitude. I wished to demonstrate my thanks to participants for sharing their personal experiences with me. Oakley had noted that there was 'no intimacy without reciprocity'.¹⁷ I argued that

¹² Marshall & Rossman, (California, 1995), p.7.

¹³ Lindblom, p.172.

¹⁴ S.Reinharz, *Feminist Methods In Social Research*, (New York,1992), p.8.

¹⁵ J. Cook, and Fonow, M. (1986), in L.Stanley, and S.Wise, 'Feminist Praxis: Research', *Theory and Epistemology In Feminist Sociology*, (London,1990), p.38.

¹⁶ Oakley, "Interviewing Women: A Contradiction in Terms," in H.Roberts, (ed) *Doing Feminist Research*, Routledge, London. (1981),p.64.

¹⁷ Oakley, p.64.

reciprocity was no more than good manners. The offer to repay the women's time by babysitting would not equal the personal 'value' of the information the women were sharing with me. A small gift would never repay the material 'value' of an hour of a legal professional's time. A retrospective token of thanks would not be judged as an enticement. A small gesture following the interview process was merely a symbol of my gratitude for the participant's contribution to the body of the work.

My responses met with partial satisfaction. The committee did not continue to question a feminist approach or the notion of reciprocity. The chairperson, however, guided, advised and invited me to restate my research aims and change my information sheet from my initial statement which was :

The main objective of the study is to illustrate why the Matrimonial Property Act is not fulfilling its aims of equitable distribution of property between spouses at divorce. Specifically the study aims to highlight outcomes for partners in the unpaid work of the home with custody of the children of the marriage, overwhelmingly women.

I agreed that my wording read as if the Act was not fulfilling its objectives in all circumstances. My statement was too general. However the committee's resolution was also problematic. The new statement suggested by the committee intended to reflect the work as non partisan. The object then was: 'research to confirm or refute unequal outcomes for women following dissolution of marriage'. I was instructed to re-word the information sheet 'without declaring an opinion' and advised that 'any presumptions should be eliminated'.

The Ethics Committee process led to my revised research objective 'to explore the legal, economic and policy implications of divorce policies for mid life women with dependent children from long term marriages,' (see Appendix 1). Included on the information sheet was an outline of extended areas of enquiry such as other influential legislation, the impact of the clean break principle, the policy making process, and identification of any gender specific issues which might influence social, legal and economic policy. I also aimed to compare New Zealand's dissolution policy with that of Canada and Australia. I was formally granted approval for the study by the Massey University Human Ethics Committee.

REFLECTION

In the first instance I had debated the committee's invitation to change the aim of my research. We had discussed this matter in detail. My plan was to

explore the issues from an inductive approach, 'where one starts from observed data and develops a generalisation which explains the relationships between objects observed'.¹⁸ I had already identified literature and four case studies¹⁹ that suggested some women experienced economic outcomes that were not equal with those of their male partners on dissolution. The research would explore this inequality. The study would not be compromised by the findings of my earlier research. New questions could be explored as relationships between the sets of new data surfaced.

It was entirely possible that comparing outcomes would not lead to a clear cut confirmation or a simple explanation of gender inequity at dissolution. I would not be able to generalise 'yes there is support' or refute 'no there is not support' to a diverse population. Making those kinds of 'deductions' would have required quantitative comparative analysis of a large representative sample of participants.²⁰ I was seeking to identify the circumstances under which unequal outcomes might emerge.

Primary research based on comparative analysis may have required contact with couples from the same dissolution proceedings in order to identify variables. Such comparisons posed serious problems of harm for participants when selected from the same family. For example, conducting survey or interview research with both adult partners of the same family could lead to breaches of privacy for individuals. Potentially one partner may have influenced responses of the other. Such surveys or interviews may have caused conflict and that would have been harmful for participants.

Such an approach would also have required resources well beyond the scope of a Masterate thesis. An alternative of secondary case analysis was out of the question because Family Court records were embargoed by section 35A of the Matrimonial Property Act 1976, which prohibited publication of any proceedings, or case reports.

The Ethics Committee's perception that the research should 'prove inequity' appeared to belong to the scientific approach, which would call on quantitative analysis. Babbie had identified the qualities of such an approach as 'requiring a strict limitation of the kinds of concepts to be considered relevant to the phenomena under study'.²¹ I wished to explore the

¹⁸ Babbie, *The Practice of Social Research*. (7th ed) , (Belmont,1995), p. 49.

¹⁹ As had Cabinet, the New Zealand Law Commission, The Ministry of Women's Affairs, Judges in the judgments listed in chapter two and legal academics also cited in chapter two.

²⁰ Patton, M.Q. *Qualitative Evaluation and Research Methods*, (2nd ed) (United States of America 1990), p.462.

²¹ Babbie, p. 93.

complexities of the situation rather than reduce the issues to a limited set of indicators. I was particularly interested in exploring the policy outcomes in more detail. Information which identified consistent or inconsistent patterns and complex interactions could be sought from different available sources of primary and secondary data. Information from different perspectives could then be thematically interpreted, to identify the critical indicators of family well-being post dissolution. This could contribute to the design of a larger, more representative study at a later date.

In depth interviewing of a small sample group of mid life, Pakeha women would produce rich detailed data, specific to their socio economic circumstances. Such a study could be replicated for other population samples which could then be combined to contribute to the overall policy picture. Although I had perceived the approach of the Ethics Committee to be located in the scientific quantitative framework, I did view their intervention as a valuable component of my inductive process. An inductive analysis 'involve[d] looking for other ways of organising the data that might lead to different findings'.²² The experience haunted my literature searches. Gathering contestable viewpoints had important ramifications for trustworthiness of data analysis and credibility of the interpretation. The Ethics Committee's questions had reflected important theoretical, design and analytical assumptions which further reading deconstructed.

Marshall and Rossman claimed qualitative methods were particularly useful for analysis of complex public policies. They commented:

*Qualitative methods help 'debug' policy - they find inconsistencies and conflicts built into policies Qualitative methods identify how policies are changed as they are implemented at various levels.*²³

I was aiming to illuminate the complexities of dissolution policies. Scientific 'proof' that women experienced unequal outcomes through non partisan methods would have required an interviewer to, 'pretend not to have opinions or to possess information that the interviewee want[ed], because behaving otherwise might bias the interview'.²⁴ Oakley²⁵ had argued that scientific claims to unbiased research produced methods which were 'functional ... mechanical ... passive and reduction[ist]'. Such research employed interview techniques which were 'depersonalised for both the interviewer and the interviewee'. She claimed that typology was viewed as the 'paradigm of the proper interview', one which valued objectivity,

²²Patton, M. Q. *Qualitative Evaluation and Research Methods*, (2nd ed) , (United States of America,1990), p. 462.

²³ Marshall, & Rossman, p.12.

²⁴ Oakley, p.63.

²⁵ Oakley, p.64.

detachment, hierarchy and science. In that scientific positivist paradigm, non partisanship, 't[ook] priority over people's more individualised concerns'.²⁶In this research, the participant's own concerns, perceptions and individual stories were at the very core of my exploration. As long as the boundary of honesty was maintained partisanship was not an issue.

In the positivist scientific model it was desirable to exclude the involvement of subjectivity and personal involvement, 'improper subjective interviews' Oakley argued, were paired with the 'classical' 'gender stereotyping ... shown in countless studies'. In those studies, 'women were characterised as sensitive, intuitive, incapable of objectivity and emotional detachment'. This observation echoed my experience of the committees suggestion that, 'I was too close to the topic and that the research could be viewed as biased'. Like Clara Greed I was 'studying a world in which I was I part, with all of the emotional involvement and accusations of subjectivity that this creat[ed]'.²⁷ My sensitivity to the subject did not mean that I was incapable of emotional detachment. I was simply presenting my personal value position transparently. And this was not just a 'woman's point of view'. Martin Rein had argued that it was impossible to exclude value positions in the research process or the final report. Policy analysts, he wrote, 'c[ould] not present findings as if social life was value neutral'.²⁸

Reflecting on the ethics and politics of interviewing women, Finch posited the view that Oakley had 'effectively exposed unbiased interviewing techniques for the sham it always was'.²⁹ I agreed, 'mutual respect' invited a best ethical practice of transparency with regard to personal observations, experiences and background reading. It would be important in this research to be politically honest before I could gain access to information. I did not wish to hide my value position behind a pretence of neutrality.

I expected that there would be debate about my understanding of the issues and my value position during the interviews with professionals, and indeed, I was seeking alternative view points. This would contribute to a rich and diverse data base that a pretence of neutrality was less likely to encourage. Transparency would permit contestability, as Reinharz noted, 'hearing other people's stories provide[d] the researcher with an alternative case that

²⁶ Oakley, p.64.

²⁷ Stanley, & Wise, Stanley, L. and Wise, S. 'Feminist Praxis: Research', *Theory and Epistemology In Feminist Sociology*, Routledge, London. (1990) p. 145.

²⁸ Rein, p.85.

²⁹ Finch, (1980), p. 79.

prevent[ed] her from generalising exclusively from her own experience'.³⁰

Transparency would assist in engendering a non hierarchical approach to interviewing. Oakley had demonstrated: 'the goal of finding out about people through interviewing is best achieved when the relationship of interviewer and interviewee [wa]s non hierarchical and when the interviewer [wa]s prepared to invest his or her own personal identity in the relationship'.³¹ If I expected people to share personal information, I also had to be prepared to share my own value position. Transparency was not the only ethical consideration of the research. Other ethical principles had to be addressed, these included voluntary participation, informed consent, confidentiality, anonymity and avoidance of harm. The following protocols were followed to protect the participants.

VOLUNTARY PARTICIPATION / INFORMED CONSENT.

All participation in this study was voluntary. Participants had the right to exit the research at any time. An information sheet (Appendix 1, 2(a), 2(b)) and a consent form (Appendix 3) was provided for each participant, with details about confidentiality and anonymity to inform their decision. I made contact after the participants had been given a week to receive and absorb the information.

I had received consent verbally and in writing for each interview. In this interaction I paid particular attention to avoiding deceit. For example, I did not play devil's advocate, or present questions designed to trap participants to provoke negative responses. Once the audio tapes had been transcribed, I sent participants a copy of their written transcript. I and provided a stamped addressed envelope for the return of their consent form, following the reading of their contribution (Appendix 7). I was conscious that the participant's permission to use data did not give me license to use the information in a harmful way.

CONFIDENTIALITY AND ANONYMITY

The concepts of anonymity and confidentiality can be ambiguous. I was guided by the following clarification. 'A respondent is anonymous is when the researcher cannot identify a given response as belonging to a particular respondent; confidentiality is established when the researcher can identify a certain person's response but promises not to make the connections

³⁰ S. Reinharz, *Feminist Action Research: Feminist Methods in Social Research*, (New York. 1992), p.34.

³¹ Oakley, p.68.

publicly'.³² I could promise confidentiality but not full anonymity. Having conducted the interviews myself I could immediately put a face to the participant's contribution. But there were other reasons outside of my influence that impinged on the question of anonymity.

Professionals and community participants would often refer me to each other and it was possible that some people discussed the research following their interview. New Zealand is 'a village,' as one of the practitioners stated, 'legal professionals interact at conferences and many know each other well'. While I attempted to protect the participant's anonymity in the text, it was possible that some participants were aware of their colleagues 'value position' and that they would readily identify each others discussion through the use of idiosyncratic language. I could not control anonymity in that context.

For all of the participants I was particularly careful to avoid exposing their identity in the text. For professional key informants I used numbers and letters to protect their identity as many of the pseudonyms I initially chose could have been presumed to be one or other of their names or other high profile legal or policy experts in the field. I found male pseudonyms more difficult to craft without the risk of exposing practitioners or judges.

One legal professional gave the same legal examples during the research interview as he/ she presented at a subsequent public meeting. During the editing stages of the thesis I excluded those examples to protect that person's anonymity. Such care, however, can not be taken after the completion of the thesis. It is therefore possible that in the future, professional participants may disclose their participation unwittingly by linking their ideas publicly to those shared in the findings of this research.

In order to protect confidentially, the interview tapes were coded before being sent to the transcriber so that identity was not disclosed. The transcriber signed a contract of confidentiality should the taped interview have revealed a participant's identity during their interview (Appendix 5). I took care in the text to disguise the participants not only by pseudonym but also by description and location.

AVOIDANCE OF HARM

Six of the seven women participants who had experienced dissolution of marriage demonstrated their interest in the topic. Three heard about the study through the university system, another three offered to participate

³² Tolich & Davidson,p76.

when they heard about the topic from myself or friends. One member of the original pilot study offered the use of her earlier transcript plus a second interview. Information about the study was passed by word of mouth and several other women and men sought direction for their personal dissolution issues. One person who had initially sought referral, was added to the research. This was primarily because she was very keen to be included but, in addition, her contribution took the place of one other participant whose interview was not recorded due to a faulty tape recorder. I did not wish to impose on that participant for a repeat interview .

The women's enthusiasm for the research was inspiring. However, at the conclusion of three of the interviews the participants commented that they were not interested in seeing their transcripts as they did not wish to revisit the past again. They had forgotten just how 'daunting' the dissolution process had been. Tolich and Davidson had warned that 'social research c[ould] harm people in ways that [we]re not immediately apparent'.³³ I was sensitive about their revisiting difficult experiences and ensured that I offered referral information for support in the form of counselling and or legal advice if participants did require further support or information. I would recommend that any further research involving a bigger sample of participants should plan for extensive debriefing and referral. It was clear that 'doing no harm is easy to accept in principle but much harder to achieve in practice'.³⁴

RESEARCH DESIGN

The study aimed to view the issues of dissolution of marriage for women and children from the micro frame (family perspective) which was both at the core and alongside the macro picture (larger policy system). The participants in the micro - frame of the study were; seven Pakeha mid life women (35yrs-48 yrs), from long term marriages (7-14+yrs), with dependent children. This purposive or convenience sample was representative of the age group where the greatest number of divorce cases were located and where it was most likely that there would be dependent children.³⁵

Three of the participants supported adolescents in tertiary education, two concurrently supported school aged children. One of the respondents supported a school aged child, an adolescent in tertiary education and her grandchild. All had experienced dissolution of marriage under current legislation. Six of the marriages were dissolved in the last four years. One

³³ Tolich, & Davidson, p71.

³⁴ Tolich, & Davidson, p71.

³⁵ (Appendix .5)

participant had been awarded dissolution ten years ago but she was still facing litigation in respect of her property and parental commitments.

The specific setting or location of these women on the North Shore of Auckland was justified as I could easily visit the participants, and they were able to be recruited through word of mouth. Accessibility with limited resources of time and money favoured this approach. But practical considerations were not the foremost consideration. These women belonged loosely to my community of identity and to the geographical area in which I had lived for the past twenty one years.

All of the women participants reported that the household income preceeding separation was above \$60,000 per annum. Some households earned more through investments or high salaries. These families were moneyed and propertied. Each of the families had owned a home of significant value on dissolution. The median personal income in New Zealand at 1996 was \$23,900³⁶ for Pakeha men. These families were in an economic class which would be considered affluent. The income stream was primarily contributed by the husband of the marriage. One woman had frequently supplemented the household income with part time work, another worked full time. Five had not participated in the paid workforce since they had children. Following dissolution five of the women were in part time work, one was collecting the domestic purposes benefit and one was working full time. All of the women participants who had experienced dissolution of marriage were older than forty years of age.

The participants who would paint the picture of the macro policy landscape were four judges (1 female, 3 male), four legal practitioners (1female,3 male) two current members of parliament (both female), two former Members of Parliament from the select committee which reported on the Matrimonial Property Act 1976, and two policy advisors. Of this group five, of the fourteen, (3 male - 2 female) self identified as having experienced dissolution under the current legislation. The two current Members of Parliament, two former Members of Parliament and the two Policy Advisors will be referred to as key informants throughout this study. This is in order to protect their anonymity.

If I added the seven women participants or micro group to a sub set of key informants who had experienced dissolution from the macro group, twelve from the total twenty one participants had experienced dissolution of marriage, under the current legislation. Nine divorced participants were

³⁶ Statistics New Zealand, *New Zealand Now: Women*, 1998, p.108.

female, three were male. All of the divorced male key informants were legal professionals. Of the total twenty one participants, all but one were employed either in part time or full time paid work at the time of interview. Fourteen of all participants were in the age range of 35 - 48 years. Five legal professionals were older two key informants were between 30-40years of age. The participants contributed some unexpected textures to the study. Most of them were in mid-life and I had not sought to find professional key informants who were also divorced.

MULTI METHOD FIELD WORK

*Fieldwork is the generation, analysis and presentation of non numerical data, based on the observation and (unstructured) interviewing of the people in the research setting.*³⁷

Action research as field work has been defined as ‘applied research where the researcher and those being researched determine[ed] the problem and assess[ed] possible solutions. The researcher w[as] not ‘detached’ but intimately involved and interventionist’.³⁸ The ‘action’ or interventionist component of this research followed the three part formula identified by Carr and Kemmis;³⁹ ‘democratic purpose’, ‘participatory character’ and ‘simultaneous contribution to social science and social change’.⁴⁰

The ‘democratic purpose,’ or motivation to explore the topic stemmed from my observation, experiences and an aim to be involved in the policy making process. This was possible because the Legislature was planning reforms to the Matrimonial Property Act 1976.

The ‘participatory character’ was reflected by the contributions to the policy debate by participants in the research, some of whom presented submissions to the Government Administration Parliamentary Select Committee. The research provided me with the opportunity to be involved in forums on community and national radio, and to address a meeting of the National Council of Women. My paid employment provided the experience of writing speeches for a Member of Parliament in preparation for debate on the issues. All of the above activities contributed in a small way to transformative ‘action’.

³⁷ Tolich & Davidson, p5.

³⁸ Tolich & Davidson, p5

³⁹ W.Carr & S.Kemmis, *Becoming Critical: Education, Knowledge and Action Research*, The Falmer Press, (London 1986), p.146.

⁴⁰ Carr & Kemmis, p.146.

The 'simultaneous action' component of the study was evident right up until the latter stages of the research process. Two days before sending this thesis to the printer for binding, a woman requested a copy of a Canadian case which I had in my research file. Her solicitor was interested in using it for a case before the High Court in Auckland. The woman had inquired at the electorate office eighteen months ago about her rights to spousal maintenance. She is not a participant in this study. It is possible that her case will set a precedent.

During the data collection stage I attended three seminars; a community based Fathering Forum, a Law Society Families in Transition Seminar, and a legal seminar sharing ideas about Developments in Matrimonial Property. These seminars were held to encourage positive social change for parents, partners and professionals.

Throughout the research process I carried a field note book. Each time I attended a seminar, forum, meeting or interview I made notes about the setting, content, and the people present. Informal note taking encouraged consideration of silent gestures, body language and facial expressions and this was detail which other methods such as surveys and case studies may have excluded. This 'participant observation' facilitated the collection of data over and above that which was generated by the in depth interviews.

The pilot research for this study involved general unstructured, in depth discussions with four women who had completed their matrimonial property settlements, for my submission to the Human Rights Committee. I had asked the participants to identify the issues most critical to them and the well-being of their children. These interviews identified the core issues of equal division of property compared with equal outcomes, spousal and child maintenance following equal division of property, the notion of a clean break split following divorce and the division of labour within marriage. The pilot interviews provided some of the initial questions for the in depth interviews with the seven women participants of this study. It also provided me with avenues for enquiry with the legal professionals and policy makers that I would question later. The pilot interviews provided excellent experience for learning to participate in, and guide in-depth semi-structured interviews.

INTERVIEWS : WOMEN PARTICIPANTS

As an interviewer I aimed to gather the richest possible data. A structured or formal questionnaire would have restricted the data gathered. The semi-structured in depth technique allowed me to reflect and ask questions according to the responses given.

At the beginning of the interview I discussed the technical and practical issues of the process with participants. I responded to any questions they had about the study. I discussed the information sheet and the tape recording. I encouraged the women to find a comfortable seating arrangement and arranged the tape recorder to suit them. I observed that they were not at ease about being recorded. I always offered to turn the tape off but found that usually their discomfort was not related to what they were about to say, but rather to how they sounded on tape. With two of the women we played back the tape and tested it so that we felt more at ease with the technical intrusion. I learned where to place the recorder at maximum workable distance away from the participant.

At the beginning of each interview we discussed a retrospective view of the participant's marriage. This included general information about the length of the marriage, when the children were born, when and if, paid work was relinquished. This discussion led to more detailed in depth discussion during which I used prompts about when the participant knew the marriage was over, and the legal and financial processes that followed detachment from their former spouse.

In the final section of the interview we discussed issues regarding the children. I found that this topic was often the most critical focus for the women as their worries about their children were ongoing. It was an excellent way to conclude the conversation as one woman noted 'all mothers have this topic in common - divorced or married,' it felt as if a chat 'about the kids' normalised the interview process. At the conclusion of each interview I re-explained the research process that I was following and concluded with discussion about the transcripts.

INTERVIEWS : LEGAL PROFESSIONALS AND JUDGES

The interviews with these participants took place at their offices. Flexibility on my part was important as their schedules were tight due to the unpredictable nature of court cases. I gauged the duration of these interviews carefully. I reiterated at the beginning of each interview that I was happy to stop short of the hour should their schedules demand their attention.

It was encouraging to note during all of these interviews that the participants were enthusiastic about the topic. I let the interviewee set the pace, watched carefully for interviewee fatigue and rounded off with a question such as; 'I don't wish to keep you any longer, is there anything that you think I might not have covered'? Or, 'can you direct me to further reading'? Frequently these questions led to further prolonged discussion, and on several occasions my field notes remind me that members of the judiciary appeared to enjoy the teaching element of the interaction.

While I was keen to demonstrate knowledge in order to establish trust and respect I was there primarily to gain expert knowledge from the participants. The balance between demonstrating a basic knowledge and gathering information often involved my answering questions posed by the participant. Initially I found this nerve racking and was worried about appearing unknowledgable. When I could not answer questions I was transparent, when I was confused about the meaning of a particular section of the legislation or legal interpretation, I questioned until I understood the meaning. I found the judiciary to be particularly patient with my probing even though the transcripts illustrate a good deal of repetition when clarification was sought. Legal professionals were also very helpful in this way. As I completed more interviews, my understanding of the legal language increased and my ability to take part in the conversation improved. The interactive nature of the semi-structured interview created a sense of collective problem solving.

At one interview with a judge I thought she/he had tired of the conversation after about forty five minutes as he/she appeared to be physically restless. I suggested we finish off the talk thanked him/ her sharing the valuable time we had spent. He/ she accompanied me to the elevator, out of the security area and to the front steps of the court house. As I was departing we stood for more than twenty minutes continuing to discuss political and economic issues relevant to the topic. As courthouses and judges chambers are security areas all of the judicial participants accompanied me out of the building. On each occasion, conversation covered the importance of such research. The enthusiasm and sharing of knowledge was motivating and encouraging.

INTERVIEWS : POLICY ADVISORS AND POLITICIANS

I met the politicians at their parliamentary offices and the policy advisors in locations of their choice. A visit to Wellington to conduct these interviews enabled a visit to the Parliamentary and Ministry of Women's Affairs Libraries. Which gave me access to materials and documents that were not generally available in other locations.

My field notes remind me how concerned policy advisors were about anonymity. Their advice to government as employees was governed by the ideology of the government of the day. While we were speaking about issues that were recorded in documents publicly available through the Official Information Act, the university or the Parliamentary Library, it was clear that any perceived critique of the policy 'process' may be held against them in future governmental employment, should their views be attributable to them personally. I assured them of their anonymity. My field notes demonstrated that their answers were carefully constructed to avoid controversy, long pauses in one interview verified just how careful the policy analyst had to be.

Politicians were interested in the sort of information and themes that were emerging from my research. At the time of interviewing the debate in the House of Representatives regarding matrimonial property legislation was on the Order Paper for the following week and an opportunity to share ideas in preparation for debate about the ensuing bill was important to them. Reciprocity in this context was one of information exchange.

DATA COLLECTION : GENDER ANALYSIS

The Gender Analysis model prepared by the Ministry of Women's Affairs provided the early question themes for the collection of data. These were equity, opportunity and choice, full and active participation, adequate resources, no discrimination, a society that values the contribution of women.⁴¹ These objective 'outcomes' for women in New Zealand society married well with my examination of the 'outcomes' of divorce for women. Through semi-structured interviews I would collect information about each outcome and examine the underlying causes of apparent social, legal and economic experiences specific to gender.

These themes were discussed with participants from the perspective of culturally defined gender differences quoted by the Ministry, originating in the Australian Law Reform Commission:

Gender describes more than biological differences between men and women. It includes the ways in which those differences, whether real or perceived, have been valued, used and relied upon to classify women and men and to assign roles and expectations to them. The significance of this is that the lives and experiences of women and men, including their experience of the legal system, occur within complex sets of

⁴¹ Ministry of Women's Affairs, *The Full Picture: Guidelines For Gender Analysis*. (Wellington, 1989), p.6.

*differing social and cultural expectations.*⁴²

The Ministry of Women's Affairs recognised that equal opportunity was not synonymous with equal outcome. The Ministry worked towards policies which aimed to achieve 'equity rather than equality'. These terms highlighted the difference between equal opportunity and equal outcomes:

*Gender equality is based on the premise that women and men should be treated in the same way. This fails to recognise that equal treatment will not produce equitable results, because women and men have different life experiences. Gender equity takes into consideration the differences in women's and men's lives and recognises that different approaches may be needed to produce outcomes that are equitable.*⁴³

With 'equity' defined as an objective, the next step of the research focus involved the identification of population groups affected by dissolution proceedings and the location of sites of inequity. I collected general population data that may have been relevant to dissolution of marriage in respect of gender (See Appendix 4). From an examination of the list I was able to ask interviewees what the underlying factors of women's higher or lower representation was possibly attributable to, and in what ways women had differing needs, experiences, issues and priorities. Together with the prioritised outcome directions from the Ministry of Women's Affairs the data provided the initial themes for questions for the semi structured interviews (See Appendix 6).

RECORDING AND MANAGING THE DATA

*Real research is often confusing, messy, intensely frustrating, and fundamentally nonlinear.*⁴⁴

I used the technique known as content analysis to organise, identify, code and categorise, patterns in the data.⁴⁵ This research method involved a process of continuous examination of observations from the field note book and transcriptions from the semi structured interviews. The first stage of the coding process involved highlighting relevant information in the interview transcripts with a coloured pen. During the next reading of the interviews I identified and labelled consistent themes. As I read I made notes in the margin where information was contradictory. I also sought to identify omissions, or where I had a lack of policy or legal information to understand the commentary fully. The search for common themes directed me to search for secondary sources such as policy and conference documents, legal cases

⁴² Ministry of Women's Affairs, p.7.

⁴³ Ministry of Women's Affairs, p.7.

⁴⁴ Marshall & Rossman, p.15.

⁴⁵ Patton, p. 381.

and text books. I listed the emerging themes from the transcripts for reference during subsequent interviews and information searches.

This was different from a quantitative content analysis which Scott described as the examination of 'standardised information [which wa]s organised and measured in categories'.⁴⁶ The themes I was looking to explore were not 'independent, finite or mutually exclusive' categories. I was not aiming to measure for 'intensity, frequency or duration'. My aims were to explore attitudes and values as a means of 'description and and explanation of the social world'.⁴⁷

Kellehear contrasted qualitative thematic analysis with quantitative content analysis highlighting the idea that the 'value' of the data may not be attributable to the number of times content was repeated. Rather 'value' was ascribed to the substance of the concepts and perceptions, conveyed in the data:

*A thematic analysis differs from a content analysis because it looks for ideas in the data being examined. It takes its categories from the data, and is more subjective and interpretive. This overcomes the problems in a quantitative approach of viewing the items as having equal value.*⁴⁸

The spectrum of ideas encompassed by the private experiences of women, the perspectives of the judiciary, and observations of the legal profession, and the politicians were to be considered in the context of different value positions. Larson had demonstrated the importance of context in her secondary content analysis of historical document. In her study she found that the 'strategies of content analysis needed to be adapted to the particular problems presented by the subject matter'.⁴⁹ From my variety of primary data I would be able to interpret and consider the implications from verbal, and observed material without losing appreciation of the context and circumstances.

During the coding process the transcriptions highlighted several new avenues of enquiry that had not been apparent during the pilot study. As new themes emerged it was necessary to 'identify and evaluate the items that appear[ed] to be theoretically important and meaningful'.⁵⁰ I spent an extraordinary amount of time identifying, rearranging and re-categorising themes. Marshall and Rossman challenged the qualitative researcher, 'to

⁴⁶ J. Scott, *A Matter of Record*, (Cambridge 1990), p.32.

⁴⁷ C. Robson, *Real World Research*, (UK. 1994), p.273.

⁴⁸ in J. Fook *The Reflective Researcher*, (Australia, 1996), p.28.

⁴⁹ Larson, D. "Problems of Content Analysis in Foreign Policy Research," *International Studies Quarterly*, Vol,32 (1988), p.33.

⁵⁰ S. Sarantakos, *Social Research*, (Melbourne 1993), p.215.

plan a design that is systematic and manageable yet flexible'.⁵¹ This required an approach which allowed the study to 'unfold, cascade, roll and emerge ... and yet meet the criteria of do ability'.⁵² When I had post-coded all of the interviews there were sixty two sub-themes identified. This 'cascade' of commentary was cut and filed in hard copy folders under nine core categories which formed a basis for working towards the emerging chapters. The nine core themes were entitled Historical Disadvantage, Reform, Feminism, the Interests of the Children, the Role of the Family Court, Gendered Conflict, Judicial Discretion, Defining Property, Human Rights/Substantive Equality.

I frequently revisited the filing, I filed and refiled the hard copies of the transcripts under the main headings. When commentary could have been relevant to one or more themes I placed a copy in both with a note to remind me of the possibility of a cross reference later. I was conscious that any ambiguity or overlaps may have had significant implications for the analysis. This proved valuable as the double filing eventually facilitated a reduction of the sub-themes down to thirty six. I discarded unrelated categories or those that were not linked to the core or sub themes, in an effort to manage the data. Along the way, two new files emerged. Contemporary Debates included issues that surfaced in the media and from lobby groups. Policy Possibilities, served as a folder for ideas and recommendations that came to mind during the analysis, to be considered, following interpretation of the data. I kept a running record of memos about possible linkages between data, organisational ideas and spontaneous thoughts.

The sheer volume of other secondary data posed a 'messier' problem. I had been filing hard copies of relevant documents under totally different themes since the undergraduate pilot study. There were newspaper cuttings, magazine articles, policy documents, journal articles, copies of court cases, internet finds and information from other countries that I had gathered in New Zealand and overseas during the last four years. This secondary data was refiled and coded to correspond with the new themes which had emerged from the interviews.

The interviews had not produced a significant quantity of data about other jurisdictions Canada or Australia, which I had originally sought to gather. Marshall and Rossman had advised researchers to 'let go of some promising

⁵¹ Marshall & Rossman, p.6.

⁵² Marshall & Rossman, p.39.

research questions in order to b[ind] the study and ensure do ability.’⁵³ It was possible that this would be a separate study at a later time involving secondary analysis and a literature review. However, I kept a file for later reference and retained an open mind about including relevant international examples where applicable to the interpretation, during the writing stage. This data was very helpful. As the reader will find later, in the absence of New Zealand research overseas information was used by lawyers to substantiate their argument in the courts.

TRIANGULATION OF DATA

*Triangulation improves the quality of data and in consequence the accuracy of findings.*⁵⁴

Denzin advocated an approach where differing sets of data could be analysed for repeated or inconsistent themes. Inclusion of data from different sources would strengthen and validate the findings of small qualitative studies. This approach, known as triangulation, was specifically designed to avoid bias in qualitative research. He identified five different categories of triangulation:

*By combining multiple observers, theories, methods and data sources, researchers can hope to overcome the intrinsic bias that comes from single methods, single observer and single theory studies.*⁵⁵

The strategy of triangulation contributed to the trustworthiness, verification and validation of this research. The types of triangulation that applied to this study included ‘method triangulation,’ where I compared observational data (participant observation) and data from the interview method with themes from relevant policy documents. Confirmation of data consistency from the three primary sources of the legal profession, policy makers, and women who had experienced dissolution, was sought. In addition secondary data collection checked for the consistency of what people had said over time with regard to the policy history and the political economy. This ‘triangulation of sources’ was accomplished by ‘validating information obtained through interviews [with] ... programme documents and other written evidence’.⁵⁶ In this study I searched parliamentary debates, legal conference documents, law reports and policy documents. These sources verified the accounts of the interview participants, two of whom had participated in the era of reform from 1976 to 1980.

⁵³ Marshall & Rossman, p.19.

⁵⁴ Robson, p.383.

⁵⁵ Denzin, p.313.

⁵⁶Patton, M. Q. *Qualitative Evaluation and Research Methods*, (2nd ed), (USA 1990), p.467.

One point of clarification regarding the organisation of data during the triangulation stage should be made at this point. The issues that emerged from interviews with women did not cover all of the problems identified by legal experts. A legal expert who read the draft manuscript of this study to check my legal citations, questioned me thus; 'there is much detail in Matrimonial Property law that operates unfairly for example the treatment of foreign assets, trusts and agreements to contract out of the Act, but you haven't addressed them, why?' Some issues in particular were omitted because women were not sure about the legal facts of their case, or the issue simply didn't occur in the context of the women's stories. While judgments from court cases did identify the above issues and legal practitioners talked of the significance of such problems, I wished the stories from the women participants in this study to drive the investigation.

The search for multiple perspectives from the three sources generated contestable viewpoints and this approach was cited by Patton as 'theory / perspective triangulation'.⁵⁷ The study focussed on the objectives of policies governing dissolution and the outcomes for families apart. The observational data, interview data and secondary data uncovered different findings about some of the core issues. This required exploration of the reasons for those differences, just as thematic consistency from different sources required explanation.

*A qualitative analyst returns to the data over and over again to see if the constructs, categories, explanations and interpretations make sense, if they reflect the nature of the phenomena.*⁵⁸

For over one year the themes and chapter headings were organised and re-organised. The inductive process meant that emerging data shifted the focus of the study for weeks at a time. One example of this happening was the reoccurring emergent theme that men were not always treated equally in regard to child care and contact. Being as equality was the underlying policy principle which governed dissolution policy, and I had moved out of the strict bounds of simple division of property, I could not ignore the evidence.

In search of qualitative rigour I followed Guba's suggestion of 'a mandate to be balanced, fair, and conscientious in taking account of multiple perspectives, multiple interests and multiple realities'.⁵⁹ I had rejected the notion that there was one reality or 'truth' or that findings were 'true' or 'false'. I aimed to explore the multiplicity of perceptions thereby painting a rich and detailed picture, 'demystifying events and understanding the

⁵⁷ Patton, p. 464.

⁵⁸ Patton, p. 477.

⁵⁹ Guba & Patton, *Qualitative Evaluation and Research Methods*, (2nd ed) , (USA 1990)

[values and] actions taken by the various parties'.⁶⁰ The values, actions and principles operative in the present legal and policy system derive meaning from the larger social system and historical patterns. Before I could interpret and understand the contemporary data I searched backward, delving into secondary sources for an understanding of how dissolution policy had evolved. The next chapter examines that history.

⁶⁰ Smith, S. *Defining Participatory Action Research*, O.S.E.P. Press, (Canada, 1997), p.204.

CHAPTER 4
EVOLUTION OF DISSOLUTION POLICY : POLITICAL /
ECONOMIC PERSPECTIVE PRE 1840 - 1968.

Equality has a language of its own. To understand the concept of equality you have to learn a whole new language. Turn the concept on its head, invert it. Equality then becomes inequality which equals injustice which put simply is oppression. (Hon Mme. Justice L'Heureux-Dube¹)

INTRODUCTION

This chapter explores the historical, political and economic context in which the policies and laws governing dissolution of marriage evolved. In the first section of the chapter, I assert that cultural expectations of family relationships were governed by patriarchal² legal norms, the family was regarded as the core foundation of wider social stability and women were held morally responsible for that stability. Meanwhile women's quest for equal participation in paid employment, professional and political life was considered aberrant - in the family, in the courts, and in the legislature.

During the nineteenth century and first half of the twentieth century the legal and moral framework exercised a powerful influence over marriage dissolution. Marital separation was implicated as a cause of social and personal downfall. In marriage, women were expected to be faithful and loyal to their husbands and it was considered, 'there [wa]s no woman unless she was corrupted in some way - no honest, decent woman that would divorce her husband'.³ On the other hand, if women were deserted by men, assistance was only provided for those judged as deserving. Individual, social and moral responsibility was a recurrent theme reflected in dissolution policies which protected the property and conjugal rights of men and disadvantaged women.

In this chapter, I argue that liberalisation of the laws governing dissolution from 1907 to 1968 made the process legally and economically accessible but outcomes continued to disadvantage women. This history illustrates that social, legal, political and economic factors cumulatively led to the subordination of the property needs of women and protected the property

¹ Oral Communication, 18th January, 1996.

² 'The word patriarchy basically means the 'power of the fathers', we use it to mean a system in which men determine what part women shall or shall not play in society'. I. Jalal, *Law For Pacific Women: A Legal Rights Handbook*, (Suva, 1998), p.14.

³ R. Taylor, NZPD vol LX 1888:241.

rights of men at dissolution of marriage.

DISSOLUTION: THE PAST

In European families the ownership of tangible property and labour was central to marital arrangements. Social class, family connections, arranged marriages, and inherited property rights were features of matrimonial decisions. In feudal times for the tenant farming class, landlords had an interest in a person's choice of a marriage partner, as they were interested in the whole family's contribution to the productivity of their estates.⁴ The organisation of agrarian production, social class and male ownership of property disadvantaged women. Married women, unlike their single sisters, were unable to hold title to separate property.

In mediaeval times all members of the family were involved in household production. Men, women and children actively participated in the work of the household producing goods for family consumption and the market. Women raised children as well as making an economic contribution to production. Their contribution was owned by the manager of the household, the husband. The patriarchal organisation of the home was entrenched. The idea that women were subordinate was 'drilled into every member of society by clerical sermons, state regulations and marital handbooks'.⁵ The family existed under the open scrutiny of others, obligations for extended family and agrarian production tied couples to the community.

The great eighteenth century jurist Sir William Blackstone's legal commentary confirmed the notion that women were deemed the property of men in marriage:

*The husband and wife are one person in law.... By marriage the very being or legal existence of a woman is suspended, or at least it is incorporated or consolidated into that of the husband, under whose wing, protection and cover she performs everything, and she is therefore called in our law a 'femme covert.'*⁶

Economic change was a catalyst for social change, the Industrial Revolution (1815- 1914), reorganised households and eventually privatised the home. Industrialisation brought 'sustained economic growth following the application of inanimate sources of power to mechanise production', initially

⁴M. Mitterauer, and R.Sider, *The European Family: Patriarchy to Partnership From the Middle Ages to the Present*, (Oxford,1982).

⁵ L. Stone, *Broken Lives: Separation and Divorce in England 1660- 1857*, (London,1993), p.13.

⁶Sir W.Blackstone in R. Graycar and J. Morgan, *The Hidden Gender of Law*, (New South Wales 1992),p.114.

for 'factory production', subsequently for the commercialisation of farming.⁷ This meant that self sufficiency was not viable. The Industrial Revolution forced services and the production of goods to be manufactured outside of the home. The separation of work from home, and specialisation of tasks, influenced the development of the roles of male breadwinner and female house wife, a new gender alignment. Callister argued that industrialisation allowed one parent to stay home and that 'gendered responsibility crowded out intimacy'.⁸ Stone noted the industrial revolution as the sign post of the beginning of the 'restricted patriarchal family'.⁹ For the authoritarian father the home became a *private* domain, colloquially "a man's home was his castle". British immigrants brought these values with them to New Zealand.

COLONIAL NEW ZEALAND: MARRIAGE AND DISSOLUTION

*The image invoked in New Zealand corresponds very closely to the 'classical family' of western nostalgia ... The family has many functions; it is the source of economic stability and religious, educational and vocational training. Father is stern and reserved, but harmonious because everyone knows his task and carries it out. Young people, especially the girls are likely to be virginal at marriage and faithful afterward After marriage, the couple lives harmoniously, either near the boy's parents or with them, for the couple is slated to inherit the farm. No one divorces.*¹⁰

The idea of the nuclear and extended family living in harmony in New Zealand during the nineteenth century may have been the valued ideal rather than the commonly lived experience. Adultery and desertion was common.¹¹ British immigrants arrived in New Zealand during the 1800's valuing European marriage. To ascertain how marriage and dissolution was viewed in the New Zealand political and economic context we can look to the actions and attitudes of the colonisers.

For Pakeha New Zealanders, missionaries and colonists brought the moral and economic construction of the ideal nuclear family, in which the 'married couple was central'.¹² In Maori society customary marriage was governed by the collective, 'all that was necessary to constitute a marriage was an intention by the parties to live together and public acceptance of the

⁷ N. Abercrombie, *The Penguin Dictionary of Sociology*, (Harmondsworth, 1984), p.123.

⁸ P. Callister, *Fathers Families and the Future Forum*, Manukau Institute of Technology, (14/9/98 1998).

⁹ L. Stone, *The Family Sex and Marriage in England 1500- 1800*, (London, 1977), p.6.

¹⁰ R. Phillips, *Divorce in New Zealand: a Social History*, (1981), p. 16.

¹¹ C. Mac Donald *A Woman of Good Character*, (Wellington, 1990), p.151.

¹² P. Koopmen Boyden, *Towards a History of the European Family In New Zealand Society*, (Wellington, 1979), p.14.

situation'.¹³ The colonisation of Maori customary notions of family can be traced to property law which moved customary property title from the collective to individual title. The shift from iwi collective responsibility to the individual nuclear family can be linked to public policies which 'tied welfare eligibility to European legal marriage'.¹⁴ Christianity, colonisation and British law introduced the concept of formal European marriage and the nuclear family to Aotearoa, New Zealand. The organisation of the household mirrored the British hierarchical social order considered necessary for the 'survival of society'.¹⁵ Individual households reflected gendered roles.

The division of labour and property rights of marriage were not the only important indicators of the gendered roles of the partnership. Economics and law worked hand in hand to determine the patriarchal organisation of family systems. Through adoption and implementation of British law and legal principles, the state provided laws and policies which reinforced what colonists considered the social norm.

In the context of British common law, adopted in the colony ;

*Upon marriage, a wife lost her independent status and identity. Any wages a wife earned belonged to her husband, even if they separated, the wife assumed her husband's nationality and domicile, she could not make legal contracts nor make a will, her husband assumed almost all control over her real and personal property.... The husband could administer physical punishment to the wife if she was disobedient and the law allowed him to rape her at any time without sanction.*¹⁶

The law reinforced women's subservience. Men had economic, legal and physical power over women in marriage.

The state's view of its obligations for social and economic well being emphasised that people who experienced hardship turn to kin and private charities for support.¹⁷ Underpinning the law and economic practice, New Zealand social policy was 'dominated by ideas that stressed individualism'.¹⁸ For example the Destitute Persons Ordinance 1846, stipulated that 'persons in

¹³G. Carmichael, *Consensual Partnering in New Zealand; Evidence from Three Censuses*, New Zealand Population Review, 22. (Wellington, 1996), p.4.

¹⁴I. Pool (1991) in G. Carmichael, *Consensual Partnering in New Zealand; Evidence from Three Censuses*, New Zealand Population Review, 22. (Wellington, 1996), p.4.

¹⁵D. Swain, 'Family' in P. Spoonley et al. (eds), *New Zealand Society : A Sociological Introduction*, (Palmerston North, 1990), p.14.

¹⁶D. Mendes de Costa, 'Criminal Law: In A Century of Family Law', (1957) in C. Mahoney, *Deconstructing Male Privilege*, New Zealand Family Law Conference, (Wellington, 1995), p.3.

¹⁷J. Elworthy, p.19.

¹⁸C. Cheyne, M. O'Brien, M. Belgrave, *Social Policy In Aotearoa New Zealand: A Critical Introduction*, (Auckland, 1998), p.24.

need were the responsibility of their near relatives'.¹⁹ This ordinance was the only policy preceding 1860 that catered for women's well being when they were separated from their husbands. The Ordinance made it an offence for a husband to:

*unlawfully, and without cause for doing so, desert his wife... or his children under the age of 14 years and leave them without means of support. A man could be ordered to pay up to twenty shillings a week to support his family.*²⁰

This was the first form of maintenance obligation in the colony. When men were not charged with such an offence or did not comply with an order, individuals and family members were expected to provide economic support and protect each other against hardship. While the Crown assumed that social services would be provided by the church and local authorities, community support systems were not established as they had been in the United Kingdom. Tennant demonstrated that women in such circumstances were not always viewed as innocent parties. 'Deserted wives carried some degree of blame for their destitute condition'.²¹ Desertion was common, and new citizens did not have extended family support.

In broader economic and political policies the state was not so reluctant to intervene on behalf of the business sector. Social policy was subordinate to property and infrastructural public policy. As the Crown focussed on the acquisition of land, 'its ownership and exploitation (would) become the means of dealing with all social and human problems'.²² This focus was justified by a belief that the value of infrastructural development lay in potential economic growth and subsequent employment opportunity. However, during the 1860's and 1870's 'the economy suffered a series of depressions'²³ and, there were social costs.

As women were a minority in the colony, there were more men than women available for marriage.²⁴ Socially, politically and economically the country was dominated by men. Competition for resources in a laissez faire²⁵ market, unemployment, and attitudes which embodied harsh moral values, perpetuated the notion of rationing help for the disadvantaged. Judgments about provision were based on whether the poor were deserving or

¹⁹ J. Elworthy, p.19.

²⁰ R. Phillips, *Divorce In New Zealand : A Social History*, (Auckland,1981), p.130.

²¹ Tennant, M. *Paupers and Providers: Charitable Aid in New Zealand*, (Wellington 1989),p.108.

²² C.Cheyne, et al, p.24.

²³ J. Elworthy, p.22.

²⁴ C. MacDonald, *A Woman Of Good Character*, (Wellington,1990),p.139.

²⁵ 'Laissez Faire, refers to a programme of minimal interference with the workings of the market system. The term means that people should be left alone in carrying out their economic affairs.' W.Baumol and A. Blinder, *Economics Principles and Policy*, (1979),p.4.

undeserving. 'Mid Victorians were reluctant to give to those they considered undeserving, moral virtue was made of self help and needing assistance was seen as a symptom of personal failing'.²⁶ In practice many families were absentee, broken, or otherwise incapable'.²⁷ Employment was focused on the regional development of infrastructure and construction work created an itinerant work force. Women were left while men moved in search of paid work.

Women who left their husband's to avoid male drinking, gambling and violence were not held in high regard, especially if they subsequently bore children to other men. Pregnancy outside of marriage was considered a sin and 'fallen women' were cared for in 'rescue homes' which were 'characterised by the customary austerity, discipline and economy'.²⁸ Women of ill regard, 'were expected to go to work usually cleaning or washing'.²⁹

Wives with independent financial support or inheritance were reticent about seeking legal protection. In 1860 The Married Women's Property Protection Act enabled wives to obtain an order to protect their own earnings or inheritance. This legal protection was rarely sought because women were obliged to prove their position in court before a male judiciary. The prospect of this acted as a deterrent.³⁰ Women's access to justice was inhibited by a legal process that explicitly required women to prove their need for, and right to, protection from exploitation.

FORMAL DISSOLUTION : THE FIRST LEGISLATION.

*We in this country have a long heritage of viewing questions through male eyes, starting from a position where the woman had no rights at all.*³¹

Prior to 1867, dissolution of marriage was not available through the courts. The only way to legally end a marriage was to seek dissolution through Parliament. Governed by British law, dissolution was granted by a Private Act of Parliament, but this would only be awarded due to adultery by a woman or aggravated adultery by a man. The limit of such a provision was 'discriminatory against women, and ... so expensive that between 1670 and 1857 there were only 325 divorces in the whole of England and only four

²⁶C.Cheyne, et al, p.25.

²⁷ W. Oliver, 'Social Policy in New Zealand; An Historical Overview', in *The Royal Commission on Social Policy*, Vol 4.(Wellington,1988), p.14.

²⁸W. Oliver, p.66.

²⁹S. Coney, *Standing In the Sunshine*, (Auckland 1993), P.55.

³⁰S. Coney, p.188.

³¹ Hon Dr. Martin Findlay, NZPD vol 408, 1976:4723.

were obtained by women'.³² No dissolutions were sought in New Zealand under the parliamentary process. Informal separation had followed the earlier noted British form of private agreement for the propertied.

In 1857, with the aim of making dissolution proceedings more accessible and less expensive, Britain enacted legislation which empowered the courts, rather than Parliament, to grant dissolution. Ten years later, the issues were hotly debated in New Zealand. Religious perspectives were polarised. Key opponents to the introduction of the Divorce and Matrimonial Offences Bill, were 'Catholics,' while 'Presbyterians were prominent in the move to legalise divorce'.³³ In addition to the religious debate, comparisons were made with other jurisdictions. Members of Parliament who argued for dissolution suggested that consistency of policy with Britain was necessary. Other legislators argued against dissolution suggesting that the colony should be wary of following nations such as the United States of America, as dissolution there had resulted in 'a general carelessness with regard to the marriage tie'.³⁴ The frequent referral to desertion in the colony would suggest that there had already been a carelessness with regard to the marriage tie in New Zealand society.

Women were not able to contribute to the formal debate. An all male legislature debated the legalisation of dissolution. Women had little formal influence over public policy and women did not have the right to vote. The Divorce and Matrimonial Causes Act 1867 focussed on moral values which reflected different conjugal expectations of women from those of men. The focus of this first dissolution law was on the importance of wives remaining faithful and loyal to husbands. The Act empowered a husband, to file in the court for divorce on the grounds of his wife's adultery. Conversely a woman could only file for divorce if her husband's adultery was aggravated by bigamy, sodomy, incest, rape, cruelty or desertion for five years or more. Men could dispense with unfaithful wives, and they needed less evidence for divorce proceedings than women who wished to leave unfaithful husbands.

Adultery was the principal ground for most divorce actions. The tenor of recorded cases included incestuous adultery, adultery involving domestic servants and gentlemen, bestiality, and from time to time, prostitutes were called on to be witnesses in dissolution cases.³⁵ While payment for sexual favour was an example of explicit exploitation of women by adulterous men,

³² R. Phillips, p. 17.

³³ R. Phillips, p. 19.

³⁴ C. Haughton, NZPD. IV. 1043, Sept. 1867.

³⁵ R. Phillips, p. 111- 114.

exploitation of wives was also an implicit feature of the economic contract provided by the marriage relationship.

Financial support was conditional upon conjugal status. For a woman financial support was only guaranteed as long as she 'remained faithful to her husband during the marriage'.³⁶ And there was an all pervasive double standard in respect of views about adultery. When amendments to the discriminatory adultery standard were debated, Henry Fish, Member of Parliament for Dunedin South, articulated the dominant attitude toward male adultery. 'All men of the world would agree that it is quite possible for a man to commit adultery and still at the same time be - outside of one act, of this one fact - an excellent husband and father'.³⁷ And this was simply the natural expected behaviour of mankind. His parliamentary colleague, Captain Russell added, 'man had a strong natural sexual instinct, and the gratification of that instinct was ... the powerful impulse of his existence'.³⁸ In this political and economic culture women were not expected to experience such powerful impulses, and their natural ability to replicate the species was argued as moral justification for discriminatory legislation.

The framework of the argument, based on 'natural sexual instinct' constructed adultery on the part of women as more serious because a woman might conceive another man's child. While a man could be viewed positively as a family man in spite of adultery,

*To say that it [wa]s an equal offence to the impropriety on the part of the wife whereby illegitimate children [we]re brought into the family [wa]s preposterous.*³⁹

Men purported to understand women's views and paternally co-opted them to bolster the argument. Captain Russell claimed, 'the innate modesty of women had, even in their own minds, made adultery a greater crime on the part of a woman than the part of a man'.⁴⁰ Women's prescribed loyalty and commitment to the household was proffered as further justification for unequal treatment before the law.

In this 1867 debate Members of Parliament consistently reflected on the important value of a woman's contribution to the structure of families and wider society. A handful of male politicians supported women's quest for participation in political discourse, once again in a paternal tone. They believed that women should 'take an interest in social issues, particularly

³⁶ K. Mahoney, p.3.

³⁷ H. Fish, NZPD. vol XCIII, 1896: 431.

³⁸ Captain Russell, NZPD. vol XCIII, 1896 : 432

³⁹ J. Wilson, NZPD. vol LVII, 1887: 85.

⁴⁰ Captain Russell, NZPD. vol XCIII, 1896:431.

those affecting the family, considered to be a woman's natural sphere'.⁴¹ But the value of the woman's contribution to society involved more than her participation in family life. Women's sexual virtue was considered paramount to the maintenance of wider social stability. Women were responsible for protecting the sanctity of marriage. This was confirmed by Oliver Samuel's view that, 'women's morality [wa]s the very safeguard to the whole of our social system'.⁴² During the debate members were concerned with protection for women from desertion. They 'had a poor opinion of male morality, assuming that men would leave their wives for quite trivial reasons if given the opportunity'.⁴³ Despite their concerns about men's moral downfall, the all male Parliament enacted the legislation which made dissolution easier to obtain for men than women and focussed on the importance of ensuring women's fidelity. Women were expected to turn a blind eye to men's adultery, for the sake of home and family and wider social stability. The legal content and political and economic context in which the statute was passed illustrated that justice for women was defined by patriarchal understandings of moral standards which accepted male adultery and denounced adulterous women.

In the British context, Stone claimed where tangible property was scarce marital discord was common and domestic violence was an indicator of economic struggles.⁴⁴ Marital dissolution was not considered an option for a woman should her husband mistreat her, because 'the family unit was seen as the basis of social stability... [and] there was wide spread fear that too liberal [an] approach to divorce would bring about social disintegration and moral collapse'.⁴⁵ Yet Phillip's examination of nineteenth century Auckland court records found ample cases of domestic violence. Such cases were heard in the Police Court, where women reported being bodily kicked to the ground, kicked in the face, threatened with hanging and numerous incidents involving alcohol abuse. He suggested that there could have been many cases of domestic violence during the era but these would have remained invisible because, 'the costs of bringing a divorce action were far too high'.⁴⁶ The form and substance of the law was not the only barrier for women who wished to obtain a dissolution. Access to the legal process was particularly difficult for women.

⁴¹ J. Richmond, N.Z.P.D. iv, 1867:256

⁴² O.Samuel, NZPD. LX 1881:234.

⁴³ R.Phillips, p.132.

⁴⁴ L. Stone, p.5.

⁴⁵ R.Phillips, p.11.

⁴⁶ R.Phillips, p.110.

If a woman sought a dissolution a divorce action could only be heard by the Supreme Court in Wellington, and this 'demanded not only court costs and legal fees, but also the expense of travel and accommodation for the parties to the divorce and their witnesses'.⁴⁷ While it was possible for a woman to obtain dissolution of marriage through this process she was not automatically entitled to own a portion of matrimonial property. If she was not in paid employment it was possible that there would not be capital available to pay for the proceedings. The core structural barrier to justice for married women was their legal incapacity to own property as an individual.

WOMEN'S PROPERTY

In the United Kingdom, following the writings of John Stuart Mill, activists prompted the passage of the Married Womens Property Act 1882, and women in the colonies with 'professional earnings' were vocal.⁴⁸ New Zealand's first woman lawyer, Ethel Benjamin,⁴⁹ was active to address inequity. She sought to represent women and in particular lobbied for a woman's right to hold property. She submitted that a wife 'could not enjoy property apart from her husband, her very existence being deemed merged by marriage in that of her lord and master'.⁵⁰ Male ownership of the property of marriage continued to leave women economically powerless.

The political ideology which valued individual ownership of property and individual social responsibility on one hand, and limited access to self sufficiency for women on the other, was an anomaly which was addressed, in part, by the passage of the Married Women's Property Act 1884. This Act, which once again followed the United Kingdom legislation, allowed women to hold property in the same way as unmarried women or *femme sole*.⁵¹ The Act 'recognised women's legal existence'.⁵² The legal presumption was that women had access to property and wealth before marriage and that deserted women owned and retained separate property during marriage. Such a presumption assumed that women had power over decision making in the household. But for many women this was not their experience. The Act did not recognise women's contribution to the household during marriage. Ownership of separate property was specific to socio economic class. Women who arrived in the colony with investment funds, or who purchased property before marriage were protected. Women without such financial

⁴⁷ R. Phillips, p.18.

⁴⁸ The law lords of the Privy Council made this observation in their historical explanation of New Zealand dissolution policy in the judgment of *Haldane v Haldane* [1976] 2 NZLR 715.

⁴⁹ In 1897 Ethel Benjamin became the first New Zealand woman to graduate with a law degree. *All About Women*, Statistics New Zealand, (Wellington,1993), p.15.

⁵⁰ S.Coney, p.188.

⁵¹ *Femme sole* was the legal term for a woman alone, unmarried, single.

⁵² J. Pierce, *The Suffrage Trail*, (Wellington,1993), p.193.

privilege were not protected. The judiciary, 'simply grafted the law's protection onto existing social relationships and institutions through legal [male] norms and principles'.⁵³ The doctrine of separate estate could not produce gender equality, access to finance and paid work cumulatively continued to disadvantage women.

In spite of the right to hold 'separate property' this legislation did not ensure access to the financial resources of the family at dissolution of marriage or desertion. Nor did it curb a husband's power, or give dependents financial protection. The law simply 'protected the [separate] property of a deserted wife and allowed her to act as a single woman'.⁵⁴ Financial equality during marriage continued to be hampered by the gendered division of roles in the household. As property acquired during the marriage was not divided at divorce, the right to own separate property did not result in financial security. Bridge confirmed that 'the social reality of the domestic and mothering roles meant that [women] remained in a totally dependent position with no rights to family property if the marriage ended'.⁵⁵ The right to ownership of separate property for married women was therefore an ineffective means of provision for the majority of women and children when families parted. Often even family capital and property was not intact by the time dissolution occurred. In some cases, men had dissipated all of it gambling and alcohol. For the women and children of these families a combination of state aid and charitable aid had begun to provide a "safety net".

WOMEN AND THE STATE

The policy mix of charitable aid and state subsidy was most transparent when the constitutional structure of the colony changed from provincial to central representation. From 1876 the government operated the central administration of health and education. Friendly societies (a precursor to private insurance companies) had been established. These organisations provided medical care, unemployment benefits and pensions. The payment of weekly contributions excluded the poor (often women) from the schemes. Charitable aid from philanthropic monies, and the good works of the benevolent provided relief, and 'the Government subsidised church operated refuges for deserted women from 1877'.⁵⁶ Snively noted that the Hospital and Charitable Institutions Act 1885 marked the beginnings of 'a systematic

⁵³ C. Mahoney, *Deconstructing Male Privilege*, New Zealand Family Law Conference, (Wellington, 1995), p.3.

⁵⁴ M. McPherson, *Divorce in New Zealand*, (Palmerston North, 1995), p.61.

⁵⁵ C. Bridge, 'Reallocation Of Property After Marriage Breakdown' in M. Henaghan and B. Aitken (eds) *Family Law Policy In New Zealand*, (Auckland, 1992), p.232.

⁵⁶ J. Elworthy, p.26.

provision for health and welfare services with the state accepting a measure of responsibility'.⁵⁷ This was the beginning of the 'idea' that 'New Zealand was a radical reformer in areas of social policy'.⁵⁸ and this policy trend was further evidenced by the introduction of the Old Age Pension Act 1898.

Yet when legislation was passed as a reaction to specific social problems such as desertion, poverty or violence, and private or informal markets provided care for victims, the economic and social context of women's disadvantage was ignored by the state. A lack of attention to structural issues resulted in piecemeal law making which became the pattern of policy making for the dissolution of marriage throughout the next century. The legislative focus continued to deal with the cause and rules of dissolution proceedings. The private/public mix of maintenance provision following dissolution disadvantaged women and children who remained dispossessed of family property when families parted.

In the suffrage movement of the late nineteenth century, activists in New Zealand and elsewhere, 'focussed on aspects of law relating to property and divorce, where changes were sought to curb husband's/ father's power and to give dependents protection'.⁵⁹ But age old male values were not easily influenced, evidenced by an advertisement in the Evening Post in 1892:

*Electioneering women are requested not to call here. They are recommended to go home, to look after their children, cook their husbands dinners, empty the slops, and generally attend to the domestic affairs for which nature designed them. By taking this advice they will gain the respect of all right minded people - an end not to be attained by unsexing themselves and meddling in masculine concerns of which they are profoundly ignorant.*⁶⁰

This example highlights the pervasive male attitude of the time toward toward women's battle for equality in their private and public lives. Such commentary may in part explain why, during the battle for suffrage, women rarely criticised private family structures or motherhood in the public forum. Many of the prominent suffragists were married with children and were dedicated to philanthropic work. It was only privately that women refused to accept biology as destiny.⁶¹

⁵⁷ S. Snively, 'Women Tax Treatment of Charities in the 1990's: Implications for Women in the Voluntary Sector,' in C Scott, *Women and Taxation*, (nd), p.107.

⁵⁸ R. Stevens, 'Social Services,' in B. Silverstone, A Bollard and, R. Latimore, *A Study of Economic Reform : The Case of New Zealand*, (Wellington, 1996], p.453.

⁵⁹ C. Delphy, *Familiar Exploitation: A New Analysis of Marriage in Contemporary Western Societies*, (Cambridge, 1992), p.27.

⁶⁰ H. Wright, *Evening Post*, June 12 1892.

⁶¹ B. Kirkwood, 'Population and Social Policy', in RJ Warwick Neville & C. James O'Neill (eds) *The Population of New Zealand*, (1979), p.287.

Women won suffrage in 1893, and there were other gains for women during the last decade of the eighteenth century.⁶² Women's experience in paid employment, their participation in higher education, and their involvement in and with the law resulted in pressure to reform dissolution policy. Gender equality in dissolution criteria became a high profile political issue during the 1890's. The parliamentary debates noted that Thomas Thompson had reported :

*Where he addressed large audiences... the question was put to him... whether he would be in favour of equal divorce laws for persons of both sexes. To that question he had replied in the affirmative and that reply was received applause on each occasion.*⁶³

GENDERED REFORMS

In 1898 the Divorce Act liberalised divorce. The Act governed "appropriate" causes and the rules for the process of dissolution. Not surprisingly, this legislation continued to reflect the expected gendered roles of the household. 'A wife could be divorced for drunkenness coupled with failure to fulfil domestic duties and a husband could be divorced for drunkenness coupled with failure to maintain his wife'.⁶⁴ The stereotypical domestic roles and their economic expectations were well entrenched in the colony. Domestic work and marriage provided financial security for women.

For women without separate property and a lack of financial resources marriage was an employment solution. Agencies which specialised in employment of domestic servants included matrimonial overtures in advertisements that were transparent about intentions. Phillips identified examples where the role of a female domestic servant was sought to be appropriated as a future legal wife; for example: 'Englishman abstainer, like to meet housekeeper (30), take station job, view marriage'.⁶⁵ Successful applicants were effectively working in servitude, where food and shelter depended on their domestic labour and sexual favours. Marriage was an employment contract and failure to comply with expectations of the fulfilment of 'domestic duties' could have resulted in dissolution of that contract. A woman's contribution to property during marriage was still not considered when marriage ended.

⁶² 'The 1880's and 1890's were a time of major change for women : they were questioning the subordinate position of women within marriage and arguing for schools for girls, sports clubs were being established, women were entering the paid workforce and the first women's trade unions were being formed.' S. Coney, *Standing in the Sunshine*, (1993), p.13.

⁶³ T.Thompson, NZPD LXXXIX,326:1898

⁶⁴ Mc Pherson, p.60.

⁶⁵ R.Phillips, p.79.

EARLY TWENTIETH CENTURY

In colonial and contemporary dissolution policy there are two strands of legislative development, one involving property and the other governing the legal process. The legislation governing dissolution post 1884 continued to focus on the cause and process of divorce. Until 1963 the legislature was silent in respect of property division.

In 1907 the addition of insanity as grounds for dissolution was included as an amendment to the Divorce and Matrimonial Causes Act. While this was heralded as recognition of the beginning of a no fault approach, it paired dissolution with pathology:

We have got to guard this colony against the fertility of the unfit what is the future of this colony if we allow either a man or a woman who has been certified as a lunatic to come back and resume co-habitation, resulting in the breeding of a race which, to my mind would be unfortunate in every sense of the word.⁶⁶

The legislation recognised that insanity was beyond the control of individuals. However the concepts of eugenics⁶⁷ and social Darwinianism⁶⁸ had gained credibility and these values infiltrated family policy. The responsibility for the production of the ideal family was the responsibility of those who reproduced, women. Population growth and reproduction of healthy children was promoted as important for racial success and national greatness.⁶⁹ To this end Dr Truby King, a former director of a mental asylum, pioneered the Plunket movement, championing motherhood as the critical factor in the development of a healthy society. He wrote extensively about issues of public health.

In 1907, the Plunket movement began as the Royal Society for the Health of Women and Children.⁷⁰ The Royal Society's concern for the health of women

⁶⁶ C. Louisson, NZPD CXXXII, 656:1905.

⁶⁷ Eugenics was considered the scientific application of the findings about hereditary and human beings with the objective of 'perpetuating those inherent and hereditary qualities which aid the development of the human race.' (Collins, 1956:355)

⁶⁸ Social Darwinianism claimed that 'forces acting in society are like the natural forces which operate in animal and plant communities and that the best adapted social groups survive conflict.' There was a racial overtone in the writings of Glumpowicz and Sumner which inferred that 'some races were superior to others'. (Abercrombie, 1984:225) Social Darwinianism is often linked to the neo libertarian economic notions of a competition for resources with an emphasis on personal responsibility or the survival of the fittest.

⁶⁹ T. King, in S. Coney, p.54.

⁷⁰ S. Coney, p. 64.

was clearly conditional on a woman's role as a married mother. The idea that women should be involved in activities other than those of mother and wife was an anathema to Dr King. Plunket publications written by the founding father were focussed on child rearing and were circulated to all applicants for marriage. Procreation and mothering were heralded as a married woman's priority in life. Education and employment beyond the household were viewed negatively, as evidenced in a letter written by King to one of his colleagues:

It is impossible for me to convey how strongly I feel that the common education of men and women upon similar lines was one of the most preposterous farces ever perpetuated.⁷¹

Women's work was focussed on the household. Their health and well being centred on their value as reproducers of the next generation. The Plunket methodology has been retrospectively viewed in a negative light even by male commentators. Reflecting on Plunket, Olsen claimed 'men were straight jacketed by ideas that big boys don't cry and women were guilt tripped into a domesticity.'⁷² While one method of exodus from an unsatisfactory marriage was to be diagnosed as insane, the criteria was to have been confined to an asylum for a total of ten of the twelve years preceding the dissolution petition, with little likelihood of recovery. Women's anxiety to escape marriage would need to have been acute to utilise such a method willingly.

Irrespective of the signal toward no fault divorce by the inclusion of insanity as grounds for dissolution, legislation continued to focus on the cause of divorce. In 1913 the Act was amended to include desertion or habitual leaving on the part of the husband without reasonable maintenance. It was not until 1920, with the social readjustment pressures following World War One (1914-1918) that the mutual ending of the relationship was recognised. The Divorce and Matrimonial Causes Amendment Act 1920 introduced discretionary divorce following three years registered separation, and reduced the period of insanity to seven years. However there was still an element of fault left to judicial discretion, as the action could only be taken provided one party was innocent of a matrimonial offence. At this point women's disadvantage was highlighted as a part of wider social and economic struggles. The depression of the late 1920's led calls by Labour party politicians for the state to take greater responsibility for the well being of the population. This period of time marked an increased

⁷¹T.King in Coney,p.64

⁷² E. Olsen, 'Breeding For the Empire,' *Listener*, (12.5.79).p18-19, and in 'Passionless People,' *Listener*, (19.5.79), p.20-21.

focus on the part of the state towards social obligations, and policies paid specific attention to women and children.

THE FIRST LABOUR GOVERNMENT

The victory of the Labour Party in the 1935 election marked the beginning of social and economic legislation which was underpinned by a theme of state social responsibility for the well being of its citizens, known as the welfare state. In 1908 the minimum wage judgment had aimed to provide 'a minimum wage for a family',⁷³ but the accepted norm of a husband, wife and three dependent children did not recognise the economic position of women and children without a male provider. The Social Security Act 1938 remedied this policy gap, it granted the equivalent of the widows benefit to women deserted by their husbands. The benefit provided a form of guaranteed maintenance for women. There was no change in legislation governing property division at dissolution of marriage.

The ideology underpinning the welfare state reinforced the perception that looking after home and family was exclusive to women. 'For many in the 1930's, paradise was a detached house with an inside flush toilet and a garden, a free doctor, opportunity for education, a job, and an income which allowed wives to stay at home and look after the children'.⁷⁴ This reflection on the socio-economic construction of women as 'mothers' 'allowed,' to stay at home and take care of the children illustrated that, 'a man c[ould] not be a house[husband]'.⁷⁵ It also demonstrated the lack of availability of affordable accessible child care facilities. Most women in a traditional nuclear family could not work full time outside of the home while children were preschoolers. This discouraged women from the paid work force and was a dependency trap for many women. It could be argued that it cleared the way for full employment for men. McCann argued 'this social construction of men's role as a playful provider who took the children to the beach and other outings resulted in men who wished to parent being considered sissies'.⁷⁶ He suggested this hangover was visible today in male culture. The welfare state transferred women's dependency on individual men for maintenance to the state as beneficiaries under the Social Security Act 1938 on dissolution.

⁷³ R. Stephens, 'Social Services,' in B. Silverstone, A. Bollard and, R. Latimore, *A Study of Economic Reform : The case of New Zealand*, (Wellington, 1996), p.453.

⁷⁴ C. Cheyne, et al, p.38.

⁷⁵ A. Oakley, *Housewife*, (1974), p.136.

⁷⁶ R. McCann, *Fathers Families and the Future Forum*, unpublished paper, Manukau Polytechnic, Sept, 1998.

Between 1840 and 1940 in colonial New Zealand, social, economic and legal gender inequalities were the norm. Motherhood was considered a life long pursuit necessary for the healthy development of children. The gendered division of labour in a household embodied the idea of a specialisation of tasks and continued to trap women in the home. Women's wages returned a fraction of those of men. 'Married women formed a very small section of the paid work force'.⁷⁷ A lack of access to tertiary education for women augmented the exclusion of women from many professions and careers. The graduated tax rate punished the secondary earner in a nuclear family, almost always the woman. These factors cumulatively discouraged women's access to full independent participation in society. At the time of dissolution of marriage, economic and social barriers compounded the legal inequity of not being entitled to a share family property on dissolution. Women's economic disadvantage was relieved when women were needed for paid work for World War Two. In the spirit of nationalism women moved into the workforce, into economic independence, and there were ramifications in respect of the number of applications for dissolution.

THE POST WORLD WAR TWO GENERATION

In 1946 women returned to the home front as men returned from the war front. The divorce rate rose during the war, increasing in 1943 to peak in 1946. At the end of the war no time was lost in a return to the old order. By the end of 1945 the economic status of women was appalling. 'Seventy three percent of married women had no income at all'. Men's earnings were considerably higher than women's. 'Five percent of married women and 26.55% of divorced women earned two hundred pound or more per annum, compared with 77.9% of married men and 70% of divorced men'.⁷⁸ The gender wage gap reflected the socially entrenched roles of male breadwinner female housewife, and demonstrated the difficulty women had earning money following the dissolution of marriage.

The post war New Zealand government focussed on a mixed economy, featuring market systems of production, consumerism, and state responsibility for social and physical well being of the family unit. Increased sub-urbanisation and low cost housing away from the expensive land needed for city infrastructures meant that women became isolated from the city and house wifely duties consumed much of their day.

⁷⁷ In 1926 only 3.5% of married women were in paid work and by 1945 this number had only risen to 7.7%. See R. Phillips, p.80.

⁷⁸ R. Phillips, p. 95.

Daily detachment for women and children in the suburbs, while men sought work in the city, was contextually different from the early colonial days, when men moved permanently in search of work. Nevertheless, this left women to take responsibility for the interests of the children and 'women found the isolation of suburban housing developments restrictive without amenities, jobs or public transport'.⁷⁹ The state viewed motherhood as an important role, and public policy resources such as the family benefit, free education and health care were channelled into improving the standard of living for children and families. Women's nurturing supportive role in society was reinforced. The policies of the state encouraged the appropriation of women's domestic unpaid labour which freed men to seek paid employment.

The Universal Family Benefit 1946 was a social policy signal that mothers were entitled to financial support and that they were considered responsible financial managers in the family unit. This was evidenced by the method of payment, which could only be uplifted by or placed in the bank account of the mother of the children. Mothers received the benefit for each dependent child irrespective of family income or property ownership.⁸⁰ As noted earlier the highest marriage dissolution rate of the decade was recorded in 1946, reflecting the separation of spouses during the World War Two and the subsequent impact of separation on family relationships. The new financial independence may have influenced a woman's choice to leave an unsatisfactory marriage. While new state benefits and state housing criteria did not necessarily fully cater for the financial needs of women who were still not automatically entitled to a share of matrimonial property, for some women they were beginning to provide support.

By 1950 it was legally possible for women to own half of the family home at dissolution. The Joint Family Homes Act 1950 was enacted to make it less costly for the title to be transferred into the wife's name after the husband's death. Although the aim of the legislation was not to empower separated spouses, it also meant that a wife was entitled to a share of the joint family home at dissolution. The provision was conditional on the good will of the husband at the time of purchase or thereafter to register the title of the home in joint names, and of the judiciary to recognise the joint ownership under the law of equity. If the male registered the home solely in his own name, then the law did not automatically protect the property interests of the wife at dissolution. The political and economic discretion of the husband in the family remained entrenched in the political and legal institutions and was

⁷⁹ C.Cheyne, et. al, p.19.

⁸⁰ *All about Women*, Statistics New Zealand, (Wellington, 1993), p. 18.

reflected in social norms:

Until the 1960's, the accepted form of social order required that men and women married and remained together. The roles of breadwinner and nurturer were separate, clearly defined, and enforced by community and religion.⁸¹

The early sixties brought significant change led by scientific advances that provided women with choices and opportunities. Reproductive freedom⁸² and varied opportunities in the employment market⁸³ gave women the chance and confidence to challenge some of the entrenched beliefs about their gendered roles. Academic institutions were supportive and as opportunities to participate in education and the paid work force evolved, attitudes and values about gendered roles were challenged. Formal equality⁸⁴ was articulated as equal opportunity. This became the central theme of a second wave of feminist activism. The new women's movement actively worked towards gaining a share of pooled family property to ensure women's financial independence from men.

THE 1963 REFORMS OF DISSOLUTION LEGISLATION

Changing values, along with judgments which illustrated gender inequality in the courts, led to a complete legislative reform of the laws governing dissolution in 1963. Two pieces of legislation that dealt with dissolution were passed in the same year. The Matrimonial Proceedings Act 1963 dealt with the cause *and process* and signalled a move away from fault.

Under the Matrimonial Proceedings Act 1963 the grounds for dissolution included:

adultery, artificial insemination of a wife with the semen of another man without her husband's consent; desertion for three years; habitual drunkenness or drug addiction for three years, coupled with neglect or non support; three years non compliance with a decree for restitution of conjugal rights. Other grounds included conviction for certain criminal offences, a separation order or agreement in effect for three years and living apart for seven years.⁸⁵

⁸¹ *Report of the Working Party on Matrimonial Property and Family Protection*, (Wellington, 1988), p.6.

⁸² The oral contraceptive pill was introduced into New Zealand in 1960. (Statistics New Zealand 1993:18).

⁸³ The Government Equal Pay Act was passed in 1960 (Statistics New Zealand, 1993:18).

⁸⁴ Formal Equality is aligned to the liberal feminist view that equality is achieved through policies and laws that provide strictly identical gender treatment for example: equal opportunity employment policies.

⁸⁵ M. McPherson, p.60.

The recognition that matrimonial relationships could mutually breakdown, that spouses could choose to separate 'by agreement,' signalled a move away from fault based dissolution proceedings. The issues that had previously pervaded fault based proceedings were, however, transferred to the new special rules governing the distribution of property. The entrenched biases of the past were echoed in, and exposed by, gendered language, which mirrored the socially constructed assumptions about women of the previous Divorce and Matrimonial Causes Act 1928.

The Matrimonial Property Act 1963 entitled a wife to a share of family property. This was the first tentative step toward recognising 'a set of rules which were [specifically] applicable to matrimonial property'.⁸⁶ The two laws operated alongside each other in a climate of shifting social attitudes. The women's movement was articulating the value of a woman's contribution to the household, and women were seeking financial independence from men following dissolution. Previously private maintenance agreements, extended family, the community and the 1938 social security benefit had delivered the available economic solutions for women and children. From 1963 property division became the focus for the provision of financial independence.

The move from dependency on maintenance to gaining a share of property was complex. Women had not generally contributed in a financial sense to the acquisition of property. Interpretation of this legislation, which valued contribution, was determined by the [male] judiciary as the reader will soon see. The ideological shift away from maintenance to entitlement to a share of the matrimonial property, was fraught with conceptual difficulty about the economic value of monetary and non monetary contributions. The courts measured domestic work, child care and prudent management against monetary earnings of the breadwinner. Although there was a move away from fault in the Matrimonial Proceedings Act 1963, the valuing of women's contributions to marriage partnerships under the Matrimonial Property Act 1963 was influenced by the conduct of spouses during marriage.

Under the Matrimonial Property Act 1963 women were expected to demonstrate their right to a share of matrimonial property and prove their contribution in order to gain a reasonable share. Conduct was considered in the allocation of assets. The common law did not provide clarity nor did the 1963 statute codify a specific set of rules for the allocation of the property of the marriage partnership. The Matrimonial Property Act 1963 allowed for significant judicial discretion in the definition of 'contribution' to marriage. From the mid sixties dissolution policy which evolved through the courts

⁸⁶ C. Bridge, p.233.

lacked certainty. Cases were litigated in the Court of Appeal and in one case as far as the Privy Council.

Following the enactment of the Matrimonial Property Act 1963, Woodhouse J. of the Supreme Court welcomed the legislation when he said:

*Marriage is a very special partnership of a very special nature...this Act enables the court to consider the true spirit of transactions involving matrimonial property by giving due emphasis not only on the part played by the husband but also the important contributions which a skilful housewife can make to the general family welfare.*⁸⁷

His comments about this legislation demonstrated that the domestic contribution of the unpaid work of the household was to be 'valued.' In his comments he noted the importance of 'skill' in house wifely duties and later in his commentary the Judge referred to the role of the judiciary in determining what proportion each partner would be granted. He implied that conduct of each spouse would be a factor in the decision making process:

*Each is in a unique position to support or undermine the constructive efforts of the other and it appears that considerations of this sort will now properly play a considerable part in the assessment made.*⁸⁸

Intrinsic in the judge's interpretation at that time was the idea that the efforts of one spouse to 'constructively' 'support' the other spouse's endeavours would be of interest to the court. Considering the social context in which women acted out their lives and the expectation that women would play supportive house wifely roles, it could have been expected that in the eyes of some judges the burden of proof would rest with housewives to prove their skills. The exercise would involve evidence of 'effort' from a base line of no entitlement, rather than the alternative of defending a contractually "equal" entitlement from the partnership, or a basic presumption of equal division.

Woodhouse J. was not communicating intentional or overt gender bias in his commentary, as he did believe and articulate 'marriage' as a 'partnership'. His concluding remarks revealed understanding of the economic outcomes for women following dissolution.

Women who have devoted themselves to their homes and families need not suddenly find themselves facing an economic frustration, at least in the area of family assets, which their husbands or wives who are

⁸⁷ Woodhouse J. in *Hofman v Hofman* [1967] NZLR 9 (AC)

⁸⁸ Woodhouse J. in *Hofman v Hofman* [1967] NZLR 9 (AC)

*wage earners have usually been able to avoid.*⁸⁹

The theme of such commentary from this judge, while considerate of women's economic position at dissolution, still highlighted women's commitment to home and family. This social construction of 'skilful housewives' 'devoted' to 'support' in the family context, sustained the traditional theme of a woman's role as complementary, subordinate and dependent. The expectation and desire for positive outcomes for women on the part of Woodhouse J., however, should not be questioned, as in policy matters he was an advocate for recognition of the unpaid work of women.⁹⁰ Contextually, Woodhouse was a judge interested in the broad social and economic policy environment. He noted that the housewife could 'free the husband to win the money income they both needed'.⁹¹ The sharing of the economic fruits of the specialisation of roles, as argued by Woodhouse, should have been guided by principles of equity. In *Hoffman v Hoffman* Woodhouse J. noted,

*there is a consistent line of authority to the effect that the s 5(1) (2) does not permit questions of title to property to be decided except in accordance with the strict legal or equitable rights of parties.*⁹²

The judgments of Woodhouse J. did not override the 'equitable interests of parties' and he did not consider it the intention of Parliament that the court should have 'unfettered discretion' to make an order. Social conditioning about women's place in society undermined women's submissions before less sympathetic judges in the courts.⁹³ The lack of certainty impacted on the outcomes for the whole family during the dissolution process. If women were portrayed as disloyal, un-supportive or unskilled in their motherly and house wifely duties, idiosyncratic judicial discretion led to outcomes that favoured male partners and created financial uncertainty for women and children at dissolution.

There was even confusion when judges attempted to use discretion to ensure equality under the 1963 Act. The lack of certainty in some cases was focussed on the conceptual difference between formal equality and substantive

⁸⁹ Woodhouse J. *Hoffman v Hoffman* [1965] NZLR 795.

⁹⁰ The Woodhouse Report into Accident Compensation recommended that women in unpaid work of the home should be able to claim Accident Compensation and this was provided for by The Accident Compensation Amendment Act 1973.

⁹¹ *Hoffman v Hoffman* [1965] NZLR 795.

⁹² *Hoffman v Hoffman* [1965] NZLR 795

⁹³ For example: *Haldane v Haldane* [1975] 1 NZLR 672, *EvE* [1971] NZLR 859, *Pettitt v Pettitt* [1970] 2 ALLER, *Keswick v Keswick* [1968] NZLR 6.

equality.⁹⁴

The 1963 Act allowed judicial discretion and judges used this in different ways. This created a problem in terms of certainty. For example Woodhouse divide equally while Wilson worked hard to achieve equal outcomes. (Key Informant Y)

The lack of clarity about the notion of equality, the resultant uncertainty and common gender bias led to major reforms of the 1963 Matrimonial Property Act. The cases which sign posted the need for reform and the changing cultural values which underpinned those reforms will be explored in the next chapter.

In this chapter I have discussed the political and economic context in which the laws governing dissolution of marriage were legalised and significantly liberalised. The gendered political economic and cultural values from the colonial inheritance when women had no property rights in marriage were reflected in the policies and laws governing dissolution for more than a century. The reforms of those policies 'did not benefit the ordinary married woman without independent means',⁹⁵ who remained at home and performed ordinary tasks of a wife and mother. Property outcomes continued to reflect the gendered domestic roles in marriage and moral judgments which disadvantaged women at dissolution.

Chapter Five will examine the values of the policy actors and relevant policy trends that led to reform and the subsequent passage of the Matrimonial Property Act 1976. It acts as the crossroads at which this study introduces the research participants. From this point, the primary data will substantiate secondary literature and guide the selection of themes explored. Policy key informants, judges and legal practitioners will speak of their understandings and experiences leading up to and under the Matrimonial Property Act 1976, and The Family Proceedings Act 1980. They will illustrate a policy culture where male legislators recognised gendered inequality. There I will compare their objectives of equality, justice, conciliation and independence with the experiences of women.

⁹⁴ Formal equality is aligned with the liberal notion of equal opportunity where both genders are treated equally. Substantive equality on the other hand recognises that women and men have different life experiences and may need to be treated differently to ensure equal outcomes. Under the formal equality principle property would be divided equally at dissolution. With the aim of achieving substantive equality a judge may divide the property unequally to take account of the different needs, skills and opportunities of one partner over the other.

⁹⁵ C. Bridge, p.232

CHAPTER 5

**MALE POLITICIANS LEGISLATE FORMAL EQUALITY:
THE POLICY CULTURE 1963-1980.**

*During the late 60's and the 70's with the rise of the women's movement and all the influences like International Women's year and the United Nations Decade for Women there was a resurgence of liberalism and that is when the complete rewriting of all family based legislation started, pushed to a degree by the conservatism of the courts and the manner in which they interpreted the Matrimonial Property Act 1963.
(Judge I)*

INTRODUCTION

Cultural values and legal assumptions are implicit in all public policies. These values and assumptions can be better understood through an investigation of the policy process that led to the passage of legislation, and an examination of the impact of the law on citizens. In the context of such an investigation this chapter traces the reform of matrimonial property law in 1976. It examines the policy culture surrounding the law change and the initial outcomes of the Matrimonial Property Act 1976 in the courts.

The first part of the chapter explores the process which led to the introduction of the code for the division of property under the Matrimonial Property Act in 1976. The objectives of the legislation are compared with the initial judgments in the courts following the passage of the Act. I examine the early cases that prompted the judiciary to redirect the policy trend back to the principles of the legislation in 1979. This section begins to identify the symbiotic relationship between the legislature and the courts as policy makers.

The second section of the chapter examines the classification of property under the code for equal division in the Matrimonial Property Act 1976. Here I critique the distinction between the 'matrimonial home and chattels' and 'balance of matrimonial property,' and the standard for departure from the presumption of equal division in both 'separate' and 'balance' property. I posit that this classification disadvantages the non-earning partner of the marriage at dissolution. I argue that unequal outcomes were likely in spite of the directive that 'monetary contributions [we]re not to be accorded greater weight than non monetary contributions'.¹

¹ Matrimonial Property Act 1976, Section 18.

This chapter identifies a policy time-frame when all areas of the policy system worked in coalition toward ground-breaking change in the way the law and citizens viewed the dissolution of marriage. I suggest that while the reforms were premised on formal equality, as a mechanism for equal outcomes at dissolution of marriage, the implementation of the act did not consistently deliver the equal 'consequences' intended by the legislators, when the Act was drafted.

THE POLICY CLIMATE PRECEDING REFORM

The policy making role of both the courts and Parliament was emphasised in the events that led to reform of the 1963 legislation. By the 1970's the feminist movement had contributed to the understandings and values of the policy makers. Several male Members of Parliament had experience as lawyers in matrimonial property disputes. The reforms of the 1963 legislation were influenced by the legal intellect, personal experiences and gender value positions of highly respected male members of parliament from both the Labour and National party.² They were aware of gender discrimination in the courts due to their own professional experiences, and from the findings of the 1974-5 first Parliamentary Select Committee on Women's Rights.

A former Member of Parliament, who sat on the Statutes Revision Select Committee and had practised as a barrister, spoke of a conversation with a judge at a hearing, under the 1963 legislation. The experience was described as the genesis for a personal commitment to change policy:

One judge said to me ... I have a rule of thumb in these cases, I give the wife one percent of the value of the home for every year of the marriage, He said, that's the rule of thumb and I'll vary it according to circumstances. (Key Informant No 2)

The barrister explored the implications for women when he sought clarification:

I said, is your honour saying that unless there are special circumstances, after twenty five years of marriage bringing up a family, sacrificing your career, and making all the contributions that might be necessary, the wife will get quarter of the home? And he said yes, that's my rule of thumb, I will vary it according to the circumstances. (Key Informant No 2)

For this hypothetical client, the value of the matrimonial home would have had to equal the value of four homes, in order for her to be rehoused in her own home in a similar location, following the dissolution of the marriage.

² Note these Members included: Hon Martin Finlay QC, Hon Jonathan Hunt, Hon David Thomson and the newly elected Jim McLay .

INIJUSTICE IN THE COURTS

The lack of certainty of property division under the Matrimonial Property Act 1963 centred on the balance of conduct and entitlement. Whether or not the value of contribution should be influenced by conduct, and under what circumstances the court might see fit to make an award, varied from judge to judge. Some judgments took conduct into account in the allocation of property. In *Keswick v Keswick*³ Mrs Keswick's leaving the home appeared to influence the judge's decision with respect to her entitlement. Tompkins J. had reflected on the wife's financial and domestic contributions to the marriage:

the evidence shows that she ... made a substantial contribution by way of her thrifty and frugal housekeeping which allowed a greater proportion of the respondent's earnings than would otherwise be the case, to be used in buying materials for the house ... she contributed by her cash contributions or services approximately one fourth of the cost of the house ...

However, Mrs Keswick had left the marital home, and this was considered to be a matrimonial offence under the Matrimonial Proceedings Act 1963. Tompkins J. noted:

*this fact [desertion] is relevant in considering whether the justice of the case demands that the applicant be given a larger interest than her contributions in money or services would warrant. I do not think, having regard to all the circumstances, that this is a case where I should award her more than would be justified by the extent of her contribution.*⁴

The Judge had recognised Mrs Keswick's service, paid contribution and prudent management. However he did not award her more than the one quarter she had contributed. There was a connection between entitlement under the Matrimonial Property Act 1963, and desertion as a matrimonial fault under the Matrimonial Proceedings Act 1963. This connection was confirmed in *Gleeson v Gleeson* by Richmond J. when he stated that, 'the two statutes are linked and complementary'.⁵ Women who left homes generally may have been disadvantaged at dissolution if their leaving was viewed as desertion.

POLICY THEMES

The Matrimonial Proceedings Act 1963 recognised relationship breakdown as grounds for dissolution. During the same period domestic violence was

³ *Keswick v Keswick* [1968] NZLR 6

⁴ *Keswick v Keswick* [1968] NZLR 6

⁵ *Gleeson v Gleeson* [1975] Current Law (NZ) 1090

considered relationship violence. It “took two to tango,” there were always “two sides to the story,” if a woman was hit she was frequently asked what she “did to provoke him,” or “who threw the first punch”? Police policy had not addressed violence in the home as a high priority. Relationship violence was a private matter viewed as “just a domestic”.⁶ Power imbalances in family relationships were not understood by the courts as they are today. Desertion from the family home in the context of what we now know about domestic violence makes it possible to hypothesise that under the 1963 Act there were women who left the matrimonial home due to their fear of domestic violence. These women may have been unable to convince a judge that these were special circumstances and may have then been punished at dissolution for their conduct (for example desertion) in the allocation of matrimonial property.

In other areas women continued to experience moral judgment and financial disadvantage in spite of state policies designed to provide relief. The Social Security Act 1968 introduced a specific domestic purposes benefit for women and children alone who faced hardship but it was not awarded to women who left their husband ‘unless they could satisfy the Social Security Commission that they had sufficient cause for living apart’.⁷ Beaglehole noted that historically there had been a hierarchy of value judgments in the approach to provision for women. Those who were widowed were considered most deserving, separated and divorced women were secondary.⁸ This approach continued into the mid sixties.

The Social Welfare Department and the Matrimonial Proceedings Amendment Act 1968 stressed reconciliation. The emphasis on reconciliation and keeping families together implied that the state was reluctant to support families apart. The notion that a woman should not leave her husband without due cause demonstrated that fault still featured in assumptions about dissolution, and gender bias continued to be articulated in public policy. The economic inequities and gendered nature of the marriage partnership apparent in early colonial times continued to disadvantage women.

Judicial discretion in property distribution resulted in women having to prove the value of their contribution to the marriage partnership in the courts and private settlement negotiations. The 1963 Matrimonial Property Act had recognised non-monetary contributions to marriage for the first time in family law. While this ideological shift recognised unpaid work

⁶ Submissions to the Parliamentary Select Committee on Women's Rights 1974-1975.

⁷ M. McPherson, *Divorce in New Zealand*, (1995), p. 60.

⁸ A. Beaglehole, *Benefiting Women: Income Support For Women*, (1893-1993), Social Policy Agency - Ropu Here Kaupapa, Wellington.

within the home, re-allocation of property continued to favour the breadwinner. The Matrimonial Property Act 1963 and the Matrimonial Proceedings Act 1963 recognised the marriage contract as a work partnership but not as a partnership of equal workers.

Research found that comparisons between unpaid and financial contributions resulted in 'low property awards to wives and a study over a four year period in the Wellington Registry 'failed to discover one case of equal apportionment'.⁹ The Court's interpretation of the Matrimonial Property Act 1963 had not considered the specialisation of tasks in the household to be in the nature of an equal partnership.

PRIVY COUNCIL CONFIRMED THE NEED FOR REFORM

In the Court of Appeal and at the Privy Council, policy certainty was sought. Woodhouse J. had signalled in *Hoffman v Hoffman* in 1965 that the court did not have unfettered discretion to depart from equitable distribution. In 1971 in *E v E*,¹⁰ the Court of Appeal had obstructed this movement toward equality in the division of property by returning to discretionary practices. Women needed to prove contribution before an award could be made, particularly in respect of property other than the marital home, McCarthy J. had said:

*The mere fact that a wife has been a good wife and looked after the husband well domestically, cannot possibly in my opinion, justify an order being made in her favour in respect of a business owned by the husband in the running of which the wife had no share.*¹¹

In a country where agricultural production was a common form of family enterprise, the patriarchal ownership of property echoed the past. Farm properties were the source of much of the debate. The particular need for reform with regard to farm property was confirmed by the Privy Council judgement in *Haldane v Haldane*,¹² which followed Parliamentary assent of the 1976 legislation.

Mrs Haldane had been given leave to appeal a decision of the Court of Appeal to the Privy Council under legal aid, because the questions involved were critical to the future interpretation of matrimonial property law. The case involved the wife's right to a share in the farm property which had provided income and residence over the period of a twenty nine year marriage.

⁹ *Wither Matrimonial Property* 4 NZUL p.271.

¹⁰ *E v E* [1971] NZLR 859 (CA)

¹¹ *E v E* [1971] NZLR 859,885 (CA)

¹² *Haldane v Haldane* [1976] 2 NZLR 723 -724 (PC)

Further, this property was the site on which the matrimonial home was located. The family farm had been acquired partly by way of purchase and gift from the paternal side of the family. The wife of the marriage had borne five children, but at dissolution had no home, no savings, and was living with one or other of her adult children.

In the view of the Privy Council the New Zealand legislation was not clear. In *Haldane v Haldane* it was stated that, 'the statute (1963) is extraordinarily difficult to construe'.¹³ The lack of clarity centred on the definition of 'contribution' to the property in dispute. The issues focused on what constituted the property of the marriage, the value of the unpaid contributions to the household, and under what circumstances the balance of the property should be divided equally. The difficulty for the Privy Council related to the ownership of property other than the home. The issue was whether a contribution to the household could be 'a contribution to property outside the home.'¹⁴ In this case farm land was the focus of the difficulty. The Privy Council found that performance of ordinary domestic duties in the matrimonial home was intended by the legislature to be a contribution to the matrimonial home. In the case of other property and assets the courts were to decide policy.

The idea that a domestic contribution was a contribution to assets outside of the matrimonial home had been left to the unfettered discretion of the court. The Privy Council cited the 1968 amendment to section 5(2) as evidence of judicial discretion for 'the power to order, the sale or part of the property division, vest one owner's property in the other, or to convert joint ownership into ownership in common'.¹⁵ The effect of this amendment had allowed the court to override the 'equitable interests of parties'.¹⁶ The Lordships concluded that the unpaid contribution extended to 'indirect contribution towards the retention of an asset' and how they were to account for this indirect contribution was to be decided on the merits of the particular case. In considering the facts of a particular case they defined the relationship between contribution and conduct thus:

*Wrongful conduct cannot be taken into account in determining either the form or the extent of the order of the court unless such wrongful conduct relates to the acquisition of the property or (which would be more usual) the extent or value.*¹⁷

¹³ *Haldane v Haldane* [1976] 2 NZLR. 715 (PC)

¹⁴ *Haldane v Haldane* [1976] 2 NZLR. 715 (PC)

¹⁵ The Matrimonial Property Act 1963 sect 5(2) in *Haldane v Haldane* [1976] 2 NZLR. 715 (PC)

¹⁶ The Matrimonial Property Act 1963 sect 5(2)

¹⁷ *Haldane v Haldane* [1976] 2 NZLR. 715 (PC)

¹⁸ *Haldane v Haldane* [1976] 2 NZLR. 725 (PC)

Wrongful conduct was not to be considered unless it influenced the value of the property. There were boundaries pertaining to the nature of the conduct. Such matrimonial conduct as adultery or desertion would generally be irrelevant under the Matrimonial Property Act 1963. On the other hand, such mis-conduct as 'sluttishness or extravagance on the part of the wife' or the 'reckless gambling by a husband' could be taken into account where it had a direct or indirect influence on the property in dispute. This would need to be 'gross and palpable to affect the order of the court'.¹⁸ In their Lordship's view, 'The Matrimonial Property Act 1963 [wa]s so constructed as to produce injustice to the wife'.¹⁹ As one judge who remembers practising under the legislation confirmed:

It was extremely difficult if you were appearing for a wife to get an award for any more than about 20%-30%, even in cases where you had a 30-40 year marriage and a really traditional sort of farming set up. I mean he had been a share milker not only had she utterly supported all of that, she'd generally brought up the children as well under difficult circumstances. You know it was very difficult to get a respectable award. (Judge A)

SOCIAL CHANGE

Feminist activism promoting equal rights for women had gained momentum in New Zealand in the sixties and early seventies. The objectives of the women's movement were equal pay rates, inclusion of housewives in accident compensation legislation, equal access to education and employment opportunities, and the exposure of the gendered division of labour and childrearing roles in marriage. There was a politically vibrant attack on men's violence towards women in personal relationships and a questioning of the social construction of femininity. The women's movement aimed to revolutionise the way that the two genders behaved and re-construct the ways in which people perceived the gendered world. There was an eloquent awareness that the institution of marriage was playing a systemic part in the subordination of women. In 1969 political action was evident 'an independent womens party ... fielded candidates ... on a platform of reform of marriage laws'.²⁰ Feminist activists believed there would be a total structural revolution.²¹ Marriage as an institution was questioned.

Indicators of social change, such as a decrease in the size of families due to the availability of contraception, and better access to tertiary education were coupled with economic shifts of increased consumption and industrial

¹⁸ *Haldane v Haldane* [1976] 2 NZLR. 725 (PC)

²⁰ S. Coney, *Standing in the Sunshine*, (1993), p.142.

²¹ Feminist activist and educator Charmaine Poutney, Oral communication November, 1998.

production. Equal pay had been introduced in the public sector. 'Married women were freed from a life of child care and were able to take up paid employment in increasing numbers'.²² But this change in the structure of work did not necessarily contribute to different outcomes for women who had been unable to maintain employable skills during child rearing.

In recognition of hardship and in an economy experiencing high rates of inflation, the Social Security Amendment Act 1973 provided a domestic purposes benefit with defined benefit rates and income exemptions.²³ The Act relinquished the discretion of the Department of Social Welfare in the granting of domestic benefits and provided payment for women and men. Women could now leave unhappy marriages, claim their entitlement without judgment and men could also choose to offer themselves as custodial parents. Legal practitioners noted a reduction in business. 'The statutory right to the Domestic Purposes Benefit resulted in a halt to maintenance litigation and there was a marked increase in the divorce rate.'²⁴ Women ceased to look to the courts to secure maintenance from former husbands. State support provided a measure of financial certainty and independence. The Domestic Purposes Benefit (1973) transferred financial responsibility for the payment of maintenance from ex-husbands to the state.

PARLIAMENT LED THE 1976 REFORMS

In 1976 the state was attempting to further empower women's financial independence by ensuring an equal share of matrimonial property. This would provide women with an equal share of capital at dissolution. Ninety two years following the Married Women's Property Act 1884, when women had fought for the right to own property, male legislators had heard the new wave of women's voices, and observed inequity first hand in their professional lives. They could not ignore the criticism implicit in court decisions. In the absence of Parliamentary direction, the courts had been forced to be active in making policy. On that basis parliament drafted reform of the 1963 Matrimonial Property Legislation.

While social change and feminist activism influenced calls for reform of Matrimonial Property legislation prior to 1976, the changes were made as a result of a culmination events from all areas of the policy system. This included the courts, the executive, the government and the opposition Labour party who had originally introduced the Bill for change. Both

²² E.Olsen and A.Levesque, 'Towards a History of the European Family in New Zealand,' in P. Koopmen Boyden (ed) *Families in New Zealand Society*, (1976), p.18.

²³ Hon. Norman King, Minister of Social Welfare, NZPD vol 385, 1973:3694-3695.

²⁴ Legal Practitioner, Y.

political parties looked to honour 1975 election campaign promises for an equal sharing regime.²⁵ The immediate need for reform of the 1963 matrimonial property legislation however was confirmed by injustice for women in the courts and male politicians with legal experience led the charge:

If you had to point to a group (who led the reform) I think it was MP'S who had been lawyers who acted for women who were clearly being disadvantaged by the existing law. I mean there's no doubt that the feminist movement was achieving a considerable degree of strength at the time would have some influence, and certainly I think it would have played some role in giving the issue a high public profile.

(Key Informant No. 2.)

It was clear to several members of parliament on both sides of the House including a number who had practised family law, that, 'the courts were never ever going to be able to get to an equal division, the equal sharing of property under the 1963 Act'.²⁶ Members of Parliament across political parties concurred that the 1963 Act was unjust, especially for women.

The frequent injustice in the courts, however, did not create a widespread consensus that change should be made to legislation. 'There wasn't a great community social movement in favour of the Act before it was passed'.²⁷ The Law Society was particularly averse to reform. But significant momentum was created by New Zealand's first Parliamentary Select Committee on Women's Rights which reported in 1975 that the 1963 Act was not interpreted according to the social values of the time. The women's movement had established the concepts of equality of treatment in the wider policy arena. They found an unlikely and surprising ally in the national Federated Farmers organisation whose legal advocate was Ruth Richardson. Following her submission to the Statutes Revision Select Committee, a Member of Parliament commented to the Hon. David Thomson, 'remember Minister, for every aggrieved farmer there's a happy farmer's wife'.²⁸ The Privy Council reinforced the notion that the 1963 legislation was ambiguous in its direction to the courts, and this was especially the case for those who owned farming property. At the regional political party level this was confirmed also:

In those days, the rural women's branches of the National Party were significant fund raisers for the party. Despite their conservatism on a range of other issues, the rural rump of the National Party caucus, in combination with the newly elected younger liberal city lawyers had no

²⁵Key Informant No.5.

²⁶ Key Informant No. 2.

²⁷ Key Informant No.2.

²⁸ Key Informant No.2.

question about the equality battle, especially when the Federated Farmers submission supported the change. (Key Informant No 5)

Members of Parliament realised along with the Law Lords, you could not make a clear distinction between contribution to the household and a farming business.

It is not difficult to understand the National Party's position on this. They were still the party of preference for rural constituencies and the M. P's knew, from personal experience and observation, that the farm household was an integral part of the farm business. Most farm women were active in day to day practical farm work, as well as farm administration, in addition to child care and home making responsibilities. (Key Informant No 5)

Promoted by an earlier Labour Government following a report commissioned by the then Minister of Justice the late Hon Ralph Hannan, the Bill was introduced by National. In 1975 on introduction the then Minister of Justice Martin Finlay contended that the Bill would 'give women an entitlement based on mutuality and equality which I believe to be the foundation of marriage.'²⁹ Thus the passage of the 1976 reform took a non partisan approach. Labour and National had participated in the early drafting of the bill, and the Parliamentary Debates recorded inter party congratulations for the final form and content, with few accusations of omission.

The National Government's Bill was introduced in 1976 by Hon. David Thompson who 'had been brought up by a mother with very strong views about the rights of women and had been very strongly influenced by that'.³⁰ Hon. Jim McLay Chairperson of the Statutes Revision Committee, identified critics of the bill as 'being totally unprepared to accept that marriage is a partnership of equals, involving both equal rights and equal responsibilities'.³¹ The shift from viewing marriage as a partnership in which women had a right to a portion of property, to the concept of formal equality, whereby women had a right to half of the home and chattels was at the heart of the proposal.

The legislation used the same language as was found in the *Haldane* judgment. But, there was another critical source of influence. Women were present as policy actors:

The courts had said to Parliament -make policy and culturally, socially politically a number of factors converged. A number of

²⁹ NZPD. vol 408 (1976), p. 4723.

³⁰ Key Informant No 2.

³¹ NZPD vol 408 (1976)p.4722.

Parliamentarians who sat on the Select Committee on Women's Rights survived the 1975 election, and brought their ideas with them. While National had had no women in Parliament in opposition (1972-1975) they now had two, Marilyn Waring and Colleen Dewe. The Select Committee on Women's Rights meant that a large number of women's groups were now used to making submissions and they frequently did. The key Justice Department discussion paper had been prepared by Patricia Webb, the daughter of a previous National Government Minister of Justice and Attorney General. The Chief Justice Department advisor was another woman Janice Lowe. And when the Women's Electoral Lobby arrived to present their submission, the delegation was led by Ruth Richardson.³² There is also no doubt that a number of the young male lawyers in the National Government got a buzz out of the fact that the further they went, the more they were going to be seen as enacting the most 'equal' regime in the Commonwealth.

(Key Informant No 5)

The Act prescribed a code which guided the just division of assets when a marriage dissolved. Its passage also signalled a general policy move toward the enactment of a family law package which would guide the dissolution process toward less adversarial procedures, change spousal maintenance principles and remove the notion of fault from dissolution proceedings. The Minister of Justice said, 'it is the beginning of a development towards rewriting the whole of family law'.³³

MATRIMONIAL PROPERTY : A PARTNERSHIP OF EQUALS

According to one key informant when the principle of equality was discussed in the Select Committee, there was an assumption of equality and that assumption referred to the 'consequences'³⁴ at dissolution. The Select Committee believed they had written an act governing gender equality expressed as equal division of matrimonial property. The idea that the politicians had legislated for 'consequences' suggested that they perceived 'equal opportunity' to deliver 'equal outcomes'. This was most radical in the explicit definition of 'contribution' to the 'marriage partnership'. Under section 18 of the Act, contribution included: the care of any child of the marriage or any aged or infirmed relative or dependent, the management of the household, provision of money, the acquisition or creation of matrimonial property, payment to maintain or increase the value of matrimonial or separate property, performance of work or services in

³² Ruth Richardson appeared for both the Federated Farmers and The Women's Electoral Lobby.

³³ Hon D. Thompson, NZPD.vol 408 (1976), p.4723.

³⁴ Key Informant No2.

matrimonial or separate property, the foregoing of a higher standard of living, the giving of assistance to enable spouses to acquire qualifications, aids to a spouse in the carrying out of their occupation or business.

The select Committee had put a great deal of energy into the discussions they thought that they had given the courts clear guidance:

I remember the Select Committee spent more time on the 'contribution' section than any other. David Thompson was particularly assiduous in the deliberation stages. Then finally the Chairman said: Can anyone think of anything we could have possibly left out? And he didn't just ask the Committee Members. He asked all of the Departmental advisors and even the law draftsman. (Key Informant No 5.)

Consultation had been wide and responsibility for covering all possibilities was shared between the elected representatives, bureaucrats and the public via submissions. This was the first time equality had been stated in a statute governing dissolution. The objective 'to recognise the equal contribution of husband and wife to the marriage partnership; to provide for a just division of matrimonial property between spouses when their marriage ends',³⁵ was a strong message from Parliament to the Judiciary that past injustices for women in dissolution proceedings were not to be replicated under the new legislation. The principle of equality was to underpin proceedings and the equal sharing presumption would provide the baseline from which the dissolution process began. The Judiciary was provided with clarity regarding the value of the unpaid work of the household. Equal sharing between parties, previously articulated by Woodhouse J., would not be compromised by the undervaluing of housekeeping. There was to be no 'presumption that a contribution of a monetary nature was of greater value than a contribution of a non monetary nature'.³⁶ The new statute aimed to create a specific code or scheme for the classification of property. With discretion restricted, Parliament anticipated that certainty in the courts would eventuate, and private settlement along the guidelines of the classification scheme would eliminate the need for litigation. But the objective of the legislation to recognise the equal "contribution" of husband and wife differentiated between three classifications of property as core matrimonial property, balance property and separate property.

Core matrimonial property included most of the basic concrete or material possessions owned by families who had earned sufficient income to purchase tangible assets: the matrimonial home (Sect 8(a)), the family chattels

³⁵ Matrimonial Property Act 1976, Long Title.

³⁶Hon. J McLay, NZPD vol 408, 1976:4109

(Sect 8 (b)) and jointly owned property and or property acquired during the marriage out of matrimonial property. The matrimonial home was safeguarded by this classification. The home and chattels were to be matrimonial property whether purchased before marriage or gifted during marriage to one or both partners. Section 8(d) provided for the inclusion of property acquired before marriage and section 8(e) included property accumulated after marriage for 'common use and benefit'.

We discussed a Goldie painting for example, which might have been inherited by either party after marriage but which had hung in the family living room for 15 years. That was to be included in matrimonial property. (Key Informant No 5.)

This inclusive approach of all the resources of the family would safeguard the home and other valuables of the marriage even if it was purchased by one partner preceding the union.³⁷

The protection of the home of the children of the marriage was an intention of parliament 'to recognise the rights of dependents and minors'.³⁸ In keeping with this principle, in 1983 there was an amendment to the Act when section 28(a) instructed the court to take particular regard to the need to provide a home for any minor dependent children of the marriage. In this way the court could grant an order forestalling the sale of the matrimonial home in the interests of the children:

The courts didn't usually force the break up of assets unnecessarily, mainly because it was not in the best interests of both parties. Forced sales are fire sales, fire sale means reduced prices. The courts may say I'm not going to force the sale now, this is where the kids are going to live - he gets a half interest if this is where the kids are going to be brought up, we should not enforce the sale. (Key Informant No2.)

Equal division could not be departed from in the division of the home and chattels unless there were 'extraordinary circumstances, that, in the opinion of the court, render[ed] repugnant to justice the equal sharing'.³⁹

The wording of that phrase was suggested by the Parliamentary law draftsman, Walter Iles, and it reflected the Law Lord's phrase in Haldane of 'gross and palpable'. (Key Informant No 5.)

³⁷ Other property acquired from matrimonial property during marriage was also included. property acquired out of separate property for the 'common use and benefit' during marriage became matrimonial property (Sect 8(e)). Income and gains derived from matrimonial property were included by section 8(f). Life insurance policies 8(g), property insurance, 8(h) and superannuation 8 (i) were matrimonial property if entitlement to the benefits derived 'wholly or in part' from contributions made after the marriage from the resources of employment or positions held during the marriage. The payment of redundancy to a partner of a marriage was deemed matrimonial property if received during the marriage, this was provided by section 8(e).

³⁸ Hon J McLay, NZPD vol 408, 1976:4109.

³⁹S14. Matrimonial Property Act 1976.

This powerful wording, was in the first few years, interpreted to include such behaviour as alcoholism and leaving the home and children. The discretionary habits of the judiciary under the 1963 Act were not so easily modified. During the early years, following enactment, judgments demonstrated that judicial discretion was difficult to constrain. When we compare initial cases with the objectives and draw on interviews with former Members of Parliament we find that the intentions of Parliament were not always followed and judgments in the courts did not consistently reflect the concept of equality of 'consequence', as was intended by the legislature, according to key informant No2.

In *Madden v Madden*⁴⁰ the consideration of conduct had delivered unequal division of matrimonial property. Personal values may have affected the judge's perception of the wife of the marriage, portrayed as failing in her matrimonial duty, evidenced by her consumption of alcohol and desertion from the matrimonial home. The husband in this case was a lawyer. Mr Madden would have understood the legal system and the principle of judicial discretion. The judiciary found Mrs Madden's lack of contribution to the household 'extraordinary' and therefore equal sharing 'repugnant to justice'. Mrs Madden was awarded twenty five percent of the home and chattels. For Mrs Madden, it appeared that the values and beliefs of the judiciary, regarding the proper conduct of a good wife and mother, had a significant bearing on the judgment.

By 1978 case law confirmed that consideration of conduct had played a part in the continued delivery of unequal division of matrimonial property. Conduct was not the only indicator that implicated judicial gender bias. Bridge⁴¹ quoting *Piper v Piper*,⁴² *Campbell v Campbell*,⁴³ and *Taylor v Taylor*,⁴⁴ illustrated that gendered assumptions, 'constructed a hypothetical marriage based around judicial attitudes and expectations'.⁴⁵ Bridge claimed that 'an individual judge [could] reflect his or her personal values and prejudices in the decision'.⁴⁶ Continued judicial discretion did not deliver certainty of property distribution. In spite of Parliament's intention to enact a clear code for the equal reallocation of property at dissolution, it appeared that fault continued to impose value judgement on decision governing the distribution of assets.

⁴⁰ *Madden v Madden* (1978) 1 MPC 54.

⁴¹ C Bridge, 'Reallocation of Property after Marriage Breakdown' in M Henaghan and B Aitken (eds), *Family Law Policy in New Zealand*, (1992) p.239.

⁴² *Piper v Piper* (1978) 1 MPC 164.

⁴³ *Campbell v Campbell* (1977) 1 MPC 37.

⁴⁴ *Taylor v Taylor* (1978) 1 MPC 206.

⁴⁵ C Bridge, p.240.

⁴⁶ C Bridge, p241.

FAULT

The initial interpretations of the Matrimonial Property Act 1976 were influenced by the notion of fault under the Matrimonial Proceedings Act 1963. Judges were to consider the grounds for divorce of adultery, habitual drunkenness and desertion from the home under the Matrimonial Proceedings Act 1963. That statute applied concurrent to the repugnant to justice clause of the new Matrimonial Property Act 1976. The intentions of the legislature in respect of 'repugnant to justice', when dividing property were clarified by a member of the select committee:

We were trying to get away from situations where a party who was guilty of mis conduct that had nothing to do with the the property was still punished in relation to the contribution they had made to the property. We were ultimately coming to the gross and palpable test which came straight out of the Privy Council decision in Haldane:

(Key Informant No 2)

In 1979, Woodhouse J. intervened with a policy statement critiquing the early interpretations of 'extraordinary circumstances' (s14) cases.⁴⁷ In *Martin* he redirected the court by defining what was intended by the words 'extraordinary circumstances' and 'repugnant to justice':

*. . . the phrase extraordinary circumstances refers to circumstances that must not only be remarkable in degree but also unusual in kind. It is vigorous and powerful language to find in any statute and I am satisfied that it has been chosen quite deliberately to limit the exception to those abnormal situations that will demonstrably seem truly exceptional and which by their nature are bound to be rare.*⁴⁸

This judgment restricted discretion to depart in the future. While alcoholism was not particularly rare or remarkable, alcoholism in marriage relationships had featured as a matrimonial fault throughout previous legislation. The significance of such a condition in previous legislation may have influenced Parliament where the issue had been canvassed. It had been decided in select committee that more than the condition of alcoholism was required for the situation to be viewed as extraordinary and repugnant to justice.

When the Select Committee discussed 'repugnant to justice' we instanced failure to contribute to the marriage partnership for a sustained period because of alcoholism which had a direct effect on

⁴⁷ Mrs Madden's earlier mentioned behaviour may have been more common than extraordinary. It is not unusual for people in unhappy marriages to abuse alcohol. It was unlikely given her husband was a lawyer, that he would leave the marital home clearly understanding the legal implications. Mrs Madden's desertion then may have been a natural response to the breakdown in the relationship.

⁴⁸ *Martin v Martin* [1979] 1 NZLR 97- 102.

earnings and property values, Woodhouse's obiter in the case of Martin v Martin was precisely what the Select Committee intended.
(Key Informant No.5)

By 1980, equal division was further reinforced when the Family Proceedings Act 1980 established the no fault regime. The abuse of alcohol during marriage, adultery and desertion from the matrimonial home would no longer affect the decisions in the courts unless the situation was "exceptional". After the Family Proceedings Act 1980, irreconcilable breakdown was the only ground for dissolution, the no fault divorce regime ran alongside the code for division and grounds for dissolution were now simply two years of living apart.

It is important to note here, that a stricter interpretation of the equal division presumption has subsequently been followed. In the Court of Appeal case *Wilson v Wilson* (1990), it was noted by Richardson, Somers and Hardy Boyes that:

*Applying the settled and stringent approach taken by this court in Martin v Martin [1979] 1 NZLR 97; and decisions following Martin, equal sharing was required..In the first group of cases beginning with Martin on to Reid v Reid [1979]1 NZLR 572, and right down to the present time, we have emphasised that the just division of the matrimonial property, to which the long title of the Act refers, must reflect the proper recognition of the presumption of equal contributions of husband and wife to the marriage partnership.*⁴⁹

The matrimonial home and chattels were consistently divided equally. The court had established strict guidelines for the code which would ensure certainty. For families who owned a home a car and had little extra to divide that code was effective. As property ownership became more complex, as more people invested in other assets and traded in new innovative ways, the definition of property came to be challenged. Where extraordinary earnings were involved it was demonstrated the court was more likely to apply discretion.⁵⁰ The presumption of equal division was the underpinning principle of the Act but the classification was not a community regime where everything was tipped into one bundle of property rights. Extra assets or those known as balance property were vulnerable to more discretion. The rule governing division of 'balance' matrimonial property suggested that parliament had not been so determined to divide a wealthy marriage as equally as one only involving a home. The wording was not as strong as 'repugnant to justice' when it came to dividing the luxuries. A new policy

⁴⁹ *Wilson v Wilson* (1990) 7 FRNZ 115.

⁵⁰ see, *Johnson v Johnson* (1979) 2 MPC 100, *Aarons v Aarons* (179)2 MPC

conundrum arose and continues to plague the implementation of the Act. The law could not keep pace with the speed of change in the economic environment and the changing nature of property ownership.

“BALANCE” MATRIMONIAL PROPERTY

Following the division of the home and chattels, property such as a business, a farm, a holiday home, a time share or secondary property, shares, or any other tangible assets were defined as ‘balance’ property. The guidelines for the court for the division of this property were for equal division, unless ‘his or her contribution to the marriage partnership had been clearly greater than that of the other spouse’.⁵¹ This distinction implied that the adherence to equal division was to be less strictly followed where gains had been made over and above the basic needs of the household.

The financial contribution of the earning partner could be argued as justification for a challenge to equal division with the non-earning partner. Where there were more resources to divide it was possible that there would be more challenges. However, given that ‘monetary contributions were not to be accorded greater weight than non monetary contributions’,⁵² undermining the equal division presumption should have proven a challenge. The intention of Parliament was that the assumption of equal division would be applied, and proof of a greater contribution to the marriage partnership would have to involve more than simply financial contribution. Equal division was to be the base line for negotiation. The courts reinforced this by following the principle especially when the balance property had taken the form of money and investment properties.⁵³

Where assets involved businesses the court was more tentative, especially when division would incur financial hardship for the business. Where highly successful businesses were concerned, *Reid v Reid* set a standard of 60:40 division, and other cases were measured against Mr Reid’s outstanding business acumen. Equal shares were awarded in cases which were not on a par with *Reid*.⁵⁴

Parliament had expected unpaid spouses to claim a share of balance property:

We certainly saw an interest in a partnership as an asset of the marriage. We saw the possibility of a wife claiming a share in the husband’s interest in a partnership, just as she might claim a share in

⁵¹ Matrimonial Property Act 1976, section 15 (1)

⁵² Matrimonial Property Act 1976, section 18 (2)

⁵³ C. Bridge, p.245.

⁵⁴ C. Bridge, p.245.

*interest in any other business.*⁵⁵ (Key Informant No 2)

Legislators expected that people who did not wish to partake in the sharing regime would make private agreements with their spouses to exit their obligations under the Matrimonial Property Act 1976.

In those days interests in partnerships had real value. If you contracted out you were protected and quite frankly we thought in practice that would happen because, other business partners would find themselves in pretty difficult situations. But we did envisage, subject to that, we did envisage, that a partnership was an asset accumulating during the marriage. (Key Informant No 2)

While key informant no.2. confirmed the notion that a partnership was an asset of the marriage, in a policy sense the courts and Parliament demonstrated a reluctance to award equal distribution in situations where earnings were extraordinary, and these were likely to involve business partnerships. In 1976 high earnings and assets significant in addition to the matrimonial home were unusual. Following the political and economic reforms which began in 1984 high earnings became, for the propertied classes, much more ordinary. In locations where property increased in value faster than other investment rates, matrimonial property settlements, increased in value. Where there were more assets at stake, there was the likelihood of an increase in the numbers of, and value of, legal challenges.

Parliament evidenced a reluctance to award equally in wealthy marriages by legislating a softer test for the equality presumption in the balance of matrimonial property than matrimonial property by section 15 where unequal division could be made if 'his or her contribution ... had been clearly greater than the other spouse.' The courts had reinforced the policy direction by awarding disparate allocations according to Mr Reid's outstanding business acumen. This point is worthy of discussion. The question that needs to be asked is; what more could Mrs Reid have done to have matched Mr Reid's contribution? The value of the unpaid work of the home continued to be compared with financial contribution. Implicit in the judgment is the notion that business acumen is of greater value than unpaid domestic work, yet the legislation directs the court to treat marriage as a 'partnership of equals'.

Neither the legislature nor the courts provided a standard of proof for a greater award to the homemaker and care giver of the marriage if their performance had been outstanding. There could have been situations

whereby a care giver and homemaker had outstanding business acumen in respect of real estate, renovation and interior decorating. That person may have demonstrated extraordinary efforts which had increased the capital value of the home and yet the test for departure in the case of the matrimonial home was 'repugnant to justice' rather than the softer test of 'contribution clearly greater than the other spouse'. For many women the work they do while bearing and raising children adds value to the property and therefore capital gain in the family home:

I must have raised and planted hundreds of trees, the property was a picture when it was sold, the garden added a huge amount to the value of the property. (Beth)

On one hand the standard of proof protected half of the home and chattels for the unpaid homemaker, on the other hand it limited the capacity to gain a greater share of home, when that person could demonstrate outstanding skill in the enhancement of property. Yet if a paid worker could demonstrate acumen as extraordinary as Mr Reid the division of balance property would be made to reflect such skill. Market skills, monetary value, continued to be the measure of contribution to the balance of matrimonial property, but a disproportionate contribution of unpaid skills and time, were not measured according to the same standard for the home and chattels. There was not a mechanism in economics or law to value the unpaid work of the household. Thus balance property acquired superior economic value.

One participant in this study had traded her right to shares in a business partnership with a contract obliging her former husband to pay a greater share of their childrens' secondary and tertiary education expenses. She worried however that his personal wealth could be hidden in trusts or lost before the expenses were incurred, and that the contract would be contested, at a later date.

SEPARATE PROPERTY

The third category of 'separate property' was not an issue for any of the participants in this study however it was a common theme to emerge with regard to the planning of future relationships. Women spoke of their need to keep property separate to protect their financial resources. The comments included: "I will not ever put my assets at risk again, they will always be kept separate", "I won't marry again I can not afford to share any property", "I am scared I will get ripped off if I ever enter a long term relationship again", "I will take a deep breath next time, but, boy I don't ever want to be poor again, and if sharing means the risk of loosing property, I won't share". However, the notion of keeping property separate, conflicted with family values for one participant who said, "I don't think there is any

protection from losing half your assets if any relationship breaks down, it is too hard to keep your money separate if you want to be a family, 'cause families share".

Retaining property as separate to the individual had implications at dissolution. If separate property had restricted the funds available to the marriage, or if a non-earning spouse helped to maintain separate property, then profits derived, and a share of any added value acquired during the marriage, would be divided at dissolution. However, these two issues continued to be debated in the courts in the context of the underlying principle of equality.

The definition of separate property was simple. It included all of the property of each spouse which was not matrimonial property or balance of matrimonial property. Under section 9(2) this property was protected. If it was sold 'proceeds, remain[ed] separate'. Any increase in value of separate property or income derived from that property, 'remain[ed] separate' unless 'the gains were attributable to the actions of the other spouse or the application of the Matrimonial Property Act,' at which point the increase or gains, 'became Matrimonial Property' provided by section 9(3) of the Act.

Judge Boshier, recently drew attention to the difficulty interpreting section 9(3).⁵⁶ The issue centred on how to value a share of separate property when there is an increase in value. Under what circumstances was the increase attributable to the actions of the non-earning spouse? He quoted as an example the Court of Appeal dismissal of Elias J' s judgment in the High Court in *Hight v Hight*.⁵⁷ Elias J. had valued the capital gain in the property and awarded, to the wife, a 50% proportion of the increase in value of shares in the farm property between the date of marriage and the date of separation. The Court of Appeal substituted the 9(3) (a) (b) award where 'due to the actions of the other spouse there was an increase in value', for a section 17 award in which 'separate property had been sustained by the actions of the other spouse'. The distinction between a passive and an active increase in value had resulted in a lesser award. The majority did not consider Mrs Hight's efforts had "preserved" the value of the shares in the property. That approach to separate property could be viewed as unjust under the equality

⁵⁶ While the debate in this chapter is located in the 1976- 1980 era, during the period of the initial implementation of the Matrimonial Property Act, it is interesting to jump out of context for a moment and note Judge Boshier's reflections, here. The issue does not arise again as a major theme in the contemporary chapters, but is nevertheless important in the definitional context of the legislation.

⁵⁷ *Hight v Hight*, (1996) 15 FRNZ 129.

model.⁵⁸ Quoting Thomas J's dissenting judgment, Boshier argued:

Thomas J. did not think it was necessary to point to a direct physical or tangible contribution to the increase in the value of the shares. He maintained that the Court of Appeal should have placed greater emphasis on the fact that the wife had foregone a higher standard of living so as to enable the husband's share to increase in value. The Court of Appeal had adopted a restrictive approach to the issue of contribution .⁵⁹

Thomas J interpreted the statute in a different way. He implied that equality in the marriage partnership included advantages and disadvantages. He flagged to the Court that the 'foregoing a standard of living than would otherwise have been available' should hold more weight in the court. One way to view that idea is to consider that the resources available during marriage would have been greater had the separate property been pooled. It was implicit in Thomas J.'s reminder that balancing opportunity cost with opportunity acquired, might be one method of reaching a more equal result. Equality in the marriage partnership could mean sharing the advantages and disadvantages, equally.

The code had aimed to deliver equality. Any greater wealth than simply a family home returned the interpretation of the Act to the 1963 issues of weighing monetary with non-monetary contribution. If there was simply a home to divide, equal division was possible. Dividing the home where there were dependent children however was not without its problems. The long title of the Act directed the court to take into account the interests of the children and yet in the majority of cases where there was only a home to divide, it was sold. This was in spite of section 26A allowing for the sale of the home to be postponed, where there were minor children.

The categorisation of matrimonial property aimed at protect the home for the children, and to provide for equal distribution at dissolution. Alongside of those objectives ran the policy theme of the 'clean break' principle. Judicial decisions focussed on this idea. Parliament intended to free women and men from residual economic obligations toward each other. Freedom from economic obligations for the adults of families apart, where there were dependent children, was an unrealistic aim according to all of the women participants in this study. The implications of strict adherence to the clean break split will be addressed in the next chapter. There I explore the dissolution process in the context of The Family Court.

⁵⁸ Judge Boshier, Family Court Conference, Butterworths, (1999), p. 59-60.

⁵⁹ Judge Boshier, Family Court Conference, Butterworths, (1999), p. 59-60.

CONCLUSION

Judges cannot ignore the fact that in all areas of law, values often influence the decision making process. An understanding of the values of others and an awareness of how one's values affect the judicial decision making process are the key to judicial fairness'.⁶⁰

The Matrimonial Property Act 1976 was passed in a creative and interactive policy environment. This was radical, social legislation. The symbiotic relationship between the courts and the legislature was visible. During the period of 1976-1980 the judiciary and Members of Parliament were influenced by previous injustice in the court and the women's movement had begun to utilise the structures of governance, actively encouraging change at the political and bureaucratic level. An increase in the number of women Members of Parliament encouraged frequent participation in the select committee process by women's organisations. Several factors coincided to facilitate innovative change and to conciliate changing social values.

The period was marked by a pragmatic commitment to manifesto promises by the government and the opposition. Responsibility for election campaign obligations were honoured. Submissions from select committees were acknowledged and suggestions were noted in the drafting of the legislation. In line with Considine's theory of interactive policy systems, the institutions, and the policy actors had acknowledged the economic needs and political rights of women at dissolution. The policy direction demanded radical change in social and cultural values regarding the way the institution of marriage was viewed.

Several of the politically prominent women who lobbied for change were women with tertiary educations, in professional employment. The men who made the legislative changes were of similar skill and education. The statute was educative as well as a code for the reallocation of property. The wording directed citizens of Aotearoa/ New Zealand to view marriage as a partnership of equals, in law. The outcomes of dissolution for non-earning partners raising children, were not always equal to those of the earning partner. In the context of the 1970's this formal equality or equal opportunity was expected to empower equal participation in society for both genders following dissolution. The reforms recognised the inequities of the past.

Chapter six will explore emergent policy principles of gender equality, independence and the clean break principle, in the context of The Family Court, the specialist institution which implements the legislation.

⁶⁰ The Honourable Catherine A. Fraser, *Judicial Awareness Training*, (1995) p15

CHAPTER SIX

THE FAMILY COURT : THE INSTITUTION IMPLEMENTING POLICY 1980 - 1998.

Family law is somewhat of a social battle ground.

(Sir Geoffrey Palmer, 1980, NZPD 432: 2489)

I think the Family Court fronts up to the battle between men and women.

(Legal Practitioner D)

INTRODUCTION

The policy objectives of the Family Court are to provide dispute resolution, with a focus on conciliation, in an informal family centred atmosphere. The policies are designed to encourage fair resolution rather than the battle ground of Geoffrey Palmer's observation.

In respect of marital dissolution it is the Family Court's role to give consideration to the objectives of conciliation under the Family Proceedings Act 1980, in an informal institution under the Family Courts Act 1980. Decisions which emerge from the Court are expected to reflect the gender equality objectives of the Matrimonial Property Act 1976, in the interests of the children's welfare under the Guardianship Act 1968. Underpinning these objectives is the philosophy of a clean break and independence at dissolution for the adults of the marriage. This latter objective, a clean break is the judicial interpretation of Parliament's intention and the objective embraces the implementation of both the Matrimonial Property Act 1976 and the Family Proceedings Act 1980. This raises the question of how spouses can achieve a clean and equal break, ideally in the interests of the children, when they are parents for life?

I claim that the dissolution process, as it is implemented, cannot achieve two policy objectives which are clearly in opposition to each other. To demonstrate this claim I specifically focus on legal procedures, the clean break principle and the notion of equality at dissolution. I argue that the exclusion of mediation of property issues in the court process, under the Matrimonial Property Act 1976, and the guidelines for private agreement, hinder conciliation, do not guarantee equal financial treatment or timely resolution of dissolution issues.

This chapter examines the interplay between policy and practice. The dissolution process will be viewed from the perspectives of the women

participants in this study, judges and legal advisors. The policy tensions between property and maintenance, independence and dependency are at the core of what can become a gendered battle. Such a battle is not in the best interests of the children, the economic well being of a non earning spouse or the emotional well-being of any member of the family apart. I claim that equal division of property is a simplistic mechanism for equal consequences when one spouse has foregone the benefits of employment to rear children. The 'clean break' is not always possible. A policy gap has emerged. I assert that the focus on an assumed equal independence has failed to recognise the different generational values and economic realities evident in individual families. The implications of 'dissolution battle sites' for children will be examined in chapter seven.

The policy and institutional practices which govern dissolution must account for and acknowledge the traditional and contemporary differences in the roles that spouses assume *during* marriage when re-allocating economic resources *after* marriage. For there to be a clean break and equal outcomes on dissolution, spousal maintenance provisions may need to be re-addressed as a claim against employment opportunities foregone. Put simply, if a marriage has not reflected equality of opportunity during the relationship then it is unlikely that division of property alone will achieve equal consequences at dissolution. Compensation and procedural changes could redress the balance.

THE POLICY OBJECTIVES OF THE FAMILY COURT

The policy objectives and practice guidelines for the operation of the Family Court directed professionals to encourage resolution of spousal disputes during the dissolution process. The new process evolved from an awareness of the negative effects of adversarial procedures:

The Family Court should concentrate on attempting to settle specific issues by agreement, with the aim of avoiding recourse to trial.¹

The jurisdiction and procedure of the Family Court was established from the needs identified in the findings of the Royal Commission on Courts in 1978 where over one third of all submissions dealt with the concept of a specialist court.² The submissions had recommended a change from traditional adversarial resolution which compounded disharmony during the dissolution process. Legal action pertaining to separation and dissolution in the courts had proven expensive and time consuming for litigants. It was decided that a specialist judiciary sitting in a specific court would deal more effectively

¹ *Report of the Royal Commission on Courts*, (Wellington, 1978), p. 543.

² NZPD Vol 432, 1980: 2500

with disputes involving families.

The legislative framework of the specialist Family Court was passed as a package. The Family Proceedings Act 1980 was the foundation statute passed. It governed the operations of the court and created a 'three tier structure',³ which provided 'counselling',⁴ 'mediation',⁵ and as a last resort 'arbitration',⁶ The focus was on self determination rather than judicial intervention.

The parliamentary intention of the subsequent Family Courts Act 1980 was to provide 'a comfortable atmosphere in which differing views [were] discussed and examined in a sympathetic manner, rather than becoming a gladiatorial arena designed for blood letting and bitterness'.⁷ Informed decisions would be made in an informal atmosphere alongside families during the transition from nuclear family to family apart. But the opportunity to 'discuss and examine *all* of the issues' at mediation did not include all economic concerns, as mediation was not available for matrimonial property issues unless there was a custody, access, or maintenance dispute.

The focus of both statutes was on conciliation rather than battle and the capacity to accomplish such aims was reliant on public awareness and the values and ethics of legal professionals. The reader will find however that in some circumstances, professional and public understanding of the policy objectives and procedures did not accompany the reforms.

THE DISSOLUTION PROCESS : PUBLIC AWARENESS

Public awareness about the role of the Family Court is important if the community is to embrace and utilise the alternative dispute resolution procedures directed by the Family Proceedings Act 1980. In this study the seven women participants believed that private, legal 'advice' was the only way to organise the formal separation process. The subsequent exclusion of mandatory counselling and mediation during their private negotiations may have contributed to their experience of an adversarial approach in every case. It is apparent that the objective of directing citizens and professionals to follow the conciliatory model is difficult to achieve.

Following the private decision of one spouse to exit a marriage or the mutual agreement to part, the engagement with the legal process was not clear cut

³ Butterworths, *Family Law in New Zealand* (8th ed), (Wellington, 1997), p. 135.

⁴ Counselling provided neutral therapeutic support for both spouses, a forum where issues could be aired, resolved and plans for the future could be made.

⁵ Mediation is a process where by a facilitator controls the process of negotiation but the participants control the issues and attempt to reach agreement.

⁶ Arbitration is a process of decision making or judgment following the hearing of relevant evidence by a judge.

⁷ Hon JK McLay, NZPD Vol, 432, 1980:2498

for the lay participants in this study. Spouses had the choice of legal advice and action through the publicly funded system of the Family Court, private action employing the services of a lawyer, or a combination of both (see Figure 2). Access to counselling was free of charge through the Family Court. Funds to provide for this were appropriated from Parliament under s 9(3) of the Family Proceedings Act 1980. This institutional knowledge was not known to any of the women who had experienced the dissolution process in this research.

When searching for information about dissolution the women participants located a lawyer either through referral from a friend or from the yellow pages of the telephone book. Gathering details about the process from community agencies was not perceived as the first point of inquiry. Information about the Family Court conciliation model could have been gained from the Citizen's Advice Bureau (CAB), Relationship Services and other community social service groups such as the Women's Refuge, or simply by asking at the counter of the District Court Registry.⁸ Alternatively a Court Co-ordinator could be contacted through 'the Registrar listed in the telephone book'.⁹ People generally understood the role of the Registrar to involve the registration of births, deaths and marriages rather than the management of the Family Court. Four lay participants in this study, as an anecdote, mentioned that they associated the courts with litigation. They assumed that the Family Court provided an adversarial rather than conciliatory service. For all of the participants in this study, engaging a lawyer was the first logical point of contact with the legal process. In retrospect, for three women, it was not perceived to have been the best avenue of enquiry. This was due to increased conflict when legal professionals became involved.

Seeking partisan legal representation was sometimes less helpful than the Family Court process. The manager of a local CAB suggested that people should contact the Family Court Co-ordinator before seeking the advice of a legal practitioner:

The minute that people engage lawyers the process is more warlike and less supportive. The CAB encourages people to explore the alternatives of the Family Court first. There is confusion about the process and if legal practitioners become involved the couples become adversarial. If

⁸ It is of interest to note that people who looked for the information from the privacy of their own home would not have found this information in the local Auckland telephone book (1998). There was no statement about the service provided by the Family Court, and Family Courts were not mentioned apart from two suburbs where the fax number was listed. The phone number of the local Family Court Coordinator was not listed in the directory, and citizens may have been unaware that these courts were a division of the local District Court.

⁹ Butterworths, p136.

*children are involved the Court Co-ordinator can help with all sorts of things such as social security issues as they have information about entitlement. We don't recommend going straight to the lawyer because once the lawyers are involved you don't explore other possibilities.*¹⁰

The idea that legal intervention could be adversarial and create further problems was validated :

I got a lawyer, she got very excited about the whole thing and she drafted me a letter and charged a lot -but she was like a Doberman -but things were very rocky emotionally, and he was very threatening. I didn't use it, the letter, or fight his lawyer's agreement because I was very panicked and I really just wanted to be rid of him. I would have signed anything - to get rid of him. (Jane)

In spite of her fears Jane did not employ the services of her legal advisor again, nor did she seek counselling during this period.

COUNSELLING

Adult counselling through the Family Court can help spouses cope with personal issues and resolve some of the most urgent practical problems during the initial separation process. Consulting legal advisors may not facilitate the same quality of personal care if there is pressure to complete negotiations. Legal professionals could not be expected to act as counsellors and often it was the wishes of the client that led professionals to circumvent the counselling provisions. It is apparent counselling could have provided valuable time to reflect and plan personal support and resources:

*A soundly structured, adequately staffed family counselling service is essential to the Family Courts success.*¹¹

Counselling in the Family Court process aimed to provide client self determination, 'with an emphasis on handling feelings - both positive and negative, the objectives were therapeutic.'¹² But in this research, couples pursuing the separation process with the guidance of legal advisors in private practice began to battle. Once the negotiations had begun, participants informed lawyers that they: 'wanted it over', 'wanted it finished quickly', 'just wanted to start life again', 'had to get to the end of it', 'instructed him to complete it quickly', so that family members 'could get on with their lives'.

When lawyers were directed to complete matters quickly and clients pressured them to follow an expedient path towards negotiation the counselling process was not addressed as a priority:

¹⁰ Oral communication, 3 July 1998, Citizens Advice Bureau, Takapuna.

¹¹ *The Report of Royal Commission on Courts*, (Wellington 1978), p.165.

¹² *Butterworths Family Law*, p.137.

My solicitor asked me if counselling had taken place in the previous twelve months. It had once, but it had been a disaster. I did not realise that the solicitor was inferring I could have sourced a professional through the public system. He offered me the alternative of the Family Court system but didn't really explain how it worked. I thought going to the court would mean a hearing, delays and extra costs. Now in retrospect, I would have preferred to have gone through the Family Court as the counselling was apparently free and their counsellors are trained especially in the area. I was too stressed to understand alternatives or question my lawyer in detail. I was afraid of the costs if legal appointments went on for too long. (Tracey)

None of the participants in this study attended the counselling provided by the Family Court. They sourced 'legal advice' rather than 'neutral support.'

Legal advisors were directed to provide information about Family Court procedures but understanding the implications of the legislative directive for counselling was dependent on the wishes of the client and the clarity of information provided. Legal practitioners were obliged to display attitudes that 'encouraged, facilitated and reassured' as clients moved through stages of disbelief, anger, bargaining, depression and acceptance.¹³ They had a statutory duty to certify that the client '[was] made aware of the facilities for promoting reconciliation and conciliation',¹⁴ that 'counselling had been sought',¹⁵ or to state that it was either, 'undesirable or would serve no useful purpose'.¹⁶ The implied legal obligation was that professionals would encourage counselling. This was difficult for legal professionals if clients were not able to absorb or did not wish to hear information about the process being offered. Tracey had felt that communication about the process was glossed over. Her understanding was limited by time and fear of legal expenses for that advice.

Without the added burden of legal expenses, the Family Court system provided personal support and neutral information outside of strictly legal matters of dissolution. If counsellors were not able to facilitate conciliation or resolution of dissolution issues, the provision of judicial mediation was a further alternative to a full court hearing.

MEDIATION

Mediation is the intervention into a dispute or negotiations of an

¹³ *Butterworths Family Law*, p141.

¹⁴ *Butterworths Family Law*, 1997, p141.

¹⁵ Family Proceedings Act 1980, s8.

¹⁶ Family Proceedings Act 1980, s10 (3) (b) (c).

*acceptable, impartial and neutral third party*¹⁷

Along with a general legal trend to utilise mediation as an alternative process of dispute resolution, the Family Court provides spouses with an opportunity to air issues in a non partisan environment. This second tier of the Court provides an opportunity for spouses to reach resolution early in the process. The policy applies to matters of child access, custody and maintenance. The exclusion of matrimonial property from the mediation process leaves couples to solve property division through private agreement or file for formal proceedings involving a full court hearing for arbitration. As a consequence of such exclusion the fires of conflict may be fuelled. Partisan legal advice may result in delayed negotiations and increased costs.

In the Family Court the neutral third party at a mediation conference is a judge. Mediation offered an opportunity for the couple to share both of their perspectives with someone who had an in depth knowledge of the legal implications, without losing the right to make their own decisions. But there could not be a mediation conference if matrimonial property proceedings were the only matter in dispute.¹⁸ One barrister claimed, 'seventy five percent of matrimonial property cases are settled between parties privately'.¹⁹ Predictably it was confirmed by all legal practitioners and judges who participated in this study, that it was Parliament's intention for most matrimonial property agreements to be negotiated and settled privately.

Six of the women participants in this study were unable to access mediation in the Family Court because the only unresolved legal issue was property. However, at the day to day level of the family, children and property issues often became intertwined and mediation would have helped. The opportunity to view implications for the lives of *all* family members was missed. There was no facility to merge the legal reality with the social and economic reality of the family.

If the women had sought a mediation conference due to custody issues there could have been discussion, resolution and orders by consent as to matrimonial property matters at a mediation conference.²⁰ Unfortunately,

¹⁷ Boshier et al, *A Review of the Family Court*, (Wellington, 1993), p.52.

¹⁸ There is no provision for mediation in the Matrimonial Property Act 1976. Under section 14(1) of the Family Proceedings Act the conference is held with the guidance of a judge. Orders can be made at the mediation conference about separation, custody, the maintenance of spouses or children, and possession or dispossession of property, subject to the parties right to obtain separate legal advice under s 15 of the Act. The judge's aim is to establish the issues, and obtain agreement and resolution under section 14(2) of the Family Proceedings Act 1980. These meetings are held in private and information remains privileged under section 18(1)(6). The chairperson [judge] records the issues guided by section 14(7).

¹⁹ Key Informant Y

²⁰ Butterworths, p.145.

some spouses access help for property issues in the Family Court under the disguise of custody issues. One of the legal advisors for a woman in this study followed that avenue. He had done so without explaining what he had filed for. She had assumed when the lawyer communicated he had filed for proceedings, that he had simply requested disclosure.²¹ When questioned why he had filed for custody he remarked that this was the normal legal practice used to force disclosure. Three women commented that threats of a custody battle from their husband disappeared once property was settled. The speed at which such threats encouraged settlement left these women regretting at a later date, the haste of signing an agreement that they subsequently felt may have been unfair.

The policy which excluded property mediation in the Family Court was a barrier to resolution when spouses were only needing to resolve property issues. It is important for the reader to note here that this policy gap could be viewed as an incentive for spouses to disguise property disputes as custody issues in order to access mediation with a judge. The potential emotional abuse of children when custody issues were mobilised as a tactic for seeking mediation in the Court will be discussed in chapter seven.

One way to avoid manipulation of the legal process above would be to acknowledge that the issues are integrated in the daily lives of separating families by providing mediation as of *right*. Mediation could be universally available and subsequently conducted in an holistic manner. Conferences could cover all issues pertaining to dissolution, for the whole family, instead of the current fragmented approach:

Our law should change from a technical and a specific point of view... Some provision should be made for a judge ... to investigate all the issues arising from a breakdown of a relationship with each party represented by counsel. So its not really a big fight, its a bit like a french investigative thing, so the judge then looks at it and says. ' OK this is the property, these are the children, and this is the maintenance issue and so forth. (Judge A)

If all issues pertaining to dissolution were heard together at mediation this would have the added advantage of saving time and costs. All of the participants in this study believed that delays and legal costs compounded levels of stress.

My interviews with legal professionals did not generate consensus about the power of mediation to reduce conflict in the courts. Eekelaar noted that there

²¹ Disclosure empowers the court to require a spouse to disclose any information that the court specifies that relates to the disposition of matrimonial property by either or both spouses.

was a lack of clarity as to whether conciliatory approaches reduced costs of litigation in Britain.²² Emery's North American research found conciliation could reduce the number of court hearings.²³ Both researchers agreed that communication between parents was effectively facilitated through a conciliatory model. The opportunity to examine all issues in one forum could facilitate clearer communication and better management of complex issues for both the family's private and legal reality.

One practitioner believed this would not be what clients would choose. This legal advisor was adamant that clients were not interested in co-operation or alternative dispute resolution. He stereotyped people who sought dissolution as displaying unfavourable personalities:

What are we trying to do make it a system that is preparing people for being nice people? If they were nice people they would not have parted.
(Legal Practitioner D)

This notion that legal practitioners may view clients negatively affected the way women approached the legal process. When Sugarbaker debated the social construction of the stereotypical divorced woman, she noted that fear of being perceived as unfavourable was common for women. They continued to harbour guilt long after the marriage ended. She claimed that almost all divorced women expressed a vague sense of shame and guilt regarding their divorces.²⁴ One judge in this study reflected on the way women are perceived in court:

Women are looking after children, and they have often been battered physically or emotionally. There are very few really strong women, and when they are they come over slightly dissolent even to a female judge.
(Judge I)

If mediation conferences with a judge were available for property issues, that would be preferable to a full court hearing or private adversarial negotiation. In both situations women in this study reported that it was hard to balance either being upset or cold. They were scared of court. They were angry about dealing about their solicitor's process. They were angry about paying so much money for what appeared to be simply letter writing. In a recent New Zealand Law Society poll of the public, a majority (54%) stated a preference for mediation over arbitration or litigation, when involved in a serious dispute with another person.²⁵ Two Judges in this study confided that they had usually approached all matters relating to dissolution during mediation conferences and had included property even though it was not a

²² J. Eekelaar, *Regulating Divorce*, (Oxford, 1991), p. 161.

²³ R Emery, *Marriage, Divorce, and Children's Adjustment*, 1983, p. 134.

²⁴ G. Sugarbaker, *Nice Women Get Divorced*, (Minnesota, 1991), p. 1.

²⁵ New Zealand Law Commission, *Women's Access to Justice, Miscellaneous Paper 10*, (Wellington, 1997). p. 2.

part of the original brief. Judicial mediation could equip spouses with independent expert confidential guidance.²⁶

PRIVATE AGREEMENTS

The policy objective was for most couples to resolve dissolution matters privately. If matters were not resolved and property division was the sole issue in dispute, then people had no choice but to employ the services of a lawyer. Private agreements do usually resolve matters for the majority of people who separate.²⁷ However, as the reader will soon note many women found their ex-partners reluctant to co-operate during the negotiation phase. Private negotiation in some cases was a barrier to resolution.

In the private context, some lawyers referred clients to mediation in an attempt to save money, time and emotional costs for the client. This mirrored the Family Court process of a mediation conference. Only one participant in this research was offered private mediation but she found it unsuccessful as the power imbalance evident in the marriage was replicated in the mediation room:

My husband attempted to talk business with the mediator. While she tried hard to remain neutral his charm made my cold approach seem resistant. I was so upset at appearing to be the one unwilling to participate in the small talk that in the face of his determination not to properly value all of our property or understand the children's need for us not to compete that I became weepy. It just didn't work. I felt incapable and childish and he would not [compromise] on any issue, so I called a halt to the mediation meetings. It was a complete waste of time, emotional energy and it was very expensive. (Tracey)

This experience would not have occurred if the mediation conference had been led by a judge of the Family Court. Family Court judges were outside of the business context and convention would not have allowed judges to take part in interpersonal interactions or make small talk about the business sector. The researchers from the Judicial Working Group on Gender Equity found family court judges were aware of such tactics:

Family Court Judges believed that they had a good understanding of the power dynamics of relationships between men and women, and [were] more alert to differences in styles of communication. They believed that this understanding [reduced] the chances of gender bias against women

²⁶ When the Family Court Review team proposed a conciliation branch to the Family Court in 1993, they commented that a Judge could 'indicate probable outcomes' to spouses if resolution was not made before a full court hearing. This would have the effect of providing spouses with a second specialist opinion. See: Boshier et al., p.73.

²⁷ In 1986 Krauskopf and Krauskopf reported that it was estimated the 90% of cases were settled privately. Krauskopf and Krauskopf, *Comparable Sharing in Practice*, (Wellington, 1986), p.31.

in the court. The comments they made during the interviews and focus groups support[ed] their perception and indicate[d] a difference in perception between them and judges of other jurisdictions²⁸

Family Court Judges are specialists in the field. They build up a wealth of knowledge in the area of family conflict. Working dissolution issues out with a judge would be advantageous due to their technical knowledge and wealth of experience in this specialist area. Judges know what the likely outcomes could be in certain circumstances. For spouses it would be a little like seeking the second opinion of a specialist in the medical model.

DELAYS AND OTHER TACTICS

Tactics to delay the process of resolution such as the withholding of information can be one of the most frustrating and stress provoking experiences during the detachment process for spouses. Delays have ramifications for women who are not earning a regular income. The increased financial costs associated with repeated legal action can disadvantage the non earning partner of the marriage.

Wives of businessmen reported that their spouses had used subtle tactics to frustrate the dissolution process particularly in the division of assets. The following examples were provided: refusal to sign a real estate sale agreement which meant the home sold for a significantly lower value six months later under a court order; failure to reply to letters; failure to reply to telephone messages; avoiding payment of household bills related to the marriage prior to separation; making arrangements with the bank to secure funds and mortgages against the matrimonial home; starting a family trust immediately following separation; registering a limited liability company immediately the separation was apparent; and finally communicating with the bank manager and changing joint accounts without telling the bank that separation was occurring. The most common problem during negotiation was resistance to fully disclose, supply a memorandum of property and assets or agree to neutral, fair valuation of property during private negotiation:

I got no disclosure even though I had asked for it in writing. I wanted proper disclosure because I had information. But my lawyer did not bother to ask for it. If you don't get disclosure the first time round, it is almost impossible to get it again, so if your lawyer mucks up you have no recourse at all. (Sharon)

People working through the issues privately find that disclosure is not mandatory until proceedings are lodged in the court.

It is not possible to negotiate in the absence of all of the facts. Women found the struggle to obtain clear information during the process about the

²⁸ Barwick, Burns and Gray *Judges Perceptions of Gender Issues*, (Wellington 1995), p. 47.

financial status of the marriage an expensive and humiliating experience :

There is a whole raft of cases out there where the woman goes dotty in the end because the husband is self employed and manages to hide assets and income. (Key Informant 1)

All participant 'wives' in this study claimed that their husband's had resisted communication about property and assets. They reported that they suspected dishonesty on the part of their partner during negotiations. One woman's husband had loaned his redundancy package to someone else. At separation he was in financial difficulty and had mortgaged the family home and his wife's car without her knowledge. Just preceding separation she found that all of the money had gone to a bankrupt person and her husband was also heavily in debt. One husband reportedly claimed that an uninsured boat had sunk, another was suspected to have hidden cash preceding separation. Another husband disputed every valuation of balance of matrimonial property and frustrated the process until the woman gave in and claimed nothing other than half of the core matrimonial property. And another woman suspected that her husband had bought property overseas with matrimonial funds but he disputed having done so. The balance of matrimonial property was disputed by one husband when he claimed the family building business was of little capital value in spite of employing eleven men on three major building sites, taking his new partner's children to Fiji for a holiday and buying both himself and his new partner an expensive car during the first year of separation. This man's adult daughter, from his first marriage, was unable to source funds to train as hairdresser. Her mother claimed a student loan under her own student entitlement to pay for the hairdressing fees.

For one woman the family money was difficult to identify as it became merged with extended family investments:

He invested money, borrowed money from his family and invested it in things and I lost track of where it was. This tax thing meant money went sideways.(Elizabeth)

When the non-earning spouse had less knowledge of the investment market than the earning spouse, there was a need to hire professional financial advice. This led to extra costs and delays for three of the women. In the absence of mandatory disclosure, unless court proceedings had been filed, citizens such as Elizabeth were left with two choices. One, accept the possibility that the memorandum of matrimonial property may exclude funds and investments which should have been identified and valued. Two, unlike Elizabeth, battle. When asked why she did not fight Elizabeth replied, 'I had had enough. The disagreements were starting to affect the children. I wanted to get on with my life, move forward'.

Volgy, from a psychological and family therapy perspective, claimed that while women 'suffered economically and experienced greater financial stress than men at dissolution, they fared better in terms of divorce adjustment than did males'.²⁹ Men's difficulties with emotional and psychological adjustments during the dissolution process may be reflected in the financial and emotional outcomes for other members of the family. Findings such as Volgy's suggest that policy makers must acknowledge gender difference as well as gender equality when determining the appropriate legal process.

FINANCIAL AND EMOTIONAL COSTS

*Women have told the [Law] Commission of matrimonial property settlements being spent on the costs of pursuing them, and of the frustration at watching legal bills rise as their former spouses deliberately delay matters. Because of the costs, many women have commented that they wonder whether it was worth pursuing their legal rights.*³⁰

The financial and emotional costs of dissolution cannot be underestimated for either spouse. This study suggested that women's economic disadvantage was compounded by legal costs of representation. Spouses who continue to earn a regular income are more likely to be able to afford to take legal action. The conciliatory model was blamed for increased costs by one practitioner, while women claimed lawyers costs, their spouses actions and sometimes poor legal advice were the reasons their expenses were high. The following submission to the Law Commission is an extreme example of how costs can get out of hand, evidenced in a copy of a letter sent by a woman to her legal advisor:

This letter is to advise you that I have no further need of your services. With the court case finally over I am taking stock of the cost to me in financial terms. At this point I can show legal fees and court costs of \$73,760.89 which, I hope you will agree, is astounding, given the straightforwardness of the issues involved and the final award of \$84,947.30. I have to say that I am devastated by the whole experience and my attitude toward the justice system is extremely negative, to say the least. (Submission 507)

One legal practitioner was outraged that the Law Commission had recorded the letter. Practitioner Y believed that this was an example of 'activism' in

²⁹ S. Volgy, *Women Divorce, Men and Divorce: Gender Differences in Separation, Divorce and Remarriage*, (New York, 1991), p.36.

³⁰ New Zealand Law Commission, *Women's Access to Justice, Miscellaneous Paper 10*, (Wellington, 1997), p.2.

the Law Commission and questioned the truth of such a claim. However excessive costs were validated by many other women's stories shared with the Commission. These legal expenses had financial consequences which reduced funds for housing, schooling and daily expenses as women waited for funds from matrimonial property settlements.

When questioned about the financial costs to a client for dissolution advice, the four legal practitioners in this study all remarked that they would discuss the costs at the outset and plan a method of payment. This involved either waiting until settlement or furnishing the client with several progress accounts. One practitioner undertook legal aid cases. He worked at the local Citizen's Advice Bureau twice a week as what he referred to as a 'free legalee'. This was not quite accurate if the matter concerned matrimonial property. The Legal Aid Board grants legal services where income cannot cover legal expenses but the cost is set as a charge against assets such as a home to be recouped by the state when the asset was sold. However, he advocated that clients explore the options of the court counselling and mediation process before private agreements were drawn up.

Boshier et al noted that counselling extended the time frame. A lack of resolution had cost implications not only for clients but also for the state. They concluded that there was:

*A lack of incentive to resolve issues at the counselling stage of the process. There is nothing to prevent parties continuing the dispute to trial stage if they are determined to do so, other than the cost of legal representation. If they are on legal aid, even that disincentive may not apply.*³¹

The participants in this study agreed that cost was a disincentive to continue the battle. Legal expenses diminished capital. Legal aid for one participant had simply detracted from equity in her home. One woman's submission to the Law Commission explained what delays had meant for her in respect of legal and living costs:

*Throughout the last three and a half to four years, I have continually found it a struggle to survive financially and the court has never taken into consideration how all of this procrastination of any payment to me has left my life in limbo. I feel that [my husband] knows that once I have been paid my share of property he will no longer have control of my life as he effectively does at this present time*³².

All of the women interviewed in this study commented that legal negotiations

³¹ Boshier et.al, p.38.

³² New Zealand Law Commission,p.33.

heightened the emotional costs of the process and that financial costs of legal representation had added to 'fear' and 'stress'. Recent research conducted by the Law Commission suggested there was a need to evaluate lawyers cost's in family disputes. Some women could not afford to access legal advice.³³ All of the women in this study commented that legal expenses had to be paid from capital. Money that should have gone toward a home began to be consumed by daily expenditure and legal expenses, one woman's legal bill cost \$15,000, and it did not involve any court proceedings.

Krauskopf and Krauskopf interviewed fifty members of the legal profession about comparable sharing of matrimonial property in practice. In 1986, ten years following the passing of the 1976 Act their respondents had observed significant emotional costs :

*Litigation is not only expensive in dollars, but in the matrimonial property cases it also exacts an emotional cost that most persons, especially those feeling guilt for their marriage failure, want to avoid. Our respondents mentioned avoiding litigation as an independent factor leading to unequal division of matrimonial property. As one lawyer put it - \$ 20, 000 is not worth going for - she just wants out.*³⁴

The notion that the Family Court was a battle ground or a place to fight was contrary to the philosophy of the court. But the tension between conciliation and adversarial resolution was frequently defined by the wishes of the client, and not all clients were like the participants in this study who walked away from conflict because they wanted out:

We have created a family law arena where it is nice to be conciliatory. The adversarial component is fast disappearing because you are breeding people to practice in the area who are conciliators. Now that is fine but it doesn't mesh with what the clients want. Clients want two things, they want a decision from somebody, not themselves often, and they want people to go and fight for them. (Legal Practitioner D)

NO CHOICE BUT TO BATTLE

For some people battle is one way of dealing with grief and anger. Clients who have not had counselling may be more likely to mobilise the legal process to deal with anger than those who have addressed their grief through counselling and mediation. Situations that lead to battle in the courts can involve a whole raft of property issues and issues of fairness³⁵ such as: the disposition of matrimonial property by one partner; a refusal to

³³ New Zealand Law Commission, *Consultation Paper 10*, p.49.

³⁴ Krauskopf and Krauskopf, p.20.

³⁵ In 1986 Krauskopf and Krauskopf found problem areas such as : 'division of farms, businesses, superannuation, valuation, sale of the home'. Krauskopf and Krauskopf, p.28.

disclose assets; custody access and support; domestic violence; allegations of sexual abuse. Legal advisors noted that some clients looked to battle for retribution, some tried to avoid battle at all costs, sometimes a battle was unavoidable. The nature of the battle was dependent on the quality of legal advice *and* the behaviour of clients. Sometimes spouses had little choice but to enter the third tier of the Family Court process - a full court hearing which often has all of the hallmarks of a gendered war.

When clients did not co-operate and one spouse frustrated the process then financial and emotional costs continued for protracted lengths of time:

My then husband proved to be very difficult in respect of access for nearly eighteen months, and it took me fifteen months, three affidavits and a visit to court, and thousands of dollars to obtain my share of matrimonial property³⁶

When communication between client and lawyer was not clear, situations that otherwise could have been avoided could lead to court action to recover lost opportunities:

*My husband was preparing to loan the redundancy money to another man, it was the last straw the only money we had left - I went to a lawyer and she gave me some bad advice. I think, she said that I had to get his signature on a document and she would not go any further until I got his signature but he wouldn't sign it and so I couldn't stop it .
(Catherine)*

Catherine was entitled to a portion of this redundancy money, but the decision to loan it was made unilaterally and all of her share of the money and a large portion of the capital in the matrimonial home was subsequently lost to a bankrupt business partner of her ex- husbands.

When custody was disputed, legal practitioners and clients had little choice other than to respond in the court:

One woman said, I don't want anything from him I just want out. But the woman's partner sought conflict. He replied, I won't pay her maintenance. The wife responded, fine. He corresponded, I won't give over half of the property, she responded, - fine. He replied I want custody of the kids,- a custody battle was born.

(Legal Practitioner S)

The idea that some clients looked for a “fight” was highlighted. A practitioner could warn of the possibility that such a case would be dismissed due to the vexatious nature of the acrimony. However, if the respondent spouse could summon the energy and resources to continue to parent

³⁶ New Zealand Law Commission, *Consultation Paper 10*, p.4

effectively and fight they may have found that outcomes were more favourable in the court than trying to deal with issues through private agreement.

Five of the women participants said they would rather give up than fight for a share of the balance of matrimonial property and they sighted their reason as the impact parental battles had on the children. Three judges and two legal practitioners commented that women might experience fairer outcomes when dealing with a judge in the Family Court than accepting privately negotiated agreements, especially where there was an imbalance of financial or emotional power in the marriage.

If court hearings were inevitable, case management required client understanding of the process. Participants in this research felt that legal language and procedures were generally difficult to understand. If lawyers completed procedures that were not fully understood then time and money could be wasted through mismanagement. Clients needed clear information and feed-back but they reported that seeking feedback was expensive. Telephone conversations were costly as lawyers charged for telephone time.

COURT HEARINGS

The Family Court was designed to provide an informal location for resolution of issues involving families. While the surroundings of the Court may be more relaxed, women have found the hearing process emotionally stressful due to the legal expenses incurred, delays and the continued interpersonal conflict with their ex-husband:

As a Family Court lawyer in excess of twenty years experience. I can tell you that one of the greatest injustices is that of the inability of women to obtain a realistic cost against men who fail to give information or fight for no reason up to the courthouse door³⁷.

Three of the participants in this study were involved in Court hearings, one filed for proceedings but pulled out at the last minute. Two women filed for settlement of matrimonial property, child custody and then subsequently challenged child support. The participant who decided not to go through with the hearing was attempting to claim spousal maintenance in order to pay her student fees. All of these participants dealt with one problem at a time in different time frames. In respect of the spousal maintenance action the possibility of court action was discouraged by legal advisors. The fragmented approach meant there were long delays before all of the issues were resolved and this added to the length of time families experienced explicit conflict:

³⁷ New Zealand Law Commission, *Consultation Paper 10*, p.1.

In theory and in practice the problem should be dealt with as a whole. But that is not the way it is designed or working at the moment. It's split up into various components ... And most women I suspect would tell you that you know it is like war ... there are all sorts of battles go on, and they win one and lose two and the war goes on, and then they look at the whole thing after ten years and I said to one of my clients once. If you are something of a whole person again in ten years time I'll be surprised. You know, by the time you fight it through, you get very annoyed at the delay, it is just shocking. (Judge A)

One practitioner believed that there was no protection from adversarial dissolution proceedings. Clients behaviour determined the way cases were approached. Unacceptable behaviour could not be modified by the courts. No matter how the policy and process was designed in theory or in practice, in daily life there were people who simply behaved badly:

A court can't alter human behaviour. It can make statements about it and it can penalise people and it can stop persons from behaving in a certain way but it can't change the way they behave.

(Legal Practitioner D)

Keeping in mind the view of practitioner D, the important question in the context of this study, was why did men continue to battle and attempt to frustrate the legal process? Pershouse provided a male perspective. For men faced with division of matrimonial property, child and spousal maintenance, as well as the possible loss of time with their children, stress levels were high. He acknowledged that cumulative stressors resulted in overt displays of anger which were common during the separation process. Grieving men behaved in a different way from women. 'Men's interpersonal friendship relationships were based on competitive interactions. At separation men found those relationships superficial. If they had invested all of their emotional attachment and support systems in their primary relationships, at separation their total emotional and social investment had gone.'³⁸ This resulted in 'hostile alienation' from their social world and anger was difficult to contain. The idea that men were more likely to be aggressive during negotiations was confirmed by lawyers and judges, but practitioners were careful to point out that this was not the case for all men. They noted that there was a whole spectrum or continuum of behaviours and attitudes displayed by male clients and most especially illustrated in respect of attitudes toward maintenance:

The men range from the real ... nasties who say I'm going to fight everything pay them the \$10. 00 per week they are entitled to because I

³⁸ *Nine till Noon*, National Radio 17. 9 .98, 10am.

know that I can get away with being self employed and hiding income. And then I see the generous person who... makes sure the wife is supported and the kids are okay . (Practitioner D)

Whether spousal maintenance was a matter of economic capacity to pay or there were other reasons for the lack of application for, and lack of award of, spousal maintenance was the next site of investigation.

The need for spousal maintenance is determined by the capacity of spouses to be self supporting in the circumstances. Six of the seven women participants in this study had a tertiary education or were in the process of completing tertiary education as mature students at the time of separation. Nevertheless they lacked employment experience. Five of the seven participants had taken more than ten years out of the paid workforce to look after their home and family. Five of the participants were not in paid work at the time the marriage ended. The need to upgrade outdated qualifications and seek employment was urgent. Dissolution had effectively located them as unemployed. For these women capital from the family home and chattels began to dissipate as it was spent on daily expenses. Subsequent capital for the purchase of a home was reduced and their standard of living dropped remarkably.

SPOUSAL MAINTENANCE

In New Zealand, the policy shift to an equal share in matrimonial property was followed in the courts under the Matrimonial Property Act 1976 and independence was guided by s 64(2) of the Family Proceedings Act 1980. That section directed the court to grant temporary maintenance to meet the 'reasonable needs' of a partner who 'could not practically meet their own reasonable needs.' This was to apply in circumstances, where the 'divisions of functions in the marriage,' 'custodial arrangements' or the 'need to retrain' had the effect of that spouse not 'practically being able to meet their own needs'. This was the only policy area governing the dissolution process which acknowledged 'need'. In establishing that 'need' the court was to have regard to the age of the parties and the length of the marriage when determining each case. This could have applied following dissolution if 'having regard to those factors' implicated a "reasonable need", otherwise spousal maintenance was only available until formal dissolution, two years following separation.

Both parties to the marriage were expected to assume responsibility for themselves within a reasonable period of time. The above special circumstances were difficult to argue and the underpinning principle of the clean break split held more "weight" in the court. The courts interpreted the

spousal maintenance rules in a restricted way. *Slater v Slater*³⁹ set narrow boundaries for the provisions of spousal maintenance under the Family Proceedings Act 1980. Reticence to apply for even short term spousal maintenance resulted. There were few applications in the courts, and little expectation that spousal maintenance would be available in private agreements. According to all four practitioners in this study there was a vague feeling amongst family lawyers that spousal maintenance applications would not be successful in the court. None of the seven women participants in this study applied for interim or ongoing spousal maintenance at separation one woman attempted to apply following dissolution.

The family law reforms of 1976-1981 focussed on property as the key to independence for women following dissolution. Spousal maintenance was viewed as an indicator of women's dependency on men. The notion that women should continue to be financially dependent on men following separation was viewed negatively by policy makers and men who had to share half of the matrimonial property at dissolution. For women capital from matrimonial property provided income, but using capital for expenses had implications for establishing a home.

Since the reforms it has become evident that a lack of income for women from traditional marriages is a critical factor in the resultant unequal consequences of dissolution. The spousal support law is statutory law. Judges can not override it, and in the absence of legislative change the New Zealand courts have been unable to make adjustments:

The courts have very limited opportunity to do anything about it. On the dissolution of marriage, except for a period to enable retraining, even ill health doesn't make a difference. I recall occasions where Family Court judges agonised over this. I remember a woman had multiple sclerosis, was in a wheel chair when her husband left her. And I can recall the Family Court Judge saying well, she is taking a paper in Japanese at university or somewhere, that's retraining, and just keeping it going for a little bit longer, but for not very much longer. I mean these are the devices that had to be used just to keep the income going for a wee bit longer. (Judge I)

The injustice of such a situation does not reflect the notion of equality which guides dissolution proceedings. This sort of case highlights the tension between the principle of equality and the clean break in practice. The principle of the 'clean break split' was reinforced in 1980 by restrictive

³⁹ *Slater v Slater* [1983] NZLR 166,173.

maintenance provisions under (s)64 of the Family Proceedings Act 1980. The Minister of Justice made Parliament's intentions clear at the second reading of the Bill in 1980. This legislation was to balance any possible injustice to men now that women had an equal share of property under the Matrimonial Property Act 1976:

*The background of the bill is that the enactment of a fairer matrimonial property law has increased pressure for men for an equally fair law relating to maintenance. Under the bill, maintenance for spouses will be essentially short term and rehabilitative in nature, designed to off set any consequences flowing from the marriage itself. There will no longer be any room for the notion of a former husband having to provide a meal ticket for life for his former wife.*⁴⁰

Thus "women's injustice" in the system was balanced with "men's injustice" if they were directed to pay spousal maintenance. Twaddle J in the Canadian Supreme Court conceptualised this equality as carrying an economic cost:

*Women's gains have not been without a price, a price most women gladly pay. A woman cannot be the equal of a man and expect maintenance from him if her marriage ends. Subject to transitional adjustments, particularly where children are involved, economic self sufficiency has become the rule.*⁴¹

While the paid worker of the marriage continued to enjoy the benefits of employment the unpaid worker had effectively joined the ranks of the unemployed. There was no longer an exchange of the unpaid work of the home for money, but in many circumstances the unpaid spouse (usually the woman) retained the role of homemaker for the children. Frequently half of the matrimonial property did not practicably meet 'reasonable need' to maintain a residence.

All participants in this study found it difficult to maintain daily living expenses following an equal division of property and the injustice was not always apparent to the participant until time had elapsed and capital had been spent to re-establish a home:

Two years following separation, I have used the capital from my property settlement to purchase a home that cost \$ 200, 000, a car worth \$8, 000, and to pay for my basic expenses since we parted. I live frugally and have helped to support my 20 year old daughter who boards away from home close to her place of study - that has cost me \$6, 000 each year. Now I am re-training and have a student loan. I have applied for many jobs but have been unsuccessful due to a lack of experience. I

⁴⁰ Hon. J. Mc Lay Minister of Justice, NZPD, 435 :5105 19 Nov, 1980

⁴¹ Twaddle J. in *Moge v Moge* (1992) 43 RFL (3d) 7,345 .

don't know how I am going to afford to pay for the last two years of my degree as my \$289, 000 property settlement has run out. (Beth)

Beth subsequently approached two lawyers in an attempt to secure temporary spousal maintenance to pay for her studies from her ex husband. He continued to work as a self employed builder, employing staff and running several consecutive contracts, owned an expensive home and two cars and took his new wife and new children on overseas holidays. If spousal maintenance had been awarded under s 64(2) of the Family Proceedings Act 1980, then s 65(3) would have determined the amount assessed. The judge would have had to consider the needs of her ex-husband's new family. His assessment would have ensured that the amount paid would not have "deprived" any dependent of her ex-husband. Both lawyers informed her that she had little chance of success as he had remarried and his new wife had two young children. They advised her that case law demonstrated a lack of judicial sympathy in the area of spousal maintenance. Eventually she did find a lawyer to take the case. Having agreed to give the case 'a go' the lawyer proceeded to interview her about the history of the marriage and prepared an affidavit for the Family Court.

Beth had never appeared in a courtroom. On receipt of the draft affidavit she took fright and was reticent about going ahead with the case. Her new lawyer had painted her ex - husband as an violent man who would not allow her to work during the marriage. She had not communicated that information and it was untrue. She felt that the system was only interested in protecting her from hardship if she had been a "battered doormat." At the age of forty seven, following a twenty seven year marriage which had provided a high standard of living, Beth found herself financially dependent on the state. Section 64 of the Family Proceedings Act 1980 could not provide Beth with protection from hardship or rehabilitative training, as of right. She was not willing to lie in court and was afraid that the emotional and financial cost would outweigh the benefits. She gave up.

Beth's decision to withdraw was a personal one to avoid continued stress. But it came on the heels of a clear direction provided in *Z v Z* by the Court of Appeal that may have helped Beth's application for spousal maintenance. The judges specifically noted the consequences of a restrictive interpretation of the Act:

Nothing in the wording of the relevant sections (of the Family Proceedings Act 1980) of the Act requires the clean break objective to be carried through to the point where the provisions operate unfairly or harshly on one or other of the spouses there is nothing in the

*wording of subsections (1) (2) to preclude a lengthy period of time, or even an indefinite period of time for spousal maintenance.*⁴²

Legal practitioners did not understand the unfair impact of dissolution for Beth, or that her need for spousal maintenance may have qualified under (s) 64 of the Act which was designed to protect women of her age and employment status. The legal professionals who were approached to help Beth lacked an understanding and in depth knowledge of women's experiences. One legal advisor was unsure as to why there had not been attempts to secure spousal maintenance in the courts:

We've got 1200 family lawyers in New Zealand .Why hasn't someone said okay I 'm going to have a look at this. And go for it. I think people advise [clients] the wrong way to be honest, And that's a nasty thing to say because that means a lot of lawyers are negligent in the way they give legal advice. (Legal Practitioner D)

Addressing spousal maintenance issues in the court system does not only call on better training of legal practitioners. The will to challenge precedent involves court hearings but women repeatedly acknowledged their reticence to sustain conflict through the courts. As a result, the gains from a court hearing were not always worth the financial cost of continued legal battle. Legal practitioners suggested women were more likely to opt for the Domestic Purposes Benefit (DPB) in the face of continued conflict, or if the earning partner's salary was likely to produce less than the state entitlement.⁴³ Claiming of the Domestic Purposes Benefit transferred women's dependency to the state. The spousal maintenance debate is located inside a class structure:

The average wage in New Zealand is still \$35, 000, you are better to go on the Domestic Purposes Benefit. So the majority of cases end up with the woman who is parting from the income earner in the family being better off on the benefit. (Legal Practitioner D)

This applies directly to the women in this study. While spousal support is not a viable option for marriages where there is a low income, it may be for higher earners. Women who are displaced into a lower socio economic grouping following separation without private spousal maintenance are more likely to be dependent on the state for a regular income. Janet Lake suggested that employment did not necessarily provide a viable alternative;

Divorced women unless they are on a benefit, are no cost to the government. Not a cost that is recognised at present, although of course there are costs .The average length of stay on a benefit is about three and a half years. Many of those women move into work which does

⁴² ZvZ (no2) (1996) 15 FRNZ 88, [1997] NZLR 241 (CA)

⁴³ Legal Practitioners D, S, Y, H.

*nothing to change their poverty levels. All that changes is who pays*⁴⁴.

Structural inequalities which produce poverty such as poor access to worth while employment compound economic disadvantage if spousal maintenance is not available. While the women in this study did not experience poverty it was interesting to note that their incomes were only a small percentage of the income their husband had been earning when they were married. Three women were earning less than a quarter of their ex-partner's reported income. These women were struggling to maintain a home. In two cases some of the capital gained from property, was spent on general expenses. The dissipation of capital was a fear expressed by all of the women in the study. They all experienced a dramatic drop in their standard of living. While this was to be expected following separation, they did not believe their ex-partner's standard of living reflected much change. Their experiences did not reflect the equality principle which governs dissolution policy.

Employed partners are less likely to experience a drop in their standard of living at dissolution. Access to credit facilities and mortgage money, continued access to superannuation, life insurance and health insurance are entitlements of paid work or purchased from the financial rewards of employment. The privileges that emerge from paid work over and above financial independence are out of the reach of non earning partners in marriage.

Twenty years down the line, and still women, what I used to call a class of women who were always expected and wanted to remain at home, and the middle class wives particularly, who lost their skills if they had a tertiary education, became unemployable. Even in good economic times.(Judge I)

Paid employment may be the only resource of a marriage. Sharing the economic resources of marriage equally could include support until the non earning spouse has re-trained or found paid employment. Spousal maintenance could redress the balance across all socio- economic groups other than those marriages where there was no employment for either spouse. Spousal maintenance may be one way to provide compensation for employment opportunities foregone, due to the division of functions in the marriage, with consideration of the age of the non earning partner and the length of the marriage.

⁴⁴ Janet Lake, *Women and Poverty* Address to the Judicial Seminar on Gender Equity (Rotorua, 1998) p.3.

Under the Matrimonial Property Act 1976 Krauskopf and Krauskopf suggested that women from long term affluent marriages are more likely to experience unequal financial outcomes.⁴⁵ The presumption of equality was more difficult to apply to luxuries over and above basic home and chattels. Professional partnerships, shares, farms, and other assets could be disputed in the courts and adequate provision of spousal maintenance was hampered by the test of reasonable need. *Haldane in 1976* had demonstrated that farms were a particular problem. If capital from the home and chattels was deemed a 'reasonable' amount of money it was unlikely that women without qualifications or work experience were likely to be awarded even interim maintenance. Yet outcomes were guided by the principle of equality. For spousal maintenance the onus was on the non earner to prove reasonable need, due to the functions in the marriage. Most women from traditional marriages who have given up paid work to raise children could argue that the functions in the marriage had led to reasonable need :

I think the great inequity of the Matrimonial Property Act has been the impact on women in long term marriages, and not necessarily long term, really I think that the woman in the partnership only has to get through to the point where she has just one child and she will be in a position where she will not be as saleable in the market place ever again. (Judge J)

If this Judge reflects the general understanding of the judiciary then it follows that women should challenge spousal maintenance provisions in the court, at least for the purposes of re-training. All of the legal experts interviewed in this study agreed that it was time for maintenance to be tested in the courts. All believed the clean break split had unfairly overridden the spousal maintenance provision.

The Australian Courts had also realised this trend and the Full bench of the Family Court of Australia had recognised the influence of economic change in a lengthy and complicated statement they articulated their awareness thus:

Importantly particularly in more recent times, there is the notorious circumstance that there is a significant gap between theory and reality for employment, especially for people of middle age, lacking experience and confidence, and who have been out of the workforce for many years, and in the context of current hire and employment. Loss of security, missed promotion opportunities,

⁴⁵ Krauskopf and Krauskopf, p.14.

*loss of retraining and developing skills in the increasingly skilled workforce with the loss of confidence which this brings, particularly in times of high unemployment, are notorious circumstances of which the Court must take notice and apply in a realistic way.*⁴⁶

THE CLEAN BREAK. A POLICY GAP

Women who have supported home and family, sometimes for many years, find at dissolution that they are expected to walk away with half of the matrimonial property (and often the children) and make a fresh start. For many women and children this is a long and rocky journey:

There was something almost idealistic in the Matrimonial Property Act, The notion that you can end a marriage, have a clean break and then both parties can then be in an equal position, the reality of the situation is that this is just not the case at all. To my mind there has to be some sort of compensating factor come into the equation the earning partner has to be responsible for the fact that the non-earning partner has been out of the workforce for all of those years.

(Judge J)

Beliefs about marriage were subject to generational differences. Three of the four practitioners differentiated between traditional and contemporary marriages, there was a clear difference characterised by age,

You get an old male . His place is his castle and it is very hard to erode that person away from it. (Legal Practitioner H)

One professional claimed generational differences had a significant impact. This professional located a specific time frame in which marriages were more likely to follow traditional ideas. The notion that marriage was a 'partnership of equals' was applied to marriages that were social contracts made in a more traditional era when marriage reflected the 1950's and 1960's discussed in chapter four:

I think that people who were married in the 50s, 60s and 70s to some extent, still have that post-war conservatism of the 1950s which was a traditional division of roles ... I mean the whole thing's changed though hasn't it because now men want partners who are more equal and more challenging, who do the cooking, go out to work and earn some money. I mean to be fair, I think that its a new model of marriage, its actually a lot better than the old model, where its much more equal where you are both in the paid workforce, or one party does leave the paid workforce for a relatively small amount of time. (Legal Practitioner S)

⁴⁶ *Mitchell v Mitchell* (1995) FLC 92-601. in The Hon Dessau J, *Property Cases Charting new Waters in the Family Court of Australia*, New Zealand Family Court Conference papers, (Christchurch, 1998),p.65.

Traditional values of male breadwinner female housewife continued to feature in marriages. All practitioners interviewed in this study found that there was a significant number of clients who arrived with traditional views. It was difficult to educate some clients that the legislation viewed marriage as a partnership of equals:

I think there is still a traditional view in males that somehow or other they are the dominant partner, the dominant in quotation marks. I have fairly strong views about this. I see increasingly in the Pakeha male white population, that they seem to sort of perceive themselves as the dominant partner in the family. I think it arises mainly from the fact that they are the breadwinners. The old traditional argument, we are the ones who are bringing the dollars in the house, therefore we are the ones who decide what happens, and therefore the non-earning spouse doesn't seem to have as much say. (Legal Practitioner H)

When marriages were spawned in one era and dissolution occurred in another the financial arrangements for spouses at dissolution could have been judged in the economic context of the timeframe:

I consider marriage a contract for life. When people were married in the sixties and seventies the contract often involved a separation of work skills. That was the contract and it was one for life. When marriage breaks down there is no point trying to alter the terms retrospectively that was the contract and that was the deal. I expect that there has to therefore be some way of recognising that deal following dissolution. I think that women are more conscious of the need to make absolutely certain they get the best possible deal, out of matrimonial property because of superannuation ... This group married in the (50's, 60's and 70's) are no longer going to have access to earnings, regular earnings. (Legal Practitioner S)

Judges in this study noted that the differences did not just relate to education and employment. They were also influenced by socio- economic class .

Some women have great ability to rehabilitate but unfortunately the Matrimonial Property Act was drafted as a result of lobbying and submissions by women of great ability. The women behind the Act were very well educated able women who didn't stop to think as much as they might have about the women in Otara and places like that. (Judge J)

The reform of the laws governing dissolution, during the period 1976 -1981, were ground breaking for their time. They reflected the notion of formal equality. Women were to be financially independent of men at dissolution irrespective of their role in day to day life, but many women were more likely to be in marriages that reflected traditional gendered roles. The underlying concepts of independence and equal opportunity may only just

be being realised in 1999. However Charlish claimed that recent research suggested that stability in a marriage was enhanced by 'a willingness to play the traditional gender role'.⁴⁷ Such findings are frightening for women with children who try to maintain a marriage relationship by following this advice and find at dissolution they are automatically expected to be totally independent. Marriages that reflect both traditional and contemporary values end. Judges and legal practitioners are faced with many different permutations of marriages. The work roles, level of skill and employment opportunity are crucial factors which are not considered under current legislation. Marriage is an economic unit with financial benefits to be shared at dissolution. In order to enable equal consequences and independence a more resourceful approach may be required.

CONCLUSION

Evidence from this study suggested that adversarial representation, high legal costs and delays have continued to be experienced by women in spite of the family law reforms of 1976-1981. An holistic approach to achieving independent equality at dissolution for both spouses should consider all of the resources of the marriage and all of the issues. An holistic family centred approach may be more effective than the current time consuming piecemeal process. Inclusion of property issues at mediation is crucial to a reduction in custody battles. Simple access to judicial mediation could reduce the financial costs of litigation to the state and citizens.

Hon. Mme. Justice Claire L'Heureux-Dube's wisdom explains a vehicle to equality at dissolution. Her model merges property with maintenance and simply includes all of the financial resources of the marriage:

Equal division could be shared in many ways : by spousal support and child support, by the division of property and assets or by a combination of property and support entitlements. An absence of accumulated assets may require that one spouse pay support to the other in order to effect an equitable distribution of resources.

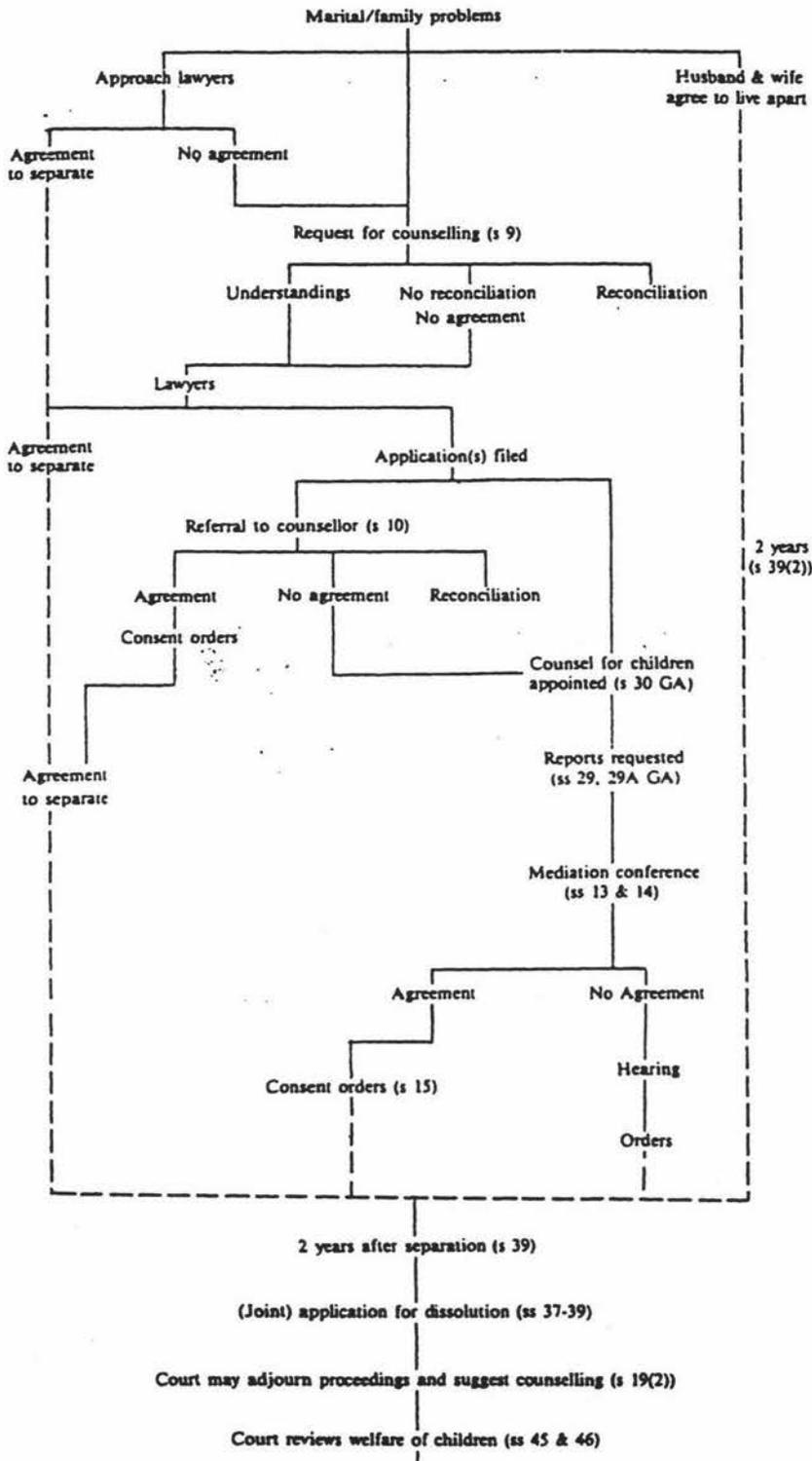
(The Hon Mme Justice L'Heureux-Dube in Moge v Moge⁴⁸)

This model holds equality paramount over the clean break. For spouses with children the clean break principle may be an unreasonable expectation. The next chapter will discuss the interests of the children.

⁴⁷ A. Charlish, *Caught in the Middle*, (London, 1990), p.11

⁴⁸ *Moge V Moge* (1992) 43 RFL (3d) 345 Supreme Court of Canada.

Introduction 0.8



The Dissolution Process: Butterworth's Family Law Guide, (Wellington, 1991), p.8.
Figure 2.

CHAPTER SEVEN

THE INTERESTS OF THE CHILDREN : PRIVATE BATTLES A PUBLIC CONCERN.

We had agreed to divide the assets and share custody of the children, but the property division negotiations were not going well. My solicitor suggested that he file for proceedings in the Family Court for full disclosure of our property and assets, I agreed. A couple of days later when dropping the children off to their father he screamed at me. He was very angry and accused me of blackmail. I hadn't realised that the solicitor had threatened to file for custody on my behalf. That was not my intention. When I questioned my lawyer, he told me that it was 'normal legal practice'. (Tracey)

INTRODUCTION

When adult relationships end there are consequences that impact on the minute day to day organisation of private family life. Children can inadvertently become weapons of parental battles, illustrated by Tracey's experience above. While the rules governing dissolution for adults encourage private negotiation without the interference of the state, the policies governing the care arrangements for children direct decisions to be made in the 'best interests of the child'. The 'welfare principle' is central to arrangements about the child's future. This is a site where state policy directs the private values of parents. The competing values of motherhood versus fatherhood may be at the core of the dissolution equality debate. These gendered parental roles, are in some instances, negotiated through the hearts and daily lives of innocent children.

In this chapter I suggest that children's welfare can be disguised by adult agendas during the dissolution process. It is apparent that in some families, the organisation of children's residential arrangements may be interwoven with economic issues. Central to this discussion is the idea that while parents battle for care of, and contact with children the resultant conflict is not in the best interests of those children.

During this study, three main themes emerged they were: the nature of contact with parents, conflict between parents and provision of adequate economic resources. Secondary research confirmed that consequences for children in the short, medium and long term were influenced by those three

factors.¹ This chapter will identify the particular sites of disagreement where some parents risk the welfare of their children as they negotiate care, contact and other parental responsibilities for children when families part.

BACKGROUND

As the reader will recall from chapter four, historically women and children were the property of their husband and father. Fathers were the head of the family. 'The rationale for the father having superior rights was that it avoided the possibility of dispute between husband and wife - one was always right'.² In respect of children's interests this was regarded as the discipline and harmony that a child needed for protection from 'divided authority', or being a 'shuttlecock of its father's or mother's idiosyncrasies'.³

During the early nineteenth century, women had challenged the gender inequality that enabled fathers custody as of right when relationships ended. The British Custody of Infants Act 1839 was empowered to award mothers custody and access. However, reflecting the beliefs of that era as discussed in chapter four,⁴ custody and access decisions were based on moral judgment.⁵ Adulterous women were unlikely to be awarded custody, arrangements for children focussed on the behaviour of the adults rather than the welfare of the children.

It was not until the passage of the New Zealand Guardianship and Infants Act 1926 that the paramouncy of the children over other issues was acknowledged. However there is little evidence that the policy was embraced. Matrimonial offence continued to influence decisions about the care and placement of children. Marital guilt was linked with the ability to parent effectively. Custody was generally awarded to the innocent parent until 1928 when Ostler J said in *Bolton v Bolton*, 'adultery by the wife ought not to be regarded for all time and under all circumstances as sufficient to disentitle

¹ P Amato, *Children and Divorce: What Hurts What Helps*, (Auckland, 1998).

J.Pryor and P. Amato, *Divorce and Separation: The Outcomes for Children*, Foundations, Joseph Rowntree Foundation, (Auckland, 1998), p3.

J. Kelly, *Current Research on Children's Post Divorce Adjustment: No Simple Answers*, Family and Conciliation Courts' Review. vol 31. No 1 Jan 1993.

² M. Henaghan, *Above and Beyond the Best Interests of the Child*, Family Law Conference Papers, (Christchurch, 1998), p.153.

³ M. Henaghan, p.153.

⁴ For a more explicit examination see, G.Austin, *Children: Stories the Law Tells*, (Wellington, 1994), pp.12-67.

⁵ *Van de Veen v Van de Veen* 1924 was the high point: While the husband joined the Australian services and travelled to France, 'risking life and limb' the wife formed a new relationship, which brought 'shame and domestic ruin' on the husband. The husband was awarded custody of the children so that they did not witness the 'triumph of evil'. in G. Austin, p.40.

[the mother] access to or even custody of the children'.⁶ In addition, reflecting what society thought was best for children, gendered rules emerged. Subsequently, children were placed with the parent of the appropriate gender. This was based on the belief that 'children need the nurturing of a mother when young and a boy the guidance of the father when he gets older'.⁷ In the following three decades the policies that valued the health and welfare of mothers and children was reflected in the belief that the mother child bond was a critical factor for successful human development and social stability. This understanding was a feature of care arrangements at dissolution. Children were usually placed in the custody of their mother. The gendered rule continued until 1981 when the amendment s23(1)(A) of the Guardianship Act 1968 removed the presumption that a parents gender would influence parenting skills.

In the contemporary context the policy guiding 'the best interests of the children' or 'welfare principle' rejects the legal presumptions and legal rules of the past. The rights of the child guide assessment toward what is judged to be in the best interests of the child. This affords consideration of the child's wider socio economic and emotional environment. Judges have wide discretion in decisions concerning children's welfare. The guidelines are not rules nor is the checklist prioritised.⁸ Determining what is 'best' is based on an individual judge's interpretation of information supplied by the family, and reports from child welfare experts. However the consideration of the children's interests through the Family Court does provide a focus on the children and information is collected from people who do not have any stake in the outcomes. In private agreements the children's interests are not explored as extensively.

Most parents organise separation and dissolution privately. They don't seek or require the help of professionals or judges of the Family Court to accomplish outcomes. But private resolution of adult issues does not provide the same 'welfare audit' of the child's emotional social and economic environment. At separation, arrangements can be implemented without any legal involvement. During, preceding and proceeding the dissolution process, children can be co-opted into their parents disagreements. Contact

⁶ Bolton v Bolton [1928] NZLR 473. in G. Austin, *Children :Stories the Law Tells*, (Auckland, 1994), p.39.

⁷ M Henaghan, (1998), p.153.

⁸ The Family Court is required to gather evidence about: existing and future bonding, parenting attitudes and abilities, availability, commitment and quality of time with the child, support for a continued relationship with the other spouse, security and stability of home environment, suitability of role models, positive or negative effects of wider family, provision for care and help, material welfare, stimulation and new experiences, educational opportunity, wishes of the child. see M. Henaghan, (1998), p.152.

and care acrimony can surface (as it did in Tracey's case) during private negotiations. Children's welfare can be impaired without ever coming to the attention of legal practitioners or the court. Consequences for children can be invisible. The potential sites of parental disagreement that risk the welfare of children must be examined.

CARE AND CONTACT

Children need souls of innocence, they need William Blake souls of innocence for as long as possible before they move on to souls of experience. (Legal Practitioner D.)

The nature and quality of contact between children and parents following separation or dissolution can be one of the earliest sources of disharmony. For children there is often a sense of torn loyalty. Their 'innocent souls' are divided, their family identity torn in two. When parents part, children have little choice other than to live in the care of one parent at a time. If resources, time and employment factors permit, this may be shared between two homes in an equal living arrangement with each parent. Alternatively, and in a greater proportion of cases, children reside in the home of one parent, with or without contact with the other parent.

Decisions about who has custody (daily care), access (contact) and guardianship (responsibility) of children are at the heart of the gendered war. Both parents usually retain overall responsibility for the children. One takes day to day care of the child's needs and the other parent has contact at arranged times. In some cases both parents retain all of the legal rights and responsibilities and work co-operatively in the child's best interests. Optimal contact for children with parents following separation and dissolution has been widely debated in contemporary social science research.⁹ Studies have demonstrated that the quality of relationships and contact with parents, extended family networks, and significant other adults in their lives influenced outcomes for children. Research has suggested that decisions

⁹ see for example: MacLean, M. and Wadsworth, M.E.J. (1988), 'The Interests of Children after Parental Divorce: A Long Term Perspective', *International Journal of Law and the Family* 155. Richards, M. P. M.(1987), 'Children, Parents and Families: Developmental Psychology and the Re-orientation of Relationships at Divorce', *International Journal of Law and the Family* 295. Amato, P. and Keith, B. (1991), 'Parental Divorce and Adult Well- Being: A Meta-Analysis', *53 Journal of Marriage and the Family* . Pryor, J. A. and Whybrow, J.C (1986), 'Making Decisions About Children after Parental Separation', *Child and Family Law Quarterly* 229. Kuh, D. and MacLean, M. (1990), 'Women's Childhood Experience of Parental Separation and their Subsequent Health and Socio-Economic Status in Adulthood', *Journal of Bio Science*, vol.22, pp121-135. Kruk, E. (1992), 'Psychological and Structural Factors Contributing to the Disengagement of Non Custodial Fathers After Divorce', *Family and Conciliation Courts Review*, vol.30, pp.81-101. Richards, M. P.M. (1982). Post -divorce Arrangements for Children: A Psychological Perspective. *Journal of Social Welfare Law*, pp.133-155.

about which residential arrangement is the best for children is difficult to predict, every case is different. Hall concluded that 'sole custody was not detrimental to children and joint custody did not minimise the impact of parental separation on children'.¹⁰ Amato referred to studies which suggested that children with joint residential arrangements were 'better adjusted overall than those with sole custody'.¹¹ He also cited the work of Johnstone who had found that it was the nature of contact rather than the residential arrangements which influenced outcomes. She found that children in high conflict, joint custody arrangements were especially likely to have mental health problems, even more than children in high conflict sole custody arrangements.¹²

The experience of frequent sustained conflict appeared to play a critical role in consequences for all children. Positive or negative effects may have been due to the private actions of parents and the way in which they maintained care and contact over time. Parents who adopted low conflict, joint care were those who were more likely, under all conditions, to share responsibilities and continue relationships with their children.

The policy governing contact and care recognises that every family situation is different and therefore treatment of the issues is outside traditional legal rules and presumptions. However, with such flexibility comes a lack of certainty about outcomes if disagreement is formalised in the court. Filing for proceedings in the court can increase the intensity of adversarial negotiations for parents. Research suggested that unless there were specific indications against such an arrangement, a child should have a continuing relationship with both parents and other members of the family.¹³ While there was no hard and fast rule, and not all children were negatively affected, there was one small area of consensus in research studies,¹⁴ experts agreed that the aim should be to preserve safe relationships that children have had with parents before the separation.

Maintaining such relationships can be particularly difficult early in the separation process when care and contact issues typically appear. Recent

¹⁰ Hall (nd) in M. McPherson, *Divorce in New Zealand*, (Auckland, 1995), p.41.

¹¹ P. Amato, *Children and Divorce: What Hurts What Helps?* (Auckland, 1998), p. 12.

¹² Johnstone, (nd) in Amato, p.13.

¹³ Martin Richards and Margaret Ely, *Children's well-being, Parental Divorce and Family Life: Who Seems To Make The Difference In The Longer Term?* Centre for Family Research, (UK, 1997), p.62.

¹⁴ K. Funder, *Remaking Families: Adaptation of Parents and Children To Divorce*, Australian Institute of Family Studies, (1996).

M. Mac Lean and J Eekelaar, *The Parental Obligation: A Study Across Households*, (Oxford, 1997).

A. Smith et al, *Access and Other Post Separation Issues: A Qualitative Study*, (Otago, 1997).

research by Funder¹⁵ suggested that the on going parent child relationship was influenced by residential arrangements, payment of child support and the level of involvement in the day to day decisions affecting the child. Wallerstein and Kelly said, 'if the non custodial parent has no right to input into major decisions affecting the child, they may withdraw emotionally and practically'.¹⁶ It is possible that some non custodial parents feel that they 'lose some of their guardianship rights' as the day to day care for the child is taken out of their hands.¹⁷ Secondary research suggested that parents were most likely to provide financial and emotional support if frequent contact was retained.

TORN LOYALTIES.

When spouses separate they detach from their former spouse over a period of time and they may fear that they will also lose attachment with their children. This creates anxiety and distress and can be a particular site of conflict and grief, especially for the parent who resides apart from the child. But adult anxiety about custody and access matters can unwittingly become the emotional responsibility of the children and this can create a sense of torn loyalties for children.

Retaining contact with both parents for the children in families that part can be a source of both practical and emotional difficulty. The potential breaking of an emotional bond with a parent by separation, and restriction of access, can be distressing to the child and interpreted as rejection.¹⁸ As adults detach from former partners, contact can call on skills of co-operation which were lacking during the marriage relationship. While counselling and mediation through the Family Court process, outlined in chapter six, often does foster co-operation in care and contact issues,¹⁹ effective resolution can be elusive. Legal practitioners, policy advisors and judges in this study all alluded to the following observation :

At marriage breakdown people are the most stressed they can ever be, especially those with children. One thing that never fails to amaze me is

¹⁵ Funder, pp.44-67.

¹⁶ J Wallerstein and J Kelly, 'Surviving the Breakup: How Children and Parents Cope With Divorce', in M. McPherson, *Divorce in New Zealand*, (Palmerston North, 1995), p.41.

¹⁷ G. Austin, p.g.21.

¹⁸ Smith et al, *Access and other Post Separation Issues, A Qualitative Study*, (Otago, 1997), p.3.

¹⁹ In 1993 Maxwell and Robinson reported: As the principal form of decision making in custody issues, counselling was seen as responsible for only 6% of decisions, although 73% of respondents noted that custody issues were 'agreed' and 55% said that access issues were 'agreed' at counselling. The distinction that Robertson makes between counselling being 'responsible' for the agreement and 'agreement reached' in counselling reflects on the nature of separation and dissolution as a process rather than one event. The latter figure would infer that counselling had an important role in resolution. G. Maxwell, *Moving Apart: A Study of the Role of the Family Court Counselling Services*, (Wellington, 1991), p.159.

just how awful perfectly nice people can be when it comes to negotiations. They want to fight. Everything comes together the rejection, property fights, everything that they have is torn apart. It is a nasty business. (Key Informant No2)

Jefferson commented that 'the elimination of opportunity to vindicate oneself [during the dissolution process] from other areas of family law has contributed to the proliferation and intensity of litigation concerning the care arrangements for children'.²⁰ Henaghan had similar views he noted at a recent conference that: 'they used to fight about matrimonial property, now they fight about custody and access'.²¹ Such explanations of disagreement may be an over simplification of the issues. Policy makers would need to look a little deeper than simply suggesting 'parents *want* to fight'. Some men are seeking primary parenting roles and many women are seeking full time work roles which demand time away from children. Conflict about the changing role of men and women in society is played out on the legal stage. Many legal professionals and judges recognise that some of these battles are symptomatic of social change which the legal process is left to mediate in the absence of legislative policy initiatives. When the legal system is guided by policy objectives of conciliation and to act in the best interests of children professionals cannot flippantly attribute the negative consequences of disagreement to the human desire for battle. Analysis at the micro level of the separating family is required to ascertain sites of disharmony.

At the level of the family, if negotiations about care and contact continue without resolution, some children begin to harbour resentment and anger. This is likely to be intense if they are invited to blame one parent for the separation. Richards and Ely noted that some children were actively encouraged to have a negative image of their absent parent. They associated this with children's subsequent low self esteem.²² When one parent held the other responsible for the separation and encouraged the child to share the resentment, the child's loyalties were torn and the trust relationship with both parents was in jeopardy. Counselling for parents, previously outlined, is not legislated for children. Women in this study reported that children were often confused and in need of an independent ear during the transition from a nuclear family to a family-apart. Women said that their children sometimes felt they could not share their worries with either parent for fear the adults would use information as ammunition against each other.

²⁰ S. Jefferson, *Families in Transition*, (Auckland, 1998)

²¹ M. Henaghan, *Fathers Families and The Future*, Conference, (Auckland, 1998).

²² M. Richards and M. Ely, (UK, 1997).

A safe and neutral outsider was needed to support the children through the transition. A teenager participating in an Otago University study described how she felt about torn loyalties:

It is important that your parents ... don't put the other parent down in front of the kids. I think that's really awful. And the few times Mum or Dad have done that it has made me feel really uncomfortable and horrible and angry at the person who said it, more than the person they're saying it about ... They really confuse you , especially if you're younger.²³

In addition to 'put downs' women in this study confirmed that children were often used as messengers to facilitate communication about daily arrangements between fighting parents. Studies have shown that using children as go betweens could lead to harmful sibling/parental conflict and torn loyalties if children were encouraged to take sides.²⁴

As discussed in chapter six, 'consideration' of arrangements for the children is mandatory during adult counselling, mediation and at dissolution. The children's circumstances are reported by parents unless a full court hearing is sought, violence has been a feature of the marriage, or issues of child welfare surface and are noticed by professionals. Professional counsellors can make it clear to parents, that the child's relationship with each parent, and the child's self esteem, is at risk when loyalties are torn. Although experts such as Richards and Ely confirmed that children often experienced torn loyalties as a result of their parent's acrimony,²⁵ it is apparent that children do not have access to counselling as of right. Furthermore, adults who do not use the resources of the Family Court in New Zealand may not receive adequate information or education about parenting during the dissolution process.

When adults cannot arrange care, contact or child support issues the disagreement becomes a matter for mediation or arbitration in the court. In the official context it is inevitable that comparisons are made between mum's house and dad's house. Women's parenting is compared with men's. Both in New Zealand and overseas, mothers are not awarded custody as easily as they were in the recent past. Smart's review of secondary literature and qualitative review of Beck's interviews suggested fathers seem to want to have their children with them after divorce and that conflicts over children

²³ Gina in A. Smith et. al, p.21.

²⁴ A. Charlish, *Caught In the Middle: Helping Children To Cope with Separation and Divorce*, (London, 1977), p. 80.

²⁵ M. Richards and M. Ely, (UK. 1997).

seemed to be increasing.²⁶ Battles for contact with and care of children suggested that adults did not always act in their children's interests. Findings from the present study suggested that custody and access battles were motivated by issues that reflected change in the way society viewed traditional gendered parenting roles.

MOTHERHOOD / FATHERHOOD CARE AND CONTACT.

*You couldn't really class her as an unfit mother [but] I thought, 'We're in a modern world now and everyone's talking about new age man-I'm just going to see how true it is'. She wanted the children [aged 2 years and 10 months] but I beat her out the door with them. She'd asked for Jimmy back but I'd refused totally. I said: If you want him you can take me to court to get him What I've done is take two children off their mother, which some people would say is a very callous thing to do; but if you start questioning yourself on these ethical issues you would have a nightmare.*²⁷

In the New Zealand context of private agreements, the majority of children remain with their mothers. The usual interpretation had been that the interests of the child are served by the child remaining with the parent who had been the primary care giver during the marriage, frequently this has been the mother.²⁸ However in contested cases it is apparent that there is a trend to award daily care to fathers in equal proportions. In both 1990 and 1995 44% of mothers were awarded custody and 45% of fathers obtained custody.²⁹ Findings from this study consistently suggested that there were ulterior motives behind many custody battles. But views were polarised about the reasons for gendered parental disagreement about care and contact issues. The gendered battle for custody of, and access to children, was a complex interwoven story of legal, practical and emotional issues.

Two of the women in this study were involved in threats to lodge hearings through the Family Court regarding custody. In one case the father of the child did not ever file for custody, he simply fought his wife's application. Following her legal expenditure of \$12,000 over an eighteen month period, he pulled out the day before the hearing. Conversely, one woman's solicitor had filed for custody in an attempt to encourage disclosure of assets from her ex-husband. Judges and legal practitioners reported that threats to file for custody by men were one way that males strategised to keep women from using the court process in property litigation. This was confirmed by both

²⁶ C. Smart and B. Neale, *Experiments with Parenthood*, (United Kingdom, 1997), p. 215.

²⁷ James residential parent, in C. Smart and B. Neale, p. 214.

²⁸ M. McPherson, p. 42.

²⁹ M. Henaghan, *Legally Rearranging Families: The Family Court Process, Custody Access and Adoption, Name Change, Separation and Dissolution*, (Auckland, 1992), p. 158.

Neave and Graycar³⁰ in Australia, and Henaghan³¹ confirmed the trend in New Zealand.

Judges in a recent gender awareness survey specifically mentioned 'custody bribery' as a deterrent for spouses from seeking resolution in the court. They implied that custody bribery was not gender specific:

*Financial disadvantage of continued proceedings leads to less than advantageous settlement. The threat of [a] former partner to seek custody leads to disadvantageous resolution of other matters*³²

McPherson suggested that it was possible 'access to children was used in the battle between spouses, as one of the few forms of power women may hold in the divorce process, and that non custodial parents (usually men) were sometimes wronged'.³³ Kelly acknowledged women's power over outcomes for children. Summarising her findings from a review of literature, Judge Sommerville noted that, 'the positive relationship between visiting frequency and adjustment in children was stronger when the custodial mother approved of the father's continued contact with the child'. She was in no doubt that 'the custodial mother had considerable influence on the father child relationship',³⁴ after dissolution. It seemed that using the children as weapons in parental conflict over arrangements for children was a tactic employed by both women and men. Some sources linked battles for custody of children to state provision of maintenance.

Taking responsibility for the day to day care of children could entitle parents to financial support from the state. In 1991 the Family Court Access and Custody review had noted that as the economic situation worsened there were more applications for custody, 'because the children [we]re seen as an income in that the Domestic Purposes Benefit [wa]s a greater amount of money than the unemployment benefit'.³⁵ Callister argued that this was a simplistic interpretation of changing socio economic conditions. It was an economic reality that some men had more time available and wished to be a primary parent. Statistical evidence suggested that the economic restructuring and downturn that characterised the late 1980's in New Zealand, did not impact on women's employment as negatively as that of men.

³⁰See: M. Neave, 'Private Ordering in Family Law - Will Women Benefit?' in *Public and Private, Feminist Legal Debates*, M.Thornton et al, 1995. and R. Graycar, *Dissenting Opinions; Feminist Explorations in Law and Society*, 1990. and R. Graycar and J Morgan, 'Matrimonial Law Reform and Equality for Women' in *Discourses in Discord ?* 1995. R. Graycar and J Morgan *The Hidden Gender of Law*, (Sydney 1990).

³¹ M. Henaghan, 1992).

³² Barwick, Burns and Gray *Judges Perceptions of Gender Issues*, (Wellington, 1995), p. 37

³³ M. McPherson, p.41.

³⁴ Judge Sommerville, *Family Law Conference Papers*, 1998, p.244.

³⁵ Family Court Access and Custody Access Research Report 5. (Wellington, 1991), p.33.

The total number of people employed declined by nearly 100,000 between 1986 and 1991 but women only accounted for 3.8% of this loss.³⁶ Calling for an equality view of fatherhood,³⁷ he argued that three clear groups of men had emerged in custody battles. One group were kept from seeing children by mothers, another group had more time available due to unemployment and the effects of re-structuring. A third group emerged due to new technology, which had allowed both men and women to work from home and spend equal amounts of time with children. It appeared that some of the acrimony regarding care and contact with children following dissolution, could be explained by a the re-allocation of resources such as time, rather than the desire to exploit state provision.

Men were not the only people vocal about their need to take a greater role in parenting. Counsellors in the 1991 Family Court Custody and Access Research Report confirmed that there were attitudinal changes in respect of the way people valued parenting and work. They spoke of women insisting that men take a role in parenting. Women were claiming that they would not parent full time, and wanted fathers to help out in terms of undertaking their share of child care.³⁸ At a functional level, it was possible that some women perceived children as the product of their labour, their contribution to the marriage partnership. Some women looked to share this responsibility more equitably at dissolution, just as financial products of the marriage were shared equally.

The women in this study spoke with one voice. They valued children remaining with their mother at dissolution. They believed that the mother child bond was vital. All of the women participants in the study plus one female policy maker who had experienced dissolution were married in the seventies. Their long term marriages had lasted from 12-25 years. The 1991 report (referred to above) might reflect a subsequent generation of men and women who were ending marriage. Participants in this study who had experienced dissolution of marriage (including five of the professional male participants), noted that mothers who had previously been primary care givers usually retained day to day care for the children. One participant feared women's vulnerability in the courts :

Its mothers who are doing all of the work. Unless there is an assumption of the primacy of the mother in the court everyone of us will be in fear of being put on trial as mothers. Our competency as mothers will be in doubt and we will have to prove it and how will we

³⁶ Statistics New Zealand, *New Zealand Now: Women*, 1998, p.87.

³⁷ P. Callister, *Pigs, Heros and Wimps*, Unpublished Ph. D. thesis at Seminar Fathers Families and the Future, Sept, 1998.

³⁸ *Family Court Access and Custody Access Research Report 5*. 1991, p.33-34.

prove it? A lot of women end up being deprived of their children because men drag up all this stuff. But the woman doesn't have anything to drag up because there was no-one bloody there to do it - right? (Key Informant No1)

Both men and women who instigated fights through the courts using custody bribery were vulnerable to abuse of the legal process. Some of the tactics reported were difficult for judges to reconcile due to the potential risk of abuse:

There's no doubt about it that many of the custody disputes we get are really disguised matrimonial property and maintenance things. Certainly there is a remarkable coincidence between the number of sexual abuse allegations that come forward once it becomes plain that the matrimonial property is a scrap. And that is unfortunate. In my view anything to do with money should be put in one basket.(Judge A)

The idea of unfounded accusations of sexual abuse of children was mentioned by some of the women in this study. They commented that they knew their ex-husband's feared such accusations:

One of my children was really acting out. I took her to a counsellor for help. When I told my husband that I had sought help for her he lost the plot. He said I was blackmailing him, that I was going to accuse him of sexual abuse. Nothing could have been further from the truth. I just wanted help for my little girl because I couldn't manage her behaviour on my own. He wrote me this pathetic letter, as if I would do such a thing. I wouldn't ever stop him from having access to his children - ugh! (Jane)

When access and custody are being determined through a court hearing, the judge focuses on the children's relationship with parents and wider kin. Inevitably the homes are compared, (under the previously mentioned guidelines) while establishing the welfare or best interests of the children. When the court is involved, counsel for the child is appointed and solicitors reported that difficult tensions can emerge. Balancing children's emotional needs with the gathering of information about their welfare compounded torn loyalties and stress for the children:

Kids get caught in the middle. I ache for the kids. I have had some horrible experiences, examples of kids who say : Look just cut me in half. Give half of me to mum and half of me to dad. I always say that when you ask children to make a choice you ask them to deny half of themselves. Why do we do this sort of thing? Because the law says you ask the kids what they think. How stupid, I mean we have an adult law and we think kids think like adults! (Legal Practitioner D)

Pressuring children to state a preference for living with one or other parent can be one of the major difficulties children face. One child in the Otago university research said he 'liked to move around kind of half and half'.³⁹ Researchers in the Otago study noted the keen sense of justice and feelings of torn loyalties that children experienced over sharing themselves between parents.

Children needed clear information during the dissolution process. McCready and Horrox⁴⁰ argued that a paucity of knowledge and lack of information may hinder children's adjustment to changes in the family system. Balancing information that could be shared, with information involving conflict, posed several difficulties for children and parents. It was reported in this study that children were anxious for information regarding their own family and they did not want any surprises 'in the neighbourhood'. Mothers reported that children sometimes 'questioned tirelessly', 'nagged,' and 'told woppas at school', to help construct their own reality about what was happening in their lives. For some children there was little warning and the change was viewed negatively by the child: 'why am I always the last to know', 'I am the one who misses out on parents, the others have had you together for longer', 'it's not fair you didn't warn me'. Some siblings within the same family had conflicting responses, 'I'm glad I don't have to listen to you two fighting anymore', 'I'd rather have them fighting together than fighting and split up', 'at least we have got mum to ourselves now', 'I'll never get over it no one can understand how bad it is for me', 'we get more time with dad now than when they were together', 'you can't ever understand how my life will never be the same again'. Some women reported that adolescent children in particular claimed the separation was a relief from constant conflict. Either way, children wished to be consulted when any new or major changes were going to affect them.

Past research⁴¹ has identified that a lack of information and explanation about separation, custody and access decisions, has been the common experience of children. An Otago University study found that children as young as five years old were able to talk about their feelings and wishes. However, more than half had never talked to anyone about the separation.⁴² Mothers commented on the difficulties they had discussing the issues with their children. Weighing the rights of parents for custody and access alongside the wishes of children was a source of conflict at some stage of the

³⁹ Smith, A. et al, p 22 .Tom (aged 11).

⁴⁰ McCredie, G. and Horrox, A. (London,1995).

⁴¹ Mitchell, A.K. (1983). *Adolescents' Experience of Parental Separation and Divorce*. Journal of Adolescence, 6, pp.175-187.

⁴² A.Smith et al, p.1.

dissolution process, for all of the participants in this study. Women feared that children would feel abandoned if they did not communicate how much they loved and wanted them. This was balanced against not wanting to pressure them about custody and access arrangements with their father. Professional and women participants spoke of the games that parents played to win the loyalty of the children. These games involved practices as diverse as supplying material rewards and promises in return for time with a parent, to being prohibited from seeing or cuddling a parent, and changing the surname of a child without consultation.

The direction to the court by s23 of the Guardianship Act to act in the best interests of the children is a reminder that battling parents may not be behaving in a manner which considers the children's wellbeing, in spite of claims that their children are of primary concern. Once a dispute is litigated it is mandatory for the Family Court to 'ascertain the wishes of the child,' and if the child is able to express them by s23(2), Guardianship Act 1968. This is implemented through the appointment of counsel for the child. The Family Court Practice notes guide the tasks of counsel for the child to, 'negotiate or mediate the welfare of the child as soon as possible. And to protect the child from unnecessary or undesirable examinations, tests, and evaluation'.⁴³ The role of counsel has been shown to aid mediation between parents because it involves effective communication across the whole family structure. The focus of Counsel for the child, on the child's needs and interests, 'influenced parents'.⁴⁴ But if private custody arrangements are made, and court intervention is not sought no mediation is enshrined in the process and conflict can continue for protracted lengths of time.

CONFLICT

The claim that divorce disadvantages children compared with children in nuclear families is legend. In 1981 Phillips wrote:

*If children become involved in what is considered anti social behaviour, the cause is often sought in their family background, particularly in what are called 'broken homes'.*⁴⁵

While children from separated families do tend to grow up in households with lower incomes and poorer housing, achieve less in socio economic terms, display increased risk of behavioural problems, perform less successfully academically and report more symptoms of depression, these

⁴³ Family Court Practice Note:18 Jan 1982. in *Family Court Review*,1993, p.109.

⁴⁴ Boshier et al, *A Family Court Review*,1993, pp.109-110.

⁴⁵ R Phillips, *Divorce in New Zealand: A Social History*, (Auckland,1981), p.15.

outcomes have been clarified.⁴⁶ These indicators may not be exclusive to the experience of being a member of a family-apart. More specifically they may be related to the process and behaviours of parents before the marriage ended and following separation. A 1998 review of two hundred British studies found that consequences for children of families apart, stemmed from the 'conflict' preceding the separation, rather than the separation itself. The conclusion was that 'it [wa]s especially important that parents appreciate the possible damage from overt conflict and violence from the involvement of children in disputes'.⁴⁷ Rodgers and Pryor suggested that a complexity of factors impinged on spouses up until, during and after the separation and those warranted closer scrutiny. It appeared the process rather than the single event, was a critical influence on outcomes for children.

Johnston, Klein and Tchann reviewed the outcomes of conflict in a recent examination of North American literature. They concluded that the parents psychological functioning and the quality of the child parent relationship played a part in the effects on children, in circumstances where there was high conflict. Children of custodial parents who were anxious and depressed by chronic custody disputes were more likely to have disturbed children. However when custodial parents were supportive and empathetic with their children during the dispute this had the effect of 'protecting the child against both parental psychopathology and marital conflict'. Johnston et al went on to warn that in any evaluation of how custody arrangements affected children their wider social support system should be included and factors such as school, social activities and contacts with friends and kin should be considered. They reported that some children were able to successfully distance themselves from their parents battles and as a result were 'particularly empathetic and aware children'. Others who had become meshed in the parental conflict were 'overburdened by adult responsibilities and constricted by their fears'.⁴⁸ If parental psychological health impacts on childrens resilience when there are disputes between parents over care and contact arrangements, then it follows that the parents must be physically and psychologically safe from conflict, and in particular from overt violence.

⁴⁶ B. Rodgers and J Pryor, *How Long Does It Go On: Medium and Long Term Implications of Family Transitions*, (Auckland 1998), Parental Separation in Later life: How Does It Affect the Children? (Auckland,1998)

⁴⁷ B. Rodgers and J. Pryor, in *The Guardian Weekly*, 5.7.98., p.24.

⁴⁸ Johnson, Klein, Tchann, in Judge C. Sommerville, 'Promoting the Welfare of Children Through the Wellbeing of Their Parents', (Wellington,1998), p.243.

DOMESTIC VIOLENCE.

In this study, male violence was reported to have increased or surfaced during the separation process for all of the participants, including those relationships where there had not been any previous experience of violence in the marriage. Contestable views regarding the definition of violence are apparent in the current New Zealand policy culture. The views are focussed on the interpretation of the Domestic Violence Act 1995. Allen recently claimed that “yelling” could qualify as psychological abuse and hypothesised ‘if you [were] a man and your marriage br[oke] down and, a dispute develop[ed] with your wife over custody of the children and she decide[d] to make an accusation of domestic violence, only St Peter would manage to avoid qualifying under this Act’.⁴⁹ The Courts and associated professionals are charged with the responsibility of weighing the potential costs, benefits and safety of the children in continued or supervised contact arrangements where there are accusations of violence or evidence of such behaviour. However it is clear that some men believe the Act is being used to withhold father’s access to children.

Women in this study reported that as separation battles gained momentum the children were effected by increased animosity between parents. Three women reported threats to kill. Supervised access arrangements are mandatory under the Domestic Violence Act 1995 for children where there are protection orders against a parent’s physical violence. The Domestic Violence Act 1995 provided immediate protection from such abuse of power, but none of the women participants from this study filed for property or custody proceedings citing domestic violence. One woman sought a non molestation order following her husband’s attempt to drive over her in the basement of their home, but her application preceded the 1995 Act and when the police requested to see evidence, and her bruises, she withdrew her application. It was reported that one woman’s husband tried to strangle her and beat her repetitively. Another woman served a trespass order following a particularly aggressive invasion of her rental property. All three women continued to seek private resolution of property, child care and contact issues, in spite of the violence. Two of the women involved the police but neither followed through with a protection order from the court.

Allen had claimed that allegations of domestic violence were a tactic used by women to disempower men in the Family Court, but Pershouse explained that men were likely to behave aggressively during the dissolution process and he spoke of men’s lack of emotional support systems during this time. He

⁴⁹ J. Allen, ‘Family Law: Domestic Violence Debased’, *The National Business Review*, (Auckland, 18. 9.98).

suggested that 'men felt cut off from their primary emotional investment and felt as though they were perceived as the disposable parent'.⁵⁰ He claimed that feelings of grief, loss and confusion led to what he termed 'hostile alienation'.⁵¹ This did not excuse the behaviour, but it did partially explain the possibility of domestic violence during the transitional phase. Legal practitioners observed an increase in domestic violence which they linked to women's public and domestic struggle for equality in marriage and dissolution:

. . . males still have that psyche that they are the dominant partners in the marriage. And women are still trying to assert their rights - not their dominance - their equality. And that is the thing which is leading to the domestic violence. (Legal Practitioner H)

Pershouse reported, that for men, separation frequently triggered 'hostile alienation' and 'traditional ways of coping, such as drinking hard and working hard, did not work anymore'. Male suicide and domestic violence were indicators 'that men did not have the well developed support networks that women accessed following separation'. He identified a need for 'effective counselling' for men during the transition, which would need to include 'in depth self audits, discussion about relationships with children, and future referral for an analysis of what these men expected from personal relationships'.⁵² The intervention for such counselling, (which was more than an anger management programme could offer) would take time and training of specialist facilitators. Such a programme would also help men who had not previously been the primary parent, acquire the parenting skills needed following separation.

PARENTING THE PROCESS.

I didn't know what to do with the kids - against a background at a time when everything is blown to pieces and parenting capabilities are diminished. Everybody's under stress. Children just get thrown around. The kids get caught in the crossfire⁵³

According to the relevant literature, effective parenting during the decision making process was a struggle for both custodial and non custodial parents. Organising practical arrangements for the children, coping with changes to financial status, seeking employment, and in addition coping with the fears of negative judgment, left children with less than optimum parental support.

⁵⁰ Fathering Forum Manukau Institute of Technology, (Auckland, 26 .9.98).

⁵¹ Alienation describes the estrangement of individuals from themselves and others. 'Hostile alienation' implies anger and or violence during times of personal or social estrangement.

⁵² O. Pershouse, *Fathers ,Families and the Future* , Fathering Forum.

⁵³ Smith, A. et al, p.55.

Hassall and Maxwell⁵⁴ suggested that disputes were motivated by mistrust, fear of loss or unresolved personal issues in the spousal relationship. If social and economic pressures were added to Hassall and Maxwell's psychological model then it could be expected that dispute in the court would further detract from the ability to parent effectively. Research conducted by Hetherington et al⁵⁵ suggested that some custodial parents tended to be preoccupied, non supportive, to use punitive discipline inconsistently, and their ability to control children's behaviour declined. For children this could mean that the parent they were residing with was not focussed on their social, economic, emotional or physical needs. Women participants in this study confirmed that it was difficult to continue to parent well during the transition from nuclear family to a family-apart:

If I continued to parent in the way the child had grown accustomed to, in the way both of his parents had agreed he was going to be reared, then I had no income- I couldn't earn anything- without making major changes. (Sharon)

Non custodial parents were also reported as likely to experience parenting difficulties. Wallerstein and Kelly⁵⁶ claimed that non custodial parents were more likely to withdraw emotionally and practically if contact time did not work out and they lost their rights to decision making about the child's welfare. This had serious consequences for children during the transition. If neither the custodial nor the non-custodial parent was focussed on the needs of the child, then that child was vulnerable to a sense of abandonment by both parents, left to fend for themselves, sometimes taking on adult responsibilities for other siblings:

The eldest daughter, my only daughter has born the brunt of taking responsibilities. When she does visit her father she is like a parent rather than a child. She takes responsibility for the home and her brothers. She is twelve. (Elizabeth)

Some non-custodial parents choose to withdraw from children's lives. Emery and Forehand⁵⁷ reflected on North American research where there was a clear pattern across six different representative studies which analysed non custodial contact. The most optimistic estimate of children's contact with non residential parents was that 'one third of children see their fathers twice a

⁵⁴ I. Hassall and G. Maxwell, *A Children's Rights Approach to Custody and Access: Time for a Radical Re think*, (Wellington, 1992).

⁵⁵ Hetherington, E.M. Law, T.C. and O'Connor, T.G. (1993) *Divorce ; Challenges, Changes and New Chances*. In F Walsh (ed) , *Normal Family Processes* (2nd ed) , New York, pp.208- 234.

⁵⁶ Wallerstein, J.S. and Kelly, J.B. (1980 a), *The effects of divorce on visiting father child relationship* , American Journal of Psychiatry, vol 137, p. 1534.

⁵⁷ R Emery and R Forehand, 'Parental Divorce and Children's well-being : A focus on Resilience,' in R. Haggerty, L Sherrod, N Garnezy, M Rutter, *Stress Risk and Resilience in Children and Adolescents: Processes, Mechanisms, and Interventions*, (U.K. 1996), p.69.

year or less and only one quarter of fathers see their children weekly or more'. Contact between fathers and their children declined substantially as time passed following separation and non residential fathers had less contact with their children than non residential mothers. The findings were linked to low socio economic status and the distance between residences.⁵⁸ Two of the women participants in this research suggested that this was true in their circumstances. The children's fathers had moved to another city which involved expensive travel if the children were to visit them. Contact was infrequent. Parents could not afford to send children by air.

ECONOMIC RESOURCES..

I thought to myself in 1988 when the Royal Commission on Social Policy was looking at the Matrimonial Property Act 1976, that the best way would be to make two significant amendments to the Act. One was to allow for the changed income earning capacity that results from marriage. The other was to allow for the economic impact of future child raising responsibilities on one partner as against the other, and to build that into the property settlement that was made on the breakdown of marriage. It seemed to me that in a situation where one spouse had improved their earning capacity considerably during the marriage, partly as a result of the efforts of the other spouse and the non-earning spouse was left with the child raising responsibilities, what you could virtually do was, (taking both factors into account) unequal sharing. If necessary the wife gets the lot.(Judge D)

The Judge may have been reflecting on the fact that the Matrimonial Property Act did not take into account future needs for children to have adequate time and care from a primary parent. While the interests of the children were mentioned in the long title and s 28 in respect of the family home in practise, there has been little evidence that childrens interests have been considered. While the idea of a partnership of equals and shared responsibility permeates all legislation governing dissolution, this is not evident in the way resources are divided. Children are not considered to be individuals with their own possessions:

When they assessed the value of the matrimonial property they accepted my husband's valuation which included all that I owned and possessed but also included my child's toy's. Everything that belonged to my child was lumped with me. My child was not seen as separate. My child apparently had \$10,000 worth of toys that was lumped with me - I owed my husband \$5,000 for our child's possessions. That is what he went for and no one disagreed. (Sharon)

⁵⁸ R Emery and R Forehand, p.69.

Women noticed that children became nervous and possessive about their belongings, especially when the parents were dividing their assets. Fights between siblings increased over possessions, conflict was heightened. Women commented on the quantity of possessions children wished to accompany them as they moved between households. They reported their children's reaction when one parent insisted that the child leave particular possessions funded from one household at that home. The children felt as if they did not really own their own possessions.

The impact of change to children's perception of their social class was reported as a significant determiner of their social and emotional happiness, reflected in school friendships. Children's judgments about social status were based on minor indicators from an adult perspective, nevertheless of importance to children. Judges commented on the children's access to their parents resources:

We have been very unimaginative. The Matrimonial Property Act itself enables you to make provision. I've quite often said to the parties, you guys are fighting about this, but in actual fact there's a problem over here with the children. Have you guys thought of setting up a trust for the children, assets invested for their benefit and that sort of thing. And sometimes cases then settle. I mean I've had cases where I've leant on people with, you know the children having been taken care of through to 25 years, I quite often go through to 25 years these days. The assets then go back into a common pool to him and her. You have got to experiment with that sort of thing and that is where judicial settlement conferences can be a very good vehicle if it is used, because you can get around the table with people. (Judge A)

The women in this study highlighted pressures for children to own particular items of clothing, toys and sports equipment which were less likely to be affordable following separation. A lack of economic resources was consistently implicated as an important factor which determined the outcomes for children when families parted. As a recognised indicator of well-being for all sectors of society, economic factors therefore, cumulatively add to other social and emotional factors that determined social, outcomes for children when the adults in their family parted.

The Matrimonial Property Act 1976 was amended by section 28A in 1983. This directed the court to have 'particular regard to the need to provide a home for any minor dependent children of the marriage'. While parliament intended to recognise the need for children to retain links with their community of identity, and to be suitably housed, the equal division and

clean break principles of the Matrimonial Property Act 1976 and the Family Proceedings Act 1980 have since overridden any extensive application of the new section and deemed less important in depth consideration of the children's need to remain in the matrimonial home. The lack of attention to this section has demonstrated that parents may be more likely to act in their own interests to secure half of the matrimonial property and economic independence.

The courts response has clearly indicated that this section did not guarantee any long term residency for the children in the family home. 'Even an order granting occupation of the family home, available when the children are unable to be re-housed, [wa]s usually only granted for three years'.⁵⁹ The Act is primarily focussed on adult property priorities, children are not paramount, and the interests of the children are not presumed to include future needs. The downward economic mobility of women from the long term marriages in this study was shared with children in all but one case where the mother had re-partnered. Women noted that they worried about their children's reaction to this change in status more than their own. That was due to the social ramifications for children. The children of three women interviewed, had to change schools because the cost of housing in the area they had resided before separation, was out of financial reach at dissolution.

Decisions regarding the retention of the matrimonial home for children under s(28)A reflected the trend of the softer test for the balance of matrimonial property in households of greater economic wealth than simply the home and chattels. This was evident in the case of *Wheeler v Wheeler* where the judge noted that a reduction in the standard of living for children was acceptable:

*If it is said that the children's standard of living would necessarily be reduced by their being obliged to live in a more modest home, by a possible need to change schools, and their mother being obliged to work. None of these factors is unique in society, and the family's coat has to be cut according to the available cloth.*⁶⁰

Whether this outcome was in the best interests of the children was not at issue. The judge did not consider the children needed a full time care giver. If the mother was unable to secure employment, or if daycare costs had been greater than earning capacity, the implications of a lack of future income was not included in the analysis. The equality model and the clean break split

⁵⁹ C. Bridge, *Family Law Policy In New Zealand*, Oxford 1992, p. 236.

⁶⁰ *Wheeler v Wheeler* (1984) 3 NZLR 317-319.

clearly overrode the interests of the children. It is apparent that the policy objectives of the Matrimonial Property Act 1976 do not reflect the interests of the children mentioned in the long title. The legislation that affords consideration of the day to day financial support for children is enshrined in the Child Support Act 1991.

CHILD SUPPORT

No discussion of the interests of children at dissolution is complete without brief discussion of child support. Five of the women in this study applied for child support. For one mother (Marie) the issues were contested over a ten year period. Entitlement was constantly reviewed and on two occasions when her children went to stay with their father for the holidays, child support obligations reversed. One Christmas holiday Marie reported that she had her complete teaching holiday entitlement stripped from her bank account by the Inland Revenue Department. This happened without any warning. Her adolescent daughter had decided to stay with her father. Her ex-husband claimed child support immediately without consultation. She was left with 14c until her next pay day - five weeks later. This occurred in spite of her having put their three children through private schools and one child through university. To accomplish this she had held down two jobs for ten years. During the period that the young woman stayed with her father, the mother paid child support and her private school fees. Marie had previously experienced difficulty claiming child support from her husband especially before the 1992 Act was implemented. She felt that her husband was wealthy but hid his income and contributed the minimum amount. On the other hand, her money was easily accessed by the Inland Revenue Department because she was not self employed. As she was paid a regular salary through the state sector her funds were more easily located than those of her ex-husband.

Four women in this study, who were custodial parents, reported that they believed their ex-husband's paid the minimum contribution to the Child Support Agency but hid high earnings in limited liability loss making companies and family trusts.

The policies which govern child support are found in the Child Support Act 1992. The Act allows for a formula assessment of the minimum level of financial support payable by parents in respect of their children. The Act empowered the collection of monies from the parents by the Inland Revenue Department, and the payment through the Income Support Service. The Act was designed to, 'correct the unacceptably low levels of child support being paid under the previous system'.⁶¹ The payments were straight forward. They

⁶¹ Judge Trapski et al, *The Child Support Review*, (Wellington, 1994), p. 21.

were not usually subject to court battles because they were worked out according to an income related formula. At separation either party could apply to Inland Revenue Department's Child Support Agency to have the formula applied to the income of the non custodial parent. In equally shared custody the same could apply, the two incomes were compared. The lesser earner, may through that method receive some compensation for lower earning capacity.

In 1994, the Child Support Review found, that irrespective of the new legislation, the following problems were evident. Approximately 17,500 liable parents, (15.8% of the total), had not paid any of their child support; 63,000 liable parents (58% of the total), were only paying the minimum \$10.00 per week during 1993/1994. A total of 80,000 liable parents were in arrears with payments assessed. The Review Group concluded that the Act created anomalies and injustices and recommended the Act and its operation be changed. The focus of the Act has been to recover the arrears of non payment and ease the fiscal burden on the state. The review pointed out that the arrears were increasing at the rate of \$3 million per month and that at 1994 arrears in total from non payment amounted to \$70 million.⁶²

Currently under Under the formula assessment it is possible for someone who is asset rich to identify as income poor to get away with paying the \$29.00 a week minimum. The income assessment ceiling, or capped rate, means that children with a parent who has high earnings may not be allocated a share of the extra resources of that parent. Four women in this study confirmed that this had been their children's experience.

In 1999 Government is aiming to make parents more accountable for child support. The 1997 figures indicate that there are over 180,000 custodial parents and 170,000 paying parents under the scheme. The Child Support Agency collects around \$184 million per year.⁶³ The amount of money owed by parents who are liable but have not paid was \$281 million in 1998. The Feminist Law bulletin reported that 'this was due partly to new assessments and penalties'.⁶⁴ There will be new penalties for parents who underestimate their income and liability will be assessed on the previous years income rather than the previous two years.

⁶² Judge Trapski et al, p. 21.

⁶³ Liddicoat, J. 'Child Support Amendment Bill (no 5)'. *Feminist Law Bulletin, New Zealand/Aotearoa*, Issue. 1. 1999. p.4.

⁶⁴ Liddicoat, J. P. 4.

In the light of such figures it was important to explore reasons behind non payment. Mossman's Canadian critique of this type of functional analysis of child support and subsequent social construction of non paying fathers as 'dead beat dads', highlighted the eagerness with which agencies of governance could oversimplify the issues. She noted that generalisations were frequently based on evidence of a few reported cases of wealthy males obstructing children's access to economic resources following dissolution. She claimed that 'many men wanted to contribute more' for their children's care but simply 'could not'. She identified economic forces such as the 'downsizing of work places, wage freezes, unemployment and privatised child support as responsible for the inability for some fathers to meet child support payments'.⁶⁵ State dependency for men, women and children and relationship breakdown are both influenced by a plethora of factors that may also be linked to New Zealand economic policies which have deregulated the employment market and implemented harsh competitive micro economic systems.

The focus on the support of children under the Child Support Act 1991 was one of financial support, state assessment, calculation and collection. The responsibilities of the parents were not outlined in non monetary terms. At separation and divorce, parents spousal relationships were no longer tenable. Parents ability to co-operate and communicate was also likely to be affected. Yet there was no guidance for this process under the functional legislation. Monetary values were paramount over values which enhanced children's emotional and social security. The legislative focus on the issues of financial support for children, while critical, failed to recognise the needs of children to maintain identity with both parents. Even when non-custodial parents continued to parent in a financial sense, this could still be considered a 'loss' or 'cost' for the child.

Custodial and non custodial parents debated the rights to parenting, but under the current regime, there seemed to be little interface between the child 'guardianship' and 'support' legislation in dealing with the non financial needs of children. These may include links to family identity, biological ties, emotional security, health and educational support. In child custody and support, adult finances are examined and children's circumstances are reported by adults. Adults have a stake in the consequences. The privacy afforded to adults can mask the consequences for children. All too frequently, women resource child support, men claim balance property and children lose a sense of ownership over their smallest

⁶⁵ M.J. Mossman, *Child Support Or Support For Children? Re-Thinking "Public" And "Private" In Family Law*, (New Brunswick, 1996), pp. 2-7.

possessions. This is encouraged by the policy framework and the courts direction to separate families by adult rights as opposed to the consideration of children's rights and interests. Children had observed that they still had a family, if a family-apart.

CONCLUSION

The issues identified in this chapter suggest that there is a complex relationship between child custody, access, support rules, and property division for adults, which have implications for children. An holistic integrated approach to legal decisions about such issues is therefore crucial to the economic social and emotional outcomes for the children of the family-apart.

Family law policy does not always consider the future needs of the children of the marriage, apart from maintenance for basic needs. The child support system can protect high earners from an obligation to share wealth with children. In theory, the Guardianship Act 1968 focusses on the interests of children but in practice the guidelines can be employed to service adult demands. The Matrimonial Property Act 1976 holds the property of adults paramount. The Guardianship Act claims the children are paramount. Reconciliation of both legislative directives requires a process which deals with all of the issues in one forum. Innocent children should not be the modern day 'shuttlecock' of their father's and mother's parental battles, during private negotiation or arbitration in the courts.

Currently economic values overshadow the values of security and stability for children. Legislation which guides dissolution is silent in respect of in depth accessible parental education, and counselling or social and emotional support for children. Both of these policy gaps, in practice, compound some families incapacity to resolve or conciliate dissolution problems without conflict.

The central legal principle when determining contact and living arrangements for families apart is the paramount 'welfare of the child'. For judges, 'almost anything about a child's life may be relevant to a child's welfare - emotional well-being, financial security, the quality of caregiving, the hopes and dreams of the future'.⁶⁶ There is a lack of clear legal direction to evaluate the children's needs in private agreements. Private practitioners are not required in law to seek expert assessment of the children's welfare, yet early resolution of custody and access cases is important for the well-

⁶⁶ Austin, G. *Children The Stories the Law Tells*, Victoria University Press, 1994, Wellington, p.12.

being and security of the children. Lawyers are simply required to ascertain that 'satisfactory arrangements' have been made for the children before dissolution can be granted.⁶⁷ This arrangement does not give specific guidance towards the protection of resources for children. Lawyers simply prepare an agreement stating the arrangements for the children. These vary from general statements of intended arrangements to detailed instructions and behaviour boundaries regarding access times and the organisation of the children's possessions. A lack of detailed evaluation of the specific arrangements for children can only risk negative consequences for the many children whose parents battle in the privacy of their lawyers offices, and their children's homes. Children's invisibility in the policy process is predictable as policy actors are adults. The next chapter will identify the actors, their policy actions and silences in the context of the proposed amendments to the Matrimonial Property Act 1976, currently before the House of Representatives.

⁶⁷ Family Proceedings Act 1980, Part 5 s45.

CHAPTER EIGHT

POLICY ACTORS : CURRENT DEBATES

Policies are results, no single group or individual achieves exactly what they set out to get contests and negotiations which take place serve to define what will emerge Power is exercised every time a group is dependent upon someone else for carrying out a task or role.¹

INTRODUCTION

Policy actors are usually described as the main players in the decision making process. Often politicians and bureaucrats who have influence and authority over legislative agendas are identified as the key policy actors. But Considine reminds us that the policy making process is a group activity. In part one of this chapter I examine the role of key actors inside and outside of the legislature. I will identify and explore values encompassed by the era of economic reform from 1984-1999 as expressed by key actors.

As I prepare to write the final chapter of this thesis, it is twenty three years since the passage of the Matrimonial Property Act 1976. Currently in 1999 the legislature is proceeding with amendments to the Act. The proposed amendments focus on omissions from the original Act, such as provision for the re-allocation of property on the death of one spouse and the inclusion of de facto relationships.² The proposals do not review the principle of the clean break split or the classification of property which governs implementation of the legislation. The policy which emerges from these amendments might not re-direct the courts to make judgments which reflect equality of outcome for non-earning spouses from long term marriages. The policy process from which these amendments emerged is the focus of the second section of this chapter.

In the final section of the chapter, I suggest that judges might be the key policy actors who make new policy in the immediate future. They may be poised to recognise substantive equality. I suggest that the application of international human rights standards in domestic litigation could pave the policy path toward substantive equality on dissolution of marriage.

¹ M. Considine, *Public Policy: A Critical Approach*, 1994, p.107.

² There is a need for an extensive analysis of the proposed Government regulation of the division of property for de facto couples. However de facto property legislation will not be discussed here as it is not within the boundaries of this thesis. The proposed amendments which cover testimony and taonga will also be omitted as the issues did not emerge for the participants during this study.

POLITICAL ECONOMY:ECHOES FROM THE PAST

There has been significant change in political and economic structures during the time frame discussed in this thesis. Industrialisation, colonisation, urbanisation, war, changes in government, contraception, education, employment, the law and economic forces, are just a few of the factors which have influenced the nature of family life.

In 1976 the Matrimonial Property Act was enacted to provide for equality and certainty of property division at dissolution of marriage. The legislation was passed in a social, economic and political era where a traditional family may have had one major income earner and one spouse caring for the family. At dissolution the house and chattels and car would have been sold, the proceeds divided and each adult would go their own way. If there was a lack of financial resource for the non-earning partner of the marriage, the state would have provided maintenance through social welfare benefits. Cheap rental housing and loans were available, health and education needs were provided free. The ongoing costs incurred by the family-apart were provided by state provision through legislation that no longer exists. Commenting on the era in which the 1976 Act was passed one judge saw it in this way:

The 1976 Act reflected the hopes of the era, that women were achieving equality at last. And that the old shackles of having to stay at home and care for the children, were being cast off. That women would be equal, now. The reality of the fact that there would never be substantive equality simply by giving them an equal share of the assets hadn't sunk in. (Judge I).

Since 1984 neo-liberal theory has been applied to the New Zealand economy, originally by the Labour Government from 1984-1990, continued by subsequent National Governments. The basic tenets of such theory included liberalisation of the market place, free trade, minimalist governance, a deregulated employment market and a focus on the repayment of fiscal debt.

The Employment Contracts Act 1991 inhibited collective bargaining and encouraged competitive individual contracts. The 1991 budget brought substantial cuts to benefits. The education sector was subject to reform, school fees were often raised as boards of trustees grappled operational grants. The health sector underwent constant restructuring, universal subsidies for doctors and prescriptions were removed. Health costs to the family increased. The Housing Corporation as the provider of low cost state owned houses became Housing New Zealand, and was directed to charge market rentals from tenants. Business competitive efficiency and the reduction of fiscal debt was valued by Government above social well being.

Proponents of this neo-liberal economic theory looked to view economics as separate from social outcomes at the policy level. Governmental authority over the allocation of resources was centred on a functional approach, a cost benefit exercise. The cost to government was the prime consideration. Ideologues claimed that the family and community rather than the state should be accountable for the welfare of the individual. Shadows of the past were cast as charitable aid, food banks, and philanthropic organisations emerged.³ Churches and voluntary groups attempted to bridge the gap as social services were devolved from the state to the community:

Churches and charities were expected to cover the governments withdrawal from social and income support. Unemployment and poverty had become structural features of New Zealand life ... the number of New Zealanders estimated to be living below the poverty line rose by at least 35% between 1989 and 1992; by 1993 one in six New Zealanders was considered to be living in poverty.⁴

Policy actors were hesitant about evaluating the social impact of new policies. Yet one parent families were at risk of living in poverty. During the ten year period (1986-1996) there was a minimal increase in the income of one parent families of 25% compared with other family types of 61%-65%. Between 1986 and 1996 the number of one parent families rose by 28%. Women were most likely to experience a lack of financial resources because sole parents, 83% of whom were women,⁵ were less likely to be employed than parents or partners in other family types.⁶ Half of the women parenting alone were doing so due to a change in their marital status. Fifty percent of single parent mothers were separated, divorced or married but living apart from their spouse.⁷

Whether political and economic re-adjustments had changed the expectations of adults in families is a matter for debate. Professional participants in this study had observed (in chapter five) that there were clearly marriages which illustrated both traditional and contemporary

³An example would be the growth of voluntary organisations such as 'The Friends of the North Shore Womens Refuge' (est. 1993) . This group has conducted community fund raisers such as Art Auctions and Celebrity talk fests to raise money to cover the operational costs of the local Women's Refuge. The members of the organisation are predominantly, propertied, married women with children, conscious of the need to protect women from violent relationships. The unpaid work conducted by these women is reminiscent of the philanthropic actors who participated in the first wave of feminism.

⁴J.Kelsey, *The New Zealand Experiment: A World Model For Structural Adjustment?* (Auckland, 1996), p.5.

⁵Statistics New Zealand , *New Zealand Now:Families and Households*, (Wellington, 1998),p.81.

⁶Statistics New Zealand ,p.81.

⁷Statistics New Zealand ,p.43.

notions of work roles in marriage. While there had been a rise in women's participation in the labour force from 41.7% in 1986 to 45.7% in 1996,⁸ the occupations in which most women were employed were those where lower median incomes were recorded.⁹ Therefore women's income had continued to be lower than men's. At the 1996 census, the median annual income received by women was \$12,600. This was equivalent to 57.2 % of that received by their male counterparts in the same period, of \$22,100 per annum.¹⁰

Education was a factor which contributed to salary differences. When participation in the labour force was broken down into occupations it was apparent that equal participation was related to levels of education. There were only 5% fewer women than men participating in occupations which involved tertiary education such as technical and associated professions.¹¹ Political opponents of the neo-liberal paradigm responded to this possibility thus:

Absolutely, because the new right revolution brought us a new class structure in this country. And there are always a group of well positioned women who can take advantage of this. Although a surprising number of them don't have children . (Key Informant No1)

Women with children were less likely to be in paid employment when their children were young. Those women with children under one year had a participation rate of 36.5% compared with 78% for women whose youngest dependent child was aged between 13 and 17 years.¹² It was possible that women were more likely to achieve equal employment status with men if they had a tertiary education and the responsibilities of parenthood did not intrude on paid work. Key Informant No.1. who was a policy actor, an academic and had experienced dissolution of marriage, linked neo-liberal economic ideas with changing values about parenthood:

In the whole ideology of competitive individualism and the market children are seen as a burden if you like, and you might as well buy the services of the market, you buy the services a woman may provide so we have a problem tying men to child support. I think women are quite anxious about it, because to most women it is not possible to raise children without support ... the world is increasingly divided between the high and low salary groups and you are either in one or the other - there is more expectation for women to earn and contribute and for men not to support women.

⁸ The labour force includes all those who are either employed or unemployed. Statistics New Zealand, *New Zealand Now, Women*, 1998,p.83.

⁹ Statistics New Zealand, *Women*, 1998,p.119.

¹⁰ Statistics New Zealand, *Women*, 1998,p.108.

¹¹ Statistics New Zealand, *Women*, 1998,p.96.

¹² Statistics New Zealand, *Women*, 1998,p.90.

Although there were more women participating in the professional and technical areas of the workplace that did not guarantee their salary alone would provide for a family. The gender wage gap had implications for child and spousal support on dissolution of marriage. While the average income for women with an arts degree was \$23,000 compared with the average income for a man with an arts degree of \$60,000,¹³ the assumption that earnings were not equal would be an over simplification. Differential labour force participation points to this gender pay gap as due to the number of women in part time work. This indicator of time use is an important consideration when making decisions about the apportioning of capital and income at dissolution. A Woman's part time salary is less likely, than a man's full time salary, to afford full support of a family.

While changes in the level of female participation in the workforce should be celebrated, it is possible that women in part time employment and non-earning women from long-term marriages, are disadvantaged at dissolution. Structural inequality during the period of economic reform compounds such disadvantage and this may imply that women who married in the 1960's and 1970's, from traditional marriages, may be particularly disadvantaged when marriage ends.

In the absence of representative time use surveys in New Zealand, Australian research has shown that women did the overwhelming majority of the unpaid work of the home and that this was not affected by their participation in paid work outside of the home. Movement into the public sphere had resulted in a double shift.¹⁴ Some marriages continued to reflect unequal gender expectations. Kelsey claimed that neo-liberal economics encouraged traditional family structures:

*State support was systematically withdrawn from those who digressed from the 'norm' in an attempt to force human relations back into economic mode. That usually meant economic independence for men in the market and economic dependence for women within the home.*¹⁵

The National Government benefit cuts in 1991 illustrated the way in which neo-liberal policy actors valued women's unpaid work. The idea that beneficiaries should make more efficient use of their own unpaid domestic work was promoted as a mechanism for their adjustment to a reduction in income. This was expressed in a paper from Infometrics Business services in

¹³ Statistics New Zealand, *Women*, p. 135.

¹⁴ M. Bittman, *Juggling Time: How Families use Their Time*, OSW, Department of the Prime Minister and Cabinet, (Canberra, 1991).

¹⁵ A. Gibb in J. Kelsey, p. 333.

April 1991. Morgan suggested that the earning population would 'participate in the market' and the beneficiary sector would be 'dependent on home production'.¹⁶ These were to be the different economic expectations of the monied compared with those who were dependent on the state. Kelsey claimed this was 'co-option of the feminist argument for economically valuing women's unpaid labour in the home',¹⁷ and exposed the resultant gender inequity of the neo-liberal doctrine.

Hyman's analysis of the benefit cuts claimed that 'economic rationalism' returned earners of 'second lower incomes (usually women) to the home because they would be more productive there'. Hyman explained that this would mean those on low benefits 'w[ould], c[ould], and should have to manage on less by substituting cheaper goods and their labour for purchases, with women reverting to elbow grease, bottling and making the family clothes'.¹⁸ If women parenting alone spent their time producing goods for the household how were they to gather the skills needed for gainful employment? For women parenting alone, child support may have paid for primary goods such as textiles for clothing and unprocessed food but nowhere in the market equation was there an equivalent payment for the labour required to process those goods. The Domestic Purposes Benefit barely covered accommodation,¹⁹ telephone and transport.²⁰ The expected social and economic outcomes of the market economy were to reflect structural inequality.

Fleming's recent study of the organisation of household income found that nearly all Pakeha families (who participated in her study), considered the 'man the main income earner and the woman's income supplemented his earnings'.²¹ In spite of women's increased participation in the workforce, restructuring of the economy had created a major increase in the number of part time jobs available. Women accounted for 70.5% of all part time workers in 1996:²²

Casualisation of labour with the consequential loss of traditional benefits like holiday pay in New Zealand, is a significant factor that is one of the outcomes which is adverse to women of economic

¹⁶ G. Morgan in J Kelsey, p.334.

¹⁷ J Kelsey, p.334.

¹⁸ P. Hyman, 'Women and Economics', (Wellington, 1994) p.71.

¹⁹ One parent families with dependent children were more than twice as likely as two parent families with dependent children to be living in a rented dwelling in 1996. Statistics New Zealand, *Families and Households*, p.51

²⁰ At the 1996 Census one parent families were those most likely to lack access to a telephone, and 1 in 5 one parent families did not have access to a motor vehicle. Statistics New Zealand, *Families and Households*, p.81.

²¹ R. Fleming, *The Common Purse, Income Sharing in New Zealand Families*, 1997, pp.100-116.

²² Statistics New Zealand, *Women*, p. 89.

restructuring. Women are disproportionately represented in the informal sector. (Judge I)

Women's dominance in part time positions meant 'casual jobs with comparatively low rates of pay, minimum employment conditions and little employment security for women'.²³ At the 1996 census over half of all employed women worked in two occupations. They were either clerks (24%) or service and sales workers (20.8%).²⁴ Fleming found that household money in Pakeha families was considered 'money earned by the man ... the general pattern was that the man earned the higher income and was expected to do so'.²⁵ It was possible that the traditional family structure of male breadwinner female homemaker may have continued to disadvantage women at dissolution, even when women were located in part time work.

If non-earning spouses moved from financial dependency on an earning partner to state dependency, structural employment inequalities were compounded by the division of labour during the marriage. The participants in this research had been born in an era of expectation that the male would be the breadwinner and the female the home maker. Five women participants in this study had noted that they were logistically unable to secure full time work during their marriage. They reported that this was due to family and household responsibilities. Their husband's employment was often time consuming and they felt that they had sole responsibility for the children before the marriage ended. Role expectations had restricted the time they had available to participate in employment. The participants had lived through the passage of the radical Matrimonial Property legislation in 1976, however they found that at dissolution, equal division of property did not account for employment disadvantage.

Significant economic and political changes have not been accounted for in current dissolution policy. Unequal economic outcomes for women have been highlighted by academics, researchers and policy actors for more than ten years. The lobby group Divorce Equity has been active since 1993 when it was apparent that many women who suffered unequal outcomes were in need of support. The proposed amendments to the Matrimonial Property Act 1976 are claimed by government politicians to address disparity. The policy process however has been hampered by inadequate consultation with the public and a lack of will on the part of ministers to address the principles which guide the legislation. The following section will examine the values expressed by key policy actors during the period of reform, while the

²³ Statistics New Zealand, *Women*, p. 89.

²⁴ Statistics New Zealand, *Women*, p.97.

²⁵ Fleming, p.116.

amendments were in the legislative policy process.

VALUES

In the late eighties Porter had noted that 'New Zealand's only constraint on achieving its potential would be the peoples inability to ... culturally adapt, change and thus compete successfully in the global economy'.²⁶ A change in values was ideologically important to 'neutralise potential sources of criticism'.²⁷ At the media level there was an element of moral judgment in speeches and popular debate which called for a return to traditional gendered expectations in family relationships. People parenting alone were sometimes targeted as a fiscal burden on the state by advocates of the competitive market economy.

This was evident in the rhetoric of what came to be known as New Right ideology. Proponents of the ideas lobbied the public and government advocating the value of minimal state involvement in the competitive market place. The Business Round Table and its representatives, an organised group of wealthy businessmen, funded research, launched policy papers and actively lobbied Government. Policy making was a game played by elite actors with ample resources. Their message was one of individual and fiscal responsibility. It was fiscally responsible to repay debt and sell assets. For some policy actors, fiscal responsibility and moral judgment went hand in hand. In 1994, the 'Year of the Family', Gibb a representative of the Round Table, theorised about the reason for dissolution of marriage. Advocating for a reduction in governmental expenditure he said:

*A practice that for thousands of years societies have said was fundamentally important to make sure that men did their cultural duty and took responsibility for a woman and her children, we largely threw that out. We decided we wouldn't bother with men, we would get the state to do it for us. I don't blame the DPB for the breakdown of marriage because it only came halfway through the period of change I think the pill was a most important [influence] because it relaxed the pressures that mothers put on their daughters to hold this cultural norm together. Normally families react to stress by pulling together, not falling apart. Human beings and their institutions are far too strong to fall apart from a bit of economic and social pressure.*²⁸

According to Gibb women were responsible for upholding 'cultural norms'. Families were not likely to part under the pressure of economic problems. Yet the the number of people parenting alone was increasing and they were

²⁶ J. Kelsey, p. 327.

²⁷ J. Kelsey, p. 327.

²⁸ A. Gibb, 'The Impact of the Changing Economy On Families', 1994, in J. Kelsey, *The New Zealand Experiment: A World Model For Structural Adjustment?* Auckland University Press, Bridget Williams Books, 1996, p.333.

criticised. Perceptions of negative outcomes for children from dissolved marriages were found in policy papers from Treasury:

*The increasing incidence of marriage breakdown and the increasing proportion of families headed by a sole parent mean that many children are growing up in a family environment very different from the traditional structure and our schools police and social agencies are facing large numbers of children suffering significant stress from their home environment.*²⁹

Intellectual conformity inside as well as outside of the formal administration had provided a network of protection from ideological challenge:

After fourteen years of the New Right, the administrators have an entrenched position. They have been carefully moved into positions and that interface between the private and the public sector has been set up. The longer the New Right have been here the harder it will be to remove them. (Key informant No1)

This phase of policy making reflected commercial and business values. One judge who participated in this study believed that such values would once again change over time:

We are in a fairly conservative phase which is concentrating far more on economic revolution than it is on social policy evolution ... but those two will come back together again if you look at history. (Judge I)

Change would be reflected in the decisions that emerged from the legislature and the courts. During the period 1995-1999 policy changes in matrimonial property and spousal maintenance were highlighted for review by the government. The policy perspective that emerged would be dependent on not only the values of the policy actors, but also on the policy and decision making process which government politicians followed.

When asked who drove policy, key informants and legal professionals in this study claimed the power of the Parliamentary Executive should never be underestimated. They claimed that most policy change or policy resistance was controlled by Cabinet. The following section will focus on the policy making process in the context of proposals to amend the Matrimonial Property Act 1976.

POLICY INSTITUTIONS

The policy actors responsible for the proposed amendments to the Matrimonial Property Act 1976 (Matrimonial Property Amendment Bill 1998) were Government Ministers. The Minister of Justice Sir Douglas Graham was responsible with Hon Jenny Shipley as the Minister of Women's Affairs.

²⁹ Treasury Briefing papers (1987), in Kelsey, p.332.

Policy advice was fed to the Ministry of Justice, the Ministry of Women's Affairs and Cabinet. This advice focussed on unequal outcomes from the implementation of the existing legislation.

The primary source of policy advice emanated from the Working Group on Matrimonial Property and Family Protection in 1988. That was one of several working groups set up to advance the Government's social policy reform programme. The composition of the group was approved by the Cabinet Social Equity Committee on 8 March 1988. The group included legal professionals and advisors, Law Commissioners Margaret Wilson and Sian Elias, legal academic Bill Aitkin and other advisors along with legal practitioners. They also consulted with two members of the Royal Commission on Social Policy.³⁰ Sixty submissions were made to the Working Group, these included a number from women's groups.³¹ The advice provided for Ministers reflected the ideas from both the Report of the Working Group on Matrimonial Property 1988 and the Royal Commission on Social Policy which also reported in 1988.

In 1988 the Royal Commission on Social Policy had stated that equal division of matrimonial property was unlikely to produce true gender equality at dissolution.³² The Commission had recommended a re-allocation of property to achieve equal consequences. The Working Group on Matrimonial Property reported that while equal division did not secure equal outcomes, housing policy at that time would help to alleviate the effects of the perceived inequity. The Working Group suggested a simplification of the principles of division to guard against unequal division of the balance of Matrimonial Property.³³ New Zealand legal practitioners reported that economic consequences favoured the income producer, when the value of the matrimonial property exceeded average amounts.³⁴

Both the Working Group and the Royal Commission on Social Policy quoted research from other jurisdictions. Research from Australia, Canada and the United States of America had claimed that the consequences for women and children following dissolution were generally harsher than those for men. Economic disadvantage suffered by women parenting alone was well

³⁰ W. Parker, *New Lamps For Old? Proposals To Reform Family Property Law*, Butterworths Family Law Journal, 1997, P.190.

³¹ Key informant No4.

³² *The Royal Commission On Social Policy*, (Wellington, 1988), Vol 4, p. 218.

³³ *The Report Of The Working Group On Matrimonial Property and Family Protection*, (Wellington, 1988), p.25.

³⁴ M Krauskopf and C Krauskopf, *Comparable Sharing in Practice: A pilot Study of Results Under The Matrimonial Property Act 1976*, 1988, p.21.

documented.³⁵ Empirical research in other jurisdictions confirmed that women experienced a disproportionate drop in their standard of living at dissolution. In Canada, Gunderson³⁶ et al noted cumulative factors contributing to the feminisation of poverty due to structural economic barriers, and Payne³⁷ linked the financial burdens of dissolution to women's poverty. Weitzman's work was considered the most notable study to provide empirical evidence of women's disadvantage compared with men at dissolution. She concluded:

*For most women and children, divorce means precipitous downward mobility -- both economically and socially. The reduction in income brings residential moves and inferior housing, drastically diminished or non-existent funds for recreation and leisure, and intense pressures due to inadequate time and money. Financial hardships in turn cause social dislocation and a loss of familiar networks for emotional support and social services, and intensify the psychological stress for women and children alike. On a societal level, divorce increases female and child poverty and creates an ever widening gap between the economic well being of divorced men, on one hand, and their children and former wives on the other.*³⁸

Stewart and McFadden³⁹ had confirmed Weitzman's findings in a similar longitudinal study in Manitoba.⁴⁰

In Australia, McDonald, Funder, Weston and Harrison conducted longitudinal studies with the Australian Institute of Family Studies to investigate property and income distribution on divorce. In their earliest findings in 1985 they confirmed women's economic disadvantage at dissolution. Their study 'conclusively confirmed that by far the most important reason for the low income earning potential for women after separation [wa]s the disruption to

³⁵ L Bryson, 'Women as Welfare Recipients: Women, poverty and the State', in *Women in Social Welfare and the State in Australia*, (Sydney, 1983), pp130-145.

R. Weston, 'Income Circumstances of Parents of Parents and Children: A Longitudinal View' in *Settling Down Pathways of Parents After Divorce*, Funder Weston Harrison, (eds), 1993.

A. Horsfield, *Women in the Economy: A Research Report on the Economic Position of Women in New Zealand*, Ministry of Women's Affairs. (ND)

S. Snively, 'The Government Budget and Social Policy', in *The Royal Commission on Social Policy*, 1988.

³⁶ M. Gunderson et al *Women and labour Market Poverty*, Ottawa: Canadian Advisory Council on the Status of Women. (ND)

³⁷ J Payne, *The Dichotomy Between Family Law and Family Crises on Marriage Breakdown*, 1989, 20 R.G.D.109 Canada.

³⁸ L Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences of Divorce*, (New York, 1985), p.323.

J. McLindon, *Separate but Unequal: The Economic Disaster of Divorce For Women and Children*, 1987, in *21 Family Law, L.Q.*, Canada.

³⁹ D. Stewart and L. Mc Fadden, *Women and Economic Consequences of Divorce in Manitoba: An Empirical Study*, 1992, 21 Manitoba Law Journal.80.

⁴⁰ R. Abella, *Economic Adjustment On Marriage Breakdown*, (1981), 4 Family Law Review, Canada.

their workforce participation resulting from child rearing. The low income earning potential of women [wa]s directly attributable to the division of functions within the marriage partnership'. They identified that following separation, the man's income standard increased while the woman's decreased. 'The husband in a mere six years could account for the total value of the property of the marriage through his superior income standard. The husband was better able to convert income into property, through his ability to obtain and service loans.' The study claimed income disparity to be important in the application of property law emphasising the need for urgent reform.⁴¹ When they conducted follow up interviews with men and women after five years they found that some women achieved economic self sufficiency through employment. However the risk of poverty remained for many women and improved circumstances were largely due to re-partnering. Men usually recovered economically and in many cases attained a higher standard of living following separation. They highlighted that the standard of living for children fell along with that of their mothers.⁴²

In New Zealand in 1993 the Boshier report⁴³ reviewed the operation of the New Zealand Family Court and recommended changes that would enable more timely and less costly dispute conciliation. Their recommendation for an exclusive conciliation branch of the Family Court had not been implemented at the time of conducting this study.⁴⁴

In 1994 the Ministry of Women's Affairs facilitated a consultation programme with women's groups to establish clear policy directives from the complaints they were receiving about property division. The ministry was lobbied by women to 'provide an impetus for reform'.⁴⁵ Advisors had noted that 'the issues were still the same but the policy and social context appeared to be changing'.⁴⁶ The groups consulted included the Maori Women's Welfare League, the National Council of Women, New Zealand Federated Farmers, New Zealand Federation of Business and Professional Women, and the Women's Division of Federated Farmers. The consultation took place at the Ministry of Women's Affairs in November 1994.

⁴¹ P. Mc Donald, *Settling Up: Property and Income Distribution on Divorce in Australia*, (Melbourne, 1985), pp.311-312.

⁴² K. Funder, M. Harrison, R. Weston, *Settling Down: Pathways of Parents After Divorce*, (Melbourne, 1993), p.137.

⁴³ Boshier et.al, *A Review of the Family Court*, (Auckland, 1993).

⁴⁴ Oral Communication, Family Court Chief Judge Mahoney, At the *Fathers Families and the Future Conference*, Sept, 1998.

⁴⁵ Key Informant No.4.

⁴⁶ Key Informant No.4.

The conclusions of the consultation were subsequently reported to the Cabinet Social Policy Committee (CSPC) and policy changes were agreed to by all of the officials and Members of the Cabinet sub-Committee. The memorandum SPC(95)M12/4.⁴⁷ outlined the recommendations. The committee had agreed the New Matrimonial Property Bill should contain statements of principle by which the courts would be guided to: recognise that equal division of property did not always take into account the differing responsibilities of the spouses during or after marriage and may therefore not result in equitable outcomes for spouses; recognise that the clean break principle could work against the interests of the custodial parent and may need to be modified where there were dependent children. The committee had also agreed that: the differing rules that apply to the division of matrimonial property and chattels and all other matrimonial property should be abolished and all matrimonial property be divided equally unless to do so would be repugnant to justice; that the courts should have greater powers though with limitations, to defer the implementation of the equal sharing of property where there were minor dependent children; that the courts should have specific discretion, in order to achieve an equitable outcome, to award for the provision of one spouse where there is likely to be a disparity in living standards between spouses due to income earning capacity.

The Members of Cabinet who were present and agreed to the above proposals were: Hon. Jenny Shipley, Rt Hon. Bill Birch, Hon Wyatt Creech, Hon Douglas Graham, Hon. Katherine O'Regan and Hon. Bill English. This agreement was made along with officials from the Department of the Prime Minister, and Cabinet, Treasury, and the State Services Commission.⁴⁸ The agreements were approved for departmental drafting. However none of these agreements above have survived the policy process. Lindblom had warned in chapter three that research and policy decisions should be considered separately and never be confused. Research was about knowledge and policy was about choice. The Cabinet process which eliminated the agreements made by the CSPC in 1995 was one choice to refer and defer decision making. Primarily 'the recommendations got stuck with the ministers in cabinet'.⁴⁹ The decision making process was not transparent.

⁴⁷ Released under the Official Information Act by the Secretary for Justice, 2nd April 1997.

⁴⁸ Minutes of a meeting of the Cabinet Social Policy Committee held on 12 September 1995 at 3.30pm. SPC(95)M12/4

⁴⁹ Key Informant 4.

CABINET

The long awaited reform to matrimonial property legislation was regularly placed on the cabinet agenda from 1995-1997. From referral to requests for more information and finally in consultation with coalition partners, the amendments limped through the Cabinet process. Initially the agreed recommendations were referred back to the Social Policy Cabinet Committee. During the Cabinet meeting on 18 September 1995,⁵⁰ The Minister of Justice requested further consultation between the Social Policy Committee, the Department of Social Welfare, the Prime Minister's department, the Department of Courts, Treasury, Caucus and members from all parties in the House. This was to consider the need for increased judicial discretion and particularly for discussion about disparity between ex-spouses in post separation living standards'.⁵¹

There were various stages in the policy process where there were stops and starts. One of them was when there was a Cabinet request to go and look at how the proposed changes would affect farmers and farm holders. There was a paper from officials that went through ten cases and outlined the percentage split of 20% : 80% and gave a summary of the issues and how it would affect farm holders. (Key Informant No4.)

The process was moving slowly. Consultation resulted in the deletion of the recommendation to pool balance property and matrimonial property and a refusal to increase judicial discretion. Farm property was once again at the centre of the dissolution policy making process. Here the interests and values of elite actors and their constituencies appeared to be central - the Prime Minister, the Minister of Women's Affairs and Hon Bill Birch all represented rural electorates.

In addition the Department of Justice was restructuring into three different Ministries and departments during 1994/1995 period. There were other priorities in terms of policy development. 'Family Law matters were not seen as a high priority in policy terms'.⁵² The Ministry of Women's Affairs and the Ministry of Justice were stymied by a lack of instruction to proceed from the Minister of Justice.⁵³

In February 1996 Cabinet responded to recommendations from the Ministry of Women's Affairs to address inequity and disparity of living standards following dissolution. At the CSPC meeting 21 February 1996, two papers one dealing with matrimonial property and the other containing a property

⁵⁰ CAB 9 [95] M 35/4Aii

⁵¹ W. Parker, *New Lamps For Old? Proposals To Reform Family Property Law*, Butterworths Family Law Journal, 1997 p.190.

⁵² Key Informant No. 4.

⁵³ W. Parker, P.190.

regime for de facto relationships were presented.⁵⁴ Cabinet had given the drafting of the Bills priority, and that meant they should have been introduced during the 1996 legislative year - election year. But reform of matrimonial property was not on the policy making agenda of the government of the day.

On the 26 February 1996 Cabinet once again deferred consideration of the two papers pending consultation with the Prime Minister and other Ministers and with Caucus.⁵⁵ On the 15th of March and the 18th of March the Ministry of Women's Affairs responded to requests for briefing papers and continued highlighting the issues identified by their consultation process, and the recommendations of the Working Party on Matrimonial Property 1988. A memorandum from a policy advisor of the Ministry of Women's Affairs to the Secretary of Justice on the 15 March stated: 'you asked for some information on why matrimonial property law reform is necessary for inclusion in the Ministers meeting on 19 March. In addition to information in the papers that have already been prepared our suggestions are as follows'.⁵⁶ Further information followed which provided a full summary of all of the issues previously prepared in depth along with an offer to meet if any further information that was required.

On March 17 the Minister of Justice produced a media statement which made it clear that he was against changing the Act. He told the Sunday Star Times that he believed the courts 'risked being rushed by gold diggers if the law was changed to allow one partner a greater share of matrimonial property'. He stated that, 'it would become lotto', he said, 'there was some sympathy around the Cabinet table for unemployed spouses of long term marriages but there was great difficulty in giving them a better deal by linking retrospective property settlements to future entitlements'.⁵⁷

It is apparent from the continued exchange of briefing papers and memorandums, that Cabinet continued to request information from the Ministry which the Ministry had repeatedly produced and submitted to Cabinet. The issues remained the same. It appears that the lack of Cabinet action was masked by repeated requests for information. Cabinet 'due to pressure of House business deferred for the time being further consideration of legislation relating to matrimonial property and de facto property

⁵⁴ SPC (96) M2/4 and SPC (96) M2/5.

⁵⁵ CAB (96) M6/14 and 15

⁵⁶ Policy advisor, Ministry of Women's Affairs to secretary of the Minister of Justice, by Facsimile, 15 March, 1996. Obtained under the Official Information Act 13.9.96.

⁵⁷ Sir Douglas Graham Minister of Justice, Sunday Star Times, 17. 3. 96. p.C2.

reform'.⁵⁸ Cabinet agreed to defer consideration of all matters of Family law reform to 6 May 1996 - election year. There was no subsequent action during that year. Divorce Equity utilised election year to seek promises that reform would be forthcoming from both parties. A petition seeking reform was launched on the steps of Parliament on the 22nd of August 1996. Deferment of decision making was perceived as a strategy to avoid controversy during election year.

Background papers continued to be prepared by the Ministry of Women's Affairs all the way through to 8 May 1997 when a consolidated and amended set of recommendations in respect of both matrimonial property and a property regime for de facto couples were submitted to Cabinet. But once again Cabinet deferred the proposals,⁵⁹ due to the cramped legislative agenda and the need for consultation with the new coalition partner - the New Zealand First Party.

It was not until after the Chief Executive of the Ministry of Women's Affairs provided yet a further briefing to the Minister of Women's Affairs on June 10 that on June 11 1997 Cabinet considered a further report of the Health and Social Policy Cabinet Committee. With Hon. Winston Peters in the chair, the report was subsequently approved on June 16 1997. The Minister of Justice announced that the bill would be introduced into the House before the end of 1997. However the drafting of the Bill was held up in the Parliamentary Counsel Office until 1998.

Two Bills were tabled in March 1998. Neither the Matrimonial Property Amendment Bill or the De facto Relationship Property Bill included the original policy directives researched and advised by the Ministry of Women's Affairs, previously agreed in 1995 by the Cabinet Social Policy Committee. The focus of the Matrimonial Property Bill 1998 was on property division in the event of the death of a spouse and the treatment of heirlooms and toanga. Some of those recommendations had been flagged by The Working Group on Matrimonial Property ten years earlier in 1988. The Bill provided greater powers for the retention of the family home where minor dependent children were involved, and better protection where matrimonial property had been disposed of to a trust or company.⁶⁰

Several legal professionals, judges, policy advisors and politicians commented that issues to do with family law were dealt with in a piecemeal manner by this government, but this was not a recent phenomena. Legal

⁵⁸ CAB (96) M16/13.

⁵⁹ CAB (96) M16/13 in *Matrimonial and de facto Property Law Reform*, The Ministry of Women's Affairs, 8 May, 1996. Poi15/2/3. Requested under the Official Information Act.

⁶⁰ Press Release from the Office of the Minister of Justice 24 March 1998.

professionals and some judges, in this study, observed that matrimonial property issues were likely to be avoided by government politicians especially in an election year. Key informants consistently mentioned that it was time to look at all family law policy instead of continuing with the current 'liberal approach to law where you fix the problem as it comes up, a minimalist approach to change, without looking at what the overall philosophical approach was'.⁶¹ Most participants in this study believed this approach was influenced by public relations and the securing of votes. Most participants commented, unprompted, that amendments to matrimonial property legislation were not popular in the electorate. The final tabling of the two Bills in the House met with cynicism:

I think the only reason this Bill is in the House is because Jenny Shipley is Prime Minister and she is screaming for something decent to do for women. That is the only reason the Bill is there. She needs to be seen doing something. If Jim Bolger was still Prime Minister that Bill would not be in, Doug Graham made promises, lots of promises in the past but never delivered. (Key Informant No4.)

SELECT COMMITTEE

The two Bills were referred to the Government Administration Select Committee which had only one woman member. The Committee received submissions up until 31 July 1998 and heard submissions during August 1998. The Report from the Select Committee is expected in June 1999. However it is election year and several key informants in this study were skeptical that the amendments would be enacted before the election. As key informant No 4. noted, the Bill would be subject to political negotiation. At the end of the day:

In the world of politics, no deal is a done deal until it is done. And so there's always a trade off. There's the situation where politicians say- if you want that there, what are you going to give me here,- I mean the politics of politics play on outcomes. (Key Informant No4.)

While the legislature has been inactive, the courts have been facing cases which identified the need for policy change.

THE COURTS: FUTURE EARNINGS

*New From Matel: Divorced Barbie - Comes With all Of Ken's Things.*⁶²

The Courts could not stand still while the parliamentary process was stymied. Issues reflecting changing social values were providing them with new challenges to statutory interpretation. The need to develop law to meet the

⁶¹ Key informant 4.

⁶² Graffiti, Ponsonby Road, Auckland, New Zealand. November, 1996.

changing nature of property in a changing socio-economic environment was illustrated by the arguments presented to the courts. In November 1996 following the general election, the Court of Appeal heard the Case of *Z v Z*.⁶³ The case attracted a great deal of media attention and public debate reflected in the graffiti quote above. In *Z v Z* the full bench of the Court of Appeal sent a clear signal to the lower courts and the legislature that it was time to address the issue of dissolution disparity for non-earning spouses from marriages of a long duration. The judges merged the issues of matrimonial property under the Matrimonial Property Act 1976 with those of spousal maintenance under the Family Proceedings Act 1980.

The case *Zv Z* involved a marriage of twenty eight years duration. The woman had been working as a secretary earning more than her husband when they were first married. She stopped work a year before the birth of their first child and took part time typing work at home for about five years. At the end of the marriage the woman who suffered from a medical condition was unable to find employment. The husband had studied for accounting qualifications and a post graduate diploma during the marriage. By the time of separation his income was over \$300,000 per annum. The dispute was over the husband's share of an accounting partnership, retirement package and his enhanced earning capacity. The concept of equal division, the nature of property (matrimonial, balance and separate), the clean break principle and spousal maintenance were all issues explored in the case.

The court held that the future earnings of the earning spouse were not matrimonial property and could not be divided as tangible property could have otherwise been. The court found however that the earning partner's entitlement to a retirement benefit formed a part of the bundle of property rights which represented his total interest in the accounting partnership. A portion of the bundle of property rights was matrimonial property as it was acquired during the marriage. The valuation of the bundle of property rights required consideration of the earning spouses likely future income and entitlements under the partnership agreement in the company in which he was a director. The earnings to be acquired by the earning spouse could be attributable to the efforts of the wife and that she should benefit from those earnings. The parties had previously agreed in the Family Court that the partnership interest in the accounting firm was of nil value. The only value agreed to was the retirement benefit which had been deemed matrimonial property. At the Court of Appeal the husband continued to argue that the partnership was of nil value but counsel for the wife argued a value of \$1.4 million. One judge viewed the differing interpretations of the case in this way:

⁶³ *Zv Z* (1996) FRNZ 88; [1997] NZFLR 241 (CA)

There were three possibilities in that case. One was that the court could see income earning as an item of property. But the judges could not go that far in terms of the scheme and language of the Matrimonial Property Act 1976. The other was the sort of intermediate course that the court adopted which said, obviously when you have got any kind of property right as you do in a partnership or employment contract or any thing like that, it gives you an income flow arising from income earning capacity. Then the particular property right is within the Matrimonial Property Act 1976. The third was to do what had been done in the past, and that was to ignore anything to do with future earning. (Judge D.)

The judges had imposed a question and line of reasoning which was claimed to be different from that which was presented to the court. They viewed a future property right where the contract for that right had been acquired during marriage as matrimonial property. They were accused of being too active in policy making terms.

JUDGES AS POLICY ACTORS

The court had chosen to look carefully at complex issues about the definition of property. In response to critique of a perceived change in the definition property and the interpretation of the Act a judge in this study suggested that statutory interpretation involved analysis of the underlying principles of the legislation. He pointed out that judges decisions contributed to the way the law evolved:

In some cases it is a question of what does this statute really mean? What is the underlying policy? And you try if there is a degree of ambiguity to look at the statute and see what is the scheme, what is the purpose and having that in mind you say well this is really the answer to this problem in this case. After all if people are talking about the judges as judicial activists, there would be no common law, I mean common law was developed by judges. (Judge D)

The Court of Appeal suggested that Parliament review the spousal maintenance laws and their relationship with matrimonial property law. Spousal maintenance as discussed in chapter six is rarely awarded because it operates in opposition to the principle of the clean break split principle of the Family Proceedings Act 1980. The Court of Appeal was critiqued for changing the direction in the *Z v Z* case.⁶⁴ Although *Z v Z* was a property case the court merged the issues with those of spousal maintenance under the Family Proceedings Act 1980. In their concluding remarks the judges debated the interpretation of reasonable need for spousal maintenance and indicated

⁶⁴M. Henagahn, 'The B to Z and Back to A of Matrimonial Property', *The New Zealand Law Journal*, January, 1997, p. 1.

that reasonable need was not limited to a 'subsistence level' nor 'uniform'.⁶⁵ Reasonable need was relative to the particular spouses.

The judges of the Court of Appeal said it was not untoward to consider a 'situation where the parties had been married for a long duration, the party is no longer youthful and the potential earning capacity of the parties is disproportionately out of balance, having regard to the statutorily recognisable contributions which each partner has made, [these] were special circumstances'.⁶⁶ The court of Appeal was guiding other courts and the legislature to recognise that spousal maintenance should be available in similar cases. Judges in this study agreed:

In Z v Z the Court said you don't apply spousal maintenance provision too rigidly... a too rigid approach had been taken in relation to maintenance especially in long term marriages where one spouse had very limited income earning capacity at the time of the break-up. (Judge D)

When asking the judges in this study who made policy they all agreed that in theory Parliament made policy. However they acknowledged that policy also evolved from decisions in the Courts. In *Z v Z* the court subtly clarified its policy making role:

*The clear distinction here is that while Parliament makes laws, the Judiciary, through the courts, applies the laws. In practice the role of the courts is more complex as it inevitably involves interpretation and development of the law. While remaining subject to Parliament and its will, there is nevertheless wide scope for the Courts to apply and interpret the law in accordance with the needs of society. Accordingly, judges may take cultural, family, economic and international, matters into account, in order to give effect to the fairest outcome.*⁶⁷

The court was signalling a change in direction:

Occasionally the courts will be quite active when they are given a case to determine So it is reactive to that extent, but even in that context the courts can be quite active, and we have of course been through quite an active phase under the former president of the Court of Appeal which has definitely had an impact on the courts below, unquestionably. And some of the courts below seize on that and are very pleased to have a wider area within which to work But then when you have a more conservative court of Appeal, that tends to be period of retrenchment. The breadth in which policy will be interpreted by the courts It is evolutionary, you have periods of forward movement and then you have periods where there is consolidation just the same as in

⁶⁵ *Z v Z* (1996) FRNZ 88; [1997] NZFLR 241 (CA) at p.71.

⁶⁶ *Z v Z* (1996) FRNZ 88; [1997] NZFLR 241 (CA) at p.72.

⁶⁷ *Report to the New Zealand Judiciary*, 1995, p.4 in *Z v Z* p.45.

politics. (Judge I)

In *ZvZ* the Judges had flagged the need for reform. Chapter five illustrated the way in which the courts and the legislature could move in a symbiotic manner toward the 1976 Matrimonial property reforms. The ‘repugnant to justice’ test (s14) was framed by the legislature from the Privy Council’s statement in *Haldane* when the Law Lords had noted that ‘conduct’ would need to be ‘gross and palpable’ to allow unequal sharing. The legislature observed the reaction and recommendations regarding statutory interpretation in the Privy Council. Similarly in 1996, The Court of Appeal attempted to ascertain what Parliament had intended in 1976. Quoting from the Parliamentary Debates in *Z v Z* the Court of Appeal reminded the courts and Parliament that marriage was a partnership of equals where in ‘many cases (the partner who works in the home) puts up with a lower standard of living to enable the other partner to advance a career or build up assets’.⁶⁸

The Judges of the Court of Appeal noted that the disparate economic impact of dissolution on women was clearly substantiated from other jurisdictions such as Australia and Canada.⁶⁹ The court acknowledged that while the Matrimonial Property Act 1976 achieves formal equality between spouses in that the conventional items of property are divided equally, it does not achieve actual equality when the husband is left with the ability to earn a significant income and the wife is left with little or no ability to earn a living. They stated that, ‘such an outcome c[ould] not be easily reconciled with the objectives of equality and justice underlying the Act’.⁷⁰

Hon.C.Fraser in her analysis of *Z V Z*, suggested that human rights conventions could have been applied in order to reconcile equality and justice. She suggested that counsel for Mrs Z could have applied human rights equality norms to the argument. The following section outlines the justification for such an approach.

HUMAN RIGHTS IN DOMESTIC LITIGATION

Underpinning all human rights legislation the Universal Declaration of Human Rights provides the foundation in principle of the general right to equality. This has become part of customary international law since it was ratified in 1948 without dissent. The Civil and Political Covenant is a far reaching commitment and general protection against discrimination. Furthermore the Economic Social and Cultural Covenant (the principal source of international social welfare obligations) provides an explicit

⁶⁸ Minister of Justice at the second reading of the Matrimonial Property Bill 1976 in *Z v Z* (1996) FRNZ 88; [1997] NZFLR 241 (CA) at p.14.

⁶⁹ *Z v Z* (1996) FRNZ 88; [1997] NZFLR 241 (CA) at p.32.

⁷⁰ *Z v Z* (1996) FRNZ 88; [1997] NZFLR 241 (CA) at p.30.

system of monitoring protection against discrimination.

The Bill of Rights Act 1990 guarantees equal rights to all. 'It aims to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. It applies to acts done by the legislature, executive and judicial branches of Government It also affirms the right of everyone to freedom from discrimination on all the grounds set out in the Human Rights Act'.⁷¹ The Human Rights Act 1993 protects and outlines those rights. It 'prohibits discrimination on the grounds of: sex, marital status, religious or ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation'.⁷² Section 152 of the Human Rights Act enshrines the government's commitment to review current and monitor new legislation, ensuring all legislation and regulations are consistent with the Human Rights Act 1993 by the year 2000. Parliament's intention was clearly to abide by International Human Rights Conventions. It was therefore possible to consider equality a constitutional norm.

While we do not have a written constitution the New Zealand Bill of Rights Act 1990 reflects the principles of the United Nations International Conventions on Economic and Cultural Rights and Civil and Political Rights to which New Zealand is signatory without reservation. Cooke P. described the Bill of Rights Act 1990, in *R v Goodwin*, as 'intended to be woven into the fabric of new Zealand' and to be 'construed generously and in a manner... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to'.⁷³ Following Cooke's lead there were numerous examples where the Court of Appeal noted the relevance of international legal norms and applied them. They noted in 1994 that the Bill of Rights was 'in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction ha[d] direct rights of recourse to it'.⁷⁴ In the case of *New Zealand Van Lines v Proceedings Commissioner* the court considered the Women's Convention and the United Nations Declaration on the Elimination of Violence Against Women. In that sexual harassment case the court noted that 'human rights legislation [wa]s to be accorded a liberal and enabling

⁷¹ New Zealand Government, Status of Women in New Zealand, The Combined Third and Fourth Reports on New Zealand's Progress on Implementing the Convention on the Elimination of all Forms of Discrimination Against Women, February, 1998. p.6.

⁷² New Zealand Government, Status of Women in New Zealand, The Combined Third and Fourth Reports on New Zealand's Progress on Implementing the Convention on the Elimination of all Forms of Discrimination Against Women, February, 1998. p.6.

⁷³ *Rv Goodwin* (1992) 3 NZBORR 214 at 242 per Cooke, P. [1993] 2NZLR 153

⁷⁴ [1994]2 NZLR at 266,[1994] 1 LRC at 431h, in Hon. S. Cartwright DBE, International Standards and Domestic Litigation : New Zealand in A. Byrnes et al, *Advancing The Human Rights Of Women: Using International Human Rights Standards In Domestic Litigation*, p. 67.

interpretation'. In *Coburn v Human Rights Commission*,⁷⁵ the court claimed, 'the proper construction of the [Human Rights Act 1993] require[d] an appropriate regard for the substantial body of authority both in new Zealand and abroad, as to the special character of human rights legislation and the need to afford it a fair large and liberal interpretation, rather than a literal or technical one'.⁷⁶ The courts were poised to consider human rights obligations in domestic litigation. Cooke J., made use of the Universal Declaration on Human Rights and the Elimination of Discrimination Against Women (CEDAW) as representative of legislative policy, helpful to a matter of statutory interpretation. In *Van Gorkom v Attorney General* and in *Tavita v Minister of Immigration*⁷⁷ he indicated that the executive arm of government was 'not free to ignore' international human rights norms.

To members of the public who are uninformed about human rights the concept of equality is one of equal treatment. Equal outcomes are assumed to occur so long as people make the right 'choices', in the neo-liberal framework. But structural disadvantage is often a barrier to equal outcomes. Structural barriers are hidden by political rhetoric which claims equality while disguising disadvantage. International human rights law has provided a different lens through which to view equality. Kennedy Q.C. addressing the New Zealand Law Society Conference in 1995 said, 'treating as equal those who are in fact unequal does not produce equality, especially if there is no acknowledgement of the world beyond the courtroom door'.⁷⁸ Judges know about substantive equality. Recent law graduates who have taken specific courses in international law and legal practitioners who attend conferences would also have been exposed to the interpretation of equality in substantive terms. But not bureaucrats, legislators or the general public. Hence the requirement for a brief revision of the two different ways of viewing equality here.

FORMAL EQUALITY

Sometimes formal equality is known as equal treatment, equal opportunity or gender neutral treatment. In the context of formal equality, men and women are treated the same way and, for example, so are different ethnicities, ages,

⁷⁵ *New Zealand Van Lines v Proceedings Commissioner* [1995] 1NZLR 100, (1994) EOC 92-620 (digest), in Hon. J Silvia Cartwright DBE, *International Standards and Domestic Litigation: New Zealand* in A. Byrnes et al, *Advancing The Human Rights Of Women: Using International Human Rights Standards In Domestic Litigation*, p. 69,

⁷⁶ *New Zealand Van Lines v Proceedings Commissioner* [1995] 1NZLR 100, (1994) EOC 92-620 (digest), in Hon. J Silvia Cartwright DBE, *International Standards and Domestic Litigation: New Zealand* in A. Byrnes et al, *Advancing The Human Rights Of Women: Using International Human Rights Standards In Domestic Litigation*, p. 69,

⁷⁷ *Tavita v Minister of Immigration* [1994] 2NZLR 257 at 266 (CA)

⁷⁸ H. Kennedy QC., *The Illusion of Inclusion-Women and the Law*, Address to the New Zealand Law Society Conference, (Rotorua, 1996), p. 3.

and characteristics of ability and disability. Treating all people the same as a mechanism for equality is a simple way to approach the concept, a politically appealing argument for individual responsibility. The reforms of 1984-1999 are an illustration of the limitations of formal equality. Equal opportunity policies in the employment market, for example, did not deliver equal outcomes for women, illustrated by the gender wage gap. The equal opportunity to parent children following dissolution did not result in men being able to parent in equal numbers.

Historically women and men have not been treated identically. The formal equality model is problematic because women's experiences are different from those of men. Hunt explained :

Formal equality assumes that by removing gendered legal barriers, men and women of similar talent and motivation will enjoy the same opportunities and achieve the same successes Formal equality is blind to entrenched structural inequalities, it ignores actual social and economic disparities between groups and individuals. By constructing standards which appear to be neutral, it embodies a set of particular needs and experiences which derive from a socially privileged group. In this way formal equality may actually reinforce inequality.⁷⁹

Hon. C Fraser argued that this was what was meant by 'male norms'.⁸⁰ Cook noted the consequences. 'Women are forced to argue that they are the same as men and should be treated the same, that they are different but should be treated as if they are the same, or that they are different but should be accorded special treatment.'⁸¹ The 'different but the same' argument focusses on treatment before the law. Another way to view the issues is by looking at outcomes under the law. This approach acknowledges that laws and regulations impact on the way we live our daily lives. Viewing equality from the position of outcomes exposes the experiences of those who are excluded inspite of policies which articulate formal equality.

SUBSTANTIVE EQUALITY

Substantive equality requires an examination of the actual conditions experienced by groups and individuals. Viewing equality from the substantive perspective embodies the aim of elimination of discriminatory structural barriers. The legal case which brought the substantive approach to the concept of equality was *Andrews v Law Society of British Columbia*, This case 'replaced the philosophy of formal equality with that of substantive equality'.⁸² The Supreme Court of Canada clarified that 'sameness of treatment

⁷⁹ P.Hunt, Submission on behalf of the petitioners to the New Zealand Parliamentary Select Committee on Electoral Reform, November, 1994, p.1.

⁸⁰ C. Frazer Jurisprudence of Equality, Key Note Address to the New Zealand Judicial Seminar on Gender Equity, (Rotorua, May 1997), p.9.

⁸¹ R. Cook, 'Women's International Human Rights Law: The way Forward', *The Human Rights Quarterly*, v15, 1993, pp230-61.

⁸² C. Frazer , p.9

[wa]s not necessarily equality'.⁸³ Most importantly the court in *Andrews* confirmed that discrimination did not have to be intentional. Intent was not required to ascertain whether a policy or practice was discriminatory. The wider social, political and economic contexts were important. Equality was to be understood as a matter of 'socially created, systemic, historical and cumulative advantage and disadvantage'.⁸⁴ Discrimination was examined by inquiring into the 'impact of the law on the individual or group concerned,' and the court suggested that an 'equality inquiry was required into the larger social political and economic contexts'.⁸⁵ This meant that attention should be paid to the social and economic context of women's lives and consideration of 'how certain laws have treated men and women unequally in the past'.⁸⁶

In *Z v Z* the Court of Appeal hinted that the substantive equality notion was of interest, when in the judgment they noted 'judges may take cultural, family, economic and international, matters into account, in order to give effect to the fairest outcome'.⁸⁷ One judge interviewed for this study suggested that the international stage was set and that outside influence of substantive equality would eventually impact on judgments made in New Zealand courts:

Substantive equality is an area in which we are going to see the next major movement because definitions of discrimination all include both de jure and de facto, or intended and unintended discrimination: all of them. So as soon as the courts seize on this, or the argument is put to the courts, there will be a whole new possibility out there. But I don't think that many lawyers have actually cottoned on to this yet. (Judge I)

Powerful international policy institutions such as the International Monetary Fund and the World Bank⁸⁸ were applying the substantive equality rule in similar economic and political conditions and this would influence New Zealand courts. The new interpretation would eventually transpose into New Zealand policy :

Substantive equality will be the big push. It is certainly what is happening internationally and I am sure that once we are through what is quite a conservative phase of policy making.... it will happen. (Judge I)

An enthusiastic policy observer might identify an emergent trend. International policy institutions, some domestic policy institutions, and some

⁸³ C. Frazer p.9

⁸⁴ *Andrews v Law Society of British Columbia* 1989, Canada Supreme Court Reports, 143.

⁸⁵ C. Frazer , p.13.

⁸⁶ C. Frazer, p14.

⁸⁷ *Report to the New Zealand Judiciary*, 1995, in *Z v Z* (1996) FRNZ 88; [1997] NZFLR 241 (CA) p.4

⁸⁸ Judge I.

policy actors, were moving toward the recognition of human rights norms in domestic jurisprudence. If not at a political and economic level, the move had been explicitly signalled in the courts:

*You can see the influence of the International Covenant of Civil and Political Rights in the enactment of the Bill of Rights Act. That's what revolutionised the way the police are required to play the international rules now,*⁸⁹ where that was not the case in the past. The Court of Appeal has insisted on that saying that not only have we got the Bill of Rights Act which brings in many of the principles from the International Covenant on Civil and Political Rights, but also we are a signatory to many international covenants. The Women's Convention (CEDAW) is increasingly having an influence. These world influences, these international influences will filter down to New Zealand. (Judge I)

The judges interviewed in this study were aware of the view that international human rights norms could be applied to domestic law.

INTERNATIONAL CONVENTIONS IN DOMESTIC LAW.

One way to understand the application of international conventions to domestic jurisprudence is to consider other areas of law which apply the concept of equality. Equality is found in international customary law and treaty law.⁹⁰ Hon. C. Fraser argued that the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) may be one such a treaty, a non discriminatory treaty.⁹¹

While it can be argued that treaties are not incorporated into domestic law until they are given parliamentary assent, it is apparent that Parliament does not intend to act in breach of international law. The Prime Minister and Minister of Women's Affairs Right Hon. Jenny Shipley reported in 1998 that, 'jurisprudence has developed in New Zealand which recognises the value of international agreements as tools for interpreting the legislative provisions which implement them in domestic law'.⁹² Thus CEDAW can be considered applicable in statutory interpretation.

The earlier mentioned section 152 of the Human Rights Act 1993 which aims to review and amend all legislation for consistency with the Human Rights Act 1993 is evidence of a public policy trend to use human rights principles for statutory interpretation. Where there are unintentional inequalities resulting from gender neutral treatment the door is open for substantive equality to be applied. Hon C Fraser claimed that courts have considered

⁸⁹ *Simpson v Attorney-General [Baigent's Case]* [1994] 2 NZLR 667.

⁹⁰ C. Fraser, p16.

⁹¹ C. Fraser, p16.

⁹² New Zealand Government, *Status of Women in New Zealand, The Combined Third and Fourth Reports on New Zealand's Progress on Implementing the Convention on the Elimination of all Forms of Discrimination Against Women*, February, 1998. p.7.

treaties (such as CEDAW) in the following ways: as a foundation of the constitution; as relevant to the determination of the common law; as a declaratory statement of customary international law which is part of the law of the land; as evidence of public policy; and as relevant to the interpretation of a statute.⁹³

SUBSTANTIVE EQUALITY : DISSOLUTION PROCEEDINGS

One judge in this study agreed that international human rights conventions might play a part in directing the courts to account for disadvantage when making judgments in respect of matrimonial property division:

If you took the definition of discrimination under the women's convention, and notified that New Zealand has ratified that convention, and then looked at the fact that if you applied just this theory of discrimination or this definition to the definition of matrimonial property and saw that the woman received less than the husband in outcome terms, then you might be able to run an argument like that.
(Judge I)

Article 16 (c) of CEDAW obliges New Zealand to ensure that women will have, 'the same rights and responsibilities (as men) during marriage and at its dissolution'. Article 2 of CEDAW protects women from discriminatory outcomes before the law when at 2 (d) it requires states to, 'refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation'. All of Judges and legal practitioners in this study, as representatives of the legal institutions in this country, consistently stated that women from long term marriages with dependent children frequently experienced substantive inequality on dissolution, under the current matrimonial property and family proceedings legislation.

We know that many matrimonial property divisions may divide the property very fairly and equally but don't provide the same opportunities for both parties. If you take the average situation where the wife receives the home and perhaps a car and the husband gets some capital out and perhaps a beach place or something like that, he is very much better placed to build on those assets than his wife because she has got to provide a roof for the children. So her assets are not for her own use, and he also has the benefit always invariably rather of having a greater income than her, partly because men on average earn more than women in New Zealand, and partly because she's got the children to care for. (Judge I)

It follows that in some cases equal division of property allows for unequal

⁹³ *New Zealand Guide to International Law and its Sources*, (Wellington: the New Zealand Law Commission, 1996), p23.

outcomes of the marriage partnership on dissolution. The Matrimonial Property Act 1976 may therefore not comply with international human rights obligations of substantive equality. Following is a summary of the line of reason suggested by Hon C Fraser in respect of matrimonial property and spousal maintenance.

STATUTORY INTERPRETATION AND SUBSTANTIVE EQUALITY

The Convention on the Elimination of Discrimination Against Women (CEDAW) could be applied to the rights guaranteed under the Bill of Rights Act 1990 and the Human Rights Act 1993, in respect of what is meant by discrimination, remembering that inequality under the substantive model does not have to be intentional. Thus, CEDAW could be relied on for the interpretation of what is property under the Bill of Rights Act 1990. The Bill of Rights requires that where there is conflict between a statute such as the Matrimonial Property Act 1976 or the Family Proceedings Act 1980, with the rights provided in the Bill of Rights Act 1990, then the Act requires that 'where an act can be given an interpretation *consistent with the Bill of Rights it should be given that meaning*'.⁹⁴ Hon C. Fraser claims that it follows: 'Judges must place New Zealand international obligations on the scale', when seeking to decipher Parliament's intention behind a specific statutory provision: Gault J. had noted in *R v Goodwin*: 'The Bill of Rights Act at least in part, affirms existing law and existing rules should continue to apply unless they are inconsistent or inadequate'.⁹⁵ This has particular relevance to spousal support under the current Family Proceedings Act 1980.

The substantive equality model under CEDAW could apply and the reasoning would be: *the courts should interpret the Family Proceedings Act 1980 and the Matrimonial Property Act 1976 in a manner consistent with the principle of substantive equality*. Validating such an approach, the high profile Canadian Supreme Court case *Moge v Moge*⁹⁶ did this. The judges rejected the self sufficiency model. The Court emphasised the importance of the negative impact of divorce on children and women's lives. It took the position that equality required that both spouses share in the economic disadvantages suffered by one spouse being responsible for the homemaking and childcare, as well as the advantages accruing to the other spouse. It acknowledged the equitable sharing notion of the economic resources of marriage and turned it on its head. In the judgment the Court argued a compensation model of spousal support. The reasoning weighed 'need' with the 'capacity to pay'. The policy shift moved the debate from near total emphasis on 'self sufficiency' to a 'recognition

⁹⁴ *New Zealand Bill of Rights Act 1990*, No 109, s6.

⁹⁵ *R V Goodwin* (1993) 2 NZLR 153 at 205 (CA)

⁹⁶ *Moge v Moge* [1992] 3SCR Supreme Court of Canada.

that equality and fairness between spouses might mean support following marital breakdown'.⁹⁷ Both the advantages and the disadvantages of the marriage partnership would be shared under the substantive equality model.

In the New Zealand context this model has yet to be argued. In *Z v Z* counsel did not deconstruct the definition of equality. The definition of property was explored. The case was treated as one of statutory interpretation. The income stream was rejected as one of the joint assets of a marriage. The court did, however, recognise that one resolution would be to have maintenance payable for an indefinite period. Three of the judges in this study implied that the higher courts were aware of the possible application of substantive equality to the spousal maintenance policy debate. One Judge remarked that it would only take 'one bright young lawyer' to change the trend. But this was an high expectation because:

The more creative you are as a lawyer then the more time you spend on a case, and with the prospect of the courts knocking it back you get not much of an income .(Judge I)

CONCLUSION

The Court of Appeal in *Z v Z*, noted that spousal maintenance legislation had been unnecessarily interpreted in a restrictive way. The Court found that under the present legislation it was unable to compensate for disparity of outcome, without applying the provisions of the Family Proceedings Act 1980. While this indicated a shift in policy direction in the courts, the legislature has remained silent.

There has been not been any response in respect of the governing principles of equality and the clean break from the legislature. The observations from the Court of Appeal are not reflected in the proposed amendments to the Matrimonial Property Act 1976. In the absence of legislative reform judges may need to assume the role of policy makers. In December 1996 The Minister of Justice told the Evening Post that 'he would wait for a High Court decision on the value of the male's business interests in *Z v Z* before pushing through any change to the Matrimonial Property Act 1976'.⁹⁸ At the time of completing this thesis the High Court had not delivered a valuation or a decision. Submissions on the amendments to the Matrimonial Property Act 1976 have been heard in select committee. Parliament is expecting to debate the amendments following the tabling of the committee's report in Parliament.

On 27 May 1999 the Clerk of the Government Administration Select Committee

⁹⁷ Hon C Fraser, p. 36.

⁹⁸ Hon. Sir Douglas Graham, Evening Post, 29 December 1996, p.1.

informed me that issues which had emerged out of the select committee process had been referred back to Cabinet for review of the underlying principles of the Act. He commented that while the Select Committee Report was due on the 16th of June it may be delayed by Cabinet as ministers intended to reconsider the clean break principle.⁹⁹ It is however once again election year, the public can but wait and see what emerges from the Cabinet process.

Chapter nine concludes this research process. There I discuss the core findings from this study. The chapter covers the policy possibilities and research ideas which have emerged from the research. The ideas for future consideration are presented in the spirit of action research as the work culminates in a submission to the Government Administration Select Committee which heard submissions on the Matrimonial Property Amendment Bill 1998. The submission is set out following the Parliamentary guidelines of how to present a submission to a select committee.¹⁰⁰ The chapter is organised in three parts. The first part is a simple cover sheet which acts as a summary of the main points covered in the submission. The second part of the chapter discusses the principles which underpin dissolution policy relevant to the findings of this study. The final section of the chapter explores the proposed amendments in the context of the research for this thesis.

⁹⁹ Telephone conversation with the clerk of the Government Administration Select Committee, 10am, 27 May 1999.

¹⁰⁰ *Making a Submission to a Parliamentary Select Committee*, Office of the Clerk of the House of Representatives, Parliament House, Wellington, New Zealand.

CHAPTER NINE
POLICY AND RESEARCH POSSIBILITIES.

*What is it we are doing in society, why are we doing what we do, and what might we do differently given our puzzlement and worry about what we do?*¹

A submission on the Matrimonial Property Amendment Bill 1998

Summary of this Submission.

1. The Bill is supported with reservations.
2. The Bill does not address the policy of the 'clean break split' which is applied to both the Family Proceedings Act 1980 and the Matrimonial Property Act 1976.
3. The Matrimonial Property Act 1976 is premised on the assumption that justice is achieved by equal division of property on dissolution of marriage. There is evidence that this is not the case in particular circumstances. The Bill does not address those specific circumstances.
4. The Bill does not significantly address the needs of children when families part. There is a need for a review of all of the policies which guide dissolution of marriage for men, women and children as they move through the transition from a nuclear family to a family-apart.
5. The main purpose of the Bill is to update the rules applying to the division of property on the dissolution of marriage. However the amendments designed to resolve unequal outcomes for non-earning spouses do not provide clear direction to the courts for the re-allocation of economic resources to achieve equal outcomes. The bill does not address the definition and categories of property ownership which have become more complex since the original Act was introduced.
6. There is no recognition in principle in this Bill of the international policy trend toward substantive equality.

¹ Rein, M. Value Critical Policy Analysis in Callahan, D. and Jennings, B. (eds) *Ethics, the Social Sciences and Policy Analysis*, 1996, Pg. 83.

General Submission.

1. I have conducted a small qualitative study with women from long-term marriages with dependent children who have experienced dissolution of marriage, under the current legislation. The study entitled 'Dissolution of Marriage: Public Policy and "The family-apart"', (TFA) also included interviews with lawyers, judges and other policy actors. The study has highlighted some of the factors that contribute to unequal outcomes at dissolution of marriage, in certain circumstances, under current Family Law. The issues that have emerged from that study will be explained with reference to the Matrimonial Property Act 1976, the Matrimonial Property Amendment Bill 1998², other relevant legislation and policies. The first section of this submission will address the broad principles of the legislation and the second section of this submission will examine the specific proposed amendments to the Act.

Equal Division of Property does not always result in equal outcomes for the adult members of the family-apart.

2. The framework of policies governing the dissolution of marriage involves the maintenance provisions of the Family Proceedings Act 1980, the Child Support Act 1991, and the Guardianship Act 1968. The Matrimonial Property Act 1976 looks to achieve justice by way of equal division of property. The clean break principle is considered appropriate so that spouses do not have continuing obligations toward one another. These presumptions can lead to economic disadvantage for women and parenting disadvantage for men. The proposed Matrimonial Property Amendment Bill 1998 does not recognise possible unequal outcome for the non-earning spouse from a long-term traditional marriage. Nor has the impact of property outcomes on the care and custody arrangements been viewed in respect of continued parenting responsibilities for men. For the family undergoing the transition from separation to dissolution all of the issues converge together. Under the law they are treated as separate entities. It is possible that perceived inequities for both parties lead to protracted negotiations and at times increased expense to the spouses and the state in Family Court litigation. There is a need for in-depth longitudinal research to identify specific factors which lead to economic and parenting disparity. All of the contributing dissolution legislation will need to be reviewed in order to establish outcomes which reflect the needs of women, men and children.

² The clauses dealt with will not include the new provisions for testimony or taonga as issues regarding those amendments did not arise during the course of the Dissolution of Marriage: A family-apart Study. Nor will the submission address the de facto Property Bill 1998, as de facto relationships were not the focus of the TFA study.

2.1 Disparate outcomes are likely to occur for non-earning spouses married in the 1960's and 1970's. non-earning spouses from such marriages are likely to be in mid life and may lack the skills needed for employment and thus financial independence. The future income needs of such spouses are not addressed in many cases by a division of the home and chattels. For Example these spouses have not usually invested in superannuation, and may lack adequate health insurance. Equality of economic outcome could be achieved by directing the court to award compensation by way of investment in superannuation and or the purchase of medical insurance by the earning partner on their behalf. Spousal maintenance, disproportionate re-allocation of resources, lump sum payment or a share of future earnings at a later date are other alternatives. There is a need for in-depth research into the future needs of non-earning spouses from long-term marriages which end in mid or later life. The governing principles of the Matrimonial Property Act 1976 and the Family Proceedings Act 1980 would need to be amended such that they clearly re-directed the courts to accommodate such changes in the underpinning principles of equality and the clean break split.

Disadvantage due to the division of functions within a marriage.

3. When children are born to partners in a marriage, the day to day responsibility for the well being of children is often taken by the mother. Child rearing frequently necessitates time out of the paid workforce. Statistics suggest that periods of time out of the competitive employment market and other structural disadvantages such as the gender pay gap are two of the cumulative factors which result in unequal consequences for mothers who have been unpaid primary parents on dissolution of marriage. Such disadvantage could be accommodated by way of spousal maintenance until such women are able to reach independence, but this may be needed for a significant period of time. The policy directives of the Family Proceedings Act 1980 would need to be re-stated as spousal maintenance is rarely awarded following dissolution.

3.1 Policies which encourage and empower fathers to share the responsibility of caring for children following separation would be welcomed. The Guardianship Act 1968 governs the care and contact arrangements for the children, in their best interests. There is a growing body of evidence that suggests men wish to take a greater role in parenting. This appears to be due to social and economic changes in the nature of work and change in the gendered expectations of parenting roles. It is apparent that there is a discrepancy between the percentage of fathers who obtain custody when they have sought it in the courts (45%) and the number of

fathers who are primary parents overall (20-33%). Arrangements which encourage shared care with low conflict and regular contact with both parents should be encouraged. The principles which guide care arrangements need to continue to focus on the paramount welfare and the needs of the children. However longitudinal research is required to establish how current arrangements impact on New Zealand children. Such research might compare shared care with single parent care following separation during the transition and following dissolution. Research could compare cases which were heard in the Family Court with those negotiated by private agreement.

Earning capacity and the division of property

4. The question of future earning capacity for non-earning spouses has been the source of heated debate. The Working Group on Matrimonial Property and Family Protection 1988 explored the idea of unequal sharing of matrimonial property and rejected the idea of compensation. The Court of Appeal in *ZvZ* similarly rejected compensation for the loss of future earnings. The issue has surfaced as one of the definition of property. The definition of property currently remains segmented into three divisions of matrimonial property, balance of matrimonial property and separate property.

4.1 Any change to the interpretation of property could not be accommodated under the law as it stands according to the Court of Appeal. But a future share in a partnership to be liquidated at retirement was found to be matrimonial property in spite of the difficulty in valuation.³ As property becomes a more complex notion in the technological age, the courts can expect further challenges. Intellectual property, the purchase of overseas property, shares on the international market and mixed investment portfolios are likely to be areas litigated in the future. The Court of Appeal signalled that a more sympathetic use of spousal maintenance provisions may be one way of addressing the issue under current law.

4.2 Another alternative would be to modify the categories of property allocation. The distinction between the home and chattels and the balance of matrimonial property has resulted in unequal sharing in some cases. The change in the categories of property for division recommended by the Ministry of Women's Affairs in 1995 was subsequently rejected by Cabinet. Research in 1988 by Krauskopf and Krauskopf confirmed that when property ownership was complex unequal outcomes were more likely to result. They claimed this was due to the distinction between the home and chattels and the balance property. Simple categorisation of all matrimonial property would

mean partners would be clear about the nature of their financial relationship - everybody would know where they stood. I argue for an all inclusive approach to the classification of matrimonial property which would result in certainty in the courts and private settlement. Viewing *all* property as the shared property of the marriage would provide clarity. Those people who did not wish to share the resources of the marriage partnership equally, would be legally obliged to organise the property of marriage by jointly agreeing to contract out of the Act. This would give partners the opportunity to clarify their property relationship before they married. Spouses might better understand the implications of shared property when entering the arrangement, before assuming full responsibility for the primary care giving of the children of the marriage and the maintenance of the household. These tasks may be more likely to be shared if the law is explicit. Couples would be more informed, and spouses would need to decide how the household, care giving and paid work roles would be shared. Such change would need to be accompanied by significant public education about the current regime, and consultation which has been lacking in regard to the current amendments.

4.3 The gender wage gap doubly disadvantages women alone. This is especially the case in respect of raising finance and credit. The loss of regular income at dissolution can be viewed as one of the most significant assets of the marriage partnership. In current law earnings are not viewed as an asset of the marriage.⁴ The impact of the loss of future earning capacity or opportunity cost for the non-earning spouse has not been addressed in policy.⁵

The Clean Break Principle.

5. The principle of the clean break is both unrealistic and in opposition to the maintenance of a reasonable standard of living for a spouse who has not earned money during a marriage. The principle of a clean break spilt is in need of clarification. There should be direction for the courts to guide priorities in specific circumstances. Legal mechanisms which encourage financial 'independence' rather than the current broad policy direction of a clean break would empower more realistic outcomes. The three main principles that govern dissolution could be prioritised. Where there are dependent children the welfare of the children should be addressed as top of the hierarchy. Equality of division of resources and the independence of adults should follow. The clean break should only be applicable where economic circumstances permit. Independence could be an aim rather than a

⁴ Apart from retrospective earnings that have been directed into superannuation funds, insurances and redundancy.

directive.

5.1 In order to enable a clean break a lump sum payment of maintenance at division of property would provide one alternative. That was the recommendation of the Working Group on Matrimonial Property and Family Protection in 1988. There are however implicit problems with that model also. The financial problems experienced by non-earning spouses following separation or dissolution are not likely to be resolved by lump sum payment. This is especially the case in economic circumstances where interest rate returns are low on invested capital. Participants in my study demonstrated that lump sum payments could be unintentionally dissipated. Non-earning partners are in need of income rather than capital. Regular income allows a non-earning partner to sustain the basic day to day needs while they retrain, suffer from ill health or are unable to secure employment.

5.2 Each family is unique and has different needs. The welfare principle which guides the Guardianship Act 1968 recognises this but other dissolution legislation does not incorporate that principle. The current procedures outlined in the Family Proceedings Act 1980 do not allow property and spousal maintenance needs to be addressed in judicial mediation unless there are issues involving children. This policy potentially risks custody battles which may be disguised property battles. There must be research conducted to examine the inter-play between custody, maintenance and property and the clean break. All issues may need to be considered together at judicial mediation.

Working toward quick, low conflict, inexpensive conciliation of dissolution disputes.

6. The Matrimonial Property Amendment Bill 1998 does not make use of the opportunity to re-address the current group of policies which govern conciliation on dissolution of marriage. The courts will not be given the power to make flexible arrangements that ensure speedy conciliatory negotiation of all of the issues surrounding dissolution for the family-apart. These are piecemeal amendments. To accomplish a more conciliatory process the legislature would need to modify the Family Proceedings Act 1980, the Guardianship Act 1968 and the Child support Act 1991 as well as the Matrimonial Property Act 1976. This submission advises that a holistic view of the issues for families is required. A complete review of the interface between the four pieces of legislation and a focussed reform of the group of Family law policies is necessary. The policies guiding dissolution of marriage do not address many of the issues which surface for the members of the family-apart. Research which included representative longitudinal case studies, of outcomes for families is needed. This would examine all of the legal

mechanisms relating to dissolution and could identify new guidelines for reform of the laws governing dissolution, in the best interests of all members of the family-apart.

Domestic violence, conduct and fault.

7. The Matrimonial Property Act 1976 provides that misconduct should only be considered if it is repugnant to justice(gross and palpable, s18(3)) and has significantly affected the extent and value of the matrimonial property. Misconduct must be established before departure from equal sharing is deemed appropriate. Otherwise conduct is not to be taken into account. There have been calls to apply conduct to situations of domestic violence.⁶ Yet the Matrimonial Property Act 1976 has retained an element of fault for judicial discretion by retention of the repugnant to justice test.

7.1 Findings from my study suggest that a return to fault/conduct would fuel dissolution disagreement for women and men. The omission of fault/conduct from legal proceedings has restricted judicial discretion and allowed for more timely resolution of issues. Any return to fault based proceedings will cause delay to resolution both at a legal and personal level. In the past where fault and conduct have been considered, judicial discretion has been unfavourable for women. When fault/conduct are applied to decision making socially constructed values and gendered expectations about parenting and partnering roles have been applied. The focus has been on misconduct rather than the outcomes for families.

7.2 The judiciary already has the power to apply the repugnant to justice test in cases of sustained violence and abuse and to compensate through unequal sharing. Where children have been harmed some judges have creatively applied section 26 of the Matrimonial Property Act 1976.⁷ Compensation could also be applied to spousal maintenance in situations where property cannot compensate the non violent spouse for their extra contribution to the marriage under violent conditions. The Family Proceedings Act 1980 could be amended to accommodate spousal maintenance where property can not compensate for the extra contribution the non violent spouse needs to make to the relationship and family.

7.3 The findings from the TFA study identified that there was a propensity for domestic violence to emerge during the period between separation and dissolution. This was particularly evident while negotiations for child care,

⁶ Judge Boshier, Family Law Conference Papers , 1998,p.

⁷ Judge Adams in the Otahuhu District Court recently ruled that a daughter was entitled to claim part of her fathers matrimonial property by way of compensation for his sexual abuse of his daughter, in *Feminist Law Bulletin*, New Zealand, Aotearoa, 1998, Issue 5. p.3.

contact and matrimonial property were taking place. Some men were emotionally unable to satisfactorily deal with separation and dissolution issues. Re-introduction of the notion of fault/conduct may invite further violence. While the courts have a difficult task ensuring that women and children are safe during the separation period, introduction of further conduct/fault based legislation would risk protracted court hearings, potentially risk sustained violence and additional retribution for women as a male partner is further alienated. There is a need for extensive research in this area. It is possible that there is a pattern whereby men who have not previously been violent become violent when relationships with spouses end. Many parents fear that their relationship with their children may come to an end at separation. If there is a pattern of behaviour that can be empirically validated then it would be necessary to identify the factors which contribute to such behaviour. There may be a need to establish policies which will provide in-depth support specifically for men. Widespread education about dissolution clearly has positive implications for the physical and psychological safety of women and children and men.

Mediation: equal economic consequences, equal parenting.

8. The Family Court Review team queried the expensive use of state funding for litigation. Their recommendations included the strengthening of conciliation and mediation to resolve issues more quickly and cost effectively. Views gathered from this study suggested that strengthening the mediation area would be worthwhile, if issues could be resolved all together as one negotiation. That way economic issues could cross cut between spousal maintenance, property division and plans could be made between spouses about the care of children.

8.1 The right for all couples to apply for a judicial mediation conference about dissolution in an holistic way could provide families the opportunity to arrive at equitable solutions which empowered independence for both spouses. This would incorporate the interests of the children. All matters could be conciliated at one time.

8.2 Boshier et al (1993) agreed with Judith Wallerstein's findings about the psychodynamics of family mediation which confirmed that, 'the interests of the child should not be diminished or forgotten in the mediation forum.' They recommended that there should be 'more consideration of the welfare of the children during mediation'.⁸ Legal advisors who abided by the Family Court philosophy of conciliation mirrored the ethos of the Family Court. Conversely, if understandings about financial issues were not reached or

⁸Boshier et al, *A Review of the Family Court*, p47.

clear information was not tabled about property issues, then the process was not likely to be conciliatory. If threats were made based on child custody arrangements or clients utilised the Domestic Violence Act 1995, in order to secure matrimonial property settlement, then the focus was on the parent's anger with little consideration of the interests of the children. Children should be paramount during all negotiations.

8.4 Emery Mathews and Wyer⁹ found that 'Custody mediation generally has proven superior to custody litigation'. Their study found 'positive cost implications for the state' such as the 'reduced need for court hearings and improved compliance with agreements'. They also found that parents were more satisfied with the dispute resolution process. The ability to resolve matters through mediation must in turn be helpful to the parenting process during the transition. Parents would be more likely to parent effectively when negotiations were resolved without delay and legal battles. The Emery et al study successfully experimented with combining mediation and guardianship issues'. Mediation also was found to produce similar benefits in the one investigation where property and financial issues, as well as custody, were included in the divorce negotiations.'

Children of Families-Apart

9.1 Facilitation of better understanding is only provided by the state for the adults. The publicly funded system was designed to mediate between spouses throughout the transition but did not take into account the need for support as children matured, following dissolution. As parents grew further apart there was more scope for differences in how children should be brought up. The opportunity for discretionary referral¹⁰ to counselling for resolution of issues ceased once dissolution was granted and the family was out of the legal system. But if further issues arose later counselling referral 'from time to time,' excluded families who had dissolved marriages and did not wish to formally file for custody or access changes. Counselling was not provided for children at any point through the transitional phase or following it.

9.2 Children's circumstances should be reported in more detail in private dissolution agreements under section of the Family Proceedings Act 1980. A welfare audit which recorded specific arrangements for the children would help focus parents on children's needs. The current obligation for practitioners to state that 'arrangements have been made for the children'

⁹ Child custody Mediation and Litigation : Further Evidence on the Differing Views of Mothers and Fathers Emery, Mathews and Wyer 1991 in A Review of the Family Court, 1993.p.

¹⁰ The Family Proceedings Act 1980 (s19).

does not report specific circumstances. This lack of specific reporting can deem issues that arise for children invisible. There is a need for research with children to determine their needs during the transition from nuclear family to a family-apart.

9.3 Children's needs could be dealt with using a problem solving approach within their family system as they move through the transitional process. Such an approach would consider the main actors in the child's life, the institutions which govern resources such as parents employment, school, health needs, child support needs at a conference with all family members. The style of the parents marriage and the effects of primary parenting versus shared parenting in accordance with parental employment could all be addressed together. Consideration of the economic and social and emotional welfare of all members of the family would help the family-apart resolve issues early without conflict.

9.4 The Family Court Review confirmed the success of the inclusion of Counsel for the Child during dissolution proceedings. The review noted that Counsel were able to achieve or oversee settlement of guardianship disputes in '70-80% of cases'. The focus of Counsel for the child on the child's needs and interests 'influenced parents'.¹¹ The review findings suggest that if there was inclusion of an independent representative for children earlier in the process, perhaps at mediation, then speedy resolution or conciliation may be more likely. Early participation in the process would reduce conflict because a child's representative would have access to both parents. However, the Family Court Review 1993 cautioned against more extensive use of legal counsel due to the 'potential cost to the state'.¹² The functional evaluation which weighted the cost and benefit of representation ignored the social impact of torn loyalties and distress for the children. Failure to provide counsel earlier along with mediation may contribute to ongoing conflict for families. That is not in the best interests of the child. There is a need for research to establish whether it would be feasible for all children of families experiencing dissolution to be offered a neutral adult advocate as of right.

Dissolution education

10. It is apparent that there is a need for an education programme which outlines the emotional effects of separation on men, the effects of parental separation on children, the economic effects of separation on women, the access needs of children at various stages, and the effects of different care

¹¹ Boshier et al, A Family Court Review, 1993, p.109.

¹² Boshier et al, A Family Court Review, 1993, 110

and contact arrangements on children at separation and dissolution.

10.1 In New Zealand there is not a distinct, separate, low cost, family or child centred service to which these families can turn for specific support in parenting after separation and during the dissolution of marriage. The plight of children and the effects of change to family systems is not a focus of the legislation governing the process.

10.2 In the United Kingdom and North America education of parents is central to dissolution procedures. Divorce 'schools' are now available in forty American states and mandatory in three. Nova Scotia, British Columbia and Ontario are in the process of introducing similar courses.¹³ Australia is piloting a parenting plan policy with the idea of providing parents with an outline which directs their attention to the various considerations and situations they need to consider when planning children's future.¹⁴ In Britain successful counselling initiatives have been implemented which are not part of the formal socio legal system. Child counselling sessions are a confidential provision for children to express their feelings and be heard. These programmes are based in schools and offered to children from age 4 years.¹⁵ These education initiatives recognise that parents struggle to put children first. In the New Zealand context Family Court Counsellors had noted that the video made by the Auckland Family Courts Association "You are Still My Mum and Dad," was useful as an educational tool.¹⁶ At the recent Family Law Conference Henaghan stated that, 'the excellent information pamphlets prepared by the Law Society and the Department of Courts were more than adequate'.¹⁷ None of the women in the TFA study knew that the video or such pamphlets were available. More extensive mandatory education may encourage low conflict speedy resolution.

The legal language of dissolution

11. The use of the word 'dissolution' throughout the Matrimonial Property Amendment Bill 1998 is desirable. Language is a tool for the examination of assumptions and commonly held values and beliefs about social phenomena. The language of 'divorce' has, in the past, pathologised dissolution of marriage and identified the experience as an indicator and cause of social dysfunction. Such an approach was undesirable. Dissolution of marriage can also be viewed as a positive move away from relationships which are

¹³ S. Driedger, *After Divorce*, McLean's Canada, April 20th, 1998.

¹⁴ M. Horan, in Canberra, *Close up and Personal*, Adelaide Advertiser, 8.4.99.

¹⁵ Richards and Ely Children Well Being, Parental Divorce and Family Life: Who seems To Make a Difference in the Longer Term? (UK, 1997), p. 22.

¹⁶ Department of Justice, *Family Court Custody and Access Research, Report 5*, 1991, p.33.

¹⁷ M. Henaghan, *Above and Beyond the Best Interests of the Child*, (Wellington, 1998), p.154.

unhealthy, unproductive, and in some cases abusive. The term 'dissolution' should be used by professionals and implicit in all legislation that refers to the end of marriage. Avoidance of negative labels such as 'family breakdown' 'dysfunctional families' and 'broken homes' can only help all members of families apart recover from the conflict and stress that marks the transition from a family together to one apart.

11.2 Throughout the TFA study I have referred to the 'family-apart', there I attempt to convey the idea that children still belonged to a family although the adults or parents may 'live apart.' Language is the means by which we communicate our values and beliefs. These terms are purposely utilised to convey the notion that dissolution of marriage is a 'life transition' rather than a 'crisis.'¹⁸ The language of divorce has been a persuasive political tool used as rhetoric to explain relationships between social phenomena which cover topics from the sublime to the ridiculous. For example: 'One reason for the fall of the Roman Empire was the breakdown in family relationships'.¹⁹

11.3 Perhaps the legislature could also look to rename the words custody, access and guardianship under the Guardianship Act 1968. These words convey a sense of ownership or power. The terms care, contact and responsibility are being adopted in other jurisdictions. Such language not only sounds more empathetic but also conveys to a child that they are cared for rather than in the custody of someone with power over them.

11.4 The language of Family law is difficult to interpret as a lay person. The wording in all of the legislation that governs dissolution excludes the ordinary citizen from seeking knowledge about their entitlements from public sources such as the local library. Education about the substance and the procedures should be readily available for members of the public.

International conventions on human rights

12. In 1995 I made a submission to the Human Right Commission outlining the possibility that international human rights standards could be applied to domestic litigation in the case of matrimonial property and spousal maintenance. The application of international conventions was possible where there was inequality of outcome between spouses due to the division of labour in the marriage under the current legislation. The analysis was based on the judgment in *Andrews v Law Society of British Columbia*. The judgment in *Andrews* applied where inequality of outcome was the result of historical,

¹⁸ This is a common view in current research about families who have moved into other living arrangements, see: Funder(1996), Hetherington(?), Prior,(1997), Amato (1997).

¹⁹ R. D. Muldoon , Quoted by Rev. Bowden , Milford Baptist Church, North Shore Times Advertiser , 20 May, 1976,p.8. cited in R. Phillips, *Divorce in New Zealand : A Social History.*, (1981), p.129.

cumulative, structural disadvantage. International conventions have been applied in New Zealand domestic courts. The application of International Human Rights Conventions to issues of substantive inequality in the division of matrimonial property and restrictive spousal maintenance provisions under the current New Zealand legislation is possible.

Specific clauses in the bill.

13. Clause 13-Amendment to s12(2)/ Home

The valuation of the homestead. The court will accept one valuation nominated by the Council of the New Zealand Institute of Valuers, or a valuer agreed by the parties. The amendment could include other valuation issues, not simply the homestead. Several participants in my study experienced difficulty establishing valuations of businesses, shares and other real estate.

14. Clause 20- New Sections 18A and 18B/ Compensation

The proposed amendment provides the court with a discretion to, (a) Compensate a spouse who has made post separation contributions to the marriage partnership, (b) Compensate a spouse where matrimonial property has been deliberately or materially diminished by his or her ex spouse. The compensation in both cases is either by way of payment of money or transfer of property. This amendment is viewed favourably as participants in the TFA study reported that there were unfair practices as a result of immediate events at the time of and following separation. This appears to be a critical period of time when assets, money and property can disappear.

14.1 There could be the addition of the word 'damaged' to the compensation clause 18(b) as 'diminish' may not always be considered to include damage to property. This would read materially diminished or damaged. One participant in the TFA study had pay for repairs to property following a violent incident.

14.2 This amendment may also be used where one spouse had added value to the family home post separation by way of for example planting, painting, repairing fixtures or generally improving the home. Such contributions could compensate for occupational rental of the home in the interim period while it was being repaired for sale. One women in the TFA study used her un paid labour to prepare the family home for sale but was obliged to pay a contribution toward rent for that period to the earning spouse at settlement.

15. Clause 21 -s 20 Debts

Section 20 of the current Act has been extensively changed. The section classifies debts to be accounted for on division of property and protects a non bankrupt spouse in the event of the bankruptcy of the other spouse. This

section is welcomed as a participant in the TFA study had been unable to protect her interest in the matrimonial home or the car, which had in part been a gift from her parents. Under this new amendment the spouses protected interest includes section 11 property (acquired by gift) and inheritance as well as the matrimonial home and chattels.

16. Clause 28 New s 26A deferring settlement

This new section provides discretion for the court to defer final settlement of a matrimonial property division or any part of matrimonial property to a future date if the court considers that an immediate settlement would cause “undue hardship” for a spouse who has custody of one or more minor dependent children of the marriage. This clause is welcomed as it potentially ensures a home for the children.

16.1 The clause only provides for minor children. There are circumstances whereby some parents are responsible for the care and protection of older children. Where children remain dependent during an extended phase of adolescence this clause will not provide security for them. There were participants in the TFA study who were providing accommodation for their adult children while they were attending tertiary education establishments and repaying their student loan. One participant was also providing accommodation for her adult daughter and granddaughter. One was using her student loan to provide day to day food and shelter for her adolescent daughter who was also undergoing training in a trade which did not qualify her for a student loan.

16.2 The clause could reflect on the “hardship of the children” as well as focussing on the hardship of the custodial parent. In the past when women have had to prove ‘hardship’ they have not been viewed favourably by the courts. In *Wheeler v Wheeler* (1984)3NZLR 317-319 the focus was on the mother’s apparent hardship and not the children’s.

16.3 The legislature could consider setting aside part of the property for the children at a later date if the home was not to be sold. This of course would only apply where there was sufficient to meet the reasonable needs of the parents. One of the participants in the TFA study commented that while she was not wealthy her ex-partner was. However her children were not granted access to the fruits of their fathers high income and privileged lifestyle.

16.4 Participants in this study were not aware that there was any possibility that the sale of the home could be deferred when they went through their negotiations. The Family Court ordered the sale of one home. All of the other

participants reported that it was assumed in their private negotiations that the home would be sold. The sale of the family home was generally understood to be part of the policy or legal requirement. Only one woman participant in the study retained the family home and that was possible because she purchased her husband's share with funds from separate family property that she inherited from relatives overseas during the period of separation.

17 Clause 37-s32. Maintenance orders.

This empowers the court to discharge, vary or suspend, extend or suspend any existing maintenance order or cancel, vary, extend or suspend any existing maintenance agreement. There is little that is different about this clause other than the language. It could have incorporated a facility for all issues to be heard together at mediation through the Family Court.

17.2 It has been reported in the TFA study that some spouses utilise custody issues to force disclosure of Matrimonial Property by lodging for custody in the court. Hence custody and property issues have become entwined for some families. The opportunity could have been taken to allow spouses to seek mediation in the court for property issues. In addition to the amendment for maintenance there could be a clause re-directing the court to deal with all of the issues at mediation.

18. Clauses 47- 44c Trusts and Limited Liability Companies

These amendments are designed to allow spouses to access funds which have been transferred into trusts and legal liability companies which has the effect of depriving one or both spouses of their share of matrimonial property. The spouse who has disposed of the property is ordered to pay money transfer property or pay income form the trust. This amendment however directs the court to not make an order where it would be unjust to make an order. If there were third persons who benefit from the trust it may very easy to prove that making an order would be "unjust", this would especially be the case if the children were the beneficiaries of that trust which is often the case in family trusts. One participant in the TFA study suggested that Matrimonial Property may have been diverted into a family trust during the initial stages of separation. If her children had been the beneficiaries of that trust she commented that she would have been unlikely to have taken action.

18.1 When matrimonial property has been owned by a trust and there is no separate property there may be no source of compensation. Lawyers in the TFA study commented that the amendment does not go far enough as the

court does not have the power to vest a capital interest in another spouse. In fact lawyers who took part in the interviews for the TFA study commented that as the amendments were being drafted and contemplated there were ways where by 'smart operators were already working under the Trustee Act and the Companies Act to side step these provisions'. Several lawyers believed the amendment would in practice be of little protection from disposition of property into a trust or limited liability company.

18.2 One participant in the study believed that an overseas property had been purchased out of matrimonial property funds but she could not prove it. There was no means of compensation should that have been proven in court because the court can't order the sale from New Zealand. However in this case the property was balance of matrimonial property. There does not appear to be a mechanism for compensation in cases such as this.

19. Disclosure-44B

The court may require a party to disclose information about dispositions of property into a trust or limited liability company. This amendment is long awaited. The court order for disclosure however should not have to be sought. It could be mandatory at separation to fully disclose all property, this would save many people time and money. A mandatory requirement to disclose assets in all dissolution negotiations may prevent subsequent applications for hearings in the court. This could avoid delays and resistance in the private settlement of property issues.

CONCLUSION

Substantive Equality: International Human Rights Standards in Domestic litigation.

In the absence of legislative reform to recognise disadvantage in particular circumstances, the courts will be charged with the duty of policy making. The recent Court of Appeal case *Z v Z* illustrated that outcome inequality emerges when women are disadvantaged due to the traditional nature of the marriage. An approach to policy which leaves the courts to make policy is unlikely to provide certainty in dissolution proceedings. Judicial policy making may open the floodgates of litigation should the legislature choose not to address the issues. Associated fiscal expenditure in legal aid, should the courts be left to make, as well as implement policy, will be an extra cost to government. The Ministry of Womens Affairs, the Working Party on Matrimonial Property, Krauskopf and Krauskopf and the Royal Commission on Social Policy have advised the legislature of possible unintentional inequality under the current guiding principles of the clean break and formal equality. It is apparent that the Matrimonial Property Amendment

Bill 1998 does not address these guiding principles and therefore fails to address inequality of outcome for the spouses of families apart. I wish to conclude this work by appealing to the Government to reform the whole package of Family law pertaining to dissolution of marriage. I would like to remind the Executive and the Judiciary that gender equality is a 'norm' in International Human Rights Conventions, which should not to be ignored. In the words of the former President of the Court of Appeal, now known as Lord Cooke of Thorndon :

*Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.*²⁰

²⁰ *Tavita v the Minister of Immigration* [1994]2 NZLR 257 at 266 (CA)

APPENDIX 1.
EQUALITY, JUSTICE AND MATRIMONIAL PROPERTY
AN EXPLORATORY STUDY.
INFORMATION SHEET FOR PARTICIPANTS

WHAT IS THIS STUDY ABOUT ?

The research will explore social, legal and economic policy implications for mid life women from long term marriages who have experienced dissolution of marriage under the current New Zealand legislation.

The long Title of the Matrimonial Property Act 1976 No.166 states that the Act is :

“ An Act to reform the law of Matrimonial Property; to recognise the equal contribution of husband and wife to the marriage partnership; to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce, and in certain other circumstances, while taking account of the interests of any children of the marriage; and to reaffirm the legal capacity of married women.”

THE OBJECTIVES OF THE RESEARCH ARE TO:

- 1) Gain a detailed understanding of the outcomes for people who have experienced dissolution of marriage under the current Act.
- 2) Identify whether the New Zealand Act meets its stated aims of equitable, just distribution of matrimonial property, maintenance of the same standard of living for the children of the marriage and to question whether the concept of a clean break economic spilt does provide equal consequences.
- 3) Compare the outcomes in New Zealand with other countries.
- 4) Identify any gender specific issues which may impact social, legal, and economic policy outcomes as a result of implementation of the Act.
- 5) Supply documentary evidence to support or refute any gender specific claims in respect of the outcomes of the implementation of the Act.

THERE ARE THREE KEY PARTS TO THIS STUDY:

- 1) Interviews with people who have experienced matrimonial property settlement under the current New Zealand legislation.
- 2) Interviews with experts in the field, legal practitioners, academics and policy makers.
- 3) An examination of key cases from Canada and Australia and the resulting commentaries of leading academics from their countries.

APPENDIX 2(a).

YOUR ROLE IF YOU DECIDE TO PARTICIPATE

If you agree to participate in this study ;

- * We will participate in an informal semi structured, private interview for approximately one hour.

- * You can choose the time and venue for the interview at your convenience.

- * You will be asked for your permission for the interview to be taped and for the transcript to be typed by a secretarial service.

- * The secretarial service will sign a contract which will guarantee confidentiality of information gathered.

- * Your real name will not be recorded in the typed notes or on the tape. You will be able to request that the tape is turned off at any point during the interview.

- * You will be able to review copies of the transcripts and be given the opportunity to make corrections or additional comments if so desired.

- * The information shared by you will be kept in a locked cabinet to which only the researcher has access.

- * Your transcript will be returned to you .

- * The researcher is interested in your personal / professional experiences of the Matrimonial Property Act. The researcher and the supervisors are the only people who will see the typed transcripts.

YOUR RIGHTS IF YOU DECIDE TO PARTICIPATE 2(b)

If you take part in this study you have the right to :

- 1) Refuse to be interviewed, and to withdraw from the study at any time.

- 2) Refuse to answer any question at any time.

- 3) Agree or not agree to the interview being taped. You may ask for the tape to be turned off at any time.

- 4) Ask any further questions about the study that occur to you before during or after your participation.

- 5) Provide information on the understanding that you will not be able to be identified in any reports that are prepared from the study e.g. your name will not be used at any point in the study.

- 6) Decide what you would like to do with the transcript and the taped interview at the end of the research.

- 7) Withdraw any information you have provided for this study, without having to provide reasons and without penalty of any sort.

- 8) Be given access to a summary of the findings from the study when it is concluded

APPENDIX 3-CONSENT FORM

1. I have read the information sheet for this study.
2. I have discussed the detail of the study with Gaye Greenwood.
3. My questions about this study have been answered to my satisfaction.
4. I understand that I may ask further questions at any time.
5. I understand that I may withdraw from the study at any time.
6. I understand that I may decline to answer any particular question in the study.
7. I am assured by Gaye Greenwood that she will feed back information about the research and its progress.
8. I agree to provide information to Gaye Greenwood on the understanding that I remain anonymous.
9. I agree to the transcription of the interview being completed by a secretarial service on the understanding that I remain anonymous and the information remains confidential.
10. I have been assured by Gaye Greenwood that all information I share with her will be kept in a locked cabinet for the duration of the study. I understand that I may request all information I have shared with her be returned to me at the completion of the study.
11. I agree to provide information for this study on the understanding that the research report will eventually be placed in the Massey University Library.

Signed-Participant

Signed-Gaye Greenwood

POPULATION DATA : PROMPTS APPENDIX 4.

POPULATION GROUP	WOMEN	MEN
Divorced Annually (1996) ¹	10,009	10,009
Median duration of marriage(1996) ²	12.6yrs	12.6yrs
Median age at divorce (1996) ³	37.8yrs	40.6yrs
35- 49 yrs divorced (1996 census) ⁴	41,567	30,990
35-49yrs Percentage of divorced Popn	27%	20%
Total divorced Popn (1996 census) ⁵	86,475	66,132
Ratio separated and divorced/ married ⁶	19.4%	15.5%
Sole parents ⁷ (approx ¹ / ₂ due to divorce ⁸)	86%	11%
Custody after separation ⁹	80%-74%	20%26%
Custody after divorce ¹⁰	77%- 67%	23%- 33%
Employed over 15yrs total median income ¹¹	\$11, 278	\$19,243
Sole parent in rental accommodation ¹²	39%	29%
Divorces involving children	52%	52%
Custodial parent with an income of more than \$350 wk ¹³	20%	54%
People Employed over 15yrs ¹⁴	45.4%	54.6%
Full time Workers ¹⁵	36%	64%
Employed/ work part time ¹⁶	37.6%	11.3%

¹ Kwawaja, M and Chan, M. Statistics New Zealand, Christchurch. By facsimile 11.8. 97.

² Kwawaja, M and Chan, M. Statistics New Zealand, Christchurch. By facsimile 11.8. 97.

³ Kwawaja, M and Chan, M. Statistics New Zealand, Christchurch. By facsimile 11.8. 97.

⁴ Kwawaja, M and Chan, M. Statistics New Zealand, Christchurch. By facsimile 11.8. 97.

⁵ Kwawaja, M and Chan, M. Statistics New Zealand, Christchurch. By facsimile 11.8. 97.

⁶ Kwawaja, M and Chan, M. Statistics New Zealand, Christchurch. By facsimile 11.8.97.

⁷ *New Zealand Now- Children*, Statistics New Zealand, Wellington, May (1995), p.22.

⁸ *Womens Access to Justice*, New Zealand Law Commission, Miscellaneous Paper 11, (1997), p.16.

⁹ *A Survey of Parents Who Have Obtained Dissolution: Family Court Custody and Access Research, report 2*, Department of Justice, Wellington, (1990), p.44.

¹⁰ *A Survey of Parents Who Have Obtained Dissolution : Family Court Custody and Access Research, report 2*, Department of Justice, Wellington, (1990), p.44.

¹¹ *All about Women In New Zealand*. Statistics New Zealand, Wellington. (1993), p.109.

¹² *All about Women In New Zealand*. Statistics New Zealand, Wellington. (1993), p.126.

¹³ *A Survey of Parents Who have obtained a Dissolution, Family Court Custody and Access Research, Report 2*. Wellington. (1990), P.26.

¹⁴ Statistics New Zealand, *Census 1996, Employment and Unemployment*, Wellington. (1998), p.19.

¹⁵ Household Labour Force Survey, Wellington, 1995.

¹⁶ *Panui: An Occasional Paper of The Ministry of Womens Affairs*, August (1997), p.5.

POPULATION GROUP	WOMEN	MEN
All Beneficiaries	54%	46%
Domestic Purposes Benefits ¹⁷ (Jun'97)	102,160	10,129
Community and social service workers ¹⁸	160,200	76,400
Average hourly earnings community and social service workers ¹⁹	\$15.27	\$19.70
Time in unpaid work ²⁰	31%	12%
Of working age and in the labour force ²¹	57%	74.3%
Ratio of female to male earnings 1993 ²²	81.16	100
Available for work but no available childcare ²³	10%	1%
Not in the labour force, at home looking after children ²⁴	25.3%	3.4%
District Court Judges ²⁵	20	92
High Court Judges ²⁶	4	37
Court of Appeal Judges ²⁷	0	7
Legal Practitioners ²⁸	28%	72%
Professors of Law ²⁹	4	18

¹⁷ Rankin, C. General Manager Income Support, By Facsimile, 3.2 .98.

¹⁸ Barnett, J., *Gender Wage Gap Part two*, New Zealand Institute of Economic Research (INC). Thorndon, Wellington. (1997), p. 20.

¹⁹ Barnett, J., *Gender Wage Gap Part two*, New Zealand Institute of Economic Research (INC). Thorndon, Wellington. (1997), p. 21.

²⁰ *Panui: An Occasional Paper of The Ministry of Womens Affairs*, August (1997), p.2.

²¹ *Panui: An Occasional Paper of The Ministry of Womens Affairs*, August (1997), p.3.

²² Barnett, J., *Gender Wage Gap Part two*, New Zealand Institute of Economic Research (INC). Thorndon, Wellington. (1997), p. 25.

²³ *Panui: An Occasional Paper of The Ministry of Womens Affairs*, August (1997), p.7.

²⁴ *Panui: An Occasional Paper of The Ministry of Womens Affairs*, August (1997), p.8.

²⁵ *Womens Access to Justice*, New Zealand Law Commission, Miscellaneous Paper 11, (1997),p.21.

²⁶ *Womens Access to Justice*, New Zealand Law Commission, Miscellaneous Paper 11, (1997),p.21.

²⁷ *Womens Access to Justice*, New Zealand Law Commission, Miscellaneous Paper 11, (1997),p.21

²⁸ *Womens Access to Justice*, New Zealand Law Commission, Miscellaneous Paper 11, (1997),p. 37.

Womens Access to Justice, New Zealand Law Commission, Miscellaneous Paper 11, (1997),p.39²⁹

OTHER

Total divorced population at 1996 census - 152,610.

Number of children affected by divorce annually (1996)³⁰ 9,445

At the 1996 census women in their forties were the age group with the highest proportion divorced 29,009 - 33% of all divorced women, 19% of the total divorced population.

At the 1996 census men in their forties were the second highest age group with the proportion of divorced 21,975 - 33% of all divorced men, 14% of the total divorced population.

³⁰ Kwawaja, M and Chan, M. Statistics New Zealand, Christchurch. By facsimile 11.8 97

APPENDIX 5.TRANSCRIBER'S CONTRACT

INFORMATION ABOUT THIS STUDY;

* Participants in this study have provided informal semi structured, private interviews with the researcher for up to two hours.

* They have chosen the time and venue for the interview at their convenience.

* They have given permission for the interview to be taped and for the transcript to be typed by a secretarial service.

* They are aware that the secretarial service will sign a contract which will guarantee confidentiality of information gathered.

* The participants real name will not be recorded in the typed notes .

* The participants will be able to request that the tape is turned off at any point during the interview.

* The participants will be able to review copies of the transcripts and be given the opportunity to make corrections or additional comments if so desired.

* The information shared by the participants will be kept in hard copy and on computer disk, both will be kept in a locked cabinet to which only the researcher has access.

* The participants tape and transcript will be returned to them at the end of the research.

APPENDIX 6.

The semi structured interview schedule for women participants:

- 1.Experiences of the legal system during the dissolution process.
- 2.Financial position pre and post dissolution of the family apart.
- 3.Residential accommodation of the family apart.
- 4.Employment opportunities and choices .
- 5.Childrens reaction and adaptation to dissolution
- 6.Priorities and needs following dissolution.
- 7.The core issues for women and children during the transition form nuclear family to life as a family apart.

The semi structured interview schedule for legal professionals and Judges :

- 1.The objectives and interpretation of the Matrimonial Property Act 1976
- 2.The concept of equality compared with the concept of equity.
- 3.The principle of the clean break split.
- 4.The interface between spousal maintenance and matrimonial property.
- 6.The legal process for dissolution of marriage.
- 7.The interface between The Family Proceedings Act, The Guardianship Act The Child Support Act and The Matrimonial Property Act.
- 8.The influence of overseas cases on domestic law.
- 9.Judicial discretion/ activism.
- 10.Who makes policy? The role of the courts visa vis parliament.
- 11.Identification of shifting patterns of beliefs and definitions of what is of valued to those involved in the law and policy making and any new developments in Family law.
12. Women in the legal profession.
- 13, Influence of International laws and Conventions.

The semi structured interview schedule for policy makers and parliamentarians :

1. Marriage and the political economy in the 1990's compared with 1976.
2. The concepts of equality and equity.
3. Priorities of Family law policy.
4. The political status of family law reform.
5. The policy making process.
- 6.Who makes policy? What were the divisions between law govt and policy?
- 7.The underpinning ideology of current policy makers/ political actors.

APPENDIX .7.

Dear ,

I am writing to feed back information about my thesis which explores the outcomes of dissolution of marriage for mid life women with dependent children. Following the interview which you participated in last year I have been conducting secondary research, coding and interpreting the data and writing up the findings.

I am indebted to the women who have shared their experiences with me and the legal and policy experts who have contributed to the research. Your contribution to my research has been particularly valuable. Overall the transcribed interviews and secondary sources have contributed to a rich and diverse data base about the experiences of families-apart, policy and legal issues relating to dissolution of marriage.

Enclosed is your copy of the transcript from your interview. If you have any concerns, comments or queries please feel free to phone me on the above home phone number.

I hope to present the final draft of the thesis to my supervisors by April 30th. I apologise for not being in contact with you during the last six months. I have been busy in paid work and have also had a raft of family responsibilities and other research to complete which has occupied my thesis writing time. In February I was finally free to return to full time work on this project and I am now on deadline toward the due date for binding of the thesis which is the 31th May 1999. Thank you for your participation.

Warm Regards,

Gaye Greenwood.

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