CHILDREN IN DIVORCE: SOME FURTHER DATA

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INTRODUCTION

This paper presents the main findings of a small research project conducted at the Centre for Socio-Legal Studies, Wolfson College, Oxford. It was intended to complement the large scale survey of the manner of disposition of the custody issue after divorce based on an examination of court records and published in 1977.[1] That study was based on a representative sample of divorce cases involving children under 18 filed during 1974 in ten courts in England and Wales and in the Court Session in Edinburgh. A total of 855 cases was examined. The data yielded information on the proposals and patterns of arrangement made by parties for their children on divorce and the courts' responses to them. Some of this will be referred to shortly.

An outstanding finding of that study was, when the totality of divorce cases is considered, how insignificant the role of the courts appears to be. Only 6.9% of the English cases were classified as being contested on custody or access at time of hearing, but this may be an underestimate.[2] Of the uncontested cases, the court order changed the children's residential status quo in only 0.6%(4) cases: in all the rest, it simply confirmed the arrangements agreed between the parties. In only two of the 39 cases where custody was considered contested was a child moved from one parent to the other without the agreement of the parents.

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1. John Eekelaar and Eric Clive, with Karen Clarke and Susan Raikes, Custody after Divorce (SSRC Centre for Socio-Legal Sutdies, 1977); see also I.F.G.Baxter and Mary Eberts (eds.) The Child and the Courts (1978), ch.1.
2. In a similar, though smaller scale study, Susan Maidment found 13% of cases to be contested on these issues: "A Study in Child Custody" (1976) Family Law 195 and 236 (referred to as "the Keele study"). The difficulty lies partly in defining what counts as a "contest" and partly in the limited information contained in the documents.

But despite the relative smallness of the number of cases which are contested and (particularly) which result in a court imposed solution, they are still significant in absolute terms. It may be estimated that, in 1979, some 101,837 divorce cases involved one or more children under 18[3] of which, on an assumption of contest in about 10% of cases,[4] indicates an annual incidence of some 10,000 of such disputes. These are notorious in terms of emotional cost and professional time. What the criteria for their resolution should be is uncertain. Indeed, the very appropriateness of a court-centred process of their resolution is in question.

To obtain information about the 'difficult' divorce cases in adequate depth poses considerable methodological problems. Examination of a population obtained by self-referral or from persons who have sought clinical or other therapy may yield valuable results, but forfeits any claim to provide a balanced picture of the overall scene.[5] A random sample of people contacted at the divorce court will yield a more representative picture, though shortage of research personnel is likely to limit the sample to a particular locality. This method was adopted by Mervyn Murch who interviewed 102 petitioners in this way and his findings have been published after the present research was completed.[6] Murch used a second sample of 41 couples known to divorce court welfare officers in three counties. The present study also sought its population through divorce court welfare officers. Our first study had shown that, in 11.3% of all the cases, reference had been made to a divorce court welfare officer for investigation and report to the court. This was done in over half of the

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3. See below, p.18
4. See note 2 above and associated text.
5. Thus the major American study reached its population through referrals by parents and clinicians: J.S. Wallerstein and J.B. Kelly, Surviving the Breakup (1980).
6. Mervyn Murch, Justice and Welfare in Divorce (1980.

contested cases. Welfare reports were more likely to be sought in the following cases: the larger the number of children involved; where a child had moved between parents after separation and prior to petition; where it was proposed that the child's residence should be changed; if non-relatives (other than a cohabitee) were in the household; if the children were split between households; where the children were living with persons other than a parent.

A population reached through divorce court welfare officers is therefore a pre-selected one; but the selection will be made on the basis of a perception that the cases contain elements indicative that the family breakdown contains higher risks of hardship or disruption to the children than 'normal' cases. The sample will also be adequately representative of contested cases. Since we not only wanted to find out about these cases themselves in some detail, but also of the role of welfare officers generally, we sought to obtain a representative sample of cases referred to the officers. Data was to be obtained by questionnaire, and to achieve our purpose, we asked the liaison officer (who allocates referred cases among the welfare officers) to supply a questionnaire each time he allocated a case (irrespective of its nature) to a different officer. No officer would receive a second (or subsequent) questionnaire until all participating officers had received one. This not only spread the load among the officers; it also achieved the requisite element of representativeness we sought.

The data was obtained by asking each officer to record information about the case and his own response to it on the questionnaire supplied. It was intended that he should do this when (or shortly after) he wrote his report and that he should return the completed questionnaire to the liaison officer together with his report. The liaison officer would

complete a separate questionnaire at a later stage indicating what the final outcome of the case was. It is obvious that qualitative information about cases obtained by this method is, strictly, data on the officers' perceptions and is accordingly liable to variation according to the subjective interpretations given to the facts by individual officers. But we must remember that a welfare officer is in a unique position to make judgments about the family. In nearly two-thirds of the investigations the officer spent more than ten hours on the case, and often considerably longer. Researchers can seldom devote so much time to their subjects.

Two hundred and ninety-five questionnaires were distributed to liaison offers during June and July 1978. By July 1980, 122 completed questionnaires had been returned, and these form the basis of the study. In 100 cases information was also returned about the hearing and its outcome. Questionnaires were returned from 24 separate probation areas.[7] The distribution between areas was as follows: 8, 21, 10, 8, 3, 2, 14, 1, 1, 15, 6, 6, 1, 1, 1, 1, 1, 10, 1, 1, 5, 1, 1, 3. The areas contained a wide range of social and demographic characteristics, but were all situated in the south-western and west midlands regions of England. It was, unfortunately, not possible to include the London area, which is served by a specialist divorce court welfare service. This spread seems sufficient to support a claim to the adequacy of the representative nature of the sample. But the methodology and the results obtained have their limitations and the research must be seen as being of modest scope, endeavouring to answer some of the questions left unanswered by Custody after Divorce (hereafter referred to as CAD), and, in particular must be

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7. The divorce court welfare service outside London is provided by the Probation and After-Care Service.

read in the light of Murch's more extensive research, with respect to which it can provide some supplemental or supportive evidence.

Some unanswered questions

There was evidence in CAD that a party on whom a petition had been served on the 'fact' of unreasonable behaviour[8] was more likely to adopt an initially hostile stance than if another 'fact' was chosen, and that this was reflected in the likelihood that a custody or access issue might be contested.[9] Would this finding be confirmed by an examination of cases referred to welfare officers? The information about the arrangements presently pertaining regarding the children on which the results of CAD were based was (mostly) that contained in the Statement of Arrangements for Children which must be filed with the petition.[10] It is also an important (though now not the sole)[11] source of information for the court.

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8. The sole ground upon which divorce can be granted in England and Wales is that the marriage has irretrievably broken down. But this can be established only by the allegation of the following five fact-situations:
(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent (popularly known as "unreasonable behaviour");
(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the petition;
(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;
(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

9. CAD, paras. 1. 4, 5.

10. Matrimonial Causes Rules 1977, r.8(2), Form 4.

11. Under the "special procedure", introduced in 1973, a petition which is undefended is examined first by a registrar and, if he is satisfied that the facts alleged are established, he issues a certificate to that effect and the judge is bound, accordingly, to grant a decree nisi. When, in 1977, the procedure was extended to cases involving children, it was provided that: "Unless in the circumstances of the particular case the court thinks it inappropriate to do so, the registrar shall fix an appointment for consideration by a judge in chambers of the arrangements for the children and send notice of the appointment to the petitioner and respondent": Matrimonial Causes Rules 1977, r.48(4)

How accurate is it? The officers were asked to make a check on this. CAD revealed the disturbing fact that in nearly one-third of all cases, access was stated not to be taking place at all at the time the petition was filed. There was little difference between contested and uncontested cases on this matter. It seemed important to try to discover, from the welfare officers, what the reasons were for this breakdwon in contact between the children and one of their parents. CAD had been unable to elicit any information about the sources of financial support of children when families break up and it was thought that this, too, was a matter on which the welfare officers could provide some information. Nor could CAD obtain any indication about the condition of the children involved in the divorce, what their relationships with their parents were like and whether their wishes had been consulted. No significant information on this question is available in the United Kingdom,[12] and, although our contribution could only be slight, any advance in knowledge in this direction is valuable. Finally, reference has already been made to the outstanding finding of CAD[13] concerning the paramountcy of the status quo in the eventual outcome of the cases. It seemed important to see whether this finding would be confirmed in the welfare officer cases and how far the officers themselves acted upon that principle. If the principle was confirmed, it also seemed important to try to discover more about those cases where the principle was departed from. In particular, in view of growing controversy on the topic,[14] how far both welfare officers and courts

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12. Murch's research concentrates mainly on the reactions of the parents to the divorce process.
13. Confirmed by the Keele study: see note 2. And see Susan Maidment, "Child Custody: Do Fathers get a Raw Deal?"
14. Encouraged by the 1980 film, "Kramer v. Kramer." And see Susan Maidment, note 13 above.

approached the question of the exercise of care and control over children by their fathers.

Some new questions

By Rule 95 of the Matrimonial Causes Rules 1977

> (1) A judge or the registrar may at any time refer to a court welfare officer for investigation and report any matter arising in matrimonial proceedings which concerns the welfare of a child.
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> (2) Without prejudice to paragraph (1), any party to an application to which Rule 92 applies[15] may, before the application is heard, request the registrar to call for a report from a court welfare officer on any matter arising in the application, and if the registrar is satisfied that the other parties to the application consent and that sufficient information is available to enable the officer to carry out the investigation, the registrar may refer the matter to a court welfare officer for investigation and report before the hearing.

It will be observed that the remit of the welfare officer is to investigate the case and report to the court. This function is intended to re-inforce the protective role of the court, which is underlined by the provision that a judge shall not make a decree absolute unless he is satisfied that the arrangements for the children are satisfactory or the best that can be made in the circumstances.[16] However, one of the most significant developments in family law in recent years has been the growing appreciation of the importance of the conciliation process in divorce cases. This was indicated in CAD in relation to the finding concerning the limited role the court can play in altering the arrangements agreed between the parties. If this is true then, it was argued [17] that the concept of the court employing the welfare officer as an investigator is called into question. For no matter how many more 'facts' the officer unearths and

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15. That is, an application concerning custody of or access to children.
16. Matrimonial Causes Act 1973, s.41(1)(b)(i).
17. CAD, para.13.26.

puts before the court, the limitations on the court in influencing the outcome remain. The officer might be more profitably employed in helping the parties to deal with their problems, either by providing them with practical advice relevant to their new needs, or (or in addition) by bringing about an agreed solution between the parties regarding their differences. These questions have been substantially explored by Murch, who presents a convincing case for restructuring the divorce process so as to separate the 'counselling' and 'investigative' role of the welfare officers and, most importantly, to enable the counselling process to take place at a much earlier stage than can usually happen at present. His suggestions are grounded in the practical experience of an experimental scheme set up for a three year period in Bristol whereby solicitors refer potential divorce clients to a specialist conciliation service before proceedings are commenced. Preliminary reports suggest that valuable results can be achieved by such intervention in those (relatively) early stages.[18]

In spite of the formal remit to welfare officers under the Matrimonial Causes Rules, there is a growing appreciation in the probation service of the importance of the counselling role.[19] Apart from Murch's data (which was obtained in 1973 and 1974), there is little evidence on the evolution of the role of welfare officers and its impact on the cases they deal with. It was the intention of the present research to obtain further information on these matters.

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18. Gwyn Davies, Research on Bristol Courts Family Conciliation Service.
19. See especially David Millard, "The Divorce Court Welfare Inquiry" (1977) 141 J.P. 765; Martin Wilkinson, Children and Divorce, 1981

THE FINDINGS

Cases which were contested

Of the 122 cases, 54 (44.2%) were recorded as being contested as to custody when the officer made contact with the family and 24 (19.6%) on access alone. In order to discover whether there is any relationship between the 'fact' for divorce chosen to establish irretrievable breakdown[20] and the likelihood of disputes over the children, it is necessary to compare the distribution between the facts chosen in the project sample with the national distribution between these facts. This is shown in Table 1.

Table 1 : Divorce Facts Alleged

Grounds	All Project cases n = 122	Contested Project cases n = 78	All petitions		All decrees nisi	
			1978 n=162,450	1979 n=162,857	1978 n=151,533	1979 n=139,503
Adultery %	28.6	33.3	26.6	27.0	28.1	29.1
Unreasonable behaviour %	53.2	51.2	34.6	37.3	31.3	32.4
Desertion %	3.3	1.3	3.4	2.7	3.5	2.9
Two years separation & consent %	9.8	2.7	24.7	23.8	26.2	26.1
Five years separation %	1.6	0.0	9.2	7.9	10.1	9.0
Unreasonable behaviour in combination %	2.5	2.7	0.9	0.8	0.3	0.2
Others %	0.8	1.3	0.3	0.3	0.1	0.05

Compiled from figures published in Judicial Statistics 1978 and 1979 Tables D 8(b) and (c)

20. See note 8 above and associated text

The figures provide striking confirmation of the findings in CAD of a link between the Unreasonable Behaviour ground and difficulties over children. While the percentage of project cases on the other major ground (Adultery) differs little from the national figure, the percentage for Unreasonable Behaviour is considerably higher, and, correspondingly, the percentage for Two Years' Separation and Consent much lower, than their national counterparts. This does not simply reflect any tendency of divorcing parties with children to favour the Unreasonable Behaviour ground because it was shown in CAD[21] that the grounds for divorce chosen by parties with children followed the same pattern as that for all parties. Table 1 shows that there is little difference, as far as Unreasonable Behaviour is concerned, between those cases which were contested at contact and all the project cases. So the conclusion must be that Unreasonable Behaviour petitions are heavily over-represented in all cases referred to Welfare officers, whether contested or not. This of course may indicate anxiety by courts about the condition of the children in cases where, for example, violence is alleged against a party. The reason for the link between that ground and the likelihood of disputes over the children must remain a matter of some speculation. The contention that the gound is always, or even usually, chosen because a state of hostility already exists which predisposes towards disputes over the children is weakened by the finding in CAD of sharp regional variations in the grounds chosen. It seems likely that the choice of Unreasonable Behaviour is dictated as much by tactics (e.g. the desire for a quick divorce) as by the relations between the parties. What does seem clear is that

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21. CAD, Table 1

parties willing to wait (or allege) the lapse of two years' separation and to obtain their divorce by consent are significantly less likely to be in dispute over the children than any other group (apart from those divorcing after five years' separation, by which time the issues will be likely to have resolved themselves).

The study also confirmed the findings in CAD[22] that wives are more likely to challenge the husbands' exercise of custody[23] than vice versa. 42.9% of cases where the children were residing with the husband alone (n=28) were contested as to custody at contact and a further 14.3% on custody and access as opposed to 26.3% and 7.0% respectively where they were resident with the wife alone (n=57). Similarly, wives were more likely to dispute access (29.8%) than husbands were (21.4%). Although the figures are small, the data indicated that disputes were twice as likely to occur in cases where the child (or eldest child) was aged 6-7 than in any other category. This was not an artefact of some other variable, such as the child's sex or where the child was resident. If this can be confirmed, the point may be of importance in furthering our understanding of the dynamics of family conflict.

The outcome in court was known in 100 cases of the study. In 31 of these cases, custody (or access and custody) had been contested at at least one hearing and in 14 it had been contested on access alone. Thus some 13% (reduction from 44.2% to 31%) fewer disputes over custody or custody and access were still disputed at hearing than were in dispute at contact, and five per cent (reduction from 19.6% to 14%) fewer where the dispute was only about access. Put another way, about a quarter of the cases which were in dispute at contact are no longer disputed at hearing. But this proportion may be an underestimate. One reason why there may have

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22. CAD paras. 3.2, 6.2.
23. For convenience, the term "custody" is used throughout in the sense of "care and control."

been no information on the outcome in court may have been because the matter was not pushed to a hearing. Also, some hearings may have been only "apparently" contested. (See note 39 below.) This data has implications on the role of welfare officers and will be returned to later.

The Accuracy of the Documents

It is gratifying that in only two cases did the welfare officer discover any discrepancy between the information in the Statement of Arrangements for Children and the facts as he found them with respect to the child's residence. In one, the child was stated to be with the father while he was with foster parents while the father was away at sea; in the other, the Statement anticipated an arrangement soon made. In only one instance was there any substantial inaccuracy in what was said about access. But more frequent and serious inaccuracies were revealed regarding statements made about the residence of the parties and other adults. Statements were inaccurate when made on these matters in one in ten cases. Most inaccuracies concerned the housing situation (for example, a party might be found to be homeless, or living in a caravan); once the parties were still living together and on another occasion the presence of a cohabitee, who had three children in care, had not been revealed. This pattern is to be expected. A respondent is more likely to challenge any inaccuracy relating to the residence of the child, which will be of concern to him, that statements concerning the actual conditions in which the children live, about which he may be ignorant or unconcerned. If he is not opposing the divorce itself, why should he expose such inaccuracies or raise difficulties about the problems faced by the petitioner, and hence risk the withholding of the divorce?

One cannot be sure that the ten per cent inaccuracy found in the sample exists for all cases involving children. The sample is a pre-selected

group of the more "difficult" cases. But how many "difficult" cases have gone undetected, and therefore unreferred? It is also true that, under the special procedure, the judge will normally interview at least one of the parties in chambers,[24] and this may provide some additional information to the court about the children's circumstances. We have no data about those interviews, but if information can be concealed or mis-stated in the documents, this can equally happen in interview. These considerations can only underline the difficulty for the court assuming any kind of investigative or protective role concerning the children of divorcing parents. The court depends on the parties (or one of them) as its primary source of information, and (unless in dispute) they have an interest in concealing the worst. Schemes to (partially) overcome some of these limitations by, for example, passing the names of petitioners over the social services departments in case something is known about the family, have been criticized on libertarian grounds.[25] Apart from these considerations, it is certainly difficult to see what 'protective' measures the court can take, even if fully informed, except perhaps in the most extreme cases where the children should be committed into care. The withholding of decree absolute[26] is unlikely to improve matters. As presently structured, the investigatory role is ineffficient and can lead to little protective or preventative action; any attempts to overcome these problems would be beset with ideological and practical difficulties.

Access

At time of contact, the welfare officers recorded that access was taking place frequently in 45.9% of cases, infrequently in 23% and not at

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24. See note 11.
25. Mervyn Murch, op. cit, ch.12.
26. See note 16.

all in 28.7%. CAD showed that access was more often exercised in the contested cases (indeed, that might be the very reason for the dispute) and the corresponding percentages for the contested cases in CAD were broadly similar: 44.4, 13.3 and 24.4. The main reasons ascribed by the welfare officers for the non or infrequent exercise of access in the present study are set out in Table 2. No significant variations were found related to the age or sex of the children, other than for children under three, who were less frequently visited.

Table 2: Reasons for non or infrequent exercise of access (n=63)

Reason ascribed by officer	%	No.
Lack of interest by absent parent	22.2	14
Consideration for the children	9.5	6
Consideration for other parent	3.1	2
"Legal advice"	1.6	1
Injunction against absent parent	7.9	5
Hostile attitude of other parent	7.9	5
Opposition by children	7.9	5
Practical difficulties	35.0	22
Unknown	4.8	3

The formidable problems of role-adjustment faced by an absent parent when visiting the children are well described by Wallerstein and

Kelly.[27] The categorisation by the welfare officers must, inevitably, be crude. Nevertheless, the data does provide some understanding of the relatively high non-exercise of access. The dominance of "practical" difficulties draws attention to the inherent disruptive effect of divorce on a child's relationships with his parents; hostility by the children or the custodian spouse rank relatively low. "Lack of interest" was the reason given in nearly one-quarter of instances, and this almost certainly understates the proportion if viewed nationally because this category is bound to be lower in a project sample dominated by disputes over children. On the other hand, the reasons for an apparent lack of interest by the absent parent to visit his children may lie deep and could only be probed by a special study which this research does not provide.

While the CAD data showed no difference between absent mothers and fathers as regards the frequency or otherwise of the exercise of access, in the present study there was non or infrequent exercise by husbands in 61.4% of cases where the children were with the wife as compared with 50.0% in the converse case. But this is not necessarily due to greater indifference by fathers: the "lack of interest" motivation was evenly distributed between mothers and fathers. Men are more likely to meet practical difficulties or encounter opposition from the mother or be prevented by an injunction. Nor did the likelihood of remarriage by either parent seem to have any relevance. Absent mothers were more likely to keep away because of hostility from the children. The figures are small, but should be seen in conjunction with the data on the children's relationships with their parents.[28]

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27. Op. cit. (note 5), pp.123 et seq.
28. Below, pp. 17-21.

Financial Support

The information obtained on this matter could not be refined and a detailed breakdown of the family finances could not be made.[29] The prime source was the statement made by the petitioner in the Statement of Arrangements for Children. Officers were asked to check this, and no significant discrepancies were found. In 35.2% of all cases the husband was said to be the sole provider of support for the children and support from social security was acknowledged in 38.5% of all cases. The position in relation to the residence of the children is shown in Table 3.

Table 3: Source of financial support, by residence of children

Source of Support		Parent with whom child resident	
		Wife (n=57)	Husband (n=28)
Husband alone	%	19.3	3.
Wife alone	%	10.5	0
Both parents	%	8.8	0.0
Social security alone or in part	%	52.6	25.0
Other outside help	%	5.3	0.0
Other	%	3.5	0.0

The heavy reliance of separated wives on social security is evident, and while the sample is not of course representative of the divorcing

29. Further research on this question is in progress at the Centre for Socio-Legal Studies.

population as a whole, the figure is consistent with other data suggesting that, both in the immediate aftermath of divorce and often in the long-term, something over half families rendered fatherless by divorce become dependent on social security.[30] The information also throws a side-light on one of the difficulties facing men who obtain (or seek to obtain) custody of the children. They will continue to provide the main source of income. In no case did the wife make a financial contribution in such circumstances.[31]

The Condition of the Children and their Relationships with the Parents

One of the more disturbing findings of the research is that in 31.9% of all cases the officer recorded signs of emotional disturbance in one or more of the children. Although this percentage was higher in cases where custody (37%) or access (33.3%) were in dispute, it was nevertheless found to be present in a quarter of the cases where neither was in dispute. The methodology did not permit any sophisticated analysis of the types of disturbance detected. As their main source of information, the officers drew on reports from schools recording aggressive or attention seeking behaviour, but they also reported what parents told them, and, of course what they observed. In 10 of the 39 cases, reference was made to the involvement of specialist outside help, such as Child Guidance Clinics, educational psychologists, psychiatrists and medical practitioners. In only one case was delinquency expressly mentioned. In considering what weight is to be put on the officers' recording of emotional disturbance, it should be remembered that the officers are members of the probation service, well accustomed to dealing with deviant young people.

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30. Report of the Committee on One-Parent Families (1974) Cmnd. 5629, vol.1, paras. 5.19-20 and Table 5.1; Elsa Ferri, Growing up in a One-Parent Family (1976), pp.49-50; John Eekelaar, Family Law and Social Policy (1978) pp.167-8.
31. Seabrook p.26.

Their threshhold for recording "disturbance" is thus likely to be higher than that of people who are less familiar with aberrant behaviour.

On the basis of this data, we may obtain some indication of the order of magnitude of the extent of disturbance among children in divorce. It seems that something like 10% of divorce cases involving children lead to substantial disputes over the custody or access arrangements.[32] This study indicates that emotional disturbance may be observed in children in about one-third of these cases. About 73% of divorce cases involve children under 18.[33] On the 1979 figure of 139,503 decrees nisi of divorce, one may estimate a figure of 101,837 cases involving children. If 10,184 involve disputes over custody or access, then on our evidence, about 3,400 will include emotionally disturbed children. But disturbed children were also found in a quarter of the non-contested cases. They may be over-represented in our sample, however, since they were cases of referrals to welfare officers and would include, for example, cases where children were in care or where some other aggravating features were present. Extrapolating from our figures to those of England and Wales as a whole can only be tentative and would need to assume a percentage of less than 25; that is, something less than 23,000 cases. On present data, therefore, it can be surmised that children[34] are suffering observable emotional disturbance in somewhat less than 26,400 divorce cases each year.

The incidence of recorded disturbance was not related to the sex of the children, but it was found to be slightly more pronounced with children aged

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32. See notes 2 and 4 above and associated text.
33. Central Statistical Office, Annual Abstract of Statistics, 1977. The numbers of children involved in divorce doubled during the years 1970-1976, and in 1976, 13 out of every 1,000 children under 16 were involved in divorce. Richard Leete: Changing Patterns of Family Formation and Dissolution in England and Wales 1964-76 (H.M.S.O., 1979), p.95. On the surmise of this paper, about 3 of the 13 will suffer observable emotional disturbance.
34. There may, of course, be more than one disturbed child in any particular case.

four and five and slightly less for children aged six and seven and under three, despite the fact that disputes were twice as likely where the children were aged 6-7. This might be no more than an artefact of the sources of information available on the children, but could warrant further investigation. Wallerstein and Kelly have recorded different kinds of reaction to divorce among children in different age groups but also indicate that children between five and eight may overcome their distress more quickly than other age groups. One suggestion they make to explain this is that these children were more often visited by the absent parent,[35] but our findings do not show more frequent visiting in their case. The data also revealed a significant difference in recorded disturbance related to whether the child was living with the mother or the father. 34.5% (n=58) of the former and 25% (n=58) of the latter showed disturbance, despite the fact that (as has been shown) custody was more likely to be challenged in the latter situation. Significant information about the quality of the relationship between parents and children was obtained regarding only or eldest children and second children. This is shown in Table 4.

Table 4: Children's Attitudes to Parents

Status of Child in Family	Attitude to Mother		Attitude to Father	
	Ambivalent or Negative	Very Negative	Ambivalent or Negative	Very Negative
Only or eldest child (n=116) %	10.3	3.4	11.3	3.5
Second child (n= 90) %	16.7	2.2	5.6	3.4

35. Op. cit., note 5, p.220.

The difference in the attitudes of second children to their mothers and fathers is striking.. The matter becomes more complex when related to the residence of the child: see Table 5.

Table 5: Children's Attitudes to "absent" Parent

Residence of Child		Attitude to absent parent					
		V.good	Good	Neutral	Negative Ambivalent	Very Negative	No Relationship
With husband only or eldest child (n=27)	%	11.1	25.9	18.5	22.2	7.4	11.1
second child (n=19)	%	21.1	10.5	21.1	42.1	5.3	0.0
With wife only or eldest child (n=53)	%	15.1	28.3	5.7	15.0	3.8	5.7
second child (n=38)	%	7.9	36.8	10.5	5.3	5.3	5.3

Both only or eldest children and (particularly) second children were more likely to retain a good relationship with their father when living with their mother than children who were living with their fathers in relation to their mother. Not only that, relationships with the absent parent were much more likely to be bad if that parent was the mother. This finding warrants further research. It is suggestive that children may harbour deeper resentments against a mother who fails to fulfil a full parental role towards them than they do against a father. If this is true, it may have implications for assessment of the relative merits (from the children's point of view) of the two parents as sole custodians of the children after divorce. On the other hand, this study finds no evidence

that the children who stayed with their fathers were apparently any worse off emotionally than those who stayed with their mothers or had a less satisfactory relationship with their fathers than the others had with their mothers. Indeed, the indications seemed to point in the other direction.

Where the Children ended up

In 73.3% of all cases in CAD, the children were living with the wife alone at the time of the petition and 10.3% with the husband; the percentages in the contested cases showed a far smaller proportion living with the wife (37.7% and 26.7% respectively). In the present study 47.5% of children were living with the wife (57 cases) and 23.0% with the husband (29 cases). Apart from children under four (who were more likely to be with their mother) the age, sex or number of children in the family had no bearing on their residence. We have noted how it was found, in CAD, that these arrangements at time of petition were very rarely departed from. How far would this happen in the present study?

We have already observed that custody was more likely to be contested where the children were living with the husband than with the wife. Our data also shows that, where there was such a dispute at time of contact by the welfare officer, it was less likely to be resolved by agreement where the children were living with the husband than with the wife. (Such failure occurred in 39.5% of cases where the children were with the wife, compared to 52% where they were with the husband). Where such agreement was reached, the officers were satisfied that it took into account the children's interests "completely" in 80% of cases where the children were with the husband, in contrast to only 60.5% where they were with the wife. This did not mean that they would have been moved from their fathers. In only two of the 29 cases where the children were with the father did the agreement involve moving the children from him to the mother (to the officers' complete satisfaction) and in one of the 57 cases where they

were with the mother, they were moved to the father, again to the officer's entire satisfaction. Thus the officers saw no grounds for disapproving of fathers caring for the children where this course had been agreed by the parties.

What was the reaction of the courts to children continuing to live with their fathers? The outcome of 31 cases where custody was in dispute at the hearing is known. In 23 cases the continued residence of a child or children with one of the parents was in issue. In nine of them the mother's sole custody was challenged, in eleven the father's and in three children were split between them. Eight (89%) of the mothers succeeded and 7 (63.6%) of the fathers. Of the three cases where the children were divided, in two a child was moved from the mother to the father and in the third the status quo remained. Thus, the status quo of at least one child was altered in seven cases, that is, 22.6% of cases which were contested on the custody issue at the hearing. This proportion is considerably higher than that revealed in the earlier studies. Let us consider the salient features of each of those cases.

(a) Cases where children moved from mother to father

Case 1 Transfer was achieved by consent at the second hearing under a joint custody order giving care and control of two boys (7 and 4) to the father despite the fact that divorce was granted "against" him on the ground of unreasonable behaviour and an injunction had been issued against him for violence. The officer recommended this outcome on the understanding that the father would obtain "100% support" from his parents. A supervision order was made.

Case 2 The order re-united an 11 year old girl with her 16 year old sister living with the father, as the officer recommended. He commented that the girl was considered "at risk" with the mother and that, although the divorce was on the ground that the father had assaulted the mother, "the

opposite was in fact the case."

Case 3 The joint custody order (at second hearing) gave care and control of a 6 year old girl to the father and a 3 year old girl to the mother. The welfare officer had recommended that they both stay with the mother. In previous proceedings an injunction had been made against the husband for assaulting the wife. There is no indication why the court departed from the welfare officer's view and made an order which not only removed the boy from his mother but also separated siblings.

(b) Cases where children moved from father to mother

Case 4 The court ordered a girl of 8, who had been living (with two older children) with her father under a magistrates' court order to return to the mother. The welfare officer had recommended this. The reasons are not clear but may have had to do with denial of access to the mother by the father.

Case 5 Custody of a girl (now 7) had been granted to the father after a contested hearing in the magistrates' court. The welfare officer stated that, while he normally made recommendations, he found it impossible to do so in this case "as there are advantages and disadvantages on both sides." The child's relationships with both parents were good. Custody was given to the mother.

Case 6 Two girls (5 and 3) were living alone with the father and their relationship with both parents was good. The welfare officer wrote: "As suggested in my report, there is little to choose between each parent; both appear to have a solid case on which to justify their custody. I suggested the Court pursue certain matters, like the father's work prospects, i.e. his desire to return (to work) on which he was vague in my interview." Custody was given to the mother.

Case 7 Two boys (12, 7) and a girl (9) were with the father. Relationships between the children and their father were stated by the welfare officer to

be "good" and, with their mother, to be "fair". He recommended that the father should retain custody. After a two day hearing, custody was given to the mother, who was also given exclusive use of the matrimonial home. The officer commented: "This case gave (me) some problems because further affidavits made since the report was prepared four months previously were produced to the court. The report was therefore somewhat out of date."

In two of the seven cases (Nos. 3 and 7), the transfer was made against welfare officer advice, although in No. 7 the officer admitted his report had become "out of date". In two, the officer had apparently been undecided and made no recommendation. In the other three, the transfer was approved by the officer. Whatever the reasons, the finding of court-ordered changes of residence in 22% of the custody cases disputed at hearing differs sharply from that of CAD where it appeared to happen in only two of the 39 custody contests (5%), although in three other cases (7.7%) changes of residence did occur, but seemed to follow the parties' own arrangements.[36] The present study obtained more reliable data on this matter and is therefore to be preferred. But both studies reveal the difficulty in this area of obtaining a large sample of cases which can reliably be defined as leading to a "contested" hearing on the custody issue.

The Position of the Father

We have already seen the extent to which children stayed with their fathers after divorce and the readiness of welfare officers to approve of this arrangement. Although it is true that, when the father's sole custody of the children was challenged by the mother, he was less likely to retain them than when he challenged the mother's sole custody, a father is nevertheless more likely to retain custody than lose it. If he loses

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36. CAD, paras. 6.4 - 5.

custody, this will usually have the approval of the welfare officer.

Further light is thrown on the way fathers are viewed as potential sole caregivers of children by considering the cases where the children and both parents were still living together when the welfare officer made contact. There were eight such cases. Two were unproblematic because in one, the parties became reconciled, and in the other, they worked out their own arrangements. In five of the remaining six the welfare officer recommended that the custody should be given to the mother, and in two this was accepted by the parties (in one, at the door of the court). The reasons for the recommendations were as follows:

Case 8 The boys (11,9) "look to the mother for their care within the home and look upon her as the domestic mainstay".

Case 9 The boy (11) and girl (8) wished to stay with the mother.

Case 10 "The father's suggestions for how he would arrange for the girl (15) and boy (13) while he is at work are unsatisfactory. The father is known to be a heavy drinker and violent."

Case 11 No reasons given, but the officer mentions a particularly good relationship between the girl (7) and the mother.

Case 12 No reasons given.

All these recommendations were accepted by the court. But in the sixth case (Case 13) the officer had recommended that the boy (5) and girl (2) should stay with the father "as the mother was involved in an unstable relationship with another man". The officer commented on the good relationship between the children and the father and thought that the boy's attitude to the mother was "ambivalent. Blames her for the break-up, I suspect, and is reluctant to go out on access. Relationship probably OK underneath." The court, nevertheless, gave custody to the mother.

When one weighs the relative merits of mothers and fathers as

potential caregivers, people may employ a number of assumptions. They may assume that the psychological development of a child demands a relationship with one parent rather than the other (a psychological theory); they may believe that the role of caregiving is more properly that of one parent than the other (a social theory); they may simply believe that the practicalities of life make it less likely that one parent than the other will be able to fulfil the required tasks adequately (what may be termed a pragmatic-predictive approach). Unfortunately the data of this study is insufficient to allow us to analyze in any depth the kinds of theories which were employed by welfare officers or courts in reaching their conclusions. Case 10 indicates the use of the "pragmatic-predictive" approach; cases 8 and 11 a psychological theory. But it seems that the officer in Case 6 was using a social theory, for the fact that the father was willing to stay at home and live off social security while caring for the children seems to have been considered deviant. It is also interesting to note that, while in only 23.8% of all the cases did the husband contemplate remarriage (compared to 36.1% of all the wives), fathers living alone with the children were more likely to be contemplating remarriage than wives similarly placed were (28.5% of such fathers as against 24.1% of mothers). It may be that the chances of remarriage makes it more feasible for the father to contemplate custody, and this would support a social theory that child caregiving is more appropriately a female role, particularly of married women. On the other hand, this still leaves a majority of cases where the husband living alone with the children was not contemplating remarriage and in only three instances was the presence of a cohabitee with the husband recorded.[37]

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37. The presence of a cohabitee was noted in only 17.7% of all cases where remarriage was not contemplated. In all but one of the cases where another adult had assumed a parental role towards the children, the officer commented favourably on that person's influence.

The Role of the Welfare Officer

Ostensibly, the role of the welfare officer to whom reference of a case has been made is simple: he must "investigate and report" to the court. The reality, however, is far more complex. An understanding of their role can be sought by adopting a number of lines of inquiry. The first and simplest, is to ask the officers how they saw their role in the case referred to them. All officers, therefore, were asked to grade, on a scale of 0-4, how far they regarded themselves as fulfilling each of four stated"roles" in the case referred to them. The results are shown in Table 6.

Table 6: Welfare Officers' Role Perception

Role		Degree of significance				
		None at all	Most ←			→ Least
Fact gatherer for court	(a)	1.6	50.0	11.5	11.5	25.4
	(b)	1.5	55.9	14.4	21.2	34.4
Counsellor to the parties	(a)	18.0	19.7	29.5	16.4	16.4
	(b)	17.4	22.0	37.1	30.3	22.2
Helper in the parties' negotiations	(a)	29.5	12.3	27.0	14.8	16.4
	(b)	28.5	13.7	34.0	27.2	22.2
Liaison officer with other agencies	(a)	54.1	7.4	11.5	11.5	15.6
	(b)	52.3	8.2	14.4	21.2	21.1

(a) Row %

(b) Column %

The data are not easy to interpret and the interpretation must be somewhat tentative. The most certain conclusion that can be made is that officers (almost) universally see some part of their function as being to obtain information for the court and almost always (82% of cases) there will be some "counselling" role. In two-thirds of cases the officer will, to some extent, see himself as "helping" in the parties' negotiations and in

nearly half, some "liaison" role will be seen. Most often the "fact gathering" role will be seen to predominate, with the counselling and helping roles assuming a secondary, but important, place in the majority of cases. Interestingly, no significant relationship was found between the distribution of role perceptions and the reason for the referral, in particular, whether the case was referred to the officer in the context of a dispute over custody or access or whether it was referred by the court in order to enable the judge to express his satisfaction with the arrangements for the children[38] ("satisfaction" referrals).

However the officers may themselves have classified their role, the picture becomes more obscure when one seeks to discover the actual effects of their intervention. Officers were asked whether they thought that, as a result of their recommendations or suggestions, if any, and if accepted by the court, the "present circumstances of any of the children" would be altered. Over two-thirds (68.9%) replied in the negative. Only 7.4% considered that the alteration would be "substantial" and 14.8% thought there would be a "slight" alteration. These answers do not, of course, necessarily contradict the dominance of fact gathering in their role perception, but does call into question the utility of fact gathering which has such marginal impact on the eventual judicial action. Standing in sharp contrast to the response to that question are the officers' answers to the following set of questions:

Do you feel that, as a result of your investigations:

	Yes %	No %	No answer %
(i) More favourable arrangements for the children are likely to be ordered by the court than was likely without an investigation ?	36.9	39.3	21.3
(ii) The parties have made or are likely to make voluntary adjustments to their arrangements which will benefit the children ?	46.7	52.5	20.5
(iii) The parties' attitudes to each other have improved ?	20.5	52.5	24.6

38. Above, note 16.

	Yes %	No %	No answer %
(iv) The parties' attitudes to the children have improved?	31.1	32.8	30.3
(v) The parties have been made aware of sources of assistance (material or otherwise) which they might otherwise not have known about?	35.2	49.2	12.3

The answer to (i) might at first sight appear to contradict the answers to the questions about altering the present circumstances of the children. But this is not so, for the favourable arrangements ordered by the court need not involve altering the children's present circumstances. The answers must, in any case, be seen in the light of the responses to question (ii), for the voluntary adjustments will normally be incorporated in an agreed order. The positive effects of the intervention come across strongly in these answers. Even where the referrral was for "satisfaction" only in 38.5% of those referrals the officers answered 'yes' to question (ii) and in 26.9% of them they answered question (iv) in the affirmative. So, even in cases where the referral did not originate in a dispute between the parties, the officer considered that his intervention had a therapeutic influence.

Looking at the information on the actual outcomes of the cases, we are able to reach some appreciation as to how successful the officers in fact were in averting contested hearings. The officers were asked whether agreement on the matters in dispute had been reached when they had completed their "investigation" and, if so, at what stage and by what process (e.g. counselling, intervention by solicitors or welfare officers or settlement at the door of the court). The results are shown in Table 7.

Agreement on custody disputes was reached in 56% of cases where that issue was in dispute at contact, in 59% where access was in dispute, and

Table 7: Agreement reached after contact

Matter in dispute at contact	Agreement reached			No agreement reached
	Mention of welfare officers only	Other processes mentioned	Process unspecified	
Custody % n = 39	18.0	18.0	0.0	64.0
Access % n = 22	41.0	9.0	9.0	41.0
Custody and Access % n = 13	15.4	7.8	23.0	54.0

in 46% where both were in dispute.[39] The methodology of the study did not permit a detailed analysis of the process by which the agreement came about. The breakdown of the processes mentioned in Table 7 is thus very rough. It was thought useful to distinguish those instances where the officer specified his contribution exclusively (e.g. by saying "following investigation by court welfare officer" or "dcwo acting as intermediary") from instances where the process was described in more general terms or not described at all. This does not, therefore, exclude the possibility of contributions by the officers in these other cases, and indeed it seems he may have played an important part in some as where, for example, all that is stated is "counselling" (but it is not mentioned by whom). Lawyers were only mentioned twice among "other processes" by which agreement was reached. Nor does it follow that agreement was not reached at a later stage after the officer completed the questionnaire. There were in

39. There appears to be a discrepancy between the proportion of cases in dispute at contact which were still in dispute at hearing (some 75%: see p.11 above) and the proportion of cases where the officers claimed agreement had been reached after contact. The explanation may lie in the unreliability of the former figure and the difficulty in knowing what a true "contest" is.

all 41 cases in which there was dispute over custody and/or access at contact in which the officer recorded that no agreement had been reached. The eventual outcome after hearing was known in 34 of these, and of those 12 (35%) were no longer in dispute at the hearing.

In the cases where agreement had been reached, the officers were asked the extent to which, in their opinion, the agreement took into account the children's interests and whether it was "genuine". The agreement was thought to take into account the children's interests "completely" in 67% of cases and in the rest only "partially". In no case was it thought to be adverse to those interests. In only one case did the officer doubt whether the agreement was "genuine": the mother was allowing the father to take the child to school, but this seemed to be largely because this saved her time and money.

The conclusion that can be drawn from this evidence seems to be that, however the officers themselves may "classify" their role, their contribution towards a process of "conciliation" in considerable. Indeed, the data confirms March's observation that "in some ways one could say that in the majority of cases an element of conciliation seemed to creep in, even though it may not have been specifically recognised as such by either the officer or the parents."[40] Agreement seems to be achieved in about half the cases which were in dispute at contact, although sometimes agreement seems only to be reached at a late stage. This raises the question whether greater success at conciliation could be achieved if the process could be initiated sooner. Under Rule 95 of the Matrimonial Causes Rules 1977[41] referrals may be made by registrars or judges or at the request of the parties. A referral by a registrar will usually be

40. Op. cit., note 6, p.160.
41. See above p. 7.

earlier than a referral by a judge, which will probably only happen when the matter has come to him in chambers.

In our study, 47.5% of referrals were made by a registrar and 37.7% by a judge. However, more than half (56%) of the referrals on custody disputes were made by registrars, and more than half (57%) the referrals for satisfaction only were made by judges. Referrals took place at a miscellany of other occasions (e.g. as a result of injunction proceedings), and only 18.9% of referrals were instigated at the request of the parties. It is clear that referrals are usually made at an advanced stage in the proceedings, thus diminishing the chances of successful conciliation. Perhaps surprisingly, in only 11.5% of cases did the welfare officer affirmatively answer the question whether he thought the referral should have been made ealier. But little can be concluded from this because the officers were operating within an existing framework which does not permit referral at earlier stages and they may well have felt constrained by this knowledge when answering the question.

CONCLUSIONS

The welfare officers were given an opportunity at the end of the questionnaire to make any comments about the case or their role in general, and a number of them did so, some in great detail. It is clearly not possible to present the views expressed as in any way representative, but two themes did recur with striking frequency. The first referred to the officers' consciousness of their lack of expertise in such cases and (as some also thought) the inappropriateness of the association between this aspect of their work and their normal duties in the probation service. The other was the feeling of the importance, in their intervention, of detaching the interests of the children from the emotions entangling the adult parties.

> The dcwo needs all the tact and diplomacy of a politician to bring about a truce which will allow the warring spouses breathing space to consider the effect of their differences on the children.
>
> ... to work with petitioner and respondent to get them to be aware of the need for the welfare of the children to be the primary matter of importance.
>
> A further role is counsellor to the children, which I would rate as highly as counsellor to the parties.
>
> I feel the role of a dcwo was pretty crucial in order to help both parties separate the children's interests from their own ...

The officer, was then, very much someone who represented the "child's point of view". If this was so, did he consult the child? The answer is, invariably yes, if the child was old eonough. A very few children of ten or older were not consulted, but these were all exceptional cases (e.g. their own position was not in issue or the investigation was for "satisfaction" only). Of eldest (or only) children and second children Table 8 shows the extent to which the officers sought the children's own views:

Table 8: Consultation of Children

Age of child	Whether consulted		Total
	Yes	No	
9	15	2	17
8	12	2	14
7	13	2	15
6	3	7	10
5	5	12	17
4	1	14	15
3	1	8	9

In one each of the two cases where children aged 7, 8 and 9 were not consulted, there were special circumstances making the consultation

inappropriate, but in the other three cases where children of those ages were not consulted, no such circumstances appear. It appears then, that once a child reaches seven he will almost always be consulted, though before he reaches ten very occasionally an officer will not consider consultation appropriate. Children aged five and six are more likely not to be consulted, but over a quarter of them were asked their views. Cases were found where even children of three and four were consulted, but this was very rare. One may agree with Murch that "apart from the welfare officer and occasionally the judge, there is really no-one within the legal machinery of divorce with specific responsibility to listen to and understand the child's point of view."[42]

Murch has argued that the conciliation process should be one where all parties participate, under the guidance of the conciliator, in the task of working out a common solution.[43] He regards the practice of concealing the officer's report from the parents as being antithetical to that objective. Indeed, the Matrimonial Causes Rules imply that the parties have a right to see the report.[44] Murch found that there was little appreciation of this right, either by the parties or the officers themselves. In our study the officers were asked whether the parties had been informed of their right to see the report and whether they should see it in the case referred to them. 68% said that the parties had been so informed and 28.7% that they had not, two officers remarking that they had not appreciated there was such a right, and a third saying it was a matter for the court. However, 86.1% said that they thought the parties should see the report and only 7.4% that they should not. The willingness

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42. Op. cit., note 6, p.164.
43. Op. cit., note 6, ch.16.
44. "After completing his investigation the officer shall file his report and the registrar shall thereupon notify the parties that they may inspect it and may besp.ak copies on the payment of a fee": Matrimonial Causes Rules 1977, r.98(3)(b).

of the officers to engage in a "participatory" exercise and to allow the parties the right to comment on their report seems clear. There may indeed be a small number of cases where this would not be desirable, but, as March has suggested,[45] certain matters could, exceptionally, be withheld from the parties on the authorisation of a judge.

That there is a place for someone to intervene "on behalf of the children" in divorce cases is hardly in doubt. This study shows that, although formally assigned an investigative role and even though they may continue to characterize their role in that way, welfare officers also saw themselves as making a significant contribution to the resolution of the family conflict and thereby advancing the interests of the children. It is a function which is not expressly recognized; the procedural framework is not designed for it. It is, then, scarcely surprising that it operates imperfectly. The implication for policy is straightforward. This "conciliation" function should be recognized and promoted. However, such a programme confronts significant practical difficulties. Is this work which should overtly be placed on the probation service? And, whoever undertakes this role, to what cases and at what stage should conciliation be introduced? Solutions to these problems can be found, though not without calls on resources.[46] But is it not one of the basic marks of a civilised society that it makes efforts to protect the interests of its children when they are threatened by the collapse of the primary social unit designed for their welfare and security?

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45. Op. cit., note 6, p.128.
46. Interesting proposals are put forward by Mervyn March, op. cit., (note 6), ch.16.