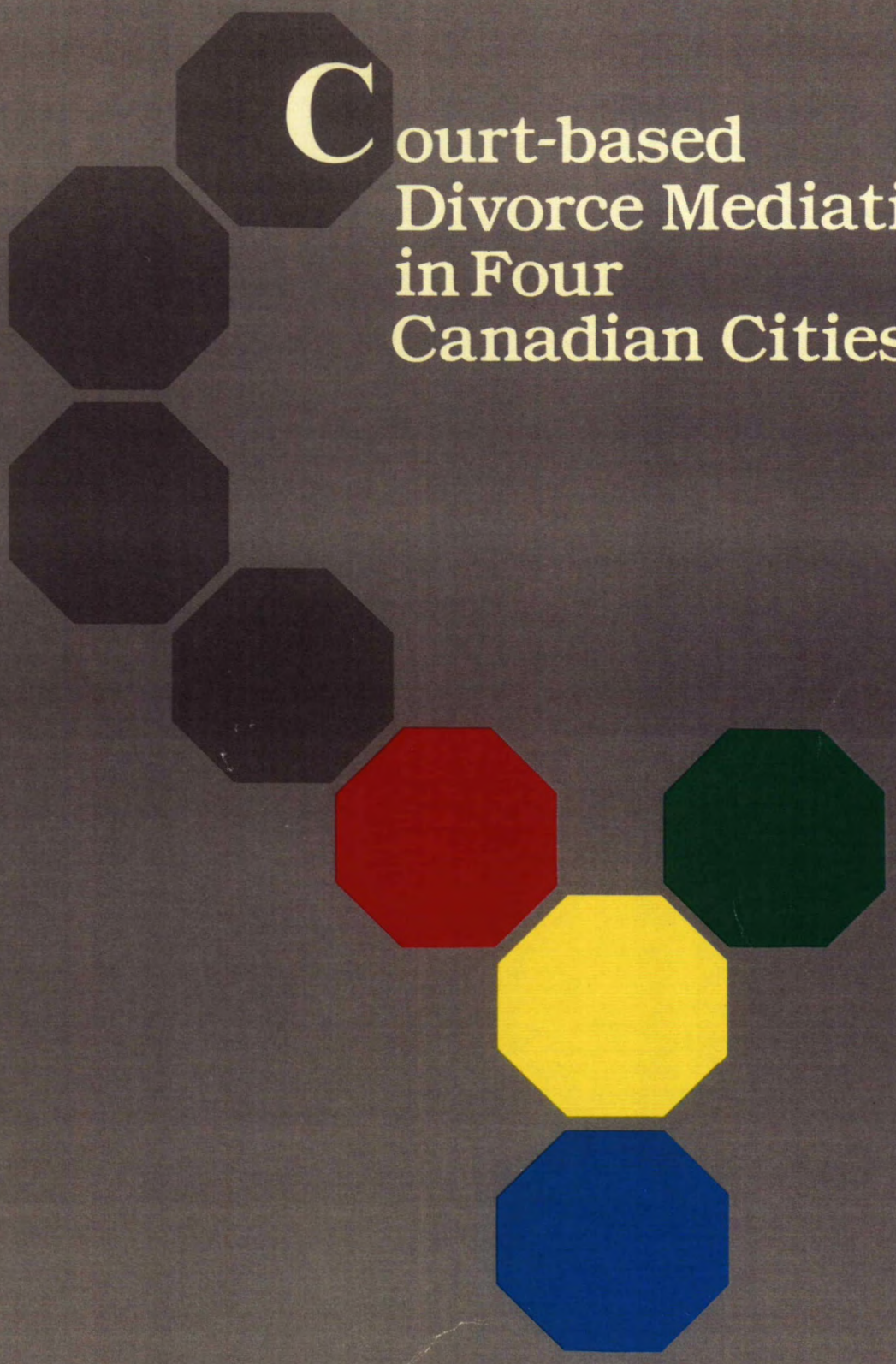
Court-based Divorce Mediation in Four Canadian Cities:



An Overview of Research Results

Department of Justice Canada
Ministere de la Justice Canada

Family Law Research
Recherche en droit de la famille

Canada

Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results

C. James Richardson
University of New Brunswick

A report prepared for the Department of Justice Canada

February 1988

Published by authority of the Minister of Justice and Attorney General of Canada.

For additional copies:
Communications and Public Affairs
Department of Justice Canada
Ottawa, Ontario
K1A 0H8

(613) 957-4222

Catalogue No. J2-76/1988
ISBN 0-662-55722-0

Printed in Canada

JUS-P-486

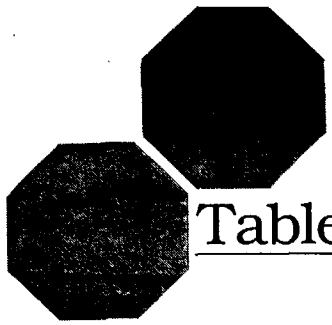
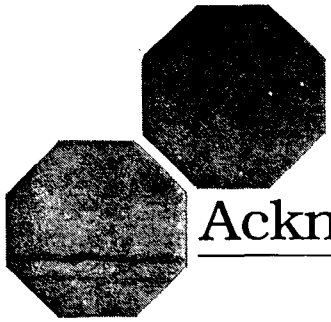


Table Of Contents



Acknowledgements

The report that follows draws upon two separate but related projects on divorce mediation. The principal investigators for The Winnipeg Study were William Greenaway and Rick Sloan, while the larger Divorce and Family Mediation Study was under my own direction. In carrying out these ambitious and lengthy projects, we were extremely fortunate in having an excellent and stimulating research team and supportive colleagues. The main researchers were Lorna Doerksen in Saskatoon, Anne Champion and Bea Cherniak in Winnipeg, Judith Wood in Ottawa, Marie Kennedy-Lévesque in Montreal and, at various points in the research, Deborah Sherrard, Kathy Alexander and Grace Ollerhead in St. John's. In addition, Justin Lévesque and Dale Albers served in a part-time capacity as consultants to one of the projects. We are grateful to all of them, but we would especially like to thank Anne Champion, Lorna Doerksen and Marie Kennedy-Lévesque, all of whom were with the project from beginning to end and who contributed immensely at all stages of the research. We were also assisted by a number of part-time interviewers and coders too numerous to mention. We thank them all for undertaking what was often a difficult and emotionally exhausting task.

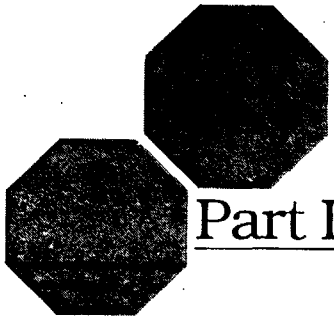
This research would not have been possible without the cooperation of staff in the various courts. Among those in Saskatoon, we would particularly like to thank Mr. Justice Dickson, Francine D'Aoust and Betty Ann Potruff, all of whom assisted us at various stages in the research. As the principal investigators of the Winnipeg study have noted elsewhere, that project benefited immensely from the assistance and advice of Jocelyn Gifford and her staff in the Family Conciliation Services. Associate Chief Justice Hamilton of the Manitoba Queen's Bench (Family Division), who also at times chaired the advisory committee, provided considerable informal advice on the research and the draft documents. Among the Montreal staff, we are especially indebted to Lorraine Fillion and André Murray, who both maintained considerable interest in the project and who taught us all a great deal about divorce mediation. Chief Justice Gold was also very supportive of the research, as he is of divorce mediation generally, and we thank him for his cooperation. Madame Justice Noonan of the St. John's Unified Family Court has a long-time commitment to finding less adversarial approaches in family matters and she also was very helpful and supportive with respect to this particular project. Carole O'Brien, the then administrator of the St. John's court, provided us with valuable information and assistance, as did Rick Morris, who has also left the St. John's Court. There were many others in all the courts who gave freely of their time and their knowledge, and we here express our appreciation of their less visible but essential contributions to this project.

We also enjoyed an excellent and often stimulating relationship with the members of the Department of Justice Canada who were involved in this

project. The project's genesis is rooted in early discussions between myself and two Justice employees, Margot Haug and Glenn Rivard, both of whom continued to give valuable advice and encouragement, even during times when they were committed to other projects. I would also like to thank Wendy Bryans for her excellent advice and her perceptive comments on draft versions of this and the two larger reports. The principal investigators for both projects are especially indebted to Ab Currie, who administrated these projects until very near their completion. He was an extremely efficient and capable administrator, but we particularly thank him for his encouragement, his good ideas and, above all, his trust in the work getting done. The task of dealing with the final products of this research has fallen to Sylvie Gagnon. She has proven to be an extremely able, supportive critic, who has brought insight to our work and we thank her.

Finally, we are indebted to the individuals who must remain nameless: the divorced and separated men and women who shared with us their experiences of a time in their lives that most people would probably prefer to forget. We are equally indebted to the many lawyers and mediators who took time out of busy schedules to talk with us or to respond to our questionnaires.

C. James Richardson
Fredericton, N.B.
February 1988



Part I: Introduction

All happy families, Tolstoy tells us at the beginning of *Anna Karenina*, are alike, but an unhappy family is unhappy after its own fashion. Had divorce been more common and acceptable in his time, and had he been writing a different book, Tolstoy might also have felt compelled to comment on how similar are weddings and how different are marriage breakdowns. Marriage may bring tears, but usually these are tears of happiness. Marriage breakdown almost invariably means pain, bitterness, sadness and a violent upheaval in most aspects of people's lives.

Divorce and the family patterns that develop from it send shock waves throughout the whole family system and have consequences which go beyond the immediate family and the adjustment period following separation. Aside from the emotional trauma which seems, inevitably, to accompany even the most amicable of separations, divorce also shatters taken-for-granted notions of what is meant by family and how, as a small group, a family relates to other families and other parts of the community. These are changes and effects that we are only beginning to understand and to incorporate into sociological theory about family and marriage and social policy.

As the traditional nuclear family has come under attack, divorce has sometimes been depicted as a potentially creative, rehabilitative and liberating process. It may often be all of these things. However, most of the evidence also suggests that however rational it may be, in the long run, to end an unhappy marriage is initially disruptive for at least some, if not all, family members. The fact that the actual divorce hearing is, for most people, not the protracted and highly emotional *Kramer vs. Kramer* situation, but a rather ritualistic formality taking less than 15 minutes, often hides the amount of prior anguish, hostility, fighting and negotiation which preceded it; the uncontested divorce hearing is often the tail end of a long and highly conflictual uncoupling process.

Recent years have seen a growing interest in the development and encouragement of ways of ending unhappy marriages which minimize the social, the psychic and the economic costs. One alternative to the traditional legal process is divorce mediation, the use of a neutral third party whose goal is to aid separating and divorcing couples to bring their marriage to an end with minimal pain and cost to everyone involved. Divorce mediation, or as it was previously called, conciliation counselling, is a new and only partially institutionalized approach to resolution of marital and familial disputes. It lacks the history and tradition of the legal process and, in some quarters, is viewed as either an unnecessary or even dangerous interloper into the area of family law. This report is an evaluation of this innovation in family law. It is concerned with the development, the nature and impact of divorce mediation as an alternative method of dispute resolution.

The questions addressed in this report have their origins in a Discussion Draft prepared in August 1984 (Richardson, 1984). That report drew upon a

number of Law Reform Commission working papers and reports on family law, evaluations of the four unified family court demonstration projects and other research on conciliation counselling and divorce mediation. Included, as well, were discussions of the various concerns about the implications of non-adversarial approaches which, from time to time, have been expressed by the legal profession, various associations concerned with the status of women in Canada and groups concerned with the newer issue of fathers' rights. The Discussion Draft concluded with a proposed research design to address the evaluation questions and general information needs of the Department of Justice Canada with respect to future policy decisions about divorce and the economic situation of women and children following divorce.

Further research was justified on the grounds that, while proponents of mediation are extremely enthusiastic about the alleged benefits of divorce mediation compared to traditional adversarial approaches, much of their optimism lacks empirical foundation and is often highly polemical, particularly in its depiction, indeed, caricature, of the adversary system. However, even if the optimism about mediation and the criticism of the legal system is warranted, it was felt that there is still a need to know which approaches and which models of mediation are emerging in Canada and how this essentially American-influenced approach works in the Canadian cultural, social and legal context. And while there seemed, at the time, a lack of empirical evidence to back up the concerns which have been expressed about divorce mediation, it was also believed important that the research consider the unanticipated consequences or outcomes of this approach to dispute resolution.

The conclusion was that there is a need for an evaluation of divorce mediation, one which could focus on process, on outcome and on social impact. With respect to outcome, the questions centred on determining the relative effectiveness of divorce mediation in bringing about responsible and long-lasting settlements, reducing pain, bitterness and economic hardship associated with marriage breakdown, improving post-divorce parenting and, from the point of view of the state, improving the efficiency of family courts and compliance with maintenance orders. At the same time, it was anticipated that a process evaluation could provide more systematic knowledge of how divorce mediation and separation counselling work, the various approaches in use and how such services interact with the legal profession and the court system. The social impact questions identified in the report centred on such matters as the implications of mediation for protection of people's rights, for the economic situation of women and children following separation and divorce, for the legal profession and for preservation of the family. Above all, however, the central focus of the research — the bottom line — was a concern with the role of divorce mediation in reducing the impact of marriage breakdown on children.

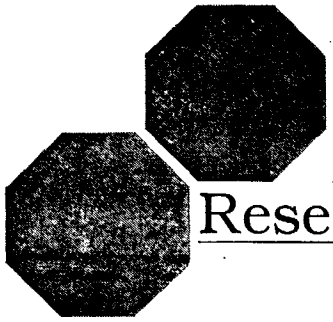
Accordingly, the Department of Justice Canada undertook, as one of its initiatives in the area of divorce mediation, two evaluation research projects on court-based divorce and family mediation services in four Canadian cities.[1] The larger of these projects, referred to throughout this

study as The Divorce and Family Mediation Study (DFMS), included Saskatoon, Montreal and St. John's. The second project, the Winnipeg Divorce Mediation Study, referred to simply as The Winnipeg Study, focused specifically on the Winnipeg Family Mediation Service. Although both projects were to pursue the same basic objectives and address the same questions about divorce and family mediation, recent substantive and procedural changes in family law in Manitoba and Winnipeg — in particular what is nearly mandatory divorce mediation in disputed custody cases — necessitated a somewhat different research design than was possible in the other three research sites and required a separate project.

The objective of this present report is to make available, to a wider audience, the major findings of these two Canadian research projects on court-based divorce and family mediation services. Given the scope of these projects and the many questions each addresses, this first report can only offer an overview of the research findings, one which must omit detail, the tables and many of the qualifications presented in the main reports (Sloan and Greenaway, 1987; Richardson, 1987a).

Because there has been controversy about the appropriateness of introducing this form of "informal justice" into family law, about the intended and unintended consequences of divorce mediation and about how best to evaluate it, this report is divided into several sections. The first section briefly describes the background issues and controversies in the area of family law and their relationship to divorce and family mediation. These issues formed the context for the questions addressed in the two divorce mediation studies.

The second and third sections of the report focus on findings of the two studies relevant to issues of process and outcome and social impact, respectively. The final section attempts to reach some conclusions about the general effectiveness and impact of divorce mediation, to consider the relative effectiveness of the different court-based models studied and the future of this relatively new approach to family dispute resolution.



Part II: Research on Divorce Mediation

Issues and Controversies

In Canada, divorce mediation, formerly called conciliation counselling, emerged as one response to more than a decade of criticism of family law in Canada. This body of law was attacked in terms of its philosophy, its procedures and the structural complications which arise from a legal system which gives the provinces responsibility for most family matters, but leaves divorce as a federal issue. Over the decade of the 1970s, the newly formed Law Reform Commission prepared a number of working papers and reports which documented what, at the time, were seen as the main problems and inadequacies of family law and its administration and proposed several major recommendations for change. These ranged from the implementation of unified family courts across Canada to a major restructuring and re-orientation of the *Divorce Act, 1968*.

Changes in Family Forms and Structure

A major theme running through these various critiques was the perceived failure of family law, its rules and its procedures to keep pace with and respond to changes occurring in marriage, family and divorce, or to deal with the psychological, sociological and economic consequences of marriage breakdown. For those writing in the 1970s, Meyer Elkin's earlier observation about the United States — that family patterns had changed so dramatically as to make traditional family law "a reflection of another time, another age that no longer exists" — seemed an apt depiction of, on the one hand, Canadian family law and, on the other, the "fire storm of change" that was transforming these venerable and enduring institutions — marriage and family (Elkin, 1973).

One important change was that in the years following the *Divorce Act, 1968*, the Canadian divorce rate rose dramatically and in its wake created a variety of family forms.[2] While statistically, the nuclear family was, and is still, the norm, it became apparent that, through choice or circumstance, a significant number of Canadians were now living their lives in other kinds of familial arrangements. For example, the single parent family began to take on particular prominence, but researchers could also point to other kinds of family forms that develop in the aftermath of divorce and coined such terms as "remarriage families", "blended families" and "bi-nuclear families" in an attempt to capture the essence and complexity of these new arrangements (Ahrons, 1979; Gross, 1985; Cherlin, 1978). Increasingly, then, as Margrit Eichler (1983) maintains, neither theory nor social policy can any longer be based on what she refers to as a monolithic bias about the family: today, there is no single family form which can be depicted as "normal."

Attitudes were also changing. In the 1950s and 1960s, divorce was most often viewed as disastrous, a singular event which undermined

and destroyed the family. Children of divorce were usually depicted as "products of broken homes", victims to be pitied. However, during the 1970s there was, if not an actual romanticizing of divorce, at least a new view of it as, *potentially*, a creative, rehabilitative and liberating process.

As was noted in one Law Reform Commission working paper:

> . . . divorce may provide a constructive solution to marital conflict. It should not be regarded as totally dysfunctional and prejudicial to the institution of marriage. Many divorcees enter into successful second marriages. Divorce can therefore provide an opportunity for the creation of new homes for ex-spouses and their children and hold out the prospect of a new and viable family unit (Law Reform Commission, 1975).

Similarly, Ann Marie Ambert (1980:10) began her study of divorce by depicting it as "a normal process with specific tasks to be mastered, recognizable stress to be dealt with and satisfaction and goals to be sought for." And many researchers, concerned about children in divorce, came to the conclusion that often-times they are better off living in a divorced family than in an unhappy, perhaps violent, intact family environment.[3]

In short, divorce was frequently depicted as a possible solution rather than the problem. At the same time, there was a growing belief that the state should not be attempting to buttress failed marriages or to put legal and administrative obstacles in the way of those seeking a legal resolution of their marital difficulties. Divorce, in other words, lost much of its former stigma, and while conventional marriage and the nuclear family have not lost favour with most people, there has, at the same time, developed greater tolerance of alternative family forms and family life styles.[4]

What emerged, then, was a much broader and less traditional conception of what is meant by "family" and what it means to preserve and strengthen it. An earlier view about divorce was that it is emotionally unhealthy for ex-spouses to maintain any kind of relationship, since this is seen as indicative of the inability of one or both to accept that the marriage is ended (Roman and Haddad, 1978). However, more recent thinking argues that a complete break is inappropriate when there are children; marital dissolution should not mean complete family dissolution, since separated or divorced spouses still have ongoing parental responsibilities which may be vital to the well-being of their children. As has been frequently noted, ideally, divorce does not end parental and family relationships; it changes them and creates more complicated family structures and family relationships. Thus, continuing contact between divorced spouses does not necessarily indicate a pathological attempt to cling to a now dead marriage. Rather, there is evidence that divorced parents often have the ability to maintain a co-parenting relationship while terminating, both legally and emotionally, the spousal relationship (Folberg, 1981:85).

Consequences of Divorce

However, accompanying this more benign view of divorce has been mounting evidence that the reality is almost invariably some degree of trauma and disruption for all family members caught up in the marriage breakdown. In the immediate aftermath of the decision to end the marriage, it seems to matter little who initiated the divorce; both find their lives disrupted and both are likely to experience a variety of conflicting emotions ranging from feelings of rejection, anger and bitterness to an ambivalent sense of relief that an unhappy, perhaps intolerable, relationship has ended (Cherlin, 1981).

As might be expected, conflicts which precipitate the divorce often carry over into post-divorce relationships. Kenneth Kressel, after reviewing the now considerable research on post-divorce families concludes that "the first post-divorce year is clearly terrible for nearly all couples." (Kressel, 1985:15). He is able to cite evidence that high levels of conflict persist well beyond the first year. Default on maintenance payments is one tangible indicator of conflict, but arguments about parenting and visitation appear to involve an even larger proportion of divorced couples. Even studies which have focused on couples at the low end of the conflict spectrum find that from 20 to 40 percent of divorced couples are dissatisfied with access and visiting arrangements and communication about parenting, and are at times in outright conflict. Kressel's reading of the evidence is that anywhere from 20 to 50 percent of divorced couples have been unable to work out satisfactory post-divorce relationships.

The most obvious and hapless casualties of this conflict are the children of the divorce or separation. Small children, more than anyone else, live their lives in the circumscribed world of the family. So, intuitively, we expect changes in its patterns or structure to have a momentous impact on them and their lives. To date, a causal link between divorce and various cognitive, emotional and behavioral problems has not been established with any degree of conclusiveness. However, studies that have drawn directly on the experiences of children close to the time of the marriage breakup provide us with a rather consistent picture of how parents may often seriously underestimate or be unaware of how extremely difficult a time it is for children and what feelings of anger, bitterness, confusion, anxiety and guilt are engendered by the breakup of the parents' marriage.[5]

This research suggests at least three factors which contribute to the adjustment of children following separation and divorce: 1) easy access and an ongoing relationship with the non- custodial parent; 2) a post-divorce mother-father relationship in which conflict is kept to a minimum and 3) re-establishment of an orderly and supportive household routine. In other words, most divorcing and separating people, not simply those battling over custody and access, are, at the time of the marriage breakdown and for a considerable period afterwards, in need of support and assistance. Many require help in their own adjustment, but perhaps more crucially, divorcing and separating people need help in assisting their children to adjust to the momentous changes associated with marriage breakup. Moreover, there is

agreement that children fare better when there is a minimum of conflict and they do not lose contact with one of their parents. This research buttresses the case for both divorce mediation, with its promise of more amicable settlements, and for joint custody arrangements that encourage shared parenting. Indeed, among proponents of divorce mediation, these have taken on the status of conventional wisdom.

Finally, underlying and accentuating these tensions and problems are the economic consequences that inevitably are associated with marriage breakdown. There is now considerable evidence that divorce has different economic consequences for women and for men. It generally leaves men better off, but destines a majority of women (and their children) to relative, if not absolute, poverty. Thus, to a large extent, the quality and nature of post-divorce relationships will be shaped by these economic issues, matters often more contentious than those of custody and access. Again, as many have argued, divorce mediation, in making people aware of their ongoing parental obligations, offers as a spin off the possibility of more financially responsible settlements, even when child and spousal support are not formally mediated.

Divorce Mediation and Family Law Reform

Attempts at family law reform have, then, taken place within the context of a changing view of the suitability of family law and its procedures, both to allow people to make the choice about whether to end their marriage and to mitigate some of the consequences of that decision. As one commentator noted, family litigation is distinguished from other civil actions in that it involves a much greater emotional element and that dissolution of marriage requires different procedures than those that "suffice for recovery of damages for breach of a commercial contract or reparation for forcible aggression upon person or property".[6]

At the philosophical level, the main villain to be singled out was the "traditional adversarial process", which the Law Reform Commission depicted as "one of Canada's great self-inflicted wounds" and as a weapon which should not be available to spouses who disagree over their personal relationship (Law Reform Commission, 1976:16). As the Commission argued, adversarial approaches are inappropriate, intensify pain and bitterness and impede the possibility of an amicable settlement. However, the Commission was also opposed to the fault-orientation of the existing legislation which, in its view, was seen as seldom relevant in marriage breakdown because the *grounds* for divorce and the *reasons* for divorce are usually quite far apart. People often felt forced to fabricate grounds, and this exacerbates an already conflict-ridden situation.

At the structural level, the Commission also was concerned about the lack of resources, services and procedures to deal with the social and emotional problems associated with marital dissolution. It was for this reason that the Commission advocated the development and implementation of unified family courts. Unification occurs along two dimensions. On the legal dimension it means the establishment of specialty courts presided over by

superior court judges with comprehensive and exclusive jurisdiction over all family matters. On the social dimension, it means that an array of services, including information and intake, counselling and mediation, legal advice, custody assessments and enforcement of maintenance orders, are integral components of the family court. Such services, particularly the social arm, would, it was hoped, complement the judicial side of the court and, through the use of counselling and mediation, seek to achieve non-adversarial resolutions of family disputes and, wherever possible, divert matters from formal court hearings (Department of Justice Canada, 1983).

Divorce mediation and separation counselling were given a central place in this restructuring of family law and its administration, for at least two reasons. First, such services were viewed as the most effective way to avoid or redress the supposed negative effects of the traditional adversarial system. Second, the Commission saw in the provisions of such services a way for family law to meet its more general objective of preserving the traditional family through reconciliation counselling and, where this is unfeasible, through separation counselling and divorce and family mediation, and to improve relations among family members following marital dissolution. It was, therefore, an approach which many felt should be available to all separating and divorcing couples, and some went so far as to argue that there should be mandatory exposure to divorce mediation when couples cannot agree on how to end their marriage.

Proponents of this approach have, over the years, argued that mediated settlements are longer-lasting and better protect children's interests than those imposed by the court through the adversarial approach. Through divorce mediation, it is argued, people are able to create settlements with which they can live and which keep them from returning to the court for enforcement or variation of custody, access and maintenance orders. Divorce mediation has been extolled as both a humane and cost-efficient approach to dispute resolution. It is more humane than traditional approaches because, according to its proponents, it

a) provides a more therapeutic approach to familial and marital disputes;
b) reduces rather than exacerbates the pain and bitterness associated with marriage breakdown;
c) protects children's interests;
d) produces more amicable settlements;
e) encourages former spouses to recognize and accept their ongoing role and responsibility as a parent.

Cost benefits arise because mediation

a) reduces court costs and court time because there are fewer contested cases;
b) reduces client costs resulting from lengthy negotiation and litigation;
c) reduces costs resulting from people returning to the court for enforcement or variation of orders;
d) reduces default on maintenance orders.

Critiques of Divorce Mediation

There is now a large literature offering both polemical and empirical support for these claims about divorce mediation. At the same time, there is a growing body of literature, mainly from a feminist perspective which, though not necessarily opposed to its goals and objectives, is concerned with whether divorce mediation, a form of "informal justice", is actually in the best interests of women and children.[7]

If there has been one growth area in the social sciences during the 1980s, it has been in feminist research and women's studies. Nowhere has this growth been more evident than in the areas of justice, the sociology of law and legal research generally. Feminist perspectives have often wedded theory and practice with the result that there has been mounting pressure, backed sometimes with solid research, for legislation to be made more sensitive to the particular situation of women, so that well-meaning reforms do not have the unintended consequence of worsening the already disadvantaged position of women in contemporary society.

As feminists have looked more closely at divorce mediation, no-fault divorce, joint custody and gender-neutral legislation and the accompanying end to sex-based assumptions about parenting and economic support, the earlier and more sanguine depiction of divorce has given way to a more bleak picture of its relative advantages for men but drastic consequences for women and their children. These questions form what in these studies was referred to as social impact evaluation questions.[8]

One does not have to be a feminist to appreciate something of the dilemma an approach such as divorce mediation presents to the legal system. An important component of our western system of law is the notion of due process, of a "rule by law" rather than a "rule by people." In civil as well as criminal law, an important part of due process is the existence of the adversarial system. By definition, divorce mediation is intended to sidestep the traditional adversary process. As Jay Folberg, a strong advocate of divorce mediation, has pointed out:

> The very elements that make mediation so much more appealing than the adversarial model create dangers and raise substantial issues. Because mediation distinguishes itself as a dispute resolution approach that recognizes divorce and family conflicts as matters of both law and emotion, we must ask how feelings are to be weighed against and blended with legal rights and obligations. Because mediation is conducted in private and because it is less bound by rules of procedure, substantive law and precedent, people will ask whether the process itself is fair and whether the terms of the mediated agreement are just (Folberg, 1983:11).

It is in this context that feminists have questioned whether women (and their children) might not fare better, economically, if represented by a strong lawyer (Bottomley, 1985). That is, because of their lack of experience with negotiation and with financial matters, generally, do women enter mediation with unequal bargaining power and end up settling for less than if had they used the traditional adversarial process? In other words, media-

tion is based on the notion of equality, often because there are skilled negotiators representing the two sides. However, this makes far more sense in labour mediation than in divorce mediation, where the contending parties may not have sat down at the "negotiating table" with equal resources because they are representing themselves.

Others have raised the more subtle question of whether women end up mediating their divorce within the context of implicit and explicit assumptions based in norms of patriarchy (Leitch, 1986). Mediators, by definition, are neutral parties. It has been argued, however, that whether female or male, they may unwittingly bring into the mediation session sexist assumptions. There is, then, the question of the extent to which mediators recognize that, through socialization, women and men may "bargain" quite differently and bring to the session quite different priorities.

Another concern centers on changing patterns of custody awards and the implications of this for women. Various women's groups have not generally been opposed to joint custody in principle and, indeed, to be consistent with other positions, must share some of the views of father's rights groups about neither sex inherently possessing parenting qualities. They have, however, been concerned with the unintended consequences of a preference for joint custody both among mediators and in the courts. Among other things, there is concern that where violence and alcoholism and perhaps sexual abuse precipitated the breakup of the marriage, women should retain the right to deny men custody and, perhaps, access to the children. Another argument is that joint custody often turns out, in practice, to be joint legal custody but physical custody for the mother. Yet, goes the argument, in obtaining joint custody, men are apparently able to pay less in child support than when custody is awarded to the mother. Thus, not only does the wife bear most of the responsibility for child rearing, but she may do so with fewer resources. Fears have also been expressed that when a woman is, for various reasons, reluctant to enter into a joint custody arrangement, she may be seen by the courts as uncooperative and thereby be at risk of losing custody altogether.

This is, clearly, an issue which goes beyond the advantages or disadvantages of mediating a dispute. Divorce mediation enters the picture because of its quite explicit bias towards and encouragement of joint custody, or more accurately, shared parenting. It appears that most mediators have been strongly influenced by the research on children and divorce and believe that shared parenting arrangements are usually in the best interests of the children involved in the dissolution of a marriage.

Feminists have provided the most articulate and focused critique of divorce mediation and other attempts at family law reform. The legal profession has also, from time to time, expressed reservations about this approach to dealing with marital and familial disputes. These can be summarized quite briefly. First, there is the concern whether this intervention, this form of "informal justice" adequately protects people's rights. While, as we have seen, this is a question also raised by feminists, the legal community has, from time to time, raised it more generally. Second, given that separation and divorce are legal issues, there is the question of what role the lawyer plays when a couple chooses to mediate their settlement. Finally, there is

concern about the legal status of agreements reached in mediation: are they technically accurate; will they stand up in court; are they just and equitable?

The research projects funded by the Department of Justice Canada were concerned with describing court-based divorce mediation in a number of different jurisdictions and with determining the outcomes, intended and unintended, of this intervention relative to those of the traditional adversarial system. The final section describes very briefly the two research projects and the data sources used in each.

The Research Projects

The Winnipeg Study

In the Winnipeg Study, the main problem in developing a research design was the lack of a comparison group. Since 1984, when a number of procedural and legal changes were introduced, virtually all the cases in the Winnipeg unified family court, where custody and access are at issue, are sooner or later referred for mediation. This effectively ruled out any comparison of "referred" and "non-referred" cases and the use of even a quasi-experimental design. Similarly, while couples do refuse to participate in mediation, it was concluded that comparisons between those who "accept" and those who "reject" mediation must be viewed with caution: either those refusing mediation do so because they have already worked out an amicable agreement or, at the other extreme, are so steeped in hostility and conflict that mediation is impossible.[9]

In short, the Winnipeg study is essentially descriptive and comparisons are largely subjective. That is, respondents — clients, lawyers and judges — were asked what difference mediation makes to them and to others *in their estimation and perception*. Comparative data by which to make a more objective assessment are limited to an analysis of archival data (1983 divorce cases), which unfortunately did not always permit comparisons to be made. The data for the Winnipeg Study are taken from the following sources:

1. Questionnaires administered to 282 clients entering the Family Conciliation Services between November 1985 and April 1986.[10]
2. Telephone interviews with 138 clients approximately three to four months after mediation terminated.
3. Extracts from Family Conciliation Services files for clients who had completed the questionnaire.
4. Family Conciliation Services internal statistical records and daily and monthly intake sheets for 1985 and 1986.
5. Extracts from court files between November 1985 and April 1986 corresponding to 93 individuals who were court referrals and who completed the initial questionnaire.

6. Archival data — examination of 170 divorce petitions filed in 1983 which involved an application for custody and/or access.
7. Structured telephone interviews with 42 Winnipeg family law practitioners.
8. Face-to-face interviews with each of the justices of the Manitoba Court of Queen's Bench (Family Division) and the six staff mediators working for Family Conciliation Services who were mediating cases included in this study.

The Divorce and Family Mediation Study

There are three basic components to this study: a systematic analysis of court records, the Case Analysis Study; an observational study, the Observation Study; and personal interviews with the former spouses whose cases were studied in the Case Analysis Study, the Client Interview Study. In addition to the basic research on divorcing couples, the DFMS included two supplementary studies, one involving face-to-face interviews with family law practitioners as well as a mail survey to lawyers interested in or practicing family law, the Lawyer Study and a mail survey of mediators and counsellors, the Mediation Study.

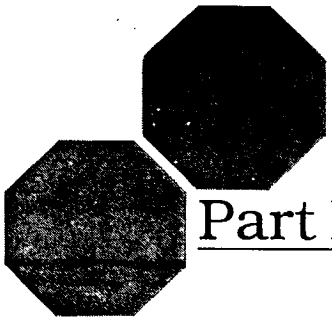
The study is longitudinal in the sense that the research plan entailed collecting data from the court files on new or recently filed separation and divorce cases (the Case Analysis Study) and then interviewing a sub-sample of the couples about six months after the case was settled (The Client Interview Study). A period of six months was chosen in order to give people some time to adjust to the divorce or separation while minimizing mobility of people out of the jurisdiction. In addition, researchers in the three mediation research sites conducted observational studies of the court-based mediation and counselling services and the relationship of these to the court process and the legal profession (The Observation Study). Informal interviews were also conducted with counsellors and mediators and other relevant staff in the three family courts. Near the end of the project, researchers returned to the courts to determine what proportions of cases — mediated and non-mediated — had shown up again for enforcement or variation of the original order.

In all, data were collected on 1773 court files, 905 divorced or separated women and men and, as a result of the two mail surveys, 220 lawyers and 219 mediators. There is also less-structured qualitative data from personal interviews with 60 lawyers active in the practice of family law in the three research sites. For two of the research sites there is detailed and extensive descriptive data from the Observational component of the research.[11]

Both divorce mediation cases and contested cases comprise a minority of all cases dealt with in family courts. For statistical and theoretical reasons, both are overrepresented since, generally, all of both kinds of cases were included in the sample. Included in the above totals were 363 court *files* in which the divorcing and separating couple attended mediation. At the interview stage, 324 *individuals* were interviewed who had used mediation to attempt to work out an agreement.

Of the 905 divorced or separated individuals interviewed, 58 percent are women. While the intent was to interview both of the previous spouses, this was not always possible, with the result that 56 percent of the sample is made up of "matched couples".[12]

In both the Winnipeg Study and the DFMS, a considerable effort was made to go beyond the systematically coded data and to include in the analysis the less systematic and more qualitative impressions, feelings and perceptions learned by researchers in the process of collecting data in the court and interviewing clients, lawyers, judges and mediators. The next part of this report, which considers some of the process questions, draws upon both the quantitative data from the research and these more qualitative data sources.



Part III: Process Issues

Divorce Mediation in Canada

The notion and use of mediation as a way to settle disputes has a long and ancient tradition.[13] Its application to matrimonial disputes is, however, quite recent, not more than a decade old. In Canada, this is still a new and developing field with unresolved debates about approach, scope, goals and the appropriate qualifications for becoming a divorce mediator.[14]

The past few years have seen the concept of divorce mediation eclipse earlier notions of reconciliation and conciliation counselling. Many who work in this field still refer to themselves as counsellors. It is apparent that the line between therapeutic counselling and divorce mediation has not been clearly and uniformly drawn by most practitioners.[15] Thus, as discussions and presentations at various conferences suggest, this is an occupational group still very much caught up in the "process of professionalization".

Professionalization of Divorce Mediation

One of the first steps in that process, formation of an organization, has already occurred at both the national and provincial levels. Second, these newly formed associations have recently developed codes of ethics "governing relations of family mediators with their clients, their professional colleagues and the general public".[16] Such codes have gone some way toward defining divorce mediation and its place in the legal system. What particularly distinguishes a profession from an occupation, however, is its ability to determine entry requirements and qualifications.

A matter of continuing debate and controversy is the question of whether, at this point, one should attempt to specify the qualifications and experience required to identify oneself as a divorce and family mediator. On the one hand is the understandable concern that, at present, virtually anyone can be proclaimed a divorce mediator. On the other hand, the prevailing consensus seems to be that in this relatively new field, it is premature even to try to set out minimal qualifications for mediators.

There are at least two reasons for not, at this stage, setting out qualifications. The first is that, at this point, most of those who offer or are interested in divorce mediation have come to it by a variety of routes and as much by accident as design. While most have professional training in mental health fields, specific training in mediation has come from attendance at workshops presented by individuals who have written what Kressel (1985) calls "enthusiastic 'how to' manuals addressed to the prospective or novice divorce mediator".

A second reason is that divorce mediation, developed essentially in the United States, has emerged out of two quite distinct fields with rather different orientations. There is no doubt that the dominant orientation has

been conciliation counselling so that most, who now refer to themselves as divorce mediators, were trained in one of the mental health professions and bring to this field an implicit and often explicit bias towards counselling and therapeutic-based approaches. However, as lawyers have become interested in mediation, they have been drawn towards the much more structured and goal-oriented approach of what has come to be called "alternative dispute resolution" techniques. This approach to divorce mediation draws upon the same body of theory and strategy as is used in mediation of labour and other disputes.[17] The orientation and goals of social workers are eschewed in favour of approaches which, in effect, set the emotions aside and which deal with the basic issues: who gets the children; how the property will be divided; who pays whom and how much and for how long. Coogler (1978) who, before his death, trained nearly half of all American mediators (Pearson et al., 1983), believed quite firmly that there should be a division of labour between those who helped divorcing couples reach a settlement and those who dealt with the accompanying emotional problems.

To date, however, it is apparent that divorce mediation in Canada has, as it were, emerged like a phoenix out of the ashes of the more traditional field of conciliation counselling. Thus, many who a few years ago defined themselves as conciliation counsellors now think of themselves as divorce mediators. Yet, as observations of the four services included in the present research indicate, while all have drawn upon and been influenced by recent literature on divorce mediation, few, if any, have entirely departed from the earlier notion of reconciliation and conciliation counselling, and there is every reason to believe that this is generally true of Canadian divorce mediators. One indication of this is that Howard Irving (1980), who has trained many Canadian mediators and who, through his writing and lectures, has had a dominant influence on the field, still believes it important that divorce mediation deal with both the emotional and practical aspects of marriage breakdown.

As Canadian lawyers have so far shown little interest in practicing mediation, the shift in terminology appears to have more to do with communication than a change in goals. That is, there is now consensus that the concept of conciliation counselling is simply too confusing. While it is conceptually quite possible to think of a continuum between reconciliation — keeping the marriage together — and conciliation counselling — reconciling the issues and ending the marriage — it is evident that this is a difficult distinction for people outside of the field to make. For both potential clients and, for that matter, judges and lawyers, the term divorce mediation does appear to convey better the goals of this approach. Mediation is also a term that seemingly resonates better with court administrators and the legal profession; mediation is understandable and familiar from other areas of dispute.

Moreover, in court-based settings, divorce mediation may seem more attractive because it offers measurable results in a fixed amount of time. In contrast, counselling is often more open-ended, its goals sometimes vague and fuzzy, and success often lies in the minds of the counsellor and the counselled. In short, in a legal system in which cases, except for a most vexatious minority, have beginnings and endings, it is much easier to sell mediation than conciliation counselling.

Court-based and Private Practice Divorce Mediation

In Canada, divorce mediation and conciliation counselling have generally been offered as court-based services available free to couples in need of assistance with ending their marriage. However, in many communities, clients seeking a divorce or separation have recently had the option of turning to the private sector for assistance with resolving their disputes. Because this has been such a recent development, most of the evaluation research has focused on court-based services.

However, in the United States, Pearson, Ring and Milne (1983) have carried out a survey of mediators in both the private and public sectors. Their findings suggest some important differences between the two. Generally, private practice mediators are more likely to mediate financial matters, such as support and property division as well as custody and access, whereas most court-based mediation is restricted to the latter two issues. Second, and not unexpectedly, public-sector mediation is cheaper and involves fewer sessions than in the private sector. Third, clients who use private-sector mediation appear to do so on a more voluntary basis than those using court or public-sector services, where the source of referral may often be the court. Fourth, while neither group offers only divorce mediation, the proportion of the case load made up of divorce mediation cases is much higher in the public than in the private sector, which in turn suggests that those working in the courts generally have more experience than their counterparts in the private sector. This profile also indicates that, while the majority of divorce mediators are trained in one of the mental health fields, those who are trained as lawyers are almost exclusively working in the private sector.

Canadian data come from two related sources. The first is the recent *Profile of Divorce Mediation and Reconciliation Services in Canada*, commissioned by the Department of Justice Canada. Second is the mail survey included in the DFMS which posed additional questions to those identified in the initial inventory and profile (The Mediation Study). The findings of both suggest a very similar pattern to that found in the United States.

In both the United States and Canada, recent years have seen an impressive growth in the number of individuals involved in divorce mediation. The profile, for example, was able to list some 476 individuals representing 707 agencies, organizations, government services or private practices. The profile notes that 36 percent of those responding were in private practice, 28 percent were in non-profit community agencies, 26 percent were in unified family courts and 4 percent were in a range of agencies or settings.

As is also observed in the profile, those responding to the survey have impressively high educational qualifications, with 71 percent of mediators and 81 percent of reconciliation counsellors holding a post-graduate degree. While fewer of those who responded to the Mediation Study (61 percent) hold a second or third degree, virtually all (93 percent) have at least a bachelor's degree, usually a Bachelor of Arts (76 percent). The most common second degrees are psychology (38 percent) followed very closely by a

Master of Social Work degree (37 percent). As in the main survey, about 10 percent of counsellors hold a PhD degree, again most often in psychology (65 percent).

It appears, however, that few if any of these counsellors have had formal training in mediation. Rather, virtually all indicated that their training had come from on-the-job experience, from short-term workshops and from reading. Thus, it is not surprising that less than one-fifth of the counsellors reported that they adhere to a particular mediation model or approach. Rather, most have developed their own approach, at times, it seems, drawing upon and adapting existing models to fit their particular circumstances and/or personalities.

In short, the evidence available on the qualifications of divorce mediators suggests that fears about an influx of poorly qualified and non-professional people into the field are unfounded. At the same time, the fact that this is such a new field does mean that few mediators were able to train formally in mediation; those practising are at the moment highly educated but not often highly trained in the techniques of divorce mediation. Assessments by lawyers bear out this conclusion: 85 percent of those surveyed in the DFMS view mediators as well qualified in mental health and counselling, though most, 72 percent, felt mediators are lacking the necessary qualifications to deal with the complexities of family law.

Some sense of the newness of divorce mediation is that counsellors responding to the Mediation Study report that they have, on average, 9.9 years of counselling experience but only 5.3 years of mediation experience. These same respondents indicate that about one-fifth of their total case load is made up of mediation cases. On average, respondents estimated that only about 51 percent of their income comes from counselling, mediation and custody assessments. There are substantial differences between court-based and private practitioners. For the former, 81 percent of their income comes from these activities, compared with 26 percent of those in private practice.

Other kinds of differences can also be observed between court-based, community-based and private-practice mediation in terms of when mediation occurs and the source of the referral. Court-based mediators deal with couples at various points in the uncoupling process, but most frequently after the couple has actually separated (47 percent) and when legal proceedings have been initiated or are in process (27 percent). Of some interest is that, overall, about 11 percent of the cases seen by divorce mediators are after divorce or legal separation, presumably to deal with ongoing or new problems of access or, in the case of joint custody awards, shared parenting arrangements.

For court-based mediators, there is less likelihood of dealing with clients who are undecided as to whether to end the marriage and for whom reconciliation is one possible outcome of meeting with a counsellor or mediator. Also, they are, as would be expected, more likely to be involved with couples after court hearings have begun and after the case is settled legally.

Divorce mediators in private practice and in community-based agencies, receive a higher proportion of their referrals from lawyers than do

court-based divorce mediators (33 percent and 22 percent respectively, compared with 13 percent). For all three groups, a major source of clients are "self-referrals" (32 percent). Aside from this source, court-based mediators report that their main sources of cases are court intake procedures and referrals from the court itself (22 percent and 18 percent, respectively).[18]

Divorce mediators estimate that, on average, couples attend 3.5 mediation sessions. Here, again, there are differences when the type of service is considered. The average number of sessions is 2.4, 4.6 and 3.4 for court-based, private practice and community-based services.

Another important difference between court- and non-court-based mediators, is that the latter estimate that a greater proportion of their cases end in reconciliation (16 percent compared with just over 6 percent). This is no doubt due to the greater mixture of marriage counselling cases in the case loads of non-court-based services and the fact that most court-based services do not officially offer reconciliation counselling.

The overall settlement rate is estimated by mediators at about 54 percent and, in another 17 percent, they believe there has been a partial settlement or a "narrowing of issues". As is described, below, these estimates of settlement rates are congruent with what was found in the court records and with clients' perceptions about the success of the mediation process. There are only small differences between the three types of services with respect to these estimates.

Interaction Between Lawyers and Mediators

Over the past decade much has been written on the supposed evils of the adversarial system and the need for alternatives to this supposedly inappropriate and harmful approach to the resolution of disputes related to marriage breakdown. Much of the criticism — whether from those writing for the Law Reform Commission or in mediation books and journals — has often been highly polemical and simplistic. Indeed, as Kenneth Kressel (1985) has observed, there is a certain irony that those committed to compromise and non-adversity have, perhaps inevitably, introduced an adversarial quality into this anti-lawyer, pre-mediation rhetoric and polemic.

However, even if in the past a case could be made about the deleterious effects of the traditional adversarial approach, the present research suggests that these have to a great extent been diluted, and in some ways undermined, by changing philosophies, attitudes and practices within family law in Canada. In the latter part of the 1980s, it is more difficult to maintain the belief that there is a real clash of cosmologies between lawyers and mediators. For example, three sets of questions posed to both lawyers and mediators in the supplementary studies in the DFMS failed to reveal substantial or patterned differences between the two groups of professionals with respect to 1) goals of settlement, 2) obstacles to settlement, and 3) attitudes about divorce mediation. On the basis of these measures, it is difficult not to agree with Kressel's conclusion that mediation is an alternative form of dispute resolution probably no better or worse than the more traditional approaches used by lawyers in negotiation (Kressel, 1985:178).[19] Apparently, both groups of practitioners see themselves as facing much the same set of

obstacles and the same tensions and difficulties. Thus, researchers should probably not expect significant differences in outcome between cases handled by lawyers through negotiation and those dealt with through divorce mediation.

In any event, few of the lawyers interviewed in the two studies fit into the stereotype of the litigious divorce lawyer concerned only with winning his or her case and with collecting an exorbitant fee at the end of the process. Nor was it possible in this Canadian sample, as it was for Kenneth Kressel (1985) in his American sample, to dichotomize them into what he calls "counsellors" and "advocates". While virtually all the lawyers interviewed are prepared to and do enter into litigation when necessary, the vast majority prefer to negotiate a settlement, because they believe that people are more satisfied and more likely to live with a negotiated settlement than with one imposed by the court. Some also pointed out that in the majority of family law cases there is no financial incentive to go to trial, because usually the lawyer cannot bill for all the time involved or at least has trouble collecting. Most would prefer to do many simple uncontested cases than a few expensive and protracted custody cases.

As well, some also noted that the outcomes of litigation are often unpredictable, making it preferable to negotiate whenever possible. Others pointed out that even though the client may wish to be litigious, they cannot always acquiesce to his or her demands; they deal with the client one time only, but must deal regularly with the lawyer for the other party.[20] At the same time, the lawyers interviewed and surveyed evinced little interest in doing mediation themselves. While in each of the four research sites there are some who have either taken mediation training or intend to do so, there is hardly the groundswell of interest sometimes reported at conferences and elsewhere.

Nor are lawyers explicitly opposed to divorce mediation or particularly concerned about either its impact on protecting people's rights, on their own role in family law or on their livelihood. Indeed, many could give reasons why it is advantageous for people to mediate their disputes, and some claimed to be advising their clients to attempt mediation. However, analysis of court files and interviews with mediators and counsellors show that the actual number of referrals is quite insignificant; about 12 percent of referrals to the court-based services in the DFMS research sites could be identified as a direct referral from a lawyer. As the mail questionnaire results show, while about 85 percent of lawyers advise clients about the existence of mediation, in only 10.4 percent of their cases is there actual encouragement to attempt divorce mediation.[21]

Most, 91 percent of lawyers surveyed, are aware of the services in their community and, as mentioned earlier, some 85 percent report that they advise their clients about mediation.[22] However, in answer to the question of whether they are more likely to advise clients to seek personal counselling rather than divorce mediation, 29 percent said personal counselling, 23 percent, divorce mediation, and 42 percent said both about equally. In Winnipeg, lawyers referring clients to one of the services in the community do not appear to make a very clear distinction between those that offer mediation and those that offer only marriage counselling and emotional support

to people involved in marriage breakdown. Both sets of data, then, suggest that there is some confusion among family law practitioners as to the meaning and objectives of divorce mediation.

While some 75 percent of lawyers would refer intractable disputes to a divorce mediator, only three percent of lawyers would do so if the client has serious emotional problems. About 40 percent would not refer a case if there is extreme hostility, and 30 percent would not do so if there is a history of wife or child abuse. A somewhat higher proportion, 47 percent, would not refer to mediation if there is perceived to be an imbalance of power between spouses or if the client is not emotionally adjusted to the separation.

As with mediators, lawyers are divided as to what is the appropriate level of involvement and proper timing of their involvement in the mediation process: 60 percent believe that the lawyer should be involved at all stages, while 40 percent believe that their role should be limited to reviewing the final settlement. Nevertheless, 88 percent of lawyers would continue legal proceedings while divorce mediation is in progress. It is also of interest that 31 percent of lawyers favoured mandatory mediation, where custody and access are in dispute, while another 50 percent gave qualified answers. Many in this category suggested that there should be greater use of custody assessments and interviews during the court hearing of all parties to the dispute. Only 11 percent gave a categorical "no" to this question.

Given the supposed concern of the legal profession with mediation of financial and property matters, it is also of interest that 70 percent of the lawyers interviewed and surveyed believe that divorce mediators should deal with custody, access and maintenance, while only 14 percent believe that it should be limited only to custody and access. Less than one percent believe mediators should deal with property matters and about 15 percent either don't know or were disinclined to answer this question.

The Four Models

As described earlier, the data base for the present research are the courts and mediation services in Saskatoon, Winnipeg, Montreal and St. John's. Direct observation and research on these four services provide findings which are generally congruent with those generated from the survey of divorce mediators and family law practitioners. However, this part of the research does permit a more detailed picture of the specific services, their commonalities and differences.[23] In the following paragraphs, the four court-based services are briefly described and compared in terms of a number of dimensions: organization, scale of operation, scope of mediation, case flow and approach.

Overview

At the outset, it should be noted that, while the initial intent was to study several different models of divorce mediation in several different kinds of communities, there is, on various dimensions, sufficient overlap as to make it impossible to talk of four analytically and empirically distinct approaches or models. In other words, court-based models of divorce mediation have more commonalities than differences. For example, in terms of scale of operation, services offered, history and philosophy, the services in Saskatoon and St. John's are much alike. Both began in the late 1970s as new and innovative components of unified family court demonstration projects. Both were created as social arms of their respective courts and were expected to provide what was then called conciliation counselling as one among a range of services. Both serve jurisdictions similar in size and not all that different in terms of the economic situation of their clients, many of whom choose to separate under provincial legislation rather than the more costly federal legislation.

While the Winnipeg court serves a larger jurisdiction, its conciliation service has in common with the two smaller sites that divorce mediation must compete with the provision of other services: intake, information services, short-term counselling and, above all, court-ordered assessments or investigations. In all three, mediation is confined to matters of custody and access. On the other hand, a unique feature of the Winnipeg court is that where either of these issues is contested, there is nearly mandatory mediation: judges consistently refer appropriate cases to mediation.[24]

The Montreal court and Family Mediation Service stands in marked contrast to the other three services studied. Apart from the size of the court and the service, one unique feature is that there is mediation of maintenance and property division as well as custody and access. With the assistance of a consulting lawyer, another unique aspect of this service, it has been possible to offer global or comprehensive mediation. In addition, because there is a parallel service responsible for custody assessments and investigations as well as an individual solely responsible for intake and information, the service is able to devote itself almost entirely to divorce mediation. One result of this specialization has been the development of a more structured and uniform approach to divorce mediation than appears to be the case in the other three research sites. Further aspects of the structure and process of the four courts are considered in the following paragraphs.

Organization

The sizes of the four services bear little relationship to the size of the court and jurisdiction. In Montreal, where the court serves about one-tenth of Canada's population, there are seven mediators (plus a coordinator and intake worker). In contrast, the Winnipeg court, serving a relatively smaller jurisdiction, has nine social workers (plus a director). At the time the research was underway, the two smaller courts had social arms with four counsellors and a coordinator (Saskatoon) and two and a half positions

(St. John's). The result is that, on a purely statistical basis, separating and divorcing couples in Montreal have less access to court-based mediation services than in the other three courts. However, offsetting this is that only a portion of the counsellors' time in the three smaller sites is devoted to divorce mediation, whereas Montreal mediators spend the majority of their time in this one area. In any event, there was no indication in Montreal that there is an unmet demand for mediation services or an unduly long waiting time for an appointment.

In all the research sites, the services are physically located in the family courts, and the services that they provide are free to individuals and couples living within the jurisdiction of the court. At the time that the unified family court demonstration projects were implemented, there was controversy about whether it is more appropriate to have the social arm administered by the Department of Justice than by the social services in the respective provinces. The argument for locating it in the Justice department was that this would encourage the notion of the social arm being an integral component of these innovations in family courts. On the other hand, attachment to a social services department was seen as leading to greater autonomy and equality of the social arm vis-à-vis the legal and judicial arms of the court. In two of the four research sites, the decision was, in fact, to retain the social arm within the departments of Justice. Subsequent evaluations of the four projects suggested that, generally, the social arm fares better within the court when it is administered by and has the support of a department of social services (Department of Justice, 1983).

With the exception of St. John's, the services studied in this project are responsible to ministries of social or community services. The general outcome is that these services appear to operate quite independently and autonomously from the court. Thus, the Montreal Family Mediation Service views its day-to-day mandate as coming, ultimately, from the clients it serves. Similarly, in Saskatoon the social arm has deliberately been viewed as distinct from rather than an appendage of the court and, in practice, the legal and social arms do operate as relatively autonomous units. This also seems to be the case in Winnipeg, where the service has considerable independence in setting policy. In contrast, at the time of the research, the staff of the St. John's social arm appeared to have little control over policy or setting of priorities. One result was that mediation generally took second place to other, more short-term services, notably intake, providing of information and short-term counselling.

Services and Scope of Divorce Mediation

In all the research sites except Montreal, where there is a separate service, counsellors who provide mediation are also regularly required to prepare custody assessments or investigations, as they are variously called. These take up to 40 hours to prepare and obviously use up a good deal of the time available for counselling and mediation. As an "approach of last resort", custody investigations are viewed by most mediators as the most stressful and least-liked aspect of their work. Not only does it take them

away from counselling and mediation, but they must also appear in court and undergo cross-examination. Moreover, in preparing a custody assessment and in making explicit or implicit recommendations as to what is in the best interests of the children, counsellors must abandon the role which is so much part of their training and orientation as a neutral and non-judgmental third party.

Aside from the problem of roles and the time required to carry out an investigation, the combination of counselling, mediation and custody assessments in the same service has the additional problem that counsellors involved in mediation cannot ethically conduct a court-ordered custody investigation. This is true because in all the services, mediation is "closed", in the sense that what is said and written down during the mediation session is confidential and, without the consent of the parties, will not be used in court or elsewhere. The possible exception is Saskatoon, where counselling, viewed as a separate process, is confidential, while information gathered in the course of mediation or a custody investigation is potentially available to the court. However, since as elsewhere it is the policy of the Saskatoon service that a counsellor provide only one type of service to a client or a couple, in practice mediation seems to be closed.

Case Flow

Observations in the research sites indicate that counsellors or mediators, as they are variously called, conceive of mediation as moving through a fairly distinct sequence of stages. The most structured of these services is Montreal. There, the first stage of mediation requires that the mediator assess the willingness and readiness of the couple to enter mediation, and that he or she identify with the couple the specific issues to be mediated. Defining the issues to be mediated is done jointly by the couple and the mediator. The mediator explains the basic rules governing the process of mediation and establishes a contract between the service and the clients.

The second stage of mediation concentrates on the needs of the children and the discussion of living arrangements for them. This stage focuses mainly on custody and access and questions regarding the best interests of the children. Since, as noted earlier, the service is empowered to mediate all issues, the third stage is one in which an attempt is made to reach decisions about support and property division and, with the aid of the consulting lawyer, to work out a memorandum of agreement.

While the Winnipeg service is limited to mediating issues of custody and access, the sequence is not all that different. The initial contact with the client is described by all the counsellors as "an interactive rather than a didactic process". The intent, in other words, is to determine the clients' initial position and to provide information about the nature of divorce mediation and the benefits they may gain from using this approach to ending their marriage. Timing is also recognized by most counsellors as extremely important. While most believe that mediation can be helpful at any point, there is consensus that it is more difficult to mediate a settlement at the very early stages of separation, when emotions are still in turmoil, and at the

later stages, when one or both parties have decided their objectives can be best met through the court process. Once a decision has been made as to whether mediation is possible, the second stage, actual mediation of custody and access, begins.

Mediation is also conceived of as occurring in stages. However, counsellors begin by determining whether they have a counselling, mediation or marriage counselling case on their hands. In general, when a client approaches the court for information on maintenance and custody, he or she is invited to bring the other spouse in for consultation and possibly mediation of the basic issues of custody and access. In other words, while in some services the counsellor writes or phones the other spouse explaining the service and suggesting an appointment, in Saskatoon the policy is essentially reactive rather than proactive; in the coordinator's view, if people can't communicate sufficiently to discuss in a joint meeting, there is little point in attempting mediation.

If couples do approach the court, the general sequence is for the coordinator, in a preliminary interview, to assess the needs and wishes of the couple. If, in the coordinator's view, what is being sought is marriage counselling — that is, reconciliation, the couple will be referred to a public or private agency outside the court. This is the procedure because, as a matter of policy, the UFC does not offer reconciliation as a primary service.

The outcome of the first session, then, can take three forms: a) the couple are assessed as in need of reconciliation counselling and are referred out; b) the couple are unsure of what they want and are, therefore, scheduled for separation counselling; c) the couple are committed to ending their marriage and are scheduled for mediation. Separation counselling can, however, have two basic outcomes: the couple conclude that they wish to work to save the marriage or they wish to end the marriage. If the latter, they proceed on to mediation; if the former, counsellors do offer a limited amount of what is essentially reconciliation counselling.[25]

Those involved in these court-based mediation and/or counselling services deal with clients who approach the service with various needs and problems. Some want information and direction, some want counselling and others, recognizing that their marriage is over, want to try mediation. Faced with these various demands, counsellors and mediators in each of the four courts have, understandably, remained relatively eclectic in their approaches and have developed and use a wide range of counselling and mediation skills and models, depending on the situation in which they find themselves.

Each has his or her own style of using these skills and approaches, and few seem to be completely committed to a particular mediation model, though there are preferences. Thus, Montreal mediators seem to have been most heavily influenced by Haynes (1981), while those in Saskatoon and Winnipeg most often mentioned Saposnek (1983). The dominant influence in St. John's has probably been Howard Irving (1980), as a result of workshops he has conducted, although counsellors there were certainly aware of and had been influenced by the books and articles produced by the leading American experts on divorce mediation.

At the same time, while observations in the courts do suggest that most of the counsellors are able to shift between counselling and mediation modes in response to clients' needs, the preferred and usual approaches of individual counsellors range across a continuum from relatively structured and practical on the one hand, to relatively unstructured and therapeutic on the other. For example, one counsellor in Saskatoon frequently requires his clients to do weekly assignments or exercises that get them focussed on different aspects of their separation or divorce and prepare them to discuss these issues at subsequent sessions. In Winnipeg, one counsellor characterized his style as "business-like" and practical and as usually steering away from "relationships", while others described their approach as relatively "therapeutic" and concerned with "communication skills". In Montreal, where mediation is relatively structured, mediators, though moving back and forth along this continuum, also have their own particular styles and approaches.

A Profile of Mediation and Non-Mediation Clients

An important component of the process evaluation is the question of who uses divorce mediation services and who does not. The reason, of course, is that critics of evaluations of divorce mediation have often raised the issue of self-selection. That is, are those who voluntarily choose to mediate their settlement different, in important ways, from those who do not? It was possible in the DFMS data to address this issue in some detail. The findings are in accord with most other studies of divorce mediation (Pearson and Thoennes, 1983; Kelly, 1987).

On the whole, those who chose this alternative are slightly better off financially, are better educated and are more likely to be employed in a white-collar occupation than are those in the non-mediation group of divorcing and separating couples. While average differences in gross income are slight, about $100 per month for men and $207 for women, mediation clients are nearly twice as likely to have incomes above $20 000 than are non-mediation clients (43.4 percent and 24 percent respectively). Similarly, about 55 percent of mediation clients have educational attainments beyond high school, compared with about 40 percent of non-mediation clients. Furthermore, 49 percent of mediation clients are employed in a non-manual occupation and 26 percent were classified as working in a professional occupation. Comparable figures for the non-mediation group are 29 percent and 10 percent respectively.

An argument which is often made against divorce mediation is that those who choose this approach comprise the more reasonable and less hostile segment of separating and divorcing couples. Predictably, there are those who argue just the opposite: mediators get all the "tough" cases. The DFMS data from the court files and the client interviews suggest that both arguments are probably exaggerations. While those who attended mediation are more likely to use fault grounds and have more issues in dispute than non-mediation couples, the differences are not great. Thus, the data

indicate that both lawyers and mediators deal with a mixed bag of cases: both groups of professionals get an equal share of easy and difficult cases.

Analysis of motivations for attending mediation give further insight into the kinds of cases dealt with by mediators. Both the DFMS and the Winnipeg Study interview data suggest that there are at least three separate groups or categories within the sample of people who attended mediation. First, there are couples who had already worked out an agreement and simply wanted to review their arrangements in order to have them made legal. This group came to mediation primarily for information on how to proceed legally and for reassurance that what they had worked out was, in fact, in the best interests of the children. In other words, some who go to mediation want an expert opinion that what they are proposing to do is just and equitable and won't do harm to the children.

A second category includes couples who want to reach an agreement on the issues related to the breakup of their marriage, but are afraid to try and settle these directly between one another; though there was not yet hostility or disagreement, some couples who chose mediation feared that things would soon escalate into bitter conflict if they were left on their own to work things out. In this group are also some who feared that lawyers would make things worse by exacerbating the level of conflict. Third, there are couples who are already in conflict over one or more issues and who, as a last resort, want the help of a neutral third party to resolve the dispute and help them reach an agreement.

It was apparent, as well, that the line between counselling and mediation is, for most clients, not well-defined. As some pointed out, they attended counselling and/or mediation to help them get through the whole ordeal of ending their marriage, to try to diffuse some of the hostility and, as more than one person put it, "to smooth the conflict out for the sake of the kids." Thus, in the DFMS, about 40 percent of the women and about 20 percent of the men attended mediation in anticipation of receiving "emotional help" and, in the Winnipeg Study, about one-fifth indicated that one motivation was the "need to talk".

Client Perceptions

Levels of client satisfaction with mediation are, in both studies, similar to what has been found in other evaluations. That is, 80 to 90 percent of respondents felt the mediator was fair, understood their situation, was friendly and approachable, had given them an opportunity to express their concerns and feelings and had clearly explained the choices available to them. Only a minority, under 16 percent, felt that they had been pressured into accepting an agreement before they were ready. Most would also recommend mediation to a friend going through a similar situation.

At the same time, it must be noted that for the most part both those who did and did not attend mediation were also satisfied with their lawyer. Most, over 80 percent of men and 88 percent of women in the DFMS, found their lawyer to be helpful and understanding and let them express their needs. Both groups are, however, less sure that what the lawyer did was worth the

cost, since only about 51 percent of the women and 44 percent of the men felt that they had got their money's worth. Here, it is worth recalling that the court-based services studied in these projects are free. It is quite possible that had people been required to pay for this service, similar proportions may have felt that they didn't get their money's worth, that they could, in retrospect, have worked things out by themselves.

It should be noted that those who were dissatisfied with their lawyers were extremely dissatisfied. These respondents were very bitter and angry and provided voluble accounts about how they had been treated or how the lawyer's actions (or, more often, inaction) had worsened an already difficult and stressful situation. In contrast, those unhappy with their divorce mediation experience were much less vehement in their criticism. To repeat, most people were satisfied with their legal representation, and there was no difference in evaluation of lawyers between those in the mediation and those in the non-mediation groups. In other words, the data do not suggest that participating or not participating in divorce mediation has any measurable effect on people's assessment of their legal representation.

Settlement Rates

Before turning to outcomes of divorce mediation, it seems fitting to conclude this section by looking at the overall success of mediation in bringing about a settlement. While this may seem an obvious question in a report devoted to a study of divorce mediation, what constitutes success turned out to be difficult to define. Mediators, and apparently clients, tend to think of the results of mediation as falling along a continuum between full settlement and no agreement whatsoever. In the middle are less clearly defined outcomes such as partial settlement and narrowing of issues. As mediators like to joke, there is always the possibility of failure in divorce mediation: the couple may decide to reconcile.

The DFMS data from the court records indicate that complete settlement was reached in just under half of the cases (49 percent). If to these are added those defined as a partial settlement, it could be concluded that mediation is successful in about 64 percent of all cases. If the six percent of cases that resulted in reconciliation are excluded, complete settlement was reached in 53 percent of the cases and full or partial settlement was achieved in just over 68 percent of the cases. To put it the other way round, mediation was entirely unsuccessful in about 25 percent of the cases: either the couple could not agree or the sessions were terminated by one or both parties. Separate analyses of the three DFMS research sites show a remarkable degree of similarity in the likelihood of either a full settlement or a partial agreement.

Clients interviewed in the DFMS have a somewhat different and, on the whole, less sanguine perception of the rate of settlement in mediation. Only 38 percent of those interviewed indicated that a full settlement was reached at the mediation stage. Another 20 percent perceived that there was either an agreement on some issues or partial agreement. By turning it round,

28 percent left mediation without an agreement, a figure reflected in the fact that about 34 percent of mediation cases were, in the final analysis, defined by the parties as contested court cases.

As in the DFMS, the Winnipeg researchers find that various data sources produce different estimates of settlement rates. Mediators estimate that there is full or partial settlement in 65 percent of cases, whereas clients' assessments put the figure at about 46 percent. As the researchers speculate, the discrepancy may be a result of the time lag between conclusion of mediation and the follow-up interview. What seemed a settlement may, in that interval, have fallen apart.

This part of the report has presented a very brief descriptive overview of the divorce mediation process as it exists today in Canada and in the four court-based services studied and observed. However, key questions of the research center on outcome and social impact, the intended and unintended consequences of divorce mediation. Thus, at the core of this research was a comparison of the separating and divorcing couples who used these free, court-based mediation services and those who chose to use only the legal process. In the next part of this report, these two groups are compared in terms of both intended and unintended outcomes.

Part IV: The Impact of Divorce Mediation

Introduction

This part presents an overview of research results from the two projects relevant to the outcome and social impact questions outlined in Part II. While process evaluation is mainly descriptive, outcome evaluation and, to a large extent, social impact evaluation, are based in some approximation to hypothesis testing. In this instance, outcomes of mediation cases are being compared with non-mediation cases. However, as described earlier, in the Winnipeg research site, a comparison group was unavailable. In this part, then, data from the Winnipeg Study gain their utility from being compared with findings from the other three sites. In the following sections, divorce mediation is assessed in terms of its impact on clients, on parenting, on the court system and process, on the legal profession and family law objectives, generally. The analysis begins by considering the economic implications of divorce mediation.

Impact On Clients

Divorce Mediation and Maintenance Quantum

One of the objectives in the Divorce and Family Mediation Study (DFMS) was to collect data on the extent of economic hardship following marriage breakdown, the role of maintenance in reducing that hardship and compliance with maintenance orders. Despite important changes in the status of women, generally, studies of male and female incomes have revealed a rather stable pattern in which women are found to earn, on average, from about 58 to 65 percent of male earnings.[26] There is considerable evidence that this inequality becomes intensified following separation or divorce.[27] Indeed, Weitzman (1985:276) concludes that under levels of support ordered by the courts, "it is only the women and children whose standards of living decline, even when the father is making his payments." The reason, of course, is that men are generally required to pay about one-third of their net income as child support, whereas women require about three-quarters of that income to continue to live at the standard existing before dissolution of the marriage.

The data from the DFMS are not novel in any of these respects. On the basis of National Council of Welfare estimates for June 1986 (about the time the interviews were conducted), some 9 percent of divorced men and 30 per cent of separated men who do not have custody of their children earn incomes which fall below the estimated poverty level for one-person households. In contrast, 58 percent of divorced and 71 percent of separated women (and their children) live on incomes which put them below the poverty line *after* including maintenance in their gross incomes and taking

into account family size.[28] Predictably, the larger the family size, the greater the likelihood of living below these estimated poverty lines. Whereas about 45 percent of women with only one child were found to have incomes below the poverty line, about 80 percent of those with four or more children were in this situation.

Overall, maintenance reduces the number of women and children living below the poverty line from 75 percent to 58 percent, a difference of 17 percent. It is where there are two or three children (family sizes of three and four) that maintenance payments have the most effect in reducing the number of families below the poverty line.

The DFMS data reveal that average maintenance quantum is greater for mediated than non-mediated cases. According to court records, the average amount of maintenance for mediation cases is $430 per month; for non-mediated cases the average amount is $332, a difference of $98 per month.[29] Clients who mediated their case report average maintenance of $543 per month, compared with $428 per month for those who did not mediate their case, a difference of $114 per month. Assuming that maintenance is paid, divorce mediation has the general impact of increasing the income level of women and children by about $1200 to $1400 per year. To put it another way, maintenance amounts are in general about 22 percent higher when the case is mediated than when it is not.

Admittedly, while the differences are not great, they do undermine the argument that women fare worse when their divorce or separation is mediated. One possible explanation of these findings is that observed differences are a result, not of divorce mediation, but of differences in level of affluence between those who use mediation and those who do not. However, when income is controlled, the differences persist: at three income levels chosen, the amount of maintenance is from 12 to 20 percent higher in mediation cases than in non-mediation cases. Finer breakdowns of income data do not change this general picture.

When the DFMS data for each of the three research sites are examined separately, it emerges that in only two of the sites are maintenance quanta higher for mediated cases than non-mediated cases. In Montreal and Saskatoon there is a difference of 28 percent and 11 percent, respectively, between mediated and non-mediated cases. However, in St. John's, mediated cases show an amount of maintenance which is about 4.5 percent lower in mediation than in non-mediation cases. In other words, the data suggest that, from the point of view of women and their children, there are fairly major benefits in including maintenance as one of the issues which should be mediated. However, as the Saskatoon data indicate, the very fact of having attended mediation and having worked out a settlement concerning custody and access has a positive impact on the amount of maintenance agreed to by the parties.

At the same time, the benefits of divorce mediation in reducing economic hardship following separation and divorce should not be exaggerated. The overall result is that the difference in the proportions of women and children living below the poverty lines is only about 4.4 percent lower in mediation than in non-mediation cases. There seems no doubt that, in general, women fare better through mediation. However, the differences in

maintenance amounts, though no doubt important to the well-being of these families, are not large enough to offset the wider inequalities which result in an impoverished situation for many women and their children following divorce and separation.

Finally, it should be noted that the modest economic benefits for women who choose divorce mediation accrue mainly to those who were able to achieve a full or partial settlement; women who attended mediation and were unsuccessful in reaching a settlement fared no better than had they used only the adversarial process.

Mediation and Compliance with Maintenance Orders

With respect to compliance with maintenance orders, most of those interviewed in both projects had not been put to the test: they had not been divorced or separated long enough for default rates to have reached the level reported in earlier studies. Moreover, since Manitoba has a unique system of maintenance enforcement, it is likely that the effects of this programme would overshadow any other form of intervention, such as divorce mediation. Nevertheless, the Winnipeg data indicate that about one-quarter of respondents reported that they were late in receiving (or paying) maintenance or that the full amount was not paid one or more times. Women interviewed in the DFMS appear to be somewhat worse off. Only 71 percent were able to state that they always received the full amount, and only about half said that they always received their payment on time. About 36 percent defined the pattern of payment as irregular or varied, and more than one-fifth were receiving no payments or less than had been ordered.

Contrary to expectations, excepting Montreal, divorce mediation does not in general have a positive impact on compliance with maintenance orders. In Winnipeg, there is, in fact, a greater likelihood of default when the couple successfully mediated an agreement or reached partial agreement than when they did not. The DFMS data for Saskatoon and St. John's do not show any appreciable difference between mediation and non-mediation clients with respect to compliance with maintenance orders, regularity of payment or general levels of satisfaction with the amount agreed to or ordered. However, in Montreal, compliance is much higher in the mediation group (97 percent) than in the non-mediation group (66 percent). Moreover, women who mediated their case report that they are more likely to receive their payment on time or usually on time than those who did not mediate their settlement (85 percent compared with 73 percent).

One of the expectations of mediation is that it will result in longer lasting settlements which will not require the parties to return to court for variation or enforcement of orders. As mentioned in Part II, it was only in Montreal that there were sufficient cases from the DFMS sample for it to be possible to undertake any kind of statistical analysis. In Winnipeg, there is consensus among judges and lawyers that the system is too recent for there to be an objective assessment of the effect of mediation on re-litigation. However, among the Winnipeg clients interviewed, 14.5 percent had already commenced a court process to alter existing arrangements, and another 41 percent expected to do so in the future. Among those who

anticipated a return to the court, the major anticipated problem was maintenance (35.3 percent) followed by access (30.8 percent) and custody (29.0 percent). There appears to be little difference between those who successfully mediated a settlement, those who did not and those who refused the offer of mediation. There are, again, substantive differences between mediation and non-mediation groups in Montreal. In the latter group, two-fifths of women indicated that they have enforced or intend to enforce their maintenance order, compared with 18 percent in the mediation group.

By the time of monitoring cases (February 1987) too few cases had returned to the courts in Saskatoon and St. John's for there to be an assessment of the relative benefits of mediation in creating stable and long lasting settlements. However, the mediation service in the Montreal court appears to be highly successful in producing settlements that mitigate the need for people to return to the court. At the time of the monitoring of cases in the Montreal court, only 72 couples, just slightly over 18 percent of the total sample, had returned to court to vary or enforce an order or to seek different measures under different legislation. Virtually all of these (97 percent) were non-mediation cases. Whereas about 20 percent of non-mediation cases returned to the court, only 4 percent of mediation cases had done so. It should be noted that one of these was in fact, a post- divorce mediation case in which the couple had been divorced a long time before attending mediation.

Divorce Mediation, Custody and Access

The analysis of Central Registry Data by Statistics Canada researchers (McKie et al, 1983) reveals a rather consistent and now well-known pattern of custody awards for the 1970s. While there are minor provincial variations, their data indicate that women receive custody in 85.6 percent of all cases. Moreover, when women are the petitioners in the divorce, men are virtually excluded from obtaining legal custody; only about 4 percent of men were awarded custody under these circumstances. However, as this study also shows, when men are the petitioners (about one- third of all petitions) there is a much greater likelihood of their being awarded custody (43 percent of cases). On the face of it, then, as the authors of the Statistics Canada report conclude, it seems that men wishing custody of their children would be well-advised to place themselves in the role of petitioner.[30]

The more recent data from the present studies suggest that, while the basic patterns of custody decisions remain similar to these earlier data, there are also a number of differences.[31] First, the DFMS data indicate women received sole custody in 76.6 percent of cases, and in the Winnipeg Study, in 65.3 percent of the cases. Second, men in the DFMS who were petitioners were less likely to receive sole custody, (22 percent compared with 43 percent). Rather, where men do petition for divorce and show an interest in receiving custody, the courts now tend to make or agree to joint custody awards, with the result that in 8.8 percent of all cases in the DFMS, there was a joint legal custody award.[32] Further, the DFMS data show a slightly higher proportion of cases (4.4 percent) where a split custody award was made.[33] None of this is meant to suggest that judges are imposing joint cus-

tody as a way to resolve custody disputes. Rather, it appears that where there is some desire on the part of the father for custody, both lawyers and mediators and, evidently, the couples themselves, are more likely to opt for joint custody than seems to have been true in the past.

The DFMS data from the court records and client interviews both suggest that, whether or not custody is in dispute, those who attend mediation are more than four times as likely to opt for joint legal custody than are those who used a purely legal process (28.4 percent compared with 6.5 percent). Court records indicate that sole custody to the mother is much less likely when the case is mediated (54.7 percent compared with 79.4 percent). Men do not necessarily do better through mediation, but the outcome is more likely to be one in which they have at least a legal involvement with their children.

The figures are somewhat distorted by the greater number of mediation cases in the Montreal research site and the obvious preference of those mediators for agreements which result in joint legal custody and shared parenting. While joint custody was chosen by only about 5 percent of non-mediation cases, 47 percent of mediated cases in Montreal resulted in joint legal custody. In contrast, joint custody was chosen by 7.4 percent and 15 percent of mediation clients in Saskatoon and St. John's respectively, and by 3.4 percent and 2.4 percent, respectively, of those who did not participate in mediation. While global and comparative figures are unavailable for Winnipeg, the researchers report that one-quarter of those who mediated their settlement chose a joint legal custody arrangement.[34]

It goes beyond the scope of this report to consider these joint custody arrangements in detail except to note that about 43 percent of the men and 49 percent of the women interviewed indicated that the award of joint legal custody also meant joint physical custody, and that for 62 percent of the women and 65 percent of the men, joint custody was their first choice. Those who mediated their divorce or separation were somewhat more likely to indicate that joint custody was their first choice than were those who used a purely legal process (69 percent compared with 60 percent of the men and 64 percent compared with 58 percent of the women). Finally, if they had it to do over, 89 percent of the men and 75 percent of the women would choose joint custody again. There is no difference between the mediation and non-mediation cases with respect to this question.

One of the concerns about family law reform and divorce mediation is that, under pressure from father's rights groups, women are being forced into joint custody arrangements against their will. The argument is that they accept these because of the fear that, should their ex-spouse fight for custody, he would have a good chance of winning. Custody outcomes do suggest that mediators encourage couples to enter into joint custody arrangements. However, the data — both quantitative and qualitative — do not, in any way, suggest that women (or men for that matter) felt compelled to accept this kind of order. Most preferred a joint custody arrangement because they believed it was in the best interests of the children. After living with such arrangements for a time, most cited advantages rather than disadvantages of joint legal and physical custody.

Access Arrangements and Orders

While contested custody disputes are relatively rare, lawyers, mediators, judges and, sometimes, clients themselves, are in agreement that access is almost invariably contentious and tends to remain so long after the final settlement. The evidence from this research suggests that perhaps the most important contribution of court-based counselling and mediation services is in aiding couples to work out workable and realistic arrangements that ensure the non-custodial parent continuing contact with his or her children, allow the custodial parent some time free of parental responsibility and respect the right of that parent to organize his or her life and that of the children in a predictable fashion. Thus, many of those interviewed in the DFMS, while having few problems working out custody, maintenance and property, expressed a need for post-divorce/post-separation counselling with respect to access. This was especially so among the small group of people who were attempting a joint custody *and* shared parenting arrangement. Similarly, clients in the Winnipeg Study estimate that mediation was most helpful in contributing to resolution of access (visitation) problems.

It is unclear which aspect of access is the greater problem. Considerable attention has been given to men who claim that they are denied access to their children. However, the data from the present research suggests that from women's point of view, the major problem is that men do not always exercise their access rights or that they do so erratically and unpredictably. In the former case, women are left in the full-time role of single parent and are often, understandably, concerned about the impact father absence has on the children. In the latter case, there is the obvious inconvenience of not being able to plan one's time around the expectation that the children will be with their father. Children face the prospect of disappointment and confusion when agreed upon arrangements are changed without warning.

From the point of view of the court, there is the vexatious problem that while compliance with maintenance orders and right to access are separate matters, they are seldom seen this way by those involved in such disputes. As Bissett-Johnson and Day (1986:55) put it, "withholding access appears to be a mother's weapon and withholding support, a father's." The courts, despite repeated remonstrations to those involved in "show cause" hearings, seem unable to dispel this connection.[35] The following paragraphs outline briefly the nature of access orders and arrangements and then consider, in general, how from the couple's perspective these are working out in practice.

Where sole custody is granted to one parent, Canadian courts almost invariably grant some form of access or visitation rights to the non-custodial parent. This seems to be the case even where there is a history of violence and/or insanity (Bala and Clarke, 1981:64). Where there has been considerable conflict about either access or custody, it is not unusual to find orders — often agreements developed in mediation — which spell things out in very specific terms. According to the DFMS data, highly specific arrangements comprise a minority of all access orders, occurring in about 23 percent of divorce cases. Apparently, in a majority of decisions (64 percent) courts

assume — sometimes incorrectly — that people can work out access arrangements themselves, and they either leave the matter of access open and vague or use terms such as "reasonable" or "liberal" access. At the other extreme, in only 1.1 percent of the cases was access denied, although in about 12 percent of the cases, the intent of the courts was unclear, since no mention was made in the order concerning access rights of the non-custodial parent.

Insofar as mediation is concerned, access arrangements are more likely to be specified when couples mediated their settlement than when they did not. In about 46 percent of mediation cases, access is spelled out in fairly specific terms, compared with less than one-fifth of non-mediation cases. This difference is perhaps not too surprising. Couples who seek the help of a mediator are often those in conflict about their post- divorce relationships and, in particular, matters relating to access and parenting; they are, therefore, more likely to wish things spelled out. As an indication of this, the court records that were analyzed mentioned specific weekends and holidays considerably more frequently when the case was mediated than when it was not (39 percent compared with 17 percent). While the number of cases is small (36 in all), access was defined in what was called "highly specific terms" in 11 percent of mediated cases, but in only 5 percent of non-mediated cases.

Evidently, in the majority of cases, the courts prefer not to impose access guidelines on divorcing or separating couples, but to allow them to work things out on their own in ways that best suit their particular circumstances. In invoking terms such as "liberal" or "reasonable" access, there is an implication that this is the best way to encourage easy and ongoing contact between the children and both parents.

However, as was learned from clients, these terms have a variety of meanings to some and no meaning to others. Two differences between the men's and the women's responses are worth noting. First, about 15 percent of women interpreted these terms as giving their ex-husband license to come and take away or to visit the children whenever it suited him. They, therefore, saw this as a negative aspect of unspecified access terms. Husbands, on the other hand, gave this answer about half as often as women, but tended to perceive this as a positive aspect of the custody provisions. Second, men showed considerably more confusion and uncertainty as to what is meant by liberal or reasonable access than did women, 46.7 percent compared with 30.4 percent, respectively. It seems, then, that while the phrase "reasonable" is a useful and meaningful concept within the law, it has little meaning to people in their everyday lives. The fact that people had attended mediation and perhaps worked out a settlement did not appear to reduce this sense of confusion.

Data from both projects indicate that even without the revisions to the divorce legislation, judges were already committed to the belief that it is in the best interests of the children to encourage as much contact with both parents as is feasible and appropriate. However, for the most part, they have left determination of what is most suitable for the children in the hands of the divorcing parents. However well-meaning the intention, it is nevertheless the case that for a sizeable minority of people, what all of this should

mean in practice is not clear. Qualitative data from the client interviews and discussions with court-based mediators suggest that open and vague arrangements can sometimes precipitate conflict and create anxiety in parents as to what arrangement is appropriate and will minimize the impact of the divorce on the children.

The varied meanings and lack of meanings that people attach to notions of liberal and reasonable access suggest that some people could benefit from a clearer set of norms concerning what is expected of them and what is, in the experience of experts, a reasonable or unreasonable level of access, given the particular circumstances and resources. While such instruction and guidance is probably not an appropriate role for judges, they could encourage divorcing couples to meet with a counsellor or mediator following the court hearing. It is unlikely that any kind of access order or post-divorce counselling process can force disinterested or alienated men to live up to their parental responsibilities or to force women, hostile or afraid of their ex-spouse, to allow him access to the children. However, it does seem possible to provide some guidance and mediation for couples mired in the logistics of attempting to maximize the children's contact with both of their parents.

Divorce Mediation and Post-Divorce Relationships

Despite anecdotal evidence of the amount of conflict and hostility which sometimes accompanies marriage breakdown, neither study provides evidence, generally, of the kind of conflict reported in American studies (Kressel, 1985). Overall, the various data sources suggest that in no more than one-fifth of all cases is there evidence of conflict and hostility between ex-spouses. Admittedly, there is indifference in another 20 percent of cases: the ex-spouses are not communicating with one another or one, usually the husband, has abandoned the home. The low level of conflict is borne out by how people described their present relationship with their ex-spouse. About 43 percent of the men and 52 percent of the women described their present relationship as friendly, cordial or at least business-like, with respect to the children. In contrast, about 21 percent of the men and 16 percent of the women said that the present relationship was tense or hostile. Nor does mediation seem to have an impact in the anticipated direction. In all, about 47 percent of the men and women who did not use mediation described their relationship as friendly, cordial or business-like, compared with about 37 percent of those who attended mediation. It must be kept in mind, however, that those who chose to mediate their case were sometimes those who started out with the most conflict and were attempting to work out a shared parenting arrangement.

Those interviewed in the DFMS were presented with a list of possible problems that separated or divorced couples might encounter with respect to access and post-divorce parenting. In the Winnipeg Study, clients were asked to respond to a similar list in the initial questionnaire and again during the follow-up interview. The DFMS data show that only a minority of those interviewed felt that they were experiencing the kinds of problems in parenting suggested by the questions (13.4 percent of the men and 19.7 percent of the women). The problem cited most often by women was that the

father was not dependable about visiting the children. For men, the major complaint was that the ex-wife said negative things about them to the children. There are some, but not substantial differences between mediation and non-mediation clients. On nine of the 13 items, women in the mediation group were somewhat more likely to identify the statement as applying to their situation. The net result is that the women who attended mediation were slightly more likely to perceive problems than were those who resolved their case through the legal process: a difference of about 3 percent. Differences between those who mediated their case and those who did not form a similar pattern for men. In nine of the 13 items, a higher proportion of men in the mediation than in the non-mediation group found these items to be a problem in their post-divorce relationship. The result is an average difference of about 4 percent over the thirteen items.

On most items, differences between the mediation and non-mediation groups are not large, and the conservative conclusion from the DFMS data is that those who mediated their settlements are about as if not more likely to be experiencing post-divorce problems than those who used only a legal process. What is noteworthy is that with one or two exceptions, most women and men are not experiencing the kinds of difficulties in access and parenting that these various items were intended to capture.

A somewhat higher proportion of clients in the Winnipeg Study than in the DFMS study indicate that, in several areas, they are having problems with post-divorce parenting. The comparisons between the two data sets suggest that these problems do not diminish over time. Nor does the intervention of mediation have a measurable effect: the data do not show a relationship between those who mediated their case successfully, those who were unable to do so and those who rejected mediation and the likelihood that people were experiencing any of these problems.

Despite differences in data collection procedures, the two studies are in agreement that in general, mediation has little measurable impact on post-divorce relations and parenting. However, when the DFMS data are broken down by research site, it is evident that in Montreal there is a consistent pattern according to which men who attended mediation were more likely to be involved in the parenting of their children than were those in the non-mediation group. For example, men were more likely to share responsibility for the children (44 percent compared with 31 percent) and there was a much greater likelihood of discussions about the children between the ex-spouses (74 percent versus 32 percent). While in other research sites there was little difference between the two groups with respect to level of post-divorce conflict and hostility, some 63 percent of the women in the mediation group, compared with 32 percent in the non-mediation group, characterized their relationship with their ex-spouse as "close" (with respect to the children). However, differences between men who did and did not mediate their settlement were not so great: 60 percent of the former compared with 53 percent of the latter said that the relationship was close. As well, one-third of the men and women in the mediation group, compared with one-fifth in the non-mediation group, said that there were no conflicts at the present time. As many mediation clients in the Montreal sample noted that

one of the motivations for attending mediation was to avoid conflict and hostility. In other words, clients' assessments were that without this intervention, post-divorce relationships would have been worse than they actually were.

Legal Costs and Mediation

One of the alleged benefits of mediation is that it reduces legal costs for divorcing and separating couples. However, overall, the DFMS data do not bear out this contention. Women who mediated their case estimated their legal fees at an average of $1599, compared with $1214 for those who did not attend mediation, an average difference of $385. Men in the mediation group estimated legal fees at about $508 higher than did those in the non-mediation group ($2019 and $1511 respectively).

One argument is that had the clients not gone to mediation, their legal fees would have been even higher. That is, people who attend mediation are generally those with matters in dispute, and should these go to litigation, the cost would be substantially higher. However, various breakdowns of the data do not support such a conclusion. For example, in general, where clients said that no matters were ever in dispute, the average legal fees were estimated at $658, compared with an average of $1758 when one or matters were, at least initially, in dispute. Those with nothing to dispute and who, nevertheless, attended mediation estimated their legal fees at $937, compared with $627 for those who did not attend mediation. Where matters were initially in dispute, the mediation group estimated legal fees at $2071, compared with $1582 for non-mediation clients, a difference of $489. When legal fees are broken down by clients' assessments of whether the case was contested or uncontested, they are still higher for those in the mediation group.[36]

Once again, when the Montreal data are examined on their own, they show a reversal of what was found elsewhere: mediating a settlement results, on average, in modest savings in legal fees for women ($133) and fairly impressive savings for men ($517). It seems evident that when separating or divorcing couples can successfully mediate all the issues, there is usually a savings in legal costs.

Impact of Divorce Mediation on Court Process

Contested cases, though a small minority of all divorce cases, take up an inordinate amount of the energy of lawyers and judges and court time and, of course, are the ones singled out by critics of family law and its administration for special attention. One of the anticipated outcomes of mediation is that it will result in fewer contested cases and a faster and thereby cheaper way to resolve family law cases.

The Winnipeg Study is mainly based on cases where custody and access were in dispute. The DFMS draws upon a broader range of divorce and separation cases and suggests that, whatever their initial status, the majority of separation and divorce cases have, by the time of the court date, been

turned into rather routine affairs; if there is conflict and dispute, most of this occurs prior to the court hearing. Since contested cases were over-represented in the DFMS sample, the data should exaggerate the amount of contention. However, the researchers, after going through the court files and noting motions, answers, counter-petitions, interim and interim-interim orders and so forth, were still able to assess only about 10 percent of cases as either "very contentious" or "contentious", and another 15 percent as "slightly contentious". In other words, by the time these cases reached court, three-quarters of them had become, one way or another uncontested, routine cases requiring, in most instances, the rubber stamp of the presiding judge to make them legal.

Clients' recall of the length of the court hearing bear out the researchers' assessments. Most (61 percent) were in court for under one hour, and some 22 percent never appeared in court at all. Thus, in only about 8 percent of the cases was there litigation which occurred over a day or more.

Those who mediated their case tend, on the whole, to have spent less time in the court hearing than those who did not attend mediation: 77 percent of mediation clients, compared with 56 percent of non-mediation clients, reported that their hearing was concluded in less than an hour. At the same time, of the clients who did go to court, 36 percent of those who mediated their case, compared with 31 percent of those who did not, were in court more than once.

The Winnipeg Study presents somewhat more equivocal conclusions with respect to impact on court process. The judges and lawyers interviewed during the study were divided as to whether mediation has much impact on speeding up the court process. In reaching their assessment, some were of the view that, even if the process is slower, the end result may be better. In other words, expedition of cases may not be in the best interests of those involved in a divorce proceeding. Rather, mediation in the view of some may permit a period of "cooling off" and of "maturation of the issues" that heightens the possibility of a "just result".

Time Between Filing and Final Settlement

Announcements describing the *Divorce Act, 1985* pointed out that the new provisions with respect to grounds for divorce give the divorcing couple the option of waiting one year or, if there is adequate evidence, of obtaining a divorce *immediately* using one of the other indicators of marriage breakdown. Given the backlog of cases in some Canadian family courts, the term "immediate" may have to be redefined. Data from the four courts included in the DFMS indicate that the time from filing of an uncontested divorce petition and the *decree nisi* ranges from 15 to 26 weeks, and for a contested divorce case from 18 to 120 weeks (Montreal).[37]

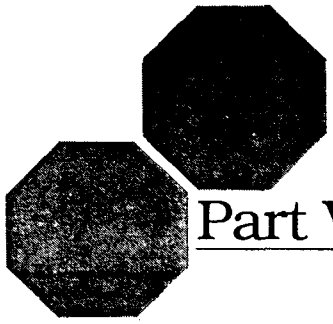
In the DFMS, It appears that those who choose to mediate their case face somewhat fewer delays in obtaining a court order than do those who use a purely legal route. With the exception of separation cases under provincial legislation, mediation cases, on average, were disposed of more quickly than non-mediation cases. While the same pattern can be seen in all three media-

tion research sites, the difference is particularly noticeable in the Montreal court. For all types of cases, mediation is the fastest route to a court order: there is, for example, a difference of seven weeks for uncontested divorce cases; a difference of 23 weeks for contested cases and a difference of four and *60* weeks for uncontested and contested separation cases respectively.

It is difficult to conclude, on the basis of these data, that sending more cases to mediation would appreciably affect the workload of the courts included in this research. Of course, the present reality is that only about 3 percent of the cases flowing through these courts go to mediation on route to a final court settlement. Thus, even if greater differences between the two types of cases had emerged from the data, it is apparent that, at the present level of staffing and demand on the part of clients, mediation services could not be expected to make much of a dent in the cost of processing family law cases or to do much to reduce the chronic problem of a backlog of cases plaguing most family courts in this country.[38]

Relieving Fear and Anxiety about the Court Process

An important component of the DFMS client interviews was the questions about how people felt about going through the divorce process and, in particular, the court hearing. As would be expected, thinking about going to court and the court experience itself evoked in people a number of responses. On the whole, the experience was perceived in more anxiety-laden terms for women than was the case for men who were, generally, about twice as likely to state that they felt confident (36 percent compared with 17 percent) about the court hearing. About 27 percent of clients experienced unexpected delays, and another 17 percent said that there had been expected delays, in their case. The most common effect of these delays was that they prolonged the pain, anxiety and insecurity associated with the marriage breakdown and subsequent divorce. In retrospect, four-fifths of the clients said they would have preferred closed hearings, and an equal proportion now favour divorce by affidavit rather than a formal hearing. Whether people had been to mediation seemed to have no appreciable effect, one way or another, on their state of preparedness, their sense of confidence or their state of anxiety and nervousness about the court hearing. These same questions were not put to clients in the Winnipeg Study, but the researchers do note that a tangential effect of mediation was that clients indicated it contributed to an understanding of the family legal system.



Part V: Conclusions

Overview

The two projects considered in this summary report have evaluated court-based mediation in four natural (as opposed to experimental) settings. In the DFMS, which considers three research sites, it was possible to compare cases in which there was an intervention — divorce mediation — with those that proceeded through the normal legal process. Admittedly, the latter is a variegated route, since some clients used the adversarial process in its fullest and traditional sense, while others reached an amicable and non-adversarial settlement, either through their own efforts or through the negotiating skills of their respective lawyers.

In the Winnipeg Study, present policies precluded the possibility of a similar kind of comparison group. Thus, while that project provides a considerable body of descriptive data on one model of court-based divorce mediation and separation counselling and its *general* effectiveness, it is not possible to reach definitive conclusions about its *relative* effectiveness. Comparisons which were made between successfully and unsuccessfully mediated cases do not, overall, suggest that there is much difference between these two groups.

The DFMS data do indicate measurable and systematic differences on some kinds of outcomes that favour divorce mediation over the ordinary legal process and are in general consistent with previous research findings.[39] However, on many measures, particularly those concerned with post-divorce relations, it is difficult to detect differences between the mediating and non-mediating groups. Moreover, as in the Denver Custody Mediation Project (Pearson and Thoennes, 1984), more refined analyses of the DFMS data suggest that most of the observed benefits accrue to those cases where there was full or partial agreement. Thus, results for couples who tried but were unsuccessful at mediating a settlement are not very different from those for couples who were not exposed to mediation at all.

At the same time, clients in a position to make a comparison often said that mediation was, in their experience, more humane and, in general, superior to the adversarial system. As the Winnipeg Study finds, this is a widely shared view: all the actors in the system — lawyers, judges, counsellors as well as clients — harbour a strong belief in the efficacy of divorce mediation, a conclusion which generally applies also to the DFMS. Thus, even if there are not substantive differences in measurable outcomes between this intervention and the regular legal process, divorce mediation may still be justified if everyone believes it to be the more rational and humane way to go when marital and familial disputes appear to becoming intractable. In other words, the process itself is as important if not more so than the actual outcomes it produces. As Sloan and Greenaway (1987) conclude, a major source of satisfaction with mediation is the clients' feelings

that they have been "returned to a pivotal role in the dispute settlement process: they become once again agents in their own cause."

While it is often argued that many who use this approach and achieve an agreement would have done so without the intervention, the comments of many of the DFMS clients suggest that there was fear that had matters been left on their own, they would have escalated into conflict. Despite initial good intentions to work things out so as to do the least harm to the children, emotions were running high enough that these intentions were at risk, and mediation offered a kind of safety valve. Nor should we discount the service provided those who attended divorce mediation mainly for the professional reassurance that what they had worked out was, indeed, in the best interests of the children and would be found legally and sociologically acceptable.

Social Impact

While the results of this research do not make a clear case for the superiority of divorce mediation over the traditional adversarial process, they also give no empirical support to the contentions of critics of divorce mediation, most of which were considered in this research under the general rubric of social impact issues. In the DFMS, the evidence is that women and children fare better, economically and at all income levels, when there is a mediated settlement, a finding which is especially true for Montreal, the one mediation service studied which offers mediation of financial and property matters as well as custody and access.

A second concern, that people's rights may not be adequately protected when they choose to mediate their separation or divorce is also without foundation. The court-based mediators studied in this research invariably stress the importance of the clients' consulting a lawyer, even if they do not intend to seek a divorce or a court order under provincial legislation. In Winnipeg, clients claimed as one benefit of mediation that they had acquired a better understanding of the law and their legal options. It is evident that most clients took the advice of the mediator and did consult a lawyer before, during or after mediation and were as likely to be represented at the time of their court hearing as those who did not attend mediation. While there is alleged to be concern in the legal profession about the quality of mediated settlements, few lawyers interviewed and surveyed in these studies expressed such concerns; few reported problems in agreements they were asked to review and draw up as a separation agreement or minutes of settlement in a divorce petition. Nor did these lawyers believe or seem concerned that mediation would diminish their role in family law cases or affect their livelihood.

While mediators evidently encourage couples to work out a joint custody arrangement, there is no evidence to suggest that women were forced into this because of fears that they would lose in a contested custody dispute. For most women with a joint custody order, this had been their first choice. At the time of the interview, they were less satisfied with joint custody than were men but this would seem to be because their former husbands, although they were sharing in the parenting, were doing so less than

equally. Nor was joint custody a trade-off for a lower maintenance payment: women involved in joint legal custody arrangements but with *de facto* sole physical custody were receiving considerably higher levels of maintenance than the general sample of separated and divorced women in the sample.

Scope of Divorce Mediation

Inevitably, when data are collected from four different research sites, there is the question of which model works best. In terms of *general* effectiveness, all appear to be working well. However, the Montreal data do suggest that mediation is *relatively* more effective when 1) it does not have to compete with the need to provide information, intake services, short-term crisis counselling, longer-term counselling and perhaps, above all, custody and access assessments; 2) mediators are free to mediate the four basic issues associated with separation and divorce; and 3) there is a deliberately structured approach to divorce mediation. At the same time, it must be recognized that these services are located in different cultural contexts. The relative success of the Montreal model may be associated with a different orientation towards dispute resolution than is found in English Canada. Thus, the finding that a number of couples in the Montreal study employed a joint lawyer, an unheard of practice in other provinces, was not a surprise to those in Montreal familiar with family law practice.

Of these several features, undoubtedly the most distinctive and controversial is the policy in the Montreal court of offering "global" — comprehensive — mediation. The evidence is that it works and that Montreal clients like it and expect it. In contrast, in the other research sites (in the DFMS) clients were often dissatisfied that what for them was the central issue could not be dealt with and settled through mediation. As Pearson and Thoennes (1984b:38) found in their research, "the presence of unresolved financial problems may have contributed to the respondents' feelings that little progress had been made even in the successfully mediated cases."

More generally, the experience of the research suggests that the issue of mediating financial matters, in particular maintenance, has been overblown. First, a majority of the family law practitioners who were interviewed and surveyed either are not opposed to mediators dealing with child and spousal support or believe maintenance is inextricably bound up with decisions about custody, access and attempts at shared parenting. Nor, as the Montreal experience shows, is it all that technically difficult for mediators to help couples work out budgets and a realistic level of maintenance quantum. Indeed, it would often appear that mediators are better placed to do this kind of financial counselling than are lawyers who usually are in direct contact with only one of the parties. There is little mystique attached to a child and spousal support and, in any event, the outcome is partially constrained by what the courts regard as a reasonable level of maintenance quantum.

Mediation of the division of matrimonial property is a more complicated matter, one where there is a much greater resistance on the part of the legal profession. However, here too, the complexities and dangers often seem exaggerated. For many undergoing marital breakdown, property division is

not a very big issue for the simple fact that there is little property to divide. When matters are more complicated, the more candid lawyers who were interviewed noted that they too are sometimes at a loss, or believe that what is actually required is not a lawyer but a tax accountant.

It is, in other words, not self-evident that if lawyers were more actively engaged in mediation, they would necessarily be better equipped to deal with the complexities of some property divisions. Moreover, as in other professions, part of the training is to recognize which problems of the client are and are not within the practitioner's area and level of expertise and competence; the division in medicine between general practitioners and specialists is the most familiar example of how this has become institutionalized into professionalism.

In short, the combined data all indicate that the degree of settlement of issues of child and spousal support is integral to satisfactory resolution of issues of custody and access and ought to be included. In the absence of a lawyer-consultant, as in the Montreal Court, it does not seem practically and politically feasible for mediators to seek an actual memorandum of agreement about property division. However, it does seem evident that the wishes of the parties and the areas of dispute, particularly disposition of the matrimonial home, should be discussed, since they set parameters as to what may or may not be realistic with respect to custody and parenting arrangements.

Approaches to Divorce Mediation

Another general area of debate centers on the apparent shift from conciliation counselling to divorce mediation and the implication that this also means a shift from a therapeutic model to a more present and task-oriented approach. Is one approach more effective than the other? In the United States, as Joan Kelly (1983) has observed, the latter has most appeal to the growing number of lawyers entering the field. However, to our knowledge, no research has yet been done which would allow a comparison between the two approaches and types of practitioners. As the present research indicates, the change in Canada is more one of terminology than of approach, since to date the field remains more exclusively the preserve of those trained in the mental health disciplines and who usually offer both mediation and counselling. In particular, for the court-based services studied in these projects, the distinction between counselling and mediation is largely analytical rather than empirical, with the line between the two processes often being fuzzy or poorly defined. This seems true even of the more structured approach of the Montreal mediation service: observations show that mediators, all trained in social science and social work, move back and forth between therapeutic and task-oriented approaches as the situation demands.

The result is that the Canadian data do not allow us to reach any conclusions about the relative effectiveness of the two approaches. However, client perceptions suggest that it would be wrong to move too far away from the conciliation counselling model and approach, whatever the more popular

nomenclature. As described earlier, an overwhelming majority of clients were satisfied with the process and, even when a settlement was not reached, tended to blame themselves, or more usually their ex-spouse, rather than the mediator or the process. Where there is dissatisfaction, the most common complaint was that the process was too quick, and that there was not enough time to talk about feelings, a viewpoint expressed more often by women than men.[40]

In general, the experience of this research points to the importance of maintaining an approach that deals with both the practical and emotional issues of marriage breakdown. Alternative dispute resolution techniques, especially those developed in labour relations, appear to have limited applicability to the uncoupling process. They are premised on the assumptions that there is a degree of equality between the parties, representation by advocates experienced in negotiation, and ongoing and prior experience with the process. Moreover, while emotions do often run high in these situations, the orientation is toward rational-legal decision making.

As described in Part II, the uncoupling process is often just the opposite. Couples bring to the session their socialization into gender-based inequalities. One, usually both, have little or no experience with bargaining and negotiation, and they are not represented. Finally, both are caught up in a combination of emotions and trauma — guilt, anger, hurt, hostility, ambivalence and vindictiveness — none of which contribute to rational decision making.

There is a certain attraction to an approach that deliberately sets aside the emotional confusion and gets on with the immediate issues and tasks. However, on balance we believe it to be one which is both unrealistic and inappropriate for most separating and divorcing couples, in at least the court-based milieu considered in these studies.

Mandatory versus Voluntary Divorce Mediation

At the time the *Divorce Act, 1985*, was before the Standing Committee, the then newly formed association of mediators, Family Mediation Canada recommended in response to the proposed changes that, among other things where there are issues in dispute, "couples be required to attend a joint mediation orientation session with a qualified mediator provided by the court" (Devlin and Ryan, 1986: 103). The purpose of this session was to acquaint people with divorce mediation and to encourage them to settle their dispute in a less litigious manner. This recommendation did not become a provision within the new legislation, and the mediation community seems divided as to whether, in such situations, at least an initial attempt at mediation should be made mandatory.

The data from the present research presents at best an equivocal answer to this question. In the DFMS research sites, mediation is essentially voluntary, with only a small number of referrals coming directly or indirectly from the court. In Winnipeg, about 30 percent of cases coming to the service are, to all intents and purposes, mandatory mediation cases. About 75 percent of these go beyond the first meeting. Contrary to arguments that mandatory mediation will not work because it is impossible to

make people cooperative, the data suggest that outcomes, particularly settlement rates, do not appear very different for these cases than for voluntary cases in Winnipeg and the other three research sites. There is little evidence that clients felt coerced into continuing mediation or were resentful about having been put through this process, and they were about as likely to recommend this approach to others as those who attended on a voluntary basis. It is evident that without this practice of mandatory referral, some of the couples who did settle in mediation would not have become aware of this alternative and would have faced a lengthy court battle. Thus, there does not seem to be any observable associated negative effects, making attendance at one orientation session a mandatory part of the process in contested cases.

Discussion

With a few exceptions, the conclusion that can be drawn from this research is that mediation produces outcomes which are consistently, but not dramatically, better than those achieved through negotiation between lawyers and, for that matter, by fighting things out in court, and it does so without the negative and unanticipated consequences ascribed to it by its critics. Both proponents and opponents may have overstated their cases; the claims of both are more polemical than empirical.

Another and, admittedly, more speculative alternative is that both are correct but that they describe an era in family law that no longer exists or which perhaps never did exist in quite such extremes in the Canadian, as opposed to the American, social, cultural and legal context. On the one hand, divorce mediation, virtually unheard of a decade ago, has gone through its growing pains and is well on the way to becoming fully professionalized. In undergoing that process, those in the field have been highly sensitive to criticism and have undoubtedly addressed many of the concerns which may have been valid a few years ago. On the other hand, family law, procedurally and philosophically, has also changed dramatically, at both the federal and provincial levels. There is every reason to believe that the legal profession — judges as well as lawyers — has participated in and internalized these changes.

Divorce mediators encountered in this research seem attuned to the reality that the outcomes of their efforts have a legal as well as a socio-emotional dimension, that, as Mnookin and Kornhauser (1979) put it, negotiations between the parties take place "in the shadow of the law." What is agreed to in mediation must meet the requirements of a legal contract, but it is also bound by what judges in each jurisdiction view as a reasonable, workable and just settlement. Mediators, then, are not likely to give positive sanction to agreements which may be rejected by lawyers or which judges find problematic. At the same time, family court judges, or at least the ones encountered in these projects, have less and less patience with adversarial approaches, especially when the issues involve the welfare of children. They prefer that the couple try mediation or further negotiation or that they order a custody assessment. Lawyers, in turn again, at least the ones included in this study, are extremely aware that an overly litigious

stance in court will not be appreciated by the judge. However, beyond the fear of invoking the wrath of judges, with whom they must deal daily, is the belief of most lawyers practising family law that it is in everyone's best interest to avoid litigation whenever possible, especially in matters of custody and access. They too believe that if the bottom line in all of this is the welfare of the children, traditional adversarial approaches are often inappropriate, a view also shared by many of those experiencing marriage breakdown.

Failure to show dramatic differences in outcomes between mediated and non-mediated cases is not, then, a condemnation of divorce mediation. Rather, it suggests that family law may have become a more humane system, one in which the goals and philosophy of mediators, judges and lawyers are more of a piece, less at odds, than may have been true in the past. The field of divorce mediation has developed in and contributed to a divorce and separation regime quite different to the one depicted and castigated by the Law Reform Commission a decade ago. In the mid-1980s, divorce mediation is no longer a radically new innovation pitted against a traditional adversarial system. It would, then, be surprising if outcomes of mediated settlements were all that different from those achieved through the present adversarial system.

As this study has found, divorce mediation does offer a useful service to many separating and divorcing couples, and those who have used this approach are highly satisfied with the process and the results. Moreover, court-based services do perform a number of other valuable services ranging from provision of information to post-divorce and separation counselling and mediation. This alternative is looked upon favorably by the courts and the legal profession and does seem to have become an integral component of family law administration, one which should continue to be supported and encouraged.

Notes

1. Other initiatives have included seed funding of Family Mediation Canada and the development of an inventory and profile of divorce mediation and reconciliation services in Canada.

2. In the year preceding the *Divorce Act, 1968*, the divorce rate was 54.8/100,000 people. In the year following, the rate rose to 124.2/100,000 and continued to rise to a peak of 285.9/100,000 in 1982. By 1985 the rate had fallen to 244.4/100,000. Since 1986, the year in which the new divorce legislation came into force, there has been a sharp increase in the divorce rate. It is assumed that this is a short-term increase brought about by the much shorter waiting period wich is a major feature of the new legislation. However, it was also anticipated that rates would fall after the 1968 legislation had dealt with the backlog of cases. It is, in other words, too early to determine what will be the impact of new legislation.

3. See, for example, Ann Goetting (1981). A recent review of the literature can be found in Richardson (1987c).

4. See, for example, Payne (1987). For a more general discussion and a more conservative set of conclusions, see Berger and Berger (1984).

5. See, for example, Wallerstein and Kelly (1980); Mitchell (1985); Hetherington and others (1982); Walczak and Burns (1984); Luepnitz (1982).

6. Quoted in Payne (1973:62).

7. In particular, see Bottomley (1985). A recent Canadian collection of articles concerned directly and indirectly with these issues is Martin and Mahoney (1987).

8. For a recent statement of some of these concerns, see Boyd (1987).

9. Consideration was also given to using a different site in Manitoba (for example, Brandon) for comparison purposes. However, there is no other jurisdiction comparable to Winnipeg in terms of rules, procedures and the formal and informal practices which are, in part, shaped by community size.

10. A follow-up questionnaire was to have provided the first measure of change. Since this was completed by only 67 clients, it was abandoned for most purposes, and the questions were integrated into the interview schedule.

11. In St. John's, a complete turnover in staff in the social arm and other complications made a detailed Observational Study impossible.

12. Separate analyses of this sub-sample indicate a high degree of agreement between responses of men and women with respect to factual matters, and the pattern of differences in responses to attitudinal and subjective questions between these men and women does not differ remarkably from comparisons of the full sample of men and women.

13. The history of mediation as a method of dispute resolution is described in Irving (1980) and Folberg (1983).

14. For a recent history and overview of mediation in Canada, see Devlin and Ryan (1986).

15. This conclusion is based on a variety of discussions of mediation conferences. For a usefull and persuasive discussion of the differences between divorce counselling and divorce mediation, see Kelly (1983).

16. From the Forward to *Code of Ethics, Ontario Association for Family Mediation, Code of Professional Conduct.*

17. Similarities and differences between mediation in labour and divorce disputes are explored in Markowitz and Engram (1983).

18. The larger proportion of referrals from lawyers, reported by private practice mediators is also reflected in what lawyers said in the mail survey. Thus, 54.5 percent prefer to refer clients to private mediators and only 15.3 percent prefer court-based services; the rest, 30.1 percent, indicated no preference.

19. Having said that, it is worth noting that some clients interviewed in the DFMS did feel that their lawyers had exacerbated and worsened an already deteriorating situation either through a too litigious stance or through unexplained and, in the clients' view, unwarranted delays in bringing things to a conclusion.

20. Those interviewed and who responded to the questionnaire do a sizeable amount of family law. Many of these lawyers said that the most litigious lawyers they encounter are those who do mainly civil litigation and take on a family law case as a favour to an existing clients.

21. It is of interest to note that lawyers whose practice consists of more than 50 percent family law encouraged about 16 percent of their clients to attempt mediation, compared with 7 percent of those who do less than 50 percent family law.

22. Both the interviews and the mail survey were conducted after the *Divorce Act, 1985* came into force.

23. Again, readers interested in details of the four courts are referred to the two larger reports (Sloan and Greenaway, 1987; Richardson, 1987).

24. As the Winnipeg report makes clear, there is considerable ambivalence on the part of judges, lawyers and mediators on whether to refer cases involving physical and sexual abuse of wives or children to mediation.

25. In St. John's, change in staff during the research period makes it difficult to say much, at the observational level, about how mediation was conducted and conceptualized by those offering this service.

26. See, for example, Armstrong and Armstrong (1983).

27. In what is, perhaps, the most intensive and ambitious study to date, Lenore Weitzman (1985) finds that, in the United States, when income is compared to *needs*, divorced men experience on average a 42 percent *increase* in their standard of living in the first year after divorce, while divorced women (and their children) experience a 73 percent *decline*. There are also several analyses of the impact on men's and women's income, after divorce, if the amount of support ordered by the court was, in fact, paid. One of these, by Chambers (1979), found that after paying maintenance, about 80 percent of men would still be living above the poverty line, findings replicated in an Alberta study of matrimonial support (Institute of Law Research and Law Reform, 1981). In contrast, if women with physical custody of children depended solely on maintenance for their family income, 97 percent would be living below the poverty line or, as it is called in the United States, the "lower standard budget".

28. While the numbers are small (N = 46), 42 percent of men with physical custody of their children were also found to have incomes which put them below the poverty line.

29. It was initially intended to separate out child support and spousal support. However, in a large number of awards (in the DFMS), court records specify only the total amount of maintenance and sometimes leave unclear what was the division.

30. The Central Registry Data on which this study was based did not allow one to determine whether those acting in the role of petitioner were requesting custody.

31. A detailed analysis of patterns of custody and access in the DFMS data can be found in Richardson (1987b).

32. The Central Divorce Registry Form did not include a category for joint custody, so that direct comparisons are impossible. It was estimated by the Statistics Canada researchers that this was the type of award in 2 or 3 percent of divorce cases.

33. It appears that the concept of split custody has, in practice, if not in strict legal usage, two meanings. As both Bala and Clarke (1981:61) and Bissett-Johnson and Day (1986:48) use the term, it refers to the very rare situation where legal custody is vested in one parent, and care and control is given to the other parent. At the same time, the Statistics Canada report on divorce (McKie *et al.*, 1983:205) uses the term to refer to situations where the children themselves are separated in such a way that each parent has sole custody of one or more but not all of the children. In our sample, there were no split orders of the first kind. Hence, in referring to split custody, we have in mind the second kind of award.

34. As noted earlier, for purposes of collecting baseline data for a future evaluation of the *Divorce Act, 1985*, data were also collected in Ottawa. While the Ottawa court does not have a court-based mediation service, it is of interest that slightly over 15 percent of awards in that court are joint custody awards. Despite the lack of mediation, this is a higher percentage than was found overall in Montreal, and much higher than in the other DFMS sites. There is reason to believe, then, that while divorce mediation promotes joint custody and shared parenting, the likelihood of this option occurring varies by jurisdiction and the type of clients served by the courts.

35. For a particularly interesting analysis and insight into the attempts of one court to convey the legal and moral issues surrounding compliance with maintenance orders and access, see Wachtel and Burtch (1981).

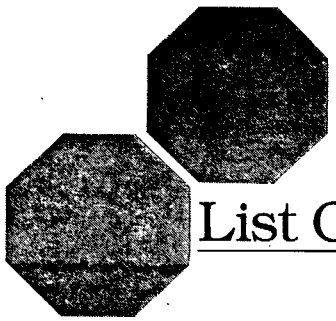
36. In the Winnipeg Study, data are not available on client estimates of legal fees. While there is a general assumption that mediation should be cheaper, the researchers were unable to confirm that this is indeed the case.

37. Near the end of the data collection period, a number of procedural changes were implemented in an effort to reduce the growing backlog of cases in the Montreal court. While these seemed to be working for a time, recent discussions with court personnel and lawyers suggest that the impact of these changes was short-lived.

38. Nor is it clear that, under existing policy and practice, a larger number of divorcing couples could be persuaded to try divorce mediation. As Pearson and Thoennes (1982) note, even when the service is free, upwards of 50 percent of those offered the service refuse.

39. See, for example, Emery and Wyer (1987); Irving and others (1981); Pearson and Thoennes (1984a); Kelly and others (in press).

40. This is a point also made by Pearson and Thoennes (1984a).



List Of References

Ahrons, C.R.
1979 "The Bi-Nuclear Family: Two Households, One Family", *Alternative Life Styles* 2(4).

Ambert, Ann Marie
1980 *Divorce in Canada*, Toronto: Longman Canada.

Anderson, Karen L.
1987 *Family Matters*, Toronto: Methuen Publications.

Armstrong, Pat and Hugh
1983 *The Double Ghetto* Toronto: McClelland and Stewart.

Bala, Nicholas and Kenneth Clarke
1981 *The Child and the Law*, Toronto: McGraw-Hill Ryerson.

Berger, Peter and Brigitte Berger
1984 *The War Over the Family*, New York: Basic Books.

Bissett-Johnson, Alastair and David Day
1986 *The New Divorce Law: A Commentary on the Divorce Act*, 1985, Toronto: Carswell.

Bottomley, Ann
1985 "What is Happening to Family Law? A Feminist Critique of Conciliation" *in* Brophy and Smart (1985).

Brophy, Julia and Carol Smart
1985 *Women in Law*, London: Routledge and Kegan Paul.

Boyd, Susan B.
1987 "Child Custody and Working Mothers", *in* Martin and Mahoney (1987), pp. 168-183.

Canadian Institute of Law Research and Law Reform
1981 *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved*, Edmonton, Alberta.

Chambers, David
1979 *Making Fathers Pay*, Chicago: University of Chicago Press.

Cherlin, A.
1978 "Remarriage as an Incomplete Institution", *American Journal of Sociology*, 84(3):634-650.
1981 *Marriage, Divorce, Remarriage*, Cambridge, Mass: Harvard University Press.

Coogler, O.J.
1978 *Structured Mediation in Divorce Settlement*, Lexington, Mass: Lexington Books.

Department of Justice Canada
1983 *Attempting to Restructure Family Law Administration* Ottawa: Department of Justice.

Devlin, Audrey and Judith P. Ryan
1986 "Family Mediation in Canada: Past, Present, and Future Developments", *Mediation Quarterly* No. 11, March: 93-108.

Eichler, Margrit
1983 *Families in Canada Today*, Toronto: Gage.

Elkin, Meyer
1973 "Conciliation Courts: The Reintegration of Disintegrating Families", *The Family Coordinator* 22(1): 60-69.

Emery, R. and M. Wyer,
1987 "Divorce Mediation" *American Psychologist* 42: 472-480.

Folberg, Jay
1983 "A Mediation Overview: History and Dimensions of Practice" *Mediation Quarterly* No. 1: September: 3-14.

Folberg, Jay and Marva Graham
1981 "Joint Custody of Children Following Divorce" *in* Irving (1981): 71-124.

Goetting, Ann
1981 "Divorce Outcome Research: Issues and Perspectives", *Journal of Family Issues*, Vol. 2(3).

Gross, Penny
1985 *Kinship Structures in Remarriage Families*, University of Toronto: Unpublished PhD Thesis.

Haynes, J.M.
1981 *Divorce Mediation: A Practical Guide for Therapists and Counsellors*, New York: Springer.

Hetherington, E.M., Martha Cox and Roger Cox
1982 "Effects of Divorce on Parents and Children" *in* Lamb (1982).

Irving, Howard
1980 *Divorce Mediation: The Rational Alternative*, Toronto: Personal Library Publishers.
1981 *Family Law: An Interdisciplinary Perspective*, Toronto: Carswell.

Irving, Howard, Peter Bohm and Grant Macdonald
1981 "A Study of Conciliation Counselling in the Family Court of Toronto: Implications for Socio-Legal Practice", *in* Irving (1981:41-70).

Kelly, Joan B.
1983 "Mediation and Psychotherapy: Distinguishing the Differences", *Mediation Quarterly* No. 1 September:33-44.
1987 "Mediated and Adversarial Divorce: Comparisons of Client Perceptions and Satisfaction", *Proceedings, Family Mediation: The Second Annual Conference*, Banff, Alberta.

Kressel, Kenneth
1985 *The Process of Divorce*, New York: Basic Books.

Lamb, Michael
1982 *Non-traditional Families: Parenting and Child Development*, Hillsdale, New Jersey, Lawrence Erlbaum.

Law Reform Commission of Canada
1974 *The Family Court*, Ottawa: Information Canada.
1975 *Divorce* Ottawa: Information Canada.
1976 *Report on Family Law* Ottawa: Information Canada.

Leitch, M. Laurie
1987 "The Politics of Compromise: A Feminist Perspective on Mediation", *Mediation Quarterly* No. 14/15 Winter 1986/Spring, 1987: 163-176.

Luepnitz, Deborah Ann
1982 *Child Custody* Toronto: D.C. Heath.

Markowitz, Janus R. and Pamela S. Engram
1983 "Mediation in Labour Disputes and Divorces: A Comparative Analysis", *Mediation Quarterly* No. 2 December: 67-78.

Marlow, Lenard
1985 "The Rule of Law in Divorce Mediation", *Mediation Quarterly* No. 9 September: 5-14.

Martin, Sheilah H. and Kathleen E. Mahoney
1987 *Equality and Judicial Neutrality*, Toronto: Carswell.

McKie, D.C., B. Prentice and P. Reed
1983 *Divorce: Law and the Family in Canada*, Ottawa: Ministry of Supply and Services.

Mitchell, Ann
1985 *Children in the Middle*, London: Tavistock Publications.

Mnookin, R. and L. Kornhauser
1979 "Bargaining in the Shadow of the Law", *Yale Law Journal*, 1979, 88:960-997.

Musty, Timothy A. and Marjorie Crago
1984 "Divorce Counselling and Divorce Mediation: A Survey of Mental Health Professionals", *Mediation Quarterly* No. 6, December:73-86.

Payne, Julien
1973 *A Conceptual Model of Unified Family Courts*, Ottawa: Law Reform Commission.
1987 "The Evolution of Family Law in Response to Changing Family Structures with Special Reference for Spousal Support", Paper presented at the Law and Society Meetings, Hamilton.

Pearson, J. and N. Thoennes
1982 "Mediation and Divorce: The Benefits Outweigh the Costs", *Family Advocate*, 4: 26-32.
1984a "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation", *Family Law Quarterly*, 17: 497-524.
1984b "A Preliminary Portrait of Client Reactions to Three Court Mediation Programs", *Mediation Quarterly* No. 3 pp: 21-40, 1984 p.38.

Pearson, J., M.L. Ring and A. Milne
1983 "A Portrait of Divorce Mediation Services in the Public and Private Sector", *Conciliation Courts Review*, 21: 1-24.

Richardson, C. James
1984 *A Proposal for an Evaluation of Reconciliation and Conciliation Services in Canada*, Ottawa: Department of Justice.
1987a *Divorce Mediation in Canada: A Preliminary Analysis* Ottawa: Department of Justice.
1987b *Evaluation of the Divorce Act, 1985, Phase I: Collection of Baseline Data*, Ottawa: Department of Justice.
1987c "Children in Divorce", *in* Anderson et al (1987).

Roman M. and W. Haddad
1978 *The Disposable Parent*, New York: Holt, Rinehart and Winston.

Saposnek, D.T.
1983 *Mediating Child Custody Disputes*, San Francisco: Jossey Bass.

Sloan, R. and W. Greenaway
1987 *Divorce and Family Mediation Research Study: Winnipeg*, Ottawa: Department of Justice.

Wachtel, A. and B. Burtch
1981 *Excuses: An Analysis of Court Interaction in Show Cause Enforcement of Maintenance Orders*, Vancouver: Social Planning and Research.

Walczak, S. and S. Burns
1984 *Divorce: The Child's Point of View*, London: Harper and Row.

Wihak, Christine
1985 *Review of Literature on Mediation in Separation and Divorce and an Annotated Bibliography of Mediation Literature*, Ottawa: Department of Justice.

Weitzman, Lenore
1985 *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, New York: The Free Press.