

## THE PROFESSIONAL STATUS OF FAMILY LAW PRACTICE IN AUSTRALIA

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### *Aim*

The aim of this article is to consider some of the reasons for the low status of family law practice as perceived by the legal profession in Australia. This topic should be distinguished from *public* perceptions of the family law system, though clearly public and professional impressions overlap. Of course, the perceptions and beliefs of even a majority of the legal profession may be based on folklore, anecdote or ignorance rather than upon any comprehensive knowledge of family law. Many of the comments contained herein are speculative. A sociologist will be disappointed by the scanty data to verify these hypotheses.<sup>1</sup> Nevertheless these comments may indicate the complexity of the issues and that the simple answers are not so simple.

Extensive research needs to be commenced in Australia to lift the veil of mystery which surrounds the behaviour and attitudes of the legal profession and their clients during the marriage breakdown/divorce process.

### I. INTRODUCTION

There are many dilemmas in practising in a profession of any kind. Any general list of tensions expands as a person enters a specific profession such as the legal profession, and then expands or changes further as specialisation occurs, such as becoming a family lawyer.

Within the legal profession, at least in Australia, family law is generally

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1 Some professional attitudes have been surveyed in New South Wales; see R. Tomasic and C. Bullard, *Lawyers and their Work in New South Wales – A Preliminary Report* (1978); also M. Sexton and L.W. Maher, *The Legal Mystique – The Role of Lawyers in Australian Society* (1982).

not considered to be a desirable area in which to practise.<sup>2</sup> It is also clear that the low status of family law in practice has created an equivalent effect in law schools. This low ranking persists despite being mitigated to some extent by the gradual emergence of a specialised core of family law practitioners and by the abolition of fault grounds for divorce.<sup>3</sup> (As usual, the *general* impression concerning status has been overcome in particular cases by individual family lawyers who are highly respected.)

A similar professional stigma attaches to practice in the areas of criminal law, landlord and tenant and workers compensation, probably for a different mixture of reasons.<sup>4</sup> If a legal practitioner cannot avoid family law, there is a tendency to 'graduate' from family law practice as soon as a junior lawyer can be located to whom the work can be delegated. Why has this professional stigma developed? In what follows some of the possible reasons are identified.

## II. LOW INCOME

It is clear that in the legal profession, as elsewhere, a substantial degree of status attaches to wealth and high income. Within a legal firm, promotion depends heavily upon costs earned. Thus commercial practice is particularly attractive as clients can be billed 'appropriately' and are accustomed to paying high fees. Moreover, a commercial client will often pay the legal costs promptly as these are passed on to a consumer or insurer, and as the client may want to preserve goodwill for future dealings with the lawyer.

In contrast, a family law client is often under-billed as the lawyer realises that his client is already in dire financial and emotional straits.<sup>5</sup> Moreover actual payment may be delayed indefinitely due to negotiations with legal aid authorities, the poverty of the client, client dissatisfaction with the lawyer, or the common cry 'Why should I have to pay all these legal costs when it was not my fault that the marriage broke down?' As a further aggravation, there is steady political pressure to standardise and control legal costs in family law disputes.<sup>6</sup>

One predictable result is that income-derived prestige *does* accrue to

2 The image of family lawyers *outside* the legal profession as perceived by clients and other professionals is another important topic. See especially the profound commentary, "Trend Analysis: The 'Changed Landscape' of Divorce Practice as Ethical Minefield" (1977) *Family Law Reporter* Vol. 3, No. 3, Monograph No. 26, 19 July 1977; also O.R. McGregor, L. Blom-Cooper and C. Gibson, *Separated Spouses* (1970); P. Tennison, *Family Court – The Legal Jungle* (1983) (an example of sensational and unbalanced journalism).

3 Family Law Act 1975 (Cth) s.48. "Fault" of various hues remains relevant to the determination of custody, financial and costs disputes e.g. *Horman and Horman* (1976) FLC 90-024; J.H. Wade, *Property Division Upon Marriage Breakdown* (1984) 254-261.

4 Tomasic and Bullard, note 1 *supra*, 36-38, 159, 164.

5 A survey of legal practitioners in N.S.W. in 1977 indicated that family law ranked in the lowest five areas of legal practice with regard to remuneration, and in the lowest six areas of legal practice with regard to prestige; Tomasic and Bullard, note 1 *supra*, 37-39, 159, 164.

6 Family Law Act 1975 (Cth) s.117 (prima facie, each party is obliged to pay his/her own legal costs); Family Law Council, *Annual Report 1983-1984* 20-28 (legal aid ferment).

specialised family lawyers who re-organise the property, trusts and tax-planning schemes of wealthy divorcing clients.<sup>7</sup>

### III. CLIENT GOODWILL

Associated with the dilemma of low costs in the short term is that of loss of client goodwill for the long term. Many family law clients are so disillusioned by their encounter with the legal system, for which rightly or wrongly they blame their legal representative, that they do not return to that legal representative with their subsequent commercial and conveyancing transactions. No doubt, clients will recommend a competent family lawyer to acquaintances who are also experiencing marital difficulties,<sup>8</sup> but will that lawyer receive their subsequent commercial, conveyancing or probate business? Probably not.

Even if a family lawyer has acted conscientiously and expertly, any ongoing association serves to remind a client of a past failure — a dark emotional chapter of the client's life better buried and forgotten.<sup>9</sup> This partly explains the consistent, though not universal, absence of specialist family lawyers in large commercial law firms (an absence which could easily be remedied). If money is money, why not take advantage of the legal fees to be derived from the marital estrangements in the corporate sector especially when there is a steady flow of clients on hand? The traditional answer in part seemed to be that short term gains are outweighed by long term losses. Keep the golden goose unruffled. The less a law firm knows about the personal anguish and failings of corporation managers and employees, the more comfortable will those clients feel about returning with future commercial business.

Over the last two years in Sydney at least, several large legal firms have opened specialised family law departments. It may be that the predominant reason for this gradual development is that large commercial firms need the advice of expert family lawyers to set up corporate structures which will be immune from the powers of the Family Court under sections 79, 85 and 85A of the Family Law Act 1975 (Cth). However this may be only one factor. As a highly competitive market develops for other legal services, family law work may be undertaken by some firms without any particular aptitude, interest or application to its distinctive challenges other than at least it provides business.

<sup>7</sup> Cf. the improved status of family law in the U.S.A. where constitutional issues involving civil rights have provided a new prestige; E.F. Hennessey, "Explosion in Family Law Litigation: Challenges and Opportunities for the Bar" (1980) 14 *Fam L Q* 187; L.P. Strickman, "Marriage, Divorce and the Constitution" (1981) 15 *Fam L Q* 259. Equivalent civil rights protections are not embodied in the Australian Constitution with the exception of s. 116 (freedom of religion): *Plows and Plows* (1979) FLC 90-607.

<sup>8</sup> The most important sources for lawyers obtaining new clients appear to be first, recommendations from previous clients and secondly, social contacts outside 'working hours': Tomasic and Bullard, note 1 *supra*, 68.

<sup>9</sup> In contrast, one can speculate on what client goodwill accrues to a lawyer after a successful adoption.

#### IV. 'NON-LEGAL' PROBLEMS OF FAMILY LAW CLIENTS

Many people in the midst of a family breakdown or crisis go to see a lawyer. Their 'presenting problem' is a legal one, but it is clear that their 'real' problems are far more complex:

[a] person in need tends to define his difficulty in terms of the helper's expertise. The same person may tell an internist he has stomach-aches, a psychiatrist he is nervous, a clergyman he is guilty, and then talk to a lawyer about executing a new will, all in connection with the same problem. The lesson in this curious fact is not that clients are childish; it is that those of us who propose to help people as a profession have divided ourselves into recondite subspecialties and then have built walls to separate us from one another. We have deluded ourselves into supposing that our specialities have reality. The talent called for in helping someone in pain is the same talent whether it is present in a physician, therapist, social worker, clergyman, or lawyer.<sup>10</sup>

The technical black-letter law issues in family law are just as prevalent as in many other areas of legal practice. However the *additional* skills required to relate to clients in crisis lead to the whole practice often being dismissed as 'nothing but' glorified social work.

A study in 1979 of 74 lawyers in Connecticut concluded:

[t]he findings of the present study clearly support the view that attorneys do indeed spend a significant proportion of their time during divorce cases providing counseling and support to clients for a wide range of problems. Moreover, attorneys not only reported providing such services but they overwhelmingly indicated that they saw these caregiver functions as an important part of their role. These findings generally held true regardless of the income level of the client being served, and whether or not they were family specialists.<sup>11</sup>

Family law clients have a tendency to return for advice on many occasions when, as far as the lawyer is concerned, the legal issue has been 'resolved'.<sup>12</sup> In these situations, most lawyers feel incompetent and inadequate. One common response is to avoid the client, fail to answer telephone calls and letters, and to put the file in the 'too-hard' basket. This professional behaviour occurs partly because of the following factors. First, it has been argued that the personality type which is attracted to and enters law school is unskilled at dealing with either his/her own emotions or the emotions of clients.<sup>13</sup> Weyrauth has suggested that the personality type attracted to and fostered by German legal education is preoccupied with rituals, detached, coldly rationalistic, inclined to emphasise procedural skills, preoccupied with prestige, tense in human relations, lacking in warmth, pessimistic, hierarchical and unreasoning in his acceptance of authority.

The homogeneous background of most lawyers may provide further basis for speculation about a common personality type. For example, in 1977 in

10 T.L. Shaffer, "Christian Theories of Professional Responsibility" (1975) 48 *So Calif L Rev* 721, 726-727.

11 R.D. Felner, J. Primavera, S.S. Farba and T.A. Bishop, "Attorneys as Caregivers During Divorce" (1982) 52 *Am J Orthopsychiatry* 323, 332.

12 I.F.G. Baxter, "Family Litigation in Ontario" (1979) 29 *U Toronto L J* 199, 217.

13 W.O. Weyrauth, *The Personality of Lawyers* (1964) cited in J.N. Turner, "If Only He Had Had a Good Teacher" (1979) *J Socy Pub Tchrs L* 253, 258.

New South Wales the practising members of the legal profession exhibited the following dominant characteristics:

- male (93% in city; 99% in country areas)
- educated at private schools
- Liberal/Country party voters
- related to lawyers
- born in Australia
- with mothers who were not in paid employment during the practitioner's childhood.<sup>14</sup>

Secondly, lawyers receive virtually no training in diagnosis, interviewing and counselling of human beings.<sup>15</sup> Yet clearly these skills take up a large percentage of a practising lawyer's time.<sup>16</sup>

Thirdly, the stereotype 'legal' personality is reinforced by the content of legal education which emphasises an intellectual and analytical approach in isolation from complex living beings.<sup>17</sup> The majority of practitioners perceive that 'academic success' at law school has been of only minor assistance in the actual practice of law.<sup>18</sup>

In contrast, Thomas Shaffer has commented:

[t]he tenets of [recent psychological] schools of thought can be presented rather simply by reducing their significance for legal education to four basic principles: (1) one's feelings are an essential part of what one needs to learn about, because much of learning how to be a lawyer is learning how to be oneself; (2) one needs, for obvious reasons, to learn about people; (3) one's best resource for learning about people is himself; (4) one's next best resource for learning about people, and thus for learning about himself, is other people.<sup>19</sup>

14 Tomasic and Bullard, note 1 *supra*, Ch. 3; see also analogous homogeneity of N.S.W. and Victorian Supreme Court judges; Sexton and Maher, note 1 *supra*, 4-5, and of Victorian lawyers, 8.

15 But *cf.* at least some North American law schools where courses on negotiations, interviewing and counselling have been introduced *e.g.* the compulsory course on "Interviewing, Negotiation and Counselling" conducted at the University of Calgary Law School described in the 1981-1982 Calendar as follows: "[t]he development of interpersonal skills and sensitivity essential to legal practice in all its forms. Emphasis is laid on skill in interpersonal communication, both verbal and non-verbal; on eliciting and evaluating information from clients; on short-term crisis counselling; on appropriate referral of clients to counselling or community resources for long term counselling and on an appreciation of the utility and dynamics of negotiation. The development of skills is tested and evaluated by simulated exercises using a variety of substantive and functional contexts." See H.T. Edwards and J.T. White, *The Lawyer as Negotiator* (1977) esp. 1-6; T.L. Shaffer, *Legal Interviewing and Counselling* (1976); T.L. Shaffer, "Lawyers, Counsellors and Counsellors at Law" (1975) 61 *ABAJ* 854.

16 See R.H. Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale L J* 950; Shaffer, note 15 *supra*.

17 *E.g.* A.J. Mohr and K.J. Rodgers, "Legal Education: Student Reflections" (1973) 25 *J Legal Educ* 403; J. Richardson, "Does Anyone Care for More Hemlock?" (1973) 25 *J Legal Educ* 427; University of Sydney Law Society, *Report by Education Committee* (1983), 37-39, 40, 141, 144 (greater emphasis should be placed on "practical skills" at law school).

18 Tomasic and Bullard, note 1 *supra*, 149-150.

19 Note 10 *supra*, 741.

The innate or developed characteristics of lawyers and counsellors have been contrasted:

<i>lawyers are:</i>	<i>counsellors are:</i>
Conscious of facts (keep your eye on the ball)	Perceptive (conscious of human facts)
Conscious of relevance (only the key facts, please)	Empathetic (feel what the client feels) and congruent (aware of their own feelings)
Comprehensive (leave no stone unturned; be prepared)	Careful listeners (try not to miss what's in the room)
Foresightful (be aware of the consequences; plan ahead)	Resilient (recover quickly, stay in the room)
Verbally sophisticated (be accurate in expressing what you think)	Open (are accurate in expressing what they feel)
Orally aggressive (win your arguments) and	Reflective (understand what is said) and
Thorough (get the job done).	Accepting, caring (try not to learn how to face a problem as much as how to face a face). <sup>20</sup>

Fourthly, only 'expert' family lawyers tend to know and appreciate competent members of other professions to whom clients can be referred.<sup>21</sup>

## V. INDECISIVENESS OF FAMILY LAW CLIENTS

Closely associated with the previous difficulty inherent in a family law practice is the apparent fickleness of family law clients. They often do not know what they want, and when they do, they subsequently tend to change their minds. This is obviously very frustrating for a lawyer who wants clear instructions before spending considerable time and effort embarking upon legal sorties. 'Commercial' clients are far more decisive and reasonable.

Probably, this indecisiveness of people going through a family breakdown is a normal expression of the stages of grief so well publicised by Elisabeth Kubler-Ross.<sup>22</sup> Thus, for example, directions given to a lawyer will vary

<sup>20</sup> Shaffer, *ABAJ* note 15 *supra*, 855.

<sup>21</sup> *E.g.* Baxter, note 12 *supra*, 209 describes how specialised family lawyers in Ontario have developed ongoing contacts with counsellors.

<sup>22</sup> *On Death and Dying* (1969): after any "loss" a person experiences stages of shock, denial, anger, depression and hopefully resolution; see also R.S. Weiss, *Marital Separation* (1975).

drastically as a client passes from a stage of depression<sup>23</sup> to anger. The lawyer hears from the same mouth in successive weeks — ‘give him everything’ and ‘give him nothing, it’s a matter of principle’, whereupon the lawyer is apparently damned whatever course is chosen — to follow the client’s directions will result in wasted money and effort, yet to ignore the directions will result in accusations of dilatoriness and negligence. Moreover any ‘proper’ legal advice tends to fall on deaf ears until the client reaches a stage of readiness to hear such advice.

This normal tendency of clients to change their minds has provided an incentive for even specialised family law practitioners to practise defensively. Insistent instructions followed today may lead to allegations of professional incompetence tomorrow:

[t]here is no question that the conscientious lawyer walks a dangerous tightrope between over-representation and under-representation, and this job is painfully complicated by the emerging pressure to practise defensively.<sup>24</sup>

## VI. DISRUPTIVE NATURE OF FAMILY LAW PRACTICE

Family law clients tend to go through various crises. Urgent requests are made to lawyers for instant action over troublesome access days; marital assets which are being sold; unpaid maintenance or threatened assaults.<sup>25</sup> Responding to successive crises is obviously not conducive to orderly office administration! Many lawyers would prefer to practise their art elsewhere than in an emergency ward. At least part of family law practice consists of answering frantic telephone calls (sometimes late at night), reassuring clients or repeating advice given on several occasions previously. To many lawyers, this necessary process may appear to be both disruptive and a ‘waste’ of time.

Moreover, family law is increasingly an area subject to consumer pressure groups. Men’s rights organisations bring accusations against family lawyers of greed, legal mystification and unnecessary jargon, trendy adoption of women’s lib rhetoric, judicial prejudice in favour of mothers and passivity due to old-boy collegiality within the profession. Turning the other cheek, women’s movements then attack the male-dominated profession more for

23 Quick and blatantly one-sided settlements by depressed spouses, especially in the absence of independent legal advice, may be struck down under the doctrine of unconscionability; e.g. *Cresswell v. Potter* [1978] 1 WLR 255; *Backhouse v. Backhouse* [1978] 1 WLR 243; [1978] 1 All ER 1158; *Webley and McMullen* (1979) FLC 90-619; *Mundinger v. Mundinger* [1969] 1 OR 606, 3 DLR (3d) 338 (Ontario C.A.).

24 “Trend Analysis”, note 2 *supra*.

25 E.g. the crisis guidebook, P.M. Guest, *Family Law Survival Systems* (1981) (“Foreword. Situations of urgency occur frequently in this emotive area of practice”).

sexism than greed.<sup>26</sup> They allege:

that insensitive male attorneys simply do not know how to talk or listen effectively to women, that they starve children by counseling husbands to default on support obligations, and encourage men to fight for custody only in order to extort a more advantageous financial settlement.<sup>27</sup>

There are even suggestions that the professional ban against advertising is a male conspiracy to prevent isolated women from locating competent family lawyers. This degree of ferment encourages lawyers to move to more peaceful pastures. And peace may not just be emotional peace. There are numerous examples of family lawyers and judges being subject to hate mail and threats of violence from hysterical parties who have 'lost' in custody or financial litigation. These outrageous incidents reached a tragic climax in 1980 and 1984 with the murders of Judge David Opas and Mrs Pearl Watson, and the attempted murders of Judges Richard Gee and Ray Watson.

This intensity of course arises in only a tiny minority of cases. On the statistics available at present in Australia, at least 90% of disputes commenced under the Family Law Act concerning finances or children are settled by agreement. Of the remainder who cannot reach an agreement, some bring entirely unreasonable expectations into the courtroom. These include the hope that a judge will have the time and inclination publicly to condemn an errant spouse, or a belief that parenting children or owning the legal title to property will guarantee continued control over both. In a multi-cultural society like Australia, the values reflected in custody and financial adjustments will inevitably clash sharply with the strongly held beliefs of various minority cultures.

It is interesting to speculate whether the planned absence of uniformed ritual and spacious courtrooms in the Family Court has had an unexpected side-effect – namely the removal of a protective mystique which surrounded Supreme Court proceedings. Perhaps a small percentage of the population would ascribe more authority to adverse decisions emanating from lofty, bewigged judges than from nearby ordinary human decisionmakers.<sup>28</sup> Of course, this speculation by itself provides no justification for returning to the

26 *E.g.* J. Scutt, "Principle v. Practice: Defining 'Equality' in Family Property Division on Divorce" (1983) 57 *ALJ* 143 esp. 159 n. 8. Scutt quotes from the Women's Electoral Lobby: "[w]e would contend that the interests most frequently ill-served by the exercise of discretion at the Family Court are those of women. Our present society discriminates against women. Women's efforts in the home are not viewed as equal in value to men's efforts in the paid work world. Women's efforts in the paid work world are not rewarded equally with men's. Women's needs are seen as less than men's needs. These are the social standards influencing the Family Court in property settlements. Until the "natural" biases against women are eradicated from our society, judicial discretion will always disadvantage women. To correct injustice at the court, clearly defined marital property rights should be set out in the Family Law Act acknowledging husbands' and wives' equal efforts and therefore their equal rights to all assets acquired during marriage."

27 "Trend Analysis", note 2 *supra*.

28 J.H. Wade, "The Family Court of Australia and Informality in Procedure" (1978) 27 *Intl & Comp L Q* 820, 830-832, 842-845.



rituals of another era.

## VII. BALANCING DISTANCE FROM AND ASSOCIATING WITH A CLIENT

In many professions there is a difficult balance which ought to be struck between maintaining an attitude of detachment from a client and yet also empathising with that same client. On the one hand a family lawyer should understand sympathetically those immediate needs as perceived by the client, and yet on the other be able to stand back and in a balanced fashion give expert legal advice on the long term interests of the client.

This balance is particularly difficult to maintain where the professional is inexperienced and where there is a family crisis. For a client will often give a version of the facts that will evoke sympathy and will strive to make the lawyer a mercenary knight with a legal club. A family lawyer who errs on the side of empathy will give unhelpful legal advice and risks emotional exhaustion or "burnout".<sup>29</sup> The family lawyer who errs on the side of cool detachment will not understand what the client is asking and will give the 'right' legal advice at the wrong time.

Of course, one easy way to reduce the problem of balancing professional distance and intimacy is not to become a family lawyer at all.

## VIII. FAMILY LAW PRACTICE – AN ETHICAL MINEFIELD?

Some of the writer's Christian friends ask, 'how could a Christian possibly be a lawyer?' Some legal acquaintances ask, 'how could a person *choose* to become a family lawyer?' The implication is clear – there is something especially morally tainted, soiled, or tawdry about those activities – or at least more tainted than being a medical doctor or a commercial lawyer. Occupations have a fluctuating hierarchy of righteousness. And family law is perceived by some as an undesirable habitation for Christians or gentlemen. Why? Apart from the reasons already mentioned, it is allegedly an area of particularly difficult moral choices.<sup>30</sup> Shaffer has responded to this suggestion:

[w]ithin the legal profession, lawyers in the "silk stocking" practice deny these moral conflicts by refusing to deal with the human problems which present conflict in an unattractive setting, such as criminal defense, divorce, and personal bankruptcy. When moral conflict does arise in the vaguer and sometimes more subtle contexts in which these lawyers practice, they cloud it behind the motives and ambitions of their clients.<sup>31</sup>

Nevertheless, the moral conflicts for family lawyers *are* more blatant and

29 Baxter, note 12 *supra*, 203. For some of the literature on "burn-out" see e.g. F.J. Spicuzza and M.W. De Voe, "Burnout in the Helping Professions: Mutual Aid Groups as Self-Help" *The Personnel and Guidance Journal* October 1982, 95.

30 See "Trend Analysis", note 2 *supra*.

31 Shaffer, note 10 *supra*, 737. But *cf.* some of the questions now being asked about lawyers' involvement in the tax-avoidance industry and the obsequious servitude of a learned profession to business interests; Sexton and Maher, note 1 *supra*, 9-12.

well-publicised. For example — should a family lawyer play the role of a fighter (a ‘bomber’) or a settler (‘a half-hearted compromiser’)? — an accuser or a negotiator? Either role will raise questions about motives. For example:

[s]ome ask whether in condemning the pushy tactics of the obnoxious divorce lawyer they are not falling back on the old-boy clubbiness of the bar, which condemns enthusiasm and favours sacrificing the paying client’s interest to avoid offending a crony or a judge whose good will will be needed in the next case. The condemnation of the bomber is probably a healthy development, but it can easily degenerate into a mere Burgerian call upon lawyers to play the game and not rock the boat.<sup>32</sup>

There is no well-defined and accepted pattern of behaviour for a family lawyer. Different clients seem to demand different styles. The behaviour and attitudes of family lawyers have been contrasted by use of the four labels of advocate, counsellor, gladiator and journeyman or alternatively by the six labels of therapist, social worker, moral agent, undertaker, mechanic, and mediator.<sup>33</sup>

When, if ever, should a lawyer directly or indirectly advise a client to engage in self-help? Despite judicial protestations against such practices it is clear that sometimes child-snatching, changing locks on houses, and hiding or dissipating assets<sup>34</sup> are ‘successful’ tactics.

Has a lawyer any responsibility to prevent the adversary system degenerating from a medieval joust between gentlefolk to guerrilla warfare between crazed zealots? Louis Nizer comments:

[L]itigations between husbands and wives exceed in bitterness and hatred those of any other relationships . . . All these litigations evoke intense feelings of animosity, revenge, and retribution. Some of them may be fought ruthlessly. But none of them, even in their most aggravated form, can equal the sheer, unadulterated venom of the matrimonial contest. The participants are often ready to gouge out the eyes or the soul of the once loved, without any pity whatsoever . . . There is no limit to the blazing hatred, the unquenchable vengefulness, the reckless abandonment of all standards of decent restraint, which a fierce matrimonial contest engenders.<sup>35</sup>

How should a lawyer respond when a client behaves irresponsibly without any apparent regard for the welfare of children?<sup>36</sup>

How seriously should a family lawyer take his/her legal (and moral) responsibility to ask clients whether they have considered a reconciliation?<sup>37</sup>

As a representative of the community, is a lawyer the last hope to stand in the breach and stop the flood of family breakdown?

32 “Trend Analysis”, note 2 *supra*.

33 K. Kressel, A. Hochberg and T.S. Meth, “A Provisional Typology of Lawyer Attitudes Towards Divorce Practice” (1983) 7 *Law and Human Behaviour* 31; see also G.R. Williams, *Legal Negotiation and Settlement* (1983).

34 *Schenck and Schenck* (1981) FLC 91-023; *Price and Price* (1977) FLC 90-125; cf. *Barnett v. Barnett* (1973-1974) 2 ALR 19, 28 (“If a party attains an advantage by trickery or fraud this is a disqualifying factor . . .”); S. Katz, “Legal Remedies for Child Snatching” (1981) 5 *Fam L Q* 103; J.M. Eekelaar, “International Child Abduction by Parents” (1982) 32 *U Toronto L J* 281; P. Nygh, “International Child Abduction”, *NSW College of Law Notes* (July 1983). Concerning the dissipation of assets, see Family Law Act s. 85; Wade, note 3 *supra*, Ch.8.

35 L. Nizer, *My Life in Court* (1944) 173-174.

36 *E.g. Rossi and Rossi* (1980) FLC 90-839, 75,303-75,304; Fogarty J. comments on the intransigent custodial litigant.

37 Family Law Act ss 14, 17; 0.25 r.3.

When is a refusal to act for an impoverished or legally aided family law client motivated predominantly by good business sense, when by callousness and greed?

How can a lawyer respond properly to client pressure to attack 'the opposition'?

In family law, these hard questions cannot be ignored or decided in secret. They occur daily and the response is apparent. Thus many decent or sensitive lawyers move into fields where the moral choices are supposedly easier, or at least are certainly less visible.

## IX. IS THE ADVERSARY SYSTEM AT FAULT?

The abolition of the adversary system, both procedurally and substantively, is often presented as a solution to many, if not all, of these and other problems in the practice of family law.<sup>38</sup> However as a panacea this is unconvincing. What alternative system is available? There is obviously a social work, mediation and counselling bureaucracy ready to move in as the courts and lawyers move out. Apart from lawyers jealously protecting their traditional (though lowly) professional turf, what problems would replace those supposedly eliminated along with the adversary system?<sup>39</sup> Lack of due process<sup>40</sup> and a system of checks and balances, bureaucratic mazes, mandatory attrition by conference,<sup>41</sup> and lack of professional standards are obvious dampeners to the reforming vision. Other ethical dilemmas have also emerged in the mediation movement in the U.S.A.<sup>42</sup>

Although the mediation and community justice networks are important *additions* to the mainstream judicial system, it is far from clear to what extent they can satisfactorily *replace* the more traditional courts.

## X. CYCLICAL EFFECT OF LOW STATUS

Once an area of legal practice acquires a low status, redemption is difficult. A tarnished reputation normally fades slowly, but here is reinforced by a cycle of events. For older practitioners who have generally stayed away from family law practice past images of the divorce will persist – private detectives, divorce raids, perjured evidence, lurid affidavits and coached

38 *E.g.* H.A. Finlay, "Towards Non-Adversary Procedures in Family Law" (1983) 10 *Sydney L Rev* 61. See now Family Law Council, *Annual Report 1983-1984*, 15-20.

39 "Trend Analysis", note 2 *supra*; R.E. Crouch, "Divorce Mediation and Legal Ethics" (1982) 16 *Fam L Q* 219; H.J. Folberg, "Divorce Mediation – Promises and Problems", *International Society on Family Law* (Fourth World Conference, 1982) Harvard Law School; L.J. Silberman, "Professional Responsibility Problems of Divorce Mediation" (1982) 16 *Fam L Q* 107.

40 *Re Gault* 387 US 1 (1967).

41 For the existing pre-trial conference procedure before Family Court Registrars under the former reg.96 (see now s.79(9) and 0.24 r.1), see M. Singer, "Towards Mediation of Matrimonial Property Disputes – Applying the Conciliatory Objectives of the Family Law Act" in H.A. Finlay and R. Bailey (eds), *Property and Finance in Family Law* (1981).

42 Crouch, Folberg and Silberman, note 39 *supra*.

clients. These memories lead to delegation of family law matters to inexperienced junior solicitors. They in turn find family law practice to be difficult, emotionally draining and unremunerative. Therefore they seek to 'graduate' from such lowly tasks by delegating that work to the next junior who arrives (of course, this process of buck-passing is demoralising for an already confused client). Rarely are good role models available or accessible for younger lawyers to see how family law can be practised.

By this process, the bad reputation becomes a self-fulfilling prophecy — bad practice results. Often the unmotivated, the unsupervised and the unskilled end up attempting to practise family law.<sup>43</sup> The motivated and talented soon hear that family law practice is not only poorly paid and difficult, it is also sloppy. Yet another motive is available for the best to do what everyone else is doing — become the servant of the wealthy. Thus most of the talent in the legal profession is "exclusively in the defense of the powerful, to the detriment of individuals less powerful and, ultimately, to the detriment of the entire society".<sup>44</sup>

## XI. PERPETUATION OF POWER AND THE STATUS QUO

It is trite to observe that there is a strong tendency for those in power to seek to perpetuate their power.

Sexton and Maher have commented that

[i]n general the lawyers who are elected to [Law Societies] tend to be those with highly successful and lucrative practices. As it is these factors that are the principal determinants of status inside the profession, this is a predictable result. But what it means is that those persons who decide the profession's public stance on issues have an even greater stake in the existing system than many of their colleagues. Not only have they themselves made it under that system, but they are currently thriving because of its operation. The temptation to regard it as sacred is therefore strong, and has in general proved overwhelming.<sup>45</sup>

This tendency may be reinforced by the propensity to be suspicious of, and even ridicule differences. The practice of family law has different features to other areas of legal practice. And the price paid for this "difference" is a steady barrage of gibe, innuendo and ridicule from the more powerful and respected elements of the legal profession.

No doubt certain differences are worthy of criticism, notably professional incompetence as mentioned under the previous heading. But the commercial critic might do well to reflect that he is part of a system which has contributed substantially to any professional incompetency and that an unconstructive criticism only perpetuates that state of affairs.

43 *E.g.* "Family Court Advocates Criticized" (1980) 18 *Law Socy J* 605.

44 Shaffer, note 10 *supra*, 757.

45 See Sexton and Maher, note 1 *supra*, 157, and 176-177 quoting President Carter in 1978: "[o]ne of the great failings of the organised bar in the past century since the American Bar Association was founded is that it has fought innovations. When greater competition has come to the legal profession, when no-fault systems have been adopted, when lawyers have begun to advertise or compete — *in short, when the profession has accommodated the interests of the public, it has done so only when forced to.*"

Notable differences in family law practice (usually *planned* by reformers) include the frequent appearance of solicitors rather than barristers in court; the absence of wigs and gowns and the attempted informality in proceedings;<sup>46</sup> the modified rules of evidence; courts closed to the public prior to 1983;<sup>47</sup> the payment by each party of his/her own legal costs;<sup>48</sup> the possible presence of an independent lawyer acting for a child;<sup>49</sup> the need to understand and co-operate with the counselling profession;<sup>50</sup> the wide judicial discretions<sup>51</sup> which initially at least seem to abandon 'black letter law',<sup>52</sup> and the judicial attempts to start with a clean slate substantially free from international or Australian precedent.<sup>53</sup>

Suspicion, ignorance and labels about the Family Court have ironically been fostered by the isolation of Family Courts from other court buildings, and by the former closure of proceedings to the public and the former restrictions on publication of information about proceedings.<sup>54</sup> Geographical segregation, while promoting independence, has not enhanced communication with the rest of the legal profession.

Apart from attracting criticism apparently for merely being 'different', the Family Court has also been attacked for effecting a re-distribution of *power* in legal practice. First, some commercial lawyers and judges are obviously offended by the 'Johnny-come-lately' Family Court judges who have risen to judicial office so easily, and moreover without necessarily supporting certain traditional legal values en route. The writer has found both the spirit and substance of these attacks analogous to the gibes that certain members of more traditional universities direct at the recently established red brick universities.

To elaborate on this point – the implementation of the Family Law Act on 5 January 1976 required the rapid appointment of many new judges.<sup>55</sup>

46 Family Law Act s. 97; Wade, note 28 *supra*.

47 Following much criticism, Family Courts were opened to the public after 25 November 1983: Family Law Act s. 97(1).

48 *Id.*, s. 117.

49 *Id.*, s. 65.

50 *Id.*, ss 14-19, 62.

51 *Id.*, s. 64(1) (custody – "welfare of the child"); ss 72-75 ("proper" maintenance); s. 79 ("just and equitable" property division).

52 *Cf. Wardman and Hudson* (1978) FLC 90-466; *Potthoff and Potthoff* (1978) FLC 90-475 (arguably *prima facie* equal division of assets gives some predictability to the vague legislative discretion in s. 79); *quaere Mallet v. Mallet* (1984) FLC 91-507; J.H. Wade, "Measuring the Chancellor's Foot – Matrimonial Property Law in Australia" (1985) 15 *F L Rev* 76.

53 New legislation which supposedly starts with a clean slate tends to attract the accusations, whether justified or not, of reactionary nationalism, parochialism, and premature rejection of insights from other sources. *Cf.* comparative approaches in *Todd and Todd (No. 2)* (1976) FLC 90-008, 75,080; *Crapp and Crapp* (1978) FLC 90-460 *per* Watson S.J.; *Smith and Smith* (1984) FLC 91-525 *per* Evatt C.J. Appeals from decisions of a single judge of the Family Court are also heard by three other Family Court judges sitting as the Full Court of the Family Court.

54 Family Law Act s. 121. On 25 November 1983, the absolute prohibition on publication was modified to allow publication which does not identify the litigants.

55 22 Family Court judges were appointed in 1976; 9 in 1977; 3 in 1978; 3 in 1979.

Initially at least these were lifetime appointments.<sup>56</sup> Such judicial crowns have traditionally been offered at the peak or end of a successful career as a barrister. Thus there is a tendency to devalue and snipe at honours won too soon.

The reality is however that the vast majority of Family Court judges have worked with dedication and competence in the face of enormous difficulties. As with every human organization, a few appointees have proved to be unsuccessful. Because of the huge case load and high public profile of Family Court judges, the behaviour of these few has been subject to far more professional and public comment and gossip than it would have received in other courts. Anecdotal horror stories, even when true, obviously do not justify disrespect for the outstanding efforts of the vast majority of Family Court judges.

Secondly, and more importantly, the existence of an independent Family Court poses a threat to some of the values and the traditional jurisdictional turf of commercial lawyers. An analogous tension can be found historically in the relationship between the common law and equity courts. The jurisdictional struggle in England between family courts and 'commercial' courts over which court should have the final say on the meaning of "marriage" for the purposes of inheritance began at the latest in 1200.<sup>57</sup> Initially at least, church courts favoured a broad meaning, while the property courts favoured the certainty inherent in a narrow ceremonial concept of "marriage". In fits and starts, this jurisdictional struggle between commercial and family courts has persisted for nearly 800 years. In England over the last 30 years the conflict has acquired some notoriety. Lord Denning in the English Court of Appeal has favoured protection of the family while the House of Lords has tended to favour commercial convenience and certainty.<sup>58</sup>

In Australia a similar pattern of behaviour is discernible, with the Family Court tending to favour family protection,<sup>59</sup> the majority of the High Court tending to favour commercial convenience and certainty,<sup>60</sup> and Federal Parliament contemplating various legislative compromises in between.<sup>61</sup>

<sup>56</sup> Federal judges appointed after 21 May 1977 must retire at 70 years of age.

<sup>57</sup> D.E. Engdahl, "Medieval Metaphysics and English Marriage Law" (1968) 8 *J Fam L* 381; J. Bryce, "Marriage and Divorce under Roman and English Law" in *Select Essays in Anglo-American Legal History* (1907) Vol. 3, 782; J. Jackson, *The Formation and Annulment of Marriage* (2nd ed. 1969) 1-77; Pollock and Maitland, *History of English Law* (1895, reissued C.U.P. 1968) Vol. II, 364-399; D. Engdahl, "English Marriage Conflicts Law Before the Time of Bracton" (1967) *Am J Comp L* 109.

<sup>58</sup> *E.g. Bendall v. McWhirter* [1952] 2 QB 466, overruled by *National Provincial Bank Ltd v. Ainsworth* [1965] AC 1175; *Rimmer v. Rimmer* [1953] 1 QB 63, overruled by *Pettitt v. Pettitt* [1970] AC 777; *Williams and Glyn's Bank Ltd v. Boland* [1979] Ch 312; [1981] AC 487.

<sup>59</sup> *E.g. Ascot Investments Pty Ltd v. Harper and Harper* (1980) FLC 90-825; (*No. 3*) (1982) FLC 91-253 (Full Court of Family Court); *Burrige and Burrige* (1980) FLC 90-902 *per* Nygh J.

<sup>60</sup> *E.g. Ascot Investments Pty Ltd v. Harper and Harper* (1981) FLC 91-000; *Re Ross-Jones; ex parte Green* (1984) FLC 91-555.

<sup>61</sup> *E.g.* Recommendation for a presumption of joint ownership of the matrimonial home or matrimonial property regime; see Report of the Joint Select Committee on the Family Law Act, *Family Law in Australia* (1980) Vol. 1, paras 5.137-5.161; Vol. 2, App. 7.

However in Australia, conflicts over values and power sometimes tend to be cloaked behind the doctrine of precedent (itself a value preference) and the equivocal words of the Australian Constitution.<sup>62</sup> Occasionally the jurisdictional struggle has been complicated by a clash of judicial personalities. For example, in the Australian High Court, Murphy J. when previously Labour Attorney-General was one architect behind the Family Law Act 1975 which repealed the Matrimonial Causes Act 1959, a creation of Barwick C.J. when he had been Liberal Attorney-General. As a judge on the High Court, Barwick consistently upheld the constitutional validity of "his own" Act<sup>63</sup> and almost invariably declared his colleague's legislation to be invalid.<sup>64</sup> Murphy as a judge has consistently upheld the constitutional validity of "his own" Family Law Act.

In the past the High Court has been content to allow wide powers over child maintenance and custody to be vested in the Family Court or magistrates' courts under the Family Law Act.<sup>65</sup> However, such a benevolent attitude has not been demonstrated by the majority of the High Court towards the expansion of Family Court power over material wealth and property. Traditionally, control of such hallowed ground has rested with the State Supreme Courts and is based on reasonably predictable principles. There is an obvious reluctance in commercial circles to allow extensive financial power to be given to judges whose values are unknown, or who are known to sympathise with and respond to the plight of deserted and dependent families.<sup>66</sup>

In the recent High Court decision of *Re Ross-Jones; ex parte Green*<sup>67</sup> the statutory powers under the Family Law Act to effect the rights of a creditor of a spouse were very restrictively interpreted. The majority of the High Court seem to be enthusiastic and precipitous about finding statutory, and perhaps eventually constitutional, reasons for excluding the Family Court judges from the commercial arena. By way of contrast, Deane J. dissented

62 *E.g. Sanders v. Sanders* (1967) 116 CLR 366; *Antonarkis v. Delly* (1976) FLC 90-063; *Russell v Russell*; *Farrelly v. Farrelly* (1976) FLC 90-039; 50 ALJR 594; 9 ALR 103; *Re Ross Jones; ex parte Beaumont* (1979) FLC 90-606; *Re Dovey; ex parte Ross* (1979) FLC 90-616; *Ascot Investments*, note 60 *supra*.

63 *E.g. Lansell v. Lansell* (1964) 110 CLR 353; *Sanders*, note 62 *supra*; *Antonarkis*, note 62 *supra*.

64 *E.g. Russell*, note 62 *supra*; *Re Ross-Jones*, note 62 *supra*; *Re Lambert; ex parte Plummer* (1980) FLC 90-904; *Ascot Investments*, note 60 *supra*; but *cf. Re Dovey*, note 62 *supra*.

65 *E.g. Fountain v. Alexander* (1982) FLC 91-218; *Vitzdamm-Jones v. Vitzdamm-Jones*; *St. Clair v. Nicholson* (1981) FLC 91-012, *V. v. V.* (1985) FLC 91-616. This judicial willingness to allow a broad federal power over the custody of children is being tested to its limit by the ambitious amendments in 1983 which have expanded the meaning of "child of the marriage" under the Family Law Act s. 5(1). See *Cormick v. Salmon* (1984) FLC 91-554 (s.5(1)(f) held to be constitutionally invalid); *Re Cook and Maxwell; ex parte C.* (1985) FLC 91-619 (s. 5(1)(e)(i) read in conjunction with para. (ce) held to be constitutionally invalid).

66 See also the jurisdictional struggle between the State Supreme Court and the Family Court over the enforcement of maintenance agreements: *Ellinas v. Ellinas* (1979) FLC 90-649; *Carew and Carew* (1979) FLC 90-698; *Perlman and Perlman* (1983) FLC 91-308; now resolved by the Family Law Act 1975-1983 s. 4(1) definition of "matrimonial cause", para. (ea).

67 (1984) FLC 91-555.

and graciously indicated an interest in the possibly unique insights of the specialist Family Court judges. Deane J. commented with some humility that "the views of Family Court judges would be particularly helpful",<sup>68</sup> and that "[the perceptions of a Family Court judge may] have a significance which is not apparent to the members of this Court whose practical experience in family law matters is ordinarily, at best, limited."<sup>69</sup>

By implication, nor was Deane J. willing to support the majority construction of a Maginot line to exclude the Family Court from making orders which effected the property interests of third parties.<sup>70</sup> He was unwilling to overrule previous Family Court decisions where interlocutory orders had been made restraining third parties from taking action to sell the matrimonial home.<sup>71</sup>

For the future, any successful legislative expansion of power over property and material wealth under the Family Law Act will give a reluctant status to family law practice. For then, its increased potential to redistribute wealth will make family law a vital aspect of commercial, tax and corporate law practice.<sup>72</sup> This would be a status derived from walking in the corridors of power, as well as from technical excellence and managerial efficiency. However, *by itself* such a development would only create a re-classified ghetto for 'ordinary' family lawyers outside the corridors of power.

## XII. THE FEMININE PRESENCE

Although there do not appear to be any statistics available to verify this proposition, it seems that a disproportionate number of female lawyers practise in the area of family law. Out of the ranks of the practising profession, the number of women specialising in areas of family law is also noticeable.<sup>73</sup> Moreover, even if this impression that there is a high proportion of females in family law practice is *statistically* incorrect, there is a common belief within the profession that it is correct. That is, women have been stereotyped in their legal roles. In a conscious effort to break the stereotype which hangs over them, some female students refuse to study family law and strive to excel in commercial and taxation subjects.

68 *Id.*, 79,501.

69 *Id.*, 79,500.

70 The majority confirmed the limited exceptions which had been developed in *Ascot Investments*, note 60 *supra* to allow orders under the Family Law Act to effect the interests of third parties; see particularly Wilson and Dawson JJ., 79,493.

71 *E.g. Gillies and Gillies* (1981) FLC 91-054; *Harris and Harris; re Banaco Pty Ltd (No. 2)* (1981) FLC 91-100.

72 Particularly the powers under ss 85 and 85A of the Family Law Act to interfere with the property rights of third parties *e.g. Heath and Heath; Westpac Banking Corp.* (1983) FLC 91-362.

73 *E.g.* Elizabeth Evatt is Chief Judge of the Family Court; outstanding American writers include Mary Ann Glendon, Lenore Weitzman, Carol Bruch, Judith Areen and the late Brigitte Bodenheimer; Australian writers include Rebecca Bailey-Harris, Helen Coonan, Jocelyne Scutt, Marcia Neave and Ellen Goodman; and in the U.K., Ruth Deech and Olive Stone. No other field of law has such a notable female presence.



This real or alleged presence of a large number of female practitioners in the area of family law is both a symptom and a cause of law status.<sup>74</sup> It is *symptomatic* because in a male-dominated profession (though the male dominance is slowly waning<sup>75</sup>) low status jobs are delegated to women. This process is then sometimes rationalised on the argument that women are more suited by nature or nurture to handle family law matters. No doubt it might be argued that males<sup>76</sup> or perhaps Australian males<sup>77</sup> are by nature or nurture generally incapable of dealing with emotional and spiritual problems especially in crisis situations.<sup>78</sup> But whether one agrees with such generalisations about male-female roles or not, it is noticeable that women end up regularly in roles that are low-paying and low status.

Apart from being symptomatic of the low status of family law, the presence of female practitioners also *causes* further low status. Males are able to delegate family law clients to females; to reinforce their stereotype of what females are good at; and to denigrate males who practice 'among the women'. Moreover, female law students lack helpful role models of women lawyers and therefore gravitate towards family law where some excellent models are available.

Shaffer has commented that

[w]omen are particularly victimized by the vague-models phenomenon; none of the pictures on the law school wall are pictures of women. Few of the professors are women and the blind Lady Justice is not a true woman either. The lawyer as student is

74 Compare the 'triple role burden' that many women have acquired in Western democracies. First, unpaid household manageress; second, part-time poorly paid employee; third, full-time custodian when the marriage breaks down. See generally M.A. Glendon, *New Family and New Property* (1981); K. Hargreaves, *Women at Work* (1982).

75 Tomasic and Bullard, note 1 *supra*, 172 indicated that in 1977 in N.S.W. females only made up 6.6% of city solicitors; 3.2% of suburban solicitors; 5.6% of country solicitors and 4.2% of corporation lawyers. Theoretically these figures should increase drastically. For example, the percentage of female graduands at Sydney University Law School has increased as follows:

1978	22%
1979	27%
1980	26%
1981	32%
1982	37%
1983	33%
1984	27%

76 E.g. Sara Maitland's essay in S. Dowrick and S. Grundberg, *Why Children?* (1980) 86-87: "[m]y husband was not just out during the day: he came in tired, he had a lot of new things to deal with, and he also started to assert the importance of his work as well as mine. He ceased to be centred on us, and as his day filled up it became apparent that he had real personal difficulties in responding to sudden emotional demands: he liked, needed, to have his day organised. He would do, generously and gladly, appointed tasks, but found it very hard to respond to unanticipated needs. I do believe this is a socially encouraged deficiency in most men, because they do have control in the majority of situations and simply do not have to respond emotionally as women do."

77 R. Conway, *The Great Australian Stupor* (1971); *Land of the Long Weekend* (1978); *The End of Stupor* (1984).

78 Cf. the nature-nurture debate in custody litigation on whether there is, or should be, a "mother preference"; *Gronow v. Gronow* (1979) FLC 90-716; L.J. Weitzman, *The Marriage Contract* (1981) 98-120.

faced with the conflict of becoming a lawyer without a clear idea of how a lawyer behaves.<sup>79</sup>

It is a long road before the almost equal number of women in law school acquire 'equal' status in law practice.<sup>80</sup> Nevertheless the eventual obvious presence of women in *all* areas of legal practice will have the side-effect of improving the professional status of family law practice.

### XIII. ZEAL FOR COMMUNITY SERVICE?

These comments on the low status of family law practice naturally say nothing about the social importance of family law. The legal profession is directly exposed to the public probably most frequently in conveyancing, will-drafting and family law matters. In 1983, on the statistics kept in the Family Court alone, there were 42307 divorce applications, 12288 property applications, 9451 maintenance applications and 12698 custody and access applications.<sup>81</sup>

Additionally, a vast and unknown number of maintenance and custody applications are heard in the magistrates' courts each year. These applications actually filed probably represent only the tip of the iceberg of legal advice given in situations of family breakdown. Moreover, the bulk of Federal legal aid expenditure continues to go towards family law disputes. Accordingly the need for widespread and at least competent professional services is obvious.

Even though pressing community needs and challenges might be established, the response will not necessarily be a rush of helping professional legal talent. Considerable work needs to be done in Australia concerning who is coming to law school and with what motives and expectations. What is happening to students, if anything, while at law school? One study in the U.S.A. tentatively suggests that entrance procedures are such that

the law schools can expect continuing disappointment in any efforts to produce lawyers who will want to represent the criminal, the underprivileged, or the family in trouble. Aiding the weak, the oppressed, the poor and the needy is not the likely end product of a professional system so status oriented in its roots.<sup>82</sup>

Another study of U.S. law students found that

women, blacks, and students with parents with relatively low family income were all more likely to cite service to the underprivileged as a motivation for entering law school than were other students.<sup>83</sup>

<sup>79</sup> Shaffer, note 10 *supra*, 736.

<sup>80</sup> See generally F.E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harv L Rev* 1497.

<sup>81</sup> Family Law Council, *Annual Report 1983-1984*, 57-60. Probably less than 10% of the property, maintenance, custody and access applications end up being defended.

<sup>82</sup> S. Warkov and J. Zelan, *Lawyers in the Making* (1965) xviii-xix, cited in the American Bar Association, *Law Schools and Professional Education* (1980) 29.

<sup>83</sup> American Bar Association, *id.*, 29, summarising the findings of R. Stevens, "Law Schools and Law Students" (1973) 59 *Va L Rev* 551, 613-614.

At least these upwardly mobile students appear to regard law as a profession where one can 'do good while doing well'.

Once students reach law school, studies conducted in the U.S.A. are inconclusive on whether the legal education process itself significantly influences students towards tax and corporate law. There is a lingering suspicion that legal education is a major culprit, but the possible other causes complicate any firm conclusion. A notable factor in an orientation towards corporate law is the hard market reality that some jobs are clearly available in the corporate sector.<sup>84</sup>

#### XIV. MEDICAL ANALOGY

The tensions present in family law practice find analogies in medical practice in a cancer clinic. In a cancer clinic, patients often come to doctors with unrealistic expectations; patients complain that they are excluded from the decision-making process over their own lives by insensitive and over-busy professionals; doctors have been put under pressure to develop extensive education programs for their clients; patients go through cycles of grief, exhibiting shock, denial, anger and depression; clients often must be given the same advice many times over, until they are "ready" to hear it; doctors are expected not only to master the technical skills of surgery, chemotherapy or radiotherapy, but also to learn to relate to patients in constant crises; patients often develop a deep antipathy towards their doctors — they suspect that the doctors are motivated predominantly by research interests or money; every encounter with the cancer clinic only heightens awareness of the patient's problems and moreover adds to these in the form of medical expenses and the side-effects of treatment; doctors are placed under the suspicion that they have chosen the wrong course of treatment as patients hear that there are many alternative or cumulative treatments available ranging from the orthodox to the zany; doctors are criticised by lobby groups comprised of disenchanting patients and their relatives; doctors are placed under pressure to deal with their patients as "whole persons" and therefore to become part of an inter-disciplinary team; even though a doctor does an outstanding job for a client, he/she will often finish with a resentful and angry client (and relatives) who expected more; patients have lobbied with some success to improve the stark and overcrowded hospital environment (especially when caring for children); and finally pressure has mounted for all the clinic staff from receptionists to doctors to be trained and sensitive towards clients.

Despite the litany of difficulties of medical practice in a cancer clinic, who would deny the social importance of treating people afflicted with such diseases? Moreover, it seems to require a person of special ability and flexibility to adapt to the pressures of such a job. For every complaint, an analogy can be found in the field of family law practice.

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84 American Bar Association, *id.*, 69-78.

## XV. CONCLUSION

The comments in this article are not offered in order to promote gloom. Rather the hope is to identify that which has been vaguely felt with the aim of responding constructively.

There are many objective steps which could be undertaken to improve the status of family law practice in Australia. These would include for example:

- certification of specialists
- advertising of family law specialists
- observation programmes for law students of good role models in the profession
- exposure of law students and practitioners to other professions dealing with broken families
- education and continuing legal education on the topics of negotiation, interviewing, counselling and relating to clients in crisis
- continuing legal education for Family Court judges
- a great improvement of physical facilities in Family Court buildings
- educational programs for family law clients
- regular publicity from the Family Court to explain its operations and that the vast majority of disputants settle by agreement.<sup>85</sup>

Despite the eventuality of some or all of these objective reforms, there remains an entrenched pecking order in the legal profession as a whole. A law student or lawyer who makes a commitment to specialise in the area of family law will soon become aware that he/she is swimming against the stream of what is considered to be professionally “appropriate”, especially if high grades and/or contacts provide a range of professional alternatives. Nevertheless, that commitment may be sustained by a personal hierarchy of values which differs from that prevailing in the dominant legal/law school culture. Ideally, the ephemeral visions of individuals to be effective servants for clients should be buttressed by a vigorous and creative organisation of specialised family lawyers and judges. Nevertheless, a healthy suspicion should persist that the lamb of community service will come to disguise the wolf of self-interest.

Ultimately, the acquisition of status for family law practice will not come by the emulation of certain attitudes within the general legal profession, but rather by creative and unconventional individual and institutionalised responses to client pressures for better service. Status will then come first from more contented clients, and perhaps later from professional legal colleagues.

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<sup>85</sup> See now Family Law Council, *Administration of Family Law in Australia* (1985).

## XVI. POSTSCRIPT – 1985 PROPOSALS

Since the original writing of this article, some relevant matters have been discussed by the Family Law Council. In a report to the Federal Attorney-General in 1985 entitled *Administration of Family Law in Australia* the Family Law Council has commented upon a large number of matters including the court environment, court services to the public, complaints about family lawyers and judges, specialisation and accreditation of family lawyers and information services for the public.

The many recommendations for change contained in this report are worthy of study. Their implementation may take some considerable time in the face of other political priorities. Nevertheless, these recommendations provide constructive approaches to what has always been, and always will be, a difficult and challenging area of legal practice.