CHILD CUSTODY AND DIVORCE

THE LAW IN SOCIAL CONTEXT

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PREFACE

As a family lawyer interested in the law of child custody, i.e. the law which seeks to protect children on the breakup of their parents' marriage, I was aware that there was a body of knowledge about the family, marriage and divorce, relationships between husband and wife, and parents and children, which addressed itself to the same concerns as the law. This body of knowledge found in the social sciences, I believed, was a crucial tool for understanding the social context in which the necessity for legal decision-making arose. The legal process was after all only one particular step in a social process, in this case the breakup of a marriage.

The purpose of this book was therefore to put the law of child custody in its social context. At one level this purpose was quite general. It was to make available to lawyers this large body of knowledge about the social process in which the legal process played only a small part. It seemed right that intelligent, caring lawyers had some understanding of the social context on which their legal practices and procedures impinged. At this level then I wanted to present the social science evidence which was relevant to child custody law simply to widen the horizons of the lawyer and make him aware that he was not operating in a social vacuum. It was not possible however to limit myself to this task. I wanted to believe also that somehow a greater social understanding of the legal process surrounding child custody would actually positively contribute to the legal decision-making process, i.e. that a greater awareness and understanding of the social process in which the legal decision-making arises would allow an evaluation of the quality of the legal decisions, if necessary to make possible "better" decisions, decisions that were more in accord with informed social science understandings of the problem.

The focus of this book is therefore on social science evidence and findings as they relate to children, and the contribution that they can make to a greater understanding of the issues that form the subject matter of child custody legal

decision-making.

The emphasis is on recent research findings which are less widely known, and these are necessarily selective. A comprehensive account of current knowledge is impossible given the wide ranging scope of the subject; so also is a detailed explanation of methodological issues. The research selected for inclusion will therefore necessarily reflect personal idiosyncracies and preferences; personal assessments of policy implications may also intrude. This is both unavoidable and excusable for the subject matter of this book represents not only an academic commitment, but also a search for a "better" legal system.

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I also want to thank Freda Mainwaring of the Law Department at the University of Keele without whose co-operation throughout, the numerous drafts of this book would not have been typed; and Rowena Gay for her professional help in producing the final copy.

I dedicate this book to my husband and children.

If matters arise in our laws which concern other sciences and faculties, we commonly call for the aid of that science or faculty which it concerns, which is an honourable and commendable thing. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them (Buckley v Rice-Thomas (1554)).

No single discipline has the omni-science which we all seek in the constructive settlement of family disputes (Payne, 1982).

The law and practice in relation to infants ... have developed, are developing and must and no doubt will, continue to develop by reflecting and adopting the changing views, as the years go by, of reasonable men and women, the parents of children on the proper treatment and methods of bringing up children (Lord Upjohn, J v C (1970)).

I have the appalling responsibility of deciding the custody of R ... The case is extremely difficult ... There is little to choose between the parents. It is transparent that there is a strong bond between the child and each of the parents (Judge Kenneth Taylor, M v M (1980)).

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Chapter 1

INTRODUCTION

THE NATURE OF THE PROBLEM

In 1981, 145,713 married couples were divorced, 60% of whom had children under the age of 16, and 159,403 children were involved in their parents' divorce (OPCS, 1983). 1,600,000 children are being brought up in one-parent families (Social Trends, 1982), a rise between 1971 and 1981 of 71% (NCOPF, 1983), and caused mainly by the increase in the divorce rate. It is estimated that one in four marriages are now likely to end in divorce, and that nearly one in five children are involved in divorce each year (Rimmer, 1981).

The enormity of the problem for the legal system has hardly begun to be appreciated. Yet for every decree absolute of divorce that is granted a judge has also made a declaration of satisfaction about post-divorce arrangements for the children and usually also a custody order, deciding which parent should be responsible for the children. Judges have always made custody orders, in previous times more often in circumstances of marriage breakdown arising out of death, more recently arising out of separation or divorce. And judges have always been criticised for the decisions they have made; dissatisfaction with custody decision-making has a long history.

One thesis of this book is that the nature of the divorce and custody decision-making process can only be understood when the legal structure is located in its social context. Why and how judges decide custody cases can only be properly appreciated within an understanding of the social process involved in marriage and divorce, of the changes in the social institution of the family and of the social expectations of parenting. And this social context itself must be seen in an historical perspective, for what society does and values today is inextricably linked with what was done and believed in the past. A sense of history brings with it a sense of balance. Judicial decisions which elicit immediate and automatic response of outrage may take on a different

light when viewed in a social and historical setting.

Although divorce has been possible in England and Wales since the end of the seventeenth century, it was only after the Second World War that divorce became socially acceptable and financially possible for all social classes (McGregor, 1957). Women's employment during the war, the social upheaval of the war, and, perhaps most importantly, the setting up of the Legal Aid scheme in 1950, all contributed to a social acceptance of divorce on a scale never before experienced. In the 1970s the liberalisation of divorce law by the Divorce Reform Act 1969 coincided with the formal breakup of marriage on an unprecedented scale, so that between 1970 and 1981 the number of divorce petitions filed rose from 71,676 to 169,076, from a rate per 1000 married total population of 4.7 to 11.8 (OPCS, 1983, provisional figure). Despite this pervasive experience of divorce, society has not come to terms with its own behaviour. Despite its prevalence, divorce is still not normally supposed to happen (Group for the Advancement of Psychiatry, 1980), so that there is neither preparation for it, nor, unlike death, officially recognised mourning for it. The lack of rites of passage for divorce, the lack of ceremony, has perhaps been even exacerbated in this country by the removal in 1977 of the judicial hearing for undefended divorces. Even the parties' "day in court", however cursory it was in practice (Elston et al, 1978) has been replaced with an anonymous administrative procedure whereby divorce petitions are processed by a registrar behind closed doors. Society has yet to create a terminology to describe the step-relationship and the wider family created by it (Mead, 1970), and the reconstruction of family life by remarried divorcees lacks adequate models (Burgoyne and Clark, 1982a; Hart, 1976). Courts are thus called upon to create the rules, the social structure for divorce, which society has failed to provide (Bohannan, 1970). Thus for example, divorced fathers appeal to the courts for enforcement of their right of access to their children, because society has been unable to create a social structure within which parenting can continue beyond the marriage which created it.

Recognition, that in a time of enormous social change in the institutions of the family, marriage and divorce, the judges are being asked to provide rules for the reorganisation of parent-child relationships, allows a perspective in which the frailties and human errors of which they may be guilty is tempered by an appreciation of the enormity of the task. The fact is that in child custody cases, the judges are asked to make decisions, which they not only dislike making, but which also encapsulate the social consequences of the divorcing process, not only in the immediate situation but also for the future. Whether a judge (or anyone else) is capable of such decisions, or whether it is right and fair

for society to require of him such decisions are difficult questions.

THE WELFARE OF THE CHILD

There is a widespread belief in our society that divorce has damaging consequences for the children of the marriage and that such consequences ought to be minimised. In modern divorce law concern for the welfare of the child has therefore been elevated to an overriding principle according to which parental needs or desires will be determined. Thus no decree absolute of divorce may be granted until and unless the judge has made a declaration of satisfaction about the arrangements for the children (Matrimonial Causes Act 1973, s 41), and all questions concerning the custody or upbringing of a child must be resolved by the courts according to the principle that "the welfare of the child is the first and paramount consideration" (Guardianship of Minors Act 1971, s 1). The "welfare of the child" is therefore the yardstick by which parental freedom of action as regards their own future and the future of their children must be measured. The concept of the child's welfare has a long history, as will be explored in some detail in chapter 4. The concept is also notoriously indeterminate (Mnookin, 1975); it has no essential meaning. As Lord Upjohn perceived in J v C (1970), beliefs about a child's best interests or welfare have changed and will change according to current views on matters such as child-rearing and parenting. The "welfare of the child" principle is therefore now a deliberately indeterminate standard incorporated into the law in order to allow current social and cultural views about the needs of children, and also, it must be said, of their parents to be embodied in the legal decision-making process surrounding divorce. The Victorians who developed the principle may have believed that the welfare principle produced determinate rules for deciding custody cases in the same way that they believed in absolute rules governing the social order. To the late twentieth century observer, reared on social sciences knowledge, the relativity of social and cultural values is more apparent. A sense of history also serves to illuminate the social determinants for the content of the welfare principle.

Seen in this light, many of the current controversies over custody can be located within the changes in the structure of the family in contemporary society. Burning issues, such as whether fathers ought to get custody, whether access for the non-custodial parent ought to be enforced more efficiently, whether joint custody for both parents is more appropriate both for children and parents, merely reflect changes in the sexual division of labour within the family, whereby modern fathers participate more in their children's upbringing, as well as increased psychological understanding of the

emotional needs of children. Issues such as whether lesbian or homosexual parents ought to be allowed custody derive from changes in acceptable sexual behaviour. These current controversies are therefore merely reflections of the recognised diversity of family forms in modern society.

Historically the welfare principle reflected the dominant ideology of the family. The Victorian judges, who developed the welfare principle, favoured one dominant family form. The Victorian family was idealised as a patriarchy, in which the father's authority was supreme, and in which both the wife and the children knew their place in the home as his dependents. The law reflected and upheld the patriarchal family by denying the wife any legal rights over her children or her property, and by respecting the "sacred rights of the father" over his dependents and their property. The welfare principle itself incorporated this family ideology, so that children's needs were largely interpreted in accordance with the father's rights. The judges accepted in most cases that the father knew best what was for the welfare of his children, and were usually reluctant therefore to deprive him of custody as against the mother. Mead has noted the ability of societies to allow "a contrast between life as people believe it to be, and life as it is lived by some, if not all, members of that society" (Mead, 1970). Victorian society is a pre-eminent example of that discrepancy between ideals and practices. The law, which was largely made by and for the middle and upper classes, upheld the ideal and masked the diversity of family forms which in fact existed. Most aspects of the patriarchal family have now been eroded (although not entirely in tax and social security provisions); of particular importance in this context was the change in the law in 1973 which finally gave mothers and fathers equal parental rights over their children (Guardianship Act 1973, s 1). Other changes had occurred at the end of the nineteenth century, for example the right of married women to own their own property (Married Women's Property Acts 1870-1882). The difference between Victorian times and now, however, is current recognition of the enormous diversity of family forms which clearly exist in our society (Rapoport et al, 1982). It is this recognition, and with it the implication of a greater social acceptance of the diversity, that has contributed to current controversies about the children of divorce. If there is now no such thing as "a normal family", as sociologists currently argue (Oakley, 1982) then beliefs about the most suitable upbringing for children of divorce are bound to differ. Thus the criticism that, along with other policy-makers (Eversley and Bonnerjea, 1982), the judges in their custody decisions may be failing to appreciate this recognised diversity of family forms.

Alongside the ideology of the family as the context for determining the child's welfare, there has also been a competing notion of the child's "best interests". This child-

centred concept originated in the Court of Chancery which had assumed a jurisdiction in Equity to protect wards (Lowe and White, 1979). Until the 1840s the Equitable jurisdiction was largely limited to cases where the ward had property which needed protection, but gradually the concept of the child's welfare was enlarged to include the child's material welfare, for example, the material circumstances in which the ward was brought up, and by the end of the nineteenth century the judges were speaking of "moral and religious welfare" as well as "physical well being" (Re McGrath (1893)). Where the ward's care was in dispute between a parent and a non-parent, for example, a relative, guardian or children's home, or between non-parent and non-parent in the case of an orphan, the courts of Equity were also recognising "the ties of affection" (Re McGrath (1893)) as a justification for leaving the child in the care of the person with whom he was already living. Though this policy of respecting the emotional ties the child had formed was not always followed, and especially where it was the father who was seeking the return of his child, for example, from foster-parents (Re Thain (1926)), the judges in their wisdom were in these cases reflecting a common-sense understanding of emotional needs and attachment behaviour long before Freudian theories were current or theories of maternal deprivation from the 1940s onwards had articulated psychological explanations for the nature of personal relationships.

Although therefore the dominance of parental rights had already begun to be eroded in the case of disputes between parents and non-parents by the end of the nineteenth century, within the context of marriage breakdown followed by separation or divorce the interpretation of the child's welfare, although the guiding principle (since 1857 when judicial divorce was introduced in this country) was inextricably bound up first with the ideology of the patriarchal family, and then with the ideology of marriage. Concern for the child's welfare, as expressed in the child-saving legislation of the latter part of the nineteenth century (e.g. concerning child labour, compulsory education, control of delinquency, child protection, sexual exploitation etc. (Walvin, 1982; Pinchbeck and Hewitt, 1973)), did not impinge in any way on the judicial task of family restructuring following separation or divorce. Over the nineteenth century the "sacred rights of the father" in respect of his children were only gradually with great difficulty displaced by the mother, as regards both custody and access, and until the end of the 1940s matrimonial guilt in the sense of responsibility for breaking up the marriage was a most powerful disqualification in the eyes of the judges losing a mother any claims to custody of her children. As a general rule, the judges took the welfare of the child to lie with upholding the father's position in the patriarchal family, and later to lie with the innocent party to the divorce by upholding the institution of marriage. To these judges

there was no dichotomy between the child's welfare principle and those other principles. In their world-view the child's welfare was actually served by upholding the institutions of the family and marriage, and in this they were merely reflecting the dominant social ideology.

The end of the Second World War saw two great changes in social values. Firstly, the concept of matrimonial guilt began to be seen as a quite separate issue from the qualities of parenting which a guilty spouse, and particularly a mother, could offer. Secondly, the psychology of child development turned its attention to the question of maternal deprivation and of attachment or bonding between children and adults. In the past thirty years or so enormous strides have been made in knowledge of the psychological mechanisms in the child's emotional development. Psychology, as social science knowledge generally, has now become a significant influence on social and cultural values, an integral feature of everyday life (Newson and Newson, 1974). Expert advice on childrearing, in particular in relation to the need of children for healthy emotional and cognitive development, abounds in modern society. The fact that this professional concern for children in psychology coincided with the demise of the matrimonial guilt principle, has made it possible for the legal system to incorporate the findings of psychology, and of other social sciences, into the judicial process of divorce. While there have always been theories of children's needs and of proper childrearing as long as there have been parents, it is only now that experts have provided a body of knowledge, which in turn, despite its gaps, its omissions, its contradictions, its susceptibility to fads and fashions (Dally, 1982), has become part of the social and cultural values of late twentieth century society (Newson and Newson, 1974). Despite the back-lash against the experts which has already begun (King, 1981; Sutton, 1981), for claiming an expertise and objectivity which is not and may never be justified by the state of knowledge in the social sciences, the judges may with some justice be faulted for failing to make themselves sufficiently familiar with, and for failing to take more into account in their decision-making, the substantial, if flawed and time-bound knowledge that presently exists. If the Victorian judges can be excused for pressing the moral and religious needs of children, values which were part of the social ethos of the time, then modern judges may be faulted for failing to grasp the enormous advances in the knowledge of child development and socialisation which inform the current social ethos. The intuitive approach of today's judges is proving to be unacceptable to a large body of litigants and critics, because it binds them to one ideology of the family and marriage which is time- and class-bound. A failure to recognise the diversity of family forms and childrearing practices, and the pervasive influence of social science knowledge nowadays makes

judicial decision-making in custody cases often appear anachronistic.

It is in the spirit of the foregoing analysis that this book will attempt to provide an understanding of the legal decision-making process concerning the children of divorce. A description of the legal process, in terms of both procedure and substantive law, i.e. the mainly judge-made rules and interpretations of the child's welfare principle, will be considered in a social science context in order to illuminate the sociological underpinning of child custody law, and also its implications in terms of child psychology and development. A contribution to the understanding of child custody law in its social context will also be provided by an historical account of how the welfare principle came to be written into statute law in the Guardianship of Infants Act 1925 (later codified in the Guardianship of Minors Act 1971), for the very origins of the statutory principle betray social and political purposes far removed from its apparent child-centred orientation. A recognition of this fact may place current dilemmas into a more balanced perspective.

THE NATURE OF THE SOCIAL SCIENCES

The theme of this book is that a social science approach to the custody legal decision-making process is required. It is inadequate to criticise the legal and judicial process from an intuitive, non-social scientific stance, because that is to act in the very way of which the judges are accused. Social science knowledge is therefore a necessary underpinning for the understanding of custody decisions in the past and present. A social history and sociological context, explaining the social structures of the family, marriage and divorce, husband-wife and parent-child relationships, introduces new perspectives and understandings that the legal decision-making process does not operate in a social vacuum. But the social sciences can contribute to the custody process more positively. A greater awareness and understanding of the social process in which legal decision-making arises may make it possible to evaluate the quality of the decisions, and to apply informed social science understandings to the problems of child custody. The theories and findings of child psychology and psychiatry, and of Freudian psychoanalysis, are nowadays reflected in modern social and cultural values, and as such must play a part in legal decisions. The focus of this book is therefore on social science knowledge relevant to children, and the contribution that it can make to a greater understanding of the issues that form the subject-matter of child custody legal decision-making.

While the basic concerns of the social sciences are philosophical in origin, the development of the social sciences from the mid-nineteenth century and their enormous