

A VIEW OF THE FAMILY COURT

In 1964, when he called a national conference on the Family, His Excellency Governor-General Georges P. Vanier made this assertion: "The family is the basic unit of our society, upon its strength and vitality depends the moral fibre of the nation."¹ These words will be given universal assent. The family is the basic social unit of any mature society. Aristotle describes it as the germ-cell of the State.² Throughout the ages, the family has been the first and most important agency in promoting, and preserving, that degree of civilization to which a tired world may presently make claim. It is the institution around which have solidified the permanent social and cultural values which are most cherished in all civilized communities. In stressing the family's function as a conductor of culture, T. S. Eliot says: "The primary channel of transmission of culture is the family: no man wholly escapes from the kind, or wholly surpasses the degree, of culture which he acquired from his early environment."³

The institution of marriage is the legal foundation upon which the family rests. An American Chief Justice stated categorically that "the institution of marriage is the first act of civilization; and the protection of the married state against all molestation or disturbance is part of the policy of every people possessed of morals and of law."⁴

Marriage is defined in an old case as "the voluntary union for life of one man and one woman to the exclusion of all others."⁵ This more comprehensive definition is offered by Edward Jenks: "Marriage may be defined for purposes of English Law as the legalized union of two persons of different sexes, at the time of marriage unmarried, with the object of setting up together a permanent domestic life of the completest possible intimacy, spiritual and physical."⁶

Marriage is a contract but it is a special kind of contract — one from which special rights and obligations flow. As John Selden remarked, in his *Table Talk*, "Marriage is nothing but a Civill contract, Tis true, tis an Ordinance of God, soe is every other contract, God commands me to keep it, when I have made it."⁷ But a marriage contract is not purely a private affair between two individuals. The state is a third party to every marriage. "Marriage," as Lord Devlin says, "though entered into by con-

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1. *Crime and the Community, A Survey of Penal Policy in New Zealand* (1964) at p. 53.
 2. *Hamburger, Max, The Awakening of Western Legal Thought* (1942) at p. 130.
 3. *Selected Prose* (Penguin Books) at p. 250.
 4. *O'Sullivan, Richard, The Inheritance of the Common Law* (Hamlyn Lectures, 2nd series) (1950) at p. 36.
 5. *Hyde v. Hyde* (1868) L.R.P. & D. 130 at p. 133.
 6. *Jenks, Edward, The Book of English Law* (1928) at p. 273.
 7. *Secdon, J., Table Talk* (Sir Frederick Pollock, editor) (1927) at p. 75.

tract, confers, when completed, a status in society that gives society a say in the terms of the arrangement.”⁸

In 1870, Lord Penzance, President of the Divorce Court, made a good statement much in the same tenor. “Marriage is an institution,” he said. “It confers a status on the parties to it and upon the children that issue from it. Though entered into by individuals, it has a public character. It is the basis upon which the framework of civilized society is built; and, as such, is subject in all countries to general laws which dictate and control its obligations and incidents independently of the volition of those who enter it.”⁹

G. K. Chesterton had a good point when he suggested that divorce should be made easier and marriage more difficult. As Margaret Puxon says: “Marriage is one of the easiest contracts to enter into, yet it has far reaching consequences, not only for the parties themselves, but for their children and for the whole of society.”¹⁰ Perhaps, society would do well to guard the entrances to marriage as carefully as it once guarded the exits. Certainly, there are many young couples, whose notions have been distorted by what may be characterized as the Hollywood version of love and marriage, who think that when they get married they are entering into a state of perpetual bliss. When the honeymoon is over and they discover that they have married a very ordinary human being, not a paragon of all the virtues, without rival and beyond compare, the shock of realization is too much for them and they never reconcile themselves to the hard facts of married life. Society requires a couple to obtain a marriage license before they can get married. Perhaps, the time has come when it should require some form of pre-marital counselling before the license is issued, so that the couple could embark upon marriage with their eyes wide open, not blinded by fond and foolish, fairy-tale notions of what marriage is all about.¹¹

For adult men and women who entertain no extravagant hopes, marriage can be the source of their greatest satisfaction in life. It can also be the source of their greatest misery. On balance, in most cases, it proves, more blessing, than curse. A bachelor, Goldsworthy Lowes Dickinson, speaking not from personal experience, but from his observations of his parents, may be permitted a few words on the subject of marriage. E. M. Forster his friend and biographer, tells us that Goldsworthy “came to regard marriage as the best obtainable earthly state — a risky state, like any other, but promising a union of emotion and companionship which

8. Lord Devlin, *The Enforcement of Morals* (1965) at p. 63.

9. *Supra* FN 4 at p. 55.

10. Chesterton, G.K., *The Family and the Law* (1967) at p. 17.

11. California now has a law requiring counselling of teenagers seeking a marriage license.

cannot be found outside."¹² Surely, these words leave little more to be said on the subject.

Browning says somewhere that in the arithmetic of life, the smallest unit is a pair. Since the beginning of civilization there have been men and women who have found the answer to the riddle of existence in each other's being.

In ancient Egypt, a poet wrote:

Without your love, my heart would beat no more;
Without your love, sweet cake seems only salt;
Without your love, sweet 'sheda' turns to bile.
O listen, darling, my heart's life needs your love;
For when you breath, mine is the heart that beats.¹³

Today, a Canadian poet writes in a more matter-of-fact fashion:

You warm me
like a double shot of rye
after a hard day.¹⁴

Though more than three thousand years separate them, these two poets are speaking the same language. Men and women who understand this language respond to a higher law than the laws laid down to govern the relationship between men and women. They do not need the restraints imposed by such laws. But, unfortunately, there are some men and women who do need these restraints. But it should not be forgotten that in the courts which deal with marital problems, there appear only that small percentage of husbands and wives whose marriages have encountered heavy weather. Lord Tanglely makes this point well. "We must remember," he writes, "that it is bad news that is news; good news is not news at all. To my mind the astonishing thing is not the number of divorces which take place, but the overwhelming number of married people who succeed in realizing this ideal of a lifelong union and the family life which a lifelong union both produces and implies."¹⁵

In England a dissolution of marriage could not be obtained through the Courts until 1857. Until that year, said Lord Dunedin, "the law of England is that an English marriage is indissoluble by any court; it is something that cannot be broken, indissoluble in essence."¹⁶

But though the courts could not decree divorce, Parliament could, but this remedy was a luxury available only to the very rich and powerful. It necessitated three costly legal steps: a suit in the Common Law

12. Forster, E.M., *Goldworth Lowes Dickinson* (Pocket Edition) (1962) at p. 4.

13. Pound, Ezra and Stock, Noel (Translators), *Love Poems of Ancient Egypt* (1962) at p. 16.

14. Farmiloe, Dorothy, *Poems For Apartment Dwellers* (Fiddlehead Poetry Books) (1970) at p. 19.

15. Lord Stanglely, *New Law for a New World* (Hamlyn Lectures 17th Series) (1965) at p. 84.

16. O'Sullivan, *The Spirit of the Common Law* (1965) at p. 113.

Courts for damages against a seducer; a petition before the Ecclesiastical Courts for what is known as a divorce a Mensa et thoro (in effect a judicial separation which did not allow the parties to re-marry), and finally a private bill in Parliament (which did allow remarriage).

True words are sometimes spoken in jest. In *Regina v. Thomas Hall*, a case heard in Warwick, in 1845, by some true words spoken in this fashion, Mr. Justice Maule focused public attention on the unsatisfactory state of affairs with regard to divorce.¹⁷

Hall was a poor man who had been convicted of bigamy. In passing sentence upon him, His Lordship remarked that it did appear that he had been hardly used.

"I have indeed, my Lord," agreed Hall, "it is very hard."

"Hold your tongue, Hall," ordered the judge, "you must not interrupt me. What I say is the law of the land which you in common with everyone else are bound to obey. No doubt it is very hard for you to have been so used and not be able to have another wife to live with you when Mary Ann had gone away to live with another man, having first robbed you; but such is the law. The law in fact is the same to you as it is to the rich man; it is the same to the low and poor as it is to the mighty rich and through it you alone can hope to obtain effectual and sufficient relief, and what the rich man would have done you should have done also, you should have followed the same course."

"But I had no money, my Lord," said Hall.

"Hold your tongue," replied the judge sternly, "you should not interrupt me, especially when I am only speaking to inform you as to what you should have done and for your good. Yes, Hall, you should have brought an action and obtained damages, which probably the other side would not have been able to pay, in which case you would have had to pay your own costs perhaps a hundred or a hundred and fifty pounds."

"Oh, Lord!" muttered poor Hall.

"Don't interrupt me, Hall," admonished Mr. Justice Maule, "but attend. But even then you must not have married again. No, you should have gone to the Ecclesiastical Court and then to the House of Lords, where, having proved that all these preliminary matters had been complied with, you would then have been able to marry again! It is very true, Hall, you might say, "where was all the money to come from to

17. Judge Parry, *The Law and the Poor* (1914) at p. 129 et seq. This quote is only one of several versions of Mr. Justice Maule's remarks.

pay for all this?" And certainly that was a serious question as the expense might amount to five or six hundred pounds while you had not as many pence."

"As I hope to be saved, I have not a penny — I am only a poor man."

"Well, don't interrupt me; that may be so, but that will not exempt you from paying the penalty for the felony you have undoubtedly committed. I should have been disposed to have treated the matter more lightly if you had told Maria the real state of the case and said, "I'll marry you if you choose to take your chance and risk it," but this you have not done."

And so Mr. Justice Maule imposed a short term of imprisonment on Hall — not for the crime of bigamy, but because he had not been honest with the woman with whom he had gone through a bigamist form of marriage.

Mr. Justice Maule was a member of a dying breed. His type is now almost extinct. A salty individualist, of the best Victorian vintage, he was more wit than humorist. He sometimes spoke his mind without too delicate a regard for the feelings for others. On an occasion, before he was to make an important appearance before the House of Lords, he had lunch with Sir William Follett, who asked how it was possible for him to sit down to a substantial steak and a tankard of stout at such a time. "To bring my intellect down to the level of the judges," was the reply.¹⁸ When he himself became a judge, he was sitting on appeal and gave judgment first. After hearing the judgments of his brother judges, he remarked: "I have come to the conclusion that my judgment was wrong, and the first misgivings that occurred to me about it were due to the fact that my brothers agreed with it."¹⁹

The true words which he spoke in jest in Hall's case served to rally the forces working for divorce reform in England. "His famous judgment," asserts Lord Birkett, "on the prisoner convicted of Bigamy before him was largely instrumental in securing a reform of the Divorce Laws in 1857."²⁰

In 1850, a Royal Commission was appointed to enquire into the state of the law of divorce. Seven years later, the Divorce and Matrimonial Causes Act went upon the English Statute books. This Act, in Professor Dicey's words, "gave national sanction to the contractual view of marriage, and propogated a belief that the marriage contract, like every

18. Manson, Edward, *The Builders of our Law* (1895) at p. 41.

19. Haynes, E.S., *The Lawyer* (1951) at p. 146.

20. Lord Birkett, *Presidential Address to the Holdsworth Club* (1954) at p. 19.

other agreement, ought to be capable of dissolution when it fails to attain its end."²¹

Manitoba became a Province of Canada on July 1, 1870, and the laws of England as they existed on that date became the laws of Manitoba. Thus the English law of divorce was introduced into this province. For many years, there was some doubt on this score, but, as Power on Divorce states: "The questions of the existence of a divorce law in the western provinces (of Canada) and of courts therein with jurisdiction to administer it have been removed from the realm of legal controversy by the (decision) of the Judicial Committee of the Privy Council in . . . Walker v. Walker in 1919, in respect of Manitoba."²²

When the English Courts were first given jurisdiction to deal with divorce, the unfortunate fact is that they started off on the wrong foot. Rules of evidence and procedure which had been laid down to save poor wretches from the gallows, when there were more than 200 offences which carried the death penalty, were introduced into divorce practise. The Court concerned itself with strict legal issues as to whether or not the case could be proved. Lawyers treated a divorce case as they did a suit for monies owing, or a brief for the defence, or prosecution, in a murder case.

Lord Eldon gives a good explanation of the role of the advocate in a common law court. "He lends his exertion to all," says Lord Eldon, "himself to none. The result of the cause is to him a matter of indifference. It is for the Court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression that truth is best discovered by powerful statements on both sides of the question."²³ The notion that the truth of a dispute between two warring spouses can be discovered by powerful statements on both sides of the question is simply nonsense. It was nonsense in 1857, and it is nonsense today, when wider grounds for divorce and separation are recognized by the law. The fact is that the real truth is not often capable of discovery by legal means alone. The grounds alleged are seldom the real cause of a marriage's failure. The law is not sufficient unto itself in finding the real cause. It must enlist the aid of some form of social enquiry. "There should be some preliminary procedure," asserts Claud Mullins, "concerned solely with the social aspects of the

21. *Supra* FN 5 at p. 129.

22. Power, *Power on Divorce* (1948) at p. 12.

23. *Ex Parte Lloyd* (1822) *Montague Reports* 70 (Also quoted by Lord MacMillan, *Law and other Things* (1937) at p. 182.

existing differences between the parties.”²⁴ The first purpose of such a procedure must be to make sure that the parties have a sufficient understanding of the gravity of the step they are taking in seeking a separation or a divorce, that they understand fully the consequences which may flow from the granting of the relief which they are asking for, that they realize that today treatment for a sick marriage may be available.

Sir Frederick Pollock, whose written word was of such high authority that, as Lord Wright said, “his legal writing advanced the study of English law and its prestige in the world and helped to make it more fit for its high destiny,”²⁵ may be heard on this point. In a letter to *The Daily Telegraph*, of November 14, 1936, (he died a few months later), he wrote: “A court for matrimonial causes should have conciliation for its first object . . . and should be entrusted with wide discretion. It should have power to grant a final decree of divorce when, after full enquiry and consideration, reconciliation proves impracticable . . . When our Divorce Court was created, its method and procedure was modelled, rather as a matter of course, on those of our civil courts in matters of ordinary litigation . . . The application of that scheme to family relationships is, in my humble opinion, all wrong.”²⁶

The idea that a court dealing with matrimonial causes should have conciliation for its first object is not a new one. Thomas Cranmer, Archbishop of Canterbury, who rose to his high office by supporting Henry VIII in his endeavour to legalize his marriage with Ann Boleyn, who was burned at the stake as a heretic during the reign of Bloody Mary, and who, in Helen Cam’s words, “redeemed a record of academic hedging by his humble and courageous end,”²⁷ in his book *Reformatio Legum Ecclesiasticarum*, revealed himself to be well in advance of his time. “Since in matrimony there is the closest possible union and the highest degree of love that be imagined,” he wrote, “we earnestly desire that the innocent party should forgive the guilty and take him back again should there seem to be any reasonable hope of a better way of life.”²⁸

If we bring the clock forward from Cranmer’s day to November, 1966, we find the Law Commission for England, under its chairman, Mr. Justice Scarman, echoing Cranmer’s thought.²⁹ Paragraph 15 of a report on family law submitted by the commission to the Lord Chancellor reads as follows:

24. Mullins, Claud, *Why Crime* (1945) at p. 81. In his *Wife v. Husband in the Courts* (1945) Claud Mullins has this to say at page 29: “I regard it as a medieval conception that husband and wife cases should be regarded solely as legal issues so far as the Court is concerned.”

25. These words are quoted by A. L. Goodhart in his introduction to *Jurisprudence and Legal Essays* by Sir Frederick Pollock (1961).

26. *Supra* FN 24 at p. 69.

27. Cam, Helen, *England Before Elizabeth* (1960) at p. 177.

28. Judge Parry, *The Gospel and the Law* (1928) at p. 220.

29. Mr. Justice Scarman, *Law Reform, The New Pattern* (1966) at p. 33.

“Accordingly, as it seems to us, a good divorce law should seek to achieve the following objectives:

- (1) To buttress, rather than to undermine, the stability of marriage; and
- (2) When, regrettably, a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.”

The Law Commission regarded the question of divorce reform as one “in which social issues and legal questions are inextricably entangled together,” and as one that “is too important a matter to be left entirely to specialists, whether they be churchmen, sociologists or lawyers.”³⁰

Today, as never before, the law needs to be so much more than itself. It needs to be cross-fertilized by the social sciences. But the converse is just as true. The social sciences need the law. They need its restraining hand. Workers in the field of the social sciences sometimes turn a blind eye to the constitutional guarantees of civil liberties. In their over-zealous desire to help those whom they think need help, they sometimes forget that there may be no legal basis for giving such help.

One luxury is still left to us — that is the luxury of being ourselves, of being different if we want to be, of doing what we choose to do — unless, of course, we bring ourselves within the compass of the law. The law is the only effective break on the enthusiasm of those who think that they know so much better than we do ourselves what is good for us. It protects our right to be individuals, not standard products, human peas in a gigantic human pod, well-adjusted to middle-class standards and values, non-deviant from the text-book social patterns so beloved by newly-hatched social workers.

Aristotle claimed that “the government of a family is naturally monarchical,” by which he meant that the husband and father is boss, and make no mistake about it, and that is how it used to be.

Until recently when a man and a woman married, they became in the eyes of the law as one person and that person was the husband. In his Commentaries, Blackstone, with his usual felicity, explains: “By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.”³¹ In those unhappy days, a wife had no legal right to own her own property, to earn her own living, to make her own contracts, to have access to the courts, to have a voice in the upbringing of her children, or to have a say as to whom should govern the country or make the laws of the

30. *IBID.* at p. 32.

31. Blackstone, Vol. 1, Commentaries at p. 442.

land. In the last hundred years, by a series of legislative acts and judicial decisions, a wife became the equal partner of her husband and ceased to be his chattel. She became enfranchised from her position of servitude. In Lord Denning's words, the position of women "whether married or unmarried, has become one of great personal and proprietary independence."³² In these present days, when the winds of feminist fury are blowing full strong, reaching gale proportions at times, some heed should, perhaps, be taken lest the pendulum swing too far and a husband become a mere satellite revolving around his wife — a lesser star in the orbit of a greater one. Surely, a richer and more satisfying human relationship can develop between two equal partners than between a master and his subordinate.

As the quality of the divorce law has improved so has the quality of marriages. There is no reason to believe that there are more unhappy marriages since the divorce laws have been relaxed than there were in the days when the marriage bond could not be severed. Marriage is no longer an unequal partnership. Husbands and wives generally have a more intense and considerate relationship with each other. Most wives are now leading more active and satisfying lives. Marriage brings to modern man and woman a mutually more satisfying personal and physical relationship. But marriages are not all made in Heaven. Some are contracted in haste, and must be repented at leisure. But a woman who makes an unfortunate marriage today is not caught in a trap from which there is no escaping. If her marriage renders her condition intolerable and her life burdensome, she may seek relief in the courts. She is no longer condemned to a life of abject misery by reason of making a wrong choice of a partner in life, or of having that choice thrust upon her.

In his 1962 Reith Lectures, Dr. G. M. Carstairs said: "Reference is often made to the figures for divorce as a sign of social disorganization; but this is to take an over-simplified view. Divorce is admittedly a confession of failure, but it is not an unrelieved disaster."³³ It is certainly not an unrelieved disaster to the parties to a marriage that has broken down beyond all possibility of repair. For them divorce is not necessarily the end. It may be only the beginning of a richer life. One chapter may be closed and another opened which may have a happier ending. No one should be condemned to a life of perpetual misery and frustration because of an unfortunate mistake. But a bargain is a bargain. No spouse

32. Lord Denning, *The Changing Law* (1953) at p. 97. In her valuable book, *Counselling* (1971), Ethel Venables, at page 2, makes this significant statement: "When a man was the autocratic head of the family and his wife and children chattels, there were fewer divorces; but no one should make the mistake of thinking that this is a sign that the quality of married life has deteriorated. The change from boss to partner is difficult but more exciting and there is no going back; the order of events is inexorable."

33. Carstairs, Dr. G. M., *This Island Now* (1962) at p. 63.

should be allowed casually to repent of a bad bargain. No spouse should cavalierly be allowed to repudiate a marriage without giving it a real try, without putting forth a genuine effort to make it a success. An American judge has put this point well: "With eyes wide open," he wrote, in the course of a decision, "this man of adult sophistication, had plucked a lemon in the garden of love, and should not be permitted to throw it away just because it proved to be sour, as lemons are quite apt to be. The bond of matrimony is not one to be thrown off with feverish haste when found galling to the tender cuticle of the individuals bound."³⁴

Lord Justice Asquith is equally expressive on this point. "It may no doubt, be galling," he said, in *Buchler v. Buchler*,³⁵ — "or, in some sense of the word, humiliating — for a wife to find that the husband prefers the company of his men friends, his club, his newspaper, his games, his hobbies, or indeed his own society, to association with her, and a husband may have similar grievances regarding his wife, but this is what may be called the reasonable wear and tear of married life, and, if it were a ground for divorce, a heavy toll would be levied on the institution of matrimony."

But if there has been a genuine marriage breakdown, if all possibility of a reconciliation between the spouses must be ruled out, if conditions in the marital home have become so intolerable that a reasonable human being should not be expected to put up with them, if in short, "the maintenance of the marriage is not morally justified," then the answer to the problem is not to grant the wife a separation, but to dissolve the marriage bond. A separation order leaves the marriage intact but gives the wife the right to live separate and apart from her husband. "The essence of judicial separation is that it gives the spouses the existence of single persons with the status of married persons."³⁶

Lady Barbara Wootton refers to husbands and wives who are separated from each other under orders of courts of summary jurisdiction as "a class, as it were, of homeless spirits, neither married or unmarried, but suspended between the chance of heaven in a happy marriage with a new partner and the certainty of hell with the old one."³⁷

Archbishop Cranmer, who did not approve of separation orders, considered them an "overture to immorality."³⁸ He certainly had a point.

34. *Horst v. Horst* 21 Lucerne Legal Register Report 170. Referred to in Brown, Wilmore, *The Legal Architect* (1959) at p. 109.

35. *Buchler v. Buchler* (1947) at p. 25.

36. Haynes, E. S. P. and Walker-Smith, D., *Divorce and its Problems* (1935) p. 26.

37. He who runs may read, but he runs the risk of forgetting where he reads what he reads. This happened to me in this instance.

38. *Supra* FN 17 at p. 127.

St. Paul said that it is better to marry than to burn. Spouses who are legally separated from each other cannot marry, but many of them do not burn for long. They form illicit unions. "Maintenance of the fiction of marriage by a legal tie," says Dr. W. Friedmann "will drive one or the other or both spouses to sexual and other relations with outsiders, clandestinely or under a social stigma, rather than openly. The law in such cases does not serve the sanctity of the marriage, but it preserves sanctimonious righteousness which will, in fact, increase adultery, fornication, and personal bitterness."³⁹

Society is taking too casual an attitude to the left-handed unions that are springing up between husbands and wives who are separated from their legal spouses and third parties. Such unions, and not divorce, are the real enemy of the Christian concept of marriage. The health of society is dependent upon sound legal marriages. It is such marriages, and not marriages of the common law variety, that are the legal foundation upon which the family — 'the basic unit of our society' — must rest. This point cannot be overstressed. "There never has been," as Dr. Wilder Penfield asserts, "and I believe there never will be — a durable human society based on any system other than the union of man, woman and child, and on fidelity to that union. They form the strong triangle. Happiness, security, love . . . these will always be theirs while the family is intact. Should the family fall, society and civilization will be doomed."⁴⁰ I cannot believe that Dr. Penfield has cause for serious alarm.

Prophets of doom are forever decrying the decay of the family as a social unit. My guess is that the family is here to stay. It will undergo changes. Its organization will become ever more flexible. Never again will the members of a family be subject to the rule of an absolute dictator. But the family as a social unit will still exist, if it should come to pass, that Macauley's New Zealander shall, "in the midst of a vast solitude, take his stand on a broken arch of London Bridge to sketch the ruins of St. Paul's."

After 1857, divorce in England was still a luxury of the privileged classes. The Matrimonial Causes Act did not have much to offer to men and women who could never hope to rise above a mere subsistence level. The recognition that the poor, as well as the rich, had their matrimonial problems, and required swift and inexpensive legal means to solve them, gradually dawned upon the lawmakers. Magistrate's Courts were authorized to deal in a summary way with these problems.

"Magistrate's courts and their predecessors have throughout their long history acted as maids of all work. When new duties had to be

39. Friedmann, Dr. W., *Law in a Changing Society* (Pelican Books) at p. 186.

40. Penfield, Dr. W., *Man and His Family* (1967) at p. 52.

done locally, Parliament usually found it convenient to add them to the jurisdiction of magistrates." These are the words of Claud Mullins who served for fifteen years as a magistrate in London, England.⁴¹ In keeping with this usual practise, Parliament gave jurisdiction to summary courts to hear disputes between wives and their husbands. A section in the Divorce Act of 1857 gave a magistrate jurisdiction to make an order protecting a wife's separate property acquired after desertion by her husband. In 1878, a magistrate's jurisdiction was extended to provide that he could make an order at the instance of a wife for separation, custody and maintenance against a husband who had been convicted of an assault upon her. In 1886 maintenance orders could be granted to wives whose husbands had deserted them and failed to make provision for their support.

The law of Manitoba followed the law of England, at a respectable distance, in providing for wives fast and inexpensive means of obtaining relief against their husbands.

An Act respecting the Protection of Married Women in certain cases was passed by the Manitoba Legislature during its sessions of 1900 and 1901. This Act provided that a married woman whose husband shall:⁴²

1. have been convicted of an assault upon her;
2. have deserted her;
3. have been guilty of persistent cruelty to her;
4. have been guilty of habitual drunkenness; or
5. have been guilty of wilful neglect to provide reasonable maintenance for her or her infant children —

and whose conduct by reason thereof has caused her to live separately and apart from him, may apply to a County Court in the judicial district in which the cause of a complaint wholly or partly arose for an order containing all or any of the following provisions:

- (a) A provision that the applicant be no longer bound to co-habit with her husband;
- (b) A provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of sixteen years, be committed to the applicant;
- (c) A provision that the husband shall pay to the applicant personally, or for her use to any third person on her behalf, such weekly or monthly sum as the Court shall, having regard to the means both of the husband and wife, consider reasonable;
- (d) A provision for payment by the applicant or the husband, or both of them, of the costs of the Court and such reasonable costs of either of the parties as the Court may think fit;

41. Mullins, Claud; *Fifteen Years' Hard Labour* (1948) at p. 125.

42. S.M. (1901) cap. 107.

- (e) A provision forbidding the husband to enter upon any premises where the applicant may be living apart from her husband, and in case such provision is made in any such order it shall not thereafter be lawful for the husband to enter upon any such premises.

On April 6th, 1912, the Manitoba Legislature gave its assent to an Act respecting the Maintenance of Wives and Children.⁴³

Section 2 of this Act provides as follows:

Whenever any husband has deserted his wife or has refused or neglected to provide for or support and maintain his wife, or his wife and family, or whenever any person, who has the control of or who is the guardian or parent of, or is charged with or liable for the support and maintenance of any child or children under the age of sixteen years, shall, without lawful excuse, the burden of proving which shall be on him, desert, wilfully neglect or refuse to provide for the support and maintenance of said children, as the case may be, such wife or any person acting on her behalf or on behalf of the said family or child or children may, from time to time, apply to any police magistrate or two justices of the peace within the judicial district in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act.

Section 3 of the Act gave the Court authority to make a maintenance order, and to make provision for the payment of costs.

By the Wives and Children's Maintenance and Protection Act, 2 Geo. V, C 101, the provisions of these two acts were combined.⁴⁴ A married woman could apply to either a county court judge or a police magistrate for an order containing the same provisions as provided by the two prior Acts.

A step forward was made by this Act. Applications could at the discretion of the Court be held in private.

These three Acts were all based on the concept of matrimonial fault. This concept had been enshrined in the Matrimonial Causes Act of 1857. Divorce was considered as punishment of an erring spouse — a spouse who had strayed from the narrow paths of matrimony. If both spouses wanted a divorce the Court had discretion to refuse it. Section 31 of the 1857 Statute laid down that "the court shall not be bound to pronounce such decree (of divorce) if it shall find that the petitioner has during the marriage been guilty of adultery." In other words a petitioner had to come into Court with clean hands if he hoped to succeed in his action for divorce. If his hands were dirty, the Court could condemn him and his partner in marriage to remain "bound indissolubly in the bonds of mutual infidelity."

When the rule was that fault on the part of one party was necessary and freedom from fault on the part of the other, divorce was often ob-

43. S.M. (1912) cap. 101.

44. Cap. 206.

tained by fraud and sometimes by perjury. Judge Parry called the procedure followed by many husbands and wives of falsifying the evidence in their desperation to obtain a divorce a degrading pantomime. "A member of Parliament," he writes, "having obtained a divorce in this way and married again wrote to the papers describing his procedure and complaining that the law necessitated that he should take part in such a farce and pretend to commit an act that in fact he had not committed, but I do not remember that the Courts even admonished him for his deception."⁴⁵

Judge Parry then goes on to make reference to Sir Alan Herbert's Misleading Case of *Pratt v. Pratt*. In this case a leading counsel who was about to retire from practice took the occasion of his last appearance in court to speak some home truths. "Mrs. Pratt," his client, he said, "is really quite a decent little woman. In fact, everybody in the case is thoroughly decent, including your lordship, if I may say so, and it seems to me a great pity that all these decent people should be put to all this trouble and expense and publicity, when the whole thing might easily be done in two minutes at a registry office or through one of the big stores. On the other hand, of course, I have to live; and you have to live, so we mustn't complain."⁴⁶

In no circumstances, until recent amendments in the law, could a divorce be obtained against the will of the innocent party. D. Mendes da Costa, Q.C., makes this comment on the doctrine of matrimonial fault: "This doctrine is specifically designed to deal with superficialities, to focus upon the symptom and not the illness; by its very nature it shows no concern or interest in getting at the actual cause of marital failure. Also, to what extent, it may reasonably be asked, is it realistic to label one party innocent and the other guilty? Under the regime of matrimonial fault, if a husband commits adultery he commits a matrimonial offence against his wife. Yet if the history of the marriage is reviewed it may be that the husband so acted because of the neglect or disinterest of his wife; or because of her failure to share with him the brunt of family life. And that she thereby created a state of affairs from which adultery became the husband's vehicle of escape."⁴⁷

In March 1947, the Manitoba Legislature passed legislation establishing a Family Court in Winnipeg. This Court was grafted onto the Winnipeg Juvenile Court which had been in operation since February 5, 1909. On May 11, 1949, the Hon. James McLenaghan, K.C., then Attorney-General of Manitoba, gave a radio broadcast in which he explained the

45. *Supra* FN 28 at p. 237.

46. *IBID.*

47. Mendes da Costa, D., *Studies in Canadian Family Law* (1972) Vol. 1 at p. 522.

nature and function of the Family Court. "Because we were aware that domestic cases," he said, "involved not only the parents but vitally affected the children as well, it was felt that some additional step should be taken to preserve the home, in so far as it was possible to do so. It was with this object in view that the Family Court was created in 1947 . . . The ordinary courts are busy courts dealing with a great variety of cases. It was felt that the preservation of the Family was of such importance that there should be a special Court for this purpose. It was decided that this Court should be presided over by a Judge who could devote the major portion of his time to cases involving marital disputes, and he should have a trained staff of counsellors whose aim would be to prevent the break-up of the home . . . A person seeking help with a problem which it is believed requires Court action is first referred to one of the Family Counsellors. The function of the Counsellors is to preserve the family unit wherever possible. The husband and wife are brought together before the Judge or one of the Counsellors to air their grievances and to see if a reconciliation cannot be brought about and the home preserved. . . ."

"When the Family Court was established it was not thought to clothe the Court with an enlarged jurisdiction. There existed . . . power under the Wives' and Children's Maintenance Act to make orders for separation, maintenance and custody of children. This jurisdiction was made available to the Family Court."

Thus when the Family Court was established in 1947 it was required to work with out-of-date tools. It was expected to introduce into Family Law a space-age concept using machinery that belonged to the horse and buggy days.

The first criticism to be made of this machinery is that it is designed for a criminal, and not a civil court. Certainly, there should be no talk of guilty or innocent parties in the Family Court. When he has listened to many hundred family disputes, a judge reaches the firm conviction that in most cases neither party is in a favoured position to cast the first stone. There is a line of cases in the courts of Manitoba which holds that the Family Court is a civil court. I shall cite but one — *Re Wives' and Children's Maintenance Act Vatai v. Vatai*, (1963) 43 W.W.R. 212, a decision of the Manitoba Court of Appeal. In his judgment in this case, Mr. Justice (now Chief Justice) Freedman had this to say: "The learned magistrate appears to have been misled by the fact that in form the proceedings, commenced as they are by the laying of an information, resemble those in criminal matters. But the resemblance is superficial and not real. The applicability of The Summary Convictions Act, R.S.M., 1954, ch. 254, of pt. XXIV of the Criminal Code, 1953-54, ch. 51, is for

procedural conveniences only. It does not of itself fix the character of the proceedings as criminal. These must be examined independently of their procedural machinery in order to ascertain their true nature and substance. Thus examined we see that they are in reality merely proceedings to secure a civil remedy — either a money payment alone, or money together with ancillary relief.”

A draft Family Relations Act and Rules of Practice prepared by the Rules Committee of the Provincial Court of Ontario (Family Division) acknowledges the need for an overhaul of the Family Court machinery. This Act provides that proceedings in a Family Court in Ontario shall be commenced not by an information and complaint, but by a petition which shall set out the relief which the petitioner is seeking and the grounds upon which this relief is sought. Rule of Practice 9(a) acknowledges the necessity of an attempt at reconciling the parties. It reads as follows: “Upon the swearing of the petition, the Clerk of the Court shall appoint a “conference officer” to assist the parties either to reconcile their differences with a view to resuming co-habitation, or in the alternative, to assist them where possible, to effect a settlement of all or some of the issues in the action.”

In the State of New York there is now a general recognition that the first purpose of a Family Court is to attempt to mend broken marriages.

Article 811 of the current Family Court Act provides: “In the past, wives and other members of the family who suffered from disorderly conduct, harassment, menacing, reckless endangerment, assaults, or attempted assaults by other members of the family or household were compelled to bring a “criminal charge” to invoke the jurisdiction of the court. Their purpose, with few exceptions, was not to secure a criminal conviction and punishment, but practical help. The family court is better equipped to render such help, and the purpose of this article is to create a civil proceeding for dealing with such cases.”⁴⁸

The present civil procedure is designed to reconcile, not to separate spouses.

Article 921 strikes the keynote of this procedure: A spouse may originate a conciliation proceeding under this article by filing a petition (stating) that his or her marriage is in difficulty and that the conciliation services of the family court are needed.

And the next article enlists the services of probation officers in the work of reconciliation. “The probation service is authorized to confer

48. Family Law, 1972 Yellow Book

with a potential petitioner and may invite the potential petitioner's spouse and any other interested person to attend such conferences as appear to be advisable in conciliating the spouses. The probation service is also authorized after the filing of a petition to confer with the petitioner and to invite the petitioner's spouse to attend such conferences as appear to be advisable in conciliating the spouses."⁴⁹

Perhaps, no court has advanced further toward the desired goal of mending broken marriages than the Conciliation Court of Los Angeles County. This court enlists the services of a staff of family counsellors who hold conferences with the parties. Its success has been impressive. "Statistics show that in the four years from 1954 until 1958 reconciliations were effected in forty-three per cent of the cases heard. The court has statutory authority to have parties who desire reconciliation to enter into a standard form of reconciliation agreement which may be enforced by contempt proceedings."⁵⁰ "Even though no reconciliation is effected," says Judge Roger Alton, "these friendly and helpful conferences result in beneficial by-products to both parties and particularly their children. Tensions are eased, hostilities reduced, common grounds of understanding created enabling the parties to amicably adjust their differences, such as harmonious visitation arrangements. Many times it promotes the settlement of controversial property rights and the elimination of a bitterly contested divorce case."⁵¹

Surely, a concerted effort to bring about a reconciliation between warring spouses is much to be preferred to the old method of having them come out of their corners swinging at each other, and raising their emotional temperatures to such a pitch that clear thinking cannot survive the gusts of passion. If reconciliation fails, then conciliation may succeed; and spouses, if they feel that they must put an end to their marriage may do so and still maintain some shreds of respect for themselves and for each other.

In an article, written in 1961,⁵² explaining the philosophy underlying the Divorce law of Australia, Sir Garfield Barwick, then Attorney-General of the Commonwealth, had this to say: "The Parliament has provided mechanisms firstly to stabilize marriages which are formally current so as to retain and promote their vitality and their function, both for the spouses and for the community; secondly the Parliament has provided a means of resolving the formal bond with justice when chance of reconciliation, or restoration of vitality, has completely disappeared." Sir

49. **IBID.**

50. MacDonal, James C., *A Comprehensive Family Court* (1967) 10 C.B.J. at p. 334.

51. *The Conciliation Court of Los Angeles County*, PFAFF.

52. Hambly, D. and Turner, J. N., *Cases and Materials on Australian Family Law* (1971) at p. 116.

Garfield went on to say that the 1959 Act sought "to combine in one statute the grounds based on the traditional principle of matrimonial offences with a ground based on the principle of breakdown of marriage when the commission of an offence is not an element."

He discussed the provisions of the Act which call upon courts to canvas the possibility of a re-conciliation between the spouses. "Part III of the Act requires a Judge hearing a matrimonial cause to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage."

In New Zealand there is a general recognition that "the family stands or falls by the quality of the marriage." To improve the quality of marriages an Advisory Committee has been established to make marriage guidance a vast team effort, available to all marriages that are encountering troubled storms that render married life less sweet than it should be. In *Crime and the Community*, a volume published by the Department of Justice of New Zealand the claim is made "that marriage counselling works in a significant number of cases — perhaps as high as a third. Already there must be a few hundred couples, and many more children, in this country who are grateful for the help they have received from marriage guidance."⁵³

"The potential good is incalculable. As Dr. W. R. Carrington, an Australian psychiatrist, has said: "If we can do the job properly, marriage guidance might turn out to be the most important development in our social services in the 20th century."⁵⁴

The fact of progress in the divorce laws of England is written large and plain on the pages of the statute books. The Divorce Reform Act 1969, (section 3 (2)) provides "If at any stage of proceedings for divorce it appears to the court that there is a reasonable possibility of a reconciliation between the parties to a marriage the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation."

In England, since January 1, 1971, "the sole ground on which a petition for divorce may be presented to the court by either party to a marriage shall be that the marriage has broken down irretrievably."⁵⁵ This provision is an attempt to get away from the principle of 'fault' or matrimonial offence. Proof of the breakdown of a marriage may be established by proving one of the following facts.

53. Dept. of Justice of New Zealand, *Crime and the Community* (1964) at p. 57.

54. *IBID.*

55. Judge H. B. Grant, *Family Law* (1970) at p. 97.

- (1) That since the celebration of the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.
- (2) That since the celebration of the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.
- (3) That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.
- (4) That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted.
- (5) That the parties to the marriage have lived apart for a continuous period of at best five years immediately preceding the presentation of the petition.⁵⁶

Since 1857, the English divorce law has been moving slowly in the right direction. It still has a little distance to go, if we accept Edmund Cahn's three basic criteria of a modern and enlightened divorce law. These are:

- (1) divorce without courtroom drama,
- (2) divorce without defendant's guilt, and
- (3) divorce despite plaintiff's guilt.⁵⁷

In 1949 a Family Court was established in Japan. The court has jurisdiction over family matters, juvenile delinquency, and contributing to delinquency. Family matters which are dealt with by the Court include cases of adoption, support and guardianship, declarations of incompetence and absence or disappearance, distribution of marital property upon divorce, partition of property inherited in co-ownership, conciliation proceedings and dissolution of adoptive relationships.

The Court does not handle divorce proceedings but any person who wishes to take action for divorce must first apply for conciliation proceedings in the Family Court. "The reason for this," explains Chief Judge Yorihiro Naito, of the Family Court, in Tokyo, "is the special recognition given to mutual concession of the parties concerned for the harmonious solution of family affairs rather than in open court hearings."⁵⁸

Conciliation proceedings are conducted by a conciliation committee, consisting of a judge and two or more commissioners, one of whom is generally a woman. Such proceedings may result in a reconciliation and

56. **IBID.**

57. Cahn, Edmund, *The Moral Decision* (1956) at p. 116. The 1966 Report, *Putting Asunder: A Divorce Law for Contemporary Society*, of the Commission established by the Archbishop of Canterbury recommended that the whole idea of matrimonial offence be replaced by the concept of irretrievable breakdown. The Bishop of Exeter, chairman of this Commission and its other members met with the Law Commission. From this meeting a compromise resulted and this compromise gave birth to the Matrimonial Divorce Reform Act 1969. Sensible people have always believed that half a loaf is better than no bread at all.

58. *Juvenile Court Judges Journal*, Vol. 19, No. 4, p. 131.

rehabilitation of the matrimonial relationship, or in an agreement for a divorce.

Family Court Judges in Japan are given special training to fit them for their special duties. They must serve as judicial apprentices for two years. Then, if they pass a special examination, they are appointed assistant judges. After serving for ten years as assistant judges, they may be appointed as judges.

The Japanese experience gives some confirmation to these remarks from the report of the McRuer Commission of Ontario: "Legal training is not enough. This is an area in which the Continental system of appointing judges should be followed. There judges are trained as career judges. They are not appointed from the bar as in Canada. Experience in the actual practice of law is not likely to be of much value to a juvenile and family court judge. Nor will years of training in commercial, corporation and property law assist him."⁵⁹

These remarks are very true — and yet it would be a risky venture, indeed, to appoint as a Family Court Judge anyone who has not had basic training in the law. It would be as sensible as appointing as the captain of a ship a man who had no basic training in navigation.

A Family Court cannot rise above its source and it finds its source in the philosophy of the presiding judge. In his *Growth of the Law*, Mr. Justice Cardozo quotes Chesterton's remark that the most important thing about a man is his philosophy, and he goes on to say: "The more I reflect about a judge's work the more I am impressed with the belief that this, if not true for everyone, is true at least for judges."⁶⁰ He might have added that it is especially true of judges whose task it is to deal with marital and family problems. A Family Court judge's philosophy determines the direction in which he faces. It governs his approach to the problems to which he must strive to find adequate solutions.

There are two approaches to the law: one regards it as a set of fixed and inflexible black letter rules to be applied with slot-machine precision to any legal problem that presents itself — the other as a living social institution designed to meet the needs and adjust the problems of men and women living in organized society. The first approach regards the law as an end in itself, the second as a means towards desirable social ends. The second approach is the one which must be followed by a Family Court Judge. Fortunately, today, in the legal profession, the emphasis is upon this approach.

59. *Supra* FN 47 at p. 25.

60. Mr. Justice Cardozo, *Growth of the Law* (1924) at p. 59.

Much current criticism of lawyers is at least a generation out of date. The legal profession has lost the status of a craft and is gradually reaching the status that it has claimed, on doubtful grounds, for generations — that of a learned profession. Law schools have ceased to be trade schools. There is still much dead wood around, but, with their permanent teaching staffs, their learned journals, their research institutes, they are becoming centres of creative legal thought. Amid the confusions of a materialistic society, they are creating, in the legal world, a current of true and fresh ideas.

A straw that indicates the way in which the wind is blowing is offered by this comment made by Professor Lawrence M. Friedman in a lecture which he gave at Osgoode Hall Law School in November 1972 — one of a series of lectures on the general theme Law and Social Change. "It is significant," he said, "that a law school, in 1971, should choose to sponsor a series of lectures on the subject of law and social change. Blackstone would not have understood what was meant by such a title. Neither would C. C. Langdell, in the United States in the 1870's. It is unlikely that such a topic would have stood at the centre or even at the fringe of academic interest in law as recently as a generation ago."⁶¹

In Sir Walter Scott's novel, *Guy Mannering*, Lawyer Playdell, pointing to his books, the best editions of the best authors, says: "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect." Today, a lawyer needs more than some knowledge of history and literature before he may venture to call himself an architect. He needs to know something of the political and social sciences. If he attends a modern law school, he has the opportunity of acquiring this knowledge — all that is required from him is to put forth the effort.

In the formal atmosphere of a court, certainly, a judge may be able to establish beyond all question that Mr. X blacked his wife's eye on a Saturday night, or that Mr. Y spent the night of January 31st, in the Don Juan Motel, with Miss Gorgeous Geegee. But, if he confines himself to traditional legal methods, he will never come within a hundred miles of finding out why these things happened. If he leaves the clanging chains of strict legalism at the door of the courtroom, he is more likely to get at the heart of the matter. If he calls upon the assistance of a family counsellor, he is more likely still.

There seems to be a great deal of misunderstanding about family counselling. In some quarters family counsellors are regarded as meddling busybodies, as recent recruits to the already swollen ranks of the

61. Ziegel, J. S., *Law and Social Change* (1973) at p. 17 .

professional do-gooders. Cervantes says that the most difficult lesson in the world is to 'know thyself'. This is the task of a family counsellor — to try to help the partners to a marriage to know themselves. Whether they live separate and apart, or whether they live together, they are the same people — they have to live with themselves. A man may run away from his marriage but he cannot run away from himself. Sometimes it helps him with his problems if he can be made to see the sort of person he is condemned to live with, whether or not he lives with his wife. A manual used by family counsellors in Australia puts this point well: 'The aim is for the client to gain that insight into his behaviour within his marriage which will enable him to adjust himself more acceptably to his situation.'⁶² And later this manual offers this explanation: "Marriage counselling in this form is not a substitute for religion nor for legal or medical advice; it is simply a means by which people can be helped to see themselves and their marriages with greater insight — a means by which they may be assisted towards a resolution of their own problems."⁶³

Family counsellors do not profess to be miracle workers. They strive simply to help their clients to help themselves. In this pursuit they do achieve occasionally something that does look much like a miracle.

In family counselling, as Mary Holt suggests, sympathy and science meet and mingle.⁶⁴ At this stage, there is, perhaps, more sympathy than science. But sympathy is not to be discounted. It can be a powerful solvent of matrimonial problems. Another person's genuine concern and sympathy can be a source of strength to an harrassed wife who has reached the end of her own resources. All some wives need to enable them to face their problems with renewed hope is a sympathetic shoulder to lean on from time to time.

But a family counsellor who lets sympathy dominate his approach to a client's problem is not going to achieve success. In counselling to 'sympathize with' is not synonymous with to 'side with'. The attitude "my client right or wrong" is a fatal one. The approach must be strictly objective. Family counselling is hard work. It calls for special training and special skills. It is no job for an amateur. In *S. v. S.*,⁶⁵ Sir Jocelyn Simon, President of the English Divorce Court, commented thus: "it is generally accepted that reconciliation is often more likely to be successful, both immediately and permanently, if it is negotiated with the help of those who have the requisite personal qualities for, and specializ-

62. Herbert and Jarvis, *A Modern Approach to Marriage Counselling* (2nd ed.) (1969) at p. 7.

63. *IBID.* at p. 21.

64. Holt, Mary, *Counselling in Marriage Problems*, (1971) at p. 1.

65. (1968) P. 185 at 188.

ed training in, the work. Under such guidance, furthermore, even if a reconciliation of the matrimonial relationship cannot be effected, at least the problems arising out of its disruption can often be solved with a minimum of injury to the parties and to their children.”

In every enquiry there must be a starting point. Into an enquiry of why a marriage went wrong, a good starting point is from the conviction that every normal person when he marries stands upon sufficient common ground and has sufficient shared interests with the partner of his choice to want to spend the rest of his life with her. Mistakes are made. Men and women do sometimes make a wrong choice in marriage. There are some conjugal knots that are tied which simply must be untied. But the mistakes are the exception, not the rule. Most marriages – and I am speaking of the situation in Canada – have more than an even chance of being successful. For many causes, in the present day world, most marriages do, at times, run into stormy weather. But by the exercise of patience, forbearance and common senses, most husbands and wives weather these periodic storms. Unfortunately, some do not. Some marriages break down to the point at which conditions in the home become so intolerable that no reasonable human being should be expected to put up with them. In such cases, to attempt reconciliation is a waste of time. But there is always conciliation. With the help of a family counsellor husbands and wives may be encouraged to settle their differences like reasonable, adult human beings. If they must separate, let them do so with dignity, retaining some shreds of respect for themselves and for each other. I have used these words before but they bear repeating. If, of course, a wife and husband, insist upon having a day in court, the door of the courtroom must be left open to them.

Children are the real losers in any marriage conflict. Many factors enter into the opportunities for normal growth and development of a child, but there will be no normal growth and development unless he is made to feel that he is a welcome member of the home into which he is born – whether he is born on the shores of an Arctic Sea, or on the banks of the Ganges, or in the materialistic security of a middle class home in Suburbia, North America.

Nature’s plan requires every child to have two parents. In this uncertain world, a child can hardly do with less. Lady Barbara Wootton asks a good question: “How, in fact, is the standing miracle of the socialisation of the savage human infant so often successfully accomplished?”⁶⁶ Today, the effort to bring about this standing miracle is so great that, except in happy exceptional circumstances, the full efforts of two

66. Wootton, Barbara, *Crime and the Criminal Law* (Hambyn Lectures 15th Series) (1963) at p. 23.

parents are required. It is not open to question that the best chance that a child has today of growing up to be a good citizen, a credit to himself and to his community, is to have the love and protection of two parents during his formative years.

Friction between parents may shatter the lives of their children, by warping their relationship with members of the opposite sex; or by driving them, because of inner conflicts, into delinquent behaviour. It can also affect the lives of generations yet to be born. Unhappy children grow up to be unhappy parents and to have unhappy children in their turn. This melancholy fact is brought home to a Family Court judge when he has three generations of one family in his court on the same afternoon all with the same basic problems.

The child is father to the man. If the child has a disturbed childhood, if he suffers from emotional malnutrition, the man will be disturbed and he will suffer from an emotional deficiency, and have no love to share with wife, children or friends. An iron rule prevails — only the child who is given love grows up to be a man who has love to give.

As Morris Ernst and David Roth point out: "Marriage is dissolved by divorce but parenthood is not. Although two people are completely divorced as man and wife, both legally and emotionally, it is well to face the fact from the start that if they are parents they are bound by their children whether they like it or not — 'for better or for worse' and until death do them part."⁶⁷

Fortunately, when they have taken a clear look at the picture, some parents make the decision that they cannot afford the luxury of a divorce, or a separation, because of the effect that it may have on the emotional lives of their children.

The pity is that more parents cannot be made to see the facts in their true light.

I sat for about eleven years," says Sir Alfred Buchnill, "as one of the judges in the Probate Divorce and Admiralty Division, and for the next five years in the Court of Appeal (in England) and was often a member of the Division of that Court which heard Divorce appeals. Those years taught me that the rift between husband and wife was often due to their distorted vision of each other's character and conduct, and to the wrong interpretation of what the other said or did. I am sure that in some cases; if only the husband and wife drifting into the Divorce Court could understand the true all-round position, and the disastrous effect of divorce

67. Ernst, Morris and Roth, David, *For Better or Worse* (1952) at p. 142.

68. Buchnill, Sir Alfred, *The Nature of Evidence* (1953) at p. 12.

upon themselves and their children, they would have the wit and the grit to make a success of the marriage."⁶⁸

As Roscoe Pound asserts: "Law must be stable and yet it cannot stand still."⁶⁹ It cannot stand still because it must be sensitive to the new social values and ethical concepts that are constantly emerging. For this reason, there has always been, and there will always be, a distinction between what the law is and what the law ought to be. The task of the lawmaker is to attempt to make this distinction approach the vanishing point.

Family law is due for a complete overhaul. It must be brought into step with current social attitudes. What it is should be brought more in line with what it ought to be. The first step in this direction would seem to be the establishment of a unified Family Court — a Court which would deal with all the legal problems that arise between the members of a family. Family law may be expected to cover, in Lord Lloyd's words, "the legal regulation of marriage; nullity of marriage and divorce; the duty and enforcement of the right to maintenance and support as between members of the family, and the duties and rights of parents or guardians in regard to their children or children under their care."⁷⁰ It might also be expected to deal with property settlements as between husbands and wives.

As the excellent working paper on the Family Court prepared by the Institute of Law Research and Reform in Alberta makes clear there are many jurisdictional problems that would have to be ironed out before a unified Family Court could be established. But there are no problems that are not capable of being resolved. "An enlightened Federal Government," says Judge H. A. Allard, "and co-operative provincial governments could readily provide devices to overcome constitutional rigidity if this was seen as desirable."⁷¹ Where there is the will, the way may be found.

Judge Parry, who certainly made his full contribution to the purpose of promoting peace between angry litigants, once said that he could foresee a time when the preamble to every statute will be "Blessed are the Peacemakers." A beginning should be made. A good place to begin would be to use these words in the preamble of a statute creating a unified Family Court.

ROY ST. GEORGE STUBBS*

69. This is the opening sentence of Roscoe Pound's *Interpretations of Legal History* (1923). Pound comments thus at page 205 of his *The Spirit of the Common Law* . . . "the conception of law as a means toward social ends, the doctrine that law exists to secure interests, social, public and individual, requires the jurist to keep in touch with life."

70. Lord Lloyd, *Law* (Concept Books) (1968) at p. 94.

71. *Supra* FN 59 at p. 28.

* The senior judge of the Winnipeg Family Court.

