Statistics Canada Statistique Canada

DIVORCE:
Law and the Family in Canada

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Authors' Preface

Although this book is about divorce, we have always hoped that it could be more than that. While it is directly concerned with patterns of change in family relations in Canada, in a sense it is also a book about Canadian society as a whole.

We evidently live in times when, in Robert Heilbroner's phrase, "familiar institutions are being replaced by unfamiliar ones, accustomed ideas by unaccustomed ones". Canadians seem less sure these days of the institutions and the ideas by which they can mark out their individual place in the world. Many of the social ties that traditionally linked people together, once mainly those of family and community, are dissolving. This change gives rise to uncertainty and concern. A great many Canadians find it hard to understand, and harder still to accept, the statistical fact that during their lengthening lifespans they are increasingly likely to marry more than once and for shortening periods of time. Many will also experience divorce. Others will neither marry nor divorce, but will establish and dissolve family relationships that are not marriage-based. So beyond our general purpose of illuminating the workings of the divorce process, we have endeavoured to treat divorce as a window through which we could look at our society more widely. It is with this in mind that we have considered some of the tangential interconnections and tensions which divorce throws sharply into relief: between valued ideals and experienced reality, between past history and present milieu, and between those two large components of our society, the family and the law. These run as latent themes through our study.

In sum, we have tried to draw in some further detail on a map of our social terrain. If this study helps more Canadians to see their social landscape a little more clearly, or to better understand and shape the social forces at work in their society and in their own lives, it will have been worthwhile.

Acknowledgements

The preparation of a careful study on any central feature of social life in Canada is necessarily a long and demanding task. In the course of our work on this volume, various aspects of the analysis have required the application of many different kinds of expertise ranging from data processing, to library research, through detailed and complex computation, and finally through the drafting process itself. Indeed, in the gestation of any such document, there will always be an involved process of co-operation, intellectual exchange, and critical assessment, and this project was no exception. In particular, though, we would like to acknowledge the enormous contribution made by Mary Jane Price through her historical research. We also thank Dhruva Nagnur for his assistance in providing data tapes, Owen Adams for his assistance in preparing the divorce "life tables", Bill Lalonde for his advice on difficult programming problems which derive from dealing with a dataset of this size, and as well, the anonymous lawyers whose off-the-record comments were of inestimable assistance in the formative stages of the process in sensitizing us to the problems as they are perceived at the 'real world' level.

At a later stage, we sent the draft manuscript to a series of referees whose knowledge of the subject is such that we felt their comments and criticisms would be valuable, even essential, to the success of the effort. Our feelings on that score have been amply confirmed. The referees were consistently excellent in the extent and thoroughness of their comments. We would like to thank (in no particular order): Leroy Stone, Robert Pike, Judy Harrington,Julian Payne, Jamie Benedickson, Lorne Rowebottom, Ivan Fellegi, Holly Harris, and James Weed.

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Finally, we want to make clear that the responsibility for the analysis and interpretation of the data is solely that of the authors and not of Statistics Canada.

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Ottawa, Ontario
Fall, 1982

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Divorce in Canada: A Prologue

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Of all the activities to which human beings devote time and energy, one of the most enduring is the maintenance of orderly familial relationships and lines of succession. In order to clarify and to codify these relationships, societies have devised elaborate sets of rules to govern the on-going succession of identity and property from generation to generation. The task is never an easy one. It is difficult and at times impossible to accommodate the vagaries of human whims and feelings, 'the polymorphous perversity' of human sexuality, the motivations behind the naming of heirs and heiresses and, last but not least, the at once lamentable and laudable human capacity for changing one's mind in matters matrimonial. Yet, where there are human beings, there are rules to govern these actions. Often these rules are contradictory and pointlessly bureaucractic in nature, their origins forgotten in the rush to get on with the important things. Consequently, the laws and the codes multiply without end, in a grinding and probably fruitless pursuit of the perfect set of rules which would both satisfy the necessity for orderliness and at the same time legitimate most mating behaviour.

In this process of social structural development, the belief in the divine origins of what are eminently man-made rules and regulations can and does introduce a degree of rigidity. It is, after all, difficult to explain a change of view on the part of a deity. Nonetheless, religious institutions have often found themselves forced to re-evaluate these views when legal change is demanded, and sometimes this task has provided ecclesiastical officials with additional secular functions and an increased social visibility.

In the creation of laws to govern matrimonial affairs, two imperatives exist which are inherently contradictory: to give legal standing to all marital relationships and to cover those relationships which exist in the real world despite the existence of other marriages which have yet to be dissolved. Thus the state continuously finds itself in the position of identifying relationships which

do not, and cannot, fall within its established definitions of order. Consequently all societies must have mechanisms for undoing or renewing social reality so that descriptions of relationships may be made to fit within the institutions of orderliness.

Such mechanisms range all the way from expunging the problem through the physical elimination of marital offenders, the removal of illegitimate children, and the foreclosure by the state of inheritable property, to such active blandishments as material and moral incentives to join the ranks of legitimate society. Certainly, the latter approach is more consistent with advanced industrial societies since, with obvious and important exceptions, substantial capital assets and indeed the economy as a whole are no longer dependent on biological lines of succession in the determination of control of economic power. In contrast, the family is stripped of many major and traditional functions, and becomes a residual container whose members freely use it as they wish in their pursuit of a desirable lifestyle and all the attendant ephemera.[1]

In fact, the mechanisms are invaluable for how they illustrate two very different views of family life. The first portrays the family in formal terms as the legal union of two individuals, each with unique rights and obligations, and this view is dominant in recent provincial family legislation. The second suggests that the couple is a collectivity much like an unincorporated partnership or association of co-adventurers. Each of these views has prominent philosophical origins.

The former view, which employs individuals as the basic unit of count, is both an old and new one. In the eighteenth century, it was used as a cudgel on surviving feudal social forms. Individual citizens were then, for the first time, portrayed as 'social atoms' by the Physiocrats, endlessly rebounding off each other in the pursuit of advantage. In modern times, this view has re-emerged as one of the bases of reformed family legislation, in the rejection of the view of the family as an inherently non-partitionable asset-holding institution. The former position (now reborn as 'possessive individualism') is in direct contradiction to the latter view of the family as a collective enterprise in which the interests of members are indistinguishable from those of the collectivity. Here by marrying, individuals are seen to create a new social entity which holds assets in common, to which special tax laws apply, and which initiates social actions in its own right. Individual members can be and are taken to be representatives of the collectivity for many purposes, much to the irritation of adherents of the individualist view.

In the 1980s, the state has few remaining interests in the contents of family life. As long as taxes are paid, children turn up at school, pets do not dig in forbidden areas, and domestic disputes do not disturb the neighbours,

1. Some feel that the process of transition will gradually end. Norton and Glick, for instance, suggest that as time goes on expectations regarding marital roles and relationships should become more consistent with real-world experiences. In other words, ideally after the period of structural transition of the institution of marriage is complete, the adjustment to be made by the partners should create less of an emotional strain (1976:12).

private family life can proceed without state interference. But the state does have an interest in the form of the family. First and foremost, support liabilities must be firmly fixed on the shoulders of individuals, since the state is not yet prepared (or some would argue, able) to undertake a generalized liability for feeding, clothing and entertaining its citizens. Secondly, the state has become, by default, successor to the ecclesiastical mandate for maintaining the order of family relations.

The legends of ancient Corinth tell of Sisyphus, the king who was condemned to roll a heavy rock up a hill in Hades only to have it fall back down again as soon as he neared the top. In many ways, the attempt to bring order to the business of mating is a task worthy of Sisyphus. Every day, the state puts the stamp of official approval on births and deaths, the transference of property from the dead to the soon-to-be-dead, on marriages, declarations of paternity, property transactions, certificates of education, criminal unworthiness, sanity, insanity and, last but not least, divorce.

For each of these processes of legitimation there exists a standard pattern, more often than not accompanied by standard paper forms which constitute a written record of orderliness. Such records are necessary since conflict can attend each and every one of these legitimation exercises. In fact, the official recording and regulation of private life is made in anticipation of conflict. To the extent that the state lays hands on only after the conflict has been resolved (and such is often the case in divorce) the tendency to ritualize the process grows. In the case of divorce, the idea of ritual is illustrated by the adherence to a 'script' of events and words spoken by interested parties.[2] The 'script' reasserts the appearance of legitimate order and reduces any discrepancy between such order and descriptions of behaviour. The story of the divorce process thus lies in the 'script' and the dramas which daily ensue in the courts, for an annual total now well in excess of 60,000 in Canada.

In 1968, the Canadian Parliament redrafted the laws concerning divorce and, as a result, there was a palpable and measurable change in the fabric of the country's social and familial life. It is a fact that, for whatever reasons, the number of divorces in Canada increased following the 1968 Act to an annual rate that in 1978 was almost five times greater than it had been a decade earlier. Legal grounds were broadened to include physical and mental cruelty, sodomy, bestiality, rape, non-consummation, imprisonment, addiction, separation and desertion, and there was a dramatic increase in the numbers of petitions and petitioners. Some cases, no doubt, were due to the backlog of potential cases newly made eligible for divorce. Others were prompted by the fact that legal grounds had now extended past simple fault, and this made divorce a more attractive proposition to those who had previously regarded the process with distaste.

2. The Law Reform Commission of Canada notes that "The perfunctory litany of uncontested divorce (90% of the total proceedings in Canada) is amply demonstrated in a leading text that reduces the relevant questions to be asked in standard form (1975b:25)".

The consequences have brought considerable changes to Canadian society and it is clearly time to assess the phenomenon of divorce in Canada in those years subsequent to the passage of the 1968 Act. We have judged that a discussion of the history and social nature of divorce is *a priori* a necessity in the treatment of such a task. Since the process of divorce is charged with tension and drama, we have found the analogy of theatre to be an appropriate and useful descriptive tool. We thus think of the divorcing couple or the parties as the 'contestants', since they are forced, by law, to contest. We designate the legal workings themselves as the 'action' and we refer to the denouement or breakup as the 'outcome'. One legal expert has noted that "As a lawyer, I think of divorce as a play, and I write the script and get a cast of characters" (Weiss, 1975:268).[3] In fact, in the courts divorce is very often a drama, staged and acted out for the benefit of an institution that has little interest in playing the voyeuristic audience. In this drama we consider the 'spoils' as the prize or reward for the officially virtuous, the pyrrhic victor of the struggle. In this instance, spoils are the human desiderata of the marriage — the furniture, cars, cottages, the liquid assets and, finally, the children. Here the image of the morality play, where the interests of society are upheld at the expense of individual characters, is truly appropriate. The fact that custody of the children is disposed of in much the same way as an antique chair is indeed a sad comment on the state of marriage dissolution and thus of the legal process at hand.

The range of responses to this process is very wide. To some, the divorce process is an affront to the moral order and a cause for concern for the integrity of social institutions in general and the family in particular. For others, it is an artificial obstacle to a peaceful end for defunct marriages. Yet, in each view, there is a basic confusion over what is being dissolved: civil contract, or family.

We must, then, at the outset, make the crucial distinction between the dissolution of a marriage (a process which is essentially legal) and the related though distinct process of family dissolution, which proceeds independently of law, and which occurs naturally through the death and departure of members in any case. Often a divorce frees parties from a marriage that has long since lost its social content. This distinction between social and legal facts must be preserved in order that divorce as a legal process be understood in its proper legal context – as the final legitimation of the status quo. Thus the same human beings appear on two 'maps': one showing the social reality of mating, the other showing the legal state of the relationships. These two maps present strikingly different and contradictory outlines of the same terrain.

3. This analogy to theatre is further supported by a rather illuminating newspaper story describing the reaction of an audience to court activity in Montreal's Palais de Justice. The reporter notes:

   There are also professional court-goers, people who come here just to pass the time . . . . To them, the courts are entertainment – with a four-star rating. The men prefer murder trials and the women in the group prefer divorce court. "They like the sad stuff, . . . especially if there are children. It makes them cry." . . . For them a good court case means action and performance (Ottawa Citizen, June 25, 1980).

In the process of 'mapping' the legal activity of divorcing we note that the great majority of divorce actions in Canada are undefended. They are legal rituals that often take no more than five minutes. Yet, family dissolution is a social reality that takes many forms, including but not limited to this ritual. Family dissolution must be viewed independently of the legal process. Often there is an implicit tension between these two aspects of dissolution: the informal and the legal. As far as this study is concerned, it is specifically the legal process we seek to describe and explain.

By focusing on the legal aspects of the process, we will follow the various acts and actors as their cases proceed through the courts of Canada toward the legitimation of what is already an established social fact. In its starkest light, the court retains a religious function, with the judge in the role of latter-day priest who acts on the basis of a secular higher authority – the law – rather than ecclesiastical authority.

The study of the divorce drama is limited somewhat by the information available. In this case, the primary data are a complete record of all Canadian divorces during the period 1968 up to and including 1979, drawn from the Central Divorce Registry of the federal Department of Justice. This record is in the form of court documents and, as such, it contains the skimpiest of data on the personal characteristics of the contestants and their families. Consequently it lacks the kind of information needed to answer the larger, sociological questions[4] although it does form a complete record of a society for 11 contiguous years following a major legislative change. We thus have access to files for approximately 500,000 divorce cases started and brought to some form of conclusion during that 11-year period.[5] Such a record allows statistical analysis on a scale which all too seldom presents itself to the social scientist.[6]

To supplement the Central Divorce Registry data, we have also made use of information drawn from a sample of the 1975 files of the Official Guardian of Ontario, since these files contain much more personal information on the contestants.

It should be noted though, that these files are not entirely representative of the full spectrum of divorce; the Office of the Official Guardian is only

4. It should be pointed out that these data are collected for the purpose of ensuring that courts across Canada are properly seized of jurisdiction in the matter by checking against contemporaneous or previous petitions outstanding between the same couple.

5. It should be noted that some cases have been withdrawn or discontinued.

6. As a body of data for this analysis, we will use the coded records for each divorce case which proceeded to *decree absolute* or was dismissed or discontinued from the year 1969, the first full year in which the new Divorce Act was in effect, up to and including the year 1979, the latest year for which a complete set of records was available to us from the Central Divorce Registry. At the time of this study, the registry was maintained by the federal Department of Justice in Ottawa.

   In addition, in some areas such as those of division of assets, income-generating capacity and post-divorce maintenance, where the Central Divorce Registry figures are not sufficient, we will make reference to figures from a special sample survey of data from the files of the Official Guardian of the Province of Ontario for the year 1975. Details of both data sets appear elsewhere.

concerned with divorces that involve dependent children in the province of Ontario. However, the resultant data do provide invaluable additional evidence and case material on the personal drama of divorce: the dissolution, and the disposition of the spoils. They also permit an examination of why husbands and wives *think* the family broke apart[7] as well as provide helpful information about matters of interim maintenance and alimony.

Finally, these data permit the examination of a number of issues that are of considerable importance to public policy in both the federal and provincial areas of family law and its reform. Ultimately, however, the real question is whether the review of such issues from an exclusively legal perspective can be effective in light of the changing nature of Canadian society and its institutions. Although we do not feel we can provide categorical answers, we consider it worthwhile to examine all aspects of the question in the belief that the facts have much to say.

But, first, the history.

The Social Origins of the Law

Historically, the grounds for divorce have reflected, in varying degrees, a mix of two different philosophies or social feelings. One has been explicitly theological, while the other has been based on expediency.

During the time of the early Roman Empire, mutual consent, and even unilateral repudiation, provided sufficient reason to terminate a marriage. At the time family matters were governed by the male head of the household and were therefore strictly private in nature. A legal precedent from the eighth century in Europe indicated a couple need only have a clerk or notary authenticate their agreement of dissolution. The tradition persisted in Western Europe until about the tenth century, when the Church of Rome emerged as a nascent political power and insisted for the first time that marriage was a sacrament.[8] The church alone claimed the temporal authority to conduct marriage and would only dissolve a union where it was seen to be invalid at the inception. The grandiosity of this assertion, so sweeping in its implications, went well with the tone of wider claims to exclusive authority over the thoughts, actions and plans of all Christians.

Until the Reformation a valid marriage was considered to be immutable. The prevailing view was "whom God hath joined together, let no man put asunder" (Matthew 19:6). Nonetheless there were alternatives. Annulment was possible, as was desertion. In some cases marriages were never formalized. One need only think of the marital troubles that plagued King Henry VIII of England (1491-1547) to understand the level of church control surrounding marriage and its termination.[9]

7. The intriguing element here is that often the two ex-partners have very different stories about what actually caused the rupture. Accounts of precipitating events must therefore be looked at with caution (Levinger and Moles 1976:199).

8. CODEX JURIS CANONICI, Canon 1012 1: "Christ our Lord elevated the very contract of marriage between baptized persons to the dignity of a sacrament."

With the Reformation in the latter half of the sixteenth century, marriage jurisdiction passed to the state and slowly the idea of civil divorce took root in Western Europe. The repudiation of the sacred tradition of marriage began with Martin Luther, who said that marriage was not a sacrament but a 'worldly thing'. Yet despite the fact that dissolution of a marriage had returned to the private domain, there were still certain ecclesiastical provisos. If the repudiating party wished to remarry it was still necessary to prove to an ecclesiastical court that the repudiation was justified and the marriage dissolved. Eventually, this task became such a burden for the clergy that secular courts were established. These courts took on the duty of authenticating stated grounds, since individuals were not trusted to make the decision themselves. The principle of marital offence as just cause was basic to the new concept of divorce.

England was slow to permit secular court divorce. Until 1857 divorce required an act of Parliament, a process that was both time-consuming and cumbersome. The 1857 act adopted a dual standard for husband and wife, insofar as grounds were concerned. Hahlo explains:

> The conception of divorce as a penalty for matrimonial misbehaviour was reflected in its consequences. A guilty wife could not claim maintenance after divorce and the innocent spouse had the better claim to the custody of the minor children of the marriage. In some legal systems the guilty spouse was liable to forfeit all or part of the financial benefits derived from the marriage, and in most, a husband who obtained a divorce on the grounds of adultery from his wife was entitled to damages from her paramour.[10] Many systems prohibited a spouse who had committed adultery from remarrying or from remarrying within a certain period or from marrying his or her paramour (Law Reform Commission of Canada 1975c:11).

The concept of fault maintained a strong hold in most countries until the middle of the century. Nevertheless, the ancient idea of dissolving a marriage because the partners were unsuited was revived by Frederick the Great of Prussia. Eight years after his death, Frederick's ideas were codified in the Prussian General Code of 1794:

> Marriage could be dissolved, not only for cause as under traditional Protestant law, but also by the mutual consent of both parties, provided the marriage was 'utterly childless' or even upon the unilateral application of one party who would allege and prove through relevant facts the existence of so violent and deeply rooted an aversion that no hope remains for a reconciliation and the achievement of the ends of the married state (Rheinstein, 1972:25-6).

9. Henry VIII's first wife was Catherine of Aragon, the widow of his elder brother. By 1519 Henry had begun to despair that Catherine would produce a male heir. He tried for an annulment of his marriage from the Catholic Church and was refused by Pope Clement VII. Nothing deterred, Henry proceeded to abolish papal jurisdiction in England, had his marriage to Catherine annulled and married Anne Boleyn. Not a man of constant affection, Henry eventually tired of Miss Boleyn and took in succession a further four wives: Jane Seymour, Anne of Cleves, Catherine Howard, Catherine Parr.

10. In this regard, it is interesting to note that in Ontario criminal conversation was abolished only in 1978 by the Family Law Reform Act.

Frederick's statute was eventually abolished in 1896, but the idea had taken root, and eventually it was to be revived.

In a survey of contemporary divorce legislation in various European and Scandinavian countries, as well as those countries following the British tradition, Hahlo (1975) concludes that there has been a gradual shift from 'fault' to 'no-fault' grounds. He observes that this is very likely due to a gradual abandonment of the early Christian norms of social conduct. If, as many now believe, marriages are made by people, rather than in heaven, there is no reason why they should not be unmade by those same people. And in this unmaking, there is no natural secular imperative to assign fault in all cases. He points out that if a couple decides to end their marriage, "depending on the law under which they live and the facts of the case, they may have to lie a lot, a little, or not at all but, somehow or other, they will achieve their purpose" (1975:45). Thus the demonstration of fault, to a greater or lesser degree, has become an encumbrance in western countries, and logically so.

The idea of fault has its origins in Protestant thought. Fault grounds presuppose that one spouse is innocent and the other guilty. Further, until the mid-70s, only the innocent spouse could be given a divorce and if it was shown that both parties were at fault, then the conditions of the respondent were stronger and the petition could be dismissed (Hahlo, 1975:61).[11] Until very recently fault has implied an adversarial process which pits one spouse against another. Criticism of the concept has been pervasive in many western jurisdictions (California, Sweden, etc.) and as a result, there has been a shift to 'no-fault' grounds. Hahlo has argued that fault grounds are objectionable for several reasons, the least of which is that distinctions between guilt and innocence are simplistic. In England, in 1966, the Archbishop of Canterbury's group stated:

> Although in practice decrees are sometimes granted to both parties, the logic of the matrimonial offence requires the court to pronounce one of the parties 'guilty' and the other 'innocent'. Used strictly with reference to the particular offence on which the petition was founded these terms are perfectly proper. But it is practically impossible to exclude the further implication that the spouse found 'guilty' of the offence in question is thereby held generally responsible for the breakdown of the marriage; and that may be far indeed from doing justice to the 'guilty' person, as well as far from acknowledging the complexity of the factors that precipitated the petition for divorce. Add to that the frequency with which the discretion of the court is exercised in an offending petitioner's favour, and the distinction between 'guilt' and innocence appears wholly preposterous (*Putting Asunder*, para. 43).

But guilt and innocence aside, courts generally do not have the means to probe an alleged matrimonial offence, nor do judges have the inclination. On top of this, side effects of fault grounds mire the contestants in what is often a nasty, unpleasant battle. As Hahlo notes:

11. The material produced by Professor Hahlo in 1975 was based on jurisprudence developed under the Divorce Act up to about 1974 and as a result *decrees nisi* to two guilty or adulterous parties are now routinely given.

> The spouses dig deep for dirt to throw at each other and the court finds itself with the repugnant task of having to delve into the seamy details . . . . On the other hand, an uncontested action is often preceded by hard financial bargaining for the terms of the divorce and a divorce-hungry 'guilty' spouse may be called upon to pay a high price for the co-operation of the 'innocent' spouse (1975c:49).

So there seems little sense in forcing a 'guilty' spouse to remain married. He or she will likely leave anyway, perhaps to live with another in a *de facto* marriage elsewhere. On the other hand, the idea of 'no-fault' or marriage breakdown as grounds for divorce is based on the principle of acknowledging the obvious: *res ipsa loquitor* (the case speaks for itself). This principle reflects the reality that marriage is a human institution and that individuals within such an institution should be able to decide when a marriage is no longer viable. On this point too, the Archbishop of Canterbury's group was eloquent. It stated that

> a divorce law founded on the doctrine of breakdown would not only accord better with social realities than the present law does, but would have the merit of showing up divorce for what in essence it is – not a reward for marital virtue on the one side and a penalty for marital delinquency on the other; not a victory for one spouse and a reverse for the other; but a defeat for both, a failure of the marital 'two-in-oneship' in which both its members, however unequal their responsibility, are inevitably involved together (*Putting Asunder*, para. 26).

As we have already stated, passage of the 1968 Divorce Act in Canada included 'no-fault' or marriage breakdown grounds as an addition to matrimonial offence grounds. Notwithstanding, the idea of fault remains intrinsic to the specific section intended to remove it, as well as to the matrimonial offence section. Here the Law Reform Commission of Canada notes that

> if marriage breakdown exclusive of fault was the criterion under section 4, it would logically follow that divorce would be available at the instance of either spouse. But this is not the case. A divorce petition can only be launched by a husband or wife whose spouse has contravened the designated legal criteria. With the exception of a petition based on the ground of living separate and apart, which can be presented by either spouse, the fault concept permeates all the grounds for divorce, whether under section 3 or section 4 (Working Paper 13, 1975c, p. 15).

In Canada, laws pertaining to divorce are largely inherited from English law. In 1857, the Divorce and Matrimonial Causes Act, (another English statute) stated that the husband could obtain divorce on the grounds of adultery. The wife, however, had to prove adultery and one additional ground: desertion, bigamy, rape, sodomy or bestiality. It wasn't until 1925 that the Canadian Parliament removed this double standard. Essentially, the only universal ground for divorce in Canada thereafter was adultery.

Before 1968, divorce laws in Canada varied from province to province. Prior to Confederation, colonies had their own legislatures and could pass their own laws. English law did not automatically apply, although it could be

adopted in whole or in part. As a result, although Parliament had jurisdiction over divorce, the provinces had different laws and procedures depending on whether or not they entered Confederation with divorce and annulment laws.[12] Apart from the broadening of grounds to include such deeds as sodomy and addiction, the basic departure of the 1968 law was the fact that it incorporated the neutral notion of marriage breakdown, without any judgment of fault. Yet if one considers the history of divorce up until that time the new law was not exactly a daring departure from the *status quo*.

Divorce as a Process

As a process, divorce is interesting from a number of points of view. It is, first of all, a very significant component of all legal activity. In terms of the numbers of individuals involved, the current volume of divorce actions in Canadian courts annually exceeds both major criminal cases and other types of substantial civil actions. By implication, it is far more likely that a Canadian will end up in court for reasons concerning marriage and family disputes than for any other major legal reasons, civil or criminal (minor traffic offences excepted). So divorce is likely to be the single most frequent and consequential nexus between the legal system and the individual. Secondly, divorce is a significant social event with many economic and social consequences for a society, and while it represents an end to marriage it also has ramifications in terms of taxes, housing stocks and even day care arrangements.

Marriage and Divorce in the Sociological Context

It is habitual in the literature on the structure of societies to refer to the various functions which families are said to perform. Such functions are the useful and often necessary tasks which are required by a given style of life, or which are required to sustain social life itself. Amongst these would be the provision of food and the socialization of infants. While none of these functions need necessarily be performed in a family context, habitually they are in most cultures.

Yet some families manifestly fail to perform some or all of these functions throughout their natural lifespan until a breakdown intervenes to disturb the pattern. When functions can no longer be fulfilled by families undergoing such breakdown, the state has an interest in ensuring that the financial responsibility rests firmly with the previous marriage partners since, in the case of children, their welfare depends on uninterrupted support. It is simply not deemed proper that the state underwrite by default what would otherwise be privately-borne costs.

12. Nova Scotia, Prince Edward Island and New Brunswick had their own divorce laws. In all three provinces divorce could be obtained on grounds of adultery. In addition, Nova Scotia had grounds of mental cruelty and New Brunswick had frigidity, impotence and consanguinity. Until 1968 Quebec and Newfoundland had no divorce laws of their own. Residents from these provinces obtained their divorces through the Parliament of Canada. Ontario received jurisdiction to grant divorces in 1930 and therefore its law was based on the English law in force in 1870.

In Canada there is a whole range of provincial legislation intended to govern spousal support, support for children, provisions for partition and sale of marital property where there are disputes, and provisions for declarations of legal death for mysteriously disappeared spouses. Indeed, the grand sum of legislation would appear to be designed to solve the problems of individuals or families[13] for whom the habitual functions are not or cannot be maintained in the traditionally sanctioned way. If, for example, a couple can no longer fulfill the functions the family structure traditionally fulfills, the state has an interest in ensuring that previous marriage partners assume financial responsibility for offspring involved.

However, the mechanisms for enforcement of maintenance orders are, in fact, largely toothless and there seems good reason to suspect that the state is often more preoccupied with form than content. Weiss writes, for example, that "generally a man who is delinquent in relation to support payments will not be pursued legally" (1975:276). But even if enforcement of the law seems flaccid, it does ensure that lines of succession are kept orderly, particularly with respect to distribution of property on the death of the previous spouse.

In the somewhat similar case of separation, some jurisdictions (notably Quebec) do accord formal institutional processing while others do not. However, the institutional responses which deal with the ramifications of desertion, mysterious disappearance, or even insanity, are again less fully developed than they might be.

One of the more interesting outcomes of present divorce legislation is the increase in what might be termed 'ad hoc marriages' or consensual (rather than connubial) unions. Since the law accords such seriousness to divorce, with the resultant delays and difficulties, many couples are opting for 'ad hoc marriages' or consensual unions. After a long history of denial and discouragement, these unions are now being accorded more and more recognition in provincial legislation. (One such example is the Ontario Family Law Reform Act of 1978.)

Thus, by a curious twist of logic, legislation now exists to impose order in a situation (consensual marriage) which is essentially still lacking in legal standing. The result has been a growing tangle of social legislation which underscores the unwillingness to confront the totality of family life in its many forms head on. The law now covers hybrid forms of the family unit as they emerge from the obscure process of social improvisation. Yet, in the final analysis, this innovation implies a real commitment to the idea that the fact of family is more important than the fact of marriage, or for that matter the presumption of permanence in either. Indeed, a society which did *not* place great value on such an institution as the family would have little need for formalized divorce proceedings. Instead, the two institutional arrangements reinforce each other, since divorce makes remarriage possible and thus permits the re-creation of the family unit. In the United States, it has been

13. Here the word 'family' is used in preference to 'marriage' since a substantial number of families in this society do not include a married couple.

noted that "decreasing proportions of those with marital problems are leaving them legally unresolved and increasing proportions are resolving them by becoming divorced" (Norton & Glick, 1976:15). In this regard divorce is clearly not a repudiation of marriage in principle but, rather, a reassertion of its value.

What divorce legislation does, in effect, is act as an institutional faucet. Opened wide, it provides a flood of offence against the moral contention that marriage is permanent, while preserving institutional order. Shut too tight, it turns the process of family re-creation into an agonizing one, not only for the legal process but for the contestants as well. In addition, it effectively denies a fair proportion of population the protection of the existing legislation, since they cannot remarry.

As is so often the case, the fact of Canadian federalism plays a prominent role in all this. In Canada, divorces are granted in provincial superior courts, under the federal Divorce Act, with provincial family law actions sometimes attached. Depending on timing and purpose, other family-related court actions are heard in different courts. This confusion of forums makes it difficult for the participants and nearly impossible for the record keepers. In a few urban areas, the problem has been addressed with the creation of unified family courts. In the words of the Law Reform Commission of Canada, such courts "are necessary to avoid legal fragmentation of family problems among several courts (and) also to provide a single legal institution specifically designed to deal with the family as an organic whole" (1977:8).

This profusion of legislation, and the cross-currents it has created, does attest eloquently to one fact: the idealized view of the family as the immutable locus of smoothly running activity is no longer a viable one.

The Wish to Divorce

In western society, there has been a growing acceptance of divorce as the suitable, if not laudable, conclusion to unsatisfactory marital relationships. As Moles and Levinger put it, ". . . in this period when aspirations of selfhood abound, divorce is becoming an increasingly accepted solution to marital dissatisfaction" (1976:1).

Coupling and uncoupling have, in some way, come to be expressions of self-satisfaction and the exercise of individual self-interest. Whereas once the family was a custodian of community values almost to the exclusion of individual initiatives, the value systems which supported this structure have now undergone significant change. This lapse has been the subject of much comment and the changing *status quo* extends to ideas on divorce as well. Referring to the U.S. contexts, Pope and Mueller put it this way:

> Attitudes toward divorce are permissive; the marriage institution is not viewed religiously or morally but instrumentally. Marriage is considered a relationship within which to seek mutual gratification. If this gratification is not forthcoming, divorce and remarriage (or even singlehood) are considered an acceptable course of action (1976:50).

Some observers have argued that the wish to divorce is really a reaffirmation of the ideal of marriage. In divorcing, one is freed to continue the search for ideal marriage. The facts tend to support this argument, since about three-fourths of all persons who do obtain divorce remarry and in fairly short order. On this Moles and Levinger have written, again concerning the United States:

> The remarriage rate has generally paralleled the divorce rate, however, indicating that divorced persons have not generally rejected the institution of marriage itself. Currently, about three-fourths of all divorced women and five-sixths of men sooner or later remarry (1976:1).

The role of the state in moderating and channelling such wishes is much like that of gatekeeper. In Canada, the 1968 Divorce Act ensures that divorce is not to be easily or frivolously gained. The clear choice of Canadian legislators has been to create a time-consuming and overly-scrupulous system. Built into this system is the hope that the wish to divorce can be deterred and that the contesting couple can somehow work out its differences through counselling. Once the criteria are met, however, the Divorce Act does permit and legitimize the wish to divorce.

In most cases, divorcing Canadians have resolved the issues before they go to court and all that remains is what the Law Reform Commission of Canada has called "a rubber stamping by the courts" (1975c:31). Only about 5% of all cases are contested in court. If anything, this shows the prevalence of an administrative routine and raises some fairly important policy questions. One such question deals with costs. In the 11-year period under study, one million persons faced divorce costs. If one assumes the modest figure of $500 for the fees and disbursements of each party in each case (and it is surely often more) one arrives at a total of $500,000,000.[14] The stakes are thus very, very high and the costs to society equally staggering.

We have already stated that only some of the data we have actually provide us with the personal characteristics of the contestants. From these data, we can infer some of the reasons why people want to divorce, but certainly not all of them. As Levinger has said,

> It is important to remember that low marital cohesiveness is not necessarily reflected in divorce, i.e. de jure separation. Legal divorce tends to require mutual consent and depends on both partners preferring an alternative to their married status (Levinger, 1976:28).

Cross-Cultural Differences

In 1968, the changes to the Divorce Act were widely hailed as a liberalization and loosening of society's requirements. But this characterization has not taken into account the international context of divorce – and the liberality of divorce laws in other countries.

14. An unknown but substantial portion of this total is underwritten by various legal aid schemes.

In order to provide a framework of reference, divorce rates for some other countries are presented in Table 1.

In this table, Canada does not appear to have a particularly high divorce rate. Countries such as Italy and Belgium have low rates (0.2 and 1.3 per 1,000 population, respectively) while countries such as the United States and the United Kingdom have high rates (5 and 2.6 per 1,000 population, respectively). The Canadian rate of 2.4 is close to the median, but the enormous increase between 1969 and 1978 (1.2 to 2.4) nevertheless underscores the fact that there has been profound social change in this country.

Table 1.

Divorce rates for some selected countries, per 1,000 population, 1977

Country	Rate	Country	Rate	Country	Rate
Belgium	1.3	Hungary	2.5	Scotland	1.7
Canada	2.4	Israel	1.1	Sweden	2.5
Czechoslovakia	2.1	Italy	0.2	United Kingdom	2.6
Denmark	2.5	Netherlands	1.6	United States	5.0[1]
Finland	2.1	Poland	1.3	U.S.S.R.	3.4

1 This information refers to the year 1976. Source: Vital Statistics, Catalogue 84-205 (1978) Table 9, p. 14.

The incidence of divorce in any society is subject to a host of factors. Among the most prominent of these are the demographic determinants of the size of the population at risk. Obviously, any particular age distribution in a population produces a certain proportion of married people which in turn will determine the proportion of potential divorces. Or to look at it another way, one must first marry to be divorced. Thus the ratio of 'divorcibles' must fluctuate with population age groups, as it also must with the proportion of the population who wish to divorce but who cannot for legal or financial reasons, with the decline in death-caused marriage termination, in some manner with the sex ratio, and possibly as well, with the already-divorced proportion of the population.

In the United States, trends toward more widespread divorce have been related to low educational attainment, low income, and low occupational status[15] (Norton & Glick, 1976:13). It has also been noted that the recent increase in divorce has been pervasive with regard to social and economic level, and that socio-economic differences in divorce are now smaller than they used to be (1976:14).

In Canada, some of the heightened post-1968 divorcing activity is undoubtedly the result of the new grounds which provided quicker

15. Previously divorced persons appear more prone than persons in their first marriage to consider divorce as a solution to conflict, or to be members of groups that find it acceptable (Levinger, 1976:37).

accommodation for those who wished to divorce. If this were the sole reason for the acceleration it follows that the general rate would have declined in subsequent years as the compression effect worked its way through the courts. This has not happened. So, clearly, there are other factors at work.

Conclusion

The task at hand is thus to compose a picture of how divorce as a social and legal activity is carried out in our society. To do this we will examine the statistical record of Canadian divorce cases in the expectation that we can tap, in some modest way, those underlying social processes and structural conditions in society which both form and are subject to the law. We have before us a model of human behaviour which reiterates a wish for divorce that arises in the context of patterned social relations and which is not best understood in terms of the psychological processes of individuals. This being the case, it should be hypothetically possible to improve the functioning of the courts, and enhance the image of the law as facilitator, without doing the idea of family significant harm.

In dealing with the personal characteristics of the contestants, we shall be looking not only for background factors which in some way predict the wish to divorce but also for the consequences such wishes initiate within the judicial system. In this sequence, the disposition of children and property is an important element, since it is reflective both of crucial cultural norms and attitudes and of the latitude within which courts vary the conventional solution.

In keeping with our stated approach, we shall first present a socio-legal history of divorce in Canada and an assessment of the social models which underlie current and past legislation. We shall seek to uncover, in broad terms, the social meaning which marriage and divorce have for mainstream Canadians and the images of family which exist in Canadian society. Our purpose will be to gain a grasp of the social milieu in which our current divorce legislation is operating. We can then address the question of how far our legislation differs from the social reality it is designed to regulate.

Implicit in this last point is the issue of what might be termed civil plea bargaining – the civil equivalent of deal-making between Crown prosecutors and defence lawyers in criminal cases. We are certain that the data show just such a process at work, as evidenced by the large number of pre-arranged, uncontested divorces which surface every day in the courts of Canada. Since the undertaking of such an analysis has great relevance for the understanding of civil procedures in Canadian civil courts generally, we devote some considerable attention to the process.

What, then, is the fit between law, family and the social order of Canadian society? What is the relationship between personal expectations, cultural values, the population structure, and the legal system? These questions follow in rapid succession. So many consequences flow from family formation and dissolution, in fact, that it is appropriate to consider the divorce process as the central tollgate through which many Canadians pass.

Chapter 2

Canadian Families in the Nineteenth Century

The Peaceful Kingdom Revisited

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The Peaceful Kingdom Revisited

There can be no question that the nature of marriage changes over time. But what has come to be custom and practice today has very definite antecedents in the patterns established long ago under entirely different social and economic circumstances. To a considerable extent, our present laws and practices still reflect these former patterns; legislation has been slow to change and breaks with the past have been the exception rather than the rule.

In this chapter we will look at the evolution of certain patterns in domestic relationships in nineteenth-century Canada. We will examine the historical record with regard to three basic factors which appear to affect the longevity of the family unit. The first deals with the economic considerations which determine the positive or negative value of the labour of family members. The second deals with legal considerations which constrain the opportunity for family members to become economic and social actors in their own right. The third deals with the ideological and cultural considerations which, in the reflection of religious views, appear in the context of family law to limit individual freedom of action.

In examining these factors in pre-Confederation Canada, changing political circumstances suggest a natural break around the events of 1837. At that time, the failed insurrections brought about some considerable change in jurisdictional boundaries as well as a change of course for the society as a whole. Somewhat similar changes occurred at the time of Confederation and we shall use these breaking points to organize our account.

I. One Colonial Era: Canada Prior to MacKenzie and Papineau

In the period leading up to 1837 there were only five areas in British North America which had sufficient population to warrant the attention of public regulators. They were Upper and Lower Canada, New Brunswick, Nova Scotia and Prince Edward Island. Lands to the north and west were owned and administered by the Hudson's Bay Company and the Northwest Trading Company whose interests in the area were frankly short-term and strictly economic. What little interest the entrepreneurs who ran these companies might have had in family life and its regulation would thus have related exclusively to their own continued prosperity. In the politically organized areas, however, the state did establish institutional initiatives in the regulation of family life and we will examine some of these in due course.

A. Upper Canada

Northrop Frye has described Upper Canada as a conglomeration of small, isolated communities of individuals separated from British cultural sources. In fact, what the rulers of Upper Canada did was impose their own eighteenth-century socio-political customs on Upper Canada in the creation of a 'little England'. Part of the requirements for forming this miniature replica was the establishment of the Church of England as the official religious organ of the province.

The pivotal feature of what became an uneasy relationship between church and state was the solemnization of marriage. Interest stemmed not so much from a concern for the moral status of the populace as from a desire to continue the religious rivalry started by Henry VIII with the Roman church. From today's perspective, there are certainly elements of humour in the idea that the colonial aristocracy should want to transplant a tradition of European politics to the wilds of what is now Ontario, but to them the issue of apostolic succession was of paramount importance. There was no other denomination, save the English church, that could be entrusted with such functions.

But conditions made practical concessions necessary. Under English law (in 1792) a Church of England clergyman or deacon had to be present in order to validate a marriage ceremony (Riddell, 1924:226). In Upper Canada this was often impossible, since the needed clergyman was not always around. Accordingly, an act was passed in 1793 which made it valid to contract a marriage before a magistrate, a commanding officer of a post, a surgeon of a regiment acting as chaplain, or any other public servant if need be, provided there were fewer than five Anglican ministers in the district. People married by public servants were further required to record their names and the names of their offspring in a register kept by a Clerk of the Peace within three years of the date of the marriage (Riddell, 1924:228). In 1797, a subsequent act extended the list of those who could solemnize marriages to include clergy of the Church of Scotland as well as Lutheran and Calvinist ministers. The act stipulated that they apply for the right, in person, to the

Court of Quarter Sessions. Methodist clergy were excluded, probably on account of their predominantly American origins (Riddell, 1924:231).

It wasn't until the close of the era that Methodists were given the right to perform marriages. In 1830 an act was passed which extended the privilege to any duly certified clergyman. All that was required was an oath of loyalty and the presentation of proof of ordination. The political nature of these restrictions was obvious. Only Christians could be legally recognized as being married, and of this group, only those married by approved agents could be certain of their status. There was a penalty of 14 years in exile for those who presided over unauthorized marriages (McGill, 1968:46). It wasn't until 1821 that this 'offence' was reduced to the status of a misdemeanour, when it became evident that juries were reluctant to convict non-conformist ministers on such charges.

Yet, the religious controversy persisted. Marriages between a man and a former wife's sister were prohibited, and voidable where they did occur. The procedure was intricate, but a third party could have the marriage voided through a petition to the Ecclesiastical Court. If one of the partners died, the marriage was deemed valid in retrospect and the children were considered legitimate, thus establishing dower rights and succession rights (Banks, 1970:4). Such unions, though uncommon today, made much economic sense on the frontier, where dead wives had to be quickly replaced. As Bassett has written: ". . . their places were filled without undue delay, as soon as some man's sister or sister-in-law came from Ontario to take the dead woman's place" (Bassett, 1975:132). It was not until 1890 that the barriers to such marriages were finally removed. So it is easy to see that romantic love as a guiding justification for a particular marriage did not enjoy much currency during that time. In the literature of the period one can find many references to marriages that were arranged by guardians. In the ruling circles marrying to advantage seems to have been of paramount importance.

The story of Gilbert Minto is an enlightening one. Minto was stationed in the garrison at York and since his father's influence somewhat outpaced the family income, Gilbert felt obliged to improve the matter through a propitious marriage. He made no secret of his goals and in a letter to his father (Lord Minto) he wrote:

> You must not be afraid of my getting married. I am not so green, for tho' the ladies of Toronto are very charming, money is a thing, which tho' often talked about, is very absolutely necessary that the gal of my heart should possess it (Dreyer, 1965:34).

Despite these optimistic notes, young Gilbert soon succumbed to the temptation to marry locally and as a result was summarily summoned home, *sans fiancée*, at the personal orders of the Duke of Wellington. He subsequently married a bishop's daughter with a dowry of £8,000, no mean sum at the time.

But what the colonial would-be aristocrats lacked in wealth they more than made up for in such intangibles as honour, breeding and genteel sports

to the extent that their manners were a parody of those of the English gentry, decades before. These compensatory delusions had a tremendous impact on the courtship and marriage customs of Upper Canada (Cross, 1967:105). Isolated members of the new 'nobility-in-the-rough' would attempt to bring their offspring to the attention of well-bred ladies and gentlemen in Toronto. There were dinner parties, balls, and arranged concerts, all in the hope that the advantageous match might be made. Since the young of the day were dependent on their parents for support, they were vulnerable pawns in the marriage game. If they rebelled, they could be sent away to school or to work for a relative. Once in the country their fates were sealed. Ostracism was thus a potent and meaningful threat to the children of the well-to-do and the fear of it kept them well within the bounds of the *status quo*. Often the game could work both ways.

In the early nineteenth century one William Kerfoot sent for a 'very stylish lady' from Ireland and informed his son Thomas that this lady would become his wife. When Thomas proceeded to marry the daughter of another pioneer, the father turned around and demanded that his next son Samuel marry the lady. Samuel agreed, but only on condition that the marriage bring with it the house on the homestead, a large frame building with a two-tier veranda running the full length of the house and decorated with gingerbread ornamentation (McGill, 1968:38).

Since marriage was a means of advancing family fortunes it was little wonder that the idea of adultery carried great social stigma. Extra-marital affairs posed a serious threat to the tenuous links of a newly civilized society whose fabric was stretched so thin by great distances and lack of communication facilities. In this setting, it would be enough to bring dishonour to the family through such a scandal, but the possibility of an illegitimate child could destroy the façade of its elevated social standing. The whole idea was an offence to the ideology of good breeding.

But there were two social realities in operation. While the mobile and aspiring gentry went on conducting its rise to glory, newly arrived immigrants were casually dropped at the ports of Quebec City or Montreal to find their own way, usually on foot, to the land they intended to claim. They lived under primitive conditions and the better part of their energies were devoted to the struggle for survival. Members of these families were first and foremost workers and the idea of romantic adventures was a luxury they could ill afford. Very little has been written on the perceptions of these early settlers. Since many of them were illiterate, they lacked the skills, the time and the inclination, not to mention the writing materials necessary to record the details of their existence.[1]

In order to gain an impression of their lives it is necessary to draw on material from a later period when conditions were just as harrowing, but for

1. Even Susanna Moodie refused offers to write for American magazine editors because she found the expense of stationery and postage to be prohibitive (Innis, 1973:62). (Moodie's fame came from her book on life in nineteenth century Ontario, *Roughing it in the Bush*.)

which the records are more accessible. In the settlement of the prairies in the 1870s, the infrequency of social contact and the difficulty of the pioneering life played a strong role in the search for a spouse. While the harsh realities of life did not preclude romance they certainly helped suppress its development. Young bachelors who had taken advantage of the offer of cheap land soon found their life exhausting and lonely. Since they were unable to meet suitable young ladies in more conventional ways, they resorted to government importation schemes whereby numbers of English domestics were shipped to Canada to be future wives. These women, in turn, came to Canada seeking a future unavailable to them in an England where rapidly changing labour force needs had excluded them. They married for occupational reasons, for economic security, for companionship and for freedom from the decaying social institutions of the British Isles. They came to Canada fully expecting to take up traditional farm life. Their marriages were thus locked into the Canadian hinterland where the very real fact of the couple's interdependence made it unnecessary for laws to keep them together. . . they had no choice.

Where the laws did not permit a couple from a non-recognized denomination to contract a marriage, the couple ignored the law and entered into an informal agreement. For those who were not bound together by virtue of economic needs or love, it was almost impossible to break the marriage bonds. Since the Church of England was politically intertwined with the state and the church did not recognize divorce, there was no provision made in law for divorce (Larocque, 1969:6). There was, of course, the British remedy of legal separation. But it was unlikely for couples to go that far. It was also doubtful whether the Church of England in pre-Confederation Canada was empowered or inclined to give recognition to legal separations. Since laws did not allow the individual to terminate the contractual agreement, he or she could end its social reality by simply deserting the household. In this regard males probably deserted more often than females since women were very often dependent on their spouse for male support and could only leave him to return to the father's homestead or perhaps to the home of another man.

Thus, in Upper Canada at the beginning of the nineteenth century, state and church were joined as official arbiters in matters of morality and marriage. Since many of the political elite were members, in turn, of the Church of England, it was natural that the wishes of the church should coincide with the policies of government. But as Upper Canada approached the 1830s and the religious affiliation of those in power began to change, the government veered from church policy on marriage. Finally, in 1830, an act was passed to allow any ordained clergy from any church or congregation the right to solemnize a marriage. But this was just a beginning. There were many reasons to effect changes in the legislation since, clearly, there were great discrepancies in the substance of the law and the social reality of the day. Indeed, such a state of affairs finds its rough parallel in contemporary life, and consequently shows that even in different legal and historical contexts, family and marriage formation and dissolution are problematic for a continuing proportion of the population.

B. Lower Canada 1800-1837

The ultimate failure of the British Crown to render impotent the Roman Catholic Church in Quebec was not due to a lack of enthusiasm on the part of British officialdom or the Church of England. In fact, a number of factors including the war of 1812 made it necessary to enlist the support of Catholic leaders throughout the world. As a result of the war and in part payment for services rendered, the Catholic Bishop of Quebec was salaried in 1813 and formally recognized in 1818. By the 1830s and 1840s, the church itself and the surrounding parishes were allowed civil status (Wallot, 1971:63).

At the beginning of the nineteenth century, marriage laws in Lower Canada were under civil law. This body of law was not, however, identical to the civil code which came into effect in Lower Canada in 1866. While women had considerable freedom of action within marriage in the first third of the century they were progressively constrained as the power of the Roman Catholic Church grew, and specifically under the terms of the civil code.

Much as their peers in Upper Canada, well-to-do French families encouraged their offspring to marry for wealth and position rather than romance and love. By the turn of the century, however, the power of the French colonial aristocracy was dissipating. Some vestiges of the seigneurial system remained, but gradually the old seigneuries were granted to or purchased by British officers. Wealthy English-speaking merchants began to establish themselves in the province and increasing numbers of French-Canadian girls married them. As a result, there was a blending of the old French aristocracy with the power and money of the English entrepreneurs.

Not surprisingly, these inter-cultural marriages were often under a great deal of stress. In his travels about Lower Canada, John Lambert found that husbands "generally wink at the frailties of their wives, and either content themselves with increasing the number of their horned brethren, or fly for comfort into the arms of a *fille de chambre*". At the same time, the annual charges of grand juries, reports by the governor and law officials as well as newspaper articles present a picture of aristocrats who led lives which were not demonstrably guided by the moral dictates of any known church (Wallot, 1971:84). Wallot has noted that ". . . many married men were known to chase after other women, sometimes their best friends' wives, and cases of bigamy were not unheard of" (1971:83). In a letter to his wife in 1798, General J. Sewell wrote: "I have just left court where I have convicted Mrs. Smith for bigamy – I am told that the seigneur of Berthier, Mr. Henri, their wives, and other members of this community are alarmed and supposed that I am preparing to attack them next. . . ." (Wallot, 1971:83).

Since the French Canadian civil code did not acknowledge the dissolution of marriage, individuals found their own way to maintain the family unit and to meet their needs. Thus marriages were kept operating while extramarital affairs were pursued on the side, or marriages were socially ended and new common-law relationships begun. This pattern of behaviour was common enough to warrant a change in the laws of Lower Canada so that

common-law marriages and illegitimate children were given recognition in 1801. Thus, instead of laws determining social customs, social customs determined the law.

C. Maritimes

Both Nova Scotia and New Brunswick depended on a trading economy which brought them in constant contact with England. As a result, laws concerning marriage were heavily influenced by the British desire to maintain the dominance of the Church of England. In 1791 a bill was introduced which would have given the privilege of solemnizing marriage solely to the Church of England. In parishes where there were no Anglican clergymen, Justices of the Peace were to be empowered to perform marriages (Hannay, 1909:185).

The political motives behind this proposed statute, together with its unsuitability, conspired to make it an unpopular one in New Brunswick. While the Upper House of Assembly wanted to uphold the supremacy of the Church of England, the Lower House wanted all denominations to have equal privileges. From 1821 to 1831 both houses fought the issue, until finally it was referred to the Crown for settlement. As a result, all denominations were given the authority to solemnize marriage (Hannay, 1909:443).

In New Brunswick, 1854 legislation made adultery an indictable offence (Edwards, 1921:22) in addition to it being grounds for divorce. Since an 1848 act had removed women's right to vote and hold office, it was important in the eyes of the lawmakers to use strong measures to preserve the marriage bond.

But the play of a society in motion had a deleterious effect on marital life. Since military men were stationed in the larger towns for relatively short periods of time, they could form transitory relationships with married women. These relationships were considered 'safe', since they were understood to be without future, and they provided both parties with a measure of excitement and amusement against the barren cold and wilderness of life in frontier Canada.

Standards of social conduct were thus generally quite liberal among the ruling circles of New Brunswick and Nova Scotia. Unlike their fellow colonists in Upper and Lower Canada, the merchants and government officials of the Maritimes were not as isolated from contemporary British society. Their socially more liberal views were matched by the laws of the land. Whereas Upper Canadian law made no allowance for divorce, New Brunswick had already allowed for it on grounds of adultery and desertion in 1758 and three years later desertion was replaced with cruelty (Larocque, 1969:5). In 1787 and 1791, Nova Scotia allowed for divorce on the grounds of adultery. There is no evidence to indicate just how widely these grounds were used, however, and it would be unfair to judge the outlying populations according to the norms of Halifax society.

D. Northwest

In the period from 1800 to 1837, the Northwest encompassed what is now British Columbia, Alberta, Saskatchewan and Manitoba. Since it was owned and administered by the Hudson's Bay Company and the Northwest Trading Company (Jamieson, 1956:3) there was predictably little concern for the state of matrimony or divorce laws. Here, in the wilds of Western Canada where the social norms of Europe were no longer relevant, the white man was something of an outsider. Trading officers led unorthodox lives in the pursuit and defence of their own special interests. Frequently, they established unions with native women, who provided not only the means to bridge the culture gap but who also served as wives and mothers. In addition, an alliance with an Indian woman helped secure the business of her tribe, familiarized the Nor'wester with Indian life and language and ultimately helped him become a more effective trader (Van Kirk, 1977:28).

By the time the Northwest Company had merged with the Hudson's Bay Company in 1821, marriage *à la façon du pays*[2] was a widespread social practice.

At the same time, there were reports that the Europeans were treating their Indian wives in an 'uncivilized manner' and the first missionaries to arrive in Rupert's Land were horrified to find many of these women being used as nothing less than beasts of burden.

Although marriage *à la façon du pays* was considered to be as binding as a church wedding, problems arose when a trader left the Company, since he often left his common-law family behind. Initially, the widowed or abandoned women were welcomed back into their tribes but eventually such cases became so numerous that many were turned away. Since the Northwest Company found itself in the position of maintaining these deserted women and their children, it quickly ruled that its workers were to choose only half-breed women as wives. In this way, incoming traders could and did replace departing husbands, and thereby suppressed further integration of the native population and Europeans. In addition, once the Hudson's Bay Company had absorbed its competitor in 1821 it took steps to ensure that it was no longer responsible for the support of deserted families. Thereafter, each man was to clothe his family on his own private account. The Company also introduced a marriage contract which bound the husband to provide for the future of his family. This contract contained a provision that the couple would undertake to be married by a clergyman at the first opportunity (Van Kirk, 1977:34).

The impetus to secure marriage bonds between trader and Indian woman was but a manifestation of the economic preoccupations of the fur trading companies. Essentially, they sought to ensure the continuance of marriage for the financial good of the Company, and thus the basis for formalizing marriages was not so much a moral one as it was a practical one.

2. This arrangement was derived from the Indian concept of marriage; that is, that a couple could agree to cohabit for an unspecified length of time.

However, it must be remembered that while such customs were widespread in the Northwest, only a miniscule proportion of the British North America population was involved in the practice. As time went on European wives became more fashionable, and Indian wives were no longer considered acceptable (Van Kirk, 1977:47).

The move to settle the Northwest did not really gather momentum until the 1870s. There really was no wholesale migration until after the turn of the century and the building of the Canadian Pacific Railway.

Despite the somewhat primitive conditions that existed, however, the Northwest proved to be in the vanguard of the move toward protective legislation for women. The Law of Tenancy by Courtesy gave a husband the use of his wife's lands, but where his wife had acquired the land with her own money he did not automatically have access to it (Edwards, 1921:27). This was the first instance in Canadian society where a wife could keep her property distinct from that of her husband. Such unprecedented legal protection did not, however, extend to all matters since a husband could obtain damages from any person who had committed adultery with his wife but his wife did not have the same redress (Edwards, 1921:23).

II. The Counterrevolution: Marriage, the Family, and Divorce 1837 to 1867

In British North America, the concept of home was an exalted one. Home was the source of support and refuge from a world filled with difficulties; a "haven in a heartless world" to use Christopher Lasch's salubrious phrase. Marriage was more or less an inevitable milestone in life, a fulfilment of the social obligation to create a stable home for the sake of King and country.

Roles were equally fixed and immutable. Men were the aggressors, capable of cruelty and malice and therefore well prepared for the harshly competitive world of business. Women, on the other hand, were the child-minders and the protectors of the spiritual values of the nation. They were to be discouraged from taking part in the man's world for to do so would risk destabilizing the home and thus the very basis of human society (Kraditor, 1968:11).

Women were presumed to be mentally and physically unstable. Even the medical profession presented exclusively female biological functions as inherently unhealthy. Dr. W.C. Taylor in a popular book on health, entitled *A Physician's Counsel to Women in Health and Disease* (1871), suggested that every woman was to "look upon herself as an invalid once a month" because "the monthly flow aggravates any existing affection of womb and readily rekindles the expiring flames of disease" (Rosenberg and Rosenberg, 1973:336).

There was also a suggestion of Eve-like moral weakness in the predominating view of women. In part, women had to be protected from the

wicked world of business since any contact might weaken their resolve and expose deeply-rooted tendencies to do evil. The Reverend Peter Z. Easton summed it up rather clearly in a sermon he wrote entitled *Does Woman Represent God?* He stated that:

> All the evidence, therefore, goes to show that emancipated Woman, trampling under foot the laws of God in nature and revelation, so far from being a purifying and refining element in society, is herself an incarnate demon, with nothing Womanly in her but the name, a creature of unbounded lust and merciless cruelty, a combination of Messalina and Lady Macbeth (Masters and Lea, 1964:34).

Even the Catholic Church went so far as to blame women for men's physical desires. In Quebec, women were thus "disposed to become sluts and a man, even a paragon of virtue, (was) plunged into an abyss of desire by the mere appearance of a breast" (Bassett, 1975:188).

The attitude that women were secondary citizens continued for those who worked outside the home. They were paid low wages commensurate with their poor education, with the idea in mind that they were either biding time before marriage or contributing to a larger, family income. If a woman had no legal rights, it was because she did not need them; she had a man to look after her interests.

Since marriage was assumed to be the pinnacle of achievement for all young girls, most of their early life was spent preparing for it. Social occasions were planned to bring young people together and time and money were spent on alluring garb that would attract a 'quality' male. Once a girl became engaged she entered the community of women. Then the social role she was destined to play began in earnest.

Married Life in Upper and Lower Canada

Political events in the 1830s and 1840s conspired to direct attention away from family law concerns. Centre stage was occupied with such events as the uprisings of 1837, a general defeat of reformist elements and the creation of the province of Canada. At the same time, there were important economic changes which were to forever alter the essentially rural and agrarian nature of the society. By the 1850s a commercial aristocracy was gaining ascendancy over the social aristocracy (Price, 1977:85). Unstable economic conditions meant that fortunes could be won or lost in the matter of a year. It was essential to survival to have family ties which would provide a support network upon which to fall in times of financial reverse. When one member of a family was doing poorly, more prosperous members could be called upon for help, a vital factor when the usual sources of capital were unable to advance money (Millar, 1974:73).

The story of Schuyler Shibley provides an excellent example of the classic nineteenth century entrepreneur. Shibley was an Ontario politician

who had worked his way up through the business world. He came from a farming family and he was an ambitious man. To all appearances, Shibley's marriage to the daughter of a prominent merchant of Kingston appeared to be motivated by practical considerations since it was rumoured he was really in love with a lady from Sarnia. The affair with the Sarnian lady came to public attention when she was brought to trial for the murder of her child, who was, in fact, Shibley's daughter. The tale became even more bizarre when Shibley had his wife write his paramour a letter of sympathy on the death of their daughter (Swainson, 1973:52). What makes this story particularly noteworthy was the public reaction, or rather non-reaction, to Shibley's marital arrangements. Although he was no doubt privately chastised for the indiscretions his behaviour had caused, there is little evidence that his actions brought him any public censure or political scandal.[3]

If Shibley's story is worthwhile in the context of life in Upper Canada, the developments in Canada East would certainly never have allowed him the same liberty. Here, ecclesiastical values intertwined with secular norms and beliefs, while marriage and the family underwent profound redefinitions. By mid-century, French-Canadian life was completely under the thumb of the church and a small group of conservative intellectuals and professionals. The family was said to be part of the timeless hierarchical order which the church imposed on the people. Any action, adultery 'Shibley-style' or otherwise, would have threatened the family and was consequently condemned.

Changes were also taking place among the rural population. Large families on farms could not absorb the labour of adult children indefinitely; and urban factory work provided an alternative for the first time. From the 1840s to the end of the century, a flood of young people left their crowded rural areas for Montreal, Quebec City and New England where there was more opportunity for work. In urban areas women who were taught to depend on marriage for a comfortable lifestyle found neither husbands nor independent success because they were so poorly paid, their value further deflated by a surplus of young women in the cities (Cross, 1973:203). This rising urbanization contributed to a loosening of family ties, although the traditional perception of marriage changed little. The structure of community life and and the pressure of peers continued to work as potent forces in the celebration of marriage as the one viable way to preserve the hegemony of family life.

The Union of Canada

Under the Union of Canada, a married woman had no control over her property.[4] She could not give it away, nor could she keep it from her husband.

3. The interpretation of events of this sort is mixed, however. Pike's account of Shibley's life indicates there *was* severe social sanctioning (1975:115).

4. The creation of the Union of Canada followed the uprisings of 1837 and 1838. In 1840 the British Parliament passed the Act of Union which effectively reunited the provinces of Upper and Lower Canada under one government.

She could not enter into contracts or obligations or appear in judicial proceedings without her husband's authorization, and in fact the absence of such authorization nullified any contractual agreement entered into by the woman (Kissin, 1976:7). If she worked outside the home her wages had to be turned over to her husband who was the head of the family unit (Kissin, 1976:4).[5] The condition of a woman thus left her entirely dependent on her husband for food and shelter. As might well be expected, it was unlikely that public monies would be given to any woman who wilfully left her husband. But by 1850 enough evidence had appeared in the City of York to prod public conscience toward some kind of provision for deserted and stranded wives. In the same year, the Protestant Orphans Home was opened to provide relief for destitute women and orphans.

Since the home was in fact without a house, a charitable organization began the search for the lodging and the medical care needed for the unwed mothers, deserted wives, children of widowers and deserted infants who would eventually become the residents. In spite of the pressing need for such accommodation it was to be 27 years before the organization secured a suitable residence and got it operating (Speisman, 1973:43).

The development of such homes was an indication of the seeds of acceptance in society toward the inevitable alteration of social and political structures. Gradually the ground was laid for the reconsideration of individual civil rights and perhaps for the resolution of problems of marriage dissolution. It was also felt that society should not be too generous with charity lest the power of poverty as a natural means of population limitation be totally eliminated (Speisman, 1973:34).

At the same time, the directions of change varied with the two realities of the Union of Canada. In Canada West the firm grip the church had enjoyed now loosened, while in Canada East it tightened. Here the Catholic Church solidified its control over social institutions and the values and beliefs which were espoused from the pulpit gradually moved French-Canadian society toward the values of ultramontane Catholicism. Consequently, the family unit took on renewed significance.

In Canada West, on the other hand, there was progressive division between church and state to the extent that political and cultural life could develop independently of ecclesiastical directives and to the point where even education became a secular function in the affairs of the state.

Marriage in 1867-1900

In 1867 Canada formally emerged as a nation, and soon after began to extend itself westward. In 1870 the new province of Manitoba was incorporated and Canada bought Rupert's Land (which included areas of what is now Alberta

5. It is difficult to precisely explain the operation of marriage laws in what is now Quebec. Part of the difficulty arises from the fact of the coexistence of common law and the Civil Code; part from a lack of pertinent literature which often helps portray the situation as it truly was.

and Saskatchewan and the Northwest Territories) from the Hudson's Bay Company. In 1871 British Columbia entered Confederation.

The nature of change in Canada's social milieu matched its political and geographical maturation. The last third of the nineteenth century brought greater educational and vocational opportunities for women, the rise of suffrage movements and generally set the stage for a redefinition of the roles of both men and women.

By the 1880s urbanization and industrialization were well under way in Ontario and Quebec, Nova Scotia and New Brunswick. At this time, 14% of Canada's population lived in cities and towns and the growth rate was climbing steadily (Acton et al, 1974:71). By 1891, the population of Montreal was 200,000; that of Toronto was 181,000 (Innis, 1973:34); Dartmouth's was 43,132 and Saint John (New Brunswick) 39,179 (Acheson, 1972:5). Although the move to live in the cities and work in the factories had a great effect on the form and substance of married life in Eastern Canada, it played no part, as yet, on the lives of Canadians living west of Ontario.

Ontario, Quebec, Nova Scotia and New Brunswick

The advance of industrialization caused life on the farms to change drastically. In the first place, goods were now produced in larger volumes and profits could be used to buy domestic and imported goods. The move away from subsistence farming changed the role of farm women since they were no longer needed to provide residual farm labour. In time this would mean their eventual re-entry into the labour market, but for the time being it mostly meant that a woman's significance was diminished from that of an integral member of the farm team to that of simple domestic.

Similarly, by the 1870s the economic value of children had lessened, since they consumed more than they produced. Children were considered to be valuable only insofar as they might support their parents, later in their twilight years. Mechanization on the farm also meant that girls were redundant, and as a result numbers of young women migrated to the cities and to the Northwest where settlements by homesteaders had now begun in earnest.

The picture was no less bleak for the young men of the time. Since there was no longer any cheap, arable land in Ontario and Quebec, many of them had no choice but to work as unskilled labour in the cities and towns or to travel west in search of vacant land. At the same time, a flood of impoverished Irish immigrants created large pools of unskilled labour in the cities of Quebec, Montreal, Kingston, Toronto and Hamilton (Acton et al, 1974:23).

Life in the city was not particularly attractive. For those 'lucky' enough to obtain employment in the factories, the hours were long, the pay poor and the conditions appalling. Home was a cold, dreary room. Domestics had even longer hours. The most common occupations for women ranged from servant

to milliner. In the years following 1874 nursing became an alternative to factory or domestic labour. By 1891 females comprised one out of eight paid workers (Royal Commission, 1970:53). The annual Report of the Ontario Bureau of Industries in 1889 gave the following wage and cost-of-living figures for female workers:

Table 1

Female workers over 16 years of age without dependents

Average number of hours/week worked	54
Average number of days/year worked	259
Average wages/year from occupation	$216.71
Cost of clothing	$ 67.31
Cost of board and lodging	$126.36
Total cost of living	$214.28
Surplus	$ 2.43

Source: From Acton et al., 1974:48, Table 3.

The financial penury meant late marriages, since many of the young migrants did not have the money to set up house together (Cross, 1973:207). Once they were married the tendency was to exist as an insular unit, removed from rural roots and kinship networks.

By the early 1860s, mothers of the aspiring middle class began to clamour for more practical and academic education for their daughters. They were dissatisfied with an educational format which prepared young girls for insular lives as homemaker and hostess, but which little enabled them to comprehend the business and political spheres of their husbands. Thus it was that in 1866 and 1867 a prominent educator of the time, Egerton Ryerson, ran into overwhelming opposition when he tried to bar young girls from attending grammar school. Nevertheless, he did manage to make his point by excluding them from classical studies and thus preventing them from entering university.

The only skilled trade or profession that did not exclude women was teaching and this was due, in part, to certain practical considerations. Not only was there a shortage of skilled male teachers willing to live in rural areas but female teachers could be paid less, so local school trustees were more than willing to admit them. However, as far as law or medicine went, women were totally barred and in the case of Ontario, by statute, until the late 1890s.

The reaction from the women of the time began in the guise of somewhat genteel protest movements and associated pamphleteering. Involvement in protest activities was centred more often than not in existing women's organizations. Many local units of the Women's Christian Temperance Union (WCTU) were involved in women's suffrage and other orthodox associations also laid the foundations for more controversial associations. When the Toronto Women's Literary Club was established in 1876 the members used the

title as a façade to cover its more critical leanings. These organizations gave their members the opportunity to air grievances and to question long-held assumptions regarding their roles and place in life.

One dominant pamphleteer was an influential American feminist, Charlotte Perkins Gilman, whose influence extended north of the border into Canada. Gilman saw marriage as an exploitive institution wherein women provided labour for which they were not paid, bore children for which they were not rewarded (since barren women received the same treatment as fruitful ones) and were forced to be economically dependent on their husbands. Gilman pointed out that since circumstances prevented women from pursuing paid employment the only avenue left open to them was to marry (O'Neill, 1967:130).

Gilman also took issue with the argument that work for women would lead to the destruction of home and family. "Marriage" she wrote, "was a socially sanctioned sexual union, while the family was created by the addition of offspring." For her the family was a primitive, authoritarian institution whose functions were being destroyed by modern society (O'Neill, 1967:130). If she was critical of the family Gilman was positively contemptuous of the home:

> Science, art, government, education, industry – the home is the cradle of them all, and the grave if they stay in it. Only as we live, think, feel, and work outside the home, do we become humanely developed, civilized, socialized (O'Neill, 1967:131).

For Gilman, the ideal home was a complex of individual dwelling units with common kitchens, nurseries and recreation sites, serviced by cooks, cleaners and child-care workers.

If these ideas were Utopian in tone, changes in the educational attainments of middle and upper class women were in fact creating new ideas of marriage. An educated woman would naturally not want to be treated as a child; and men, for their part, were not necessarily looking for child-like women. Ministers' wives, for example, were expected to take over the mission while their husbands were away and doctors' wives to take the place of the doctor in isolated regions where medical care was lacking. In polite society the ability to sustain an intelligent conversation over dinner became more important as the social networks of industry developed and prospered.

Out of this social change came the start of the first major reorientation of family law in one hundred years. In 1888 Ontario wives were given the protection of mandatory support payments from their estranged husbands. Children, however, were not covered under these payments until 1922 (Department of Health and Welfare, 1973:43). In addition, Prince Edward Island's WCTU presented petitions to the legislature in 1895 which resulted in the passage of a very liberal Married Women's Property Act in 1896 (Cleverdon, 1950:201).

The status of traditional marriage began to preoccupy writers of the time as well. One author suggested that if those who propose marriage could live

in the same house for several months and thus acquire an everyday and commonplace acquaintance – instead of one in which "distance lends enchantment" – society might endure shorter engagements and, at the same time, ensure happier married lives (Austin, 1890:238). For the first time Canadians began to openly discuss unhappy marriages and their dissolution in terms of incompatible personalities. There were suggestions that those who propose a life union should become so thoroughly acquainted before marriage that the chance of a change of mind after marriage would be minimized (Austin, 1890:238).

For those women who did decide to leave their marriages the path was a rocky one. There was no guarantee that a woman could find work and if she did it was usually for very poor pay. A few, however, managed brilliantly. Kate Simpson had been married for three years and had two children when she decided she had had enough and left her home in Bowmanville for the frontier town of Prince Albert. There she worked as a governess for one year and then moved to Regina. To support herself she became the first legislative librarian of the Northwest Territories, then taught school and later worked as a clerk in the Territorial Department of Agriculture. By the end of the century she had become an employee of the Canadian Pacific Railway and was sent to the British Isles on colonization missions (MacEwan, 1975:35-40).

But stories like Kate Simpson's were rare. For most Canadians the family unit was sacred and it was protected from wilful abandonment by either husband or wife. A proper Christian family life was the basis of a moral, stable social order. Marriage was still "a divine institution ordained by God."

In Quebec, married women had no legal status whatsoever. Under the Civil Code, which was drawn up in 1866 and based on French practice, women were in the same category as minors and the feebleminded. In matters concerning their private rights they had to have representatives act for them. From the memoirs of Napoleon, an excerpt gives a strong hint of the principles which informed and shaped the code:

> Woman is our property. She bears our children . . . the wife is his property just as the first tree is the property of the gardener . . . to women belong beauty, grace and the art of seduction . . . her obligations are dependency and subjection (Kircheisen, 1929:153-54).

Thus the Civil Code of Quebec perpetuated the tradition of husband as the legal head of the family. Not only did the married woman lose legal status in the husband-wife partnership, she also continued to perform tasks – catering to the needs of her husband and numerous children and spending less time working outside the home.

The legal mechanisms available to Canadians to petition for divorce did not make such an option easy. With Confederation, the British North America Act gave the Dominion Parliament exclusive jurisdiction in matters of divorce, as well as the power to create divorce courts. Nevertheless, the federal government did not exercise its authority; it allowed all existing provincial laws to stand and refrained from enacting its own. This did not solve the problem of

providing divorce procedures for persons living in provinces without divorce courts (Larocque, 1969:6) so the federal government turned to British tradition to solve the problem. Since British Parliament retained the power to dissolve marriages and the British North America Act was similar in principle to that of the United Kingdom, Canada's federal Parliament could justifiably be used to dissolve individual marriages. Thus persons wishing a divorce from provinces having no divorce courts had to submit a bill to Parliament (Special Joint Committee, 1967:53). A divorce was granted when the bill passed Parliament.

Increasing numbers of petitions soon made it necessary to create a special divorce committee within the Senate in the 1880s. From the committee, the petitions went to the full Senate for approval and then to the House of Commons as part of a large block of private members' bills. Here they were usually passed without debate (Kunz, 1953:213).

In the Maritime provinces, it was necessary to prove adultery, with the exception of Nova Scotia where cruelty was used as an additional ground. Ontario, Quebec and Prince Edward Island had no provincial divorce courts so petitioners in these provinces had to apply to the federal government for a private act of divorce. As far as grounds went, the rules differed depending on the sex of the petitioner. For a male, adultery was the only reason needed. But female petitioners had to have additional complaints such as desertion for two years or longer without reasonable excuse, or extreme physical or mental cruelty. This double standard stemmed in part from the Victorian belief that a wife's adultery was more of a betrayal than a husband's. A woman was presumed to be innocent and therefore could not be motivated by a 'natural' desire for extra-marital sex, but rather by other ulterior motives. An adulterous husband, on the other hand, was simply following his 'natural' desires.

Yet the hazards of divorce (which virtually always meant adultery) were not taken lightly. In 1888 the Hon. Mr. Gowan addressed the Canadian Senate with the warning that "the people of Canada know how to estimate and do value and cherish the sacred character of the matrimonial tie, the purity and sacredness of the family – they know these sentiments – attributes of the higher law – are the source and life of Christian civilization and that without them no nation can permanently prosper" (Senate Debates, 28 February 1885:58-9).

Until 1930, a wife was forced to sue for divorce in the province in which her husband had established his permanent home and even if he had deserted she still had to find him. As a result, substantial numbers of deserted wives and especially those with limited incomes had "to remain permanently married to a permanently absent spouse" (Pike, 1975:118).[6]

As a result of these pitfalls, the situation of divorce in Eastern Canada tended to keep both men and women within a marriage. Economic factors and social pressures, along with the internalized beliefs regarding marriage,

6. The 1930 *Divorce Jurisdiction Act* provided a limited form of relief from this requirement though by no means did it eliminate the problem.

played a strong role in keeping the family intact, stronger even than the laws of the land, although they too acted as further impediments to the dissolution of marriage. For all these reasons, the rate of divorce[7] within the final third of the nineteenth century remained constant and extremely low.

Table 2.

Number and rates of divorce, 1871-1900

Quinquennial periods	Numbers of decrees granted: annual averages	Decrees per 100,000 population
1871 – 1875	3	0.08
1876 – 1880	6	0.1
1881 – 1885	10	0.2
1886 – 1890	11	0.2
1891 – 1895	12	0.2
1896 – 1900	11	0.2

Source: Pike, 1975:125; taken from the Canada Year Book 1921, Table 40: pp. 825.

British Columbia, Alberta, Saskatchewan and Manitoba

As one travelled west of Ontario, a sense of the wilderness of the country grew as the traces of civilization disappeared. The vast forests of Manitoba were interspersed with great stretches of vacant prairie in Saskatchewan and Alberta and finally finished at the Rocky Mountains of British Columbia. Roads were little more than cleared trails while rivers were effective barriers to travel in the warmer seasons. Trading or military forts served as towns or at least supply depots for homesteaders coming West. The economy had gone from a dependency on trapping to a dependency on farming. The western half of Canada was at approximately the same stage of development as the East had been from 1800 to 1837.

Yet, as in the East, the family remained as a significant socio-economic institution. Ideas about the role of women and children were also much the same as they had been in Eastern Canada. Wives were housekeepers and children were to provide cheap labour – a hedge against the future insecurity of their parents.

Both government and industry supported and encouraged the institution of family since both believed that, without it, the development of the West could not advance as quickly. In the 1890s, both the Department of Immigration and the Canadian Pacific Railway used promises of marriage to attract

7. Of course, figures on the number of divorces do not give a complete picture of marriage breakdown. Desertion and separation should be included but such statistics are generally not available.

eligible single women from England. But the promise of security and a place in the home was not the only motive that kept women bound to the idea of marriage. There was the additional factor, imposed by the law of the land, of what control she had over her possessions.

When Canada purchased the Northwest Territories, many of England's laws became the laws of these territories. Thus, with respect to the rights of a wife, England's Dower Act of 1834 became operative. The Dower Act entitled a wife to the lifelong use of one-third of the land which the husband possessed, which was not disposed of by will. (Previously, a married woman had only the Law of Tenancy by Courtesy to protect her rights over her property.) England's Dower Act stayed in force until 1868, when the Dominion Parliament passed another act for the territories which further extended the right of women to control their own property. In the same year Tenancy by Courtesy was abolished.

Any discussion of these laws should also include consideration of their enforcement. While a wife controlled her husband's access to her land, once she had given him permission, she had little control over what he did with it. Further, it is not unreasonable to expect that at the outset of marriage, permission was easily given. But when the marriage soured how could a wife regain control over her land? In addition, the Dower Act gave a woman the option of remaining on her husband's property until she died. However, if there was a marriage breakdown, a husband could easily make it intolerable for his spouse to stay.

While there were efforts to give women some protection of law over their own property, it was obvious that legislators feared too much autonomy would threaten the family unit. The arguments against giving women the vote reflected these fears and are more than summed up in the attitude of one British Columbia senator:

> "I would not deprive my wife, or my mother or my daughter of any right that would bring them comfort, or ease, or emolument. No, I love them too much for that; but I love them more by not exposing them to disagree with me. . . ." (Cleverdon, 1950:135).

Sir Rodmond Roblin, the premier of Manitoba, was even more blunt. He charged that suffrage would "break up the home and throw children into the arms of servant girls" (Cleverdon, 1950:58).

So there were several social forces at play in keeping most couples together in the western half of Canada. But if restricting property laws and limited job opportunity played their part, so did the fact of the physical distance from Ottawa. Since divorce could only be obtained by submitting a bill to Parliament, many would-be petitioners were discouraged. If the petitioner were a woman, she had to petition in the province where her husband resided and she had to have grounds in addition to adultery to successfully press her case.

The figures for divorce do not, in fact, reflect the extent of marriage dissolution in Canada during the latter half of the nineteenth century. In the

provinces which did not have their own divorce courts – Ontario, Quebec, British Columbia, Alberta, Saskatchewan, Manitoba and Newfoundland – it was much easier and less expensive to simply desert an undesirable marriage.

Conclusion

At the close of the nineteenth century, law and custom provided a thick armour of protection against assaults on the institutions of family and marriage. Under the law wives were not the legal guardians of their children and did not possess the full spectrum of possible rights as far as ownership and property were concerned. Once a wife left the matrimonial home, she became 'propertyless' and childless. She also faced a world where jobs for women were scarce and pay was low.

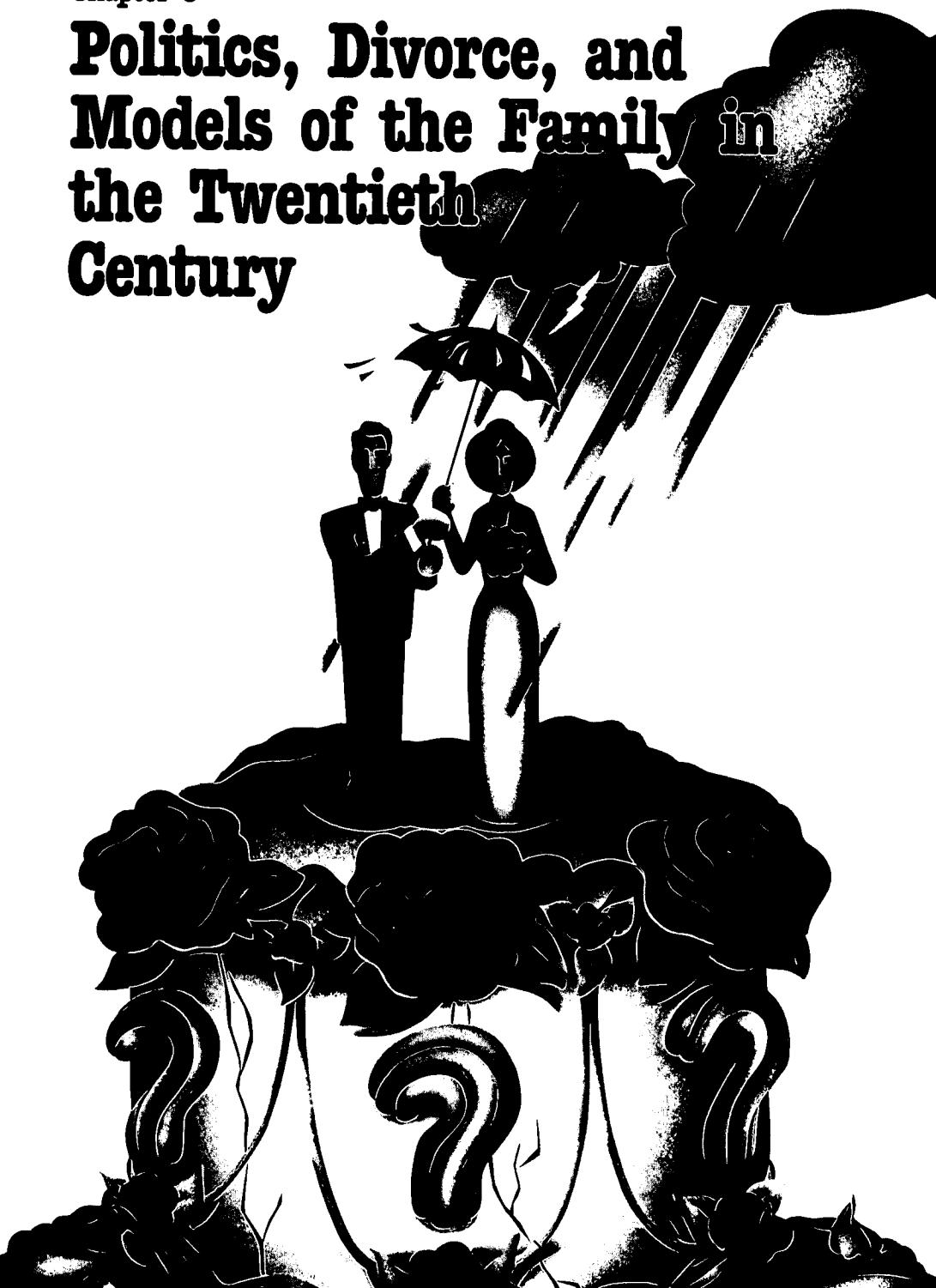
At the same time, customs worked to preserve and keep families together. There was a feeling that it was natural to marry and unnatural to remain single. At the same time, it was one's duty to see a marriage through. It was a mark of manhood and social honour to be able to support a family and remain with a wife. The network of kinship and social ties worked to reinforce convention. In areas where the power of the church remained strong, the threat of criticism and perhaps ostracism kept a couple together.

Beyond these social pressures, there were the very real economic implications of marriage and its dissolution. Where a family operated a farm or small business, there were definite advantages to a division of labour shared by husband and wife. Since families were often the fundamental units of primary production in those early days the laws worked to protect family and marriage. The depth and pervasiveness of social conventions made it extraordinarily difficult for any but a small number to contravene them.

In the twentieth century, however, the dam burst, and neither the conventions nor the lawmakers who voiced and reinforced them were able to withstand the force of social change.

Chapter 3

Politics, Divorce, and Models of the Family in the Twentieth Century



Chapter 3

Politics, Divorce, and Models of the Family in the Twentieth Century

While laws clearly buttressed the families of the 19th century, it was the harsh economic realities of pre-industrial Canada that maintained the cohesiveness of the majority of family units, especially on the frontier. The rigours of life on the frontier tended to keep marriages together, even if they were not particularly happy or harmonious. In addition, the laws and legal mechanisms to do with marriage and divorce were still in a very rudimentary form. If any non-conformist couples wanted to defy them they could and did, with impunity. Prosecutions were rare; the guardians of justice were more concerned with serious offences against the often precarious social order of the day.

In the twentieth century all this changed. Industrial production began to accelerate, fuelled as it was with a large supply of cheap immigrant labour. At the same time, an emergent middle class began to enjoy a higher standard of living. Cities grew, and with their growth came all the attendant urban problems: slums, inadequate diet, broken families, juvenile delinquency and crime.

Of more political and social significance, some women of this emergent middle class were newly-released from the tedium of domestic duties through labour-saving devices and services. As a result, they found themselves with time and energy on their hands and many of them were ready to take on the task of ridding the country of its growing social problems. One of their strongest and oldest reform establishments, the National Council of Women in Canada, underwent a great spurt of growth in the first decade of the century (Strong-Boag, 1976:232). The council was an attractive organization, with its gentle mix of traditional views and progressive-sounding policies. By 1907 it was advocating equal pay for equal work and the admittance of women to all professions. It even went so far as to promote farming as a genteel and profitable activity for women, arguing that mechanization made physical strength less important and that plant and animal care was analagous to mothering.

Nonetheless, when it came to effecting any serious social change, women remained politically impotent. Since they did not yet have the right to vote, their protests could only take the form of verbal objections and demonstrations. Ironically, the situation changed only as a consequence of Sir Robert Borden's need, in 1917, for a cadre of supporters who would be favourable to the idea of conscription. Still, only women with a relative overseas or those who had been in Canada since 1902 were now eligible to vote. These conditions were not removed until 1918.

Once women had gained the vote (not until 1940 in Quebec), a potentially major interest group existed which could champion the equalization of rights. In fact, legislation began emerging almost immediately after their enfranchisement. By 1923 women had been granted co-guardianship of their children in most provinces (Department of Health and Welfare, 1973:73) and two years later they were given the right to sue for divorce on identical grounds to men.

In many ways these suffrage activities illuminated the social and political reality of the day. One middle class suffragette, Emily Murphy, used the support of suffrage organizations to get a New Dower Act passed in Alberta (1911) which gave wives the right to a one-third share of their husbands' real property (McClung, 1972:xi). Suffrage activities also helped cement lines of communication between bright and aggressive women and they increased public awareness of claims for opportunities in education and career and for protective legislation in matters of work and property.

Protective Legislation

While the National Council of Women of Canada made demands for western dower legislation, the Provincial Council of Women for Alberta went one step further and petitioned Ottawa to grant homesteads to women. The request was refused by the Minister of the Interior on the grounds that while men made permanent settlers, women might use such an opportunity to become speculators (Strong-Boag, 1976:234). Despite this particular failure, the diligence of those who had been involved laid the foundation for women in other provinces to press for improvements to property and support laws.

In British Columbia, during the first decade of the century, women had no property rights and were not the legal guardians of their children. A husband could leave his wife penniless simply by neglecting to leave a will or by willing property and savings away (Basset, 1975:119). Men had sole control of the disposition, management, education and religion of their children, including any unborn children. If a husband deserted, his wife and children could apply for support under a maintenance act passed in 1901 (Department of Health and Welfare, 1973:73). Nevertheless, in the second decade the British Columbia legislature passed a Married Women's Property Act (1911) which contained extremely progressive provisions. British Columbia, Saskatchewan (1909) and Manitoba (1913) all enacted statutes containing provisions which were quite similar to Ontario's later Married Women's Property Act of 1960 (Saucier, 1964:35).

Even so, Alberta provided still more property rights for women than did British Columbia. Under Section 10, Chapter 19 of the Statutes of Alberta (1906), "a married woman (could) in respect of land acquired by her on or after the first day of January 1887 have all the rights and be subject to all the liabilities of a *femme sole* and might, in all respects, deal with the land as if she were married". When Alberta became a province in 1905 the homesteading law, which denied a wife all dower rights in her husband's estate, came under examination. Many saw the law as grossly unjust to those pioneer wives who had faced the same hardships as their husbands in order to build a homestead.

To remedy the situation, Alberta passed a Married Women's Relief Act in 1910. The act did not give a widow the right to her husband's estate but it did give her the privilege of applying to the superior court for relief, under certain circumstances. In turn, the superior court was entitled to give an allowance to the applicant out of her husband's estate and/or to convey or assign property. If a woman had been found guilty of adultery, however, she was excluded from an interest in her husband's estate. In 1911 Alberta went one step further and passed dower legislation which entitled a wife to one-third of her husband's estate, even without a will. Nor could he will away her third of the property.

In 1917 the Alberta government passed yet another dower act, giving the wife use of the land on which the house rested for the remainder of her life. In the same year, the legislature of Alberta declared that a wife was indeed entitled to alimony "by the law of England, or to any wife who would by the law of England be entitled to a divorce and to alimony as incident thereto, or to any wife whose husband lived separate from her without sufficient cause and under circumstances which would entitle her, by the law of England, to a degree of restitution of conjugal rights".

Saskatchewan followed Alberta's lead and passed the Devolution of Estates Act in 1911. It provided widows with a certain amount of relief if they received less from their husband's estate than they would have had if their husband died intestate (Saucier, 1964:36). In the same year Saskatchewan introduced relief measures for deserted or destitute wives and children, in the form of a Deserted Wives' Maintenance Act (Department of Health and Welfare, 1973:58).

Manitoba was far ahead of both Alberta and Saskatchewan. Nine years before Saskatchewan, Manitoba passed maintenance legislation for deserted or destitute wives and children. Within two years of Alberta's 1911 Dower Act, Manitoba had abolished dower and tenancy by courtesy. (As has already been noted in the previous chapter, both Alberta and Saskatchewan had eliminated the practice of tenancy by courtesy in 1886.) Under tenancy by courtesy a husband could use his wife's lands during marriage if there were no children, or for life if there were children (Edwards, 1921:27).

Ontario was the first province (as early as 1888) to introduce legislation regarding maintenance for deserted wives, but the legislation did not include

children until 1922 (Department of Health and Welfare, 1973:43). Ontario also had a dower act with a disqualification clause for adultery (Ontario, 1968:24). Whereas the western provinces sought to protect the wife from her husband disposing of their land without her consent through provincial government statutes, Ontario left the protection of wives to the discretion of courts. It is interesting to note that Ontario's deferment of protection to the courts is in keeping with the formation of many of the laws of that province. In fact, Ontario laws often encompass decisions of the courts in England, a legal tradition which may also help in explaining why Ontario was apparently behind British Columbia, Saskatchewan and Manitoba in the development of some aspects of Women's Property Acts.

In Quebec the situation surrounding women's rights was even more rigid. A married woman could not hold and dispose of her own property and all her rights were defined in terms of the good of her family. Political participation and economic support were the responsibility of the husband. Since the church did not recognize separation or divorce, French-Canadian politicians did not consider alimony or desertion allowances necessary.

Protective legislation among the various provinces was based on the principle of guilt. In the four western provinces and in Ontario, a wife who had been deserted received relief payments. On the other hand, if the wife deserted she was not entitled to protection, since she was the party guilty of breaking up the family. These revisions left the husband still in a stronger position of power than his wife. The direction such legislation took was thus a reflection of the perceptions of politicians and austere Victorian gentlemen who saw the increase in the power of women as a threat to the stability of the family. If the existence and continuance of the family unit rested on the weaker economic and political position of the women, then they were determined to preserve the situation as it was.

Canadian Attitudes Toward the Family

In the initial decades of the twentieth century Canadians had mixed reactions toward social change. While they enjoyed the leisure that technological progress brought, they regarded its attendant social ills with some unease. Their response was often a nostalgic one, a look to the past as a romantic, idyllic time when strong families meant a strong nation. A woman's absence from the home, in the case where she was obliged to support her deserted family, could only detract from such stability. One observer of the time remarked:

> When the mother is absent from the home, the children are sadly neglected. The younger children suffer physically; the older ones through lack of discipline often become utterly unmanageable and thus qualify for a life of crime. It ought to be a fixed rule with social workers that such arrangements should be made as would leave the mother free to care for her home and children (Strong-Boag, 1976:252).

Fearing serious societal problems, urban middle and upper class Canadians began to institute programs that would provide help for mothers who

were forced to support their families. Some thought that the provision of day care would replace and perhaps even surpass the absent mother's effort. The East End Day Nursery in Montreal was probably one of the first public day care centres (Klein and Roberts, 1974:238). The National Council of Women attempted to set up a national network of day nurseries, but in the end centres were set up only in Edmonton (1908), Saint John (1908) and Halifax (1910). The King's Daughters, another active women's group, organized and offered summer nurseries for short holidays from the city. Public kindergartens were also opened to help working mothers.

In addition to these public initiatives, the National Council of Women wanted legislation which would deter men from leaving their families. It wanted desertion to be made an indictable offence and the father of an illegitimate child to be criminally responsible in the case of that child's death, any injury to the child, or non-support. It wanted the mother to be co-guardian of legitimate children with the primary right of guardianship. Finally, it proposed that men who were convicted of desertion be employed at industrial labour during their jail terms, with the proceeds to go to their families.

Divorce

In 1905, Alberta and Saskatchewan joined the Confederation of Canada. While the provisions for divorce in their two provincial constitutions closely followed the British divorce law of 1857 (Larocque, 1969:6), it was not until provincial high courts acquired jurisdiction in 1919 that the provisions were acted on. But if it appears strange that it took the two provinces 14 years to recognize divorce jurisdiction, when one considers the state of the administration of law at the time one wonders how they accomplished the feat so quickly. The practice of law was carried out in such a rudimentary fashion that in 1902 a Justice of the Peace in the Big Red River area built a log house to be used as an inn, a hospital, a non-Sectarian church and, last but not least, as a courthouse (Niddrie, 1970:20).

In Ontario, by contrast, the practice of law was only slightly more advanced. The Canadian Bar Association had only been founded in 1912 and the profession was still not self-regulating. As a result, it hadn't the clout needed to pressure the Minister of Justice and the Prime Minister into creating a divorce jurisdiction for Ontario. In addition, the electorate was very clearly in favour of maintaining the family unit, and for a profession in the first blush of its struggle for autonomy, it was perhaps not the most politically auspicious moment to push for divorce reform.

The situation continued until the mid-1930s when developments in the United States began to have a profound impact on the social mores of Canadian life. The American experience came as a result of an accelerated industrialization which nurtured a more prosperous and sophisticated population. Traditional all-purpose professions gave way to new experts, who specialized in specific areas in the new technological era. Clergymen, once the sole arbiters of morality, were now forced to share this privilege with the

social worker, the reformer, the sociologist, even the philanthropist. With such a diffusion on matters of morality, the evolution of ideas and opinions went much faster than in Canada or Britain, and as a result the United States found itself in the midst of a sexual revolution.

The arbiters of this sexual revolution, or the New Moralists as they called themselves, contended that a person had a right to expect his or her marital union to be pleasurable and that failure in this regard was a legitimate ground for divorce. George Howard argued in *A History of Matrimonial Institutions* (1904) that restriction of marriage, not divorce, should be used as a method of social control. Even social scientists took issue with the question of morality in divorce. In 1909, E.A. Ross wrote in *Century* that "loveless couples of the 'good old times' appear to have been held together by public opinion, religious ordinance, ignorance of a remedy, the expense of divorce, or the wife's economic helplessness, rather than by heroic fidelity to an ideal" (O'Neill, 1967:181). Now the new secular authorities could and did challenge the traditional notion of marriage once and for life. Consequently, regardless of what opposition the churches in the United States manifested, the idea of divorce as a useful social mechanism had now been sanctioned by the new secular authorities.

In Canada the churches were in a markedly stronger position than their American counterparts. In Quebec the Roman Catholic Church was virtually in control of social thought throughout the 1920s and its opposition to divorce was strong and vociferous. Canadian politicians thus trod carefully, mindful of the sensitivity of the situation and the risk of political gambles in an atmosphere so charged with anti-divorce sentiments. Many Canadians were also suspicious of the modern philosophies and young couples were blamed for putting their personal pleasure and material acquisitions before any consideration of producing offspring.

Yet, notwithstanding the pressure of such public censure, there were some signs of experimentation in Canada. A divorce bill establishing a uniform divorce process for Canada (excepting the province of Quebec) was passed in the Senate in 1920 but died in the House of Commons. In fact, only five bills relating to divorce law were to make it through the House of Commons until the 1960s. The first of these made divorce grounds the same for women as for men. Thus, from 1925 on, a woman could sue for divorce solely on the grounds of adultery. In 1930 a federal act removed the restriction that a wife had to sue for divorce in the province in which her husband lived, but "only if she had been deserted for a period of two years and could prove not just that the husband was guilty of adultery but also that he has wilfully deserted her" (Pike, 1975:118). In the same year J.S. Woodsworth, an influential Canadian socialist and social reformer[1], persuaded the Mackenzie King government to apportion time for his private member's bill calling for an

1. James Shaver Woodsworth, clergyman, politician and author, figured significantly in the political history of Canada. In 1932, he was elected chairman of the newly-created Co-operative Commonwealth Federation (CCF) and became its parliamentary leader as well. As a result Woodsworth is popularly credited with the founding of this political party which subsequently became the New Democratic Party of Canada.

Ontario divorce jurisdiction. The bill passed, with a narrow margin. Seven years later the federal government passed an amendment to the British Columbia Divorce Act to give individuals the right to appeal their cases.

Yet, the progress of the nation at large was seriously hampered by attitudes within the churches and in the Province of Quebec. Henri Bourassa's response to the Equalization Bill in 1925 demonstrates the dampening effect Quebec had on the progress of divorce legislation in Canada. Ignoring the intent of the bill to equalize the sexes, Bourassa turned to the issue of federal and provincial powers regarding marriage and divorce. His argument was that the federal government could make any laws it pleased about marriage and divorce, while Quebec was left only with the authority for the mere celebration of marriage. Bourassa's views on the matter were representative of French-Canadian ideas and at the time such ideas still extolled the priestly view of women's subordinate and maternal role. In addition, the Quebec Civil Code allowed for the separation of husband and wife only under extreme circumstances. As most of Canada began to change and adapt to the new morality, Quebec society remained stationary, only grudgingly tolerating divorce as a process that would go on in spite of the rigid social censure which church and state so rigourously applied to it.

The Thirties

In 1929 the New York stock market crashed. Along with it, the western world's trading system collapsed and Canada was one of the most vulnerable victims. Since her economy was still in a semi-developed industrial stage, Canada was heavily dependent on foreign trade and particularly on the export of raw materials, semi-finished products and grain.

The Depression sank its teeth into everything and everyone, but there were certain pockets of people who suffered more than others. On the prairies the blow of financial depression was accompanied by drought and grasshopper plagues. Thousands of farm families were on the verge of starvation. In the Maritimes the fisheries and steel industries ground to a halt. By 1933 approximately 23% of the labour force was out of work, compared with just 3% in 1929. As a result, restrictions were placed on the number of married women (not self-supporting) who could be employed.

In Quebec the problems of the Depression were intensified by the fact that most major employers were English-speaking, while the majority of their employees were French-speaking. On the political scene it was the dawn of the Duplessis era. In 1936 Maurice Duplessis managed to push Premier Louis Taschereau out of power, charging that he was selling out Quebec. To strengthen his popular appeal Duplessis aligned himself with the church and in return had its backing for his tirades against the radicals of the day (McNaught, 1977:250).

The union of church with government had repercussions for the women of Quebec as well. While other women of Canada were gaining rights as independent citizens, Quebec women were still defined as minors. They were

not allowed to inherit property or own property they had acquired. In addition, they were required to hand over their salaries to their husbands, if and when they might be asked to. French-Canadian society was based on the Christian family and governed by God-given authority. In the hierarchical order of things, the woman's sphere was the home; her divinely ordained task was to be wife and mother (Stoddard, 1973:102) and her duty was to have as many children as possible so as to ensure the continuance of the society and its culture.

For years, French-Canadian women quietly accepted these church-sponsored dictates, and consequently many refused to support the struggle for women's rights. Nevertheless their discontent grew, and during the Depression, leaders of the two French-Canadian suffrage associations steadily challenged the validity of such contemporary views. To keep the issue alive these early suffragettes published brochures, made public appearances and wrote newspaper articles. But their task was not an easy one. From 1929 to 1936 a campaign was waged to keep women out of the job market. There was even a bill introduced in the legislature which would have denied them the right to work except in the fields and forests or in the home. That bill was not passed.

A turning point came with the election of the government of Adélard Godbout in 1939. Godbout had included the issue of female suffrage in his election platform (Stoddard, 1973:92) so it seemed certain that his election would ensure the vote for women. However, the leader of the Roman Catholic Church opposed the idea on the grounds that women's suffrage ran counter to the preservation of the family and that voting would expose them to the vulgar and perhaps unhealthy passion of politics. Godbout was not deterred and in the end his Bill 18 was passed and women were granted the right to vote.

Although the Great Depression proved traumatic for the economic order of Canadian society, its effects on the social fabric and especially on family life are less visible when gauged by historical social statistics. Throughout the thirties the rate of divorce showed only a slight year-to-year increase. During the years 1921 to 1926 the annual number of divorces per 100,000 population remained stable at 6.4, thereafter beginning a slowly accelerating rise (1927: 7.8; 1930: 8.6; 1935: 13.2) (Statistics Canada, 1973:73). This pattern of a gentle rise was interrupted only once, and to a minor extent, in 1931 when the rate dropped briefly to 6.8.

At best the Depression exerted only a minor immediate effect on the formal legal dissolution of marriages. In 1930 a change in law enabled wives to sue for divorce in the province in which their husbands had left them (rather than in the husband's province of residence). In the same year, a divorce jurisdiction was established in Ontario. While these changes had the effect of making divorce technically easier to obtain, the stigma attached to divorce coupled with the high legal costs and the restricted grounds for petitioning continued to put up insurmountable barriers to most of those tempted to sunder their marriage bond.

Canada at War: The 1940s

The rate of marriage in the 1930s and 1940s fluctuated considerably, mirroring the economic highs and lows the country was experiencing. During the Depression years the marriage rate had dropped to a low unmatched since 1921. But by 1939 the rate had rallied to parallel wartime activity and the consequent economic improvement.[2] In addition, there was also evidence that some women were delaying having children. The total fertility rate for 1939-40 was 2,692 children for every 1,000 women of childbearing age. By 1941 that number had risen by only 140 children.

Inevitably, the war created drastic changes in the make-up of the labour force. Since men were now otherwise occupied, the government began to look to the female population to fill the jobs that soldiers left behind. Initially, the plan was to implement short-term emergency measures in order to supply the labour needed for essential war industries. Above all, the government did not want to disrupt families by calling on married women with children (Pierson, 1977:127). In the end these plans were thwarted by circumstance. By 1943 there were severe labour shortages in service jobs since previous workers had left, lured away by higher wages offered in the war industries. As a result, the National Selective Service called first on childless married women to staff hospitals, restaurants, hotel laundries and dry cleaners. When that supply still did not meet the demand, mothers were offered three-month contracts to work for private industry.

Policies to aid women's entry into the labour pool included an amendment to the War Income Tax Act, as well as the provision of nurseries and after-school supervision of children. In 1942 the Income Tax Act was further amended to allow the husband of a working wife to claim a full exemption for her regardless of her income (Pierson, 1977:135). There was also a Nurseries Agreement, dividing responsibility for capital and operating costs between federal and provincial bodies while the initiative for establishing nurseries remained with the provinces. This agreement provided for nursery care, foster home care for children under two years of age and school day care for children between six and 16. By September of 1945 there were 28 day nurseries in operation in Ontario. In Quebec, where the program was slower to start, there were only five. (As far as other provinces are concerned, there are no records of provision for wartime child care services.) Once the war ended individuals were left to renegotiate for day care needs. In Quebec the government was adamant in its refusal to continue assistance to child care facilities, despite many appeals from social agencies, charities and working mothers. In fact, for Quebec, day care was over with the end of the war emergency.

In Ontario, however, the situation was different. In the first place, more child care facilities had been established and demand for them continued to grow. Secondly, federal support was extended to April 1946. Thirdly, the

2. In 1921 the number of marriages per 1,000 population was 7.9, although it slowly declined to 7.3 in 1923 and to 6.9 in 1925. However, in 1929 it was 7.7 and dropped to 5.9 in 1932, whereupon it started to increase – to 7.1 in 1935, 7.9 in 1938. But the rate jumped to 9.2 in 1939 and to 10.8 in 1940.

Ontario legislature set up a plan to underwrite the cost of day nurseries. (There were no provisions made for school-age children.)

The large-scale entry of women into the labour force during the war carried some other unforeseen consequences. For one, governmental approval of married women in the labour force helped remove the social stigma attached to the idea of a working wife. For another, participation in the work force proved to many women that they were capable of holding down a job and running a home at the same time. In the press of wartime requirements, their work experience gave them a taste of independence. For many, it was the first time they had some control over their own wages and, to a greater extent, control over their own lives. It was natural, then, for women who had entered the labour force for reasons other than to contribute to the war effort to attempt to remain in the labour force after the end of hostilities.[3]

Thus it was not surprising that the rate of divorce accelerated immediately after the war as women began to take their newly found independence seriously. However, while the rate picked up dramatically in the immediate post-war era, it soon lost momentum.[4] In fact, the idea of marriage began to take on a new attractiveness. With its surplus productive capacity, post-war Canada was in need of new markets. Since the family was one of the major consumer units in society, it became a target for advertisers and sales people; the rewards of family life were overstated and idealized by the media in order to emphasize the material 'needs' of families.

In addition, it was a moment in the history of Canadian divorce when the temper of a rapidly emancipating population had to contend with the temper of a stolidly traditional ecclesiastical establishment. Two major Canadian churches were intractable on this score. Neither the Roman Catholic nor the Anglican Church recognized divorce or remarriage and while the United Church conceded that divorce was necessary in some cases, in its *Report of the Commission on Christian Marriage and the Christian Home* in 1946, it opposed any attempts to extend the grounds for divorce (Larocque, 1969:54).

Little wonder, then, that reforms to divorce legislation received scant attention in the House of Commons during the 1940s. In 1941, Woodsworth attempted to introduce a bill which would have extended divorce grounds to include desertion, insanity and cruelty. The bill died, buried in the fuss of a call for a federal election. In the Senate, however, there was a great deal of discussion on divorce and divorce grounds. In 1943 Senator John Farris succeeded in obtaining Senate approval for a bill which added presumption of death to the grounds for divorce. But the next year Senator John Haig failed to obtain the Senate's approval for a bill to transfer parliamentary divorce to the Exchequer Court as a means of getting it out of the parliamentary mill. Two

3. The labour force participation rate for women 14 years of age and above was 21.8% in 1931, 22.9% in 1941, 24.4% in 1951, and 29.3% in 1961 (Ostry and Denton, 1967:23-26).

4. The number of divorces in Canada rose dramatically from 3,827 in 1944 to 8,213 in 1947. These numbers represented in rate form (per 100,000 population) are 32.0 and 65.4, respectively. But by 1949 the rate had dropped to 45.0 (Statistics Canada, 1975:28).

years later Senator Walter Aseltine tried to get the same sort of bill passed. Again the attempt was unsuccessful (Larocque, 1969:88).

The Progress of Family Law: The 1950s and 1960s

The Second World War left a heavy imprint on social forms in Canada. Canada emerged from the war for the first time as a major industrial nation and its subsequent post-war boom had economic and demographic effects which are by now well known. Government assistance to veterans in obtaining education and housing meant both the upgrading of the skills of the population as a whole, and the building of a large volume of new suburban housing which, in turn, created new styles of life dependent on the car and the stay-at-home wife. In addition, immigration on a scale hitherto unknown created both a rapid population flux in urban areas and perhaps more importantly a new mix of social attitudes quite different from those which characterized pre-war Canada.

People were now understandably concerned with security and well-being after decades of continuing social disturbance, and young men and women sought to create a tranquility within their families no doubt modeled on the ideals of a stable, socially integrated life that large rural families had lived decades before. Marriage took on a new attractiveness. In 1946, the mean age of brides at first marriage was 24.1 years and for grooms, 27.1 years. By 1956, these figures had dropped to 23.4 years and 26.1 years respectively (Cook, 1976:18). The total fertility rate rose appreciably, too, as the allure of newly-idealized familial values drew more couples into suburban, child-centred lifestyles. When marital difficulties surfaced in rising numbers of families, health care experts attributed them to deep-seated character faults of individuals rather than considering the possible inability of men and women to sustain the idyllic ideals of suburban life in the face of its many inherent contradictions. For one thing, couples were increasingly isolated geographically and socially from their kin, and the considerable occupational and geographic mobility contributed to a pervasive confusion in standards and expectations concerning normal matrimonial relationships. For another, many women found homemaking did not prove to be the satisfying be-all and end-all that the media had portrayed so warmly and convincingly.

The 1950s brought a rising albeit measured incidence of divorce (with rates of 37.6 in 1951; 38.7 in 1954; and 40.3 in 1957, but each lower than the rate in 1947 of 65.5) as more and more people began seeking divorce. Legislators began to consider divorce reform with a growing awareness that the laws in existence did not and perhaps could not control or eliminate the occurrence of family breakdown and divorce.

As a result, there were certain legislative concessions to allow for support of mothers and children. In 1951 Prince Edward Island passed the Children's Act which allowed that a deserted or destitute wife could claim maintenance from her husband for herself and her children. The following year both New Brunswick and Newfoundland passed maintenance acts which allowed for

support for both mother and child. It took Nova Scotia another 15 years before it passed the Wives and Children's Maintenance Act of 1967 (Health and Welfare, 1973:13-16). Yet each of the Atlantic provinces included clauses in their legislation which released the husband from obligation if the wife engaged in uncondoned adultery.[5] To the last, the state engaged in protective legislation which attempted to impose fidelity on the wife.

The difficulties surrounding divorce in the 1950s were catalytic in creating a definite mood for reform in the 1960s. One of the leading issues surrounded the question of transferring all divorce bills to the Exchequer Court, an idea that had already been pushed, although unsuccessfully, by Senators Haig and Aseltine during the 1940s. From 1960 to 1963, two Members of Parliament deliberately blocked federal divorce bills in order to revive the issue. In 1963 a newly-elected Liberal government quickly moved to end the blockade and a few months later the Dissolution and Annulment of Marriages Act was passed. As a result, an *ex-officio* justice of the Exchequer Court now presided over Senate divorce hearings, while the House of Commons was limited to a purely legislative role (Larocque, 1969:29).

Yet the change in the process of divorce did nothing more than whet the public's appetite for change. The media quickly took up the issue of divorce, both during and after the period of the blockade, and produced several radio, television and magazine specials on Canadian divorce law. Both *Maclean's Magazine* and the *Star Weekly* became strong proponents of broader grounds for divorce (Larocque, 1969:30).

Ever sensitive to public opinion, the politicians now began to sense that the time was opportune for expanding the grounds for divorce. In 1966 the Cabinet announced the creation of a Special Joint Committee of the Senate and House of Commons on Divorce. The committee held extensive hearings in order to receive submissions from individuals and groups. In many respects its findings were both surprising and expected.

From the start, it was evident that no major groups were adamantly opposed to broader divorce grounds. The committee was particularly relieved to discover that the three major churches of Canada were not about to oppose divorce reforms. Early in the proceedings, Senator Arthur Roebuck took the precaution of sounding out the Roman Catholic hierarchy on the subject and received a firm assurance that the church would not oppose wider divorce laws. The reasons for the Roman Catholic reversal appear unclear. What *is* known is that in September of 1966, in an extraordinary change of previous policy, the Roman Catholic Church advised its members that they were to vote according to their conscience on the very controversial divorce legislation.[6] (In fact, the move was a kind of tacit approval for Catholics to vote in favour of the legislation.) Thus in one fell swoop the Roman Catholic policy-makers redefined the relationship between church and state, as far as the Canadian church was concerned. From the Catholic Women's

5. In other words, if the husband knew that his wife was committing adultery and did not object, his silence amounted to a tacit acceptance of her acts. However, if he did object, there had to be a certain freshness to his allegations to avoid accusations years after the fact.

League came the message that while Roman Catholics would continue to have very definite ideas regarding marriage they did not intend to impose those beliefs on the entire Canadian society through the support of restrictive laws.

The committee's hearings spotlighted other significant changes in the times. The United Church of Canada had radically modified its views on marriage and divorce to the point where it gave serious consideration to the concept of marital breakdown as a grounds for divorce. In fact, briefs to the committee from both the United Church and the Anglican Church included marital breakdown as plausible and advisable grounds for divorce.

In June of 1967, following the last of the submissions, the Special Joint Committee issued an extensive report and a draft of a new divorce law. In December of 1967, the government's Bill C-187 incorporated not only the committee's proposal for wider divorce grounds but went further, proposing a complete transferral of parliamentary divorces (stemming from Quebec and Newfoundland) to the Courts. Two months later the bill was passed and on July 2, 1968, it received Royal Assent.

Conclusion

In contrast to previous eras, the twentieth century has witnessed a storm of public debate over the issue of family law reform. Yet at least in the first half of the century the net effect of the legislative changes which did occur left the husband in a stronger position as the custodian of family assets and spiritual values (but not with respect to child custody). Those laws which were passed, especially the property laws, gave women more protection and security but they still operated on the principle that too much of a good thing would endanger the family unit. Both property and maintenance laws ensured that just reward, in the form of state or paternal support, went only to those women who were faithful and determined to keep home and family together.

The leverage women needed to lobby for increased freedoms and social protection did not really come until they had gained the right to vote. Changes to the divorce laws in Canada came in two spurts: during the 1920s and 1930s, and then again in the 1960s. In the 1920s and 1930s the emerging school of American social science took the issue of divorce out of the context of morality and placed it squarely within a secular, temporal sphere. With the help of the media Canadians soon grasped the nature of these changes. As a

6. In a brief submitted to the Special Joint Committee of the Senate and House of Commons on Divorce in 1967, some Roman Catholic bishops stated:

> It will be up to the legislator to apply his principles to the concrete and often complicated realities of social and political life and to find a way to make these principles operative for the common good. He should not stand idly by waiting for the Church to tell him what to do in the political order. The ultimate responsible conclusions are his own as he fulfils the task he has along with all other legislators. That task is the promotion of the common good through the provision of wise and just laws. . . The norm of his action as a legislator is not primarily the good of any religious group but the good of all society (*Proceedings of the Special Joint Committee of the Senate and House of Commons on Divorce*, 1967: 1515-1516).

result, divorce came to be viewed as a legitimate mechanism necessary for psychological stability and not some bizarre phenomenon that, unless squelched, would destroy the fabric of social life.

While the first quarter of the twentieth century had been one of prosperity and experimentation, the Depression that followed quickly shattered the mood and forced its harshness on the national psyche. Any leftover shreds of romantic notions about marriage quickly turned to dust. The Second World War put a further strain on marriage, since husbands were away fighting and wives were at work in the war industries. In 1944 there were 3,827 divorces. Three years later that figure had jumped to 8,213, a figure not matched until 1964.

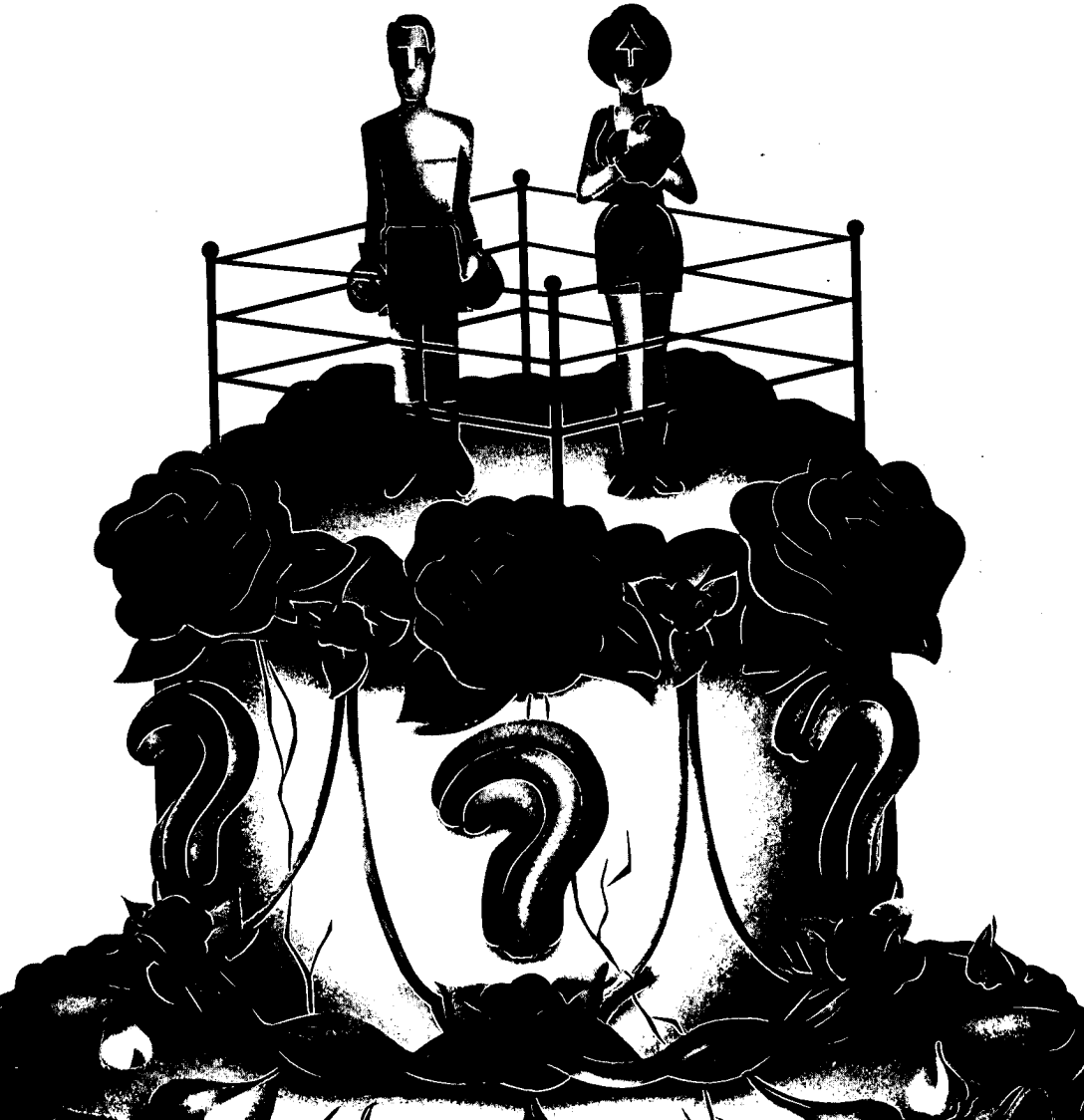
The second great rush of divorce reform took place in the 1960s. There was a great deal of soul-searching during the 1960s: social scientists, church policy-makers, politicians, and Canadians in general. There were enormous changes in the attitudes and values pertaining to the family. There were public debates and government reports on the issue of divorce reform. At the same time, more and more women enrolled in universities and colleges and their increased education allowed them a greater economic independence. The move to economic emancipation was paralleled by a move toward greater sexual freedom, with the introduction of effective new contraceptive technology and a loosening of abortion laws.

The pivotal point of change came with the creation of the Special Joint Committee of the Senate and House of Commons on Divorce. Its establishment was the political affirmation that it was now more than just expedient to act on the issue of divorce reform; it was necessary. If the findings of the Committee brought out one reality about the state of the Canadian consciousness, it was the traditional Canadian ambivalence to divorce. On the one hand, the emphasis on family preservation at the expense of individual freedoms was no longer acceptable. On the other, the feeling was pervasive that divorce was not something which should be obtained easily or frivolously. Marital breakdown was to be offered as grounds for divorce (the tacit acknowledgment that marriages will break down and that such is human, acceptable and even to be expected), but only after a three-year wait.

With the resultant 1968 divorce law Canadians had a revamped approach to the issue of divorce, yet while the new law constituted a major change from the previous one, it was not entirely revolutionary. Rather, it simply effected the partial legislative recognition of a social reality which had been fact for a long time.

Chapter 4

The Contestants



Chapter 4
The Contestants

It is a familiar and oft-cited scene from the motion picture *Gone With the Wind:* "Frankly, my dear, I don't give a damn," says Rhett Butler as he takes his leave of Scarlett O'Hara. There it was, one of the more powerful statements in the history of heaven-made romances: just a few pithy, well-chosen words that unravelled the whole 'damned' thing.

Throughout the western world Rhett Butler's words have often echoed, if not from the same script, certainly in the same spirit, as husbands and wives find themselves saying they've had enough. The legal restrictions and ideological injunctions have proven for many to be paper tigers. Now, in an ironic twist, the increasing volume of divorce has become just so much thematic grist for the entertainment mills. Authors, movie makers, playwrights, even gossips have taken this fact of social life and turned it into 'fine and satisfying entertainment'. Divorce has gone from being socially reprehensible to something that is both acceptable and normal and even something which immortalizes otherwise very ordinary people.

The adversarial system under which divorce is granted has thus given rise to a new art form, a formula morality play that could well be the modern parody of an ancient Greek tragedy. Yet, all too often the prosaic reality of particular divorces does not quite live up to the script. The perfect plot resolution is seldom to be found in a sundered marriage. As Canadian journalist Warner Troyer has noted, the reality is often 'obscene': an incipient conflict in a mix-up with the adversarial format imposed by the law. Yet, if the prosaic reality of divorce does not live up to the artistic demands scripts impose, sometimes, those scripts fail too. Films such as *Scenes from a Marriage, Kramer vs Kramer, Alice Doesn't Live Here Any More* and *An Unmarried Woman* deal with the aftermath of an ended marriage in a novel way, and reconstruction of single life as a new romanticism.

Similarly in the popular press, readers are continually offered descriptions and compelling arguments concerning divorce – how to prevent it, how to foster it as a reconstructive process, how to anticipate the economic problems it brings, how to tell the children, how to deal with religious and

parental opposition, how to get superior legal advice, how to get a good property settlement, and where and how to enjoy the putative freedom which results. The hidden presumption is that divorce causes problems, an implication given substance by a body of social science literature that sustains a continuing interest in the topic.

Two decades ago, to know of someone divorced, or better, to have been divorced, was rare indeed. Divorce had an aura of mystery and a certain stigma attached to it, and the icy crust of social censure melted only after the adult in question had found another mate and re-entered the conventional world of married life. Today, it is commonplace to have some personal first-hand knowledge of divorce and in fact, with the numbers what they are, most adults probably know at least one divorced person. Yet the stigma is still real, and women in particular experience it (Schlesinger, 1971; Brandwein et al., 1974) even though its power has been tempered through the educative effects of their personal experience.

The public attention is on divorcing. First-hand knowledge of divorce has been augmented and reinforced by other information, often based upon simple national statistics concerning divorce. Such information is frequently found in newspapers, popular journals, and on television – as part of the routine burden of normal news and public affairs comment. Together, all this information, regardless of source, has served to focus public attention on divorce and the divorcing. The numbers are sufficiently impressive that more and more persons must be confidentially assessing their own marital arrangements with an eye to occupying the best ground in any future battle. Changes in family law also alert married persons whose finances are in disarray to the fact that what might seem to be theirs is only theirs in a contingent sense, barring the onset of hostilities. If a man's house was once his castle, it may now only be a lodging house, occupied on suffrance. The law thus introduces ambiguity where once there was certainty: the news media, the anecdotal lessons in slyness and backstage legal manoeuvering.

In addition, much of the journalistic deluge has focused on individuals or small groups of people with distinctive peculiarities (the custodial father, the divorcing politician, the divorced entertainer, etc.). Stories that start with national statistics quickly move to case histories. The truth is that what all the divorced and divorcing have in common is the legal entanglement. But while it assuredly allows a portrait of a human condition to focus on individuals, it can also turn the truth into a one-dimensional stereotyped perspective on divorce. As a result, some major misunderstandings have developed, notably the tendency to view legal divorce as the height of a marital conflict, not its nadir.

In addition, we frequently get the chance to read about the divorce of some socially or politically prominent person, but we almost never hear about the thousands upon thousands of cases in which no newsworthy persons are involved. A movie about the miseries of a well-off couple whose main preoccupation is with finding their own identities, ignores the many couples for whom such emotional adventures are an unaffordable luxury. Stories which dwell on the division of marital spoils fail to acknowledge the straits of many

couples who have pitifully little to divide, and for whom divorce is the final sputter of vestigial conflicts long ago resolved and decided.

Another constant theme is the vulnerability of teenage marriages. Yet divorce among the older age groups is consistently ignored. Nary a word is printed about persons with a combination of such characteristics as old and poor. Grandmothers divorce in Canada, as elsewhere, but somehow their stories are seldom if ever considered newsworthy.

The image is therefore a misleading one. Everyone from the entertainers to the professional pundits have had a crack at colouring it in, and the result has been an inaccurate picture. It is the purpose of this chapter then, to describe, as fully as possible, the real characteristics of the contemporary contestants or players in the divorce drama. While most Canadians could name and summarize the details of the life of a divorcing movie star, they would not in general be able to do the same for John Smith or Jane Doe. How can we thus fill in a picture of their attributes and circumstances? An answer to this question requires a general statistical treatment of the specific analytical question of who divorces, when, and how, and perhaps ultimately why. The component parts of the response include an assessment of the characters, the plot, and the strategies. In succeeding chapters we attempt to draw them together to produce a homogeneous narrative of the process of divorcing with a special emphasis on a coherent portrayal of its social logic.

The Divorce Rate

In the international context, we have already observed that Canada's divorce rate is a moderate one. But in the context of historical Canadian figures, the current crude rate of divorce is nothing less than unprecedented (Figure1).

In 1921, the divorce rate was 6.4 (per 100,000 population), a number that more than doubled to 14.3 by 1936. After World War II, the rate rose dramatically to 63.1 and then subsequently declined to 37.6 by 1951. During the fifties, the rate held, without any serious fluctuations, but by the mid- and late sixties, it had once again begun to move upward, reaching 51.2 by 1966. The most momentous change occurred in 1969, immediately after the passage of the new Divorce Act. At that point, the rate stood at 124.2, and subsequently soared to 148.4 in 1972, 200.6 in 1974, 235.8 in 1976, and 243.4 in 1978.

Over nearly six decades, the combined effects of social change (war, secularization, legal change) have wrought huge changes in the ways in which Canadians see their lives in the context of the family, marriage, and the presumptive civil right to divorce on demand. As was discussed at some length in the previous chapters, a rather considerable proportion of the population, including the various institutional sources of opinion, have opposed divorce in principle and opposed attempts to make it easier to obtain. Further, there has been a strong conviction that such a process is potentially destructive for the society as a whole. In fact, what we increasingly see is the *de facto* availability of divorce on demand, albeit an availability which entails

lengthy delay and considerable expense. If anything, the 1970s have seen the near vertical path of the rising crude rate break through whatever levels of resistance remained from the conventions of the previous century.[1]

The crude divorce rate includes persons who are not 'at risk' (i.e. below the legal age of marriage or unmarried). However, a more refined measure compares the number of divorces in a given year to the number of married women 15 years of age and older. This measure is presented in Table 1 and shown graphically in Figure 2.

As with the crude rate, the rate per 100,000 married women has generally increased over the 11-year time span from 1970 to 1980. More recently the rate of increase has slowed, indicating perhaps that the limit of the courts' capacity to absorb and process cases may have been reached in 1975 (that was the year that the rate of increase slowed). In 1976, the rate was 985.6, an indication that approximately 1% of all married women in Canada were granted a divorce in that year. On the basis of these figures, we can estimate that in excess of 1% of all existing families have been dissolved in each year since the mid-seventies. Even though this figure is an astonishing one in the historical context, it must still be remembered that it likely represents only the tip of the family and marriage dissolution iceberg.

Since assessing the likelihood of divorce is, at best, a risky venture, it is necessary to consider more complex statistical measurements. One way to assess the level of divorce in society is to estimate the chances a marriage has of eventually terminating in divorce. Such odds are often arrived at by calculating the ratio of divorces to new marriages in any given year. Obviously, since this ratio compares two dissimilar populations, any long-term accuracy of its predictions is purely coincidental.

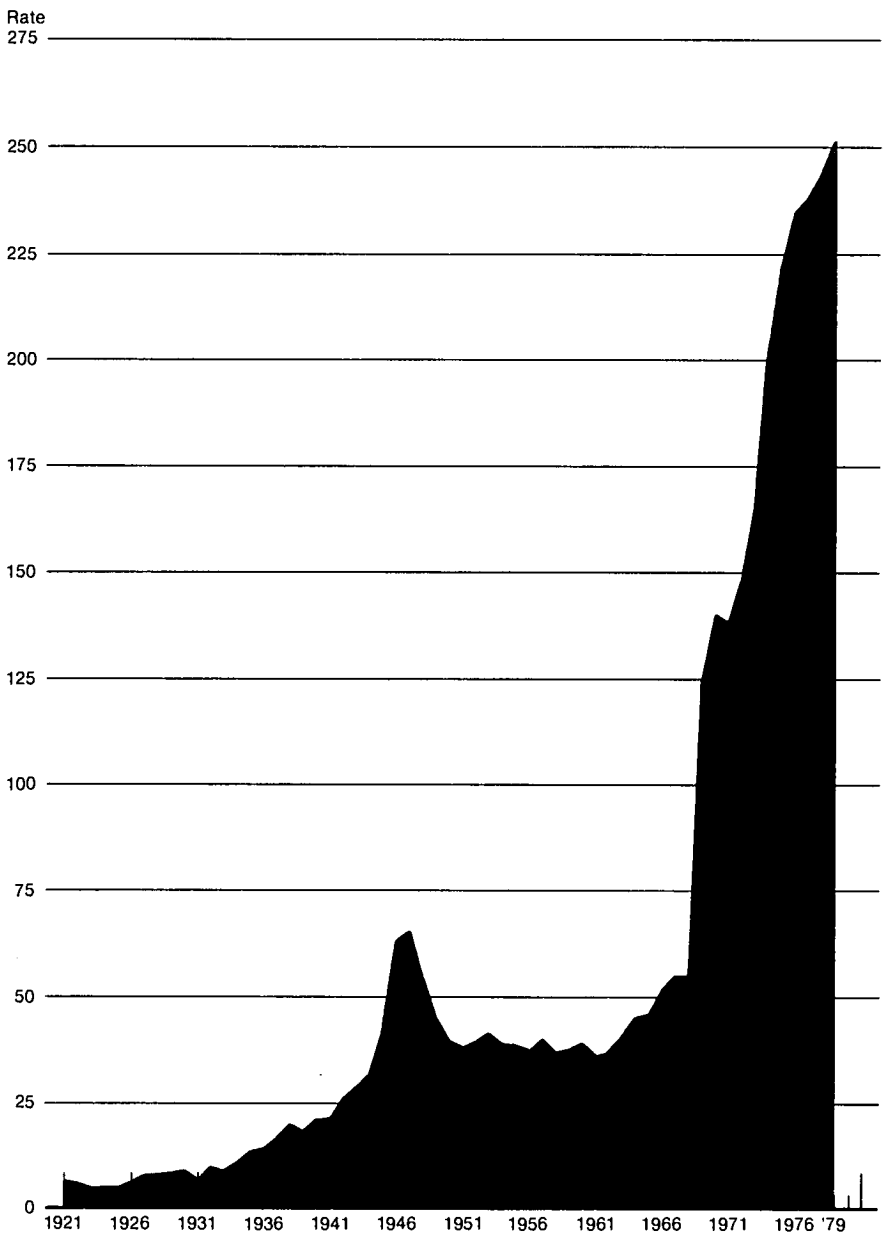
An alternative method, and one that calculates lifetime probability involves the construction of divorce tables, similar to the way in which life tables are constructed. It should be noted that the application of life table methodology to Canadian divorce data is much more recent here than in the United States.[2] Partly, this has to do with the relative infrequency of divorce in Canada prior to 1968 and partly it has to do with technical considerations. As far as the history of divorce activity goes, the lack of data is simply explained. It is really only in the decade directly following the 1968 revision of the divorce law that divorce data have been created and accessible. If we are thus to consider divorce and death as the only sources of formal attrition from the married population, divorce increased from just 13% of marriage dissolutions in 1967 to a substantial 40% in 1976.

1. The demand for marriage has not flagged either but one cannot assume that contemporary marriages are by intent the same phenomenon as in years past.

2. Basavarajappa (1978) has published the first divorce tables for Canadian males and females, based on the sex-age-specific divorce rates observed during the 1970-72 period. From these tables, he observed that "if the persons marrying between the ages of 15 and 25 (and born between 1946 and 1956) experience the divorce rates observed in 1971 and successive ages, nearly one-quarter of them may be expected to obtain divorce eventually by the time they are 75 years old" (Basavarajappa, 1978:59).

Figure 1

Crude Divorce Rate Per 100,000 Population, Canada, 1921-1979



Source: Vital Statistics, Vol. 11, 1976, 1977, Table 11 (84-205).
Statistics Canada Daily, Sept. 4, 1979 (11-001E).

Table 1.

Divorces granted and rate per 100,000 married women, 15 years and over with percentage change from previous year, 1970-79

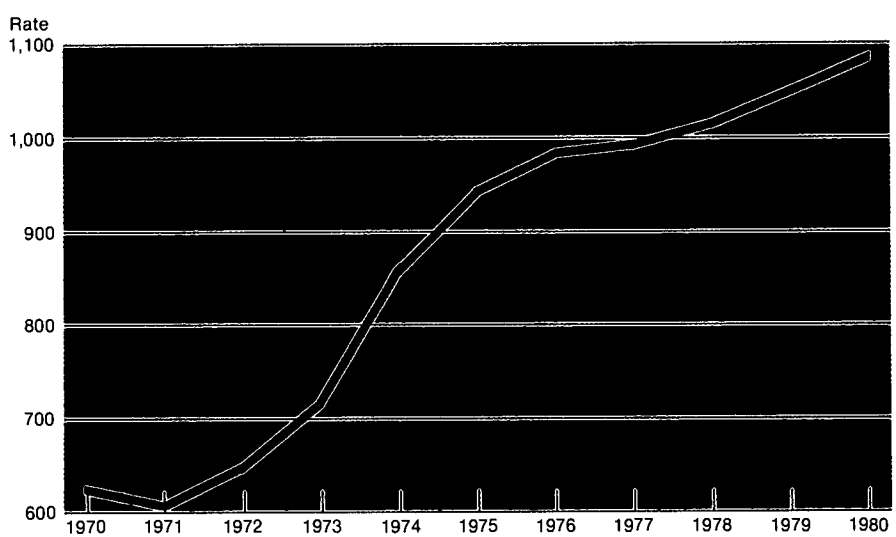
Year	Number	Rate	Percentage change
1970	29,775	621.0	11.6
1971	29,685	607.2	– 2.2
1972	32,389	649.9	7.0
1973	36,704	716.4	10.2
1974	45,019	860.1	19.5
1975	50,611	942.4	9.6
1976	54,207	985.6	4.6
1977	55,370	994.2	0.9
1978	57,155	1,016.1	2.2
1979	59,474	1,050.4	3.4

Source: 1976 Vital Statistics, 84-205, Table 12.
1978 Vital Statistics, 84-205, Table 11.
1979 Statistics Canada Daily, August 1, 1980.

Note: To this point, the figures presented have dealt with only year-by-year comparisons and in no way express the cumulative risk to married persons over time.

Figure 2

Divorce Rates per 100,000 Married Women 15 Years and Over, Canada, 1970-1980



Source: Vital Statistics, Statistics Canada (84-205), various years.

As far as technical considerations are concerned, the explanations are more complex. For one thing, the construction of divorce tables for Canada is subject to certain data limitations. At the present time, divorce tables using the duration of marriage are impractical. While the distribution of divorces by duration of marriage is readily available, the corresponding distribution of the population at risk is not. It would be possible to construct a cohort (age specific) divorce table that would show the cumulative probability of divorce for the first 10 years of a marriage, but this would be an incomplete estimate, since during the period 1974-77, the *median* duration of marriage at the time of divorce was 10.9 years. Thus a cohort table truncated at 10-year durations would reflect approximately only one-half of the lifetime incidence of divorce.

In the absence of sufficient data on duration of marriage/population at risk of divorce which would be necessary to derive current divorce tables, we must rely on the age-specific divorce rates, usually obtained by taking three years of data derived from the population census.[3] Nonetheless, with the growing availability of schedules of age-specific rates of marriage and divorce, the life table tool can now be handily applied to an analysis of divorce rates. For the purposes of the current discussion, we have included two divorce tables, one for males, one for females.

It should be noted that these tables explicitly recognize divorce as the only source of attrition from the married population, and therefore do not consider the possible death of the wife or the husband. If such data were available, a more realistic approach to the length of married life would be the construction of a triple-decrement table, whereby a similar cohort of 100,000 males is subjected to fixed schedules representing the three sources of attrition; namely divorce, death of the wife, or death of the husband. At this writing, though, there are no representative data on the age-specific incidence of widowhood in the Canadian population.

From the divorce tables, however, it can be seen that the average expectation of married life between the exact ages of 15 and 80 was 49.9 years for males and 49.7 years for females. If the tables are truncated at the 75th birthday, in order to be comparable with Basavarajappa's earlier results (see footnote 1), the average expectation of married life is reduced to approximately 46 years for both males and females. Thus, the potential 65-year span of married life between the 15th and 80th birthdays is reduced by an average of nearly 15 years, or almost one-quarter of the potential length of married life.

With the growing availability of schedules of age-specific rates of marriage and divorce, life table techniques have been extended to other substantive areas as well (see Mertens for a detailed presentation of the construction of nuptiality tables). Two fundamental questions a divorce table enables us to answer are these:

1. If a hypothetical cohort of marriages contracted by either males or females all at the same moment in time at birthday X were to be

3. Numerous examples of divorce tables are to be found in the demographic literature, primarily based on the United States experience. For example see Jacobson (1959), Ferriss (1970), Krishnan (1971), Preston (1975) and Preston and McDonald (1979).

exposed to a fixed schedule of age-specific divorce rates, what proportion of these marriages would terminate in divorce prior to birthday Y some specified number of years later (say, 15 years for example)?

2. On average, what would be the expected longevity of a marriage contracted by birthday X, considering divorce as the only source of attrition in the married population?

Table 2

Divorce table for females 1975-77 (probabilities for married women at a given age)

Age[1]	Probability of divorce[2] before next birthday	Remaining married[3]	Divorces during interval[4]	Probability of ever divorcing[5]	Average remaining years of marriage[6]
15	0.0002	100,000	17	0.3624	49.09
16	0.0005	99,983	50	0.3623	48.10
17	0.0014	99,933	142	0.3620	47.12
18	0.0029	99,791	287	0.3611	46.19
19	0.0049	99,504	488	0.3592	45.32
20	0.0072	99,016	712	0.3561	44.54
21	0.0092	98,304	907	0.3514	43.86
22	0.0116	97,398	1,135	0.3454	43.26
23	0.0136	96,263	1,313	0.3377	42.76
24	0.0152	94,950	1,447	0.3285	42.35
25	0.0162	93,503	1,515	0.3181	42.00
26	0.0165	91,988	1,514	0.3069	41.68
27	0.0170	90,474	1,534	0.2953	41.37
28	0.0165	88,940	1,468	0.2831	41.07
29	0.0151	87,471	1,316	0.2711	40.75
30	0.0164	86,155	1,417	0.2600	40.37
31	0.0154	84,738	1,304	0.2476	40.04
32	0.0143	83,434	1,195	0.2358	39.65
33	0.0140	82,239	1,151	0.2247	39.22
34	0.0139	81,087	1,131	0.2137	38.77
35	0.0131	79,956	1,047	0.2026	38.32
36	0.0127	78,910	1,004	0.1920	37.82
37	0.0120	77,906	935	0.1816	37.30
38	0.0115	76,971	884	0.1716	36.74
39	0.0110	76,087	835	0.1620	36.17
40	0.0104	75,252	783	0.1527	35.56
41	0.0103	74,470	770	0.1438	34.93

Table 2.

Divorce table for females 1975-77 (probabilities for married women at a given age) – (Continued)

Age[1]	Probability of divorce[2] before next birthday	Remaining married[3]	Divorces during interval[4]	Probability of ever divorcing[5]	Average remaining years of marriage[6]
42	0.0100	73,700	737	0.1349	34.29
43	0.0091	72,963	661	0.1261	33.63
44	0.0093	72,301	670	0.1181	32.93
45	0.0090	71,631	644	0.1099	32.24
46	0.0081	70,987	573	0.1018	31.53
47	0.0082	70,414	577	0.0945	30.78
48	0.0075	69,837	522	0.0872	30.03
49	0.0073	69,315	505	0.0802	29.25
50	0.0063	68,811	432	0.0734	28.46
51	0.0061	68,379	419	0.0676	27.64
52	0.0057	67,960	390	0.0618	26.80
53	0.0051	67,570	342	0.0564	25.96
54	0.0048	67,228	325	0.0516	25.09
55	0.0047	66,902	317	0.0470	24.51
56	0.0039	66,585	259	0.0424	23.32
57	0.0039	66,327	258	0.0387	22.41
58	0.0036	66,069	236	0.0352	21.49
59	0.0032	65,833	212	0.0315	20.57
60	0.0029	65,621	187	0.0284	19.63
61	0.0026	65,434	169	0.0256	18.69
62	0.0025	65,265	163	0.0231	17.73
63	0.0024	65,102	156	0.0206	16.78
64	0.0021	64,945	133	0.0183	15.82
65	0.0021	64,812	135	0.0162	14.85
66	0.0018	64,677	116	0.0142	13.88
67	0.0016	64,561	105	0.0124	12.90
68	0.0015	64,456	94	0.0108	11.92
69	0.0013	64,362	87	0.0094	10.94
70	0.0012	64,276	77	0.0080	9.95
71	0.0010	64,198	67	0.0068	8.96
72	0.0009	64,131	57	0.0058	7.97
73	0.0009	64,074	60	0.0049	6.98

Table 2.

Divorce table for females 1975-77 (probabilities for married women at a given age) – (Continued)

Age[1]	Probability of divorce[2] before next birthday	Remaining married[3]	Divorces during interval[4]	Probability of ever divorcing[5]	Average remaining years of marriage[6]
74	0.0008	64,013	50	0.0040	5.99
75	0.0008	63,963	51	0.0032	4.99
76	0.0008	63,912	49	0.0024	3.99
77	0.0006	63,862	35	0.0016	3.00
78	0.0008	63,827	51	0.0011	2.00
79	0.0003	63,776	17	0.0003	1.00
80	0.0	63,759	0	0.0	0.0

Table 3.

Divorce table for males 1975-77 (probabilities for married men at a given age)

Age[1]	Probability of divorce[2] before next birthday	Remaining married[3]	Divorces during interval[4]	Probability of ever divorcing[5]	Average remaining years of marriage[6]
15	0.0002	100,000	21	0.3773	49.28
16	0.0003	99,979	28	0.3772	48.29
17	0.0019	99,951	92	0.3770	47.30
18	0.0008	99,859	77	0.3764	46.34
19	0.0027	99,781	236	0.3760	45.38
20	0.0037	99,545	369	0.3745	44.49
21	0.0056	99,176	555	0.3722	43.65
22	0.0079	98,621	784	0.3686	42.89
23	0.0098	97,837	954	0.3636	42.23
24	0.0117	96,883	1,132	0.3573	41.64
25	0.0132	95,748	1,262	0.3497	41.13
26	0.0147	94,486	1,386	0.3410	40.67
27	0.0162	93,100	1,509	0.3312	40.27
28	0.0167	81,591	1,532	0.3202	39.93
29	0.0157	90,059	1,409	0.3086	39.60

Table 3.

Divorce table for males 1975-77 (probabilities for married men at a given age) – (Continued)

Age[1]	Probability of divorce[2] before next birthday	Remaining married[3]	Divorces during interval[4]	Probability of ever divorcing[5]	Average remaining years of marriage[6]
30	0.0174	88,651	1,545	0.2976	39.22
31	0.0161	87,105	1,405	0.2852	38.91
32	0.0157	85,700	1,344	0.2734	38.54
33	0.0151	84,356	1,271	0.2619	38.14
34	0.0152	83,085	1,267	0.2506	37.72
35	0.0144	81,818	1,180	0.2390	37.29
36	0.0139	80,368	1,122	0.2278	36.83
37	0.0135	79,516	1,071	0.2169	36.35
38	0.0133	78,445	1,040	0.2062	35.83
39	0.0127	77,405	985	0.1956	35.31
40	0.0118	76,420	900	0.1852	34.76
41	0.0115	75,520	872	0.1755	34.17
42	0.0113	74,647	843	0.1659	33.56
43	0.0105	73,805	772	0.1563	32.94
44	0.0104	73,032	762	0.1474	32.28
45	0.0102	72,271	737	0.1384	31.62
46	0.0095	71,533	682	0.1295	30.94
47	0.0096	70,852	677	0.1212	30.23
48	0.0089	70,174	621	0.1127	29.52
49	0.0082	69,553	570	0.1048	28.78
50	0.0082	68,983	549	0.0974	28.01
51	0.0074	68,434	506	0.0901	27.23
52	0.0073	67,928	493	0.0833	26.43
53	0.0065	67,434	438	0.0766	25.62
54	0.0060	66,996	403	0.0706	24.78
55	0.0057	66,593	380	0.0650	23.93
56	0.0053	66,214	350	0.0596	23.06
57	0.0051	65,864	334	0.0546	22.18
58	0.0050	65,530	325	0.0498	21.29
59	0.0043	65,205	282	0.0451	20.29
60	0.0042	64,923	272	0.0409	19.48
61	0.0037	64,651	239	0.0369	18.56

Table 3.

Divorce table for males 1975-77 (probabilities for married men at a given age) – (Continued)

Age[1]	Probability of divorce[2] before next birthday	Remaining married[3]	Divorces during interval[4]	Probability of ever divorcing[5]	Average remaining years of marriage[6]
62	0.0033	64,411	213	0.0333	17.63
63	0.0032	64,198	206	0.0301	16.69
64	0.0029	63,992	185	0.0270	15.74
65	0.0028	63,807	179	0.0241	14.78
66	0.0023	63,628	144	0.0214	13.82
67	0.0020	63,484	129	0.0192	12.86
68	0.0021	63,355	130	0.0172	11.88
69	0.0021	63,225	135	0.0151	10.90
70	0.0016	63,089	104	0.0130	9.93
71	0.0017	62,986	105	0.0114	8.94
72	0.0015	62,880	97	0.0098	7.96
73	0.0015	62,783	94	0.0082	6.97
74	0.0015	62,689	96	0.0067	5.98
75	0.0012	62,593	77	0.0052	4.99
76	0.0014	62,516	88	0.0040	3.99
77	0.0010	62,428	64	0.0026	3.00
78	0.0009	62,324	54	0.0016	2.00
79	0.0007	62,310	43	0.0007	1.00
80	0.0	62,267	0	0.0	0.0

Notes:
1. This column refers to the interval between the two exact ages as indicated. For example, the age 15 connotes the interval of one year between the 15th birthday and the 16th birthday.
2. This column represents the probability of a person who is married on the xth birthday becoming divorced before attaining the next birthday. This has been set to 0 at age 80.
3. This column represents the number of persons, of the initial cohort of 100,000 married persons, remaining married at the beginning of each age interval.
4. This column represents the number of persons who were married at the beginning of each age interval, who will become divorced during this interval.
5. This column represents the probability of ever becoming divorced at age x.
6. This column represents the average number of years expected to be spent in the married state before divorce after the xth birthday, by those who divorce before the 80th birthday.

Using the divorce tables, we note that those females entering marriage by their 15th birthday could expect to remain married for 50.1 years prior to attaining their 75th birthday. Similarly those males entering marriage by their 15th birthday could expect to remain married for an average of 50.5 years before their 75th birthday.[4] Thus, if we were to think of the 60-year span between the 15th and 75th birthday as the potential length of married life in these tables, it may be seen that divorce reduced this length by an average of nearly 10 years.[5]

The values of two functions of the divorce tables, the probability of divorce at age X, and the probability of ever obtaining a divorce at age X, are plotted in the following two figures on divorce probabilities.

These figures show that the single-year probability of divorce is at its highest at age 27 for females and at age 30 for males. Age at marriage is also a likely explanation for the higher divorce probabilities for females up to the age of 27, whereafter the male rates remain higher at each subsequent age, although the gap narrows somewhat after age 60. The figures also illustrate that the probability of obtaining a divorce declines steadily between the ages of 20 and 55, and levels off after that, when it drops below 5%. There is less than a 1% chance of obtaining a divorce after the age of 68 for females, and after age 71 for males.

The odds in favour of ever divorcing seem extraordinarily high, a function perhaps of increasing life expectancies. Canadians are living longer, so the probability of marriage accommodating itself to the changes its partners inevitably experience is getting smaller.

There are two different interpretations one can place on these trends. The conservative viewpoint would see them as clear evidence that the nuclear family is a crumbling institution. The more liberal view, on the other hand, would take the high rate of remarriage as an indication of a progressively greater commitment to living in a *workable* nuclear family, even though it might be on a second or subsequent attempt. Despite these two conflicting views, one thing appears certain; while the institution of the marriage-based family is being embraced ever more tightly, marriage itself is an incidental and often irrelevant consideration for growing numbers of Canadians. It is also quite clear that many persons have discarded even these formalities, with the aid of recent provincial family laws which in some instances are applicable even where a marriage has not actually occurred.

4. One factor that may account for the slight differences between males and females on both the proportion of marriages ending in divorce and also the average expectation of married life is the differences in the age-specific divorce rates between males and females.

5. This of course assumes that divorce is the only source of attrition among this hypothetical married population. Clearly the forces of mortality also operate to reduce this potential span. It will be seen below that we have considered the effect of all three forces (husbands dying, wives dying and divorce) in the analysis for the 1975-77 period. There is an additional consideration of remarriage. Remarriage tables for the divorced population were first published for Canadian males and females for the year 1966 (Kuzel and Krishnan, 1973). The authors reported that the likelihood of remarriage from the divorced state was very high. For example their results show the lifetime prospects of remarriage between exact ages of 20 and 80 to be virtually 100% for males, and 91% for females.

Figure 3

Probability of Ever Divorcing for Married Men and Women, Canada

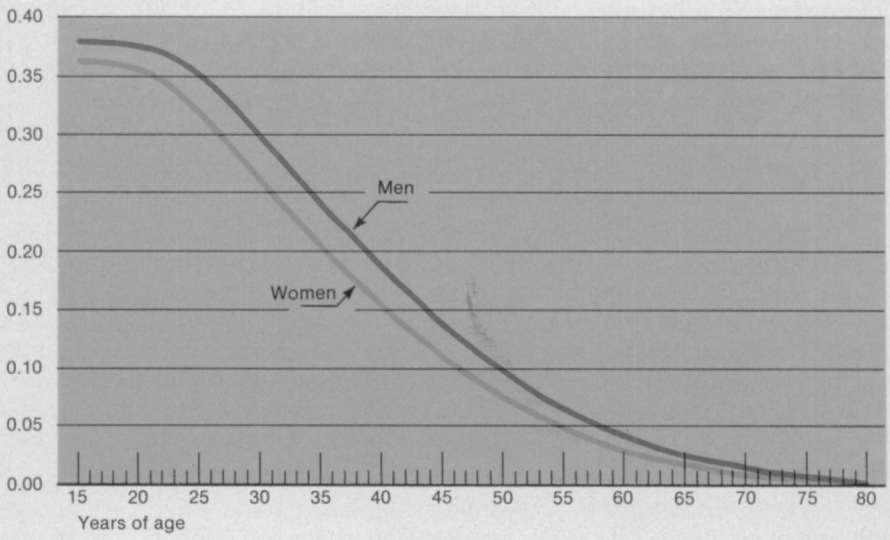
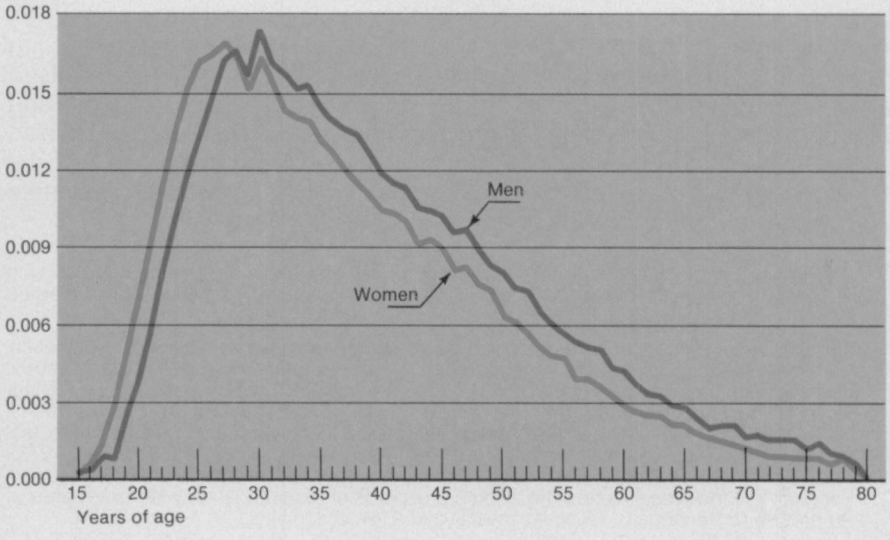


Figure 4

Probability of Divorce Before Next Birthday for Married Men and Women, Canada



Defining Divorce

Divorce culminates marriage instability and breakdown except in the isolated cases where the marriage was entered into for straight financial gain or to frustrate the intent of certain laws such as those governing immigration. However, the reverse proposition that divorce is synonymous with breakdown or instability is an incorrect one. There is a continuum between very stable and very fractured relationships. When we speak of divorcing or divorced persons, we are discussing only a fraction of all marriage breakdowns (see Figure 2). In addition, there is a large but unknown number of marriages – consensual unions – that have no legal status in the first place and thus can give rise to no legal activity. But considering only the case of those couples who did at one time go through a form of marriage, Figure 5 shows us that the type of marriage breakdown has strong implications for the present legal right to remarry, or the absence of such a right (which we previously indicated is a presumptive civil right in the minds of most Canadians).

Figure 5

A framework of legal outcomes of marital breakdown

Legal outcome	Marital breakdown[6]	
	Involuntary	Voluntary
No right to remarry	illness resulting in chronic hospitalization imprisonment	desertion separation continued 'poor' marriage
Right to remarry	death	divorce annulment

Marriage and divorce both have numerous and contradictory definitions, and frequently the practical social definitions of both are at odds with the legal definitions. Figure 6 distinguishes between these two particular points of view: the social scientific (which we call behavioural), and the legal view. The diagram shows how these two views create concurrent though different sets of contexts for marriage and divorce as events and also as processes.

6. This does not imply a consensus between the spouses. Instead, only one spouse need assume a breakdown, whether it be voluntary or involuntary.

Eight boxes or cells result from the combinations noted above. In a rough sense, the ordering of the horizontal labels and the numbering of the cells reflect a time sequence. Admittedly, such a schema is not without flaws, since it would be naïve to consider that marriage only begins with the chimes of the wedding bells. Indeed, many couples live together for substantial periods of time before marrying, and these couples create *de facto*, privately contracted marriages. Similarly, the social and psychological processes of divorcing may begin before the wedding itself takes place! Or, alternatively, they can persist long after the legal divorce itself is completed.

Nevertheless, the typology can serve as a guide to the essential preconditions of divorce. Without marriage, one never needs divorce, a thought which must occur silently and often throughout the land. Marriage thus serves as the benchmark for our typology while it is far from being the prerequisite of having families. (There are jurisdictions internationally, some in the United States, where the majority of live births are illegitimate.) In essence, marriage and divorce are antithetical and mutually reinforcing and divorce restores the *status quo ante*, and thus helps facilitate further marriage.

First, it must be re-emphasized that there is a great deal of similarity between marriage as a process and divorce as a process, a distinction that is blurred in many marriages most of the time. For many, uncoupling must start at an unconscious level; slowly and imperceptably at first, then manifestly and consciously guided toward the final breakup.

Sometime after this process has commenced, *a priori* before the marriage or *fait accompli* following the marriage, the legal process begins to respond to certain social events. Depending on the complexity of the circumstances, such legal reaction can involve any number of court appearances, form-filling, consultation, even division of property rights. In addition, there are certain social processes in the act of divorcing such as the advertisement of one's availability. Once a definitive social act has occurred, such as the physical decampment from the marital home, lawyers can undertake to translate it into a legal mode.

Nonetheless, the social sundering of marital ties does not always have the expected legal counterpart actions. Many marriages are destined to continue in name only, as the spouses depart to form new families and carry on their lives as they wish, without any public acknowledgement of their now defunct but still legally binding marriage.

The Data

Our framework has indicated a number of ways in which divorce can be considered. However, our principal data source is a product of the legal system itself and is thus restricted to indications of the processing of divorce petitions in the courts.

When the Divorce Act took effect in July of 1968, it also became mandatory that all petitions for divorce be registered with the federal government's

Figure 6

Marriage and Divorce as Social and Legal Acts and Processes

	Time			
	Marriage		Divorce	
	Act	Process	Process	Act
Social	(1) • wedding nuptials • often a festive occasion, much more elaborate than what law requires • of course can precede the wedding day e.g. start of living together	(2) • intimate, ongoing relationship • growing together • being a couple • the state of being married	(3) • systematic sundering • uncoupling • disengagement • often slow, perhaps unconscious at first • redefinition of self as a single individual	(4) • in some cases may precede legal act, perhaps after separation has occurred • social act, with social meaning of the legal trial of decree • social sundering
Legal	(5) • wedlock is begun • legal requirements are satisfied • no right to remarry	(6) • maintenance of legal obligations over time • often unconscious • will broaden with the birth of children	(7) • marshalling your cases, or responding to suits • takes time, may involve various courts for different reasons e.g. support payments	(8) • "deadlock" is over • trial (courts) and subsequent decree • right to remarry

Central Divorce Registry in Ottawa. Now, when a petition for divorce is filed with a court anywhere in Canada, a copy of the registration form is forwarded to Ottawa. Once a petition is discontinued, dismissed, or a decree is granted, the second part of the registration form is sent to the Registry detailing the outcome of the petition. The implementation of this registration procedure has initiated a complete set of records on every divorce petition filed in Canada. The subsequent coding of the information on these forms makes it possible to analyze in detail many characteristics of Canadian divorces since 1969. Information is available on the legal processing of divorces such as the duration of proceedings, the choice of grounds, and any contestation of the petition. The ultimate outcome of the divorce action and information on custody awards are also presented. Social characteristics such as age, sex, marital status at marriage of the husband and wife, as well as the number of children, are recorded and will be used to describe the social process of divorcing.

However, there are still no data on levels of education, occupation, income or religion, and consequently the role that these factors might play in divorce cannot be directly assessed.

It should be pointed out here that our data contain information for all cases commenced under the Divorce Act since 1969 and completed on or before December 31, 1979. No cases have been included that were still active after that date. Consequently, when the terms 'divorcing' or 'divorced' are used in the context of the data, they refer to action in the past. The use of the term 'divorcing' normally implies that the end result of such a process is a divorce. However, this implication does not hold for every case here, since a small percentage of cases are discontinued or dismissed instead.

Who Divorces and Why

The clearcut increase in the crude divorce rate noted in 1969 was an important and immediate consequence of the relaxation of the stringency of Canadian divorce law in 1968. In some limited sense, the law caused an increase in divorce by providing unhappy couples with a less hostile legal mechanism for marital dissolution. By the same token, changes observed from 1921 onward in the crude rate serve to show the underlying importance of other factors such as economic distress and war. Thus a more general understanding of these other influences is necessary for a fuller understanding of the social and, ultimately, legal process of divorce.

Much research activity has been devoted to identifying the social correlates of divorce. Since this work has not produced a general predictive theory of divorce, it is instructive to review briefly some of the proposed models. The first of these is based on the social importance accorded lineage, kinship, and the eligibility of persons for marriage.

Orderly Replacement – Permanent Availability

In this model, the crucial distinction is between types of kinship systems. In the first and older form, family lines are traced through the male line. The family is a conservative force, seeking to maintain orderly succession across the generations through the systematic introduction of outsiders into a rigid and unitary succession of generations. Offspring are trained to see themselves as standard-bearers who will carry on the family line and maintain the clarity of succession. Farber describes this as the *orderly replacement* model (1964).

In contrast, the *permanent availability* model is bilateral and, notes Farber, "there is no need to consider lineage arrangements for marriage. . . the maintenance of marriage is a personal rather than a kinship problem" (Farber, 1964:108). Clarity of succession is discounted in favour of personal satisfaction. Marriages are based on love relationships and as a consequence, divorce is necessary from time to time to replace unsatisfactory relationships as they develop, even though it irremediably muddies the lines of succession. "Marriage", as Farber puts it, "is not maintained for orderly replacement, but exists for personal welfare" (1964:115). This latter model corresponds more closely with existing social practice. That is not to say that orderly replacement has totally disappeared. In fact, what has occurred is that its contemporary expressions rely less on concrete necessity (there is no farm to be divided up) and more on a mechanical adherence to tradition.

Manifestly, the control of marriage by elder kin has progressively declined as the norms of premarital chastity, later marriage, and large families have been blown away by (largely successful) attacks on the principle of the righteous authority of elders. Farber also notes such trends as the increasing rate of divorce, the increase in the numbers of married women in the labour force and a social emphasis on youthfulness as empirical evidence consistent with the permanent availability model. These trends are further proof that the bonds of authoritarian family and male rule are destroyed progressively over time in response to changing societal requirements.

The Constraints Model

Marriages are not just subject to internal pressures. Feldberg and Kohen have focused on the role of ideology and the influence of external organizations on family members. In their view, the family has increasingly come to be seen as a device for personal fulfilment. At the same time, high expectations for happiness set the stage for intense disappointments, where such expectations are not realized. Feldberg and Kohen argue that it is difficult to maintain the premise of *entitlement* in the face of demands for time and energy on behalf of employers and the emotional demands of child-rearing. The net effect of these internal and external pressures puts both supporting roles of mother and father into serious jeopardy. Part of the problem lies in the necessary structural arrangements marriages impose where, as Feldberg and Kohen insist:

> (men) are believed to be best at instrumental tasks and consequently have major responsibility for the family's relationship to external organizations. In contrast, females are believed to be innately capable of understanding and ministering to emotional needs (Feldberg and Kohen, 1976:153).

The net effect of these external demands is to remove the greater part of most married men's energies from the pool of family resources. Any external involvement on the part of wives will impose an even further drain on the limited amount of collective resources. Feldberg and Kohen (1976) cite Gurin, Veroff and Feld (1960), and Bradburn and Caplovitz (1963), to support the view that

> since family structure is not conducive to meeting emotional demands as they arise, the woman is structurally positioned to fail. When emotional need and crises go unresolved in the home, the woman, as the adult primarily responsible for this area of family life, may question her self-worth. At the very least, she is unlikely to find the fulfilment she sought in family life. . . . For many people this contradiction results in divorce (Feldberg and Kohen, 1976:156).

As the energies of the family are depleted, and emotional gratification dwindles, both husband and wife may develop other relationships. Since there are no constraints, or rules that would rechannel interest and affection to family members, the family unit crumbles. It is as if the gravitational forces of the family nucleus have been neutralized or exceeded by the combined pull of outside influences. As Feldberg and Kohen point out: "(when) the major bond between spouses is an emotional one, the continuity of the marriage depends on the very satisfactions which are most jeopardized by the external order's demands on family life" (1976:157). Thus, the failure of a marriage may be not so much a personal problem (as is widely believed) but rather a structural one.

The Reciprocal Exchange Model of Married Couples

In the reciprocal exchange model, the family is observed to exhibit a rough equilibrium of energy deposits and withdrawals under normal circumstances, based on a sexual division of labour. Scanzoni (1976) suggests that conjugal cohesion, at best in very fragile balance, may be placed in jeopardy by an enhanced cultural valuation of occupational achievement and success. In other words, interest in one's career can devour interest in one's spouse and if the family becomes a forum or window for the display of material success its usefulness as an emotional unit or haven will necessarily suffer.

In the traditional family setting, the husband has the right to outside employment and the duty to provide the necessities of life for wife and children, while the wife has the right to his support and the duty to bear children and tend house. If the cultural valuation of each role is approximately equal, tenuous as it may appear, the marriage will balance. If however, the

cultural valuation of paid employment rises above that of housewifery, conscientious work in each role will give rise to increasing discrepancies in success which in turn will create a disequilibrium and the balance will be upset.

The inability of anyone, male or female, to contribute an equitable share to a marriage purely through household work has forced them out of the home and into more meaningful jobs, in an attempt to recapture their self-esteem. Ultimately, these anomic forces upset the original balance and leave the partners with no clear yardstick of what might now be an equitable and fair division of labour.

The Forced Choice Model: Premarital Pregnancy

As its title implies and as traditional authority has dictated, unplanned pregnancies have very often led to unwanted marriages. There have been many studies of the relationship between forced marriages and subsequent divorce. In his article *Premarital Pregnancy and Marital Instability*, Furstenberg (1976) concludes that some of these marriages are doomed from the start, since they are missing the critical courtship process and they generally lack the requisite economic resources.

Although Furstenberg's insights do not and cannot explain away the entire problem of divorce, they do illustrate how fear and confusion, combined with precipitous action, can create doomed marriages. The incidence of such marriages, however, is on the decline, and certainly with the enhanced availability of abortion and placement of infants the likelihood of being forced into such a marriage has diminished. There is, nonetheless, already a group of older couples who experienced such a trauma early in their married life. Very often, they feel cheated of their childhood and young adulthood, a time which quite rightfully they feel should have been free of the financial and emotional responsibilities with which their premature marriage burdened them.

The Interpersonal Relations Model

According to Levinger (1965, 1976), there are three dimensions that one should consider when analyzing why a particular marriage fails. The first deals with internal sources of gratification such as sexual fulfilment, companionship and reflected public esteem. The second deals with constraining factors such as religion, felt obligation, children and even economic dependence. Thirdly, there are the external sources of gratification which vary according to the individual. These deal with independent sources of income, availability of secondary sexual partners, and intellectual distancing.

In combination, these three sources of variation help gauge the probability of marital dissolution. Hypothetically, if marital attraction is low, constraints weak, and the sources of outside attraction numerous, the chances of divorce

are high. Yet, it is important to remember that while these three factors can create the *wish* to divorce, it must then be sustained by the presence of certain practical necessities. At the same time, the wish to divorce is tempered by the profound suspicion with which being single is still viewed. As Christopher Lasch has said:

> Our society, far from fostering private life at the expense of public life, has made deep and lasting friendships, love affairs, and marriages increasingly difficult to achieve. As social life becomes more and more warlike and barbaric, personal relations, which ostensibly provide relief from these conditions, take on the character of combat (1978:30).

A Numeric Description of Divorcing

The five explanatory models we have outlined briefly have suggested or implied that certain factors (for example, age at marriage, number of children, marital status at marriage, duration of marriage, etc.) are important in any consideration of the correlates of divorce. Since these and other dimensions are registered on the forms sent to the Central Divorce Registry and thus are contained in our data set, we want to examine this numeric evidence for any patterns of uniformity.

Age at Marriage

The common perception is that the earlier the marriage, especially if accompanied by an unwanted pregnancy, the lower its chances for survival. The figures in Table 4 indicate that divorcing persons, both husbands and wives, had a higher percentage of teenage marriages than their ever-married[7] counterparts. In addition, the table shows that 53.9% of divorcing husbands were married at age 20-24, while just 40.0% of ever-married males were married at this age.

We can also observe that females in both groups tend to marry earlier than the males in either group. Within the divorcing group, 83.4% of the wives were married by age 24 compared to only 66.6% of the husbands. Similarly, in the ever-married group, 74.0% of the females married for the first time by age 24 compared to just 50.9% of the males.

Table 4 thus highlights the association between age at marriage and divorce. The findings are not at all unexpected since there have been many studies that have clearly shown the association between early age at marriage and subsequent divorce (Palmer 1976, Weed 1974, Carter and Glick 1970, Bumpass and Sweet 1972, Gibson 1974).

It could be rightly pointed out that this association is due to factors other than age. However, in their data taken from the 1970 United States National Fertility Study, Bumpass and Sweet (1972) found that women who marry

7. Ever-married simply denotes that a person has been married.

Table 4.

Percent distributions of age at marriage of divorcing husbands and wives and ever-married persons[1,2]

Age	Divorcing[3] persons (1969-79)		
	Husband	Wife	Total
20 or under	12.7	42.4	27.5
20–24	53.9	41.0	47.5
25–29	20.4	9.5	15.0
30–34	6.7	3.3	5.0
35+	6.3	3.8	5.0
Total	100.0	100.0	100.0
Number	(491,386)[4]	(490,030)[5]	(981,416)
Age	Ever-married persons (1971)		
	Male	Female	Total
20 or under	5.9	26.3	16.6
20–24	45.0	47.7	46.4
25–29	31.3	16.9	23.7
30–34	10.9	5.3	7.9
35+	7.0	3.9	5.4
Total	100.1	100.1	100.0
Number	(5,491,386)	(5,490,030)	(10,981,416)

1. The ever-married figures are by age at first marriage. Source: Statistics Canada, 1971 Census, Catalogue 92-750, titled Population: Age at First Marriage.
2. Information on the relationship between age of husband and age of wife in the divorced population for each year can be found in Vital Statistics Vol. II Marriages and Divorces, Statistics Canada Catalogue 84-205. A similar relationship for husband-wife families can be found in Statistics Canada, 1971 Census, Catalogue 93-720, titled Husband-Wife Families.
3. There are no noteworthy differences between divorcing persons and those that had a decree granted.
4. Missing values = 13,244 or 2.6% of the total.
5. Missing values = 14,600 or 2.9% of the total.

under 25 have higher rates of marital disruption even after taking education, pre-marital pregnancy, religion and residence into account (see also Weed 1974).

There have been several explanations offered concerning the findings of such studies. Palmer discusses the idealistic and unrealistic expectations of married life that young couples may hold. She points out that "because of their

youth, their expectations are likely to be higher and their marriages to be less the idealized version they anticipate than for older couples who are likely to be more realistic" (1976, p. 622). Palmer also notes that young persons, especially women, may be more dependent on their parents and such dependence may adversely affect their marital relationships.

Gibson (1974) has found that pre-marital pregnancy was associated with those marriages where the female was under 20. Since pre-marital pregnancy cuts short the adjustment process prior to marriage and since it may also result in financial difficulties, subsequent marriages were much more vulnerable to breakdown. Gibson's explanations are supported by the work of Bumpass and Sweet (1972).

Although it was stated earlier that age at marriage is a predictive factor, exclusive of other variables such as education or pre-marital pregnancy, this does not mean that these factors cannot aid in our explanation. The findings would suggest that the struggle for independence by young marrieds from their respective families, along with changing post-marital role perceptions contribute to the breakdown of youthful marriages. However, these factors do not constitute the total explanation. There are many other aspects to be examined.

Area of Residence

Since 1969, the crude divorce rate has changed both across provinces and over time. Table 5 indicates these changes, although for the sake of brevity, only two-year intervals are presented.[8]

With only one exception since 1969 (Prince Edward Island in 1975), Newfoundland has had the lowest crude divorce rate in the country. Part of the reason has to do with the fact that prior to 1968 a federal act of Parliament was necessary to obtain a divorce. Concommitantly, the corresponding shift in attitudes and behaviour initiated by the Divorce Act in 1968 has been larger and slower than in some of the other provinces. (Also to be considered as mitigating factors are Newfoundland's isolation and its large rural population.)

With the exception of Nova Scotia, the Maritime provinces also have had low rates. One consideration in assessing these low rates has to do with the great out-migrations of the very young who often tend to be the most susceptible to divorce. In addition, the Maritimes are generally more economically depressed than the rest of Canada and this may also be a contributory factor.

As mentioned previously during the period 1974 through 1976, Quebec had a higher divorce rate than Ontario. This finding is all the more remarkable given that in 1968, with the exception of Newfoundland, Quebec had the lowest crude rate in Canada (10.2). This incidence was partly due to the fact that prior to 1968 divorce for persons domiciled in Quebec could only be secured by a federal act of Parliament. The effect of social and legal change in Quebec in the 1970s thus cannot be overstated. Indeed, following the

8. The intervening years' rates can be found in Vital Statistics, Catalogue 84-205.

changes of 1968, the demand for divorce exploded, suddenly released from the restrictions of the law and also as a direct result of the loosening of the tight grip of the religious establishment which had hitherto so severely coloured the social view of divorce.[9]

As might be expected, Ontario led the way in terms of the absolute number of divorce petitions in the 11-year period from 1969 to 1979. In fact, in the 11-year span from 1969 to 1979 the Ontario divorce rate jumped from 160.4 to 256.3.

Table 5.

Crude divorce rate (per 100,000) by province, 1969, 1971, 1973, 1975, 1977, 1978, 1979

	Canada	Nfld.	PEI	NS	NB	Que.	Ont.
1969	124.2	20.0	91.9	102.1	55.3	49.2	160.4
1971	137.6	28.7	54.7	91.6	76.1	86.3	158.5
1973	166.1	41.4	47.0	155.2	88.1	133.0	173.6
1975	222.0	69.2	63.1	194.2	112.3	227.8	212.6
1977	237.7	80.8	113.4	215.8	139.9	231.1	236.2
1978	243.4	75.0	110.5	233.1	165.9	236.6	243.2
1979	251.3	84.2	117.1	268.4	174.5	228.8	256.3
		Man.	Sask.	Alta.	BC	YT	NWT
1969		136.3	92.1	221.0	205.0	262.5	96.8
1971		140.1	88.1	224.6	225.6	255.4	71.8
1973		162.4	97.7	263.4	245.7	304.6	111.1
1975		194.8	123.2	309.7	306.6	206.7	148.1
1977		202.6	157.3	308.1	330.9	274.4	154.7
1978		211.8	150.7	310.4	326.7	299.5	176.6
1979		208.5	159.3	324.5	343.4	287.0	179.7

Source: Vital Statistics, Vol. II, Marriages and Divorces, 1976, Catalogue 84-205 and Statistics Canada Daily, Friday August 1, 1980, Catalogue 11-001E.

Until 1973, however, the Yukon had the highest divorce rate (304.6) followed next by Alberta with a rate of 263.4. Again, the high rates for the Yukon are undoubtedly connected to the age/sex structure of the population. In the first place, the population was very young, and with a 1966 sex ratio of 118.3 males (Kalbach et al., 1971:116) for every 100 females, one might be

9. Another explanatory factor revolves around the number of courts in Quebec that were newly-empowered to hear divorce actions in 1974. In that year, 34 courts were added to the list of venues where divorce petitions could be heard, where previously only two courts in the province had such authority. As the backlog was cleared, the crude rate in Quebec in 1977 once more slipped slightly behind that of Ontario.

forgiven for presuming that women there do have an undeniable source of attractive options. In addition, the migratory character of this population is an important determinant. Fenelon has suggested (1971:326) that social integration may be lower in areas where there is a large migratory population, and consequently, the social costs for divorce may be lower, the power of salient norms somewhat diminished and the rate of divorce consequently far higher.

The western provinces show high rates of divorce as well. In 1975, Alberta had the highest crude divorce rate in the country (309.7), followed closely by British Columbia (306.6). This rate may be associated with the rapidity of social change in Alberta since the beginning of its oil boom. In addition, and historically, Alberta courts have been progressive forerunners in the interpretation of the Divorce Act.[10]

In 1978, British Columbia had the highest divorce rate in Canada (326.7) which was well above the Canadian average of 243.4. With the exception of Saskatchewan, the crude rates tend to rise as one moves westward. It is probably not coincidental that Saskatchewan has had a higher percentage of rural residents than the other western provinces.

In terms of absolute numbers of divorces, Ontario leads the way with 36.7% of all divorces granted in Canada followed by Quebec with 23.9%, British Columbia with 15.4%, Alberta with 11.4%, Manitoba with 4.1%, Nova Scotia with 3.2%, Saskatchewan with 2.5%, New Brunswick with 1.7%, Newfoundland with 0.7%, Prince Edward Island with 0.2% and the Yukon and Northwest Territories both with 0.1%.

Divorce and Migration

In virtually every case, divorcing represents not only a psychological and social separation of former spouses, but a physical separation as well. This results in a change in housing needs, both in terms of units and type. Often, physical separation involves a move of one or both parties and in a surprising number of instances, former spouses are living in different provinces before and by the time the divorce petition is filed (see Table 6 and Figure 7).

In Quebec, of all the women divorcing, 93.4% of their husbands also resided in that province. In part, it might be concluded that in Quebec, language and cultural considerations act as deterrents to migration outside the province.

For Ontario, the comparable figure is also rather high at 88.3% and this probably reflects the large and dispersed industrial base which permits and encourages intra-provincial mobility. This supposition is also supported by the fact that when husbands are not living in the same province as their wives, and especially when the wife is living in the Atlantic provinces, a large proportion of husbands are to be found in Ontario.

10. Alberta courts were pioneers in the more lenient interpretation of what might constitute mental cruelty, an interpretation which places emphasis on the *effects* of an act of mental cruelty rather than the *intent* behind it.

In Alberta and British Columbia, over 80% of husbands were located in the same provinces as their wives, or in a neighbouring province, with little in the way of a reverse flow eastward to central Canada. In the Yukon and the Northwest Territories, approximately half of the husbands were not residing in the same territory as their wives.

Age Differences

Conventional views have it that the ages of marital partners should be similar. May-December marriages are regarded with a good deal of scepticism and such heterogamous couplings (whether they refer to marriages between older men and younger women or older women and younger men) are implicitly felt to have a higher probability of breakdown.

Data presented by Bumpass and Sweet (1972) support these expectations. Their analysis of United States national data for white ever-married women under 45 showed that husbands aged 25 and over marrying wives aged 14-17 had higher levels of instability.[11] Higher levels also occurred when women over 25 were married to men aged 22-24 and when

Table 6.

Province of residence, 1969-79*

Province	Wives resident %	Husbands resident %	Husbands also reside in %	
Newfoundland	100.0	70.9	16.3 Ont.	3.5 NS
Prince Edward Island	100.0	61.2	15.4 Ont.	7.8 NS
Nova Scotia	100.0	76.7	11.3 Ont.	3.0 NB
New Brunswick	100.0	72.7	12.2 Ont.	4.5 NS
Quebec	100.0	93.8	3.5 Ont.	—
Ontario	100.0	88.7	2.3 BC	2.2 Que.
Manitoba	100.0	73.1	7.5 Ont.	7.2 BC
Saskatchewan	100.0	68.8	12.0 Alta.	9.1 BC
Alberta	100.0	82.0	7.5 BC	3.7 Ont.
British Columbia	100.0	83.5	5.4 Alta.	4.6 Ont.
Yukon	100.0	49.7	27.5 BC	10.3 Alta.
Northwest Territories	100.0	51.3	19.9 Alta.	9.7 BC
Other**	100.0	1.1	49.9 Ont.	16.1 BC

Excluding missing values (5.1% of file).

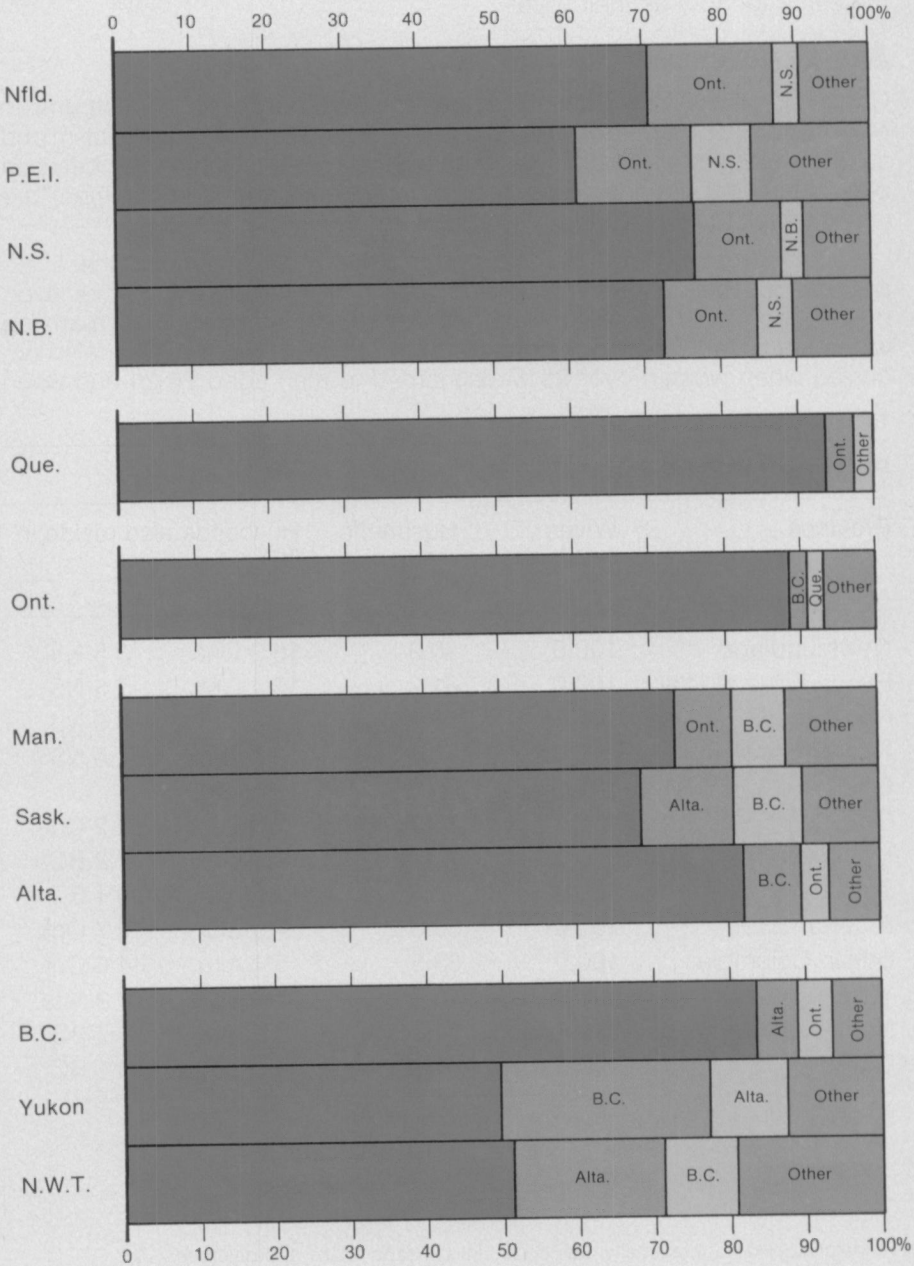
* This table does *not* imply that it is the husband who has migrated.

** Other (N=84) might include Armed Forces Overseas personnel.

11. Instability was operationally defined to include separations and divorces.

Figure 7

Resident and Non-resident Husbands of Petitioning Wives, Canada, 1969-1979



women aged 22-24 were married to men 20-21. Their data also show that "the stability of the marriages of the youngest brides increases with the age of their husbands up to the last category (25 and over), where the age difference is large enough to be socially significant" (p. 762).

These findings are consistent with an Australian study by Day (1964). The Day study showed that the divorce rate was lower if the husband and wife had an age difference of five years or less. If more than five years separated them, the divorce rate was higher, especially if the female was older than the male.

Age differences between husband and wife have been calculated and preserved in our data. Table 7 presents a percentage distribution of the difference in ages between spouses for the Canadian divorcing population.

The figures indicate that half (50.5%) of all the couples had an age difference of less than three years, while for a third of the cases (36.5%) the male was three to 10 years older than his spouse. In only 4.5% of the marriages is the female three to 10 years older than her husband. This small percentage is not surprising, since the median age at marriage for husbands has been older than the median age for wives from 1940 to the present. (Vital Statistics, Vol. II, 1976, Catalogue 84-205). Altogether, only 6.1% of the marriages show an age spread of more than 10 years and where there is such a gap, it is usually the male who is older (5.5%).

Table 7.

Percentage distribution of age differences by sex of older spouse, 1969-79

Age difference	Number	Percent	Cumulative %
Female 3–9.9 years older	21,761	4.5	4.5
Female 10+ years older	2,736	0.6	5.1
Less than 3 years difference	254,680	52.9	58.0
Male 3–9.9 years older	175,882	36.5	94.5
Male 10+ years older	26,376	5.5	
Total	481,435	100.0	100.0

Missing observations: 23,195

For the purposes of comparison the ideal situation would be to examine the age difference present between married men and women (duplicate Table 7 for the married population). We can, however, make some tentative observations by examining the differences between median ages at marriage for single persons and the comparable figures for divorced persons (see Table 8). We can use several time points much further in the past for the married population since those who marry in one year are extremely unlikely

also to divorce in the same year. Finally, if the age difference between the married population is smaller than the age difference for the divorced population, it could well be argued that divorced persons have a generally greater age difference than their still-married counterparts.

In Table 8 we are assuming that the vast majority of the divorced population married after the year 1949.[12] With one exception, in every case the age difference between the brides and grooms was smaller than the age difference between the divorced persons. Although these are crude summary statistics, the differences between the two populations are in the expected direction and consequently lend support to the reported findings of Day (1964) and Bumpass and Sweet (1972). It appears that divorced spouses do tend to have a larger age difference than married couples.

Insofar as age difference is one indicator of lack of compatibility, one could hypothesize that age difference would be related to duration of the marriage in the following manner. Research has shown that marriages between like persons are more likely to be successful. A logical extension of this proposition allows that of those marriages that are not successful, the ones characterized by low age difference would last longer.

Table 9 illustrates that when the wife is more than 10 years older than her husband, there is a tendency for the duration of marriage to be disproportionately shorter. This pattern is not repeated when the husband is 10 or more years older than the wife. In fact, with minor exceptions, the rest of the table indicates no support for the idea that a larger age difference results in a shorter duration of marriage. This fact in turn suggests that the norms of paternalism in marriage are perhaps more resilient in contemporary families than is currently believed.

To summarize the data regarding age difference, we may conclude that although there is a tendency for divorcing spouses to have a slightly larger age difference between them, this age difference appears to be related to few other characteristics. In figures not presented here, it proved to be the case that these differences do not vary by province or by year, suggesting a consistent pattern of insignificant difference, influenced by a small number of extreme cases, notably where the wife is much older. Such marriages, atypical as they are, may be more significant as indicators of character irregularities in the participants than as signals of more general conditions which might jeopardize a marriage. Also, in this latter group of marriages, two-thirds of the couples have no dependent children when the wife is three to nine years older and fully four-fifths are childless when the wife is 10 or more years older. This pattern is also present when the husband is 10 years or more older (i.e., fewer dependent children) but it does not seem in that case to contribute to a higher propensity to divorce.

12. This is a reasonable assumption. In 1974, 77.8% of the divorcing population had a duration of marriage of 20 years or less.

Table 8.

Age difference between brides and bridegrooms,[1] 1950-1978[2] and age difference between divorced spouses, 1969-1978

Age difference (in years) between brides and grooms				Age difference (in years) between divorced spouses	
1950	2.8	1965	2.5	1969	3.3
1951	2.8	1966	2.5	1970	3.5
1952	2.7	1967	2.4	1971	2.9
1953	2.7	1968	2.2	1972	3.3
1954	2.7	1969	2.1	1973	3.3
1955	2.8	1970	2.1	1974	3.1
1956	2.9	1971	2.2	1975	3.0
1957	3.0	1972	2.2	1976	2.9
1958	3.0	1973	2.3	1977	2.8
1959	2.9	1974	2.2	1978	2.8
1960	3.0	1975	2.1		
1961	2.9	1976	2.1		
1962	2.8	1977	2.2		
1963	2.6	1978	2.1		
1964	2.6				

1. Never previously married.
2. Calculated by subtracting the median age at marriage (or divorce) of the females from the median age of the males.

Source: Vital Statistics, 1974, Vol. II, p. 16, p. 37, (Catalogue 84-205); and 1976, Vol. II, p. 7, p. 40, (Catalogue 84-205); and 1978, Vol. II, p. 2.

As might be expected, the age difference is greater for those persons who marry later in life, and not unrelated for those persons whose past marital status at marriage might have been widowhood or previous divorce. Nevertheless, these findings must be kept in perspective. They do not apply to the large majority of the divorcing whose age difference is minor and for whom inter-spousal age differences is therefore not an important factor.

Prior Marital Status of Divorcing Persons

Given the large number of persons for whom divorce has become a reality in the last decade, it would not be a surprise to find that many persons repeat the process in their search for personal gratification. While such events have increased in incidence, the overwhelming majority of persons divorcing during the time period under study were dissolving their first marriages (see

Table 9.

Duration of marriage by age difference, 1969-77

Duration of marriage	Wife 10 or more years older	Wife 3–9.9 years older	Less than 13 years difference	Husband 3–9.9 years older	Husband 10 or more years older	Total
4.9 years or less	32.3	22.8	22.5	20.5	22.0	21.8
5–9.9	25.2	22.7	29.4	26.6	23.5	27.7
10–14.9	16.1	15.4	17.0	17.8	16.7	17.2
15–19.9	10.6	13.5	11.6	13.1	12.9	12.3
20–24.9	8.3	11.4	9.0	9.9	10.3	9.5
25 or more	7.5	14.1	10.6	12.1	14.5	11.5
Percent	100.0	99.9*	100.1*	100.0	99.9*	100.0
Total	2,732	21,750	254,583	275,808	26,354	481,227

Missing observations: 23,503
* Discrepancy due to rounding.

Table 10.

Marital status of husband at marriage by marital status of wife at marriage, 1969-79

Marital status of husband	Not previously married	Marital status of wife		Total
		Widowed	Divorced	
Not previously married	95.8	49.1	57.2	92.5
Widowed	0.6	26.7	5.8	1.4
Divorced	3.6	24.2	37.0	6.1
Total (percent)	100.0	100.0	100.0	100.0
Number	463,178	10,190	31,262	504,630
	91.8	2.0	6.2	100.0

Table 10). Similarly, 84.3% of the brides and 83.3% of the bridegrooms[13] marrying in 1976 were embarking on their first marital experience.

13. Vital Statistics, 1976:18. However, this does represent a decrease from 1969 when the corresponding figures were 89.3% and 89.4% for women and men, respectively.

The row and column total percentages in Table 10 indicate that 91.8% of divorcing wives were single[14] when they married. Likewise, 92.5% of divorcing husbands were single at their marriage. Of divorcing husbands and wives, respectively 1.4% and 2.0% held the marital status 'widowed' at the time of their marriages. Lastly, 6.1% of divorcing husbands and 6.2% of divorcing wives held the marital status 'divorced' (they are now experiencing at least their second divorce) at the time of marriage.

The data show that 'like has married like'[15] in 90.7% of the marital unions. Formerly married women prefer men who had not previously been married. For husbands choosing wives, the same would be true, although widowed husbands select widowed wives about as often (37.6%) as they choose single wives (37.3%) and more often than widowed wives select widowed husbands (26.7%). In summary, this table generally confirms that the great majority of divorces take place among persons in their first marriage, a finding which probably reflects the fact that the majority of all marriages are first marriages.

It is also instructive to examine the relationship between marital status at marriage of the husband, marital status at marriage of the wife, and duration of marriage (see Table 11). Do people who have experienced a previous marriage and consequently have a basis in experience for comparison, decide to divorce earlier than persons who have never been married? Does this vary by gender? Does a previously divorced woman get out of her current marriage sooner than her previously divorced male counterpart?

In Table 11 it is evident that previous marital status is related to the duration of marriage. In all cases where at least one spouse was previously widowed or divorced, a disproportionately high percentage have a duration of marriage of less than five years. However, variation exists within this group. In one of every three (33.9%) unions between a single female and a previously married male, breakup occurs before their fifth wedding anniversary, compared with 44.8% when both were previously married and 30.0% when just the wife was previously married. Only 19.6% of marriages where both spouses were single upon marriage have a marriage duration of under five years.

At the other end of the duration continuum, when both the spouses were previously married, only 1.8% of the marriages lasted over 25 years while 13.1% of couples in which both spouses had been single at marriage had a similar marriage duration. For all categories of duration of marriage, the figures for 'mixed marriages' – one spouse single, the other widowed or divorced – are very similar. Whether it is the husband or the wife who has experienced a previous marriage does not appear to be a crucial fact.

14. When we say 'single when they married', we mean that they are beginning their first marital experience. Those cases where they were previously married, but divorced, will be explicitly indicated.

15. We added up the numbers on the diagonal and divided this by the total N for the table.

Overall, the marriages in which both spouses were previously married have a disproportionately short duration. For 74.5%, breakup occurs in less than 10 years compared to 46.8% when both spouses were previously single. This suggests, perhaps, that a spouse's past experience may play a role at least in terms of perceiving the early signs of a moribund marriage; alternatively, it may indicate that the same attitudes or dynamics which were operative in the first marriage continue to operate in the second.

Table 11.

Duration of marriage by marital status at marriage of husband and wife, 1969-79

Duration[1] of mariage (in years)	Wife single[2]		Wife other[3]		Total
	Marital status of husband at marriage		Marital status of husband at marriage		
	Single[3]	Other[2]	Single[3]	Other[2]	
4.9 or less	19.6	33.9	30.0	44.8	21.5
5–9.9	27.2	28.6	28.1	29.8	27.4
10–14.9	17.4	14.0	16.5	13.5	17.1
15–19.9	12.7	9.5	11.0	6.9	12.3
20–24.9	10.0	7.2	7.9	3.3	9.5
25 or more	13.1	6.9	6.6	1.8	12.2
Total (percent)	100.0	100.1	100.1	100.1	100.0
Number	443,750	19,428	22,873	18,551	504,602

1. Calculated on the basis of the date the divorce petition was filed.
2. Single means never previously married.
3. Other = divorced + widowed. They were combined since the figures were largely the same for both. However, there are two minor exceptions that should be pointed out. When the wife's marital status was single, and the husband's marital status was widowed, 17.6% had a marriage duration of under five years, as opposed to 34.5% when the husband's marital status was divorced. In the same circumstances, except with a marriage duration of 25 years or more, the corresponding figures are 19.5% when husband was a widower and 5.2% when he was divorced.

In Table 12, the figures clearly point to the differences great age disparity can cause. At the time of divorce, fully four-fifths of previously widowed husbands were 45 or older – as were nearly three-quarters of wives. In contrast, less than one-quarter of husbands and not even one-fifth of wives who were single prior to their current marriage were 45 or older. Similarly, previously divorced persons were generally older than those who were single, although they were not as old as persons who lost a spouse through death. Male-female differences tend toward the expected direction, since wives are generally younger than husbands regardless of their past marital experience.

The evidence also demonstrates that those spouses who were not single are most definitely a small minority who tend to divorce more quickly (have a shorter duration of marriage), and who also tend to be older.

Table 12.

Marital status at marriage of spouses by age of divorcing spouses, 1969-79

Age of divorcing spouse*	Husband was			Wife was		
	Single	Widowed	Divorced	Single	Widowed	Divorced
30 or under	30.9	1.2	7.8	43.2	4.0	15.3
30–44.9	46.7	15.7	51.4	40.6	24.6	54.0
45 and over	23.4	83.1	40.8	16.2	71.4	30.7
Total (percent)	100.0	100.0	100.0	100.0	100.0	100.0
Number	460,710	7,007	30,123	456,951	9,773	30,411

* Age at time petition was filed.

Five Years or Fifty Thousand Miles: Duration of Marriage

Since we have discussed the duration of marriages in concert with the age of the parties, some comments on duration are in order, particularly in light of rapidly rising life expectancies. In essence, longer lives raise the probability of divorce because the period of risk lengthens (as it does, similarly, when the age at marriage decreases). We have previously suggested that the date of filing a petition for divorce is but the formal and final signal of a crumbled marriage. We are thus unable to assess how long the *living* duration of a marriage might be, since this period would often begin well before the marriage ceremony and end well before divorce. This introduces unavoidable imprecision in duration calculations, particularly if what was once pre-marital courtship is now in fact part of the real lifespan of the marriage. Chester (1971a) highlights the weaknesses inherent in using duration of marriage,[16] since the *de jure* duration is much shorter if one takes marriage as a starting point, and much longer if one chooses to measure from the moment of the first cohabitation (*de facto* duration). He puts it, somewhat laconically, this way: "the legal length of marriage is an unreliable guide to marital behaviour" (1971a:177).

16. In the correct (and narrow) sense of the term *de jure*, *de jure* duration of marriage would refer to duration as measured using the date of marriage and date of decree absolute. However, for our purposes, we have chosen to make *de jure* duration refer to the period of time between the date of the marriage and the date the petition was filed. Hence we are not including the duration of legal proceedings in our calculation.

Such qualifications serve to show the direction in which the behaviour of Canadians nowadays has diverged from that expected in earlier times. Rather than the neatness of celebrated start and quiet finish, we have a confused jumble of events, times, and actions that bespeak the increasing marginality of both marriage and divorce as civil contractual acts. Clearly, when one speaks of reforming the divorce process, one is addressing only half the question, the other being the contractual act of marriage itself.

The confusion of timing might be of only academic interest were it not for the fact that in jurisdictions such as Canada, one ground for divorce is separation of not less than three years. If a couple, as indicated by our data, has a duration of marriage of five years[17] and uses separation as grounds, the *de facto* duration of their legal married life is, at most, two years. This illustrates well the effect the current law has on couples wishing a divorce since they can wait longer for a divorce than the real elapsed time of their marriage.

Although this poses a substantial problem in the interpretation of our data (not to mention to the contestants), insofar as we are interested in legal procedure, our measure of duration of marriage is useful in underscoring the possible effects the law can have. Couples desiring divorce who are not prepared to ignore the conventions of the culture regarding (*de facto*) remarriage before divorce may have a very long vigil.

Figures concerning duration of marriage, displayed in Table 13, show that one-fifth of the divorcing couples (1969-79) had a marriage duration of less than five years, and nearly one-half (48.9%) had marriages that lasted

Table 13.

Percent distribution of duration of marriage[1] of divorcing couples, 1969-79, 1969 and 1979

Duration of marriage (in years)	Number	1969-79 %	Cumulative %	1969 %	1979 %
Less than 5	108,569	21.5	—	13.2	23.7
5–9.9	138,351	27.4	48.9	21.3	30.7
10–14.9	86,143	17.1	66.0	18.0	17.2
15–19.9	61,845	12.3	78.3	14.9	10.3
20–24.9	48,135	9.5	87.8	13.3	8.1
25 or more	61,315	12.2		19.3	10.0
Total	504,358	100.0	100.0	100.0	100.0
				22,915	59,429

Missing observations: 272

1. Calculated on the basis of the date the divorce petition was filed.

17. From date of marriage to date when divorce petition was filed.

less than 10 years. Consistent with our earlier observations, these figures indicate that many divorcing couples tend to petition for divorce relatively early in their marriages.[18] The figures are also conservative in view of the fact that many couples have first satisfied the three (or five) year separation period required by law before they petition.[19] So in fact many marriages were operational for an even shorter period than indicated here.

Nevertheless, 21.7% of the couples had a duration of marriage of 20 years or more. Clearly, this implies that they would have married in 1959 or earlier since during the late 1950s and early 1960s, divorce was not the relatively easy alternative it is today. Consequently, it is conceivable that many of these couples delayed their divorce although in fact their marriages were over in the real sense long before the legal proceedings were instituted.

A second explanation for delayed divorce involves the law itself since prior to 1968 virtually the only ground for divorce was adultery. With such legal restrictiveness it is plausible to conclude that many persons who wanted to divorce before 1968 rejected the idea rather than run that gauntlet (or perhaps worse, fabricate the grounds in order to satisfy the law).

In fact, as Pike has noted, "it has generally been easier in this country to obtain a legal separation or a separation agreement than it has been to obtain a divorce" (1975:121). In Quebec, this has been the oft-repeated pattern. The figures Pike cites show that in Montreal courts between 1960 and 1968, there were 19,000 actions undertaken for legal separation. During the same period for all of Quebec, there were fewer than 4,700 divorces.[20] Nevertheless, since remarriage is impossible without divorce, the duration of marriage as presented here is certainly not an accurate reflection of the *de facto* length of marriage.

Pike (1975:121) has also advanced the argument that migratory divorce was another less sordid alternative to the fabrication of grounds, although many of these foreign divorces were legally invalid in Canada.[21] However, they were generally accepted by Canadians and as Pike suggests, respected by the legal authorities since the latter recognized their inevitability after such divorces.

In Table 13, the duration of marriage figures illustrate how the duration of marriage has decreased from 1969 to 1979. If, however, one posits that those who used migratory divorce in former times were married for fewer years than their stay-at-home counterparts, then such might very well have an inflationary effect on the percentage of divorcing couples who had a relatively lengthy duration of marriage. Those persons being counted in the lower half of

18. There is little variation among provinces across the country.

19. Most people who do have a short duration of marriage (under five years) do not use separation as grounds. Instead, nearly half allege adultery.

20. Pike cites C. L. L'Heureux-Dubé, 1969, 'Le Droit de ne pas Divorcer.' *Cahiers de Droit* 10:121-66 for these figures.

21. Their invalidity would arise from the fact that they were not certifiable (in the particular Canadian jurisdiction) as being equivalent to a Canadian divorce.

Table 13 could in part be seen as a residue of those who obtained foreign divorces. Insofar as this factor is important, and the law itself is important and liberalized attitudes are no less important, the situation seems to lend itself to a gradual decrease in the time most marriages will last, and in fact Table 11 does illustrate such a trend in the years from 1969 to 1979.

The *de facto* duration of marriages as opposed to the *de jure* duration have been the subject of at least two studies (Monahan, 1962; Chester, 1971). In a study of divorces registered in Wisconsin in 1957, Monahan found that 24.1% of the couples had a duration of marriage of less than two years. Half of the couples reported a *de facto* marriage duration of 6.0 years, whereas their *de jure* duration was 1.3 years longer.[22] Similarly, Chester (1971) reported that the median *de facto* duration of marriage was 7.0 years as compared to 11.3 years when *de jure* duration was used. His study was based on undefended divorces granted in England during the years 1966-68 to those couples who were on their first marriages and living in a large provincial city.

Studies have also shown that the duration of marriage is related to age at marriage (Palmer, 1977). (This relationship can be examined here with the figures in Table 14.) Generally, the numbers for husbands and wives are similar, and as such, we will discuss them together (using the specific figures for females). Further, where the duration of marriage is less than five years, the percentages for all those persons with an age at marriage under 30 are not meaningfully different from the norm (21.8%). Even when age at marriage is 30-34, there is only a modest overrepresentation (27.2% v. 21.1%). However, in the oldest age category (35 and over), 39.2% of the females had a marriage duration of under five years. For those persons with a marriage duration of 5 to 9.9 years, only those who were between 25 and 29 years of age deviate from the norm.

Generally, it appears that persons who married when they were 25 to 29 are the most evenly distributed across categories of duration and this suggests that predicting the duration of marriage for this age group would be the most difficult. These couples may well have been old enough to have gained some experience, yet still young enough not to feel the pressure of time. Perhaps the most notable (although not really surprising) difference can be observed for those whose duration of marriage is 20 or more years and whose age at marriage was at least 35 years. Very few (7.0% of females) fall into this category, while the percentages are much larger (at least 19%) for those in the other age categories. What is surprising is that men and women who marry late (after age 35) terminate their marriages disproportionately early. In contrast, and contrary to popular wisdom, both men and women who marry relatively young do not start to legally end their marriages quickly. Nevertheless, the limitations of these figures must be kept in mind and as such the duration of such marriages is still very much an open question.

22. Consider a couple who set up house in 1990 and who marry in 1995 only to separate one day later as the result of certain incipient conflicts. In fact, their *de jure* stay together would subsequently be far shorter (depending, of course, on how expedient the divorce action was) than their *de facto* stay together.

Table 14.

Duration of marriage by age at marriage and sex, 1969-79

Duration of marriage[1] (in years)	Age at marriage					
	–20	20-24	25-29	30-34	35+	Total
	Females					
Less than 5	19.9	21.4	23.1	27.2	39.2	21.8
5–9.9	28.9	27.7	22.4	24.0	29.2	27.7
10–14.9	18.5	16.4	15.0	16.6	15.3	17.2
15–19.9	12.8	11.8	13.0	13.0	9.2	12.3
20 or more	19.8	22.7	26.4	19.2	7.0	21.1
Total[2] (percent)	99.9	100.1	99.9	100.0	99.9	100.1
Number	207,830	200,951	46,344	16,075	18,712	489,912
	Males					
Less than 5	22.5	20.5	19.9	22.6	34.7	21.7
5–9.9	31.0	28.9	23.5	23.3	28.2	27.6
10–14.9	17.7	17.5	16.4	16.7	15.6	17.2
15–19.9	11.5	12.3	13.3	12.9	10.0	12.3
20 or more	17.3	20.8	26.9	24.5	11.5	21.2
Total (percent)	100.0	100.0	100.0	100.0	100.0	100.0
Number	67,205	264,928	100,437	32,686	31,023	491,269

1. Calculated on the basis of the date the divorce petition was filed.
2. Percentage may not add to 100% due to rounding.

Number of Children

Up to this point we have viewed the duration of marriage as an outcome and we have attempted to explain its variations partly in terms of the ages of the parties. Nonetheless, the duration of marriage should also be viewed as a 'cause' in conjunction with fertility figures, and as such, we face certain limitations necessarily imposed by the nature of our data.

Ideally, the data should include the total number of children born to each woman in the course of her marriage. However, in this case, the data only provide information on the number of *dependent* children of the marriage.[23] By virtue of this fact, there is no way of including those children of divorcing couples who are no longer dependent. However, we can include those dependent children of another spouse by a previous marriage. Consequently

our assessment of fertility and how it relates to divorce will be constrained to the extent that the 'number of dependent children' is not a fully accurate reflection of fertility within a marriage or its equivalent.

In Table 15, the relationship between the number of dependent children and the duration of marriage is examined. As would be expected, when the duration of marriage was less than five years, two-thirds of the couples had no dependent children. Even when the duration of marriage was 5 to 9.9 years, 41.5% of the couples had no dependent children. Of those couples that *did* have dependent children, 40.2% had only one child. When the duration of marriage was 25 years or more, 79.9% had no dependent children. However, this does not necessarily reflect a low fertility rate on the part of the wives so much as the fact that their children were no longer dependent at the time of

Table 15.

Number of dependent children by duration of the marriage, 1969-77

Number of dependent children	Duration of marriage			
	Less than 5 years	5–9.9 years	10–14.9 years	
None	67.4	41.5	26.8	
One	24.2	27.1	17.0	
Two or three	8.1	29.8	46.8	
Four or more	0.4	1.6	9.3	
Total (percent)	100.1	100.1	99.9	
Number	108,569	138,351	86,143	
	15-19.9 years	20-24.9 years	25 years or more	Total
None	28.6	48.1	79.9	48.3
One	14.8	21.0	11.9	20.8
Two or three	40.8	24.6	7.0	26.1
Four or more	15.8	6.3	1.3	4.8
Total (percent)	100.0	100.0	100.0	100.0
Number	61,845	48,135	61,315	504,358

23. In the Divorce Act, 'child' of a husband and wife includes any person to whom the husband and wife stand in *loco parentis* and any person of whom either the husband or the wife is a parent and to whom the other of them stands in *loco parentis*; 'children of the marriage' means each child of a husband and wife who at the material time is (a) under the age of 16 years, or (b) 16 years of age or over and under their charge are unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life (Divorce Act 1967-68, C. 24, S.1).

divorce. This is perhaps also tangential evidence in support of the conventional wisdom that many couples wait until their child-rearing duties are over before divorcing.

An equally plausible explanation would suggest that couples divorce because the nest is now empty, and as the children exit, so too does the rationale for maintaining the marriage. Since, as we pointed out earlier, our data allow for an analysis only of the numbers of dependent children, both these explanations may be helpful in explaining the links between dependent children and duration of marriage as a precedent cause for divorce.

Table 16.

Age of divorcing husband and age of divorcing wife, percent distribution, 1969-79

Age	Wife		Husband	
	%	Cumulative	%	Cumulative
15–19	1.2	—	0.2	—
20–24	15.4	16.6	8.0	8.2
25–29	22.4	39.0	21.8	30.0
30–34	16.8	55.8	20.3	50.3
35–39	12.1	67.9	15.2	65.5
40–44	10.2	78.1	12.1	77.6
45–49	8.4	86.5	9.3	86.9
50 and over	13.5	100.0	13.2	100.1
Total (percent)	100.0		100.0	
Number	492,103			

Age at Divorce

Although we have already considered the issue of age and divorce, Table 16 provides greater detail on the current age of husbands and wives when they filed for divorce. It is interesting to note that in virtually all cases, husbands were completely out of their teens and only 1.2% of wives were still teenagers when their petitions were filed. At the other end of the age scale, 13.5% of wives were 50 years of age or more, as were 13.2% of husbands. If anything, the figures on the early end of the scale show that the nature of the breakdown and the divorce process itself is a lengthy one. In the middle, we can see that 39.0% of wives were under the age of 30, compared to only 30.0% of their husbands at the time the petitions were filed.

By using the median age at divorce, we can determine whether or not the age at divorce has declined with time. The last available Vital Statistics figures (1977) show that the median age at divorce for both husbands and wives has declined over time. In 1969, the median age for women was 37.3 years while

in 1977 it had dropped to 32.6 years. This decline has been consistent for both men and women. In 1969, the median age of men was 40.6 years, but by 1977 it had dropped to 35.4 years. The patterns move in lock-step, since here the figures are consistent with the shortening of marriage duration (however it is measured) over the same period of time.

Characteristics of Those Divorcing: A Summary

Every year, the marital dissolution process, in both its social and legal guises, becomes a reality for more and more persons of varied origins and characteristics. No group of individuals, no matter how committed they may seem to be to the principle of marital permanence, appears to be immune to divorce. The individuals involved are both young and old, and they come from all parts of Canada and are of all religious persuasions. They are veterans of past marriages or they are novices. They have married at all stages in the life cycle and their marriages persist for widely varying periods of time, with any number of ensuing progeny. Despite the universality of the phenomenon, however, there are certain patterns in the data which indicate that the probability of divorce, (overall about 36% of all marriages at the mid-1970s rate) is not a blanket probability unrelated to characteristics of the persons involved.

In fact, some characteristics occur more frequently than others in our review of the data, though these observations are more in degree than in kind. But, if there are certain recurring threads or themes in the move to divorce, certainly they are not of sufficient magnitude to cause the development of certain strategies for reform or avoidance. In fact, there would be little hope for any initiative which sought to prevent divorce through the simple identification and prevention of high risk marriages. It is, for example, a fact that as one moves west, there is a gradient of rising divorce rates. In 1976, British Columbia had the highest crude rate of divorce, but it also had a high rate of immigration.

With reference to the age factor, our analysis shows us that teenage marriages tend to end in divorce more often. It's easy to foresee the results of a situation where lack of education and poor employment prospects along with pre-marital pregnancy put harsh pressure on such early marriages. On the other hand, it is also a fact that one-third of divorcing men were not married until they were at least 25. But even though the statistics might seem to make a case for more stringent age limitations, any increase in those permissible ages could simply turn young people away from the benefits of civil law or clergy. That in turn raises the worrisome prospect that family law reforms could benefit an ever decreasing constituency.

Divorcing couples also have a larger age difference than their married counterparts although virtually 50% of all divorcing couples have an age difference of less than three years, and where there is a larger age gap, it

tends to be the husband who is older, again as might be expected. Except in a small minority of cases, the duration of marriage is only loosely related to age difference, but when the wife is 10 or more years older, the marriage is disproportionately shorter.

Most divorcing persons were single (never previously married) when they married their current spouse. Only 2% of wives were widowed (and 1.4% of husbands). However, when the marital status was not single, the duration of the marriage was shorter. For example, we noted that when both spouses were single, only one in five had a duration of marriage under five years; however, when both had had previous spouses, this figure was more than two in every five. As is to be expected, too, these more 'experienced' persons tended to be older. Overall, nearly 50% of the divorcing couples had a *de jure* duration of marriage of less than 10 years. It is not possible, though, to comment accurately on the *de facto* duration except to say that in some circumstances – for example, when the grounds are separation – the real duration of the marriage would be grossly overstated.

In 1979, the median duration of marriage for persons divorced in that year was 10.0 years, evidence of a long-term decline in the length of failed marriages. Recently, persons wishing to divorce seem less willing to linger in an unsatisfactory relationship. In 1969, 19.3% of the dissolving marriages lasted 25 years or more, but by 1979, that percentage had dropped to 11.3%.

Further, it seems to be the case that the older one is when marrying, the shorter will be the time before marriage failure. As we have already noted, the median age for divorcing women has dropped since 1969 with a corresponding trend for men. In time, many of these will remarry, since with enhanced life expectancy and younger age at divorce it is clearly now possible for Canadians to live through two complete family formation cycles should they so wish. The potentially considerable consequences of such a phoenix-like resurrection puts obvious pressure on current patterns of behaviour and social relations, to say nothing of many social and financial policies – from life insurance to pension plans – and the concomitant changes imply a considerable reordering of such social policies.

At the beginning of this chapter, we spoke of Rhett Butler's famous words and we suggested that throughout the western world, they have found their echo, often and consistently. From the statistics that we have looked at here, we can now see that the trends are unmistakable. Yet, the reasons are as complex and varied as the numerous roles the contestants must play to achieve their ends, both in the divorce courts and in society. No doubt some of the phenomena we have described here fall into the category of cohort differences; that is, differences which relate to the attitudes and behaviour prevalent in particular generations. Even though most of the couples in our data divorced in the 1970s, they were born and were married in other eras, each of which had its distinctive expectations, imperatives, opportunities, and gratifications. It is also likely that for some, the mate who was perfectly

acceptable during one era is intolerable in another. There is an entire generation of couples who were raised on the implicit assumption that good parenting requires the presence of a stay-at-home full-time mother and this generation would see divorcing before the children have left home as a destructive option. Then there is another more recent generation of single parents who view their one-parent households as perfectly satisfactory and in fact a preferable, more positive approach. Such age-specific views of family life originate at various points in the national culture. Thus in the 1950s the emphasis was on family life while in the 1970s it turned on celebration of the newly arrived age of entitlement. This dramatic reversal has meant that many couples, whatever their social characteristics, find it difficult to help their marriages out of one era and into another.

The increasing incidence of divorce and its popular portrayals, whether in the form of newspaper copy, or in melodramatic movies, calls also for an examination of the ways in which divorce takes place. It is partly for this reason that we will now turn to the styles of divorcing – those distinctive patterns which are illustrative of the views and attitudes of people of specific eras. In our own times, these styles or patterns are emerging in concert with equally remarkable changes in underlying values and institutions.

Chapter 5

The Action

Chapter 5
The Action

It seems to be the nature of human affairs that private relationships are not always structured as simply or neatly as the participants might wish. On occasion, there are broader social consequences of the manner in which private relationships are ordered; and often, public policy as reflected in the law intervenes in an attempt to shape this impact. Most often it is through such laws that the state sets forth the nature of the public interest that must be attended to. The formation and dissolution of marital and family relationships is one such area of legislative concern.

In order to marry in Canada, a couple must satisfy minimal legal conditions regarding the capacity to marry. Beyond the standard requirements pertaining to consanguinity,* they must observe certain formalities (such as the procurement of a marriage licence), and there must be publicly stated mutual consent to the formalization of the marriage bond. Failure to observe the specific requirements in any of these areas could subsequently provide grounds for annulment of the marriage. Once a person marries, a number of economic rights and obligations peculiar to this status are unilaterally imposed by law.

The justification for the involvement of the state in matrimonial matters rests on the proposition that it is in the public interest that the marriage-based family should continue to be the principal unit of social relations in this society. The presumption is that children shall be born and reared within such a unit and that property accumulation shall take place in its name and that roles and the names that identify them shall be in terms of family position (mother, father). It is assumed that family assets shall be used to promote the welfare of the family as a whole. Since spouses rely on one another for support, and children in turn upon both, when the marital mechanism fails, the state imposes binding support obligations. It is in the public interest to ensure, as far as possible, the voluntary fulfilment of marital obligations within a functioning marital unit. Marriages are assumed to have been entered into with

* Prohibited degrees of relationship within which individuals in Canada lack capacity to marry.

consent, concomitant obligations willingly undertaken, and no further justification for state enforcement of its terms is necessary once the existence of a valid marriage is established.

Further, the dependency which families support may be either imposed by circumstance, as in the case of elderly family members who require physical care, or created, as when husband and wife develop a sexual division of labour – husband as earner, wife as homemaker. Social dependency of any kind is not easily dissolvable, so there is a powerful need to maintain a modicum of support to family members despite the expiration of family support.

Thus, it follows that the state has an interest in divorce, and in making sure that the economic functions of the marriage are translated into an acceptable, although modified, form at the time of divorce, so that alternative provisions for children and spouse may be made. If there is no support by the family of its members, then their support must be provided by the public purse.

And so, common to every divorce in Canada, whatever its origin or cause, is the law. Persons may differ in their reasons for wishing a divorce, in the number of children they have, in their ages, previous marital backgrounds, and in any number of other ways. However, whatever their peculiar circumstance, whether pressing or inconsequential, they are all subject to legal processing. The Divorce Act (1968) is the federal statute under which a person divorces. It contains the 'rules of the game' (the legal procedures to be followed), as well as the conditions under which an individual may ask the state's permission for a divorce from his or her spouse (in legal parlance, the 'grounds' for divorce, the permissible conditions which can give rise to a divorce in the eyes of the law). A couple may consider themselves to be divorced emotionally, economically, or socially, but until the legal channel for divorce has been successfully navigated, they are not divorced in the eyes of the law, and thus are still married.

In this chapter we intend to explore the legal experience common to all divorcing persons. We will concentrate primarily on a description and analysis of the major legal factors contained in our data; namely, sex of petitioner, alleged grounds, presence of responses to petitions, and the duration of legal proceedings. We will also examine some of the ways in which the patterns of legal proceedings may be linked to the social characteristics of divorcing spouses discussed in the last chapter.

Among the multitude of possible questions, the following will be addressed: who normally initiates a divorce proceeding? What grounds do they choose? How does age or the presence of children affect the selection of grounds? Under what circumstances do parties contest a divorce? With what parts do they take issue? How long does a divorce take? What factors affect this time element? How closely does the legal process reflect the social reality of divorce? What are the effects of this process? How ritualized is divorce? But before we address these questions it would be fruitful to familiarize the reader

with the legal steps involved in divorce and the typical circumstances surrounding it. This is best illustrated through the use of the following two composite case examples.

Case One

Susan and Ray, aged 24 and 26 respectively, were married in Ontario five years ago. They both still live in Ontario, although not together. Three years after the marriage and one child later (Karen), Susan finally decided, after a suitable period of reflection, that her marriage was unsatisfying and that it was unlikely to get better. She felt Ray spent too much time away from home because of his job as a struggling regional salesman. When Ray was away on one of his frequent business trips, she moved out of their apartment, taking Karen and much of the furniture with her. When Ray returned, he was disconcerted but not really surprised, since he too had long since realized that the marriage had a limited future. Susan and Ray worked out a separation agreement that basically confirmed the *status quo*. Ray kept the car, Susan the furniture. She also retained custody of Karen and Ray agreed to pay $100 a month in child support. He also received bi-weekly visiting privileges. Once Susan had a job she decided she did not want any funds from Ray for herself. A lawyer for Susan soon formalized the arrangement as a binding private contract which they both quickly signed.

Ray moved to a nearby city and began living with a woman named Betty. Susan too, after about a year had passed, met another man (Joe) and their relationship progressed to the point where they wanted to marry. She discussed the matter with Ray and he consented to a divorce with the same terms they had already agreed upon. Susan was not sure what was involved and so she visited a lawyer who listened to her story and drew up a petition for divorce based on the most efficacious ground: adultery. The separation agreement was attached. The petition contained the vital statistics of the marriage and alleged that Ray had committed adultery with Betty. Susan was the petitioner, Ray the respondent and Betty the co-respondent. Ray was served with the petition and the case was listed for trial.

Since Karen was a child of the marriage, Ontario law required that the Official Guardian make a report to the court on the proposed custody arrangements. Hence, the lawyer also sent a copy of the petition to the Official Guardian who, in turn, sent out short questionnaires to Susan and Ray. They filled these out and duly returned them. Subsequently, the Official Guardian filed a report with the court stating that the divorce presented no problems relating to Karen.

The trial was heard five months later in the Supreme Court of Ontario. It was very short; only Susan and her lawyer were present and evidence was presented to show that Ray and Betty lived in the same residence. Within 20 minutes, Susan was granted a *decree nisi* which would be-

come absolute in three months' time, barring an appeal or the showing of cause why the *decree nisi* should not be made absolute. Ray was ordered to continue paying child support and his visiting privileges ('reasonable' access) were also stated in the *decree nisi*. Upon receipt of the *decree absolute*, Susan and Joe were married.

Divorce can be relatively straightforward, both legally and personally, as exemplified above. Both Susan and Ray had reestablished themselves in relationships which were marriages in fact if not in law. They cared little about the formalities of divorce itself, and certainly not enough to cavil about who said what about whom. Both agreed on all the major issues: the marriage had ceased to exist, money and property matters had long since been settled, and custody was never an issue since Ray had no desire whatever to take over full responsibility for his daughter. All in all, the official action was painless and trivial, but probably costly. It brought little pleasure or pain and generally gratified no one. It was necessary for Susan to make allegations against Ray, something she found vaguely distasteful but after all, there were no spectators in court to hear them and the court officials looked like they had heard it all thousands of times before. There was just enough manifest conflict to satisfy the requirements of the Divorce Act in the sense that the two parties must remain distinct – they could not present a joint request.

This first example captures the essentials of a significant number of Canadian divorce cases. They are short, routine, and even a misuse in some cases of the judicial process since there is nothing for the judge to do but accede to the wishes of the petitioner, after questioning him or her as to the possibility of reconciliation as required by the Act.

Divorce trials are usually speedy, straightforward affairs. Frequently only the petitioner shows up in court and the whole procedure may take 15-20 minutes. Of course this is only true of noncontested cases. Part of the reason that these are dispensed with so quickly is that the parties (especially the respondent(s)) have already given evidence before a Special Examiner. Consequently there is no reason for them to appear in court to give that particular evidence again and it can be presented by a lawyer on their behalf. Often the evidence will clarify and support the grounds for divorce as do the questions and answers contained in one such affidavit. The dialogue presented below concerns a male respondent accused of adultery by his petitioner wife. In this case, it is the male respondent who is being questioned for evidence to be later presented in a court.

Q. Are you A.B.?
A. Yes.

Q. Are you married to C.B.?
A. Yes.

Q. Do you know E.F.?
A. Yes, I do.

Q. Is it true you are living together?
A. Yes.

Q. Do you live together as husband and wife?
A. Yes.

Q. Where do you live together?
A. 123 XYZ Road.

Q. How long have you lived together there?
A. Two years.

Q. During the period of living together have you had sexual intercourse with one another?
A. Yes.

Q. When was the last time you were in the same house as your wife; under the same roof?
A. With my wife?

Q. When did you last live with your wife?
A. July 1975.

Q. Have you had sexual intercourse with your wife from that time to the present?
A. No.

Q. Did your wife encourage you to have sexual intercourse with E.F. in order to bring a divorce?
A. No.

Q. Do you know of any agreement to suppress or fabricate evidence in an attempt to deceive the court?
A. No.

Special Examiner: Thank you.

A similar line of questioning was directed at E.F., the co-respondent in the divorce petition. With these two affidavits, the lawyer for the petitioner estimated that the whole trial would occupy only 15 minutes of the court's time.

In the example presented above, the answers were very factual and non-judgmental. Both parties wanted a divorce and co-operated with each other. Although this is the norm in most cases, there are exceptions. Our second example illustrates how complex and difficult it can be to demonstrate in a clear and convincing manner that grounds do exist. Here, the individual is the respondent wife (petitioner-by-counter-petition) who is being cross-examined before the Special Examiner by the petitioner husband's (respondent-by-counter-petition) lawyer. The little bit below is again a small segment of the entire cross-examination and names and facts have been altered in order to protect the identity of the persons involved. Nevertheless, it still is powerful evidence of the direction questioning can take, given extremely unfortunate conditions. Here the divorce is obviously contested and the grounds both are alleging against the other are mental and physical cruelty. Custody is also at issue.

(At this point the wife has been listing all the nasty things her husband calls her.)

Q. . . . are there any vulgar names . . . and I am stressing the word 'vulgar' that you put in your affidavit. Do you understand?
A. "You are bad".

Q. Yes?
A. "You are a bitch".

Q. Yes?
A. "You are crazy".

Q. Are there any others?
A. Yes.

Q. Please indicate them.
A. "evil-minded witch" . . . "you are an animal" . . . I was called these things in my own home . . .

Q. When were you called all these names?
A. Almost every day.

Q. When did it start?
A. Throughout our marriage.

Q. Right through the whole marriage?
A. Well, after D. was born. He certainly couldn't call me a crazy mother until I was a mother.

Q. Now, did you call your husband any of these names?
A. No.

Q. Or similar names?
A. No.

Q. Now, you say your husband assaulted you?
A. Yes.

Q. Many times?
A. Yes.

Q. How?
A. He hit me.

Q. With what?
A. His fist.

Q. Where?
A. His favourite place was my arm or my eyes.

Q. And how many times did he do that?
A. Often.

Q. Once, two times, five times?
A. No.

Q. How many?
A. More than a dozen times.

Q. I see, and do you remember when he did this?. . . Any other occasions?

One can expect that in circumstances like these, the husband will give a very different picture when his turn comes. He will likely try to show that the 'name-calling' was not mental cruelty and also try to put a different construction on the 'facts' regarding the allegation of physical cruelty based on charges of assault. As the example shows, divorce can be fraught with animosity and even hatred. In this case, the judge eventually ordered a *decree nisi* to issue on the petition and the counter-petition. In other words, he found that both parties were guilty of mental cruelty and physical cruelty. The divorce was granted, but who 'won'? What did all this strife gain them? As it is, divorce is probably one of the more emotionally exhausting experiences a married individual can undergo, and separating the emotional response from the rational response is sometimes clearly impossible. Yet, if anything, this public battle has allowed the parties involved to purge themselves of one another and thus, in a cathartic sense, it has been of some use.

Styles of divorcing can run the gamut from the cordial to the vicious. The two styles presented here give two radically different legal solutions to the same social dilemma. These styles can become even more divergent when one considers other social characteristics.

The second case illustrates to what lengths a warring couple can go in making use of the divorce process to promote conflict in hopes of inflicting a devastating defeat on their former spouse. While it is by no means typical, this case serves to illustrate the incredibly complex series of events that can occur when the contestants seek to prosecute their private war with all the weapons which the Divorce Act and civil procedure make available to them.

Case Two

Dennis (37) and Kerry (34) had been married for 13 years. They had one child, a boy of eight years named David. Marital problems began in 1969 shortly after the birth of the child and battles have been raging ever since. Although Kerry and Dennis maintained an outward facade of civility and stayed together until 1974, they occupied separate bedrooms most of the time. Finally in April, 1974, Dennis felt he could no longer tolerate the 'rages' and verbal abuse heaped on him and the outlandish 'punishments' accorded his son for what seemed to be irrational reasons. The situation had become appreciably worse over the past few months and he finally left the home, taking David with him. Dennis immediately asked his lawyer to file for divorce on the grounds of mental and physical cruelty and to effect the necessary steps to petition for custody of David.

Kerry was duly served with a notice of the petition and the petition itself. She took exception not only with the grounds alleged, but also with the claim for custody and the lack of support for herself. She, in turn, with the

help of a lawyer, 'answered' the petition and attempted to refute the allegations made by Dennis regarding her mental and physical cruelty toward him. She also counter-petitioned and claimed custody of David and alleged mental and physical cruelty on the part of her husband.

From this stage on, one confrontation quickly followed another. At one point David was returned to his mother, only to go back to his father a few months later, where he remained. Kerry's and Dennis' lawyers, not surprisingly, were unable to work out arrangements satisfactory to both parties. Dissatisfied with the course of events and blaming their lawyers for this, both changed legal counsel in 1975 and negotiations began anew.

Kerry would not drop the counter-petition and the new lawyers could not settle the issues at stake. Finally in early 1976 there was a cross-examination on the documents (affidavits) that had been generated. Here each lawyer questioned the other party on the information they presented and had transcripts prepared. The lawyer then took these transcripts to a local master (a court official with jurisdiction to make interim awards) who decided that Dennis should pay Kerry $100 a month until the divorce action was heard. Both, however, were predictably unhappy with the amount.

Several months later, a pre-trial hearing with a judge was arranged. Here, the judge tried in an informal way to help Dennis and Kerry settle their differences, but to no avail since their conflict had by now assumed a momentum of its own, and both wished to inflict pain and injury on each other. The case remained contested until the trial date was set for May 1977, three full years of battling after separation.

The trial lasted through eight full days of testimony. First Dennis gave his story by answering questions posed by his lawyer. Then he was cross-examined by Kerry's lawyer. Kerry then testified and was in turn cross-examined.

Much of the evidence dealt with David and the grounds of mental cruelty and physical cruelty alleged by one against the other. The judge reached his decision in a written report handed down a few days later. He granted the divorce and custody was legally settled by awarding David to his father. Dennis was ordered to make monthly maintenance payments of $125 until Kerry completed the final two years of her university degree. Kerry's first inclination was to appeal the custody decision in the *decree nisi*, but she subsequently decided she did not have the stamina for another 'round'.

Individual circumstances and the inclinations of the spouses thus unquestionably affect many aspects of the divorce proceedings. Given the will to do battle, the Divorce Act sets the stage for lengthy and extremely costly legal proceedings and may be seen to actually foster conflict. Whereas the

first case was facilitated by a spirit of indifference on the part of the couple, any inclination to antagonism, such as that seen in the second case, finds fertile ground in which to grow in the divorce process.

In spite of the obvious differences between the two cases, they each have several elements common to all divorces. They rest on the satisfaction of legal requirements, many of which are adversarial in form if not in fact. Where Dennis and Kerry took every opportunity to exploit these opportunities, Susan and Ray abstained, as do most divorcing couples, from indulging any taste for legal vengeance.

Who Petitions? Heroes and Villains

As our two case examples have shown, each spouse in a divorcing couple must be assigned their respective legal roles. The law requires that one be the petitioner, the other the respondent. By what social mechanisms this assignment occurs is not clear. In our first example, one spouse appropriated the role of petitioner by being the first to act on her desire for divorce, and her husband passively and nominally accepted the role of respondent. That is not to say that the thought had not previously occurred to him, just that he had not initiated an action. But much like a drama in the tragic tradition, Case Two had an active protagonist and antagonist. Legal roles were not quietly assumed, but actively pursued in the exercise of the available legal avenues, and each, in the eyes of the other, was the antagonist. Although these cases are examples of the two extremes possible, we maintain that the choice of legal roles reflects more than just individual circumstances; it also reflects larger social and legal contexts and processes. It is the assessment of exactly how these contexts are translated into legal roles that becomes problematic. Inquiry into the historical record would prove informative on this point, but unfortunately there are no Canadian records in this regard. However, Friedman and Percival (1976), in an article entitled *Who Sues for Divorce? From Fault through Fiction to Freedom*, do provide us with an historical analysis with respect to the United States. Although there are the usual questions of comparability, the American experience does allow us to suggest possibilities at work in a Canadian social and legal context.

Friedman and Percival note that women have nearly always filed a majority of the petitions in divorce, and although the percentage has generally increased over time, it does vary by region. For example, in the southern states, *circa* 1870, 53% of the divorces were awarded to women, but in New England, the figure was 68.2%. Interestingly, the South had very stringent divorce grounds, while some of the New England states were rather liberal by comparison. National figures for the U.S. show that women were generally plaintiffs when the ground was cruelty, drunkeness, or neglect to provide, whereas men tended to be plaintiffs when adultery was the ground.

By 1931, state variation had decreased. In the American South, the percentage of divorces awarded to wives was 67% and New England was

only slightly higher at 74%. The highest proportion was to be found in the Pacific region at 77%. There was little variation through the next three decades, when women were plaintiffs in approximately 71% of the cases. Since 1970, the states which introduced no-fault grounds[1] no longer follow the pattern. Instead, men have petitioned more often than they did in the past. Indeed, in a study of a Florida county, Gunter (1977) notes that with no-fault grounds, men filed for divorce in nearly two-thirds of the cases – a complete reversal from when Florida used only fault grounds. Whether this is a temporary phenomenon or not is difficult to judge. Friedman and Percival note that the results of a 0.4% sample of Florida divorces in 1974 show that 71.5% of the petitioners were women. This seems to contradict the findings of Gunter's Florida study. The differences could be a function of methodology but more likely the 1974 figures represent a return to 'normal' after a flurry of petitions received immediately after the change in the law.

Both the legal context (grounds for divorce) and the social context have had implications for who petitions. In the South, especially in the nineteenth century, divorced persons (especially women) were stigmatized and found themselves in an awkward position in society. As Friedman and Percival point out, "social pressures and an uncertain future held them back" (1976:76-77). Around the turn of the century, however, as social pressure lessened and attitudes to divorce and marriage changed, women petitioned more often. Although there was a superficially righteous aversion to easy divorce, and on the surface divorce laws remained fairly stringent, "the need and desire to settle doubts about property rights" (Friedman and Percival, 1976:78) was a very practical and strong motivating force. This demonstrates that under some circumstances, orderly property relations come to be more valued than orderly family life.

Thus, a fiction was born. The tolerance for hypocrisy proved more robust than the reluctance to rectify familial disorder. On this, Friedman and Percival write:

> Formally speaking, divorce depended on fault: a divorce case was one in which an innocent party demanded freedom from a sinner's clutches. Where husband and wife agreed, for whatever reason, that their marriage was dead, it was the wife who would have to file the lawsuit. In the first place, it was less damaging to accuse a man of cruelty, desertion, or adultery than to accuse a woman of these acts. In the second place, the wife would of course keep the children; the husband would pay. Hence the wife in form had to play the innocent party, whether she was in fact or not.

Couples also tended to use the loose, more ambiguous grounds of cruelty, since its legal meaning is somewhat more benign than its literal meaning and its proof was a matter of judgment. Adultery was more embarrassing and required 'obnoxious proof'.

1. This term will be elaborated on later in the chapter. For now, we will just say that 'no-fault' grounds do not place any emphasis on conduct of one party that was not acceptable to the other, but rather emphasize the end result — usually that they have separated and have concluded that the marriage should be terminated.

With the introduction of no-fault divorce, both Friedman and Percival (1976) and Gunter and Johnston (1978) observed for California and Florida respectively a shift in which of the spouses filed for divorce. Now there was no longer a need for 'guilty' and 'innocent' spouses, and in addition, property laws in California at least, were changed to hold out the prospect of a more equitable division of family assets. Consequently, it has probably become a matter of indifference as to who files the petition. Gunter and Johnston suggest that melding the 'law in action' with the 'law in form' is related to a "reversal in sex roles in terms of which partner officially initiated the divorce proceedings" (1978:573).

They go on to recognize that the

> patterns described . . . may reflect simply the transformation of covert, latent behaviours into overt, official behaviours. (They) maintain, however, that this particular overt behaviour is one aspect of sex roles, and that this change MAY ultimately affect sex-role expectations, an important component of the overall role. It may be that the removal of the legal and social stigma attached to the party being divorced (the defendant in the adversary system) makes males less reluctant to take the official overt step in seeking divorce, and perhaps makes females more willing to be 'filed against' (1978:573-4).

What can these U.S. findings and their accompanying interpretations suggest about the Canadian past with respect to sex of the suing party? Perhaps in the nineteenth century, Canadian husbands petitioned more often than the present percentage (33%). We noted earlier that in the U.S., when adultery was used as grounds, men tended to petition more often, at least until 1920. Since the only effective ground for divorce in Canada before 1968 was adultery, this also suggests that men would have petitioned more often in the past. However, we have also noted the importance of contrivance (the 'innocent' wife) and consequently, women may have petitioned more often in Canada than the U.S. data would suggest. Secondly, the U.S. evidence gives credence to the contention that changes in the law produce changes in the sex of the aggrieved party in divorce. Until 1925, Canadian divorce law discriminated against wives, requiring them to furnish evidence of other matrimonial offences besides adultery, a requirement not made of the men. Prior to this point we would suspect that men filed more often, but perhaps with time the legal change contributed to an increase of female petitioners, as was noted in the U.S.

Changing attitudes and the resultant contrived nature of divorce that was documented for the U.S. has probably occurred in Canada as well. The previously described use of migratory divorce by Canadians (Pike, 1975) implies that attitudes in the early and middle part of this century were less rigid than what the letter of the law implied. However, part of the fiction has always required an 'innocent' wife and perhaps even more importantly, an outraged mother.

The 1968 divorce law change in Canada did not represent a complete transformation from 'fiction' to 'freedom', or from fault to no-fault divorce, as

was the case in California and Florida in 1970, but rather a compromise between the two. Nevertheless, the introduction of separation grounds (circumscribed though they are) does suggest that more men are now more likely to petition than in the previous period.

It is nearly impossible to speculate on the Canadian reality prior to 1968 since it was only mid-way through that year that data became available on the characteristics of petitioners. Nor is it possible to transfer exact U.S. proportions for certain years to Canada although we do expect that the overall trends were probably similar. It is, however, possible and indeed probable that there would be an observable time lag, especially historically, between the U.S. trends and their parallel appearance here. For one thing Canadian Friedman and Percival have observed a correlation between an increase in the number of female petitioners and an increase in the divorce rate, but Canada's divorce rate had historically been lower than that of the U.S.

Nonetheless, the fact remains that the legal and social contexts play definite parts in aiding our understanding of why one spouse files for divorce rather than another. In the typology in Figure 8, the desire to divorce and the recognition of possible consequences are presented in the current legal context of divorce in Canada.

As we have shown in Figure 8, the desire for divorce at the time of petitioning is either joint or unilateral. Similarly, the desired consequences of that divorce in terms of support and custody may or may not be satisfactory to both spouses. Both of these facets can change with time since a unilateral wish may become a joint one or consequences or conditions that were once mutually unsatisfactory could become satisfactory to both. However, for the purpose of discussing the typology, we assume that the event is captured at its inception and therefore encompasses the designation of the petitioner (and hence, of the respondent) and then the respondent's first formal response, if indeed there is one.

The circumstances listed in Cell 1 represent the least difficult divorce. Here both spouses either want the divorce or are indifferent; they also have arrived at a set of mutually agreeable settlements. In such a case who actually petitions for divorce is really of little consequence, perhaps only a reflection of the pattern of behaviour in the marriage itself or perhaps only a function of a lawyer's estimation of which party is least likely to set the judge's teeth on edge! Of course, where grounds are present for only one spouse, that spouse must be the petitioner, with the other agreeing in advance to co-operate; in other words, if the husband was adulterous, then the wife will be the petitioner, unless she also has transgressed and thus given her husband some grounds for petitioning. Where both have grounds at the outset, whoever is in the position to use the easiest and fastest grounds will likely petition. In the event that the ground is separation (where either party can file), it is difficult to predict the petitioner. It may be a matter of who wants the divorce first, as we saw earlier in the first illustrative case. However, we have noted that in the United States, men used no-fault grounds more often than fault grounds. This indicates that, all things being equal, men are more likely to step into the

Figure 8

Typology of Legal Roles: Who Is Petitioner?

Desired Consequences	Desire for Divorce: Joint	Desire for Divorce: Unilateral
	(1)	(2)
Satisfactory to both parties	• matter of convenience, indifference as to who petitions • least difficult divorce • completely mutual	• desiring party petitions and other passively accepts respondent role • or other answers petition and files counterclaim for negotiated relief
	(3)	(4)
Not satisfactory to both parties	• may or may not be agreement as to who is petitioner • respondent may file for an appearance or may file counter-petition	• desiring party petitions and 'forced' respondent answers petition and files counterclaim for non-negotiated relief • most difficult divorce • completely unilateral

breech and petition when no legal defence is possible in a moral parody of the Charge of the Light Brigade.

Where it has been determined that the wife will receive support or custody of the children, then it could be advantageous for 'staging purposes', especially when fault grounds are used, to make the fiction morally consistent by orchestrating the event so that the innocent party reaps the benefits. Attempts to save face may also motivate one spouse to petition even when no material benefits can be expected.

Thus, for spouses who want a divorce with mutually satisfactory consequences, which partner makes the first legal move is often purely incidental. The outcome may reflect characteristics of the marital relationship or may simply be a product of instrumental considerations (such as who saw a

lawyer first). We have no way of knowing which is more important or for whom. Of the four cells in our typology, we expect that a majority of couples fall into this category.

At first glance, the chances of a case falling into Cell 2 may seem rather unlikely. However, it does cover those instances where both spouses may be willing to separate, but one spouse does not want a divorce. Perhaps he or she is opposed on religious or moral grounds, or thinks that at a later time the marriage could work. Whatever the reason, the wish to divorce is unilateral. Despite this, however, the two parties do manage to negotiate such items as support and custody to their satisfaction.

Obviously in this case the petitioner will be the spouse who desires the divorce. Depending on the degree of opposition, the other spouse may actively oppose the divorce by filing an 'answer' and attempting to disprove the cited grounds, or passively resigning himself or herself to the fact that there is nothing much to be done. In the event that an answer is filed, and assuming it will be successful, a counterclaim will also likely be included that is the same as that in the petition to assure the respondent of the negotiated support or to give custody to the respondent. A counterclaim may not be filed with the answer if the desired consequences are already formalized in a separation agreement or if the respondent feels that the negotiated settlement requires no further legitimation. If there is no answer filed, then the features of Cell 2 allow for a legal process with little difference than that of Cell 1, although of course, there is a major qualitative difference in inspiration.[2]

When the desire for divorce is a mutual one, yet the terms of settlement are not satisfactory, as in Cell 3, both spouses may clamour to be the petitioner in order to increase their advantage, especially if fault grounds are alleged. Whether this strategy works or not is another question. In other instances, Cell 3 may resemble Cell 1 if only one spouse has grounds. Thus, there may or may not be prior agreement as to who petitions.

Since there is lack of agreement about economic and/or 'parental' consequences, respondents in Cell 3 are likely to file a counter-petition which essentially results in a reversal of legal role. The petitioner by counter-petition hopes that his or her side of the story will be upheld insofar as the consequences or terms of settlement are concerned. Often new grounds are alleged. The other alternative is to make an appearance at the trial and present the pertinent arguments in favour of his or her version of the desired consequences.

Since both parties want to divorce, attempts would usually be made by the respective lawyers to negotiate a satisfactory set of consequences acceptable to both parties.[3] This type of negotiation is not peculiar to Cell 3, but

2. The Divorce Act does allow a judge to refuse a divorce if it means undue hardship to the respondent party. However, this section is rarely invoked.

3. This typology does not preclude the possibility that although both parties may agree to the divorce, perhaps even to its economic and social consequences, both also want to be the petitioner. Resolution of this problem is not clear, especially since such intangibles as pride or reputation could be at its root.

would also occur in Cells 2 and 4. However, it is probably more easily accomplished, or of more importance than in Cells 2 and 4. Our findings show that only approximately 12% of divorce petitions have an answer filed; thus, very few couples fall into Cell 3, which, as we noted in connection with Cell 2 and can now note again, will be the case with Cell 4.

In some few instances, there is a unilateral desire for divorce in combination with a set of unsatisfactory consequences. Perhaps this is the most difficult divorce (Cell 4) since not only will the petitioner often be in the position of defending his or her grounds, but also, certain ancillary claims to custody and maintenance. This type is very similar to that in Cell 2 except that if an answer and counterclaim is filed (which is very probable), the contents of the counterclaim will not be mutually satisfactory. Further negotiation will be necessary, or in the event that it is not successful, a judicial decision will be required.

From the discussion of the typology it is readily apparent that many interrelated factors operate to 'produce' a petitioner. These factors in turn result in several different responses on the part of the other (respondent) spouse. However, it is very difficult to identify with any precision the degree to which the assuming of legal roles reflects the nature of decision-making. Indeed, the decision-making mode in divorce may follow the pattern of decision-making in a marriage where one spouse was dominant and the other passive or submissive.

In this case, the submissive spouse may decide to make the pre-emptive decision to petition for divorce or where both spouses are dominant, and will not allow themselves to be 'outdone' by the other spouse, the petitioner may be challenged in the form of a counter-petition, not for rational reasons but emotional ones. Last but not least, the spouse wishing the divorce first may wait or encourage the other spouse to file in an attempt to assuage guilt feelings over 'causing' the marital failure.

So there are various ingredients in determining who petitions for divorce. They range from general social and cultural reasons (attitudes toward divorce, role of divorced persons in society, the impact of war) through legal reasons (availability and acceptability of grounds for divorce; stigma or lack of it attached to grounds) to personal reasons (indifference, revenge, saving face).

National figures for the aggregated entire 11-year span beginning in 1968 indicate that approximately two-thirds (65.5%) of the petitioners have been women. This proportion increased slightly (with minor intervening fluctuations) from 1969 (63.7%) to 1976 (66.9%) and dropped back to 65.2% in 1979. There was also some provincial variation regarding the percentage of female petitioners; provincial figures range from a high of 72.7% in Alberta to a low of 60.7% in the Yukon, while most of the other provinces are only slightly above or below the national figure.[4]

The Relationship Between Age and Sex of Petitioner

Chronological age determines a great many of the other characteristics of every person. Knowing a person's age allows an approximation of that individual's position in the life cycle, how long he or she has been in the labour force, whether or not child-bearing is complete or child-rearing finished, and how long he or she might have been married. The age of a person also signals the era in which the individual was born and consequently allows a more accurate assessment of the social and cultural ideas that were probably influential for that person, but not as much for others who were born earlier or later.

Invariably, the pattern is a striking one. With increasing age, the typical life activity patterns of husbands and wives diverge dramatically, especially in the context of a traditional marriage. The husband's salary typically increases along with his capacity to acquire property[5], while the wife raises the children, entering and leaving the labour force periodically as family circumstances permit or dictate. As she ages, historically she has become more financially and materially dependent on her husband and her interest or opportunities in the labour force have diminished, at least until the last child leaves home. Her economic well-being in the event of a divorce is thus likely be more tenuous than her husband's and so she may prefer the economic security of an unhappy marriage to the economic unknowns of being divorced. Consequently, she may take a more passive role and not become the petitioner. Ultimately, however, she may agree to divorce since as our typology suggests, her will to resist is weakened by her cultural conditioning and her lack of the financial wherewithal to enter the marital battle field.

These are the kinds of considerations that we will take into account in our discussion of the relationship between age and sex of petitioner. They are especially necessary since our data do not allow us to address the question in a more direct manner.

In Table 1 (as well as Figure 9) the relationship between the age of the petitioning party and the sex of the party shows without exception that the percentage of female petitioners declines with increasing age.

The percentage reaches a high of 81.2% when the petitioner is 24 or younger and declines to a low of 47.3% when she is 50 or older. For male petitioners, the pattern is, of course, precisely the reverse.

4. Provincial variation over time is not widespread. The overall percentage of male petitioners as we have already observed, has declined and this is generally mirrored in the provincial trends. The most notable exception to this pattern is Alberta, which has maintained a consistently lower level of male petitioners. At the other extreme, Quebec and Newfoundland had, from 1969-71, a much higher level of male petitioners than the national average (47% in 1969 and 43% in 1971). Interestingly, these are the two provinces that had no provincial mechanisms for divorce prior to 1968. As might be expected, the largest yearly fluctuations tended to occur in those provinces with relatively few divorcing persons (Prince Edward Island, Yukon, Northwest Territories, Newfoundland).

5. Census material shows that average family employment income increases with age of husband (up to age 54), and further, the husband contributes the much greater proportion of it. (1971 Census, Vol. 1 – Part 2, Catalogue 93-723).

Table 1.

Sex of petitioner, by age, 1969-79 (percentages)

	Age of petitioner			
	24 or under	25–29	30–34	35–39
Male	18.8	30.3	34.7	35.9
Female	81.2	69.7	65.3	64.1
Total	68,391	115,946	94,001	68,277
	100.0	100.0	100.0	100.0
Total row percentages	13.6	23.1	18.7	13.6
	40–44	45–49	50+	Total
Male	37.4	40.2	52.7	34.4
Female	62.6	59.8	47.3	65.6
Total	54,003	42,437	59,817	502,872
	100.0	100.0	100.0	100.0
Total row percentages	10.7	8.4	11.9	100.0

Missing observations = 1758.

Figure 9

Percentage of Male Petitioners by Age Group, Canada, 1969-1979

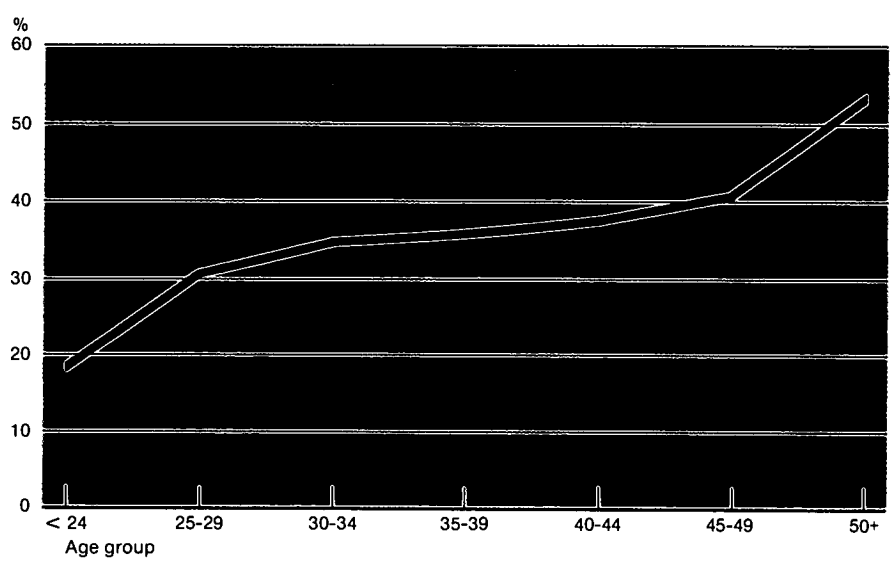


Table 2.

Percentage of male petitioners, by age group, for provinces and territories, 1969-79

Age	Canada	Nfld.	PEI	NS	NB	Que.	Ont.
24 or under	17.8	15.3	20.3	17.0	19.7	17.1	18.5
25–29	30.3	27.4	26.2	29.3	34.1	26.8	32.1
30–34	34.7	36.2	26.3	33.4	38.0	31.4	37.5
35–39	34.0	40.2	34.2	32.6	37.6	35.0	37.9
40–44	37.4	34.8	36.8	34.9	41.3	38.5	39.3
45–49	41.2	44.6	35.7	38.8	41.6	40.1	43.5
50+	52.6	56.8	57.7	54.1	58.8	50.4	56.6
Overall % of male petitioners	34.5	33.2	32.0	33.0	37.0	33.6	36.7

	Man.	Sask	Alta.	BC	YT	NWT
24 or under	18.5	16.7	14.9	18.8	15.4	15.2
25–29	30.0	30.7	26.2	34.1	36.0	37.9
30–34	34.8	32.1	29.0	38.2	42.9	45.0
35–39	37.5	34.5	28.8	37.9	45.3	45.2
40–44	34.4	33.4	29.4	38.9	39.3	35.6
45–49	37.8	36.0	30.5	40.1	50.9	53.8
50+	53.8	57.7	44.3	50.2	51.9	65.6
Overall % of male petitioners	34.4	33.8	27.3	36.4	39.2	39.0

In the older years (over 50), the sex of the petitioner may reflect an increasing desire of the spouse with the property (typically, the husband) to put his property and financial affairs in order for inheritance purposes.

The young female petitioner on the other hand is probably better able to manage financially once she is divorced than older women might be. Often, younger women will still be in the labour force, or their length of time out of it will be much shorter. Young petitioners also tend to use marital offences

(presumably because they are faster) more often and this suggests that legal requirements dictate the sex of the petitioner more often, even if both parties should desire a divorce. This pattern may also reflect cohort effects as well. It is certainly true that older persons have experienced upbringing with underlying values, attitudes and lifestyles that differ from those of a younger generation. The generation raised during the Depression has markedly different attitudes concerning economic security than those born and raised after World War II. Consequently, the threat or certainty of economic insecurity as a result of divorce would be a more salient aspect of divorce for those older women who lived through the Depression. In turn, this suggests that the pattern could be predictably different when women born after World War II reach the age of 50.

Table 2 presented national figures over the entire period from 1969 to 1979. As far as provincial variation goes the differences are not striking, nor are they particularly consistent among provinces within the same region of the country. The percentage of male petitioners under 24 ranges from a high of 20.3% in Prince Edward Island to a low of 14.9% in Alberta. This range in fluctuation is typical across all age categories. In the oldest age category (over 50), the Northwest Territories have the highest percentage of male petitioners (65.6%), while Alberta (perhaps not coincidentally, a very rich province) has the lowest percentage of husbands as petitioners (44.3%).

As with provincial differences, there are only small differences over the period from 1969 to 1979 (See Figure 9). The general pattern remains the same, as we see in Table 1, and although there are minor variations within individual age categories, they usually do not exceed 5 percentage points. With only two exceptions[6], all of the years not presented here fall within the limits already laid out on the graph.

Duration of Marriage

Since we have determined that the question of who petitions is related to age, we might also expect to discover a relationship between duration of marriage and sex of petitioner, since age and duration of marriage are not unrelated factors. However, our aggregated figures make clear that the variability among categories of duration of marriage is negligible. Canadian men petition approximately 34.5% of the time, regardless of the duration of their marriages. The only exception to this consists of those with a 30-year or longer duration of marriage. In this instance, 47.0% of the petitioners are husbands. Similarly, the variation across years is generally less than 5 percentage points, although differences across categories of duration of marriage have lessened over time.

Provincial patterns are plainly reflective of the overall Canadian pattern. In most provinces duration of marriage is not related in any important fashion to who petitions. The one apparent exception is those marriages lasting 30

6. In 1970, the age category 44-49 was slightly higher at 43.5%, as was age 50 and over at 58.2%.

Table 3.

Percentage of petitioners who are male, by age of petitioner and duration of marriage, 1969-79

Duration of marriage	Age of petitioner						
	24 or under	25–29	30–34	35–39	40–44	45–49	50+
Less than 5	20.3	43.9	44.7	37.7	37.2	37.6	43.1
5–9.9	8.1	27.2	48.2	52.5	47.0	44.8	52.1
10–14.9	—	7.1	26.5	48.8	52.1	50.7	53.7
15–19.9	—	—	7.1	26.3	48.4	53.2	54.5
20–24.9	—	—	—	7.8	27.9	48.6	59.6
25 years or more	—	—	—	—	8.8	27.1	52.1

years or longer, in which men petition notably more often than women. Alberta also shows a lower percentage of male petitioners for most categories of duration of marriage. The Northwest Territories and Yukon Territory do not follow the pattern (or lack of one) exhibited by the other provinces; here, the fluctuations in marriage duration are unpatterned yet noticeable. However, the territories do represent a small proportion of the total and are also traditionally noted for their divergence from the rest of Canada in numerous other respects (such as development, and age-sex structure).

Thus while age has some influence on who petitions, the duration of marriage has very little. However, when the two are combined, the result is different from either of its component parts (see Table 3). If the age at marriage was under 25 (as computed from the recorded case information) the percentage of male petitioners is very low and especially if it was a teenage marriage (about 8% for all the appropriate combinations of age and duration of marriage). However, the remaining figures in Table 3 contain no apparent pattern, except that the percentages are substantially higher than those already described.

Number of Dependent Children and Who Petitions

When there are dependent children[7], divorce not only signals the final dissolution of the partnership but also requires a radical reorganization of the family. In a divorce action the petitioner states that the spousal component of the particular family is no longer valued but there are still other component

7. According to the Divorce Act, dependent children, or 'children of the marriage' refers to each child who is (a) under 16 years of age or (b) 16 years of age or over and under the (parents') charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life. (Sect. 2).

members or aspects that may very much be so. In our culture, children are predominantly viewed as an important part of family life and most married couples want and have children. Although it is true that the number of children per family is declining, this probably reflects attempts to increase the quality of family life rather than an attempt to repudiate it.

As the literature on voluntarily childess marriages suggests, (Veevers, 1971, 1971a), the 'parenthood prescription' or the desire for progeny is still a very strong one. Children have a profound impact on marital relationships and in some cases are probably the major factor in marital failure. However, we maintain that children are as highly valued by divorcing parents as they are by married parents and indeed, their value may be accentuated by divorce, when it finally comes time to decide questions of custody.

There is, in these changes, the suggestion of a social current toward the modular family where the spousal component is interchangeable while the offspring component is fixed. This type of venture generally suffers, however, since it is almost always the case that only one parent receives custody of the children (it is felt that siblings should be raised together) and consequently, keeping the offspring component 'fixed' is practically impossible for the non-custodial spouse. Nevertheless, the non-custodial parent can usually maintain contact with the children, thereby demonstrating that the divorce does not necessarily imply a repudiation of that element of the family. (We will treat the issue of custody more fully in Chapter 7.)

In a divorce, children are often the focal point of negotiation, and so it is reasonable that their presence be related in some measure to the legal role. Earlier we noted that women, especially with children, would petition in an attempt to assume the role of 'innocent' spouse and to reap the 'reward' of the children. Indeed, our figures show that the presence of children is associated with female petitioners since where there are dependent children, 71.7% of the petitioners are women, compared to 59.6% when there are no children. Beyond this, the actual number of children is of very little consequence from the point of view of who files the petition.

Table 1 showed a relationship between the age of the petitioner and the sex of the petitioner. Age is one indicator of the likelihood of having young dependent children. Therefore we examined the relationship between age of petitioner and the number of children. Here, there was variability among categories of number of children, especially at the younger ages.

Younger men (under 40 years) petition least often when there are four or more children and most often when there are no children present. However, at age 50 or older, men petition most often when there are four or more dependent children. At the same time, differences between petitioners with dependent children and those without are small, suggesting that children are not an especially consequential element in the decision as to who petitions within this age group.

Since younger couples have younger children and since children especially are most often in the care of their mothers, it is likely that some mothers might petition in order to preserve the image of 'correctness' in making the divorce action more socially appealing.

Summary

There are undoubtedly cases in which the decision as to which spouse will file the petition is made randomly or by accident; in the majority of divorce cases it is likely that this decision is formed in a specific social dynamic. The question of who petitions can be answered most readily in terms of age and number of dependent children, and to a lesser extent, by duration of marriage. Overall, women petition more often than men (2/3 v. 1/3) and to an even greater extent when there are dependent children. If the wife is a young mother (probably with small children), the likelihood is greater that she will petition than at other ages, thus reinforcing the societal prescription of maternal care for infants. Where the petitioner is 50 or older, regardless of the presence of children, the husband is the petitioner in a slight majority of cases. To a greater extent, the older the man the more likely he is to petition. To a much lesser extent, men in marriages of longer duration petition more often than those in marriages of a shorter duration.

Ultimately, what is so intriguing about these figures is the extent to which tradition is still so much in evidence. The context of divorce is much more homogeneous than might have been expected, and the roles more fixed and institutionalized than might have been thought in the absence of these figures.

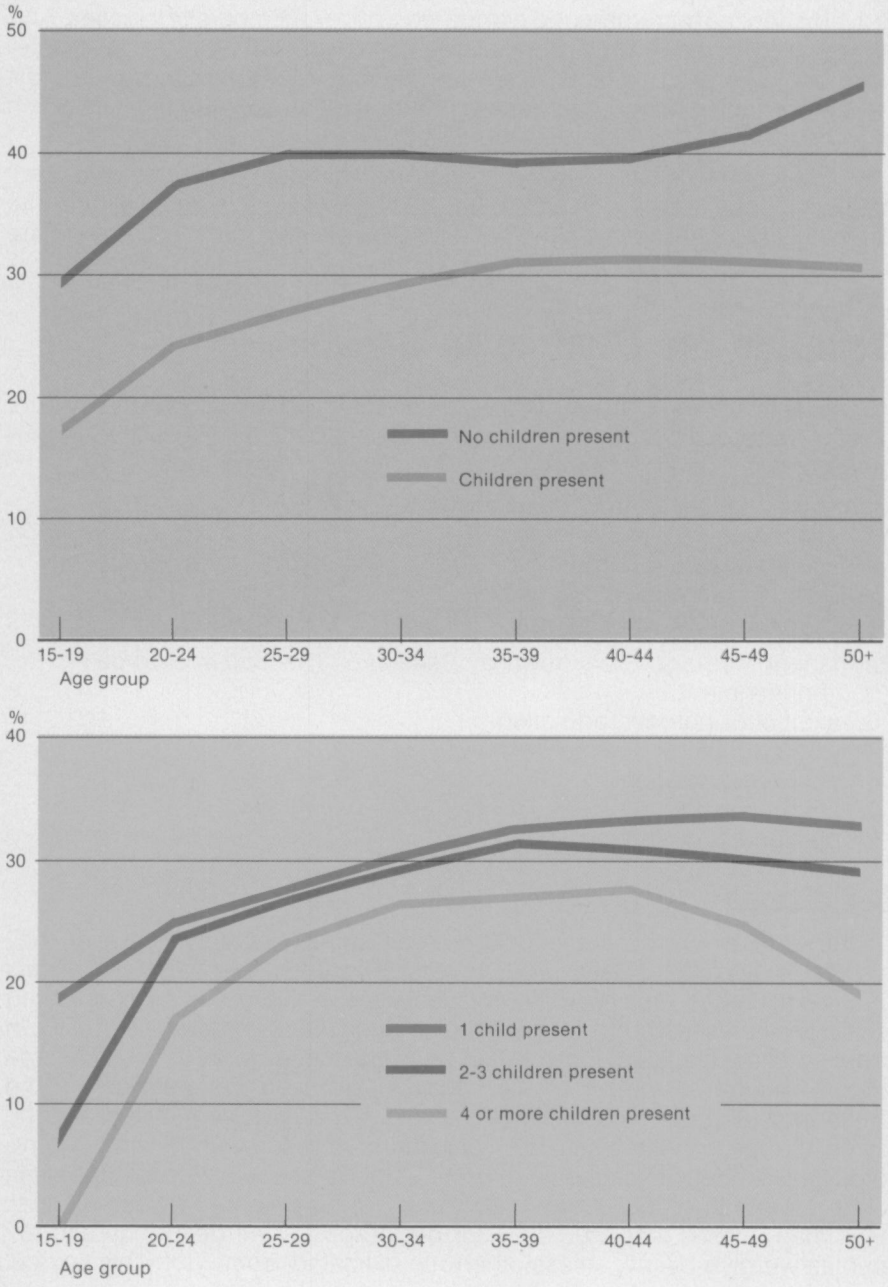
Over the last decade, there have been repeated claims that a social revolution in family life (and in the definition of roles of men and women) has occurred. Notwithstanding these claims, the patterns we see in the figures suggest the continuation of most traditional marital patterns, qualified only by a growing intolerance of the idea of making the best of a bad marriage.

Throughout this section we have suggested several explanations for these patterns. We have noted that the social context in combination with fault-oriented grounds for divorce has produced a historical pattern of predominately female petitioners in Canada and there are similarities between Canada and the U.S. in this regard. To return to our image of the morality play, it is not unrealistic to think of the trial as often a staged affair where proper casting and performance are essential. It is important that these playlets appear routine since any obvious deviation which might awaken the court's interest might result in a prolongation or less desirable judicial assessment of the case.

The idea of tradition, or perhaps experience, has some bearing on the question of why differences in who petitions are observed for different age groups. Although it is difficult to separate the effects of age (in a biological sense) from those of experience (cohort effect), we feel both are present and important. The social experience and conditioning of older persons, coupled

Figure 10

Percentage of Male Petitioners by Age Group, and by Number of Children, Canada, 1969-1979



with different life cycle stages, has produced behaviour that is in some ways distinct from their younger divorcing counterparts. Younger spouses may perceive their situation and its alternative in much different terms. Young women, for example, are closer to the labour market and have much improved chances for remarriage compared to older members of their sex. And given the changes of late in sensibilities with respect to post-marital 'singleness' and other features associated with divorce, younger women may find it easier than their older counterparts to handle the emotional adjustment which a de-coupling necessitates.

In short, there is evidence to suggest different styles of divorcing. Although those seeking divorce differ in many ways, they must all fulfil the same institutionalized requirement of the legal role they choose or are assigned.

Grounds for Divorce in Canada

In the introductory chapter, two distinctly different views on grounds for divorce were discussed. For the current discussion, we have listed the full range of grounds admissable under the current divorce law:

Matrimonial Offence Grounds: (Section 3, Divorce Act)

1. adultery
2. unnatural acts – (sodomy, bestiality, rape, homosexual act(s))
3. form of marriage with another
4. physical and mental cruelty

Permanent Marriage Breakdown by Reason of: (Section 4, Divorce Act)

5. imprisonment
6. alcohol or narcotic addiction
7. whereabouts of spouse unknown
8. nonconsummation
9. separation
10. petitioner's desertion

Definitions

On the surface, many of these grounds seem self-explanatory. However, they are not always easy to define and prove in court. Often seemingly similar sets of circumstances result in different decisions in interpretation concerning what constitutes a ground. Some of the grounds are deliberately unspecific in order to allow for judicial discretion and interpretation. Federally, Canada follows the legal system of common law which is based on statute law and the precedents and decisions which interpret it. To some extent, this allows the law to change with the times, but it also introduces some uncertainty. Therefore, we will briefly examine each ground and describe how each has been interpreted through case law. M.C. Kronby, in his *Divorce Practice Manual*, cites many cases that are useful for our purposes. All definitions and examples we give below, unless otherwise indicated, come from this source.

The corresponding numbers that are provided are taken from the entire base of 504,630 cases.[8]

1. Adultery: Voluntary sexual intercourse with a person of the opposite sex other than the spouse by a married person constitutes adultery. As our law functions, it is not always necessary to prove the direct fact of adultery. It can be inferred from circumstances: "strong evidence of association, intimacy and opportunity, especially in the absence of clamorous denials – generally will suffice" (Fleishman, 1973, p. 48). This is a very popular ground, alleged in 200,851 of the cases.

2. Unnatural Acts: These include sodomy, bestiality, rape and homosexual acts. Sodomy has usually been defined as carnal knowledge *per rectum* by a man of any man or woman. It is rarely used as a ground (only in 353 cases).

   Bestiality is also an offence under the Criminal Code and is defined as carnal knowledge in any manner by a man or woman with a beast. Only 147 divorce cases have been reported during the period 1969-79 using this ground.

   In *Counsel for the Damned*, Fleishman recounts the story of one client trying to choose a ground from a list of them. "Oh, this Three B must be me." "Three B, madam? Bestiality?" "Oh, yes! Bestiality. My husband is a real beast". "Madam, have you the slightest conception of what bestiality means?" . . . Her face burns scarlet, blanches green. "Oh. . . I thought bestiality meant he was a beast. . . and I could get a divorce. . . " (p. 95).

   In some respects, rape is a special case of adultery since in Canada, a husband cannot be accused of raping his wife (though inter-spousal rape might furnish cruelty grounds). Although it is a criminal offence, the respondent need not have a criminal conviction of rape.[9] In fact very few divorces for obvious reasons proceed on this ground (just 227 cases). According to the Criminal Code of Canada, "a male person commits rape when he has sexual intercourse with a female person who is not his wife (a) without her consent, or (b) with her consent if the consent (i) is extorted by threats or fear of bodily harm, (ii) is obtained by personating her husband, or (iii) is obtained by false and fraudulent representation as to the nature and quality of the act" (Sect. 143).

   For someone wishing to use homosexual acts as a ground, the fact that his or her spouse is a homosexual will not suffice. It must be demonstrated that a homosexual *act* was committed by the spouse during the term of the marriage. Since this is so difficult to prove, petitioners often use mental cruelty instead.

8. The numbers provided in this section will total more than 504,630 since more than one ground is alleged in some cases.

9. At the time of writing, Bill C-53 has been introduced into the House. It will, if passed, remove the offence of rape from the criminal law, in the process removing spousal immunity.

3. Form of marriage with another: This ground is not the same as bigamy since, as is the case with bigamy, the marriage is not void *ab initio* (from the beginning). In the case of a man with two wives, the first wife (in the valid marriage) could sue for divorce because her husband had gone through a 'form of marriage with another'. The second wife's marriage, however, is bigamous and void from the beginning, since there is an existing prior marriage. The second wife is therefore in a position to sue for annulment, not divorce. This ground is used most often where the respondent spouse has obtained a foreign divorce that is not recognized in Canada, and has subsequently remarried. Overall, however, it is used rarely (334 cases between 1969 and 1979).

4. Physical Cruelty and Mental Cruelty: Since the definition of cruelty encompasses both physical and mental aspects, the two will be discussed together. Defining cruelty in law is not an easy task. However, one statement of it has been very clearly specified by Mr. Justice Schroeder of the Ontario Court of Appeal in a judgment on a leading case involving these grounds:

> Over the years the Courts have steadfastly refrained from attempting to formulate a general definition of cruelty. As used in ordinary parlance "cruelty" signifies a disposition to inflict suffering; to delight in or exhibit indifference to the pain or misery of others; mercilessness or hard-heartedness as exhibited in action. If in the marriage relationship one spouse by his conduct causes wanton, malicious or unnecessary infliction of pain or suffering upon the body, the feelings or emotions of the other, his conduct may well constitute cruelty which will entitle a petitioner to dissolution of the marriage if in the Court's opinion, it amounts to physical or mental cruelty "of such a kind as to render intolerable the continued cohabitation of the spouses". That is the standard which the Courts are to apply. . .
>
> "Care must be exercised in applying the standard set forth in section 3(d) that conduct relied upon to establish cruelty is not a trivial act, but one of a "grave and weighty" nature, and not merely conduct which can be characterized as little more than a manifestation of incompatability or temperament between the spouses. The whole matrimonial relations must be considered, especially if the cruelty consists of reproaches, complaints, accusations, or constant carping criticism. A question most relevant for consideration is the effect of the conduct complained of upon the mind of the affected spouse. The determination of what constitutes cruelty in a given case must, in the final analysis, depend upon the circumstances of the particular case having due regard to the physical and mental condition of the parties, their character and their attitude towards the marriage relationships" (Knoll v. Knoll, 1970).

The variety of situations that have been alleged to constitute cruelty stretch on and on. Some idea of their range can be gleaned from the following mélange of examples, as given by Kronby.

In Kronby's cases, cruelty was found where the transvestite behaviour of the husband caused continual stress to the wife; where the husband ignored his wife, neglected her medical needs and made unreasonable sexual demands; where chronic alcoholism resulting in treatment of the petitioner by the respondent made cohabitation intolerable; where the wife belittled her husband, hindering the conduct of his business and producing depression; where the wife refused to have children; where the wife habitually and continually ridiculed the husband's sexual performance and compared him to a previous husband and lovers; and even where a husband devoted too much time to card playing and too little to his wife.

In some cases, cruelty was alleged by the petitioner but not found by the court. Here the examples range from the husband who was insufficiently affectionate especially during intercourse, to mutual religious intolerance, to a lack of communication, to husbands who couldn't hold jobs.

Some of the divorces involved were denied because of lack of evidence; others because the conduct was not of a 'grave and weighty' nature. Cruelty was alleged in 72,163 cases.

5. Imprisonment: Imprisonment for not less than three years within the five-year period preceding the petition is grounds for divorce. If the imprisonment is the result of a death sentence or a sentence of 10 years or more, then its length need only be two years immediately preceding the petition. Time on parole does not count as imprisonment. Few petitions are brought using imprisonment as a ground (835).

6. Alcohol or narcotic addiction: These addictions are difficult to define. The Divorce Act requires that the respondent be "grossly addicted to alcohol, or a narcotic as defined in the Narcotic Control Act, and *there is no reasonable expectation of the respondent's rehabilitation within a reasonably forseeable period*" (emphasis added). By way of editorial comment, Kronby adds that the latter part of this ground "would require the court to have the precognition of the deity" (p. 16).

   Despite this, cases have demonstrated that medical or clinical evidence is not required as does the one set out below.

   Interesting evidence of gross addiction was used in another Fleishman case, where the wife was the petitioner. The husband had joined the Royal Canadian Navy as a young seaman in 1941, remaining in the Navy until 1968. Her most cogent evidence consisted of two pictures shown to the judge – one snapshot taken with his companions on the topdeck as a carefree young boy in 1941, the other a photo taken in the summer of 1971 showing what one could barely believe to be the same man. His appearance was that of a man absolutely mind-blown with booze, a filthy drunk such as one sees in beer parlours or on the seediest streets of town. The judge was so astonished that he was forced to remark, "Madam, I need no further evidence of this man's chronic addiction to alcoholism. You may take your decree" (p. 52).

Difficult though these addictions may be to define, they account for more than a trivial number of divorce petitions — a total of 17,503 between 1969 and 1979.

7. Whereabouts of spouse unknown: The length of time applicable here is three years. Requirements for divorce using this ground differ procedurally from other grounds. In all divorce actions, the respondent must be notified of the action but such a requirement can be obviously problematic in cases of long-gone spouses; and consequently, substituted service is allowed. Newspaper advertising, or delivery of the petition to the spouse's relatives, constitute two methods of substituted service. Often maintenance and costs are not awarded; nor is service of the *decree nisi* required. An order to dispense with this service is routine. This ground was alleged in only 3,028 petitions.

8. Nonconsummation: This is an infrequently invoked ground (only 2,019 cases). There must be nonconsummation for at least one year through illness, disability or refusal on the part of the respondent. However, consummation must be attempted. In one case, a decree was refused since the husband's inability to consummate the marriage was proved, yet there had been no attempt at consummation on his part.

   In another case, a petition was dismissed when the marriage was found to be one of convenience, in order to facilitate immigration. The parties had not cohabited and therefore it was held that the respondent had not *refused* to consummate. This ground does not apply to those situations where consummation occurred, but subsequent intercourse was refused.

9. Separation: This ground is very widely used (212,449 cases). However, since it has a time requirement of three years, when the petitioner files his or her petition the couple must have been separated for at least this length of time. As well, the period of separation must be continuous, with one exception: a couple is allowed to resume cohabitation for a single period of not longer than 90 days in an effort to effect a reconciliation while not penalizing the parties by interrupting the running of time. Being separated, or living 'separate and apart', does not mean that the couple must live in separate dwellings, although this is the usual state of affairs. A couple can be living separate and apart under the same roof if they are not doing household duties for each other and have no sexual relationship, joint social ventures or communication. However, the evidence 'must be clear and convincing' and must show a physical separation as well as a mutual intent to destroy the matrimonial relationship.

10. Desertion: In this sub-section, the Divorce Act provides a penalty to the petitioning spouse if he or she has deserted. Here, the deserting spouse must wait *five* years before petitioning. However, the deserted spouse may petition after three years. Desertion involves a repudiation of marital obligations by the petitioner where there is no agreement on the part of the petitioner with the respondent to terminate the relationship. It is

> unclear as to what ground a spouse would use (separation or desertion) when the other spouse is more or less permanently hospitalized. Desertion was used as grounds in 22,204 cases.

All grounds for divorce in Canada, excepting separation, are permeated to a greater or lesser degree, by the fault conception. Its retention coupled with adversary procedures, render uncontested divorces in Canada unrealistic, inefficient and inappropriate playlets that "promote(s) hypocrisy and a disrespect for the law and its administration" (Law Reform Commission of Canada, 1975b:25). The Law Reform Commission goes on to state that in its opinion, "a fault-oriented divorce law is anachronistic, unrealistic and demeaning" (1975b:29). It further argues emphatically that the process of divorce should stress conciliation and consensual agreements directed toward adjustment of all the family members and that procedures for divorce should not be contentious or adversarial in nature. In the event of a dispute, independent investigations could be called upon, and as the commission has stated,

> To minimize conflict and acrimony and to promote consensual settlements, we also recommend that a system of neutral pleadings be devised that excludes accusatory allegations of misconduct. And, where both spouses consent to a divorce, it should be available on their joint application (1975b:37).

In addition, the Law Reform Commission does not subscribe to a designated period of separation prior to divorce as proof of marriage breakdown. It argues that reconciliation is not likely once the parties have separated and have begun to develop independent lives. "What is the justification for imposing a separation period where other circumstances indicate that the spouses will never come together again?" (1975b:35)

The Commission also points out that an economically dependent spouse may find it difficult to withdraw from cohabitation in order to satisfy a statutory requirement. Thirdly, the Commission finds objectionable the arbitrary character of some designated period of separation, since tension and anxiety of responsible spouses will only be aggravated by an enforced period of separation.

These suggestions for reform differ from those recommended by Hahlo (1975) in his research for the Commission. Hahlo advocates that marriage breakdown be the only ground for divorce (with the possible exception of incurable insanity) and that separation for one year be the conclusive evidence of it. In the event that the request for divorce is joint or consensual, Hahlo maintains that the prescribed period of separation be six months.

Although these two views have express differences, the overall tenor of both calls for a radical shift away from fault-oriented grounds and adversarial procedures to grounds based on failure implemented in a non-adversarial way. Both however agree that divorce is an end result of a bad marriage and not its cause. Hahlo (1975) aptly cites Rheinstein (1972) in this conclusion:

> (N)ot divorce but the factual breakup of a marriage constitutes the social evil which has been decried so often and so passionately. It is this situation which turns the children into 'orphans', which is likely to throw them and perhaps the wife too as a charge on the taxpayers, which creates the psychological problems of loneliness, and which injects a general element of instability into the fabric of social life. But none of these effects is produced by divorce, which is an event occurring not in the world of the living but in the universe of formal law (p. 226).

In sum, there is an element of mystery to marriage; who can say with certainty when a marriage is no longer? It is not often an easy task for spouses, and so it must be far less so for such distant agencies as courts. The task of establishing grounds is a difficult, elusive and sometimes nearly impossible one invented by medieval clerics and subsequently inherited by ill-prepared judicial officials. In the end, it may only be disposed of by an open admission that its intellectual origins lie somewhere in the same mysterious realms as that of the question of how many angels might fit on the head of a pin.

Subjective Reasons for Marriage Failure

Thus far we have described the Canadian grounds for divorce as well as some of the possible social and structural reasons for marital breakdown. We now turn our attention to the findings of a random sample of divorcing spouses with dependent children who had initiated legal proceedings in Ontario in 1975 (and who were divorced at the time of our survey); we shall consider in particular statistical information about why their marriages failed. Primarily, our interests lie in the assessment of how closely these subjective, informal reasons are mirrored in the formal legal reasons of grounds for divorce. As we stated in the introductory chapter, our central view is that the social process of marriage and family dissolution proceeds independently of the theatre-like legal process. There is, nonetheless, a relationship between the two, simply because formal legal dissolution requires the specifying of grounds, supposedly with a basis in the social reality of the marital unit. These are different forms of an account but rooted in the same reality. Despite the common element, the divergence between the two is probably greater than the similarities.

The law insists that grounds be provided and in so doing it often forces a contrived and distorted picture of the social reality as defined by the persons involved. By knowing the grounds for divorce, we can tell little about why a particular marriage failed and although it may well be that citation of adultery as a ground does in fact accurately mirror why a marriage failed, it could just as easily be that adultery was not a cause of marriage breakdown but a symptom or even the result. Marriages fail for numerous reasons too complex to decipher. For example partners split up for whatever reasons, and one or both will commit adultery after this point. Coincidently, adultery is grounds for divorce, and adultery is what one party may then allege.

Yet, suppose neither spouse has committed adultery? In such a case, the couple might have to 'arrange' adultery, or wait three years (separation) or

perhaps attempt a petition based on mental cruelty, or maybe even forego the petition altogether. None of these variations are very pleasant alternatives.

Thus, in the end a couple who desire divorce must turn their personal account into a legal one. The difficulty involved in this translation represents a problem of no small social consequence and significance. For many couples, it erects needless barriers which they must overcome and in the meantime they are left in a state of civil limbo. Where separation is to be used as the ground, three years must pass before a petition can be filed. During this time, the contestants are not married in any social sense of the word, nor are they divorced. For some this is not socially or psychologically troublesome; for others the burden is enormous.

The records of the Official Guardian of Ontario frequently show cases of such troublesome ambiguity between the personal and legal account. In Table 4, personal accounts of female petitioners are compared with their 'corresponding' legal accounts. First of all, we note that the major grounds used by women are noncohabitation (36.5%), adultery (32.6%) and mental and physical cruelty (17.0%). The most often cited subjective causes[10], however, are adultery (24.7%), alcohol (23.2%), beatings (13.2%) and lack of communication (9.6%).

The fit between these two measurements of the same dimension is a poor one. When adultery alone was used as a ground, only 44.6% also stated it to be a cause of marriage failure; 55.4% of women used adultery as a ground, yet did *not* state it as a cause of marriage failure. There is little doubt that adultery occurred when it was pleaded; however, to state that it was a cause of marriage failure in all cases is to stretch the point. The fact is that adultery is the most expeditious of grounds and so it lends itself to the circumstances. Interestingly, only 58.5% of the petitioning women who said adultery was a cause of their marriage failure actually used it as a ground in their divorce petition. Some, though, did use it in conjunction with other grounds such as mental and physical cruelty (4.9%). Many used separation, desertion, or whereabouts of spouse unknown (noncohabitation), as grounds, perhaps because noncohabitation does not emphasize fault or because the adultery had been condoned[11], or perhaps because an actual separation of three years had occurred before the wish to divorce was formed.

The second most frequently cited cause for marriage failure (23.2%) was alcohol, yet it was seldom viewed as a useful ground for the divorce petition. It was cited as a ground by only 1.4% of all petitioners.

10. It is important to emphasize that each cause is a variable, as opposed to a category on one variable. Also, since respondents often stated more than one cause, the column percentages do not total 100%. Therefore, primary emphasis should be placed on the following method of interpretation. For example, of all those wives petitioning with only adultery as grounds, 44.6% also stated adultery as a cause of marriage failure, whereas 55.4% (100.0% – 44.6%) did *not* state adultery as a cause of marriage failure (Table 3).

11. The Divorce Act forbids the granting of a divorce in some circumstances: when collusion, condonation or connivance has occurred. The first is an absolute bar to divorce; the others are discretionary and bear only on the fault grounds in Section 3 of the Act. These 'bars to relief' will be discussed more fully in our next chapter.

Indeed, a woman determined to divorce as soon as possible would be hard pressed to use addiction as a ground for divorce if her husband had not been grossly addicted for at least *three* years. It would be much faster to complain of the consequences using mental and/or physical cruelty, or easier to arrange adultery. Whatever the reason, more often than not the cause of marital breakdown often fails to match the grounds that are ultimately used.

In 1969 Braid suggested that alcohol-related problems are even more frequently related to marriage breakdown than our figures would suggest. He noted that "Metro Toronto Judge William Little of the Family and Juvenile Court analyzed 100 cases of family breakdown and determined that intemperate use of alcohol was the factor most frequently responsible. His analysis showed that alcohol figured in 44% of the cases" (Braid, 1972:97). It is possible, though, that the observed alcoholism was in some sense the *result* of unhappy marital experience. The Braid article went on to state that the fact that so few petitions rely on alcoholism suggests the requirements are too stringent, or that petitioners are choosing other grounds such as separation (noncohabitation) or cruelty. Our figures support this contention.

We can draw much the same conclusion pairing such causes as beatings and mental cruelty with their appropriate legal grounds (physical cruelty and mental cruelty, respectively). Similarly, this was the case in only 45.3% of the divorces where mental cruelty was stated to be a cause of marriage failure. Even when we include these grounds in combination with noncohabitation or adultery, the fit between the law and the stated reality is far from being perfect.

Table 4 also shows that noncohabitation is often used as a ground when the stated cause was that the couple had married too young (57.8%); or else responsibility problems ('couldn't handle responsibility', 'he was too irresponsible') were given as the cause of failure (54.1%). The evidence in Table 4 of the 'lack of fit' between the two forms of account shows that while the generally fault-oriented legal approach of the Divorce Act (excepting separation) may expeditiously maintain orderly procedure, it simply does not reflect the complex forces at work in the breakdown of a marriage.

The overall conclusion that can be drawn from Table 5 is much the same as that of Table 4. However, we note that overall, men as petitioners rely more heavily on adultery alone as a ground (52.4%) and much less on mental and physical cruelty (3.4%) than do women (where the figures are 32.6% and 17.0%, respectively). There are several possible explanations for this difference.

The first might be that perhaps men really are not victims of physical or mental cruelty to the same extent that women are. It could also be that cruelty is more difficult for a husband to prove than it is for a wife, especially since the popular conception has it that women are victims, not men, and lawyers and judges are probably not immune to this conception. Finally, the husbands themselves may deem it an affront to their self-esteem to admit they were the victims of physical cruelty or the recipients of mental abuse. The stereotype of

the hen-pecked husband is not exactly socially admired and consequently to use mental or physical cruelty as grounds is unattractive. However, men use noncohabitation in about the same proportion of cases (38.0%) as do women.

With respect to stated causes of marriage failure, men also cite adultery most often (19.0%) although somewhat less frequently than women (24.7%). However, incompatability is cited next most often (11.3%), followed by lack of communication (7.7%). It is important at this point to remember that the under-reporting of causes of failure was much higher for men than for women.

Men who give adultery as a cause of failure use it much more often as a ground (76.4%) than do women. This is the only instance where the cause of failure adequately mirrors the legal ground. However, if we consider all of those men who used adultery as grounds, only 27.6% cited it as a cause for marriage breakdown.

When the subjective causes of failure were blamed on lack of communication or lack of maturity (age), male petitioners tended to use adultery much more as a ground (55.6% and 51.9%, respectively). If financial problems were cited as the cause, however, only 30.0% used adultery as a ground.

Here again, Table 5 demonstrates that the causes given for marriage failure generally do not reflect the grounds pleaded with much accuracy. Very often, the law seems to force the presentation of a contrived picture of reality. In this the Law Reform Commission has noted:

> Experience shows that even in a contested divorce action, the search for guilt is, in most cases, an exercise in futility. There are, no doubt, cases where it is possible to say with assurance that the respondent's adultery, cruelty or desertion was the sole, or at least, the main cause of marriage breakdown. In the vast majority of cases, however, it is impossible to pinpoint real fault or guilt. Both parties may be at fault or there may be no fault at all (1975b:48).

In the end, people desiring divorce are routinely compelled to distort their understanding of reality to fulfil the requirements of the law. The divorce law is adversarial in nature and theoretically, it 'pits' one spouse against the other on the assumption that the truth will out.

Practically, our courts are ill-equipped and judicial officials demonstrate a lack of zeal for their role of moral arbiters and inquisitors. Often the action doesn't reflect anything more than the path of least resistance to divorce. When fault grounds are involved, thousands of morality plays occur every year with their inevitable heroes and villains. Although our divorce law has been criticized by many (certainly the Law Reform Commission has called for a revamping (1975b:67)), it is still 'the only game in town' and obviously, people with the wish to divorce are compelled to play it.

Table 4.

Inconsistency between legally cited grounds and self-reported causes of divorce (wife as petitioner)

Some stated causes for marriage failure (by wife) N / Column % / Row %	Selected grounds for divorce*						
	Adultery only	Noncohabitation only	Mental and physical cruelty together	Noncohabitation and physical cruelty together	Adultery, mental and physical cruelty together	Selected total	Overall total
	144	69	7	3	12	235	245
Adultery	44.6	19.1	4.2	7.5	41.4		24.7
	58.8	28.2	2.9	1.2	4.9		
	42	83	55	14	8	202	230
Alcohol**	13.0	22.9	32.7	35.0	27.6		23.2
	18.3	36.1	23.9	6.1	3.5		
	7	30	71	5	8	121	131
Beatings	2.2	8.3	42.3	12.5	27.6		13.2
	5.3	22.9	54.2	3.8	6.1		
	41	29	14	2	4	90	95
Lack of communication	12.7	8.0	8.3	5.0	13.8		9.6
	43.2	30.5	14.7	2.1	4.2		
	25	52	7	1	2	87	90
Married too young	7.7	14.2	4.2	2.5	6.9		9.1
	27.8	57.8	7.8	1.1	2.2		
	29	41	8	6	1	85	88
Incompatability	9.0	11.3	4.8	15.0	3.4		8.9
	33.0	46.6	9.1	6.8	1.1		
	21	40	6	3	1	71	74

Responsibility	6.5	11.0	3.6	7.5	3.4		7.5
problems	28.4	54.1	8.1	4.1	1.3		
	5	14	29	2	5	55	64
Mental cruelty	1.5	3.9	17.3	5.0	17.2		6.5
	7.8	21.9	45.3	3.1	7.8		
	16	19	17	4	0	56	58
Career related	5.0	5.2	10.1	10.0	0.0		5.9
	27.6	32.8	29.3	6.9	0.0		
	17	18	4	3	1	43	46
Financial problems	5.3	5.0	2.4	7.5	3.4		4.6
	37.0	39.0	8.7	6.5	2.2		
	14	14	3	1	3	35	41
Lack of interest	4.3	3.9	1.8	2.5	10.3		4.1
	34.2	34.2	7.3	2.4	7.3		
	15	17	1	1	0	34	35
Spouse left	4.6	4.7	.6	2.5	0.0		3.5
	42.8	48.5	2.9	2.9	0.0		
Percent distribution	323	362	168	40	29		
of grounds	32.6	36.5	17.0	4.0	2.9		
	(N = 991)						

* The five categories of grounds account for 93.0% of all combinations of grounds used by the wife. Although causes such as imprisonment and homosexuality were given, their cell sizes were small and consequently they are not displayed. However since both are also grounds for divorce, it is important to note that 1) no wife or husband stating imprisonment as a cause of marriage failure used it as grounds; 2) a maximum of 2 women out of 5 stating homosexuality as grounds used it (none as a single ground) and the one male petitioner stating homosexuality as grounds used it as grounds.

** Alcohol addiction was only cited 21 times as a ground for divorce by either the husband or the wife, and in 19 ot these divorces it was used in conjunction with other grounds.

Table 5.

Inconsistency between legally cited grounds and self-reported causes of divorce (husband as petitioner)

Some stated causes for marriage failure (by husband) N / Column % / Row %	Selected grounds for divorce*						
	Adultery only	Noncohabitation only	Mental and physical cruelty together	Noncohabitation and physical cruelty together	Adultery, mental and physical cruelty together	Selected total	Overall total
	68	17	0	1	1	87	89
Adultery	27.6	9.6	0.0	8.3	33.3		19.0
	76.4	19.1	0.0	1.1	1.1		
	25	25	1	1	0	52	53
Incompatability	10.2	14.0	6.3	8.3	0.0		11.3
	47.2	47.2	1.9	1.9	0.0		
	20	14	2	0	0	36	36
Lack of	8.1	7.9	12.5	0.0	0.0		7.7
communication	55.6	38.9	5.5	0.0	0.0		
	14	10	2	0	0	26	27
Married too young	5.7	5.6	12.5	0.0	0.0		5.8
	51.9	37.0	7.4	0.0	0.0		
	11	8	0	1	0	20	20
Spouse left	4.5	4.5	0.0	8.3	0.0		4.3
	55.0	40.0	0.0	5.0	0.0		
	8	9	0	0	0	17	19

Lack of interest	3.3	5.1	0.0	0.0	0.0		4.1
	42.1	47.4	0.0	0.0	0.0		
	10	2	3	0	0	15	16
Lack of praise	4.1	1.1	18.8	0.0	0.0		3.4
	62.5	12.5	18.8	0.0	0.0		
	8	2	1	0	0	11	13
Alcohol**	3.3	1.1	6.3	0.0	0.0		2.8
	61.5	15.4	7.7	0.0	0.0		
	3	7	0	0	0	10	10
Financial problems	1.2	3.9	0.0	0.0	0.0		2.1
	30.0	70.0	0.0	0.0	0.0		
	4	4	2	0	0	10	10
Arguments	1.6	2.2	12.5	0.0	0.0		2.1
	40.0	40.0	20.0	0.0	0.0		
Percent distribution	246	178	16	12	3		
of grounds	52.4	38.0	3.4	2.6	.6		
	(N = 469)						

* The five categories of grounds account for 97.0% of all combinations of grounds used by the husband. Although causes such as imprisonment and homosexuality were given, their cell sizes were small and consequently they are not displayed. However since both are also grounds for divorce, it is important to note that 1) no husband stating imprisonment as a cause of marriage failure used it as grounds; 2) the one male petitioner stating homosexuality as a cause of marriage failure used it as grounds.

** Alcohol addiction was only cited 21 times as a ground for divorce by the husband or the wife, and in 19 of these divorces it was used in conjunction with other grounds.

The Changing Basis of the Play: Grounds for Divorce and their Correlates

Different groups of people have divergent styles of divorcing. We have already contended that different groups will make use of divorce law in variable fashion. Previously we discussed how legal role was affected by age, children and length of marriage. Now we will build on these findings and connect them to the grounds for divorce. We will determine how the particular grounds are linked to legal role, children, age or duration of marriage. We will see whether women distinctively prefer some grounds most typically, while men use others. Other questions will come under scrutiny: Do older 'divorcers' choose different grounds than younger ones? How do children enter the equation, or do they matter? What other factors could come into play? Do the figures bear out our contention that different groups use different grounds?

Different Scripts for Different Genders: Sex of Petitioner

It would appear that the bases of divorce vary with the sex of the players. In Table 6 it is apparent that women petitioners select grounds different from those habitually chosen by men. The principal category for both sexes is noncohabitation. However, it is more popular with men since they rely on it half the time while women petitioners rely on it just over a third (37%) of the time. Men also use adultery considerably more often than women: 36.6% as compared to 27.5%. However, in both cases, adultery is the second most-often pleaded ground.

As we have already noted, men rarely (5.4%) plead grounds of mental and/or physical cruelty. Rather mental and/or physical cruelty are 'female' grounds invoked by women petitioners far more frequently (19.0%) than men. This is further attested to by the fact that women use the fourth category for divorce (which contains cruelty) more often (10.9%) than men (7.1%).

Generally, men use adultery or noncohabitation (85.8%) and although women use these grounds as well, they make much more use of the remaining possibilities (35.8%). These differences may be due to fundamental differences between men and women or they may simply reflect that more grounds are easily used by women than men. We have already discussed this likelihood with reference to mental and physical cruelty. It also seems plausible that such grounds as imprisonment, rape, and alcohol or narcotics addiction are much more easily used by women even though in general, these grounds are not heavily relied on. Essentially adultery and noncohabitation seem the only two particularly effective choices available to men. In addition, these two grounds are the easiest to prove.

Since 1969, mental and/or physical cruelty have been increasingly used as grounds. In 1979, 16.1% of petitioners cited cruelty compared to only 9.0% in 1969. This increase may partly reflect an increasing familiarization with how cruelty has come to be defined. Prior to 1968, cruelty was much more

Table 6.

Grounds for divorce by petitioner, 1969-79 (percentages)

Grounds for divorce	Husband	Wife	Total
Mental and/or physical cruelty	5.4	19.0	14.3
Adultery only	36.6	27.5	30.6
Noncohabitation only[1]	49.2	36.7	41.0
Noncohabitation, adultery, mental cruelty, physical cruelty[2]	7.1	10.9	9.6
Others[3]	1.7	5.8	4.4
Total	100.0	99.9*	99.9*
	173,890	330,740	504,630

* Discrepancy due to rounding.

1. Includes separation, (by far the most important), desertion, and whereabouts of spouse unknown.
2. Includes any combination of these four, except mental and physical cruelty, which is contained in category one.
3. Includes other grounds such as sodomy, bestiality, rape, homosexual acts, addictions to alcohol or narcotics, imprisonment, as well as any not yet mentioned combinations.

rigorously defined in provincial family law (since intent of the respondent spouse was a paramount consideration), and it is therefore probable that lawyers were reticent to plead cruelty until some delimiters (which have come to emphasize the effect of the cruel conduct) were established. Perhaps courts are interpreting cruelty more loosely with time, making it a less risky venture. It is also possible that clients feel less stigma attached to cruelty than in the past and are consequently a little more amenable to pleading mental or physical cruelty.

Since 1972 the use of adultery has remained rather stable at around 30%; however, recently it has begun to rise, reaching 32.4% in 1979, up from 21.5% in 1969. Unlike cruelty, noncohabitation has declined in use over the 11-year span from 52.8% to 38.2%. The high figure in early years may represent those marriages that had broken down well before 1968, but whose members had no easy way short of collusion to dissolve them. With some yearly fluctuation, the other two categories of grounds have remained fairly stable, together accounting for approximately 14% of all grounds or combinations of grounds.

Provincially, some notable overall differences do appear. Looking at the figures for cruelty, New Brunswick and Ontario petitioners cite it in approximately 9% of all petitions while petitioning Albertans use it over one-quarter of the time (27.6%). In Alberta, we must remember that there is also a greater proportion of female petitioners. However, this factor does not likely account

for all of the wide difference between Ontario and Alberta rates. Alberta was the first province to advance a liberal interpretation of cruelty, and this may be reflected in the propensity for cruelty to be cited as a ground.

The Canadian 11-year average for the use of adultery is 30.6%, but it is alleged disproportionally less often in Newfoundland and Quebec (25.0% and 22.3%, respectively) and most often in British Columbia (39.4%). Perhaps not coincidently, Newfoundland and Quebec had to rely on parliamentary divorce prior to 1968. This may partly reflect a greater persistence of traditional family values. In Newfoundland at any rate, this appears to be compensated for by the reliance on noncohabitation (56.0%).

Noncohabitation is also used in a majority of cases by Manitoba petitioners (55.0%). As we might expect, given the other figures, Alberta petitioners use it less than a quarter of the time (21.5%). The other two categories of grounds (any combination of noncohabitation, adultery, physical cruelty and mental cruelty, excepting mental and physical cruelty; and other) are used to similar extents in most provinces. The obvious exception is Quebec, where petitioners allege these two categories for a total of 20.4%. Albertans also use the former category in about one-fifth of the cases.

More Differential Use of Grounds: The Combined Effects of Age and Sex of Petitioner

One of the most notable changes so far described was the shift in who petitioned, in relation to age (Table 1). In this case older petitioners tended to be male more often than younger ones. There was also a propensity for husbands to use different grounds than wives. The common denominator between these two findings again suggests that perhaps age and sex affect the selection of grounds. Indeed, Figure 11 shows a rather dramatic connection especially for the most heavily used grounds.

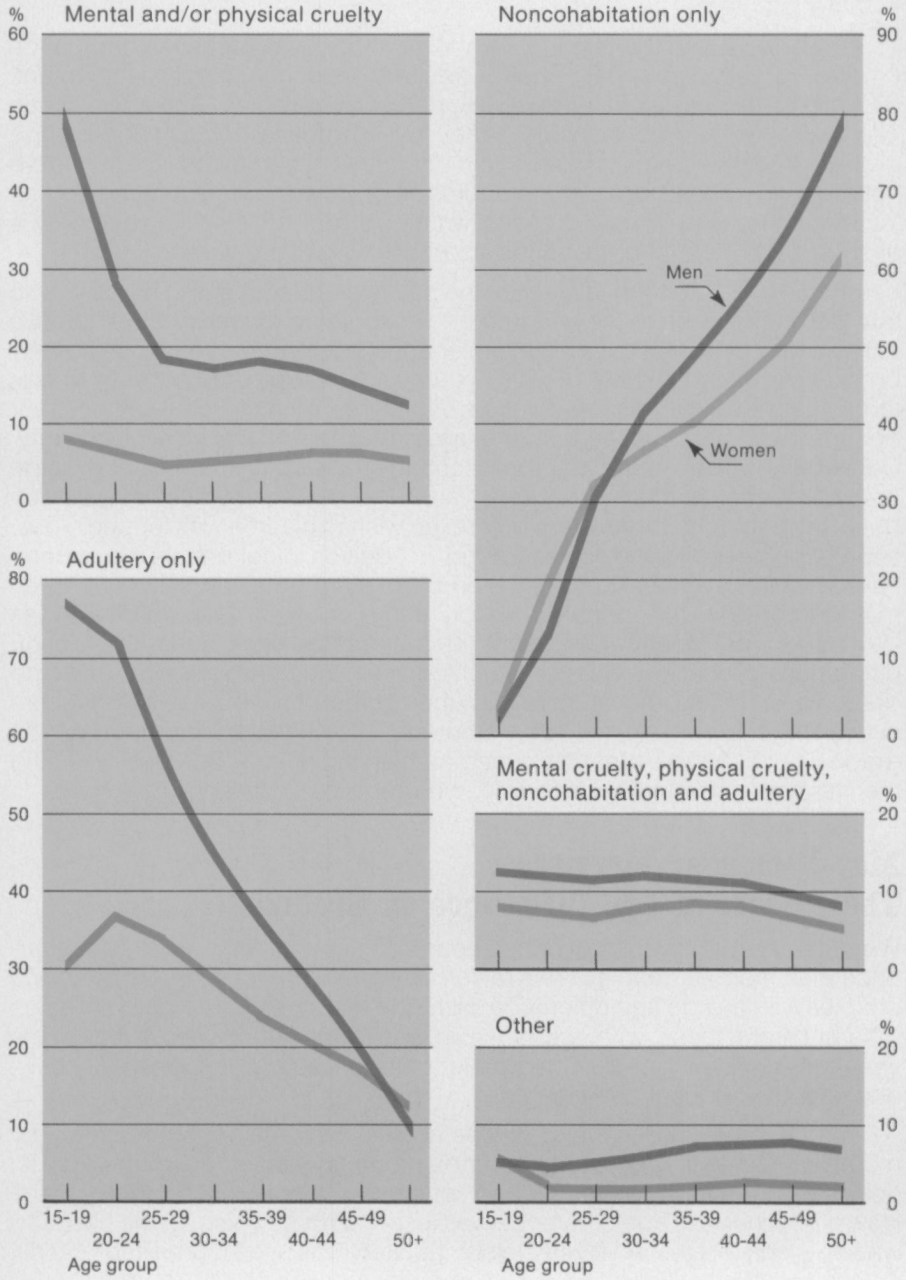
The use of adultery converges with increasing age between husbands and wives. The statistics also evidence a remarkable, uninterrupted decline with age in the frequency with which adultery is alleged, particularly on the part of husbands. Of male petitioners under 30, 60.3% cited adultery (alone) as grounds while those aged 45 years or over alleged it in 13.1% of their petitions. Wives under 30 make use of adultery about half as often as men (38.6%), but cite it approximately as often as men (13.3% *vs.* 13.1% respectively) in the oldest age category, 45 years and older.

On the contrary however, noncohabitation is used by both men and women with increasing age. The trends are clear and unmistakable, showing that the youngest men and women use noncohabitation the least often (26.2% and 28.1% respectively), increasing with age until nearly four-fifths of all men 45 and over use it (73.7%) and more than three-quarters of women (78.4%). Male-female differences diverge after age 30.

With respect to cruelty, husbands rely on it infrequently no matter what their age. Women at all ages use it more often than men. The differences are

Figure 11

Grounds for Divorce by Age Group and Sex of Petitioner, Canada, 1969-1979



most noticeable under age 30 when women cite physical or mental cruelty 22.9% of the time, compared to 4.9% for men. This figure drops for women aged 30 to 44 years to 17.4% and continues a much more gradual decrease until at age 45 or older, women cite it only 13.3%. As we have said, male usage is rather stable.

Stability is also the main feature of the other two categories of grounds ('mental cruelty, physical cruelty, adultery, noncohabitation' and 'other' grounds). They are used infrequently, particularly by men. Although women cite them more often than men, they by no means account for a large proportion of the cases. There is little change with age by either sex. As we noted, this is consistent both over time and provincially. Overall, men cite 'other' grounds in 1.7% of the cases; women 5.8%. The remaining category is alleged by 7.2% of the husbands and by 11.0% of the wives.

Earlier we noted that the sex of the petitioner changed with age and also that grounds varied by sex. Figure 11 would seem to indicate that the two complement one another. At the earlier ages, adultery is used most often by both sexes. We might infer from this that young couples do not wish to wait three years and use noncohabitation, or that they are not morally affronted or bothered by the possible social stigma attached to the idea of adultery. Conversely, at the older ages, noncohabitation commands centre stage probably because there is a greater likelihood that the couples have already been separated for three years before the wish to divorce was formed. Thus, separation becomes the easier ground. In addition, older people may indeed have a moral aversion to the citation of adultery. After all they have been married considerably longer, probably during a period when marriage was viewed as very nearly sacrosanct. This suggests once again that cohort differences probably exist and affect the selection of grounds just as aging does. To test these effects more fully, the figures would have to be observed over a longer period of time. For example, if cohort effects were important, the graph would change over time, whereas if 'aging' effects, perhaps reflecting the life cycle, were more important, the graph would change little.

May-December Marriages: The Effects of Age Difference on Grounds

We noted previously that divorcing couples have a slightly larger age difference than married couples. This raises an interesting question. Do divorcing couples with a large age difference utilize the grounds for divorce in a fashion different from those who are close in age? Our figures show that some variation is present for the three major categories of grounds (cruelty only, adultery only, noncohabitation only).

When either the husband or wife is older than the younger spouse by more than 10 years, cruelty is used disproportionately more often (20.2%) compared to 13.3% when the age difference was less than three years. However, when the age difference was less than three years, or the husband was between three and 10 years older, adultery was used more often (35.0%,

29.5% respectively) than when the wife was between three and 10 years older or when either was more than 10 years older than their spouse (about 20.1%).

Noncohabitation is still the most frequently cited ground, no matter what the age difference between the spouses may be. However, there is no clear pattern. It is most frequently used when the wife is between three and 10 years older (45.0%), and least often cited when there is less than three years difference (37.6%).

Why these findings exist as they do is a matter of conjecture. It appears not to make any difference whether it is the husband or wife who is 10 years older (or more) since the percentages are almost identical in each case; however, there are large discrepancies based on whether it is the husband or the wife who is between three and 10 years older. Furthermore, these differences tend to disappear as the age of the petitioning spouse increases.

Children and Grounds

Approximately 48% of the divorcing couples have dependent children. Many of these children are old enough to understand in some rudimentary way that their parents are breaking up. Therefore, one might suspect that in the minds of some parents, fault-laden grounds may be felt to have a harmful effect on

Table 7.

Grounds for divorce by number of children, 1969-79 (percentages)

Grounds	None	One	Two or three	Four or more	Total
Mental and/or physical cruelty	13.4	14.6	15.5	16.4	14.3
Adultery	28.3	31.5	34.7	27.8	30.6
Noncohabitation[1]	46.5	39.0	33.5	35.3	41.0
Noncohabitation, adultery, mental cruelty, physical cruelty[2]	7.8	10.7	11.6	12.7	9.6
Other[3]	4.0	4.3	4.7	7.9	4.4
Total	100.0	100.1*	100.0	100.1*	99.9*
	243,540	104,987	131,746	24,357	504,630

* Discrepancy due to rounding.

1. Includes separation (by far the most important), desertion, and whereabouts of spouse unknown.
2. Includes any combination of these four grounds, except mental and physical cruelty, which is contained in category one.
3. Includes other grounds such as sodomy, bestiality, rape, homosexual acts, addictions to alcohol or narcotics, imprisonment, as well as any not yet mentioned combinations.

the relationship between the respondent spouse and the children. However, in Table 7 the figures do not support this speculation, although they do show that noncohabitation is used more often when children are not present (46.5%). There is also a slight indication that other grounds are used more often, the more children there are.

In addition, the figures indicate that age of petitioner does not clarify the relationship between number of children and grounds chosen. Generally some patterns (or lack of patterns) across categories of number of children for the various grounds exist at all ages. The percentages do vary by age, but they closely mirror the pattern found between age and grounds. In sum, children do not affect the pleading of grounds in any meaningful manner, but they *can* profoundly affect the style of divorcing in other ways, and this subject will be treated subsequently.

Past Marital Experience and the Selection of Grounds

In most (92.1%) of our divorcing population the sundered marriage has been their first marital experience. However, a small minority are veterans of at least one past marital dissolution, either through the death of a partner (1.7%) or via the divorce courts (6.2%). In our description of the contestants in Chapter 3, we found that those with past marital experience had a subsequent marriage of disproportionately shorter duration. The figures in Table 8 suggest that petitioners with one or more previous marriages tend to select different grounds for divorce than their previously single counterparts. The statistics also indicate that it is not just past marital experience that is related to the type of ground a petitioner chooses, but the *nature* of that experience. Widowed petitioners differ from those who are divorced and in turn, both differ from those experiencing their first marital dissolution. Since we know that the use of grounds varies by sex from Table 6, sex of petitioner has been introduced in Table 8 as a control variable. Age is also related to grounds, but even when it was introduced separately as a control variable, differences by marital status still persisted.

If one recalls the figures in Table 6 (grounds pleaded by sex of petitioner), it becomes immediately apparent that the first panel of Table 8 (those with the prior marital status of single) shows little difference. This is not at all surprising since the overwhelming majority of petitioners, whether male or female, were marrying for the first time. However, there is noticeable deviation from this pattern if the petitioner was previously widowed or divorced.

Widowed male petitioners rely substantially on noncohabitation (68.2%), while using adultery markedly less often (11.2%) than their previously single and divorced counterparts (37.2% and 34.5% respectively). Nevertheless, they make more frequent use of cruelty (12.3%) than other male petitioners. Like widowed males, widowed females also use adultery less often (13.5%) than other female petitioners who were single (28.0%) or divorced (24.8%) at

Table 8.

Grounds for divorce by marital status at marriage of the petitioner, and by sex, 1969-79 (percentages)

Grounds for divorce	Not previously married petitioner		Widowed petitioner	
	Husband	Wife	Husband	Wife
Mental and/or physical cruelty only	5.1	18.1	12.3	27.1
Adultery only	37.2	28.0	11.2	13.5
Noncohabitation[1]	48.8	37.0	68.2	42.2
Adultery, mental cruelty, physical cruelty, non-cohabitation[2]	7.3	11.1	4.4	8.2
Other[3]	1.6	5.8	3.9	9.0
Total	100.0	100.0	100.0	100.1*
	162,069	304,387	3,082	6,547

	Divorced petitioner		Total of percent distribution
	Husband	Wife	
Mental and/or physical cruelty only	8.3	30.3	14.3
Adultery only	34.5	24.8	30.6
Noncohabitation[1]	50.1	30.5	41.0
Adultery, mental cruelty, physical cruelty, non-cohabitation[2]	5.0	9.4	9.6
Other[3]	2.1	5.0	4.4
Total	100.0	100.0	100.0
	8,739	19,806	504,630

* Discrepancy due to rounding.

1. Includes separation, (by far the most important), desertion, and whereabouts of spouse unknown.
2. Includes any combination of these four, except mental and physical cruelty, which is contained in category one.
3. Includes other grounds such as sodomy, bestiality, rape, homosexual acts, addictions to alcohol or narcotics, imprisonment, as well as any not yet mentioned combinations.

the time of their current marriage. On the other hand, they make disproportionately more frequent use of cruelty (27.1%) than previously single petitioners, but less use than those wives who were previously divorced (30.3%). Of all female petitioners, previously widowed wives use noncohabitation most often (42.2%) while previously divorced wives use it least often (30.5%).

Generally, previously divorced males make use of the grounds in a similar fashion to previously never-married males, while those previously widowed rely on noncohabitation to a great extent. Previously divorced females cite noncohabitation less than other female petitioners using cruelty in a fashion similar to those previously widowed female petitioners, but much more often than the majority groups who were previously never married. Overall, the pattern of the sex differences is what would be expected.

The description of these figures is fairly straightforward but the explanation is somewhat more difficult. The past events of personal histories have evidently shaped current behaviour, since the unique experiences associated with being either widowed or divorced have an effect. Widowed petitioners are doubtless older on average than single petitioners. This may explain the heavy use of noncohabitation. It is also concomitant with the low use of adultery. However, it does not seem consistent with the high percentage relying on cruelty. Perhaps the second spouse, by providing a basis for comparison (presumably with a satisfactory spouse in many instances) measures up so unfavourably that the petitioner spouse concludes that cruelty has occurred. On the other hand, in approximately half the cases, previously divorced spouses (especially females) use grounds that do not require a statutory time delay. This is suggestive of the importance of time; perhaps these petitioners using cruelty and adultery represent that small portion of the population which has a third marriage in the offing, and, by virtue of that fact, are truly practising that refined Occidental form of polygamy known as serial monogamy.

It may also be possible in part that age may help in further clarifying the observed differences in Table 8. It is important to note that previously widowed petitioners are much older than the others. Of these, 60.4% are aged 50 or older, compared to 19.5% for previously divorced and 10.6% for previously single petitioners. Beyond this the age factor adds little to our explanation. However, in order to keep the discussion in perspective, it is imperative to note once again that over 90% of petitioners were never previously married and the figures pertaining to this latter group are by far the most important.

Grounds for Divorce: A Summary

Although there are 15 individual grounds for divorce, most divorcing Canadians rely on only three: cruelty, adultery, or separation for not less than three years. (Separation is grouped with two other grounds – 'desertion' and

'whereabouts of spouse unknown' to form the category of 'noncohabitation'. However, separation is, by far, the largest component in this category.) The first two are fault-oriented and together account for 44.9% of all cases, while the latter (noncohabitation) places an emphasis on marriage failure, accounting for 41.0% of all cases.

These grounds are differentially invoked by men and women – men rely on noncohabitation and tend to ignore cruelty, while women use cruelty more often although their most often chosen category of grounds is also noncohabitation (separation). Similarly, for both sexes, age is associated with the disproportionate use of some grounds. Adultery is usually the prerogative of the young, especially male petitioners, while noncohabitation is in vogue for older petitioners, both male and female.

Cruelty is more popular as a ground when the age difference between the spouses is a minimum of 10 years, while adultery is alleged more often when the age spread is less than three years. The presence of children is not particularly associated with the differential use of grounds, although noncohabitation is used more frequently when children are not present. Lastly, a past marital record of either divorce or the death of a spouse is associated with the different use of grounds compared with those whose marital record showed 'single'. Widowers rely on noncohabitation, while widows and divorcées plead cruelty differentially more often than singles, whether male or female.

Countering the Petition: Filing an Answer

In general, the proclivity of respondent spouses to formally disagree with the petition for divorce is low. Nevertheless, it is an avenue that is pursued with vigour by a small minority, as typified by the respondent in our imaginary Case Two. The typology of legal roles presented and described earlier in the chapter also outlined various ways in which a respondent spouse could marshall his or her case, depending on circumstances. There are various methods by which a defendant spouse can take issue with a petition and once a war of legal paper starts it is often difficult to terminate.

Legal actions are governed by sets of rules which state who must be notified of the pleadings. These proceedings can become exceedingly complex and incredibly costly, especially when third parties take issue with alleged facts. It is also possible under some circumstances in some jurisdictions that children can become involved in the proceedings and be represented independently by their own lawyers. (See Chapter 7 for a further treatment of this issue.)

It is quite obvious that in many cases a divorce is contested simply because the hurt, anger, antipathies, or desire for vengeance of one or both parties preclude a rational, calm approach. Rather, the spouses are bent on

making sure that the other spouse 'is going to pay' or is 'not going to win'. It is not that they themselves will win in some absolute sense, but that they don't want their spouses to get off as easily as it appears they might. Although the psychological reasons for this are beyond the boundaries of our present discussion, it is simply good sense to acknowledge that they do exist.

Differential Counter-Attack According to Gender and Alleged Grounds

Fault-based grounds are alleged via an adversarial legal process. Given the accusatory nature of these grounds, it would not be surprising to expect that some respondents would contest the divorce simply on the basis of the grounds chosen by their petitioning spouses. If this were so, we would expect that respondents would differentially file answers depending on the grounds. Since noncohabitation is not fault-oriented, this line of logic would predict that respondents would file an answer least often when this is the category of ground cited. Similarly, we would expect to find a higher level of response when cruelty is used since a respondent may not want to let this pass unanswered given the harsh image conjured by the idea of cruelty. Further, he or she may desire an opportunity to place a different construction or interpretation on the 'evidence' and require the petitioner to 'strictly prove' the original grounds. Grounds of adultery, on the other hand, might be less likely to incite a denial since in certain circles adultery is regarded as a quick 'out' and is quite devoid of stigma.

In any event, people will generally use the easiest and fastest grounds available, since there is often no tangible gain involved in making the procedure more difficult than it already is. However, there are bound to be petitioners who transfer their emotionalism and personal difficulty with the divorce to the legal arena by choosing grounds that are more provocative than other possible grounds. In so doing, they impose time and cost penalties on spouses who may be eager for a divorce. At the same time lawyers acting as screening agents for the court attempt to convince most people of the rationality of using the most straightforward grounds.

The second legal factor related to filing a response has to do with the sex of petitioner, or more appropriately in this instance the sex of respondent. Respondents usually 'answer' a petition for reasons connected to grounds, children or money. We have already discussed the issue of grounds. As far as the children are concerned, since women usually have them, it is most often up to the father to file a response if custody is at issue. Financial considerations are more difficult to explain since males as respondents could claim that their spouses want too much money or conversely, respondent females could claim that they are not getting enough. Given that two of these three factors suggest that males would file responses more often than their wives, we expect overall that males will file responses more frequently.

In Table 9, these two factors (grounds and sex of petitioner) are combined. The neutral grounds included in the category 'noncohabitation' were

least often associated with the filing of a response by either sex – 11.7% of female respondents who answered a petition cited these grounds, and 5.8% of men. Petitions citing cruelty were answered most often by both women and

Table 9.

Percentage of spouses filing an answer*, by grounds for divorce, 1969-79 (percentages)

Answer	Mental and/or physical cruelty	Adultery	Non-cohabitation[1]
Percent filed by wife (as respondent)	39.2	14.4	11.7
Percent filed by husband (as respondent)	21.6	12.4	5.8
Total percent filed	23.8	13.2	8.2

Answer	Mental cruelty, physical cruelty, noncohabitation, adultery[2]	Other[3]	Total
Percent filed by wife (as respondent)	23.8	25.6	15.7 (21,603)
Percent filed by husband (as respondent)	17.0	15.5	12.1 (31,158)
Total percent filed	18.8	16.5	13.4 (52,761)

* The level of missing data on this variable is high (19.0%), and results must be regarded with some caution.

1. Includes separation, (by far the most important), desertion, and whereabouts of spouse unknown.
2. Includes any combination of these four grounds, except mental and physical cruelty, which is contained in category one.
3. Includes other grounds such as sodomy, bestiality, rape, homosexual acts, addictions to alcohol or narcotics, imprisonment, as well as any not yet mentioned combinations.

men – 39.2% and 21.6%, respectively. The remaining three categories fall in the middle, with adultery not much higher than noncohabitation, especially for female respondents.

Although grounds contained in the 'other' category may be avoided because of their attached stigma, it is also a fact that they require stronger evidence. Cruelty, however, is a ground that is more a matter of judgment and therefore the one with the highest probability of judicial uncertainty.

Overall, answers are filed in only 15.7% of the divorce actions where the wife responds and 12.1% where the husband responds. This is significant in that it further exemplifies our assertion that our adversarial divorce law does not match the social realities of most divorcing individuals. Instead, most spouses have negotiated their positions and have worked out mutually satisfactory arrangements before they see their lawyers or with the help of lawyers. What is essentially akin to plea-bargaining as we know it in the criminal context is carried out relatively informally with the resultant understanding that there will be 'no fuss' once the petition is filed.

Do Parents Fight Petitions More Often than their Childless Counterparts?

It is inevitable that the filing of a response will occur relatively more often when there are children than when there are none. In addition, although the number of children is related to answering or not answering a petition, their actual presence or absence is even more important (see Table 10).

The figures in Table 10 show that where there are no children present, a response is filed by only 9.5% of the defendants. However, the proportion of

Table 10.

Answer filed/not filed*, by number of dependent children, 1969-79 (percentages)

Answer	Number of dependent children				Total
	None	One	Two or three	Four or more	
Filed	9.5	14.4	16.9	16.7	12.9 (52,761)
Not filed	90.5	85.6	83.1	83.3	87.1 (355,796)
Total	100.0 188,460	100.0 89,271	100.0 110,370	100.0 20,456	100.0 (408,557)

* Because the level of missing data on this variable is high, the results must be regarded with some caution.

answers increases the more children there are – from 14.4% with one child to 16.7% with four or more. Overall, when there are children (regardless of their number) answers are filed in 15.8% of the cases. This would suggest that the custody of children could be an undecided issue in a significant number of cases which reach court.

This pattern continues in relation to the grounds used. Table 11 shows that with cruelty as grounds, and no children present, responses are filed in 20.4% of the cases. This figure rises to 27.6% when there are four or more dependent children present. A similar pattern is present across virtually all the categories of grounds. The larger changes are observed among categories of grounds rather than according to the number of children, suggesting that the choice of grounds is a relatively more important factor. Indeed, cruelty is still answered most often and noncohabitation least often (See Table 11).

Table 11.

Percentage of petitions with answers filed by grounds for divorce and number of children, 1969-79 (percentages)

Number	Cruelty	Adultery	Non-cohabitation
None	20.4	9.2	6.3
One	23.7	14.4	9.9
Two or more	27.6	17.2	10.9
Four or more	27.6	17.8	9.6
Total	23.8	13.2	8.2

Number	Noncohabitation, adultery, mental cruelty, physical cruelty	Other	Total
None	15.7	14.2	9.5 (17,878)
One	19.1	17.2	14.5 (12,816)
Two or three	21.1	18.7	16.9 (18,643)
Four or more	22.4	17.4	16.7 (3,424)
Total	18.8	15.5	12.9 (52,761)

Age and Contestation

Of all the factors discussed so far in this chapter, age (of petitioner) has probably been the one most strongly associated with dramatic effects.

There are many reasons why older respondents will file more often than their younger counterparts. In the first place, it is probable that they have more at stake and thus the potential to lose a good deal, especially in economic terms, when divorce occurs. Respondents at older ages are more often women (they are also more likely to file an answer) who are also typically the relatively less well-off spouse upon divorce. Secondly, there are likely to be more dependent children (at least up to a certain point in the age curve) and their custody is sometimes at issue in divorce since the more children the greater the potential for disagreement. Table 12 shows the basic relationship between age and the percentage of respondents filing an answer ('all grounds combined' category) as well as the more complex relationship among age, grounds pleaded and percentage of cases in which an answer is filed.

Although the relationship between age and filing a response is not a particularly strong one, with a maximum difference of only 5.5% among age categories, it is fairly consistent. Increasing proportions of respondents file with increasing age from a low of 10.3% for those under 25 to a maximum of 15.8% at age 45-49. There is then a slight decline to 13.3% for those respondents age 50 or older, perhaps reflecting the absence of dependent children for this group. A more noticeable shift occurs, though, when the factor of legal ground is introduced to the analysis.

Although cruelty is most employed as a ground at the younger ages, it is most often contested at the older ages (35.0% for those between 45-49). This steady increase with age extends itself, with only a minor exception, for all five categories of grounds, but is least noticeable when noncohabitation is the category of grounds on which the petition rests. There is only a change of 3.8 percentage points from the youngest group of respondents to the oldest group. In this context it is necessary to recollect that noncohabitation is the most frequently cited category of grounds for divorce, and that the larger variation occurs in categories that are less frequently invoked.

To sum up the analysis on the filing of an answer, a brief description of trends over time is in order. Since 1969 the percentage of cases in which there was a response filed has increased, although there have been yearly fluctuations.

The most evident change has been in the latter several years of the 1970s and perhaps reflects increasing dissatisfaction with conventional patterns of settlement.

Respondents who file an answer are statistically atypical. In overall terms (disregarding the effect of missing data from other variables) in only 14.0% of cases will a response be filed and undoubtedly fewer will be maintained through the trial stage. Some lawyers estimate that fewer than 5% actually contest in court. Of those that do, a somewhat higher proportion are female,

Table 12.

Percentage of cases where a response was filed, 1969-79

Year	Percentage	Year	Percentage	Year	Percentage
1969	8.8	1973	11.5	1977	15.5
1970	11.5	1974	9.8	1978	14.7
1971	12.3	1975	11.7	1979	15.1
1972	10.8	1976	15.0		

have children, are older, or are fighting a petition that alleges some form of cruelty. Of all these factors, it appears that the greatest variation exists with respect to grounds. Interpretation or explanation of these factors is hampered by the lack of information about the motive for filing. We must emphasize again the undeniable presence of psychological or idiosyncratic factors. For some, divorcing style means contestation – whether it be for its own sake, out of spite, anger or hurt or a calculated means to increase bargaining power, economic necessity, or parental attachment.

The Legal Profession

Up to this point, we have discussed divorcing couples largely as though they were proceeding unaccompanied through a sequence of legal moves. However, most people do not initiate these proceedings on their own. Rather, they will engage legal counsel to translate their wish to divorce into acceptable legal terminology and thereafter to shepherd them and the necessary documents through the formalized legal steps. It is therefore left up to their legal counsel to impose technical expertise, formality and orderliness on the problem.

Thus, it is a fact that "the private attorney is an absolutely central figure in the operation of the civil justice process" (Shover, 1973:256) and "consequently the effects of matrimonial laws on those who would legally end their marriages depend partly on their lawyers' definition of the problem" (O'Gorman, 1963:5-6).

On the Blishen prestige scale of socio-economic status, the practice of law ranks seventh out of 320 Canadian occupations, behind chemical engineers, dentists, professors, medical doctors, geologists and mining engineers (1971:449). This strongly suggests that Canadians attribute high social status to lawyers, and the resultant faith they have placed in the legal profession clearly has consequences for the nature of the practice of law. The high status lawyers enjoy is not entirely a tribute freely given, though. The increasingly contractual basis of many social situations in our society today places citizens in a position of heavy dependency on lawyers to provide protection from the disadvantages of legal ignorance.

As a professional group, lawyers have a great deal of collective control over the conduct of their work and that of their colleagues. Their professional bodies set out the educational requirements for their members, thereby screening prospective entrants to the field, establish fee schedules, provide codes of ethics, discipline members, foster professionalism, and act as a unified force to voice the views of members on various public issues. Since lawyers have a near monopoly over the practice of law, theirs is the preserve of a nearly exclusive knowledge of the intricacies of the field.

It is not an easy matter to select a lawyer for divorce. Historically, the legal profession has not permitted its members to advertise their services or fees. Thus, someone choosing a lawyer may operate on the recommendations of friends or acquaintances, or by referral from another lawyer, or by simple random choice. Nor is the risk over at the initial stage of choice, since the competence of the lawyer has yet to be tried and tested. In many cases, clients do not feel themselves sufficiently informed about the profession to presume to judge the competence of their chosen counsel. Thus, the operative factors in the choice of lawyer are risk, faith, and word of mouth. In addition, the *caveat emptor* usually in effect for the purchase of other services cannot apply here since it is difficult and costly to 'shop around'.

We have already shown that the vast majority of divorce cases are uncontested and consequently fairly routine. A client consults with a lawyer and discusses problem areas. The lawyer then decides on a course of action that is vetted by the client. In the prescribed manner, the lawyer files the petition, formally notifies the other interested parties, perhaps consults with the respondent's lawyer, has a trial date set, and then handles the case in court.

Since many divorce cases are conventional and routine, lawyers can rely on their clerks and secretaries to process much of the work. In *Lawyers on Their Own*, Carlin quotes one lawyer who does little reading of legal material or preparation of documents:

> I have a sharp girl – I have dictation down to minutes – ten minutes to dictate a petition. It's mostly pleadings and drafting decrees. The girl handles the form work (1962:94).

Of course, a client pays for the services rendered by the lawyer and his staff. An average uncontested divorce costs between $600 and $1,000, and is on the rise at least as fast as inflation; a contested one many thousands. If one considers the number of divorces resolved in a year, it becomes readily apparent that the effective demand for legal work in divorce can be measured in the scores of millions of dollars, an enterprise of such financial and social scope that it begins to bear a striking familiarity to the ecclesiastical panjandrum of church courts in the middle ages. In fact, in pre-modern England, divorce through the ecclesiastical courts was a remedy only for the rich, since

> before an ordinary man would have been halfway through his case, his annual salary would have been consumed – not leaving him a penny for bread or ale. – But who could have earned anything during the long

> period of appearance before the ecclesiastical court? (Walker, 1971:273)

Although the cost of a divorce has lowered with time, it is still expensive. H.W. Silverman, a lawyer himself, expounds on this state of affairs with respect to family law when he states that the present system is

> not conducive to the rational and effective settlement of matrimonial disputes; and since it does provide lawyers with fees which are often lucrative, especially when one considers the amount and complexity of the work done (e.g., in the garden-variety uncontested divorce, fees are out of all proportion to the work done, hence is it any wonder that do-it-yourself divorce kits are being sold to the public), opposition by lawyers (if such does exist) to changes in the matrimonial legal field should be viewed with some diffidence as lawyers do have a vested interest in the continuation of the present system (1977:169-170).

Obviously like their clients, lawyers want to win. In some circumstances, especially where the grounds are not straightforward and require a lot of evidence, the odds of winning can be enhanced by giving the client one or more dress rehearsals. Once again Fleishman emphasizes the importance of the perfect orchestration. His comments also help illuminate not only the importance of the judge, but also the workings of the system in more general terms.

> My mouse-like client has a clear-cut case – but if she cannot present it clearly in court, she will be tossed out on her mouse-like rear. . . She must tell her story in court audibly and plausibly. . .
>
> The calendars of the courts, like the mills of God, grind exceedingly slow, but eventually the trial date approaches. On the day preceding it, I summon my client to the office. I try to explain to her that women are invariably at a disadvantage in a court room, which is an institution devised by men for men in a world where men usually have their way. . . but. . . that's the way it is . . .
>
> The judge is the man you must concentrate on. He is the one person who has to hear your problem, . . . and he is the one person who can do anything about it.
>
> I keep at it for a full hour. Question after question . . . but her answers grow quieter, and they grow shorter. It is the worst rehearsal I have ever gone through. I draw some consolation from an old saying: the worse the dress rehearsal, the better the opening performance (1973:133-135).
>
> (By way of ending, this woman did receive her divorce.)

So generally, lawyers are engaged to assist clients, not only in the legal requirements but in the performance of the playlet itself. It is not hard to imagine why some coaching is necessary. The divorce court (a high court) is a foreign stage. Its approach is a formal one. The judge conducts proceedings while robed and sometimes so do the lawyers and some of the court personnel. Even court furnishings, with the raised bench as the physical as

well as symbolic focal point, are designed to elicit respect.[12] The divorce court is also a public place and, by virtue of that fact, 'outsiders' have the right to observe cases. Indeed, the parties do often 'air their dirty linen' in *fact*, as well as in theory.

In observing one particular contested divorce proceeding in the course of our research, it was evident that our presence in court had an obvious unsettling influence on the female spouse. One court official and one lawyer also queried our personal interest in the case. (Presumably, our presence would have been inappropriate had we been witnesses in the case.) They concluded that we were law students and went ahead but their reaction seemed to indicate that in this court at least, observers were not usually present.

In the end, the creation of tension that led to the courtroom drama is enhanced by the legal complexity and the adversarial structure the law has imposed. Even in the case of routine and straightforward divorce cases, the process still calls for a lawyer and for a script and finally for a courtroom drama. Presumably, simpler laws would lessen the need for such legal accompaniment, assuming that there were no attendant complications. Certainly up until now, much of the responsibility for the staging of these events has fallen directly to the legal profession. As we mentioned in the introduction to this chapter, the undisputable fact of divorce is that it must be subject to the due process of the law, regardless of its origin or cause.

12. This is in direct contrast to current Australian proceedings, where the Family Law Act, 1975, specifically states that "proceedings shall be held in closed courts, neither judge nor counsel shall robe (and) that the court shall proceed without undue formality . . ." (Bates, 1976:42).

PUBLIC ANNOUNCEMENT:

John and Jane Smith
announce
an amicable divorce

Their friends and relatives are asked not to take sides and to please keep in touch with both.

For the time being they are both still at home:

1234 14th Street,
Western City,
Prairie Province, Canada

PUBLIC ANNOUNCEMENT:

"My wife, Julia Lombardo, left my bed and board ten months ago. I will not be responsible for any bills in my name contracted by her."

Henry R. Lombardo
R.R. #3 Kentville
(Kentville Advertiser, Apr. 3, 1973)

PUBLIC REPLY:

"In answer to last week's notice I, Julia Lombardo, did not leave my husband's bed and board, I was kicked out. I own the bed and I've fed myself as he has never worked during the last five years since I married him."

(Kentville Advertiser, May 3, 1973)

Chapter 6

The Outcome

Chapter 6
The Outcome

Hahlo has written that "a decree of divorce does not kill a marriage but certifies that it is dead" (1975:64). If one could lay to rest the notion that divorce is a process which kills marital relationships, then an important step will have been taken in the understanding not only of divorce itself in its task of social bookkeeping, but also of the current status of mating in this society. After all, death is a state from which recovery is impossible, though the exact point at which it occurs is often not ascertainable, nor particularly relevant. It is a state that follows the process of dying, and by direct analogy, divorce is also a state or event which culminates the legal and social processes of uncoupling. Just as death carries the sole connotation that something has ceased (it signals the absence of a valued state or process), so too does divorce (being insignificant in and of itself) signal the end of a marital bond. Yet it in no way *causes* the end of that bond.

In most cases, divorce is a routine event that formally and legally signifies the right of the parties to remarry, even though as we have stated before, remarriage itself is but a small incremental step in the lives of new and ongoing relationships. It is as if the legal paperwork is always one step behind and one step to the side of a vital social process. Little wonder that the public reacts with a somewhat disrespectful bemusement toward the legal institutions themselves. Many of those who favour divorce law reform believe that the current type of proceeding (adversarial) "can only bring discredit to the legal system as a whole" (Veitch, 1980:184) and only if most proscriptive elements of family law were removed, and social accounting became the residual role, would this gap be significantly narrowed.

Up to this point, our efforts have been concentrated on the description and ordering of the interrelated legal and social factors that bear upon divorce. We have also looked at the considerable discrepancy between the legal grounds chosen for divorce petitions and the 'corresponding' social accounts of marriage breakdown. The evidence is persuasive that many of the grounds require spurious allegations of marital wrong-doing and attribution of guilt purely and exclusively to satisfy legal requirements and that the

adversary system abets the formation of overtly hostile and truculent behaviour, given an inclination on behalf of a party to so act. Most importantly, we can see that the legal grounds fail to capture the reality of marriage breakdown in any meaningful way, since to a large extent the Divorce Act has been shaped as a tool of social engineering.

The complexity of the divorce process would suggest on its face that the outcomes of trials are not necessarily predictable. Nevertheless, the facts have led Hahlo (1975) (among others) to the conclusion that couples, regardless of the extent of their dissimulation, *will* receive a divorce as a matter of course (though it must be noted that some delay in acquiring grounds may occur). Our figures support this contention almost without fail; 92.8% of all petitions result in a decree, while only 0.8% are dismissed and only 6.4% are discontinued, most often at the instigation of the petitioner. For those persons who do file for divorce, the end result is thus practically guaranteed from the start, so far as judicial decision-making is concerned. We suggest that this is so because judges are most often presented with a *fait accompli.* The sole remaining element of drama for such persons would lie in the (small) likelihood that something might just go amiss (where the judge, for instance, might decide to alter the offered terms, an alteration which in the general context could be seen to be unusual and burdensome to one or both parties). In fact it is the lawyers who formulate a package and who largely determine the course of events and the timing of its presentation. In so doing, the legal profession collectively assumes a regulatory role in the terminal aspects of marital life, even though, in the words of Veitch, "it is still true to say that a great many lawyers and judges have little knowledge and scarce appreciation or feel for this area of law (family)" (1980:177). Nevertheless, satisfying the terms of the Act can not only be problematic, but can result in continued legal bondage of couples for whom there is no longer any marital reality. Veitch points out several examples of this in his survey of the work of the courts and summarizes by saying that his survey shows "the oftentimes mechanical responses of the judges to interpretive problems posed by the restrictive legislation even though the legislation contains no-fault provisions" (1980:182).

Stops Along the Way

Once a decree is granted, there ensues a 90-day appeal period. Hence one receives a *decree nisi* or conditional decree at the time of trial unless the judge can be convinced that practical necessities are so pressing (such as where a child is expected) that the waiting period can be dispensed with. Barring an appeal, or the showing of other circumstances which would prevent further activity, this decree is then routinely converted to a *decree absolute* upon the application of the petitioner or his lawyer. With the *decree absolute*, the sundering of the marital relationship is recognized with formality and finality.

Where there is a discontinuation of petition it is usually because the petitioner ends the proceedings for personal reasons, or because the respondent spouse dies. However, in those few instances where a petition has been

filed for a period of time with no evident action taken, it may be discontinued by the court. This is only done after counsel for the petitioner has been contacted and has assured the judge that he or she has no interest in actively maintaining the petition. Precisely how often this happens is not known, but overall it is certainly a rarity in Canadian divorce courts.

The situation is further complicated by the fact that in these circumstances a judge may dismiss a petition instead of discontinuing it. Depending on a judge's preference, a 'dormant' petition may either be dismissed or discontinued, and therefore these two types of termination cannot be analytically distinguished nor accurately measured. Usually, though, a petition is dismissed by a judge because in his or her opinion, the necessary requirements of the Act have not been satisfied during the course of the trial. Dismissals are seldom related to cause since under such circumstances it would amount to a denial of the petition and for most practical purposes would mean starting the process all over again. Divorce actions are occasionally found to be collusive, a finding which constitutes an absolute bar to divorce.[1] While in reality many divorces entail 'arrangements', few are denied for this reason. The chances of dismissal are not only very small – about one in every 125, or 0.8% – but the judge may even adjourn the proceedings to enable the petitioner and counsel the opportunity to rectify certain flaws of logic or evidence. Yet generally, the assumption seems to be that if lawyers permitted the case to reach trial, the couple are legitimate candidates for a decree.

These findings suggest that although the appearance of adversarial proceedings must be maintained, terms having been agreed upon in advance, the charade rarely serves any meaningful function. Couples are put through the paces (often psychologically traumatic for them since they may or may not be aware of what is happening), in some cases to satisfy the known proclivities of a particular judge. Indeed, as Bradbrook has noted, some members of the bench are not overly thorough or critical, while others see themselves as more active participants in a process that simply legitimates an earlier, virtually irreversible decision (1971). Obviously, this perception must be modified in the event the divorce is contested. In these circumstances, the stakes are raised and consequently allegations and evidence must be treated with greater care.

Although the proportion of cases that do not result in a decree is very small (6.5%), we will take note of those factors which are associated with a greater probability of discontinuance or dismissal. Of our five categories of grounds, cruelty and 'others' are associated more often with discontinued petitions (12.2% and 11.8%, respectively) and dismissals (1.6% and 1.0%, respectively), while noncohabitation has disproportionately lower levels of discontinuance (2.8%) and dismissal (0.3%). Put another way, 86.2% of

1. Collusion was defined in Section 2(c) of the 1968 Divorce Act as follows: "an agreement or conspiracy to which a petitioner is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court. . . . In addition, condonation and connivance are discretionary bars to divorce with respect to Section 3 (matrimonial offences) of the Act."

petitions using cruelty receive a decree, while 96.8% using a form of noncohabitation receive their decrees.

Secondly, petitions are most often discontinued within the first six months (39.8%), or else after two years (25.2%). Dismissals also happen disproportionately early (35.7%) or late (17.8%) compared to those that result in a *decree absolute* – 25.8% within the first six months and 4.3% after two years. Fifty percent of all divorces are granted between six months and one year.

Thirdly, there is generally little variation by province or court regarding the final disposition of a petition, although provincially there are higher levels of discontinuance in Newfoundland (12.7%), Alberta (10.0%) and the Northwest Territories (9.2%). Dismissals are somewhat higher than the national average in New Brunswick (1.2%) and Manitoba (1.5%). When we examined figures for the courts in the large cities, there were few differences and since some provinces have only one court (Newfoundland, Yukon, Northwest Territories, Nova Scotia and New Brunswick), the results are of course the same as the provincial figures.

Fourthly, if an answer was filed, 1.3% of the petitions were dismissed, compared with 0.2% if there was no answer.[2] Slightly more are discontinued (2.8%, compared to 2.0% when there was no answer filed by the respondent). These differences are miniscule, especially in the context of the overall picture.

Fifth, age of the petitioner is not related to the final disposition, and sixth, the percentage of discontinued petitions is higher (11.7%) when no children are involved. Similarly, the rate of dismissal is 1.3% when there are no children. Nonetheless, virtually all petitions in which dependent children are involved receive a *decree absolute* (99.6%).

Lastly, over the years, the percentage of petitions that are discontinued has risen slowly but steadily from 3.1% in 1969 to 9.5% in 1976, with a slight drop to 7.6% in 1978. The rate of dismissal, however, has fluctuated even more modestly over the nine-year span.

There is generally an extremely low level of variability attached to the rates of discontinuance and dismissal. When we consider only the dismissals (as generally court-instigated) in terms of the decrees (also court-ordered), it is a foregone conclusion that virtually everyone who initiates a petition receives a decree.

In Chapters Four and Five, our tables and discussion included, with no distinctions, those cases that eventually were terminated via a dismissal or discontinuance. However, given the statistical evidence presented thus far in Chapter Six, we are confident that our previous figures do not require alterations of any consequence. We will go on to discuss the remaining findings only in conjunction with those petitions that result in a *decree absolute*.

2. These figures differ from previous ones because of the high level of missing data, as noted earlier. Therefore, results should be regarded with caution.

Divorce: The Death Analogy

The sundering of the marriage partnership involves various phases, analogous to courting and marriage. During courtship there is a gradual unification of the interests of two persons and there is a process of redefinition of self that intimately involves one another. These altered perceptions are often socially announced through the mechanism of formal engagement that declares the intentions of the couple to marry. Today, this phase assumes less significance than it did in the past when it was viewed as a verbal contract that could result in legal compensation (usually to the fiancée) by proving breach of promise should the intent to marry be unilaterally terminated. Today this phase entails preparations for the start of the next phase – legal marriage. Interestingly, religious marriage ceremonies are not as straightforward in some religious faiths as they were in the recent past. Certain churches now have policies that require attendance at seminars geared to fostering more successful marriages. Part of the justification for these courses is the rapid increase in the divorce rate, along with the new-found sense of responsibility (genuine, if somewhat naïve) for their role as gate-keepers.

The marriage ceremony, whether it be civil or religious, signals the commencement of a phase that at its beginning is typically felt to be a permanent social as well as legal union. However, despite all the good intentions and favourable predictions regarding marital success, many individuals do conclude at some later point that 'things are not working out'. So begins, perhaps very subtly or unconsciously, the counterpart phase in reverse, the informal disentanglement (usually initiated by one party) of the social and psychological common denominators.

As we inferred in the introductory comments of this chapter, this process bears an unsurprising kinship to a death. Kuhbler-Ross (1969) has described the stages of dying and broken them into five distinct moments: denial, anger, bargaining, depression and acceptance. These stages are perhaps more appropriate for the spouse who is *not* the first to consider the separation and he or she may feel that the marriage is satisfactory, that what is happening cannot be true. This denial may often be followed by anger – "why me; what did I do to deserve this?" Next may come attempts to bargain in the form of promises. "If you stay, I'll be the perfect spouse". This may or may not work. If it does not, depression may set in. However, ultimately everyone will come to the final phase: acceptance that the marriage is over. Some spouses may pass through all of these stages; others may not. The length of time for each phase, as well as their ordering, could also be highly variable. How these social-psychological developments parallel the legal ones is not clear, but our typology in Chapter Five does suggest that most people have probably accepted divorce as inevitable.

Informal disentanglement becomes a more concrete fact once a petition for divorce has been filed[3], since the intention is now public and confirmed as

3. Of course, many broken marriages never reach this stage since couples are under no obligation to legally end their marriages. They can rather desert or separate.

serious. Finally, in the same way that a marriage ceremony symbolizes the legal genesis of a union, a divorce trial with its subsequent *decree absolute* symbolizes the legal sundering of that same union and returns the individuals to their single status with modified social relationships.

As one can well imagine, the time elements associated with the various styles of coupling and uncoupling produce highly variable combinations. At one extreme, there are 'whirlwind' courtships precipitating short marriages and equally brief divorce proceedings; at the other there are long marriages that have evolved out of protracted courtships and engagements and resulted, after a slow 'drifting apart', in elongated divorce proceedings.

The Time Factor

The social and psychological aspects of becoming coupled, being coupled, and uncoupling demand a consideration of the time factors for each. Since our main interest lies in understanding the institutionalized legal process, we will concern ourselves primarily with the various time frames involved once the petition for divorce has been filed.

Perhaps as discomfitting as the legal proceedings themselves is the way in which they are protracted. Some legal professionals decry the length of time required in some jurisdictions to process a divorce case. Implicit in their statements is the philosophy that justice delayed is justice denied. A lengthy duration of proceedings is all the more onerous given its predictable outcome (and doubly onerous given that 'time is money'). The proceedings are often nothing more than contrived theatre virtually always successfully directed and shaped toward one purpose: maintaining the appearance of propriety, authority, and above all, social order. Quite often, the grounds for divorce are only instrumental and the majority of couples have already agreed on the desirability of a divorce. Since the outcome of these cases is virtually guaranteed, it would appear that the time period required to process a divorce is far longer than necessary, and can thus only be seen as some form of perverse if unintended punishment, the object of which is unclear.

Assuming an adversary system, all of the above factors must be offset by another cornerstone of Canadian legal philosophy – due process. Here we must consider the rights of the respondent spouse and the special procedures regarding dependent children that must be incorporated into the divorce process. Obviously, these procedures involve time. Respondent spouses must be personally served with the notice of petition and other documents unless otherwise ordered by the court. This service must occur within 90 days of filing the petition. Of course, substituted service is allowed for those petitions alleging disappearance of the respondent. Substituted service is also allowed when *bona fide* attempts at service have failed or the respondent has been evasive. In these instances, a newspaper notice will generally suffice. Similar 'time' rules are in effect regarding any answers made by defendant spouses.

In some provinces (for example, Ontario), the presence of dependent children requires that an official agency (in Ontario this agency is the Office of the Official Guardian) peruse the petition for divorce and make a report on the welfare of these children. In Ontario, the bases of these reports are the questionnaires filled out independently by the parents. Once again there is a time period involved. The agency is served after the respondent and then has 90 days in which to make its report. This time period could be extended if the parents are tardy in filling out the questionnaires or if the agency encounters other problems in the course of making the report. Some parents never do fill in these questionnaires, apparently to no ill effect.

The obvious effect of all these regulations is to lengthen the duration of proceedings. Most of these regulations are arguably necessary, although Kronby in his *Divorce Practice Manual* comments with reference to Ontario that

> there is no provision in the Rules authorizing an order to dispense with service of documents on the Official Guardian although such a provision would be desirable, especially for proceedings under Section 4(1)(c) of the Act (p. 52).

Some Ontario lawyers express very negative opinions about the necessity for a report from the Official Guardian, claiming that in the vast majority of divorce cases it serves no useful purpose. However, others might argue that the time delay is a small price to pay if the procedures help safeguard or improve the welfare of even a small minority of children. In any event, the due process must be balanced against the problem of delayed justice. On top of this, one must also consider court delay as one measure of the efficiency of the court system to provide divorces.

Table 1.

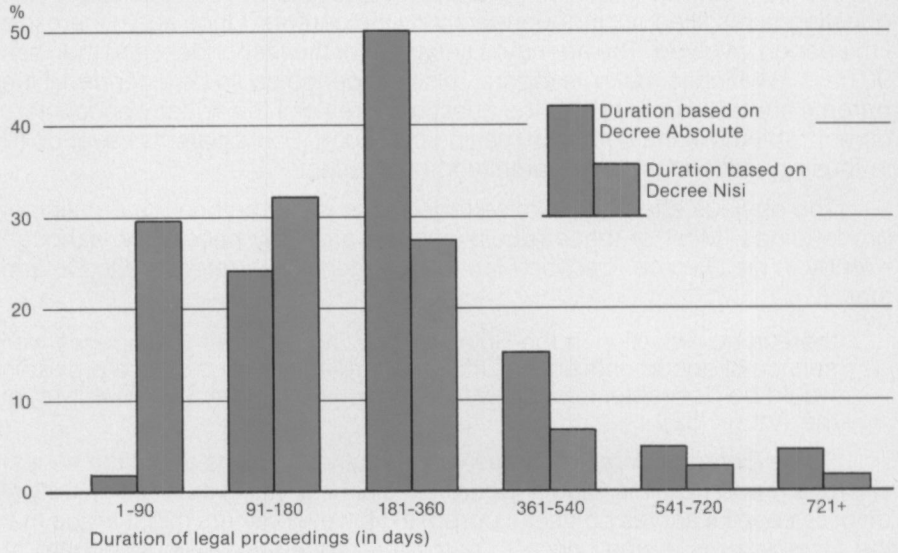
Percent distributions of duration of legal proceedings, based on *decree nisi* and *decree absolute*, 1969-77

Duration (days)	*Decree nisi*	Cumulative %	*Decree absolute*	Cumulative %
1–90	29.8	29.8	1.8	1.8
91–180	32.1	61.9	24.0	25.8
181–360	27.4	89.3	50.0	75.8
361–540	6.7	96.0	15.1	90.9
541–720	2.4	98.4	4.9	95.8
721 or more	1.5	99.9	4.3	100.1
Total	100.0		100.1*	
N**	467,962		471,298	

* Discrepancy due to rounding.
** Totals are discrepant due to missing values.

Figure 12

Percentage Distribution of Duration of Legal Proceedings From Petition Date, Canada, 1969-1979



Professionals in various court jurisdictions complain bitterly about the lengthy waits before appearing in court due to overloaded and understaffed facilities. We will attempt to examine court delay in various provinces and courts over time by looking at the time period from the filing of the petition until the receipt of the *decree nisi* (typically, immediately following the trial). This will be carried out in the context of another time measure – time elapsed from date of petition filing until the granting of the *decree absolute*. Of course, the completion of this time period signals the right of the individuals to remarry and includes the generally required 90-day appeal period. This latter period is not affected by court delay, although once again, it represents due process of law. Thus we have two measures – one more appropriate for assessing court delay, the other applicable for a description of the length of the overall process (see Table 1 and Figure 12).

Considerable differences are manifest between these two particular measures. When duration of legal proceedings is measured on the basis of the *decree nisi* date, we note that nearly two-thirds of the cases that do receive a decree are heard and adjudicated within 180 days (six months). This compares with approximately one-quarter of the cases (25.8%) when duration based on the *decree absolute* is used. Nearly nine-tenths of all couples who do receive a decree have 'their day in court' within 360 days (one year), while only three-quarters are entirely through the process in the same amount of time.

Even when we take into account 'due process' considerations, the length of time before receipt of the *decree nisi* does, in some cases, appear to be

exaggerated. However, for the time being, we will suspend judgment of this fact.

Provincial and Court Differences

Using duration of legal proceedings based on the *decree nisi* and comparing the results by provinces, we note some rather major differences. In Alberta, 58.0% of all petitions are granted a *decree nisi* within the first three months after filing; in Ontario, the comparable figure is 18.7%, with Quebec and British Columbia not far behind at 24.0% and 27.5%, respectively (see Table 2). These are also the three provinces that process the most divorces. However, they also have the greatest number of courts – Ontario (49), Quebec (36), and British Columbia (46), although prior to June 1974, Quebec only had two courts. This fact might have a partial bearing on the Quebec figures. Certainly this can be verified by examining the above pattern over time.

Table 2.

Percent distributions of duration of proceedings based on *decree nisi* date, by province, 1969-79

Province	Duration in days				
	1–90	91–180	181–360	361 or more	Total (N)
Newfoundland	48.4	37.9	9.6	4.1	100.0 (3,263)
Prince Edward Island	56.3	28.1	10.3	5.3	100.0 (1,026)
Nova Scotia	47.8	36.7	12.0	3.5	100.0 (15,264)
New Brunswick	46.2	40.9	10.3	2.6	100.0 (8,021)
Quebec	24.0	21.2	41.4	13.4	100.0 (112,717)
Ontario	18.7	35.8	31.2	14.3	100.0 (172,608)
Manitoba	54.2	28.7	11.6	5.5	100.0 (19,134)
Saskatchewan	43.0	35.1	16.4	5.5	100.0 (11,917)
Alberta	58.0	21.1	12.7	8.2	100.0 (53,578)
British Columbia	27.5	45.3	18.8	8.4	100.0 (72,671)
Yukon	52.7	25.7	14.9	6.7	100.0 (579)

Table 2.

Percent distributions of duration of proceedings based on *decree nisi* date, by province, 1969-79 (Continued)

Province	Duration in days				
	1–90	91–180	181–360	361 or more	Total (N)
Northwest Territories	33.3	37.3	19.8	9.6	100.0 (541)
Canada	29.6	31.9	27.2	11.3	100.0 471,319

Missing observations = 542

Surprisingly enough, trends from 1969 to 1979 indicate that the addition of new courts in Quebec did not improve processing time. The jump in the crude divorce rate from 1973 (133.0) to 1974 (200.1) seems to have more than offset the availability of new courts.

For simplicity's sake we have chosen not to present the full table detailing the duration of proceedings for each province and each year. Instead we have selected highlights indicative of trends (see Table 3). However, one general impression of the entire table is the considerable amount of annual fluctuation in many of the provinces. Second, in later years the differences among provinces are somewhat less pronounced, and in general a greater percentage of cases require more than one year (see Figure 13).

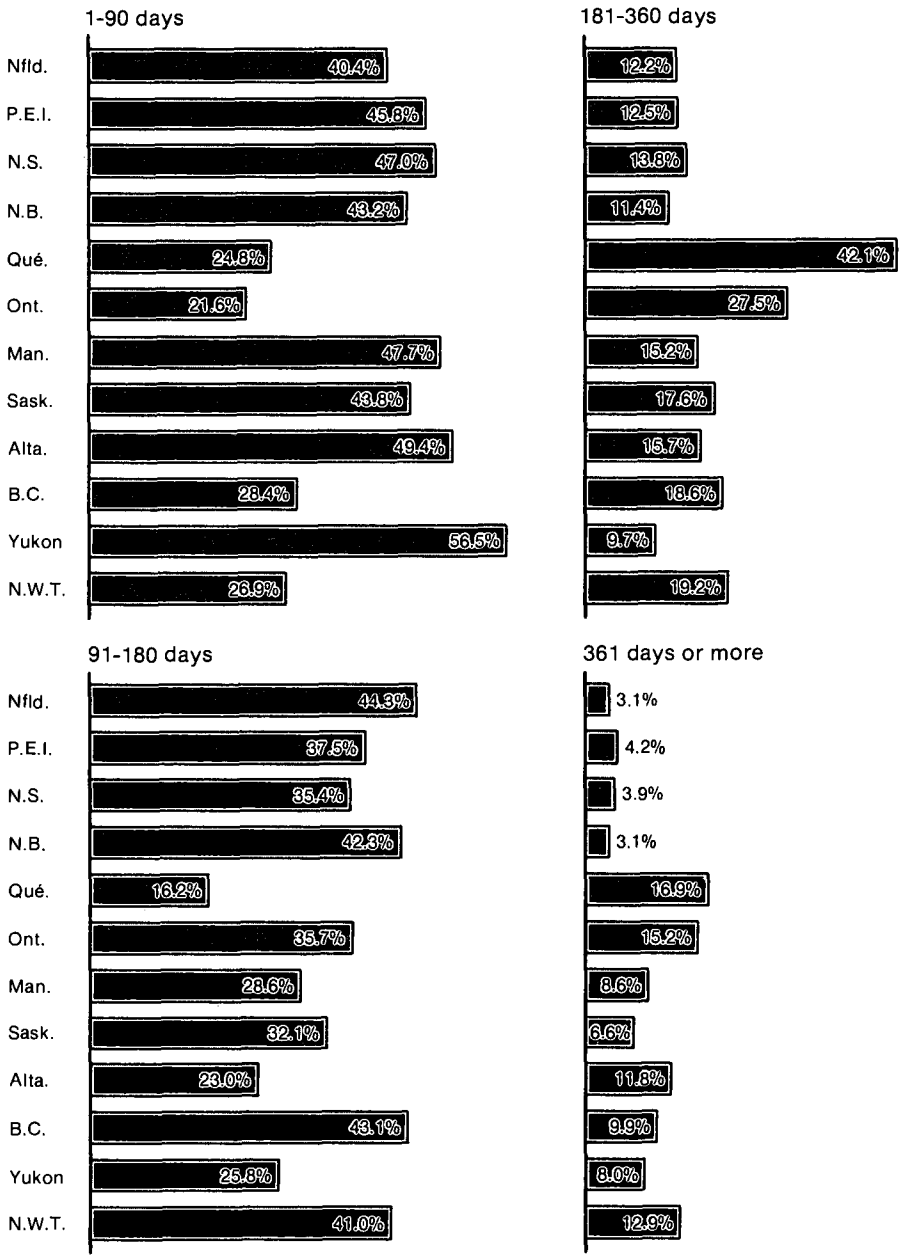
It can also be noted that most cases (Table 3) take longer in the more recent years than they did in the first years after the Divorce Act took effect. In Manitoba, for example, 66.5% of the cases required only 90 days or less to obtain a *decree nisi* in 1971, but the same percentage for 1978 had decreased to 43.7%. Similarly, in 1970 Quebec had 7.6% of its cases requiring more than 360 days to receive a nisi, while the comparable figure for 1978 was more than double this (17.0%).

Court statistics are obviously unitary in those provinces that operate only one divorce court (Newfoundland, Nova Scotia, New Brunswick, Yukon and the Northwest Territories). If we concentrate on those provinces that have a multiplicity of courts, we observe that for the major centres[4] there are only a few noteworthy differences from their respective provincial averages. Nearly

4. The major centres examined are as follows: Charlottetown, Quebec City, Montreal, Hamilton, London, Ottawa, Toronto, Winnipeg, Regina, Calgary, Edmonton, Vancouver and Victoria. These centres account for 65.1% of all cases that receive a final decree. Hamilton does not include figures for the Hamilton–Wentworth-Unified Family Court that opened in the summer of 1977.

Figure 13

Duration of Divorce Proceedings,(1) by Province, 1979



(1) Based on Decree Nisi in actions where Decree Absolute granted.

Table 3.

Variability in duration of proceedings* in selected provinces, 1970-79

Provinces	Range of variability %
High percentage of cases completed within 90 days	
Alberta	low 1979 – 49.4 high 1973 – 62.5
Manitoba	low 1978 – 43.7 high 1971 – 66.5
Prince Edward Island	low 1972 – 40.6 high 1978 – 65.9
Low percentage of cases completed within 90 days	
Quebec	low 1974 – 21.7 high 1977 – 25.7
Ontario	low 1970 – 10.6 high 1973 – 22.0
British Columbia	low 1974 – 14.8 high 1970 – 41.2
High percentage of cases requiring more than 360 days	
Quebec	low 1970 – 7.6 high 1978 – 17.0
Ontario	low 1974 – 12.0 high 1978 – 16.5
British Columbia	low 1970 – 5.0 high 1976 – 10.2
Low percentage of cases requiring more than 360 days	
Nova Scotia	low 1973 – 1.8 high 1976 – 4.9
New Brunswick	low 1970 – 1.1 high 1974 – 3.7

* Based on *decree nisi* date of actions where *decree absolute* granted. 1969 was too soon after the Divorce Act took effect to accurately display cases taking more than one year. Therefore 1969 was excluded from consideration for this table.

one-quarter (23.6%) of all Quebec cases that eventually receive a *decree absolute* have the nisi within three months. However, the Montreal court is substantially below this at 8.3% while Quebec City is noticeably higher at 37.3%. Ottawa is below the corresponding average for Ontario (18.8%), with only 10% of the cases processed within three months. Toronto, Hamilton and London, on the other hand, are close to the provincial percentage while in the other provinces the figures for the major centres examined were similar to the provincial results.[5]

Presence of Children

Proceedings can be lengthened in some provinces (e.g., Ontario) due to legal requirements specifically designed to protect the best interests of any dependent children. Secondly, any decision-making and bargaining on the part of the couple and their lawyers about the custody and support of these children could also serve to protract the proceedings. These factors become all the more important since 58% of all petitions that result in a decree involve children. Table 4 compares the time elapsed from the date of petition to the date of the *decree nisi* for those couples with children as opposed to those without.

The differences between the two distributions are heightened when the duration is 90 days or less – 37.4% of petitions with no dependent children

Table 4.

Duration of legal proceedings based on *decree nisi*, date by presence or absence of children, 1969-79 (percentages)

Duration (days)	Children absent %	Children present %	Total
1–90	37.4	23.3	29.6
91–180	32.5	31.5	31.9
181–360	21.9	31.5	27.2
361–540	4.9	8.2	6.7
541–720	1.6	2.9	2.4
721 or more	1.7	2.6	2.2
Total	100.0	100.0	100.0
N	211,457	259,862	471,319

Missing Observations = 542

5. Trends over time with respect to courts and duration indicate fluctuation that is substantial in certain jurisdictions. Over the long term, for the courts examined, it is probably safe to say that Ottawa has the longest waiting period, followed closely by Montreal, especially since 1975.

receive their nisis, compared with only 23.3% for petitioners with children. This disparity is reduced somewhat when we examine the 91-180 day category and observe 21.9% with children versus 31.5% of petitioners who have no dependent children. The differences are less pronounced when the duration is over 360 days. The presence of children does seem to lengthen proceedings, although most of the variability occurs in the shortest time period which, incidentally, corresponds with the Official Guardian-specified time frame of 90 days in force in Ontario.

Meaningful differences exist among the provinces with respect to the relationship between duration of proceedings and the presence of children (see Table 5). When there are no children present, Alberta is the province with

Table 5A.

Duration of proceedings* by province and absence of dependent children, 1969-79 figures

Duration (days)	No children present (%)				
	Nfld.	PEI	NS	NB	Que.
1–90	51.0	58.6	51.5	46.5	25.2
91–180	37.0	26.9	35.9	42.2	21.5
181–360	7.8	8.7	9.9	8.8	41.9
361 or more	4.2	5.8	2.7	2.5	11.4
Total	100.0	100.0	100.0	100.0	100.0
	1,299	401	5,654	3,015	45,994
	Ont.	Man.	Sask.	Alta.	BC
1–90	36.1	56.9	45.6	63.7	30.7
91–180	35.5	28.0	35.4	19.7	46.4
181–360	19.7	9.8	14.1	10.2	16.5
361 or more	8.7	5.3	4.9	6.4	7.0
Total	100.0	100.0	100.0	100.0	100.0
	81,167	8,835	4,997	22,528	37,130
	Yukon	NWT			Total
1–90	52.6	37.2			37.4
91–180	25.6	39.5			32.5
181–360	15.0	15.7			21.9
361 or more	6.8	7.6			8.2
Total	100.0	100.0			100.0
	234	223			211,457

Table 5B.

Duration of proceedings* by province and presence of dependent children, 1969-79 figures

Duration (days)	Children present (%)				
	Nfld.	PEI	NS	NB	Que.
1–90	46.7	54.9	45.7	46.2	23.1
91–180	38.6	28.8	37.2	40.1	21.0
181–360	10.8	11.4	13.3	11.2	41.0
361 or more	3.9	4.9	3.8	2.5	14.9
Total	100.0	100.0	100.0	100.0	100.0
	1,964	625	9,610	5,006	66,723
	Ont.	Man.	Sask.	Alta.	BC
1–90	3.3	51.9	41.2	53.9	24.8
91–180	36.1	29.4	35.0	22.2	44.2
181–360	41.3	13.2	18.0	14.5	21.2
361 or more	19.3	5.5	5.8	9.4	9.8
Total	100.0	100.0	100.0	100.0	100.0
	91,441	10,299	6,940	31,050	35,541
	Yukon	NWT			Total
1-90	52.8	30.5			23.3
91-180	25.8	35.8			31.5
181-360	14.8	22.6			31.5
361 or more	6.6	11.1			13.7
Total	100.0	100.0			100.0
	345	318			259,862

* Based on *decree nisi* date of cases in which a *decree absolute* was granted.

the highest proportion of divorce petitions resolved within 90 days (63.7%), compared with Quebec which has the lowest proportion (25.2%). Low percentages are also observed for British Columbia (30.7%) and Ontario (36.1%). Quebec also has the highest proportion of cases requiring more than one year (11.4%), while the lowest percentages are found in Nova Scotia and New Brunswick (2.7% and 2.5%, respectively).

When there are children present, the story is a little different. Ontario has the lowest percentage of cases moving through the system within 90 days (3.3%), and the highest percentage (19.3%) requiring a year or more. The

former figure certainly mirrors the effects of the mandatory procedures of the Office of the Official Guardian of Ontario. For some of the other provinces (Atlantic, Saskatchewan and British Columbia), the presence of children has very little effect on the duration of proceedings. In the remaining provinces (excepting the Yukon) there is a more noticeable downward shift, at least with respect to the percentage receiving a nisi within 90 days. For example, the difference between the two figures is 9.8% in Alberta. The Yukon is the only jurisdiction where a higher percentage get a *decree nisi* in 90 days or less (52.8%) than when children are not present (52.6%). However, the Yukon has relatively few cases, overall.

Filing an Answer

It has already been explained why the presence of an answer filed by the respondent should lengthen the duration of proceedings. In this section we shall examine the statistical record to ascertain the magnitude of the difference between durations that include processing of an answer and those that do not (see Figure 14). Only about 10% that have an answer filed receive a *decree nisi* within three months, contrasted with 28% when there is no answer.

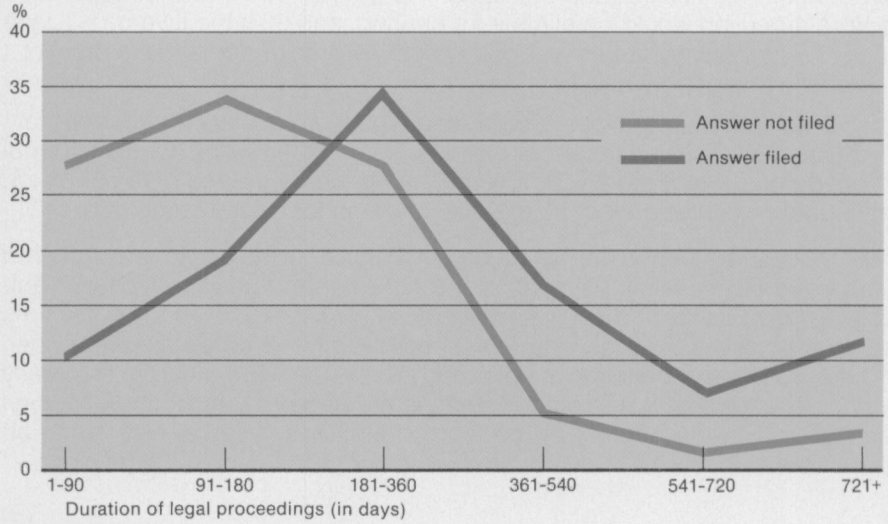
More than one-third (36%) of petitions that have answers filed against them take longer than one year while only 10.7% with no answers take this long. Clearly (and predictably), one effect of filing an answer is to protract the time element necessary before receiving the *nisi*. From the respondent's point of view this delay is probably quite beneficial.

From the information presented in the previous section on the presence of children, as well as from the figures we have just put forth, it is possible to conclude that the presence of children in concert with the presence of a response could well extend the duration of the case exponentially. This assumes of course, that the petitioner's goal is as abbreviated a legal duration of proceedings as possible. The respondent may concur with this objective or may, in contrast, actively encourage delay as a method of wearing down the opposition in an attempt to achieve his ends. This activity on the part of the respondent would be most pronounced when a response is filed. Table 6 displays the combined relationship of the presence of children and an answer on the duration of proceedings.

Bearing in mind the relative proportions of the four combinations (as shown at the bottom of Table 6), sizeable differences do emerge. Protracted struggle over custody seems evident, especially when both factors are at work. Only 8.7% of cases where both children and an answer were present obtained a *decree nisi* within three months compared to 36.4% when both these 'conditions' were absent. The ordering of the two intermediate categories (no answer, children present; and petition answered, children absent) indicates that the presence of an answer inhibits the speedy receipt of a *decree nisi* more than does the presence of children. About a third (34.5%) of those instances where both a response and children are present endure for over one year. As we pointed out earlier, delay could be very beneficial to the respondent particularly if he or she is attempting to modify or change any

Figure 14

Percentage Distribution of Duration of Legal Proceedings[1] by Answer Filed/Not Filed, Canada, 1969-1979



(1) Based on Decree Nisi date.

Table 6.

Duration of legal proceedings (based on *decree nisi* date) by presence or absence of dependent children and answer filed/not filed, 1969-79

Duration in days	No answer filed		Answer filed		Total
	Children absent	Children present	Children absent	Children present	
1–90	36.4	21.5	15.5	8.7	26.3
91–180	34.5	34.6	21.5	19.5	32.7
181–360	22.7	33.3	32.7	37.3	29.3
361 or more	5.4	10.6	30.3	34.5	11.7
Total %	100.0	100.0	100.0	100.0	100.0
N =	162,924	184,358	15,868	34,658	397,808
Row percentage	40.9	46.4	4.0	8.7	

Missing observations = 74,053

custody arrangements set out in the petition. Preparation of the respondent's case could be enhanced with more time.

Are Some Grounds Faster Than Others?

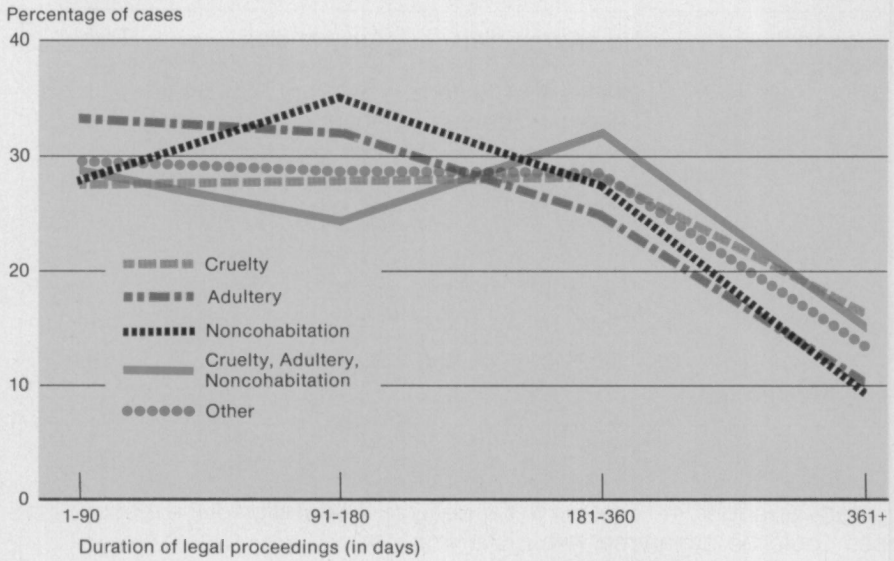
Earlier, it was suggested that if a petitioner has a choice of grounds, he or she may be inclined to opt for the one that is quickest. Obviously grounds based on noncohabitation require the couple to put in three years of separation before a petition would be eligible for hearing, and thus the divorce will take longer. Alternatively, adultery requires no such time period and the proof of it is usually straightforward.

Cruelty, by comparison, usually requires more evidence to corroborate the allegation. These differences are not clearly evident in the duration of legal proceedings (see Figure 15). Overall the variability in the figures is minor, although once again most noticeable in the shorter duration categories.

Indeed, adultery is the fastest ground – 65.3% of the petitions are cleared with a *decree nisi* within six months. The same figures for noncohabitation and cruelty are 62.9% and 52.9%, respectively. At the other end of the time continuum, there are somewhat fewer cases requiring more than a year when adultery or noncohabitation are pleaded (10.1% and 9.5%) than when cruelty is the ground (15.1%). These differences are generally minor though, when considered in the context of the more dramatic shifts observed when an answer is filed.

Figure 15

Duration of Legal Proceedings Based on Decree Nisi Dates, by Grounds for Divorce, Canada, 1969-1979



The Appeal Period

We have already described how the implementation of 'due process' contributes to time delays. In this context we cited the presence of a 90-day appeal period generally necessary between the receipt of the *decree nisi* and the receipt of the *decree absolute* and observed its effect in Table 1. There were discrepancies between the duration figures based on the nisi and those based on the absolute. Therefore our goal here is to examine the time period between the receipt of the nisi and the absolute in an attempt to ascertain the speed with which petitioners (or respondents[7]) apply for their final decrees.

In Table 7, this distribution shows that a few individuals (4.9%) are granted their *decrees absolute* before the appeal period has expired. In fact, 2.9% receive their *decrees absolute* at trial. These instances manifest a judicial discretion that will award the *decree absolute* earlier if circumstances warrant. For example, if an about-to-be spouse was due to give birth before the 90 days elapsed and also planned to marry as soon as possible, it is within the judge's discretionary authority to make the decree final since it is said to be in the public interest that the child be legitimate by being born in wedlock. Necessarily, the respondent must certify that there is no intention of launching an appeal.

Close to two-thirds (64.2%) of the *decrees absolute* have been conferred within four months of the trial date. A further 25.8% are granted between four and six months after trial, leaving a residue of 10.0% of the petitioners to whom a *decree absolute* must be less than pressing. Approximately one-third of the

Table 7.

Percent distribution of the number of days between the *decree nisi* date and the *decree absolute* date, 1969-79 (percentages)

Number of days	Percent	Cumulative %	Number actual
0	2.9	2.9	13,709
1–90	2.0	4.9	9,433
91–120	59.3	64.2	278,986
121–180	25.8	90.0	121,838
181–270	6.0	96.0	28,018
271 or more	4.0	100.0	18,609
Total	100.0		470,593

The greater portion of this difference from the total of 504,630 is due to those petitions which were dismissed or discontinued.

7. While the onus rests on the petitioner or his or her lawyer to obtain the *decree absolute*, if, after 120 days have elapsed since the receipt of the conditional decree, the petitioner has not made application for the final decree, the respondent spouse may then apply to the court to have the decree made absolute.

petitioners incur more delay than is required by any statute. In a minute number of cases this delay may signal the launching of an appeal. Since often the local master or registrar has responsibility to recommend the quantum of maintenance after the trial, any dispute over this would also protract the delay between the *decree nisi* date and the *decree absolute* date.

Summary

Divorce proceedings are necessarily adversarial in structure, because the law compels it. Why? Because the adversarial method has historically been considered the most effective in uncovering pertinent facts in social affairs, and because the granting of a divorce petition must never rest on the mere preferences of the individuals concerned but on 'objective' facts. And the law presumes there will *always* be two sets of interests potentially in conflict. The choice of grounds often entails the allegation of fault, or in the event that the grounds do not involve fault, they require lengthy waiting periods. The legal response to these circumstances is one of compliance which often results in ritualized miniature dramas designed to fulfill the necessary requirements, at least in form. The psychological responses on the part of the petitioner and respondent frequently include a heightened antagonism, anxiety, bewilderment and even resignation. The social response is often to applaud the current state of affairs or to denounce it. In spite of these generally negative reactions to a process that is unduly drawn out, the success rate is virtually total.

There are three factors that combine to explain this outcome. The first two have to do with the lawyer. In the context of divorce, part of the lawyer's function is to screen his or her clients by assessing the information provided and deciding if a petition is likely to be successful. There is nothing to be gained for the client by filing a petition that is clearly defective because of inadequate grounds or a residency period, for example. Thus, the cases that do come to trial have an excellent probability of being successful. Second, the high success rate of petitions may reflect positively on a lawyer's ability to present a credible case. On the other hand and in view of the large number of undefended petitions, lawyers *should be* successful in court.

The third factor has to do with the judge. It is, after all, the judge who has the ultimate word. Judges make the important decision regarding the granting of a decree. Their overwhelming acceptance of petitions strongly indicates that they too, implicitly or subconsciously, recognize that what they see before them in court is often not real in any social sense but arranged or contrived for their legal assessment. Further, it would not benefit anybody for them to seriously play the role of inquisitor in undefended actions. Even if a petition or its presentation is not particularly strong, as long as it meets the minimal requirements, the majority of judges would be satisfied. In this context then, most judges are passive bystanders and, perhaps more importantly, view themselves as such. Most likely they would only get tough where a serious mistake occurs that would flagrantly jeopardize or undermine the law in question.

Several factors were disproportionately associated with petitions that were eventually dismissed or discontinued. However, in most instances of a successful action these factors were of only minor importance. The type of ground, duration of proceedings, presence of children, province, and the filing of an answer are factors that distinguish in a very small way those petitions that do not result in a decree from those that do.

Nearly two-thirds of all petitions received a *decree nisi* within six months and nearly three-quarters received a *decree absolute* within 12 months. If there were no children present and no answer filed, 70.9% of these cases received a *decree nisi* within six months, compared to 28.2% if both these factors were presented. Proceedings tended to be longer in Ontario, Quebec and British Columbia (especially if dependent children were involved), although overall the Canadian figures do not appear to show excessive court delay in the majority of cases. When one is cognizant of the effects of due process of law and its impact on the duration of proceedings, any allegations of court delay must be qualified. Our figures also showed that adultery was indeed the ground with speediest completion.

With respect to the period between the *decree nisi* and the *decree absolute*, we noted that two-thirds have a *decree absolute* within four months after the *decree nisi*. Any delay beyond 90 days, barring further disputes or appeals, must be seen to rest with the petitioning party. Some do delay for many months before picking up a *decree absolute* and this obviously lengthens the duration of proceedings based on the date of the filing of the petition and the date of the *decree absolute*.

Once a person has passed a lawyer's screening, a divorce decree can be seen as a common leveller – virtually everyone who wants one (and can pay) gets one. The style may vary according to grounds, the presence of children, and the presence of an answer, and this in turn may lengthen proceedings, but the end result is the same. In this context it is interesting to note that filing an answer is often discouraged by legal counsel, especially when it deals with corollary relief, because legal professionals state that a judicial decision is likely to be very similar to the negotiated figures suggested by them.

As far as divorcing styles go, the range is from the fast simple cases that involve no children or fighting to those that do involve children and vigorous formalized conflict. Yet these two extreme groups comprise only the polar components of the divorcing population. In between lie the great majority where a divorce involves a little fighting and hard negotiation, or perhaps difficult grounds, custody disagreements, or a combination of all these characteristics that come together to produce a 'divorcing style'.

Further, and given the almost universal frequency with which decrees are granted, it would appear that the divergent personal or social styles of divorce are inconsequential and irrelevant to the legal outcome, although not to the terms of the settlement. Having thus established the inconsequentiality of personal peculiarities to the legal process, one is up against a situation where

there is a growing rift between the exigencies of the process and the dilemma it sets out to resolve. Clearly we are now faced with a situation where the process is so well in hand that it works almost automatically to produce the desired results. By such definition, it becomes redundant since the outcome will nearly always be the envisaged one. At this point, we all – laypeople and lawmakers alike – must surely see that the process is often eviscerated of any real social content.

Chapter 7

The Spoils

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The Spoils

The story of custody battles is as old as history itself. One such battle occurred in the court of Solomon who was King of Israel in the 10th century B.C. and who was known across the land for his wisdom. The Old Testament records the case this way:

> Two prostitutes who lived together had each recently given birth to a baby. They came before Solomon with only one baby, each with her own explanation. The first woman said that in the middle of the night the other woman's baby died. This woman then took the dead baby and placed it in her bed, taking the live baby as her own. The other woman denied this, and maintained that the living baby belonged to her.
>
> Solomon's dilemma – who was the mother of this living baby? In his wisdom, he asked that a sword be brought and ordered his assistant to divide the living child in two and give half to each woman. The first woman, who was the real mother, asked Solomon to give the child to the other woman. The other woman said "divide it". Solomon then ordered his assistant not to kill the child, but give it to the first woman, since she was certainly the real mother.
>
> excerpted from 1 Kings,
> Chapter 3, verses 16-28

Although this particular case and the way in which Solomon solved it is different from modern day custody battles, it does illustrate the dilemma judges must face on a daily basis in the context of divorce. Indeed, the biblical drama is not without modern reference, since Mr. Justice Kirke Smith of the British Columbia Supreme Court recently asked a battling couple, "What would you have me do? Cleave the child with a sword?" (Fleishman, 1973:189).

Just as the act of marriage marks the beginning of a set of unique relationships that are legal, financial and emotional in character, so divorce heralds the end of these relationships and the modification of others. At the same time as certain rights and obligations are extinguished, the right to spousal support may be strengthened as commitments are sorted out regarding dependent children. The subsequent division of the 'spoils' of the

marriage (property, money and children) now becomes *the* primary source of conflict and thus is worthy of individual consideration as a critical element in the divorce process. In this task, however, we have faced some data limitations.

Since the records of the Central Divorce Registry did not contain the sufficient and necessary information on support payments and custody decisions, we drew our material from a modest study of a sample of Official Guardian of Ontario records. In this chapter therefore, our focus will be on custody awards as they are made at the time of divorce and the amounts of support payments typically ordered. Further, since matters of property, support and custody are intricately interwoven in the process of negotiation, we will attempt to discuss them separately and to point out common features where they do exist. We will also examine the negotiation of arrangements that in most cases was brought to a successful conclusion before the divorce itself, but which is nonetheless related to it since the possible exercise of judicial discretion is not without impact. The contents of some of these arrangements may only come as the final elements at the trial (and most particularly with the official stamp of approval on the altered contractual relationship) but for the most part negotiation is now private.

In the negotiation of property division – of what and how much of it belongs to whom – there are several factors which work to complicate the eventual resolution. Part of the complexity clearly arises from the clash of wills inevitable in any confrontation or negotiation. But more importantly, some of that complexity has arisen from the jurisdictional differences imposed by the peculiarities of constitutional law in this country. In an assessment of how such a situation came to be, and in an attempt to understand the current state of affairs as it relates to family property division, it is necessary to at least briefly review the historical record.

Property Division: The Historical Overview

In England, prior to the 1880s a married woman was incapable under law (with minor exception[1]) of owning property, nor could she incur debts. "With accuracy, it was observed that under the common law, upon marriage the husband and wife are one and the husband is one" (Wuester & Payne, 1975:263). With the industrial revolution women became increasingly interested in the issue of property rights. Finally, in 1882, the English law was altered with the passage of the Married Women's Property Act which established for wives the capacity to own and acquire property.

In Canada, all of the common law provinces adopted the law of separate property – what one owns is his (or hers) – through similar Married Women's Property Acts. Since then, these acts have been variously revised at certain

1. For wealthy women, the problem was somewhat alleviated. If property was given to her "for sole and separate use" the husband could not control it. However, the woman could not sell or mortgage it. This was to protect her from a husband gaining the proceeds of such an action.

points to incorporate additional features such as provision for wives to make wills. However, none of these recent changes have altered the basic principle of the law of separate property.

In fact, with two exceptions, the operative principle has always been "It is mine if I paid for it with my own money". The first exception occurs where the spouses have their own agreement as to who owns what and the second relates to the way title to property has been arranged. With the second exception, the complexity of the circumstances is clearly stated by Wuester and Payne in their work for the Law Reform Commission of Canada:

> If a husband pays for property with his own money but takes title in his wife's name (or in their joint names), the courts rely upon a rebuttable presumption to the effect that he intended to give his wife a gift of the full ownership interest (or a half interest if the title was in joint names). For example, if a husband buys a house with his own money but has taken title in his wife's name, she will usually be held to be the owner of the house. The husband may rebut this presumption by showing that he did not intend to make a gift to his wife at the time of the purchase or by showing that he put the property in his wife's name for some other reason. This presumption does not apply, however, where it is the wife who purchases property with her own money and takes title in her husband's name. On that factual situation the courts generally have held that the husband is holding the legal title for his wife and that the property belongs to her (1975:264)[2].

At first glance, separate property may seem to be a fair way of deciding ownership, and ultimately, the division of property. However, when it is tested in a social and economic context, serious problems emerge. Recognizing and proposing solutions to these problems have been the ongoing tasks of law reform commissions in most provincial jurisdictions for more than a few years.

For one thing, the law of separate property denied recognition to the contributions of women homemakers who have little if any opportunity to contribute to the actual accumulation of capital but who do free their spouses to be full-time wage earners. Further, if the wife, in addition to the duties imposed upon her by home and family, assists her husband by working with him in his business, the situation becomes even more lopsided. In such a situation, the wife will gain no more ownership interest in the property (unless she made a direct financial contribution to its purchase) than a customer acquires ownership of a telephone by paying for it many times over on a monthly rental basis.

In 1973, the Supreme Court of Canada found (in a 4-1 decision), in the case of Murdoch v. Murdoch, that Mrs. Murdoch had made no direct financial contribution to the assets of a family ranching business, and thus deserved nothing. This was in spite of the fact that she ran the ranch for five months of

2. These presumptions have been modified by statute in some but not all provinces in the last five years.

the year while her husband was away and in addition did hard physical labour (haying, raking, driving trucks, etc.) as a matter of course. This extraordinary effort (as described by Mr. Justice Laskin, the dissenting judge) established no legal right to the property.[3]

The Manitoba Law Reform Commission describes a similar case where the judgment was more favourable:

> In the Kowalchuk case, the facts revealed that the spouses had been married in 1938 and separated in 1967, but the marriage had not been dissolved. The wife sought a declaration of her entitlement to a half interest in the Manitoba farm lands, machinery and equipment which were acquired in the husband's name after the solemnization of the marriage, as well as an accounting of her claimed interest in their cattle herd. Although no written agreement existed, the husband had told the wife that the farm was for both of them. The facts disclosed that all her married life the wife had worked full-time on the farm, milking the cows, working in the fields and garden, keeping the farm accounts and doing all the housekeeping. Early in the marriage the wife's parents gave her four cows which became part of the farm stock.
>
> The Manitoba courts held that the farm was acquired, improved and operated, during cohabitation, by the parties' joint efforts. The gift of the four cows was a significant contribution as also was the wife's labour and account keeping. It was held that the husband's statement that the farm was for both of them was effective to disclose the parties' common intention, and the wife was entitled to relief sought (1976:3).

Another problem with separate property focuses on factors which spouses may not have viewed as significant at the time, given their general view of their marriage as a co-operative venture. A wife, for example, may not see a significant difference between using her earned money to purchase groceries and clothes, as opposed to using it to make mortgage payments on a house. However, the common law placed great emphasis on such distinctions.

There are also certain anomalies that stand out in the current laws on property ownership. Indeed, Wuester and Payne have suggested that the law very likely does not reflect the attitudes, desires and expectations of a substantial majority of Canadians (1975:271).

The heightened interest in civil rights which started in the 1960s has developed through the 1970s into a wide spectrum of demands (successfully pressed in many cases) to establish the formal legal rights of citizens in legislation. In particular, the rights of spouses to property settlements upon marriage breakdown have been singled out for substantial revision and codification. So general have been the demands for individual legal rights in

3. The Murdoch decision is generally regarded as an excellent example of how inequitable the law of separate property can be. Nevertheless, it seems to have had a positive influence as a catalyst for change. The decision has now been effectively overruled by later decisions of the Supreme Court of Canada in Rathwell v. Rathwell and in Pettkus v. Becher, the latter case involving a 'common-law' relationship.

these times that some commentators have dubbed it the 'age of entitlement'. Property ownership has come to represent a relatively more important source of identity for individuals (symbols of worthiness and success) as the century has progressed. The guiding principle behind these changes has ostensibly been to insure that property ownership will in future be an equal partnership in a marriage. As if in anticipation of a subsequent marriage failure, rules now govern the ownership of assets acquired by a married couple, and unencumbered ownership of 'family assets' such as the family residence has been made much more difficult. For the first time, the law dictates who is permitted to own what and how one can exercise ownership within a marriage. Relatively few decisions are left to the discretion of the married couple and relatively more are imposed by legislation. But what seems on the surface to be a simple demand (equality) for a simple benefit (one-half) turns out in practice to be very complicated indeed, particularly when business assets held by one spouse can, but need not be, included in the grand sum which is to be divided. Further, the presumption that the value of work of stay-at-home wives can be quantified, or indeed, the presumption that the behaviour itself is normally to be expected continue to be contentious and complicated points of discussion.

Law reform commissions, both provincial and federal, have proposed various schemes designed to ameliorate matters. Special property regimes for the matrimonial home with deferred sharing, community property and separate property with judicial discretion have all been considered by the various commissions. Whatever the practical procedures, the new philosophy argues for an altered division for family property, namely the communal holding of title to family assets, (whether desired and acknowledged or not). The Law Reform Commission of Canada states its principle concerning marital property in the following way:

> The object of property sharing should be an equal participation by both spouses in the financial gains of the marriage, regardless of the internal division of functions in the marriage – that is, who worked outside the home, who managed the household and who cared for children – before sharing took place (1975a:44).

At the time of this writing, the common law provinces have new legislation concerning family property, indeed covering family law as a whole, since, as we shall see, 'fair and equitable' solutions would not be facilitated by reformed property laws that were to be used in conjunction with antiquated custody or support laws. The Province of Quebec has had a system of partnership of assets as its primary property regime since 1970.

Indeed, to understand the ground that has been covered since the 1973 Murdoch case, consider the decision in Ontario re: Silverstein v. Silverstein after the introduction of the new Family Law Reform Act (1978) in Ontario:

> Mr. and Mrs. S were married in 1940. Shortly after their marriage they opened a store in Mr. S's name. Mrs. S made a substantial contribution in the first years to the store. Over the first decade of the marriage, two children were born and a new home purchased in Mrs. S's name.

Over the course of the marriage, the business diversified – new properties were bought, and new companies were started by Mr. S with a third party. While Mr. S ran the business enterprises, Mrs. S raised the children and ran a comfortable home for the family.

In 1975, the couple separated and a petition for divorce was filed as well as applications for property division. Matters were still not settled before the passage of the new Family Law Reform Act (1978) and so the old applications were considered under the new law.

The new law has three basic principles. "First, the family assets are to be divided equally between the spouses unless it would be inequitable to do so for any one or more of the statutory criteria. . . . Second, the spouse who assumes the major responsibility for child care and household management enables the other spouse to acquire property that may not be family assets. This assumption of responsibility may, where appropriate, be recognized in a material manner. Finally, the contribution of work, money or money's worth toward other than family assets in the name of the other spouse should be recognized in a material way" (1R.F.L. (2d): 239).

Using these principles, the judge in the case ordered that the matrimonial home be divided equally; that Mrs. S be awarded a half interest in one of the business properties by virtue of her work contribution to that property and her child care and household management. Under the Divorce Act, Mrs. S also received a monthly maintenance award since it was determined that she was 62, in poor health and it was impossible for her to make a substantial contribution to her own maintenance.

In computing the appropriate figures, income tax and capital gains tax matters were integral considerations. After all the calculations were done, both Mr. and Mrs. S. would have approximately equal annual incomes.

There was a suggestion by Mrs. S's lawyer that she receive the matrimonial home (which was very dear to her) and that Mr. S receive all the assets in his name. However, the judge stated that the new act did not give him the broad, sweeping power to do this, although the solution had a certain appeal. In the judgment it was noted that a private settlement offer had been made to Mr. S. Perhaps it was the solution suggested at trial.

In this case, the law did not view the couple as strangers, as does the law of separate property, but as equal marital partners with a unique relationship between them. In Ontario the law now presumes that both spouses are entitled to property of the marriage – for example, the matrimonial home.

Under the most recent provincial family property laws (to early 1982), wives can now, in principle, expect to participate more fully in society as owners if, and it is a very large and significant 'if', the provisions of such laws are observed.

One might easily assume from the exclusive use of court examples to this point that requests for court-imposed decisions represent the normal course of events in property dispute resolution. However, to make such an assump-

tion would clearly be mistaken, since the overwhelming tendency is to negotiate any property dispute in a relatively informal fashion. Court-imposed decisions clearly seem to exist only as a last resort. Even if court procedures are initiated, it is still possible to settle before trial. If the record of Canadian civil litigation involving individuals as plaintiffs is any guide, of all these actions initiated for formal adjudication, only between 18% and 26% actually reach the stage where a judgment is issued.

The actual use of legal machinery as a remedy for a spouse (usually the wife) who is unsuccessful in informal negotiations with the other partner results in another degree of complexity. Although the British North America Act confers legislative authority over divorce and corollary relief on the Parliament of Canada, other ancillary matters (such as property division), connected to but not really a part of divorce, are within the legislative power of the provinces and there is no requirement of uniformity among provinces. They have jurisdiction over property division, a right that prevails even in the event of divorce.

Moreover, they seem also to possess the exclusive power to deal with questions of custody and support prior to or in the absence of the filing of a divorce petition. When a judge makes a final order regarding corollary relief in the context of the divorce trial, this order generally supersedes, thereby nullifying, any existing provincial orders.

Support

Many parallels exist between property division and the payment of support. Routes to conflict resolution, for example, could be cast in the same mold. In many cases the two are inextricably linked since decisions concerning property have consequences for those made with respect to support, and as we shall see subsequently, for custody as well.

There are many terms for the money paid by one spouse to the other following their separation. These terms include alimony, support, maintenance and corollary relief. They reflect legal distinctions, depending on where and when the order was made, and under what statute it was concluded. However, such distinctions are not particularly helpful or necessary for our purposes and so we will use the terms interchangeably to refer to the same thing: that is, money paid from one spouse to another spouse and/or children to contribute to such necessities as food, clothing, shelter.

Typically, this is a one-way flow from husbands to wives since women generally earn less than their spouses and until recently provincial laws have seldom recognized any obligation for wives to support husbands. In some provinces there are Deserted Wives' and Children's Maintenance Acts, but no similar legislation for husbands.

As with property division, support payments can also be negotiated informally between the couple themselves upon separation. It may be agreed, for example, that a set amount will be paid weekly or monthly over an

allotted time period – often until the children reach age 16. There also may be an agreement to handle the problem of inflation. Often, this sort of arrangement will be formalized, usually with a lawyer's help, in a separation agreement, along with the property matters. A formal agreement can also be of benefit at income tax time.

For some couples, negotiating support is not so straightforward and they will require assistance from legal counsel to hammer out terms. Sometimes they may even need court assistance. As might be expected, this requires more time and money and may result in more resentment than if the couple had been capable of negotiating it on their own. In fact, much legal opinion has it that arrangements between spouses (be they of property, finance, or custody) are more likely to be honoured if they are mutually satisfactory and voluntarily carried out. Thus, in some jurisdictions, every effort is made to help spouses come to a decision on their own, without formal judicial intervention.

In some cities (such as Toronto, Edmonton, and Hamilton), there have been family conciliation projects to test the workability of getting spousal agreement on as many issues as possible before going to court, and the necessity of a court appearance may sometimes even be removed. These conciliation procedures rely heavily on counselling sessions as well as close ties with community social services, and besides helping to relieve some of the frustration and animosity between husbands and wives, they also help to save court time.

For those spouses who cannot work out solutions informally, or who do not have access to supervised conciliation, the regular court approach is the last remaining route. Often the result is a court order for maintenance, an order which in many cases has no effect. It is very easy for husbands who have vowed never to pay support to succeed. Often women are completely deserted as their 'errant husbands' move to unknown locations (perhaps in another province), only to move again if they are traced and served with another court order for support. Even when the 'errant husband' does appear in court, judges are reluctant to impose a penalty such as a jail sentence since it would reduce his earning capacity even further.

However, there have been attempts to reduce the magnitude of the problem. Some provincial governments have agreements with other provinces and with some foreign jurisdictions for the reciprocal enforcement of maintenance orders. If a maintenance order was made in Ontario, for example, and the husband moved to Manitoba and defaulted on his payments, Manitoba legislation allows the enforcement of the Ontario order in Manitoba.

Similarly, family courts in some jurisdictions have instituted arrangements where support payments are made into the court rather than being paid directly to the wife. Theoretically, this is supposed to aid in enforcement, but although collection rates have improved considerably, the task becomes more difficult as more and more cases need to be administered. For the most part the collection systems are one portion of a more general attempt to demystify all family-related procedures through the creation of a unified family

court. Unified family courts not only provide conciliation and support payment monitoring services, but they also bring together all of the courts that could have jurisdiction over family problems in an effort to simplify such matters. Once again, most provincial law reform commissions have drafted proposals and even instituted pilot projects concerning the development of unified family courts.

The defaults of some husbands are officially recorded, while others are not, simply because their wives do not attempt to have maintenance orders enforced. The reasons for this vary. Some women are afraid of physical repercussions; others feel degraded by their prior court experiences; others consider further efforts would be futile and have resigned themselves to going it alone. Still others have improved financial circumstances and no longer want support. The following two cases concern women trying to obtain support. Later, the male point of view will be provided in two additional cases.

Case One:

A divorced woman age 45, with five children between the ages of 10 and 19, has been separated for nine years and divorced for seven years. She now earns $12,500 a year at a full-time job and also works at another job on weekends.

Legally, her ex-husband should have been paying her $100 a week in child support since they first separated, but she has received the full amount only once. Her husband got her to agree out of court to lower the payments to $25 a week "because he told me he just didn't have the money".

"I took him to court four or five years ago. The judge ordered him to pay $5 a week more ($30 a week total) to make up the arrears, but he said he just couldn't do it."

"It was so degrading, the whole court atmosphere, begging for $5 extra with hat in hand, listening to reasons why he couldn't pay, and then not getting it after all. It's such a ridiculous amount of money... we had never really fought until that day in court."

"A few months after this I finally told him to keep his support. There had been some problems between him and one of the children and for the money, I didn't need the aggravation."

Case Two:

Another divorced woman, age 26, with a seven-year-old daughter, said her husband has built up $2,400 in arrears since they separated two years ago, "but if I were to press him for the money, it would blow his relationship with our daughter".

She receives $340 a month on Family Benefits, makes about $120 a month in part-time work, and plans to go back to work full-time now that her child is older.

"I'm supposed to be getting $25 a week in child support . . . I haven't received a cent from him, and if he were to pay support it would make going back (to work) feasible".

"But I don't know if it will be worth the hassle to go after him for the money, even though I know he has it. He makes at least $15,000 a year. And there is some bitterness when you're sitting there with absolutely nothing. The court hasn't done anything that I'm aware of" (McCallum: *Globe and Mail*, June 9, 1977).

Komar writes that lawyers are generally reluctant to become involved in the enforcement of support orders (1978:513). As he points out:

The business of collecting debts has, at times, an unsavoury reputation, and when this is added to the hostility and petty bickering of separated spouses, the reluctance of the Bar to get involved is understandable (Komar, 1978:566).

However, Komar also points out that often there is very little in the way of written judgments concerning the enforcement of maintenance orders, and in this "jurisprudential vacuum, lawyers feel justifiably uncomfortable". (Craig: 1978) It seems that enforcement proceedings are as potentially mystifying to the lawyer as they are to the client. From the point of view of the woman, the headache involved in actually obtaining support agreed upon or ordered can be enormous. Often this support is for the children and their mothers are faced with fathers who have unlawfully abdicated their parental obligations.

However, husbands and fathers, even those who do pay, have stories to tell that often put a very different interpretation on the facts. The emotion of a marriage gone sour may have violated their sense of natural justice; having to support children and 'that woman' may be felt to be unfair especially if regular access to the children is made troublesome or impossible. For those husbands and fathers who have low incomes, making support payments can be difficult, especially in the face of unemployment and inflation. When an order has been made under a law that gives some weight to conduct or fault, the husband may perceive the order as a form of punishment and feel it is unwarranted and not pay. Under these statutes, support is awarded to a wife only if she can prove adultery, cruelty or desertion on the part of the husband. However, the obligation to support any dependent children is ever-present. If some women clearly feel that their (ex) husbands 'get off lightly' by not honouring a legal order of moral duty, some men can feel exactly the same way about their (ex) wives, as these next two cases illustrate.

Case Three:

Chris, in his late 20s, is an accountant earning $17,500 a year who has been separated from his wife and a baby boy for nearly two years. "Your

wife plays all these threatening games on you – there's no hope of reconciliation unless you do what I say, you could go to jail if you don't pay right away, sign this or you don't see your kid." These things really happen.

After she hired a lawyer to draw up a legal separation agreement, though, he began paying her $50 a week in child support. (The agreement was never made.) "She'd asked for $800 a month for her and the child, but there was no way. So she went back to her teaching job. When she did that, though, I didn't think we were sharing the expense of the child 50-50. I mean, really how much can a baby cost?"

. . . "I feel like I'm being used. I still don't have any furniture. I can't afford it because I'm trying to get caught up – I've got lawyer's fees, I've got an insurance policy for my child ($50 a month), I've got my own rent ($250 a month), plus my tax situation has changed – I'm considered an independent."

Case Four:

Tony is a 33-year-old businessman. "If I could put my money into some special account so I could be sure my children got it, I'd do it right away."

He has been paying his ex-wife $300 a month for the support of their children, a nine-year-old boy and eight-year-old girl, since they were divorced about five years ago. "I'm damned if I should send her a cheque so she and her boyfriend can buy colour TVs, redecorate the apartment, and go to the racetrack all the time. That's where a lot of the resentment comes in: I can't control where my money goes, and I can't control how much I should send" (McCallum: *Globe and Mail*, June 9, 1977).

As one might now expect, support payments can be problematic at any time, be it immediately upon or after the separation or at or after divorce, if terms are not yet present and enforced.

The Divorce Act allows for maintenance payments to be made to either spouse for him or her and any children. The judge is to make his or her order "having regard to the conduct of the parties and the condition, means and other circumstances of each of them" (Divorce Act, Sect. 11(1)). However, to date there are very few instances of support being paid by a wife to a husband or children, thus indicating that the traditional norms of family life are fundamentally still intact. Also incorporated into the Divorce Act is a mechanism whereby interim orders for support can be made through the court. This procedure is usually invoked where there is no provincial support order and the applicant spouse does not have sufficient funds to wait until the divorce trial.

In the event that a provincial court order for support already exists, the judge can simply make no order, in which case, the order under the provincial legislation continues in force.[4] Komar has stated that "A divorce court has no authority to cancel or otherwise tamper with a Family Court maintenance

order; (however) what can happen, it seems, is that by some inexplicable process a maintenance order made ancillary to divorce can supersede an earlier Family Court order" (1978:547).

We have already indicated that questions of support may be answered in a separation agreement. Quite often the terms of support in these agreements will be incorporated into the *decree nisi*. Once they are included, the terms can be subsequently varied under provisions in the Divorce Act. Even at the time of trial a court will not be bound by the terms of a separation agreement. In Ontario at least,

> where it is "fit and just to do so" it will make the award appropriate to the circumstances before it. . . (Kronby, 1977:134).
>
> However, it has been declared in reference to one Ontario case that a court ought not to intervene, in the absence of duress or fraud or material misrepresentation, despite the fact that a bad bargain may have been made (Kronby, 1977:134).
>
> Nevertheless, this hesitation is substantially reduced when the interests of children are concerned.

It is also difficult to estimate just what percentage of a husband's income should be earmarked for support payments. Popular wisdom once had the figure pegged at one-third. However, figures computed from our Official Guardian study indicate that the average amount was approximately 20%, while the median amount was somewhat less at 17% of the husband's (net) income. In this context, the findings of the Law Reform Commission of Canada with respect to court-ordered support are worth noting. The Commission has stated that "it is clear that a majority of maintenance orders made by Canadian courts are not properly complied with" (1976:22).

In this section we have emphasized the problematic features that support matters can assume. Solutions for these problems lean in the direction of reformed family law, court conciliation projects, unified family courts and assistance for spouses in enforcing maintenance orders. Nevertheless, these solutions leave untouched those cases where support is regularly forthcoming or where there is simply not enough money to go around. If the circumstances are extreme, government transfer payments (welfare, mother's allowance) provide minimal sustenance.

Custody

In the introduction to this chapter, we spoke of King Solomon's solution to a child custody problem he was asked to resolve. Fortunately for all concerned and especially the children, the majority of custody decisions are not disputed before the courts. Instead, the parents resolve matters on their own, or with legal or other professional assistance. In some number of cases, the

4. Except in Ontario prior to 1978 Family Law Reform. It is perplexing that Ontario judges concluded that a divorce decree that was silent as to maintenance automatically terminated an existing summary maintenance order (Komar, 1978:548).

outcome is assumed, thus requiring no conscious determination. It is most commonly assumed by both parties that the mother will have custody of the children.

Mothers are thought to be more biologically in tune with the early emotional needs of their children. Popular wisdom predicates this belief on the basis of a presumed maternal instinct. The mutual affinity of mothers and children is said to be natural and by virtue of that fact, to be valued and protected. Regardless of any objective truth associated with these feelings, they do support the social norms which recognize a special relationship between mother and children that should not be violated. So traditionally women have not been encouraged to engage in any vocations that might take them away from the home and their children. Consequently, as Blake has noted,

> most women are permanently attached to motherhood as their primary status . . . . Women's personalities have been 'adjusted' to sex-role expectations that assume a lifetime of home-centred priorities (1974:314).

It is this close alignment of the mother with her children that lies at the heart of the cultural view that females have an innately superior ability to rear their children. Like other social norms, this remains largely unarticulated, unwritten, and immune to empirical testing. Perhaps the most effective way of demonstrating its strength is to assess the consequences (sanctions) that are applied (assigned) in the event of its violation. There is a great deal of stigma attached to a wife and mother who deserts not only her husband but also her dependent children. The immediate assumption made by many is that she is wrong, uncaring, and irresponsible to forsake her children, and the question invariably is "how could she possibly do such a thing?"

In a similar fashion, the motives of voluntarily childless women are often questioned and accompanied by the imputation of pejorative characteristics. According to a study of voluntarily childless wives conducted by Veevers (1974), these wives felt that others saw them as selfish, immature, unnatural, and unfulfilled. In addition, they described the very strong, although sometimes subtle, pressures they experienced from friends, relatives, and even acquaintances to have children. Indeed, there are forceful pressures on women to want and have children and there are equally compelling norms for mothers to nurture and love their children once they do arrive. All this persists in the face of and despite numerous campaigns to change public attitudes to the contrary.

Concomitantly, in the courts of law, there are certain *a priori* rights that derived from these expectations and obligations. If care and protection of children should be provided them by their mothers, then consistency demands that mothers have a superordinate claim on their children. This unwritten right is of no consequence until another claim in the form of custody is entered by the competing party – often the father in the context of divorce. In these circumstances, the mother's claim is usually held to be superior, precisely for the reasons just outlined. In fact, the social norms in this regard are entrenched to such an extent that there exists a common law principle stating

that children of tender years (under seven) should be with their mother. Also, some provincial statutes until recently did not provide a mechanism whereby the father can claim custody; instead the bias was in favour of the mother.

As we have already pointed out, such was not always the case. In feudal Britain, husbands had an unquestioned right to the custody of their children, a state of affairs consistent with the fact that women had very few legal rights. Not only was the husband the legally responsible 'partner' in a marriage, but custody of his children was "almost of the nature of a property interest, and it was intimately bound up with the intricacies of feudalism, (the right to sell the marriage of an heir, etc.) . . . . Once the feudal implications of parenthood were removed, the protection of parental rights became less important than the legitimate interest of the child himself" (Ontario Law Reform Commission, 1968a:7).

Prior to the beginning of the 19th century, a parallel view existed in the United States. Bass and Rein (1976) point out that "common law rule . . . regarded the father as the natural guardian of the children. This was generally based upon the fact that he was in control of all marital property and was vested with the legal responsibility to support the child" (Bass and Rein, 1976:47).

Since much of Canadian law has its roots in English law, the English context is of relevance to the study of Canadian law. For example, Ontario, or more specifically its predecessor, the Province of Upper Canada, "adopted the law of England as it stood on October 15, 1772. The first law of custody in Ontario, therefore, was the still-prevailing common law view that a father's claim to custody was superior to that of the mother" (Ontario Law Reform Commission, 1968:7).

In Ontario this superior claim of the male head of the household was recognized until the passage of the Ontario Judicature Act of 1881 which modified the situation so that both the mother and father would have equal rights in law to the custody of their children. Nevertheless, the father's superior right to custody that had existed for nearly 100 years prior to 1881 was still being reckoned with in Ontario courts in 1916. In one case it was said that

> if the other things were equal (e.g., the conduct of the parents), then, when there was a conflict between the parents, the court in reaching its decision should consider the father's ancient right to control (Ontario Law Reform Commission, 1968a:8).

There is an important distinction to be made here. Although the husband may have equal rights in law, (as he does under the Divorce Act[5]), these rights are currently permeated by the powerful cultural convention that mother and children should remain together.

5. At least there is no section of the Divorce Act which ostensibly discriminates against him. Other statutes (for example, the Infants Act, R.S.O. 1970) place both parents on an equal footing. "Father and mother of an infant are joint guardians and are equally entitled to the custody, control and education of the infant" (Sect. 2(1)).

Historically, parental rights (notably those of the father) were of more importance than those of the children. Today, it is commonplace to speak of children's rights and to insist that what is in the child's best interest should be of paramount consideration in questions of custody determination. Yet although the philosophy is regarded as sound, there are problems which emerge in any attempts to implement it. It is not always an easy matter, for example, to discover or decide what the best interest of a particular child might be or who should make such decisions.

Steinberg contends that

> in a great number of legal situations and in matters which greatly affect his interests, the voices of the child or his legal representatives are not only unheard but unsolicited . . . . Basically, it (the law) has left the parent to speak for his child probably on the theory that what is best for the parent is best for the child. But, as we all know, this is not always so (Steinberg, 1974:238).

Thus in the end, it is the parents who speak for the child and this is most definitely the case with respect to custody in the context of the divorce court. Not only is the child not to be party to the proceedings, with all the rights that such status would confer, but he or she must also rely on the judge's discretion. The judge in turn may appoint a *guardian ad litem* (next friend) to protect the child's best interests. Discretion to appoint such a guardian resides with the high courts of the provinces which possess together

> an overriding 'best interest' jurisdiction based on the concept of *parens patriae* or 'parent of the state'. It gives an inherent responsibility to the High Court, representing the Crown, to oversee the welfare of children within the Crown's territory. In many instances, this jurisdiction enables the High Court to stand as the ultimate protector of children . . . . (Wilson, 1978:2).

Today, judges place primary emphasis on making custody awards they consider to be in the best interests of the children when they are called upon to do so in a custody dispute. In the event of no dispute, judges basically accept the decision of the parents, with little question. However, before final decisions are made, many factors must be considered including age, sex, and feelings of the children, as well as the proposed arrangements for food, clothing, shelter, education and even the presence of siblings and parents. Different judges will approach these considerations in different ways. Although regard for the best interests of the child is assuredly a positive principle which is receiving more and more credence, it is not necessarily fully operative in all cases, as the following dissenting judgment given in 1976 in Saskatchewan illustrates:

> The issue of custody is without doubt the most important one – and was so treated by counsel at the hearing of this appeal – and the most troublesome. While at the hearing of the appeal the parties concentrated their attention on this issue, they were not so minded at the hearing of the petition, even though the issue was far from settled. From the standpoint of custody the hearing of the petition was, in my respectful view, quite

> unsatisfactory. Virtually no evidence was directed to this issue. The parties primarily concerned themselves with adducing evidence to show whether, on the basis of the many marital battles engaged in by them, one or other of them should be favoured by the trial judge in his determination of the issue of cruelty.
>
> No one bothered to bring forward much information in respect of the two individuals who of all the persons likely to be affected by these proceedings least deserve to be ignored – the children. We know their names, sex and ages, but little else. Of what intelligence are they? What are their likes? Dislikes? Do they have any special inclinations (for the arts, sports, or the like) that should be nurtured? Any handicaps? Do they show signs of anxiety? What are their personalities? Characters? What is the health of each? . . . In short, no evidence was led to establish the intellectual, moral, emotional or physical needs of each child. Apart from the speculation that these children are 'ordinary' (whatever that means) there is nothing on which to base a reasoned objective conclusion as to what must be done for this and that child, as individuals and not as mere members of a general class, in order that the welfare and happiness of each may be assured and enhanced.
>
> Nor was any direct evidence led to show which of the parents, by reason of training, disposition, character, . . . and such other pertinent factors . . . is best equipped to meet the needs of each individual child . . . (Wilson, 1978:23).

This judicial comment illustrates some of the considerations relevant to the determination of a child's best interests. In view of the fact that the Divorce Act provides few rules applicable in the resolution of custody, judicial opinion becomes all the more important. About the Act, the Law Reform Commission of Canada has commented that

> the criteria for custody determinations set out in the Divorce Act are not satisfactory since they are not addressed to the interests of children and furnish little guidance (1977:48).

Their conclusions appear well founded. The Divorce Act (Section II) permits the court,

> if it thinks it fit and just to so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make . . . an order providing for the custody, care and upbringing of the children of the marriage.

Because the determination of custody is such a difficult and emotion-laden task, judges prefer to exhaust other possibilities before being forced to decide custody themselves. In a 1970 study of attitudes of 14 Ontario trial judges toward child custody adjudication laws, Bradbrook states this:

> Although custody cases are difficult to try, the vast majority of cases filed never reach the point of decision. The main reason for this is that all but one of the judges interviewed stated that they make serious attempts to make the parties settle their dispute out of court. One judge admitted that he even goes so far as to see the disputing parents in his rooms and to

> browbeat them into making a settlement. The majority explore with counsel the possibility of a settlement as they feel that it is in the child's interests to keep the case out of court if at all possible. Counsel are usually equally anxious to avoid litigation in this field, and bring pressure to bear on their clients to settle, wherever possible. This formidable combination of judge and counsel insisting on a settlement usually produces the desired result (1971:560).

Bradbrook also notes the importance of judicial discretion in defining 'welfare' of the children. For example, the article cites judges, admittedly from the 'old school' who view adultery adversely, while others she cites state it usually has very little impact on their decision concerning a child's 'welfare'. Judicial discretion is thus of great importance in addition to being rather variable. Some circumstances are salient for some judges (for example, whether or not a mother works outside the home), but not for others. Consequently the type of decision rendered to parents may hang on 'the luck of the draw'.

There is an interesting interaction between the law and social norms regarding custody. Many of the laws provide for the rights of both parents, either explicitly or implicitly. At the same time, there are legal principles, such as the 'tender years' doctrine, which favours the mother, and others, less well-known perhaps, that voice a presumption in favour of the father if the child is over seven years.

Yet for the most part social norms dictate that the mother is the parent better suited to rear the children, and certainly these norms are reflected in legal decision-making concerning custody. Our figures show that 85.6% of the custody awards are made to mothers[6]. Traditional sex roles, rightly or wrongly, are still just as relevant to the determination of custody. The law does not operate in a vacuum but in a social context and as such, social community opinion as an expression of these norms is heeded even if that opinion might possibly be perceived as selective and outmoded.

There is no question that attitudes toward appropriate sex-role behaviour for fathers and mothers have undergone significant change in recent years, as one major component of a more general drive for sexual equality. Family roles are an important nexus for change, and consequently, custody decisions should be capable of providing an assessment, however crude, of the degree to which changing attitudes toward equality have been internalized by parents, judges and other legal professionals. Yet, how strongly have fathers accepted the prevailing social norms as their own? Are they reluctant to seek custody because they are disinterested or because they perceive the social norms favouring the mother to be so strong that any attempt to upset or challenge them would be futile? Do they believe that the mother is the better parent?

6. This figure applies to only those circumstances where one parent or the other gets all the children.

In this regard it is interesting to note the recommendations of the Law Reform Commission of Canada, which advocate that

> parliament endorse through legislation the principle that one parent is not to be preferred as the custodial parent on the basis of sex. Custody of a child is entrusted to a particular individual and not to a representative of popular conceptions about what a man or woman is supposed to be capable of doing or ought to do. Sexual stereotypes are irrelevant in determining the individual capacity of a parent to love, care for and raise a child (1977:58).

In the following section the figures will provide us with a description of which parent receives custody under varying circumstances. They will also be useful in answering certain questions. For example, are the grounds specified in the petition related to which parent gets custody? Is the legal role a factor? Does the age or the number of dependent children affect the custody resolution? How are custody patterns changing? In addition, we will assess not only the general Canadian picture but the provincial trends over the 11-year span under scrutiny.

Correlates of Custody

At this juncture it is imperative that we make explicit our working assumption that both parents want custody of their children. However, what is not clear is whether this parental regard extends to desiring custody in the event of divorce. It is quite possible that one spouse does not want custody of the children. On the other hand, when we examine custody awards in the context of a response being filed, we will assume that some proportion of respondents are actively contesting custody. With this one exception, it is impossible to reasonably impute any motivation or attitudes to the parent not receiving custody. To resolve this problem, we will refrain from making our assumption an integral part of our description. Nevertheless, it is extremely difficult to erase all traces of it since the language used to discuss custody is implicitly biased in favour of the assumption.

Types of Custody Awards by Region

By far the most common type of custody award is an award made to the petitioner, who is, as we have already observed, most frequently the mother. The second most frequent type is an award to the respondent (usually the father). These are not the only possibilities, however, as Table 1 indicates. In addition, Table 1 provides regional comparisons which show very few differences.

In Canada, 72.5% of the custody awards are made to petitioners. This figure varies little by region, although in the western provinces the proportion is slightly higher (76.0%). Overall, the respondent receives custody in 16.2% of the cases and there is little deviation from this in most regions. The exception is in the Territories, where the figure is quite a bit higher at 24.5%. This assumes less importance in light of the very small number of cases (665).

Third party awards are very rare. When they do occur (0.3% overall), the award could be to another relative, either maternal or paternal, or to an agency such as the Children's Aid Society. This type of award would be most probable when neither parent wanted custody or both parents were judged incompetent to care for the child(ren). This type of award is made most frequently in the Territories (0.9%), followed by Quebec (0.6%) while in the western provinces it occurs 0.1% of the time.

The next type concerns split awards, usually in cases where several children are divided between the two parents. A few also involve awards to one parent and to a third party. Overall, 3.0% of awards take the form of split awards. Regionally, there is little variation; in Ontario 2.4% of custody awards are split, whereas in the Territories that figure stands at 4.7%.

In 7.2% of divorces involving children, there is no judicial award. This is not surprising since a judge is not obliged by the Divorce Act to make an award. Thus the choice may be made for several reasons. There may already

Table 1.

Types of custody awards by region, 1969-79 (percentages)

Type of award	Region					
	Atlantic provinces	Quebec	Ontario	Western provinces	Territories	Canada
All children to petitioner	74.0	72.9	68.7	76.0	68.4	72.5
All children to respondent	16.6	17.1	15.0	16.6	24.5	16.2
All children to third party	0.4	0.6	0.2	0.1	0.9	0.3
Split award	3.8	3.3	2.4	3.1	4.7	3.0
No award	4.7	5.4	12.2	3.7	1.1	7.2
Award and no award	0.6	0.7	1.4	0.5	0.5	0.9
Total	100.1* (17,266)	100.0 (66,819)	99.9* (92,336)	100.0 (84,004)	100.1* (665)	100.1* (261,090)

* Due to rounding.

be a custody award under provincial legislation that the judge does not choose to disturb. The children of the marriage may be over 16 by the time the action is heard. As well, custody may have been satisfactorily decided in a separation agreement or one parent may be a step-parent.

In Ontario there are many more 'no awards' (12.2%) than in other regions. This variability might be explained in part through informal procedural differences. Perhaps the Ontario judiciary prefers not to make an award in the context of divorce when there is already an existing provincial custody order. In other regions, however, it may be common practice to duplicate, in essence, a provincial order in the divorce decree. Although we have no evidence to support the following explanation, we would conjecture that it is possible that separation agreements are more widely used in Ontario than in other areas as a vehicle for stating the custody decision. Again, this explanation would suggest procedural differences.

In Table 1, the last category concerns 'award and no award'. Here the case will be that one or more children are awarded to the mother or father or third party while there is no award made concerning one or more other children. Probably this type would most frequently happen where the petition listed all the dependent children of the marriage, but where some were over 16, and maybe still attending school. In this event the judge might decline to make a custody order.

Joint Custody — The Elusive Award

There is one type of award that we have not yet examined thus far and that is the joint custody award. In this case we have no statistical information since the Central Divorce Registry forms do not include a measure to count it, a fact which in itself indicates the rarity of the award. In fact, when these forms were designed (for first use late in 1968), the occurrence of joint custody was so low that it simply didn't merit attention. In any case, joint custody is used to describe those situations where both parents have the legal responsibility for decisions affecting the child – education, health and welfare matters – although the child physically usually resided with one parent while the other had liberal access. Joint custody also refers to those cases where the child(ren) physically change residence from one parent to the other, alternating perhaps on a weekly, monthly or even annual basis, or where responsibility for decisions affecting the child shifts along with the physical residence of the child.

In some cases, neither parent wants a joint custody regime for the children. In March of 1979, the Ontario Court of Appeal overturned a lower court joint custody decision (Baker v. Baker)[7]. The three-man appeal court stated that there was no support in case law for the order of joint custody and that such orders should be limited "to the exceptional circumstances which are rarely, if ever, present in cases of disputed custody" (*Globe and Mail*,

7. Neither parent requested joint custody.

March 30, 1979:1-2). Indeed, most joint custody arrangements are probably made privately rather than through the courts. This is so because it is seen to be difficult to force parents to co-operate in matters concerning their children on a day-to-day basis, and this type of co-operation is necessary before a joint custody arrangement can succeed.

Table 1 clearly demonstrates that most awards (88.7%) involve all children being awarded either to the petitioner or to the respondent. Since we cannot easily determine the exact nature of a split award, the remaining descriptions will concentrate only on those cases where either one parent or the other receives sole custody of all dependent children. It should not be inferred, though, that (a) awards are honoured, or (b) that they are not varied informally, or (c) that custody implies residence. As in other aspects of the divorce process, life may proceed in a different direction than that which the court orders have sought to enforce.

Spouse Receiving Custody: Provincial Patterns

Some modest provincial variation is apparent in an assessment of the extent to which husbands receive custody as compared to wives (See Table 2), although the stability of the relative proportions stands out as the principal feature.

Table 2.

Spouse receiving custody*, by province, 1969-79

Province	Spouse receiving custody			
	Husband %	Wife %	Total %	Number
Newfoundland	15.2	84.8	100.0	1,734
Prince Edward Island	15.4	84.6	100.0	599
Nova Scotia	15.6	84.4	100.0	8,909
New Brunswick	16.7	83.3	100.0	4,392
Quebec	16.1	83.9	100.0	60,075
Ontario	14.4	85.6	100.0	77,353
Manitoba	13.8	86.2	100.0	9,802
Saskatchewan	11.4	88.6	100.0	6,362
Alberta	11.9	88.1	100.0	29,785
British Columbia	13.1	86.9	100.0	31,805
Yukon	14.1	85.9	100.0	332
Northwest Territories	16.8	83.2	100.0	286
Canada	14.4	85.6	100.0	231,434

* Includes only those cases where one spouse receives all the children.

For husbands, the range of variation goes from a low of 11.4% in Saskatchewan to a high of 16.8% in the Northwest Territories. Of course, the converse is true for wives. The Canadian figure for husbands is 14.4%, and many of the provinces are reasonably close to it.

Table 3.

Spouse receiving custody* by sex of petitioner and province of divorce, 1969-79

Spouse receiving custody	Province or Territory			
	Newfoundland		Prince Edward Island	
	Husband	Wife	Husband	Wife
Husband	62.5	1.9	51.7	3.1
Wife	37.3**	98.1	48.3	96.9
Total	100.0	100.0	100.0	100.0
Number	380	1,354	151	448
	Nova Scotia		New Brunswick	
	Husband	Wife	Husband	Wife
Husband	41.3	5.8	47.3	4.1
Wife	58.7	94.2	52.7	95.9
Total	100.0	100.0	100.0	100.0
Number	2,438	6,471	1,279	3,114
	Quebec		Ontario	
	Husband	Wife	Husband	Wife
Husband	44.9	5.2	43.4	3.9
Wife	55.1	94.8	56.6	96.1
Total	100.0	100.0	100.0	100.0
Number	16,556	43,519	20,595	56,758
	Manitoba		Saskatchewan	
	Husband	Wife	Husband	Wife
Husband	34.0	5.7	40.0	2.1
Wife	66.0	94.3	60.0	97.9
Total	100.0	100.0	100.0	100.0
Number	2,792	7,010	1,560	4,802

Table 3.

Spouse receiving custody* by sex of petitioner and province of divorce, 1969-79 (Continued)

Spouse receiving custody	Province or Territory			
	Alberta		British Columbia	
	Husband	Wife	Husband	Wife
Husband	38.0	4.5	42.0	3.3
Wife	62.0	95.5	58.0	96.7
Total	100.0	100.0	100.0	100.0
Number	6,650	23,135	8,135	23,670
	Yukon		Northwest Territories	
	Husband	Wife	Husband	Wife
Husband	34.5	3.2	34.0	7.5
Wife	65.5	96.8	66.0	92.5
Total	100.0	100.0	100.0	100.0
Number	116	216	1,001	186
	Canada			
	Husband	Wife		
Husband	42.6	4.3		
Wife	57.4	95.7		
Total	100.0	100.0		
Number	60,751	170,683		

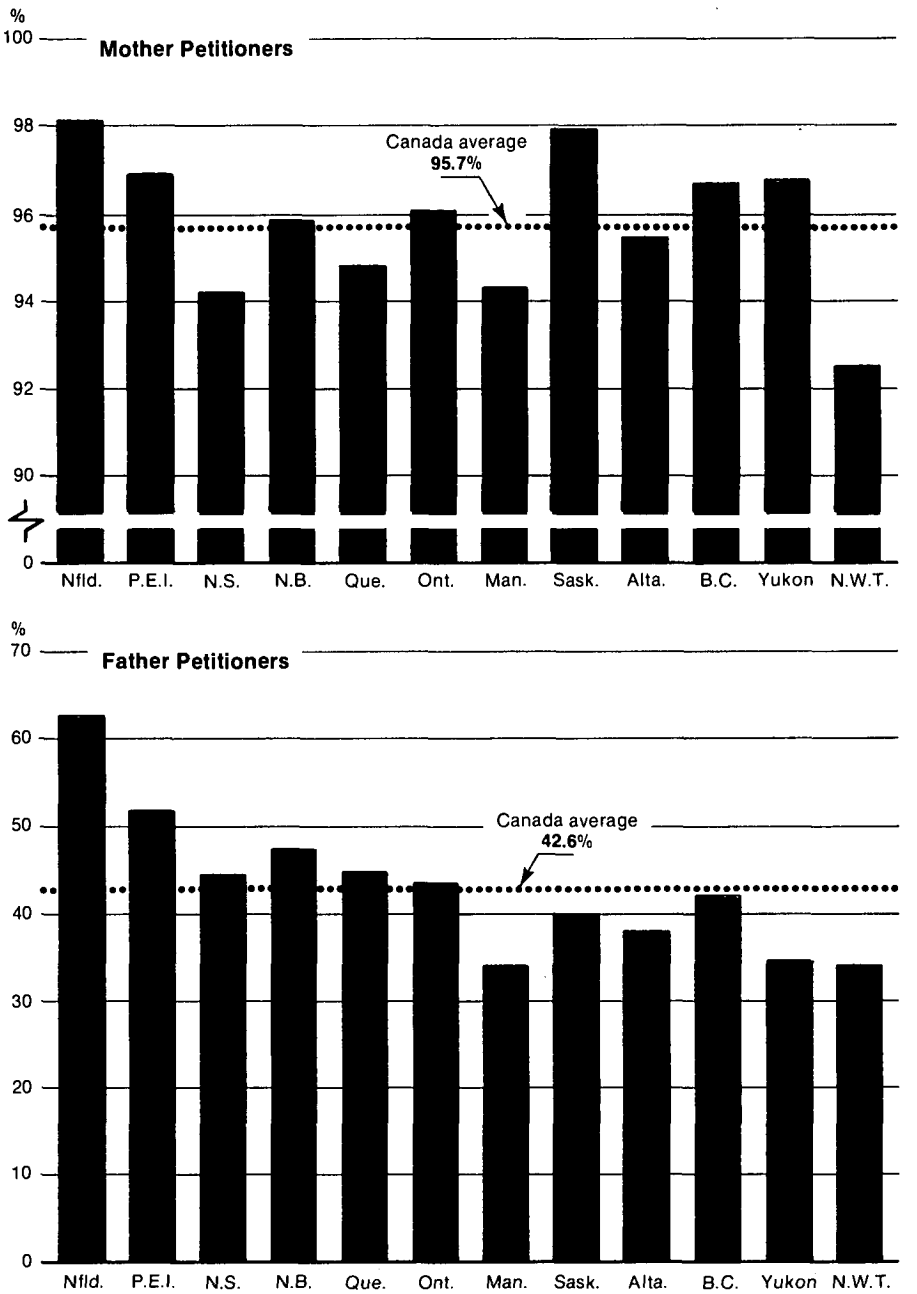
* Includes only those cases where one spouse receives all the children.
** Discrepancy due to rounding.

The Effect of Sex of Petitioner and Province of Divorce on Custody Awards

We have already discussed legal roles (petitioner or respondent) and the reasons why one spouse may assume the role of petitioner (usually the wife) as opposed to that of respondent. We have noted that legal roles may reflect a certain indifference, the specific ground being pleaded, the effects of age, or an attempt at staging so that the legally innocent spouse reaps any benefits such as the receipt of maintenance or child custody. We repeat that there is

Figure 16

Proportion of Petitioners Receiving Custody (Mothers and Fathers), Canada and the Provinces, 1969-1979



little way to assess the relative importance of these reasons. Such considerations aside, we will now go on to describe custody awards to parents by their respective legal roles and province of divorce. (See Table 3 and Figure 16)

First, let us consider how often the wife obtains custody when her legal role is that of petitioner. A glance at the lower right-hand corners of the provincial sub-tables makes it obvious that women as petitioners obtain custody in virtually every case. Fathers (as respondents) are shut out particularly in Newfoundland (1.9%) and Saskatchewan (2.1%), but are awarded custody somewhat more often in Nova Scotia (5.8%) and the Northwest Territories (7.5%). In Canada as a whole, 95.7% of petitioner mothers obtain custody.

Petitioner fathers receive custody substantially less often than their female counterparts. In fact, only in Newfoundland and Prince Edward Island do they receive custody in a majority of cases (62.5%, 51.7%, respectively). The other extreme occurs in Manitoba and the Northwest Territories (34.0% each). The remaining provinces are fairly close to the overall national figure of 42.6%.

Although legal role clearly makes a difference, the effects of gender are even stronger. In the majority of provinces, the mother will receive custody in most cases, regardless of her legal role.[8] However, fathers will receive custody more often as petitioners than they will as respondents. The reasons for this pattern are much less obvious, although it would certainly suggest that any father wishing to obtain custody might well be advised to place himself in the legal role of petitioner. A factor that undoubtedly influences the custody decision is the residence of the child before custody is determined. While we cannot address this, it is a relevant consideration.

Trends in Custody According to Sex of Petitioner

Aggregated Canadian figures showed that female petitioners were awarded custody in 95.7% of the cases. The similar figure for males as petitioners was 42.6%. If liberalization of attitudes toward sexual equality are manifested in behaviour (as indicated by obtaining custody), we would expect to observe increasing proportions of fathers receiving custody over the 11-year span from 1969 to 1979. Secondly, to the extent that legal role reflects (however imperfectly) elements of fault and to the extent that fault is important, we might also expect to see a decline in the importance of legal role over time. These hypotheses are in keeping with our perception that there is an increasing

8. In other analyses not presented here, it was observed that custody is awarded most often to a parent when all the children are of the same gender as that parent. In those cases where all the children were boys, fathers received custody most often (16.2%). When there were both boys and girls the figure was 14.6% and when the children were all girls fathers received custody in 11.9% of the cases. The reverse is true for the mother. Either parents or judges (or both) feel that same sex gender identification holds some importance, or children prefer to live with the same-gender parent. Nevertheless, these differences are small in light of the overall differential between husbands and wives.

societal realization that 'fault' is not particularly relevant to assessing custody.

First, consider the percentages for petitioner husbands receiving custody. The trend declines steadily from 1969 (55.8%) to 1975 (39.9%), experiences a slight upshift in 1976 (41.5%) and then subsequently declines slightly in the last four years to 38.8% in 1979. Conversely, a slow, but steady increase exists for husbands as respondents receiving custody. In 1969, the trend begins at 1.9%, rises to 3.8% in 1973 and continues to increase to 5.6% in 1978. Once again, the reverse trend occurs when the wife as petitioner receives custody.

Thus we can conclude that husbands were granted custody slightly less often in 1979 than in the early seventies. Over the 11-year span the maximum variation is only 1.8%. These figures thus show no support for the notion that the influence of traditional sex roles on behaviour is declining. Our first hypothesis is denied by the numbers.

Tentative support exists, however, for the second expected result. It would seem that legal role has become somewhat less important over time since petitioners (both husbands and wives) get custody less often then their respondent counterparts. The differential between husbands as successful petitioners and husbands as successful respondents has decreased over time.[9] These figures apply to the wife as well and are not affected by any changing proportion in terms of which parent petitions since the percentage of fathers who petition is relatively constant over time (approximately 26%).

Age is another factor that must be taken into consideration. We already know that there is decidedly a relationship between sex of petitioner and age of petitioner such that husbands petition more often with increasing age. Therefore there is a distinct possibility that this relationship could affect the one observed in the previous table. (In tabular analysis not presented here for simplicity's sake, age[10] was introduced as another factor in the relationship already present in Table 4, in order to observe its effects.)

In our analysis, we have concentrated on the effects of age for the husband, both as petitioner and as respondent and we have observed that husbands aged 35 or older received custody slightly more often than their younger counterparts. This pattern was consistent for every year, 1969 through 1979. The same general trends observed in Table 4 concerning the decreasing importance of legal role were also present, regardless of age. For wives, of course, the inverse case held. They got custody less often, if they were 35 or older, than did their younger counterparts.

Since differences by age are marginal (for example, in 1974 the magnitude of the difference between a petitioner husband under 35 receiving

9. From 55.8% minus 1.9% equals 53.9% in 1969, to 38.8% minus 5.5% equals 33.3% in 1979.

10. Since to include both age variables into the analysis would complicate it to a considerable degree, we will also assume here that age of petitioner adequately reflects the age of both parties. Secondly, in our tabular analysis age was dichotomized into two categories – 34 or younger and 35 or older – in order to produce a 4-way table that was manageable.

Table 4.

Spouse receiving custody* by sex of petitioner and year, 1969-79

Spouse receiving custody	Year and sex of petitioner			
	1969		1970	
	Husband	Wife	Husband	Wife
Husband	55.8	1.9	54.2	2.6
Wife	44.3	98.1	47.6	97.4
	100.1	100.0	100.0	100.0
Number	2,027	6,767	3,345	9,916
% of husbands receiving custody	14.3		15.1	
	1971		1972	
	Husband	Wife	Husband	Wife
Husband	49.6	2.9	45.7	3.3
Wife	50.4	97.1	54.4	96.7
	100.0	100.0	100.1	100.0
Number	3,768	10,521	4,197	11,197
% of husbands receiving custody	15.2		14.7	
	1973		1974	
	Husband	Wife	Husband	Wife
Husband	43.7	3.8	40.8	4.1
Wife	56.3	96.2	59.2	95.9
	100.0	100.0	100.0	100.0
Number	5,012	13,239	5,864	17,230
% of husbands receiving custody	14.8		13.4	

Table 4.

Spouse receiving custody* by sex of petitioner and year, 1969-79 (continued)

Spouse receiving custody	Year and sex of petitioner			
	1975		1976	
	Husband	Wife	Husband	Wife
Husband	39.9	4.5	41.5	4.7
Wife	60.1	95.5	58.5	95.3
	100.0	100.0	100.0	100.0
Number	6,723	19,351	6,996	20,380
% of husbands receiving custody	13.7		14.1	
	1977		1978	
	Husband	Wife	Husband	Wife
Husband	40.8	4.7	39.9	5.6
Wife	59.2	95.3	60.3	94.4
	100.0	100.0	100.0	100.0
Number	7,679	20,867	7,358	20,496
% of husbands receiving custody	14.3		14.8	
	1979			
	Husband	Wife		
Husband	38.8	5.5		
Wife	61.2	94.5		
	100.0	100.0		
Number	7,782	20,634		
% of husbands receiving custody	14.5			

* Includes only those cases where one spouse receives all the children.
** Discrepancy due to rounding.

custody and a similar husband over 35 was only 6.8%), what is perhaps more important is the consistency of patterns over time. Assuming that custody is desired, husbands have a small, but uniform edge when they are older.[11]

The explanations for these patterns are less clear but it would appear that older fathers might feel themselves better equipped financially and emotionally to care for their children, and judges may concur. Secondly, older fathers tend to have older children and these children in turn, because of their age, might choose to live with their fathers and also have this legitimated in the courts. In any event, it is very likely futile to contravene the wishes of an adolescent regarding custody.

In sum, the evidently stationary patterns from 1969 to 1979 would strongly suggest that there have been no revolutionary changes in the nature of custody awards despite the popular view that changes have occurred. Where they have taken place, the changes have been carried out in spite of the courts and not because of them. Finally, we find no evidence that norms pertaining to sex roles and custody have materially changed at all, though we do not preclude the possibility that such may be the case.

Grounds and Conduct: Connection or Accident?

In some instances, conduct is easily translated into grounds: physical cruelty and adultery. In other instances, conduct can very well be hidden by grounds (such as separation) where there is no apparent implication that poor behaviour was even an issue.

In establishing this connection between grounds and conduct we have already quoted the Divorce Act, with its directive that conduct be considered among other things when making an order for custody of the children of the marriage. (Sect. II). When we combine this with one or more informal perceptions of conduct displayed by the spouses and also consider the adversarial nature of court proceedings, it is reasonable to expect that grounds pleaded in a divorce action could be related to dispositions of custody and legal role. In fact, given the material already discussed, it would be rather surprising if there were no differences. We have already flagged the distinction between marital failure grounds and marital offence grounds. With respect to the latter we have noted variability in the degree of stigma attached to some grounds (homosexual acts) versus others such as adultery. We have further pointed out that with the exception of grounds of separation only the 'innocent' spouse may assume the role of petitioner. Lastly, judges are instructed by the Divorce Act to take into account conduct and grounds in

11. In this context it should be noted that petitioner fathers gain custody more often the more children there are. (There are no differences according to the number of children for respondent fathers.) When there is one child 40.7% receive custody, for two, the figure is 44.7%, and for three it is 54.1%. This is probably related to age, and other figures confirm this only to a certain extent, because the number of children does not reflect total marital fertility, but only reflects the number of dependent children.

combination with their legal role so they may assess conduct in a legal setting. Taking all of these factors into consideration, then, we expect variability in such a way that petitioners will receive custody more often when the grounds involve marital offences, and secondly, that within the offence-type categories, the petitioners alleging a greater number of offences or those that carry greater social stigma will receive custody more often.

Table 5 displays the joint relationship between sex of petitioner and alleged grounds in conjunction with the indication of which spouse receives custody. Different grounds are associated with petitioners and respondents receiving custody in varying proportions. Since wives as petitioners get custody in at least 95% of the cases regardless of ground, let us consider husbands as petitioners. Our hypothesis is supported, at least with respect to petitioner fathers. The rank ordering from 'most often gets custody' to 'least often gets custody' (in percentage terms) is as follows[12]: 'other' (69.9%), cruelty, adultery and/or noncohabitation (49.0%), adultery only (44.9%), cruelty only (42.1%), and noncohabitation (37.4%).

In the first two categories, a majority of husbands receive custody. In the first instance ('other'), the grounds tend to be rather stigmatizing, (for example, imprisonment or homosexual acts), and in the second instance several grounds are pleaded. The next two categories, adultery and cruelty, are little different from the basic relationship (presented earlier in Table 3) between sex of petitioner and spouse receiving custody. However, the percentages are higher than for the last category (noncohabitation) which is based on marriage failure grounds. Thus, when marital offences are cited as grounds, the husband as petitioner gets custody in greater proportions than if the grounds are marriage breakdown[13]. Nevertheless, there is a good deal of variability among the marital offence categories as well.

The picture is similar for the husband as respondent obtaining custody. Here the figures are also low — in every instance at or below 5.1% and where 'other' is used, just 2.4% of the respondent husbands get custody. Incidentally, this allows us to observe once again the overwhelming tendency to award dependent children to their petitioner mothers.

In Table 5 the variability (especially for petitioner fathers), suggested that grounds chosen affect the process in some way in addition to the strong effects of gender. Thus all grounds are not equal. In fact, we would contend that judges and lawyers not only view individual grounds differently, but impose on the conduct behind them an ordering based on certain implicit moral values. Perhaps more importantly, the parents themselves (especially fathers) consider the matter in the same way and use the criteria to help them decide if they will ask the court for custody. Certainly any reprehensible

12. This same ordering holds for women as respondents, except that it is from 'least often gets custody' (i.e., other) to 'most often gets custody'(i.e., noncohabitation).

13. Technically speaking, not all the grounds generally described as being marital offences in fact are. However, the majority are, and those that aren't contain elements of fault – as was discussed in Chapter 5.

Table 5

Spouse receiving custody* by sex of petitioner and grounds for divorce, 1969-79 (percentages)

Spouse receiving custody	Grounds and sex of petitioner			
	Cruelty only		Adultery only	
	Husband	Wife	Husband	Wife
Husband	42.1	5.1	44.9	4.6
Wife	57.9	94.9	55.1	95.4
	100.0	100.0	100.0	100.0
Number	3,788	32,840	26,435	49,255
	Noncohabitation		Mental cruelty Adultery Noncohabitation**	
	Husband	Wife	Husband	Wife
Husband	37.4	3.7	49.0	4.9
Wife	62.6	96.3	51.0	95.1
	100.0	100.0	100.0	100.0
Number	23,732	56,528	5,798	21,212
	Other***			
	Husband	Wife	Total	
Husband	69.6	2.4	14.4	
Wife	30.1	97.6	85.6	
	100.0	100.0	100.0	
Number	998	10,848	231,434	

* Includes separation, (by far the most important), desertion, and whereabouts of spouse unknown.
** Includes any combination of these four, except mental and physical cruelty, which is contained in category one.
*** Includes other grounds such as sodomy, bestiality, rape, homosexual acts, addictions to alcohol or narcotics, imprisonment, as well as any not yet mentioned combinations.

conduct on the part of the respondent spouse could be used as leverage in informal negotiations over such matters as custody.

Secondly, the figures might represent what is little more than an attempt by the parties and their lawyers to make everything appear 'normal' to the judge. Thus where circumstances permit, matters may be contrived consciously or unconsciously in order that the petitioning (innocent) party receives custody. This would perhaps reduce the likelihood of the judge

questioning the arrangements. Such an explanation rests heavily on the degree to which the *adversarial* nature of the proceedings plays a role. When one parent has no interest at all in obtaining custody, the explanation fails of course.

Although the rank orderings observed for Table 5 remain remarkably constant over the 11-year span, the actual percentages for the individual categories of grounds have generally dropped with time, or dropped and then remained rather stable for the more recent years. For example, the proportion of petitioning husbands using 'other' grounds has dropped from 78.6% in 1969 to 65.1% in 1977, with little fluctuation in the intervening years. The percentage of petitioner fathers obtaining custody using noncohabitation has also dropped from 49.6% in 1969 to 36.1% in 1974 and has remained stable since. Cruelty is the only category in which there is a fair amount of fluctuation, although even here, it has lessened in recent years.

The petitioner husbands' loss in this respect has been counterbalanced by increased percentages over time when husbands are respondents and get custody. Thus, what decline there is in the importance of legal role seems to be uniform across most categories of grounds.

In Table 5 we can also observe that for the most often used categories of grounds[14], petitioner mothers received custody most often, followed by respondent mothers, petitioner fathers, and lastly, respondent fathers. (For the minor categories of grounds, the intermediate orderings are reversed.) This is generally the same picture that is present for 1979, but it represents a change from the 1969 figures. In 1969, petitioner mothers received custody most often followed by petitioner fathers, respondent mothers and finally respondent fathers. In fact, this ordering held for virtually every category of grounds. Further, the common element for the first two rankings is the status of petitioner, thus emphasizing the importance of legal role. At the same time it should be noted that the common denominator in 1979 for the first two rankings is 'mother', thus illustrating the ever-present importance of traditional sex-role elements.

In concluding, it is clearly apparent that the type of ground a petitioner chooses or is forced by circumstances to cite has implications for the chances of obtaining custody of the children. More generally, it can be seen that there will often be a relationship between grounds used and the outcome. It must also be considered that the choice of grounds is determined through a series of factors, some of which may also, by inference, affect the outcome. The relationship is admittedly an elusive one. What does seem clear is that there is reinforcement for the view that the selection of grounds for divorce is inextricably linked to custody awards. Beyond this it is difficult to posit any definite correlation.

14. Cruelty only, adultery only, and noncohabitation.

When the Respondent Contests: Is the Picture Altered?

We have no way of knowing why a divorce is contested, since our dataset does not capture this information but only records whether or not an answer was filed. Further, there is no way of knowing exactly how often custody is contested. We only know that in some number of cases it is a serious and unresolved issue. We also know that when there are children, 15% of the divorces are contested. In these cases the judge must assess both sides of the argument in order to legally resolve the conflict. If the divorce is not contested (no answer has been filed), the judge will be more likely to legitimate the *status quo*, whatever it may be. Our figures to this point have shown that the *status quo*, in a majority of cases, holds the wife as petitioner with eventual custody of the children. However, it is important to recognize that even if the spouses agree on the custody of the children, the judge will not necessarily "be bound by this private agreement" (Temins, 1969:73). In fact, it is reasonable to expect that a judge will upset any existing arrangements more often when he or she is being asked to, than when such is not[15] the case. Where there are no problems a judge gives legal weight to a personal decision, but when problems exist, the judge must attempt to find agreement, or impose his or her own decision. Common sense suggests that when an answer is filed, a respondent spouse is more likely to obtain custody than when no answer is filed.

Table 6 bears this out. Women who filed a response received custody in nearly two-thirds of the cases (65.8%), while the comparable figure was just a little more than half (54.7%) when no answer was filed. There was also an increase to 10.2% from 3.3% for husbands as respondents when they filed an answer.

Based on calculations of the magnitude of the difference, female respondents increase their percentage (65.8% – 54.7% = 11.1%) about twice as much as do males (10.2% – 3.3% = 6.9%). Interestingly enough, though, husbands, regardless of legal role, get custody more often (19.3%) when an answer is filed than when one is not (13.7%). It must be remembered that wives petition more often, thus placing men in a position to respond more often (Chapter 5, Table 8).

It has already been noted that over time husbands have received custody less often as petitioners and more often as respondents. In the context of filing an answer, this trend holds only when no answer has been filed, and even then the last three years (1977-79) are stable. When a response is filed, there is much more fluctuation for both husbands and wives. However, the range between the upper and lower limits is still rather small. For example, respondent females received custody most often in 1972 (67.7%) and least

15. It would be valuable to know how often a judge overrules a private agreement. Some may argue that since approximately nine out of every 10 divorces are uncontested, it is of little importance to discuss awards of custody in a legal framework. Yet, because this presents an interpretive problem, the data could allow us to comment about what kinds of decisions are made.

Table 6.

Spouse receiving custody* by sex of petitioner and answer filed/not filed, 1969-79

Spouse receiving custody	Answer filed			
	Husband petitioner	Wife petitioner	Subtotal	
Husband	34.2	10.2	19.3	
Wife	65.8	89.8	80.7	
	100.0	100.0	100.0	
Number	11,591	19,139	30,730	
	Answer not filed			
	Husband petitioner	Wife petitioner	Subtotal	Total
Husband	45.3	3.3	13.7	14.6
Wife	54.7	96.7	86.3	84.4
	100.0	100.0	100.0	100.0
Number	39,808	121,997	161,805	192,535

* Includes only those cases where one spouse receives all the children.

often in 1971 (63.1%) – a range of only 4.6 percentage points. For respondent men, the figures were 5.9% in 1969 and 11.0% in 1975 – a range of 5.1 percentage points.

Over time there has been a narrowing of the magnitude of the difference in obtaining custody between contesting and not contesting, at least for respondent women. In 1969, the magnitude of the difference was 27.1 percentage points, whereas in 1977 it was only 6.6 percentage points. Thus any 'advantage' from filing would appear to have decreased. For respondent husbands the magnitude of the difference (between contesting and not contesting) has always been fairly low, but with some fluctuation – a low of 4.5% in 1969 to a high of 8.2% in 1970. All other percentages fluctuated within these limits. By 1979, respondent husbands and wives increased the percentage of the time they received custody equally by filing. In both instances the magnitude of the difference was approximately 6 percentage points. Lastly, it should be pointed out that the percentages have remained stable since 1975. Some of the large differences observed in the early years probably represent a familiarization process with the new Divorce Act.

Clearly, filing an answer increases the likelihood that the respondent spouse will obtain custody, although only slightly in recent years. Our next step is to query whether or not this pattern (as presented in Table 7) is altered according to the grounds pleaded. We would anticipate variation along the dimension of grounds, given our earlier discussions. We might also expect that the more stigmatizing grounds would inhibit the effectiveness of filing a response, assuming, of course, that custody is the goal. Table 7 does not, however, support this contention.

We will turn first to the differences between female respondents receiving custody depending on whether or not an answer was filed. Table 7 shows that the change in percentages between cases where an answer was filed as opposed to where one was not is roughly similar for comparable individual cells for all categories of grounds, excepting adultery. The difference where adultery is the ground is only 5.6 percentage points (59.2% – 53.6%) while it stretches to approximately 20% for the other grounds. With the exception of

Table 7.

Spouse receiving custody* by sex of petitioner, alleged grounds and answer filed/not filed, 1969-79 (percentages)

Spouse receiving custody	Answer filed Alleged grounds					
	Cruelty only Petitioner		Adultery only Petitioner		Noncohabitation Petitioner	
	Husband	Wife	Husband	Wife	Husband	Wife
Husband	34.1	11.9	40.8	9.2	24.4	8.9
Wife	65.9	88.1	59.2	90.8	75.6	91.1
Number	1,386	5,669	4,641	5,745	3,896	3,669
	100.0	100.0	100.0	100.0	100.0	100.0

	Physical cruelty Mental cruelty Adultery Noncohabitation** Petitioner		Other*** Petitioner	
	Husband	Wife	Husband	Wife
Husband	35.2	12.4	55.9	6.7
Wife	64.8	87.6	44.1	93.3
Number	1,364	2,643	304	1,413
	100.0	100.0	100.0	100.0

Table 7.

Spouse receiving custody* by sex of petitioner, alleged grounds and answer filed/not filed, 1969-79 (percentages) (concluded)

Spouse receiving custody	No answer filed Alleged grounds					
	Cruelty only Petitioner		Adultery only Petitioner		Noncohabitation Petitioner	
	Husband	Wife	Husband	Wife	Husband	Wife
Husband	51.2	3.1	46.4	4.0	40.7	3.2
Wife	48.8	96.9	53.6	96.0	59.3	96.8
Number	1,521	19,366	17,705	35,943	16,809	46,647
	100.0	100.0	100.0	100.0	100.0	100.0

	Physical cruelty Mental cruelty Adultery Noncohabitation Petitioner		Other*** Petitioner		Total
	Husband	Wife	Husband	Wife	
Husband	55.6	3.5	77.0	1.5	14.6
					28,044
Wife	44.4	96.5	23.0	98.5	85.4
					164,491
Number	3,238	12,510	535	7,531	192,535
	100.0	100.0	100.0	100.0	100.0

* Includes separation (by far the most important), desertion, and whereabouts of spouse unknown.
** Includes any combination of these four, except mental and physical cruelty, which is contained in category one.
*** Includes other grounds such as sodomy, bestiality, rape, homosexual acts, addictions to alcohol or narcotics, imprisonment, as well as any not yet mentioned combinations.

adultery, the range from the highest percentage (most often gets custody) to the lowest remains the same, whether or not an answer was filed. It would therefore appear that with one exception, filing a response does not increase the probability of obtaining custody differentially according to the grounds.

Why adultery should be the exception is not clear, especially since we have already argued that some of the other grounds probably tend to carry a stronger social stigma. Although we have no evidence to substantiate this, it is

possible that women who committed adultery are more likely to be living with another man than women who are accused of other matrimonial offences. In turn, this common-law arrangement might very well be viewed rather dimly by the judge (and the petitioner spouse) as a suitable environment in which to raise young children. This explanation becomes more plausible if one considers that if cruelty was pleaded, there was likely no adultery and if there was no adultery, there was no 'other man', ergo, the necessary condition for 'living together' is absent and sensibilities on the part of the judge and the petitioner are less likely to be offended.

The comparable figures for the male respondents have shown that they do not get custody very often. However, by filing an answer no matter what the grounds, fathers (like mothers), increase the likelihood of getting custody. The change in percentage points tends to be rather small when adultery or noncohabitation have been alleged (about 5%) and somewhat larger when crueltyor other multiple grounds are alleged (8.8% and 8.9%, respectively). Also, the ordering according to grounds, from who most often gets custody to who least often gets custody, changes when a response is filed. This suggests that the grounds alleged play some role, albeit a minor one, in light of the small differences between grounds.

A Synthesis: The Overall Custody Picture

To a father who does not succeed in obtaining the custody of his child(ren) it is small consolation to know that he is not alone. The figures show that only one-seventh of all fathers actually receive custody. For the young child who is torn between two parents and who adamantly wishes they would reconcile, the medicine is made no easier to swallow by the realization that most divorcing parents do not reunite and that joint custody is very rarely the solution. The poignancy of this human drama is seldom translated into the world of statistics. Nevertheless, the numbers are extremely useful and necessary in order to provide a general description, not only of custody awards in particular, but for the larger legal process of which they are a part. We have viewed the law as the public ordering (or reordering), sometimes consequential, of private relationships and in this immediate context, of parent-child relations. The implication, of course, is that the legal reordering has consequential effects on the social order of the family.

Our description of the tabular material in this section has revealed some surprising patterns and provoked many further questions. Perhaps the most unexpected piece of information is that fathers did not have custody of their children any more often in 1979, proportionately speaking, than they did 10 years earlier.

Further, our findings support the widespread social preference for custody to the mother. Regardless of whether fathers accept or reject this view, they do not currently have much hope of changing it. Because the figures vary

so little provincially, it would therefore appear that our comments apply equally to all parts of Canada.

Other findings related to specific legal characteristics indicate that the importance of legal role has declined over time. Petitioner fathers, for example, get custody less often and this decline is offset with an increase in custody to respondent fathers. The grounds selected for divorce are differentially associated with petitioners receiving custody, especially fathers, since petitioner mothers are already extremely likely to obtain custody. Fathers in this role are most likely to receive custody when the category of grounds is 'other', and least likely when the category is noncohabitation. Thus it would seem that fault plays a role although it cannot definitely be stated in precisely what manner.

Filing a response increases the likelihood that the respondent will receive custody. However, a wife's act of filing an answer when considered in conjunction with grounds has, with only one exception, a uniform effect across categories of grounds. That exception is adultery, where the effects of filing by an adulterous spouse are much lower (about 6% change) than for the other categories of grounds (about 20% change). It is also imperative to note, though, that only 15% of the petitions are contested when children are involved. Older fathers (35 or over) are awarded custody slightly more often than their younger counterparts. This relationship has held consistently from 1969 to 1979, regardless of legal role.

Finally, our figures make clear that all children normally go to one parent or the other. There are relatively few split awards, third party awards, or joint awards. It is also standard practice to give the non-custodial parent 'reasonable access' to the children. Here 'reasonable' often translates into bi-weekly visiting privileges as well as a sharing of the children's school holiday time.

There is an undeniable link between characteristic features of the legal process and custody awards. We have emphasized the role of social norms, the law in general and its adversarial character in particular, differential resources as indicated by age, and finally, the possibility of staging the action to produce some desired outcome, as potential explanations to explain these links.

With respect to custody, the figures indicate that the law and social norms are mutually reinforcing insofar as the gender of the custodial parent is concerned. The Divorce Act does not indicate any sexual preferences, yet the nature of custody decisions rendered under this Act indicates that women continue to keep the children when the custody decisions are made. If we entertain the unusual hypothesis that custody of the children is a disadvantage (in terms of time and expense), the father could be considered as the parent who fares better. After all, he is free of the children and he may well default on support to some extent. The parent who obtains custody thus may not always be the 'successful' one.

If, however, we assume that both parents want their children, and further, that they should have equal opportunity to get custody, then our findings

imply that to the extent that new norms of sex stereotyping become accepted, a change in the forms of custody would occur. Such acceptance is not yet clearly in evidence.

The Spoils: Who gets what, whom, and how?

Issues such as property, support and children need not be decided legally in a court, although custody and support are often legitimated in a divorce decree. Assuming that a couple can sufficiently purge themselves of any negative emotions that exist between them, they can more likely solve all of the ancillary issues to divorce on their own or with a minimal amount of legal advice. For those who cannot, the exercise becomes much more costly in terms of both time and money and is further exacerbated by differing legal forums chosen according to the nature of the problem and its timing.

Depending on what property laws exist in the various provinces as well as the individual proclivities of the spouses, a couple could share equally in the assets of the marriage, or laws of separate property could prevail. These are not necessarily mutually exclusive. When a law of separate property applies, often the husband has title to more than the wife. It is the exception rather than the rule that the wife earns more than the husband. Typically when she is awarded custody, she is also awarded child support and perhaps maintenance for herself. However, since many court orders to pay support are never honoured for one reason or another, many wives fail to receive the full amount of support that is awarded, and the arrears continue to grow until they are almost surely unrecoverable. In fact, if a wife makes no formal legal attempts over a long period to recover what is owing her and her children, a judge will have little sympathy to the suggestion that arrears should be paid.

It is difficult to obtain comprehensive figures on these issues, since the acts in question are predominantly voluntary and consequently we can not apply statistical measurement to those agreements that are privately arranged. Within broad limits, the couple has the freedom to negotiate its own division of the 'spoils', or it can rely on the judgment of the courts. Whether these courts subsequently offend the sense of fair play and natural justice or uphold it is a matter of personal judgment. Since both love and war are involved in the dissolution of a family, it may even be unreasonable to expect fairness at all. The extent of legal change has proved the tacit acceptance of this idea. The social and economic consequences of legal decisions which tend to grant custody to women along with modest accompanying support serve to perpetuate and enhance the already pronounced differences between men and women. For one thing, custody is an inevitable drain on energies which could otherwise be devoted to making money, especially when fathers renege on their legal obligations. Thus the present consequences of marriage dissolution of a financial or custodial nature do *not* appear, in sum, to alter the rather well established patterns which custom and convention have dictated since the onset of the present century. In some key

respects, family life, in unbroken as well as broken states, seems very much of a piece over the period spanning the early part of the century to the present. Although if there has been change in economic and social life, in the law, and in the sex-typing of human behaviour, the patterns of continuity are nonetheless real and apparent.

Women and men, despite all claims to the contrary, continue to place value on the married state and to have faith in the judicial and ecclesiastical recognition of that state. They still, in overwhelming numbers, make assumptions concerning the importance of the maternal role, and finally, still countenance an inequitable division of marital property in favour of the husband whose greater presence in the work force favours his attempts to provide the major share of income and thus produce ownership of most family assets. Whatever one may think of this pattern, it persists and if we are to believe our data, it is little changed over the decades of this century.

Certainly, that pattern *means* different things to contemporary citizens – it may now be a source of guilt – but nevertheless the behaviour persists. Perhaps, in the end, the behaviour and ideologies of men are harder to change than the law. The ironies of contemporary married life are crushing.

Chapter 8 Epilogue

Rites and Rights: Some Concluding Remarks on Divorce, Law, and the Family

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Rites and Rights: Some Concluding Remarks on Divorce, Law, and the Family

This has been a chronicle of how marriages and families expire. We recognize that because our story has been told mostly with numbers, it could not capture the full essence of how Canadian women and men experience marriage and family breakdown; the turmoil, the miscellaneous hurts and traumas of divorce, cannot be counted. Perhaps, though, our chronicle offers the possibility of better understanding the nature of the society we live in. In this concluding chapter, we offer some brief reflections on the meaning of divorce in our society, and on the relationship between law and social order.

The Decline of the Family, or the Malleable Household?

The family, with school and church, has long been an institution whose importance most of us have been taught to revere. Because we have been living in what might be called the 'Age of Familism' since the last World War (as we outlined in Chapter 3), many Canadians believe that the family – and implicitly this means the middle class nuclear family – is a universal social unit which has remained essentially stable and unchanged for many generations, and which must be accorded privileged standing as *the* fundamental unit of our society. But there is much concern nowadays that the family might no longer be such a cherished social institution, that it no longer holds a position quite so honoured or essential in our society. The growing prevalence of divorce is widely believed to be the key indicator of the decline of the family and values associated with it. How, it is argued, can the large numbers of people who voluntarily dissolve their families (by any historical standard the rate of legal divorce is unprecedented) be interpreted otherwise? Other signs can be pointed to, as well: the rate of child-bearing is extraordinarily low, and still declining, and the number of non-formalized domestic unions is rising.

These trends are viewed by some as evidence not only of the decline of the family but also of the apocalyptic deterioration of our society as a whole.

This is one prevalent view of what today's extensive divorce means. It rests on a set of assumptions and beliefs, not always well articulated, about the nature of society, and the social as well as the moral conditions necessary for its continuance.

In distilled terms, it is believed by many if not most Canadians that in each of our lives there must be at least a few social relations which are stable, lasting and nourishing – social relations which impart some order to the more important aspects of our lives. These primary relationships are seen as necessary in a social world where change and uncertainty are pervasive and extensive. Further, these essential social relations must be accompanied by an ongoing moral and cultural order, a complex of values, ideals, and standards of behaviour which give vitality and meaning to life. As well, there must be some mechanism for ensuring that the crucial process of socialization is carried on, whereby children are initiated into their surrounding social and moral environment and transformed from fledgling human beings into fully developed, participating members of our society.

This line of argument holds that these basic conditions, necessary for a meaningful and orderly social life, are, and should be, provided by the family and that it is in the family more than any other social context where we must learn the values and ideals and the social relations which will subsequently lend substance to our lives. It is in the course of living within our families, the argument goes, that we first experience the affection and the emotional nourishment that are so essential to human well-being. Thought of in this way, the family is the incubator and replicator of social order. It follows that if this incubator cannot be effectively sustained in some reliable fashion, there will be repercussions for the well-being of society. Thus, if in the early years of life people are not able to acquire an adequate sense of their own identity, not to mention the moral and cultural order which surrounds them, this may presage later instability and unsoundness of character, and thus represents a loss for society at large. In this line of reasoning, the family is viewed as a vitally necessary ingredient for the continuation of our society, the primary nurturing institution in the adult as well as the early years of life. Any marked change in the family which diminishes this nurturing activity puts the 'health' of our social order at risk.

It is but a short inferential jump to the conclusion that divorce is more likely to be the cause of social decay than its product.

There are a number of counter-arguments to various elements in this view of the family and its place in the social order. These are based on a view of society as more flexible, innovative, and filled with redundancies than we might have been led to believe. While the family may provide nurture and learning, for instance, it need not do so either uniquely, adequately, or inevitably. Although many families can and do perform these functions well (better, some people believe, than any other social unit) and are thereby a

powerful force for the well-being of society, other families can be damaging, destructive, and conflict-ridden. So the idea that the family is both a beneficial and an essential social institution is a matter of judgment and one's values, not just a matter of fact. Values vary manifestly, thus casting doubt on any single-minded interpretation of family function.

A broader form of this revisionist argument is that the family, viewed across the sweep of history and different cultures, has had neither the form nor the functions of today's version. Rather, for many cultures and for much of history, the fundamental unit of sociation has been the household and not the standard nuclear family with its two parents and their immediate offspring. Nor has this household been formalized by the requirements of church and state as the family is today. Across time and across cultures, the household has had many or few members, has pivoted around the authority of a central female or a male, and has been structured with greater or lesser importance determined either by marriage or by blood relations.

The household, and with it the family, is thus neither a fixed nor a universal social entity. In fact, in our culture we can track the shift from the social organization of persons in non-formally established household groups to the establishment of the nuclear family as the core structure, a development often associated with the industrial revolution. It is difficult to tell in that particular historical instance whether it was the change in property law and contractual relations which stimulated a change in housing and domestic relations, or just the opposite. Clearly, the new industry required a new type of worker, housed and supported in a different way. But since the latter was a precondition for the new industrial order, one cannot be certain which came first. Today, it would appear that household-based interpersonal relationships as opposed to nuclear family-based ones might be becoming somewhat more important, again for reasons that we do not yet know.

What is clear is that the boundaries between households and families are becoming less well defined. At least two factors are contributing to this. One is the rising incidence of unions (once called common-law marriages) which have not been formalized by religious officials nor given legal standing by states; these unions, particularly those which are childless, are closer to being a household than a family. (This is because families, by definition, are groupings of people connected by blood or marriage (or adoption), typically comprising spouses and their children. Households, by contrast are groupings of people who live together as a unit under the same roof, whether related or not.) And perhaps a more dominant factor is the growing incidence of repeated marriages and shared custody arrangements. New extended kinship relationships which have never previously existed and which as yet have no regular kinship names can create a considerable degree of confusion; a child, for instance, could have four grandparents and a further set of two 'step-grandparents', and any number of 'step-aunts' and 'step-uncles', to imagine one simple case.

Many of these trends have appeared and grown only in the last 20 years, indicating that something more than a normal evolution of domestic forms is occurring. There is also a basic shift in mores concerning sex, marriage, family, and domestic organization which appears to be under way. During this period, fertility patterns have changed, abruptly swinging from one extreme to the other. Physical mobility has become relatively cheap and easy, allowing long-distance relationships and for the first time permitting commuting marriages. Age at marriage, once markedly down, has begun to rise again. Mortality rates have fallen and life expectancy has risen dramatically, and all these fundamental changes have been accompanied by enormous changes in living patterns or lifestyles. It is difficult to understand social change on such a scale, much less to map out our individual lives in the face of so much newness and uncertainty.

Deeply rooted in all these changes are the ways men and women associate with each other, and most aspects of behaviour now seem to be open to scrutiny. Small wonder that what once seemed immutable, the marriage-based family, so firmly specified in form and function (in retrospect, at least), appears adrift in an uncharted sea; small wonder as well that there is a widespread sense of loss and that attempts are made to recover that well known past, sometimes by new-found religious fervour. But as Arlene Sknolnick has written, "we are no longer peasants, Puritans, or even suburbanites circa 1955. We face conditions unknown to our ancestors, and we must find new ways to cope with them" (1981:47).

At the core of this debate about the importance of family are two fundamentally different and opposing notions about our social order – its resiliency, or its fragility. The first line of argument we outlined earlier implicitly holds that our society is rather more fragile than it is resilient and that care must be taken to preserve the ongoing functioning of such pivotal institutions as the family. The contrary view holds that human societies are more resilient and that over the longer term the requirements for social order are such powerful imperatives that if they are not met by one social institution such as the family, then some other social arrangement will evolve or be created to satisfy them.

In the end, who can say? For this verdict, the jury is certain to be out for a long time. Collectively, our knowledge of how human social order is maintained and how it evolves is so rudimentary that it is well nigh impossible to reach any confident conclusion about what today's divorce rate means for Canadian society in the longer run. It seems a nearly universal feature of human societies that when we live in times of uncertainty and change, especially where concerns are centred on strategic social institutions, we are inclined to anticipate the darker, more pessimistic meaning in important events and trends. We can see, with a great many other Canadians, only that today's extensive divorce is indicative of fundamental change taking place in 'the family' but we cannot see clearly the direction of that change. It is too soon to know what the family is becoming, or what might be coming to replace it, and whether any of it will be for good or for ill. Truism though it may be, it seems certain that our children will experience 'family' and grow to adulthood within a

different set of nurturing social relationships than yesterday's or today's generation. It will not be the first time, nor the last, that the form of social life will change significantly from one generation to the next. The growing visibility within the last decade of two particular social forms – the voluntarily childless couple, and the voluntarily single-parent family – suggests that we should not underestimate the creativity and resilience of our society. To what latent, unfolding social dynamic this creativity may be the adaptive response will likely be understood only by our children's children.

No matter how much we weigh these facts and arguments about its tangible consequences, the extent of today's divorce still strikes a discordant note for many Canadians. For the majority, perhaps, it is a violation of the moral order. Could this be because we live in an age marked by such rapid change that what few strong ideals which seem capable of survival must be defended all the more strongly? Because divorce is a necessary mechanism that permits the undoing of human error in matters of marriage, a requisite recognition of human fallibility, it can be construed as an affront to the ideal under which the error was made – first of all, marriage, and by extension, family. Divorce is the ending of events that began with romance. It is the cancellation of something that began with high hopes, grand dreams, great expectations. In most instances it is a negation of what was once glowingly positive. In divorce, loss is unavoidable.

But because three of every four divorced people remarry, we would speculate that the majority of people who divorce consider that act to be the cancellation of their particular marriage, rather than a denial of the value of the institution of marriage in general. So perhaps divorce is nothing more than a contemporary contradiction between one of our most central ideals and the particular reality to which that ideal gives birth. Indeed, it is an axiom of human affairs that there will be some degree of discrepancy between the ideals and beliefs people espouse, and the behaviour they demonstrate relative to those ideals and beliefs. Where marriage and family are concerned, we seem to be especially sensitive to this discrepancy. The extensive public treatment of marriage, family relations, and divorce in our literature, in the cinema *(Kramer vs Kramer; The Way We Were; An Unmarried Woman)*, in drama, and in our popular press, can be taken as a sign of great concern about the gap between the powerful ideals about family and their social reality. Is there any other institution in our society so suffused with such sentiment, idealism, and nostalgia?

Form and Content — A Mismatch

Up to this point in our concluding reflections, there has been little occasion to mention the law at all. Perhaps this omission is indicative of a fundamental independence of family formation from the law. Or perhaps idealism about the family forms such a potent set of cultural symbols that to build the law into 'the family' would be to somehow diminish it. But for whatever reason, we suspect that Canadians generally have only a vague sense of how profoundly the law

works in structuring, molding, and influencing the circumstances of their lives and controlling the range of behavioural choices or opportunities available to them as ordinary citizens. While we take it for granted that the law affects us all in varying degrees and in varying ways,both trivial and profound, it is rare for us to stop to consider just how fully our particular lives are structured, either directly or indirectly, by it.

Much of this volume has been concerned with the form and content of family life as it encounters and is encountered by the law. We have seen that in divorce proceedings the letter of the law (in the categorical specification of grounds) is upheld in form while more meaningful social content is lost from view.

Since the real reasons for wanting a divorce are very often shunted aside in the process of setting out allowable grounds in order to make the divorce successful, the content of the legal work of the courts is seldom a reflection of the true dynamics of family dissolution, nor is it intended to be under the law as presently framed. The result is that while divorce constitutes an external alteration in the legal form of a given family, it does not substantially affect the social reality of altered family life. This disjunction between the two aspects (legal form and social content) continues to undermine the authenticity and worthwhileness of the legal transition from married status to unmarried (or once married) status.

Why, then, do so many persons annually seek a divorce? Why do they not simply side with those who have rejected the whole process and like them devise their own means to revise their marital or familial lives? The answer which we have offered in a number of different contexts and in a number of different ways is that the commitment of these citizens to the standards of 'normalcy' in gaining community acceptance for their family forms outweighs the burden of undergoing the complexities and costs of formal divorce. Persons seeking a divorce manifestly wish to square their affairs – to make concordant the form and content of their marital lives, in spite of the fact that the law as it is now written, and the legal institutions which apply the law, demand an element of 'malrepresentation' if not misrepresentation. For these persons who are seeking divorces, it is important and necessary to acquire social legitimacy for their actions and plans – in some sense, they need the permission of those in authority to fully rebuild their lives. For such persons, the reality and difficulty of a divorce process that forces them to compromise are likely to be disillusioning, perhaps even to the point of diminishing their confidence in the law and prompting them to wonder whether it should work this way.

We ought not to dismiss the importance of such disillusionment out of hand. Form is important in everyday social life. In the way one projects an outward image of the inner self through dress and speech, in the orchestrated dramatics of the political campaign, in the well-worn cliches of the hard sell, and in the maintenance of social and cultural institutions such as the law, the validity and relevance of form is underscored. But if authenticity and credibility are to be maintained, form must be matched by substance, the image must

be supported by consistent actions. When the distance between the two aspects is too great, when the merchandise does not live up to expectations, when the promise is not fulfilled, when the lively exterior betrays a flawed interior, then sooner or later the integrity of the promises and the parties making them is called into question.

In the same way, there is a need for a legal process that would more fully match the already difficult social process of transition from the married state to the unmarried state. Such a legal process would serve positive social ends more clearly and effectively. Not incidentally, it would also maintain the stature of marriage as a valued institution as well as enhance public regard for the law.

Sturm und Drang

Divorce does not cause marriage breakdown, unsatisfactory marriages do. Failed marriages are a social phenomenon unrelated to the legal institutions *per se*. (We would note in passing that the evolving expectations and circumstances under which people judge their marriages as satisfactory or not deserves a consideration we cannot give here.) We have shown empirically that the gap between the legal and social realms is wide, and that the legal act of divorce merely legitimates a pre-existent social fact or set of facts. Nevertheless, by focussing on the legal component (as do many citizens), we diminish an understanding of the concomitant social process so necessary for a complete grasp of divorce as an institution in parallel with marriage. Indeed, we can gain a complete picture of this full process only if we understand the decline of a specific marriage, with its inevitable stress and conflict, in concert with its legal dénouement. Divorce is at once: a legal act, a process of disengagement, a social act of individual redefinition, and a social institution.

There has always been conflict in marriage; the *sturm und drang* of married life appear to be universal. Likewise, there has always been social divorce – perhaps known by other names – but everpresent nonetheless. As we showed in our historical review, legal divorce in Canada was not always available and even when it was, the fear of the social censure often made it an undesirable option. However, there was still social divorce, or uncoupling – also known as desertion, separation, or empty marriage. Historically, social forces based upon obscure theological reasoning worked against divorce in any form. Decrying divorce and holding forth on the virtues of married life, religious leaders warned against the consequences of stepping outside such approved patterns. Brides and grooms frequently were older at time of marriage than is the case now and death came much earlier, often to resolve marital conflict with a grim finality. The result was that the time at risk for a marriage was much shorter than it is now.

But as lives lengthened, and some would say were enriched, as a direct result of the maturing industrial revolution, the family changed to such a degree that its primary function has become that of providing an emotional

refuge for its members. Why this should have come to be is a matter of continuing interest. Aries has written, for example, that:

> In an attempt to fill the gap created by the decline of the city and the urban forms of social intercourse it had once provided, the omnipotent, omnipresent family took upon itself the task of trying to satisfy all the emotional and social needs of its members. Today it is clear that the family has failed in its attempts to accomplish this feat, either because the increased emphasis on privacy has stifled the need for social intercourse or because the family has been so completely alienated by public powers (1977:227).

It follows, then, that if the capacity of a particular family arrangement to provide emotional support declines, for whatever reason, the failed family will cease to be an inviting environment and becomes a source of continuing distress for its members. Perhaps in former times when a particular family setting ceased to be emotionally satisfying for members, the other responsibilities (such as growing food, or producing goods, or educating children) might well have counterbalanced this deficit in emotional support and worked to keep the unit functioning. But in contemporary circumstances it is not surprising that the wish to divorce and to remarry is formed with increasing frequency. Indeed, by placing the responsibility for the provision of emotional support almost exclusively on the contemporary family, and with the removal of almost all other responsibilities which were once part of normal family life (such as primary food production, education of the children, etc.), the decline and fall of many present-day marriages is virtually assured. Over the course of rapidly extending lifespans the task of the family to provide emotional support must be constantly adjusted to reflect the changing needs of its members. Thus, the success of the family stands or falls almost exclusively on its ability to make these difficult and demanding adjustments.

As a matter of course, most Canadians probably feel that marriage is for life, that it is inviolable in the face of all but the most extreme difficulty. Yet, notwithstanding their strong views on the permanence of marriage, a significant proportion of them will experience a family breakdown and divorce sometime in the course of their lives. The phenomenon is pervasive, has no special regard for particular groups of people or views, and can occur even against a person's wishes since it takes only one marriage partner to initiate divorce proceedings.

Just as the form and content of family life have changed, there have been corresponding shifts in the norms and values which underlie them. For example, codified legal norms – laws – also have a new place in the order of things matrimonial. Though divorce is now more freely available than in the past, its place in a 'supportive' structure of community services is not yet fully developed nor are all of its ramifications fully integrated. Because this is so, the stress caused by the process of divorce itself merely adds to that of the pre-existing unhappy family situation.

Nor is the emotional trauma of divorce the only burden it brings. Tens of thousands of Canadians divorce every year, yet the process itself is still so

foreign to people that lawyers are felt essential by nearly everyone to guide or direct the process. There is more willingness to discuss the rights of children today, yet these rights are often lost to view in the smoke and fire of the trench warfare of divorcing. It is a legal and social fact that women are generally awarded custody of their children and financial support for them, yet husbands default on these payments with regularity and impunity. Since mothers in such straits need to work, they also require day care, and this is a necessity that is often not available at all, or which requires subsidization. The provision of day care and its associated worries can thus also be added to the list of consequences for individuals of the family dissolution process.

Once it was the family and the community, interlocked, which constituted the basic supportive safety net for those people whose lives were in crisis of some kind. The winds of change have blown that protection away; ironically, it is now the family which has come to be in need of support services, which in today's world are provided largely by public institutions. Yet there are no comprehensive institutionalized means for easing the 'standard package' of largely predictable consequences, even though some jurisdiotions do provide advocates for children, organizations to help enforce maintenance orders are operating in some locales, and subsidized day care is available on a limited basis. But only when such concern and such programs become widespread, interlocked, and 'normal', will a full-scale safety net have been put in place for families in crisis. Only in such circumstances will the real and often devastating consequences of family dissolution and divorce for individual family members be neutralized, and we are a very long way from such a situation today, as are most if not all Western countries.

Law and the Public Ordering of Domestic Relations

> *And how swollen with the displaced decision-making of all of life can courts become before they stagger and fall of their own weight?*
>
> Eugene Kennedy

When one looks to the future of marital relationships, it is clear that responsibility for settling disputes cannot entirely devolve on the courts. While the public ordering of private relations is a proper function of the civil courts, it must be remembered that in the normal course of events, only a small proportion of such disputes reach the stage of a judicial decision. In the age of entitlement, the 1970s, fewer and fewer of these private conflicts seem to have been successfully resolved privately. The responsibility for resolving an increasing proportion of them has been shifted by the individuals concerned to the courts, perhaps because the pursuit of individual objectives has come to have a higher priority in the minds of many than the responsiblity to attempt to function peacefully in a conciliatory manner.

And while this long lineup for mandatory court processing may represent an advance in upholding individual rights, it appears to have been purchased at the additional cost of increasing the load on judicial institutions. In a wholly unprecedented fashion, large numbers of cases which require little substantive attention and a small additional number which defy rational settlement have flooded into Canadian courts. In response, courts seem to have grown more stylized in their treatment of routine conflicts, following formulas sometimes embodied in legislation and sometimes not (awarding child custody to mothers, for example). Indeed, with this overloading of the courts, it is nearly impossible to treat individual cases and litigants with anything like the attention to detail which the law demands. As a result, we may be reaching the limits of the ability of courts to provide timely decisions. If we do reach this point, it follows that the effectiveness of our legal institutions will suffer, and so also may one of the basic tenets of our culture and social order – the supremacy of law.

The essence of the problem would seem to lie in prescribing identical treatment for whole classes of actions which arise from circumstances 'requiring' judicial treatment, for instance, divorce and the processing of support and property obligations which follow family breakdown. More than ever before, legal obligations are imposed by statute rather than by mutual agreement between parties to contracts. The Divorce Act and family laws in general seem directed to forestalling litigation by laying out the responsibilities of the parties in clear and unmistakable terms. Any conflicts which ensue thereafter are for the most part not the result of the failure of past voluntary agreements entered into by a couple but rather purely a matter of interpreting the generalized sets of obligations imposed by statute. Conflicts arising over the interpretation of these obligations must then be treated by the courts since their origins lie not in a mutual agreement which once existed but rather in a set of rules which are difficult for laymen to understand and which very likely have never been looked at by the couple in any detail prior to their decision either to marry or to divorce.

And what is the gist of the laws which divorcing citizens encounter in this fashion? We have argued they have as their central intent the clear specification of the financial responsibilities which derive from marriage (and from the almost universally assumed resultant child-bearing as well). These responsibilities are, in contrast to being collective charges on public wealth, to be affixed, as they always have been in the past, firmly on the shoulders of the natural parents – and particularly on fathers. This body of law has evidenced a progressive and cumulative elaboration of the basic principle that fathers shall pay, with a lesser but growing obligation imposed on mothers as well, without regard to whether the parents ever married. The specification of these responsibilities in law however, does not seem to have in any way lessened the burden on the courts.

We live in an increasingly litigious society. Growing numbers of people *choose* to cede to the courts the matter of specifying their personal responsibilities. Law is an ever-enlarging part of life in our time because we

are less certain (or accepting) of what might be the boundaries of our responsibilities, relative to whom else. When we do not understand or accept our responsibilities, informal as well as formal, in each of our diverse roles in life (parent, worker, spouse, citizen, homeowner, car driver, and so on), we have to turn to other institutions to adjudicate – and sometimes to shoulder – those responsibilities. More and more Canadians have been turning to the courts, and to lawyers, to help define or defend their responsibilities; more often than not, this is done in the name of protecting our *rights*. But often there are unfortunate byproducts of depending upon other institutions to solve these matters; there is the expense, the long periods of waiting for proceedings to run their course, and the almost inevitable sorting of people into winners and losers. Whereas the courts were intended to have been institutions of last resort, they are coming to be the first stop for people in conflict. The exercise of rights is coming to replace the practise of rites as a principal means of establishing and maintaining social order. The law has become the panacea for all types of everyday social conflict rather than a remedy for the more serious instances which call for authoritative intervention.

Families, in contrast to marriages, are either a living reality or they cease to hold meaning or substance for their members. Whether they continue to exist as vital entities or not is strictly a private matter of choice to be decided by the participants in whatever way they choose, so long as the resulting responsibilities continue to be carried by the parties who created them. The law cannot force married couples to maintain a functioning family – strenuous attempts in that direction in the past failed. The fact of family dissolution can, in the absence of substantive legal consequences, be a privately resolved trauma. This happens routinely either when no marriage was contracted or when marital obligations are not unilaterally imposed by legislation. Current divorce law does not allow such a whimpering end; it requires the outward pretext of a bang if a marriage has been contracted. By insisting on complex and compulsory judicial processing we may also be compromising those norms which pertain to the need for taking direct personal responsibility for one's actions, norms which would push individuals in the direction of restructuring their own lives and social arrangements without intervention of law.

We have been forced to conclude, along with others before us, that the family, or the new household as it seems to be becoming, is not an immutable form nor can it be successfully established or maintained by law. Forms of bonding are manifestly created by people according to their needs and to meet the requirements of the situation, the assorted pressures and constraints of their social milieu. While it is not difficult to see why some feel the family is somehow crumbling, it is also plausible to argue that the process of social innovation in devising domestic arrangements which responds to changed circumstances is not only alive but undergoing a great burst of activity, all this in spite of the burden of a law laden with impedimenta from the past. What is passing from the scene is the notion of immutability in anything. Kinship is becoming modular, defined relative to persons, not statuses;

spousal bonds are likewise spelled out in terms of specific persons who may or may not choose to re-evaluate those commitments in the future. Like it or not, we are in the age of the relativistic family in which change might not necessarily mean loss but rather a different point of view.

It is too early to decide whether we should celebrate.

Postscript

After the play has finished and the audience slips away, to the ranks of society have been added two more divorced persons and often some afflicted children. We are left with the question: What is the significance for the society as a whole? There are no simple answers, either in terms of the futures of the former spouses, or of their children, or of their former matrimonial property, or the legal institutions which have added complexity – perhaps difficulty – to the lives of those affected. We have pointed out some of the separable consequences of the process of divorce for the couple and for society. But by most measures, this is not a constructive process; it adds little of value to the social life of the nation.

Perhaps in the future, a way may be found to make the process less potentially hurtful to the participants, and more supportive and positive. But even if no such action occurs, the historical record indicates that many people will go ahead and do as they wish in any case. These individuals will regroup and reform their lives in a resurgence of optimism about their respective family futures. Once more to try, they sustain the difficulties of the divorce process in order to reach beyond a failed marriage for the emotional security of the ideal nuclear family. Ever more salient as time goes by, and as more and more absolutes fall of their own weight, the family as haven beckons to neophytes and to the divorced alike to try to defeat the odds and gain the sense of security it promises but increasingly fails to deliver.

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