TOWARDS NON-ADVERSARY PROCEDURES IN FAMILY LAW

*H. A. FINLAY**

I

Law is concerned with the adjustment of interests and the resolution of disputes. Differences inevitably arise between individuals, and the legal system and courts of law have provided the traditional mechanism whereby society has resolved conflicts and adjusted the respective interests of its members.

We regard it as the distinguishing mark of a civilized society that there should be guidelines for the use of the courts by which they shall process the disputes which come before them. These guidelines must be both known and certain, to enable all members of society to shape their conduct accordingly. They must be capable of application and of enforcement, and that enforcement must be guaranteed by the state. They will form a standard of conduct, and to conform to them will be a response, both to legal and to moral rules, for legal rules of conduct tend to become, if they were not so to begin with, part of the moral code of the society in which they operate. If they diverge from that society's morality, or if they become outdated and out of tune with prevailing opinion and morality, they will be abolished, modified or allowed to fall into desuetude. It is, incidentally, this process of change, and the pressures which it generates that gives the impetus to law reform.

The guidelines for the resolution of conflicting interest disputes consist of a network of legal rules, which confer rights and impose duties on individuals in any given constellation of facts. These are common to all civilized systems although there may be some differences in method between them. The civil law works through its codes, while the common law holds to the notion of a received tradition based on custom, case law and precedent, applied by the courts with a good deal of pragmatism, and made to suit individual cases by the judicious use of the discretion. But these differences do not go to the essentials of our legal systems, their purposes, methods, assumptions and achievements. These essentials are based on and presuppose a dispute between two or more parties, in which each party relies on some rules or propositions of positive law, while countervailing rules or principles may be distinguished or otherwise discounted or discredited. The process, however, presupposes a continuing position of conflict, and it is the resolution of that conflict which is the object of the legal process. It includes the composition of the dispute at an

* Associate Professor of Law, Monash University; Member of the Victorian Bar.

earlier stage and before the court's adjudicative power is finally exercised. Practising lawyers well know that such compositions or compromises are powerfully helped along by the imminent deployment of court processes, and settlements at the door of the court or even in the course of litigation are a common feature of our litigious process.

Whereas the conflict which is resolved only by the decision of a court of law at the conclusion of a possibly long and bitter contest betokens polarized positions of the parties, the compromise which has been achieved before or during the trial implies that there has been a change in their attitudes. There has been a yielding, a modification of the litigants and their viewpoints, their patterns of behaviour and modes of thought. This leads one to ask whether, if one were to concentrate more on this aspect of a dispute situation, it would not be possible to forestall the setting in motion of the legal process in personal disputes? Certainly one would expect that the more the elements of the dispute were based on a clash between the personalities of the opposing individuals as distinct from the subject matter of the dispute, the more such an approach may offer a means of preventing litigation. This would apply particularly in the area of family law, which is based on interpersonal relationships, and where disputes, once they arise, can involve the whole personality and culminate in a fight to the death of the relationship.

Of all human relationships, none are more personal, private and intimate than the relationships existing within the family, particularly the nuclear family of modern Western industrial society. Our law has traditionally protected confidentiality between spouses, even to the extent of allowing that principle to override, for example, the requirements of criminal justice in the matter of compelling incriminating evidence against one spouse being given by the other. But what has the law got to do with relationships within the family? Should the law be allowed to enter the sanctum of the matrimonial home and seek to lay down and enforce rules of conduct that should more properly be dictated by love, affection and mutual consideration? Unfortunately, any human relationship may be subject to the threat of breakdown at some stage or other. When this happens, the law steps in once the parties are no longer capable of regulating their own relationships themselves. So also in family law, the law and the machinery of justice have been used to regulate what was left of the matrimonial relationship, to wind up the partnership of marriage and to oversee the wellbeing of children. The rubric "family law" is of relatively recent origin — it is both more accurate and more comprehensive than was the older "Law of Domestic Relations".[1] Certainly, the term is more comprehensive.[2] But it also underlines the importance which the law has in our social system in dealing with this subject matter.

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[1] E.g. in Eversley's standard textbook of that title, first published in 1885. Among the earliest examples of the use of the term "family law" which I have been able to find is in W. Harrison Moore, *The Constitution of the Commonwealth of Australia*, London, 1902, Pt. VIII, Ch. 1, Section E.

[2] *Cf.* Eversley, *op. cit.* preface to first edition, p.x: "Infancy by itself cannot, of course, be properly styled a 'domestic relation' . . . but because of its importance it has been deemed advisable to discuss it in this treatise, though separately and apart".

Law is concerned with rights and duties,[3] and if family problems are seen primarily in terms of rights and duties, then a reliance on the law and its processes is entirely justified. The use of law in relation to the family may be traced to three considerations: the abovementioned device of solving family problems by legal means, the interest of the community in the family as a cornerstone of society, and the history of the regulation of the family in Western Society.

II

Professor Glendon has traced the historical development of marriage from Roman times to the present day.[4] From a pre-Christian, secular institution of an essentially private, non-legal nature, marriage became a sacrament, and as such a logical subject for regulation by the Church, and a social institution in which the State came to have a predominant interest. Under the influence of the Roman Catholic Church, it came to be permeated by law,[5] which regulated the conditions for its formation as well as the legal duties and consequences arising out of it.[6] Marriage and marriage law thus came to be based on the sacramental character of marriage.[7] Although the ministers of that sacrament were the parties themselves, the presence of a priest as a witness became compulsory.[8] The modern form of marriage in canon law was settled at the Council of Trent in 1563 by the decree of Tametsi although its adoption was not necessarily enforced in every Catholic country at precisely the same time.[9]

Eventually and for a variety of reasons, such as the Reformation, the Roman Catholic Church lost its exclusive jurisdiction over marriage in an increasing number of countries and the State took over.[10] What Glendon has called the juridification of marriage now became complete. The contents of some of the rules may have changed,[11] but the mechanisms and techniques of the law continued to apply to the institution of marriage. Marriage was no longer based on its sacramental character which had transcended the personalities of the parties, but had now become a corporate union which ultimately was no more than a private legal contract between two individuals of different sex.[12]

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[3] It would be presumptuous to attempt to define law in this short space, but this statement should be uncontroversial enough. For a comprehensive discussion and overview of this aspect of law, see Paton, *Jurisprudence*, 4th ed., Paton & Derham, Oxford U.P., 1972, Ch. 3.

[4] Mary Ann Glendon, *State, Law and Family*, North-Holland Pubg. Co. 1977.

[5] Muller-Freienfels, *Ehe und Recht*, Mohr, Tubingen, 1962, at 12.

[6] Glendon, *op. cit. supra* n. 4.

[7] Muller-Freienfels, *op. cit. supra* n. 5 at 13.

[8] Glendon, *op. cit. supra* n. 4 at 310.

[9] *Id.* 315.

[10] *Id.* 316.

[11] See e.g. the complex regulation by canon law of the prohibited relationships of consanguinity and affinity, described in Pollock & Maitland, *History of English Law*, Vol. II, at 385-389. Of the complicated rules governing this area of the law the authors say: "they are the idle ingenuities of men who are amusing themselves by inventing a game of skill which is to be played with neatly drawn tables of affinity and doggerel hexameters", at 389. *Cf.* Finlay, "Farewell to Affinity and the Calculus of Kinship", 5 *Uni. of Tas. L.R.* 16 for a brief review of the abolition of the impediment of affinity and the simplification of the rules of consanguinity in Australian law.

[12] Muller-Freienfels, *op. cit. supra* n. 5 at 20.

Upon this contractual relationship, the State superimposed a network of legal relationships within marriage, on the basis of which each party was endowed with a plenitude of marital rights, which had their counterparts in corresponding duties. Demands which arose out of these rights could then be litigated in the courts. Until 1857 in England these were the ecclesiastical courts, but with the passing of the Divorce and Matrimonial Causes Act of 1857,[13] the secularisation of English marriage law became complete.

We know that so far as English law was concerned, these developments were not contemporaneous with those in other European countries, although they followed a similar sequence. The changes which were brought about by the Council of Trent in 1563, in England had to wait another two centuries until the Clandestine Marriages Act 1753.[14] And a century later again, the reforms achieved by the Divorce Act of 1857 saw the setting up of the new secular Divorce and Matrimonial Causes Court. "Family law" had arrived, for now both the inception of marriage and its termination (otherwise than by death) had become integrated into the secular legal network: Lawyers had become the midwives as well as the undertakers of marriage. "The solution to the question which arises for determination in a divorce case cannot be settled on a consideration of the Christian doctrine of marriage as laid down in the Book of Common Prayer, but on a true construction of the relevant Acts of Parliament."[15] Thus "the new principle of judicial divorce . . . was that a broken marriage could be treated like any other civil wrong; prove the wrong done to you, and the law will grant its remedy".[16] This is an apt description, although the reference to broken marriages would, in the context of 1857 have been considered an anachronism. The concept of marriage breakdown, of seeing marriage and divorce in terms of personal relationships rather than rights and duties belongs to the twentieth century.[17] This way of looking at marriage is in my view incompatible with that which regards marriage and divorce primarily in terms of property and other legal relationships, and recent developments in this area of law have been characterized by the turmoil which arises in any attempt to mix antithetical concepts as much as mixing such physical substances as oil and water or the hot and the cold. Marriage breakdown implies and invites the possibility of helpful intervention from without. A helpful approach,[18] however, is not promoted by a dogmatic insistence on legal rights and duties. The adversary process is based on the assumption of a struggle between the parties.[19]

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[13] 20 & 21 Vict. c. 85.

[14] Lord Hardwicke's Act, 26 Geo. II, c. 33.

[15] *Weatherley* v. *Weatherley* [1947] A.C. 633, *per* Jowitt, L.C.

[16] Sir Leslie (now Lord) Scarman, *English Law — The New Dimension*, Hamlyn Lectures, Stevens & Sons, London, 1974, at 30.

[17] Report of Royal Commission on Marriage and Divorce (Morton Commission), 1956; Archbishop of Canterbury's Committee in *Putting Asunder*, 1966; *cf.* Finlay: "Fault, Causation and Breakdown in the Anglo-Australian Law of Divorce" (1978) 94 *L.Q.R.* 120.

[18] Such as was pioneered in the United States by Judge Paul W. Alexander who stressed the value of a therapeutic approach; *cf.* the "helping court" concept of the Family Court of Australia, as advocated e.g. by Watson, S.J., a Senior Judge of that Court and one of its architects.

[19] *Cf.* Muller-Freienfels, *op. cit. supra* n. 5 at 239.

The content of that struggle were the contractual rights of the parties. Marriage was attended by that bundle of rights comprised within the notion of the consortium. These were personal rights which were infringed by an unprovoked abandonment of the consortium by one of the parties, as in desertion, or by the perpetration of an act which constituted a direct infringement, as in adultery. But underlying such breaches of an almost quasi-criminal chracter, when viewed in the context of the relationship between the parties, was the notion of property. Linked with this was the important social function of marriage as a means of implementing dynastic or property alliances. Only with the rise of the middle class and the gradual extension of property ownership to it and to the lower classes in the train of industrialization did marriage become a significant institution that was meaningful to all sections of society.[20]

There was another powerful philosophical foundation for the law relating to marriage. This was the interest which the state took in the institution of marriage. Marriage was seen as the foundation of the family and the family, in turn, as the cornerstone of society. The law could be, and was used for the implementation of population policies and based on considerations of purely practical utility.[21] Control by the State could go so far as the Prussian Civil Law of 1794 which dealt with such intimate matters as sexual relations, and the frequency and length of time governing the taking to bed and breast-feeding of an unweaned infant, or the institution in Switzerland of certain "morality courts" which, prior to 1874, watched over the enforcement of marital duties between the parties *inter se* and were able to punish with imprisonment of up to one year persistent dereliction of such duties.[22]

But even in a climate of less regimentation and greater personal freedom, status was always considered as an important matter of public concern.[23] A restrictive attitude to the availability of divorce was regarded as being founded in the public interest in the cohesion of marriage and the family and through them, of society itself. There was also a very strong economic basis for marriage as a public institution: the obligation of the husband to maintain his wife and children, to prevent them from becoming a public liability.[24] Divorce was the ultimate sanction against a wife's infidelity whereby she might be introducing "spurious offspring" into her husband's lineage, who threatened to alienate his title and estates from the family to which it legitimately belonged.

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[20] *Cf.* e.g. Glendon: "So far as the common law of England was concerned, propertyless individuals came to the attention of the legal system principally as objects of the criminal law", *op. cit. supra* n. 4 at 12; also at 323.

[21] Muller-Freienfels, *op. cit. supra* n. 5 at 21.

[22] *Id.* 22-23.

[23] See e.g. *Niboyet* v. *Niboyet* (1878) 4 P.D. 1, 11, per Brett, L.J., R. H. Graveson, "The Future of Family Law" in R. H. Graveson and F. R. Crane (eds.), *A Century of Family Law,* Sweet & Maxwell, 1957.

[24] It is significant that the law relating to maintenance in England originated in the Poor Laws; see L. Neville Brown, "National Assistance and the Liability to Maintain" (1955) 18 *M.L.R.* 110; McGregor, Blom-Cooper and Gibson, *Separated Spouses,* London, Duckworth, 1970, Ch. 10; Finlay and Bissett-Johnson, *Family Law in Australia,* Butterworths, Sydney, 1972, at 447-450. *Cf.* Finer & McGregor, "The History of the Obligation to Maintain" in *Report of the Committee on One-Parent Families,* Vol. 2, Cmnd 5629-I(1974), App. 5, at 85-149.

Resistance to divorce, and to the gradual widening of the grounds was thus for long based on the fear of a dilution of the concept of marriage as a cohesive social force. It was not until the emergence of a view of marriage as a personal rather than as a social or economic relationship that the concept of marriage breakdown began to take hold. In England, this ripening concept may be traced in the early years of the twentieth century through such cases as *Pullen* v. *Pullen* in 1920[25] and *Blunt* v. *Blunt* in 1943.[26] In the latter case, no less a body than the House of Lords affirmed the possibility that it could be in the public interest to dissolve a marriage that had broken down irretrievably.[27]

Thus we can say that in Western societies, marriage has been dominated by the Church, the aristocracy and wealth, and each of these interests has used the forms and mechanisms of the law to maintain its hold upon an institution of such fundamental social importance. As each of them waned in influence or significance as a component of the body politic or as a social force, so the importance of marriage as a form of social cement has lessened. And with this development has come a corresponding lessening of the need for the law to regulate family relationships. As Glendon observes: ". . . marriage law seems to be withering away precisely because rank and status, wealth and power in society are decreasingly determined by family relationships".[28]

III

This waning importance of marriage law can be seen today in a number of ways, and it parallels the lessening importance of marriage itself. Recently there have been measures to abolish the difference between legitimacy and illegitimacy in the status of children in a number of countries.[29] Glendon describes this as a worldwide tendency, which has deprived legal marriage of one of its most important effects.[30] At the same time, there has been a tremendous increase in extra-marital cohabitation. Many of these cohabitative unions can be described as informal marriages. In many societies such financial consequences as arise from tax laws or social welfare benefits legislation and which were formerly attached to the marriage relationship may today be similarly annexed to such de facto unions.[31] Because of this, and of the increasing ease with which legal marriages may be dissolved, the formal and the informal marriage are approaching a condition of coalescence in fact, if not in law, and it will become increasingly difficult to distinguish between them.[32] What is

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[25] 36 T.L.R. 506.
[26] [1943] A.C. 517.
[27] E.g. Finlay, *loc. cit., supra* n. 17.
[28] *Op. cit. supra* n. 4 at 322.
[29] See e.g. Status of Children legislation in New Zealand and the Australian States and Territories, as well as in the U.S.A. and certain European countries.
[30] *Op. cit. supra* n. 4 at 82.
[31] *Cf.* J. H. Wade, *De Facto Marriages in Australia,* 1981, C.C.H., Sydney.
[32] Finlay, "Defining the Informal Marriage", (1980) *Univ. of N.S.W.L.J.* 279 based on "The Informal Marriage in Anglo-Australian Law" in John M. Eekelaar and Sanford N. Katz, *Marriage and Cohabitation in Contemporary Societies,* 1980, Butterworths, Toronto, at 156; Finlay, *Family Law in Australia,* 2nd ed., 1979, Chap. 9; R. Bailey, "Legal Recognition of De Facto Relationships" (1978) 52 *A.L.J.* 174.

perhaps most significant is the fact that the personal and social stigma attached to such relationships, as to illegitimacy, has almost completely disappeared. This has led to a growing assimilation of the legal position of a de facto spouse to that of a legal spouse, as may be seen particularly in England under the leadership of the Court of Appeal, and of the Master of the Rolls, Lord Denning, in particular.[33]

In the light of the foregoing account, it may appear strange that the law should still have such a dominant position in relation to marriage. Professor Glendon has stated, and I would agree with her, that "a close look at the discrete elements of the current period of legal evolution reveals a shift in the posture of the State with respect to the family, a shift which is approached in magnitude only by that which occurred in connection with the Reformation in most European countries when the State acquired jurisdiction over matrimonial causes from the ecclesiastical authorities".[34] However, I also agree with the statement which follows that passage, that this process of dejuridification of the family matters is not characterized by suddenness. I want to focus on the very considerable legal elements which still adhere to the family and its relationships in our society, and many of which still dominate it. This is particularly so in the procedures and structure of the law, which are frequently unsuitable for the composition of family disputes. Modifications in this procedural aspect of family law have taken place, but it is still true to say that the parties are often more embittered after going through the courts and in consequence of doing so, than they were before. This is due to a variety of factors, and probably derives from the fact that the adversary system, as its name implies, presupposes a contest between two or more adversaries. The judge is the arbiter or umpire, who listens but does not take an active part in directing the process and gives his ruling at the end. The lawyer who advises a client, though he may attempt to negotiate a settlement, in weighing up the risks and costs of the alternative of litigation, always has before his eyes the ultimate spectre of the court where his client's case may prosper or founder. Accordingly, and quite rightly, he must put his client's case in such a light as will bring out its strongest aspects while minimizing its weaknesses. In the course of doing so, he will rehearse with the client all aspects of the marriage, will revive many incidents which were perhaps forgotten but now, in surfacing, add fuel to the flames. He will rebut the claims of the other side. As each party is confronted with his or her spouse's legal claim, sharpened by legal wit for the purpose of putting it forward and making it

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[33] *Cf.* e.g. *Davis v. Johnson* [1979] A.C. 317; Finlay, "The Battered Mistress and the Violent Paramour" (1978) 52 *A.L.J.* 613; *Cook* v. *Head* [1972] 2 All E.R. 583; *Dyson Holdings Ltd.* v. *Fox* [1976] Q.B. 503; *Eves* v. *Eves* [1975] 3 All E.R. 768; *Tanner* v. *Tanner* [1975] 3 All E.R. 776. In Australia, this tendency has been less clearly marked, but some claims have been allowed, e.g. in *Pearce* v. *Pearce* [1977] 1 N.S.W.L.R. 170; *Ogilvie* v. *Ryan* [1976] 2 N.S.W.L.R. 504; *Olsen* v. *Olsen* [1977] 1 N.S.W.L.R. 182; *Hohol* v. *Hohol* [1981] V.R. 221. Other claims were unsuccessful, e.g. *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685; *Kardynal* v. *Dodek* (1980) F.L.C. 90-823. The older attitude of the law that such relationships were contrary to public policy and any attempts to spell out valid claims as void for immorality, as e.g. in *Fender* v. *St. John Mildmay* [1938] A.C. 1, while not yet expressly abolished or abandoned in all respects, has certainly been greatly eroded and is being increasingly departed from.

[34] *Op. cit. supra* n. 4 at 321.

insurmountable, and enriched with the accretion of every triviality and exaggeration, the client becomes appalled at the duplicity, meanness and treachery of his opponent, which are even greater than he had previously suspected.

It is tactically necessary, or at least desirable, that opponents in any fight should "psych themselves up" to a hostile attitude in which the adrenalin will flow and every resource of spirit and pugnacity become available. In time of war, our rulers seek to imbue us with such venom and hatred for our enemies that the relationships between nations have sometimes become embittered for generations.[35] But is such an accumulation of bitterness desirable in the sphere of private human relationships?

The answer to that rhetorical question must be, emphatically, No. On a purely functional level, the methods of the law in a common law context of adversary proceedings exacerbate feelings, polarize the parties and leave an often lasting legacy of hostility and bitterness: "Instead of doing all in its power to facilitate reconciliation of the parties, it forces them into a position of hostility and antagonism so that a divorce is almost inevitable. It arrays one against the other in battle formation and makes the plaintiff assault the enemy with all the venom at his command."[36]

Three possibilities will be briefly considered in the remainder of this paper which would, by progressive degrees, depart from the hostility presently generated by adversary legal procedures in family law.

IV

The adversary process has been critically commented on, and increasingly so in recent years in common law countries. It was subjected to a critical analysis by Lord Devlin in his recent collection of lectures: *The Judge*.[37] The thrust of Lord Devlin's criticism is directed mainly at the greater costliness of the adversary process. Family lawyers will be more directly concerned with the effect on the feelings of the parties which is one of the main objections to it in this area.[38] After all, it is of comparatively little consequence, if the two opponents in a running down case carry away

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[35] E.g. the relationship between France and Germany between 1870 and 1945.

[36] Judge Paul W. Alexander, "The Follies of Divorce — A therapeutic approach to the problem." (1949) *U.Ill. L.F.* 695 at 700.

[37] 1979, O.U.P., Ch. 3, "The Judge in the Adversary System", particularly at p. 55 ff.; and see for Australia, Sir Richard Eggleston, "What is Wrong with the Adversary System" (1975) 49 *A.L.J.* 428 and Professor Wolfgang Zeidler, Vice-President of the West German Federal Constitutional Court in an address at the 21st Australian Legal Convention in 1981 and published under the title "Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure", (1981) 55 *A.L.J.* 390. *Cf.* Mr. Justice Michael Kirby, "Adversary Trial: Blowing the Whistle?" [1980] *Reform* 52.

[38] For two recent criticisms by Judges of the Family Court of Australia, see Mr. Justice Edward Butler, "The Family Law Act: What of the Future?", a paper delivered at a Seminar of the Sydney University Law Graduates Association in 1979, and Mr. Justice Ray Watson: "The Resolution of Spousal Conflict", an address delivered to the Australasian Conference on Family Law at Queenstown, New Zealand. For two comments by a psychologist intimately connected with the Family Court of Australia as Director of Court Counselling, Melbourne, see Moloney, "The Family Court — Current Practice and Future Perspectives", Chapter in forthcoming book *Children of Parents in Conflict* by Eva Learner and Banu Moloney,

with themselves lasting feelings of hostility towards one another from the court room, since it is unlikely that they will ever meet again. Still less do feelings of hostility matter to the corporate personalities of two opposing companies. In situations of family breakdown, however, the parties may have to continue to communicate for years in relation to such ongoing problems of mutual concern as the upbringing of their children and perhaps other matters of concern to the family. And it will add to the hurt to those children if they are made to endure the hostility between their parents during their growing years. These problems are mentioned in relation to hostility enduring after dissolution, — the damage is infinitely greater in a marriage that may still have some chance of survival or resurrection.

It is chiefly in relation to children, that legal systems have recognized the inadequacies of the adversary process, and have made certain modifications, for example in the wardship jurisdiction of the English Court of Chancery. Wardship proceedings have been characterized as "not like ordinary civil proceedings. There is no 'lis' between the parties".[39] The overriding interest is the paramount interest of the child, and its protector is the sovereign or state as *parens patriae.*[40] Thus the Official Solicitor's report in a wardship matter is confidential, but, so strong is the adversary principle in common law systems, that the House of Lords has sought to confine that confidentiality within the court's discretion, which will tend to permit disclosure to the parties, such as parents, except in rare cases.[41]

When the Family Law Act 1975 was enacted in Australia, an attempt was made to modify some of the aspects of the adversary system, and to introduce features in keeping with a conciliatory, and even inquisitorial approach. There is, for example, a power for a judge to adjourn proceedings, to direct or advise counselling and to interview the parties, with or without counsel — all these to promote reconciliation or to improve the parties' relationship with one another.[42] One of the aims specifically written into the Act is in fact to assist parties "to consider reconciliation, or the improvement of their relationship to each other and to the children of

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Footnote 38 (continued)
Melbourne:

> The problem is that lawyers see their brief as one of "winning" for their clients. The adversary system does not allow them to take an overall view; the principle of the best interests of the children cannot be seriously considered. Lawyers tend to see the allegations that are made in tactical terms. As detached negotiators they can always retreat closer to the middle ground. But having brought the emotions of their client to a high pitch they can offer no guarantees that those same clients will accompany them back to the more sane position closer to the centre. A "win" through the adversary system can be a pyrrhic victory which leaves the couple hopelessly estranged and the children fearful of crossing the chasm between their parents.
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> The Court battle does not represent a catharsis in any true sense of the word because it is not the couple who do the fighting but the lawyers who do it on their behalf. Furthermore, the fighting is conducted in a highly ritualised fashion in which expression of emotion is strongly discouraged and in which the rules of combat are usually poorly understood by the clients themselves.

[39] *Per* Cross J. in *Re B. (J.A.) (an infant)* [1965] Ch. 1112, 1117.
[40] See e.g. *J.* v. *C.* [1970] A.C. 688.
[41] See *Official Solicitor* v. *K.* [1965] A.C. 201.
[42] Family Law Act, s. 14.

the marriage".[43] There are provisions for conferences of both parties with a welfare officer to discuss the welfare of their children[44] or with a registrar of the court to try to reach agreement in matters in issue between them, usually in relation to property.[45] The wishes of a child between 14 and 18 as regards custody and access have prima facie to be given effect to, unless there are good reasons to the contrary,[46] and a court may order separate legal representation for a child concerning whom there are proceedings between the parties.[47] Perhaps the most important innovation, however, was the creation of a court counselling service, somewhat like those of some American Conciliation Courts, which is available to help the parties and their children.

Nevertheless, the structure of the Family Court of Australia is that of a court in the traditional adversary mould. When a judge attempted to break out of that mould early on in the life of the Family Law Act, the High Court of Australia corrected him and pointed out, that the procedure to be followed by a court of law was the adversary procedure. In the case of *R.* v. *Mr. Justice Watson, ex parte Armstrong,*[48] Watson J. in the Family Court had been hearing proceedings concerning financial matters between a husband and wife. The judge had said: ". . . the proceedings in this court are not strictly adversary proceedings. The matter . . . is more in the nature of an inquiry, an inquisition followed by an arbitration." The High Court disapproved and said that the judge must follow the procedure provided by law, which did not authorize him to convert proceedings between parties into an inquiry which he conducts as he chooses. Again, in *In the Marriage of Lonard*[49] and also in *In the Marriage of Wood,*[50] the Full Court of the Family Court of Australia disapproved of Watson J.'s too active intervention in the conduct of litigation, in accordance with what the High Court had said in *Armstrong's Case,* and the Court of Appeal had said in *Jones* v. *National Coal Board.*[51]

Thus it can be seen that the Family Law Act contains the tentative beginnings of a non-adversary system, but the courage has so far been lacking to carry them through to their logical conclusion. A further example occurred in *R.* v. *Cook, ex parte Twigg*[52] in which the Full High Court again declined to take the opportunity of departing from a strictly adversary procedure in relation to a counselling report. A judge of the Family Court had ordered the parties to attend a conference with a court counsellor. At the conference, the wife had refused to reveal her reasons for opposing an application by the husband with respect to access to the children. She indicated further, that she took this position on the advice of

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[43] *Id.* s. 43(d).
[44] *Id.* s. 62(1).
[45] Family Law Regulations, reg. 96.
[46] Family Law Act, s. 64(1).
[47] *Id.* s. 65.
[48] (1976) 9 A.L.R. 551.
[49] (1976) 11 A.L.R. 618.
[50] (1976) 11 A.L.R. 657.
[51] [1957] 2 All E.R. 155.
[52] (1980) 31 A.L.R. 353.

her solicitor. The judge had thereupon adjudged both the wife and her solicitor guilty of contempt of court, and fined them. The High Court quashed the conviction and held that although a wilful breach of an order to attend a conference which had been ordered in pursuance of the Act was punishable as a contempt, there was no duty upon a party to disclose matters at a conference which that party did not want to disclose.

Again, the fault, if it is a fault, at least from the point of view of any failure to depart from a strictly adversary procedure, was not with the courts, but with the legislation. The Act simply had not made a clean break or departure from a traditional adversary procedure. Attempts by judges to make such a departure were therefore doomed to failure. The age of legal fictions is truly a thing of the past. The modern approach to law reform is to do so consciously and after careful enquiry, by laying down a conscious policy in the shape of an expression of the parliamentary will.[53]

Similarly, the role of the child's separate legal representative appointed by the court which, as has been mentioned, was one of the innovations introduced by the Family Law Act, at first gave rise to some uncertainty as to how this new role was to be filled. Watson J. sought to assimilate it to that of the Official Solicitor in the English wardship jurisdiction. He sought in this way to combine what in effect were two different functions: one amounting almost to guardianship of the child, the other as a solicitor whose client is the child.[54] This approach was, however, not followed by other members of the court. In *In the Marriage of Lyons and Boseley*[55] the Full Court attempted to lay down guidelines that were to be followed. They were somewhat tentative, however, and the debate in this matter continues, if not to rage, to stumble along.[56]

The role of the separate representative is in fact a potentially most fruitful departure from a pure adversary model. He is, in some respects, like an *amicus curiae,* in that he takes up an independent stance, apart from both parties. He is there to assist the court, and to seek the truth — yet, he does so in the interest of the children, who are in truth not parties, yet have some of the attributes of parties. The separate representative can be seen, in respect of the child whom he represents, as a "third arm" for the judge, able to do from a position of independence of both parties, what the judge under the adversary system cannot do: find out facts, present evidence, cross-examine both parties and make submissions in support of his clients. He therefore removes parts of the trial from the strictly adversary model and imparts to it some of the characteristics of an inquisitorial proceeding.

The truth of the matter is that in spite of the modifications of a non-adversary character introduced by the Family Law Act, that Act and the system which it governs remains essentially adversary in nature. Desirable as departures from that model may be, such as those attempted by Watson

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[53] *In the Marriage of Tansell* (1977) F.L.C. 90-307.
[54] *In the Marriage of Todd* (1976) 8 A.L.R. 602.
[55] (1978) F.L.C. 90-423.
[56] See e.g. the contrasting views of Wood, J. in *Lyons and Boseley* and of Treyvaud, J. in *Waghorne and Dempster* (1979) F.L.C. 90-700.

J., (and supported by the present writer) they cannot be expected to take hold until such time as radically different legislation is enacted for the purpose of promoting a new code of procedure on radically different principles. Nevertheless, within the system provided by the law, there are degrees of legalism. Initially, lawyers in the traditional mould will apply the law along strictly traditionalist lines. Gradually, though, there will emerge those with a greater degree of empathy and understanding for the new system, with a feeling for the particular requirements of a highly specialized jurisdiction such as exists under the Family Law Act. The differences of approach of the High Court on the one hand, and family lawyers like Watson J. on the other must be understood in this light.

Curiously enough, an analogous phenomenon was observable in England when the Divorce Reform Act 1969[57] was first introduced. At first, provisions of the new law were applied with a greater degree of legalism than was probably intended by those responsible for framing it, or than was strictly required by that law upon its own terms.[58] Developments have swept past that initial phase, aided by further reforms, such as the introduction of the "special procedure" in undefended divorces[59] for dealing with petitions without the presence of either the parties or their legal representatives. A similar proposal, dubbed by its opponents "mail order divorce" is at present before the Australian Parliament.[60]

Thus it has been possible, for instance in Australia, to erect or evolve virtually a new code of children's rights, and a practice of dealing with issues of custody and access in a way that would have been completely contrary to the traditional common law concepts of "parental rights". Interestingly, this has been achieved without any express legislative enactment of a prescriptive nature, but simply by judicial interpretation of the paramount interest principle of the child.[61]

V

Because of the antithetical character of the adversary and inquisitorial systems, it is often taken for granted in any criticism of the former, that the latter will automatically provide a logical and satisfactory alternative to it in the process of the law. Certainly it would seem that the inquisitorial system offers certain advantages. It proceeds on the assumption, that the purpose of legal proceedings is to find out the truth. It then follows, that the judge will therefore take a more dominant part in the proceedings before him, and will give them the direction which he deems necessary in order to

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[57] Now the Matrimonial Causes Act 1973.

[58] For a criticism, see Finlay, "Justiciable Issues and Legalism in the Law of Divorce" (1971) 45 *A.L.J.* 543; "Reluctant but Inevitable: The Retreat of Matrimonial Fault" (1975) 38 *M.L.R.* 153.

[59] Matrimonial Causes Rules 1973, S.I. 1973, No. 2016 (L. 29); Matrimonial Causes (Amendment No. 2) Rules 1976, No. 2166 (L. 39).

[60] Family Law Amendment Bill 1981, clause 41, proposed new section 98A.

[61] Contrast e.g. the attitude of Wood, J. in such cases as *D.H. and M.K.* (1981) F.L.C. 91-015, *Mazur and Mazur* (1976) F.L.C. 90-132, *Parsons and Punchon* (1978) F.L.C. 90-490 with attitudes in a State Supreme Court favouring the now outmoded "preferred role of the mother" on the basis that it was "biologically determined by deep genetic forces" in *Epperson* v. *Dampney* (1976) 10 A.L.R. 227 at 241.

achieve the primary objective. He will be justified in deciding what witnesses should be called, and whether certain matters should be excluded as not likely to serve that objective. He is, in the simile of Professor Zeidler, both train driver and signalman who determines the speed of the train and where it shall stop. Professor Zeidler also contrasts the destination of the English train[62] as the due and equitable process of law with the German train whose destination is the discovery of the truth.[63] Parenthetically, one might add the comment, that while the convinced common lawyer would probably say that the discovery of the truth is the inevitable result of the adversary process of law, this is an unproven assumption, based in the folklore of the common law, so that this particular argument ought perhaps to be put into suspended animation until we have proof one way or the other.

A more subtle aspect related to this is the moral question posed by Sir Richard Eggleston concerning the moral duty of the State to ensure the right decision in each case, even if the parties have not chosen to place all the relevant evidence before the court.[64] Eggleston supports such an approach as giving a better service to litigants.

In the balance sheet drawn up by Lord Devlin, there is a strong presumption in favour of the inquisitorial system on the ground of economy and the saving of time.[65] This is indeed a powerful argument and worthy of serious study, particularly when the mounting cost of going to law in the labour-intensive model of the common law threatens to put the law and its processes beyond the reach of the common man, woman or child.

In any comparative evaluation of the two systems, the question that must be asked is "which is the more successful in taking bitterness and hostility out of family breakdown situations?" Because of the relative absence of personal confrontation in a courtroom setting and the minimal role of cross-examination, and because so much is done on paper rather than *viva voce* in a courtroom setting, undoubtedly the inquisitorial procedure is less inflammatory upon the feelings of the parties. The rage that comes from being called, openly or by implication, a liar by one's own spouse or that spouse's spokesman is less likely to be provoked by inert pieces of paper. Nevertheless, there is still a confrontation of opposing points of view, and the parties are still likely to go away at the end, nursing a sense of grievance. Two other methods of defusing matrimonial disputes are worth considering.

VI

The first method is to get the parties to compose their dispute, say in custody or property controversies, before ever the court process is invoked,

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[62] I.e. legal system.
[63] Zeidler, *op. cit. supra* n. 37 at 392.
[64] Eggleston, *op. cit. supra* n. 37 at 430.
[65] Devlin, *op. cit. supra* n. 37.

by mediation and conciliation. These methods have been used successfully in Australia for years in the sphere of industrial relations, but their use in the no less contentious area of matrimonial relations is still in its infancy. A beginning has been made by the development of the registrar's conference on property issues which has been mentioned above,[66] and the conference with counsellors in relation to children.[67] Successful though these devices have proved to be, and in spite of the considerable scope for further development which they promise to offer, they do not normally achieve the objective of forestalling or deflecting the court process since they normally come too late in the disintegration of marital relations. They typically come into play in pursuance of an order of a judge, hence after the commencement of legal proceedings. They do, however, show what can be done to by-pass the full flow of the adversary process, and should be encouraged and much more widely used.

Nor do such mediation procedures have to be undertaken within the penumbra of the court. Indeed, the more they are separated and seen to be separate from the forensic setting, the greater their chances of being successful. It is true that some people look to judges for authoritative rulings, and there is a high degree of acceptance of them by most sections of the public because in our political system we have been conditioned to such acceptance. Not only is this positive aspect of judicial dispute resolution achieved at great cost, however, in terms both of money and also of personal trauma, but it is also arguably greatly inferior as a healing process, to any method by which people can be helped to develop their own solutions for themselves.

Not very much has been done on these lines in Australia as yet, although some work is being attempted, by various community groups and individuals, with varying degrees of success. One suggestion is to use experienced family lawyers to act as arbitrators at the invitation of the parties and again, while this is intended not to supersede the valuable work of registrars, it could supplement it, and would be both quicker and cheaper than court proceedings.

In America, on the other hand, the use of this kind of expedient has been developed to a much greater extent. Family mediators have emerged and work has been done on the development of procedures by which they do their work. As this paper is being prepared, an article by Patricia L. Winks comes to hand, discussing and outlining some of these developments.[68] Thus the emphasis here is on negotiation and compromise which the parties are encouraged and helped to achieve, rather than on conflict and fighting, and for that reason alone, this method must be welcomed.

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[66] *Supra* n. 45.
[67] *Supra* n. 44.
[68] "Divorce Mediation: A Nonadversary Procedure for the No Fault Divorce", 19 *J. of Fam. Law,* 615.

VII

Lastly, and one step further yet from the adversary procedures of the law is a still more radical solution, which may be achieved through the use of counselling. Here the very attitudes, behaviour and personality of the litigants become the focus of attention. The litigant or subject, to choose a more neutral term, is encouraged to see things in a different light and to modify his attitudes and actions. His negative or pugnacious feelings towards members of his own family may be replaced by more balanced attitudes, and what was to him a very real and traumatic problem may come closer to solution, or even go away. While this method is by no means infallible, nor available in every conceivable case, it offers a far greater hope for the reintegration of broken families within the social structure.

When this kind of approach is successful, even the personality of the subject may be changed — hopefully for the better.[69]

The progression at which this paper hints then, is in the direction away from the courts, away from the law towards methods of solving family problems which concentrate on the personality whence these problems arose, rather than the symptomatic situations to which they gave rise. This method seems both more logical and direct and goes to the root of the problems, unlike the more indirect expedient of dealing with the symptoms by treating them as legal problems. The legal problems are secondary, and of course the law has an important part to play in resolving them. Ultimately, however it is my belief that the role of the law in family dispute resolution will be a subordinate role and that non-legal methods and institutions will emerge to deal with it.[70]

The wheel is turning full circle. Marriage began as a purely personal relationship, untroubled by any involvement with the law and legal institutions to regulate it. The law came later but when it did, it effectively took over. Today we are still working through this legacy, but as our attitudes to family relationships have changed and are changing, we are finding the law no longer adequate for such a dominant role. The alternatives which are emerging have been briefly looked at in this paper, and they promise to offer greater effectiveness and success.

It is exciting for us to be in on the beginning of a new phase. It should be our aim to work towards its perfection. I believe that our contribution can be a useful one, provided we know where we are going.

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[69] *Cf.* e.g. Glick and Kessler, *Marital and Family Therapy* (1974), quoted in Foote, Levy and Sander's *Cases and Materials on Family Law*, 2nd ed, 1976, at 1134: "Family therapy attempts to change family interaction, structure and function. As a result of such change, certain aspects of the personality of an individual may change". Also Goulding and Goulding, *Changing Lives through Redecision Therapy*, 1979, at 49: "Our objective is to establish an environment for change. We create an intensive, rather than extensive, environment, encouraging the patient to change himself in a short period of time . . . and then go out and practise his changes without further therapy."

[70] *Cf.* the view of Mr. R. J. Ellicott, Q.C., when Attorney-General of the Commonwealth: "It is possible that in the future a new concept of family law will emerge where counselling becomes the main function of the family court and the role of the judge lessens". (An address at a seminar on "Women — Today and Tomorrow", 13 August, 1977.)