FAMILY LAW

processes
practices
pressures

Edited by
John Dewar
and Stephen Parker

Family Law
Processes, Practices and Pressures

Proceedings of the Tenth World Conference of the International Society of Family Law, July 2000, Brisbane, Australia

Edited by
John Dewar
and
Stephen Parker

HART PUBLISHING
OXFORD AND PORTLAND, OREGON
2003

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
5804 NE Hassalo Street
Portland, Oregon
97213-3644
USA

Hart Publishing is a specialist legal publisher based in Oxford, England. To order further copies of this book or to request a list of other publications please write to:

Hart Publishing, Salters Boatyard, Folly Bridge, Abingdon Rd, Oxford, OX1 4LB
Telephone: +44 (0)1865 245533 Fax: +44 (0) 1865 794882
email: mail@hartpub.co.uk
WEBSITE: http//:www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN 1-84113-308-6 (paperback)

Typeset by SNP Best-set Typesetter Ltd., Hong Kong
Printed and bound in Great Britain by
Biddles Ltd, www.biddles.co.uk

FAMILY LAW: PROCESSES, PRACTICES AND PRESSURES

Contents

Part II: Practices

Part III: Pressures

Introduction

John Dewar and Stephen Parker*

The environment in which family law systems operate around the world is, it seems, becoming more complex. There is growing pressure on legislators to 'do something' about family law and its administration (although what that 'something' is varies according to taste—to arrest a perceived decline in family life, to implement international human rights norms, to advance someone's rights, to improve the protection of vulnerable groups, to protect the public purse). Courts are increasingly under pressure to deploy diminishing resources cost-effectively in the face of a seemingly inexorable increase in demand for their services. Legal practitioners find they have to adapt to these changes, and adjust their practices to a world in which it is unclear whether there is a role for lawyers at all. At the same time, people's lives change—family life is lived in more diverse forms and family practices are becoming more subtle, attenuated and diverse than ever before.

This volume is a collection of papers from the tenth World Conference of the International Society of Family Law, held in July 2000 in Brisbane, Australia. The conference's theme, 'Processes, Practices and Pressures', was designed to capture some of these trends. The theme was designed to permit an exploration of the complexities of the family law environment—whether top-down pressures coming from international or domestic legislators, or bottom-up changes in social and professional practices. The resulting collection of papers is broad-ranging, but reveals a number of consistent threads.

THE IMPACT OF CONSTITUTIONAL AND HUMAN RIGHTS NORMS

Postwar family law has been characterised in many jurisdictions by wide-ranging discretionary decision-making vested in courts. This has been thought necessary to enable courts to tailor solutions to individual circumstances, and expresses a belief that family law outcomes are better if tailored rather than prescribed in advance. One consequence of this is that family law has not, on the whole, been

* John Dewar is Professor and Dean of Law, Griffith Law School, Queensland, Australia; Stephen Parker is Professor and Dean of Law, Faculty of Law, Monash University, Melbourne.

thought of as conferring rights on family members, in the sense of claims to specific outcomes. This is changing, however, as international human rights conventions are perceived as having implications for state family laws; and as lawyers become more creative in their use of constitutional argument to advance the claims of groups hitherto excluded from the mainstream of family law procedures and remedies, and from the public law entitlements associated with 'family' membership. The chapters by Sutherland and by Roca and Morales explore the implications of human rights arguments in a family law context.

THE CULTURAL CONTEXT

At an international level, the universalising tendencies of human rights frequently brush up against local cultural or religious norms and pose the question of which is to prevail. At the same time, within each legal system, the constitutional norms of the state, or the assumptions underlying state family law itself, may sit uneasily with the practices of religious or ethnic groups. This is often a fruitful source of tension for family law, and is the subject of the chapters by Jessep, who explores the relationship between customary law and constitutional law in Papua New Guinea; Knoetze, who considers the relationship between customary inheritance practices and state law in South Africa; and Freeman, who looks at some recent English cases involving questions of race or religion. If there is a pattern detectable in all this, it seems to be that there is a convergence between countries in which Western legal principles have been superimposed on pre-existing customary law (where there is a rolling back of recognition of customary law) and Western countries such as the United Kingdom, which have a large ethnic or religious minorities (to whom legal principles are being slowly accommodated).

GIVING CHILDREN AN EFFECTIVE VOICE

Article 12 of the UN Convention on the Rights of the Child states that children have a right to an opportunity to be heard in judicial or administrative proceedings affecting them, and that children capable of forming views should be able to express them. Yet, in many jurisdictions, the means by which children's views are ascertained and taken into account falls some way short of the standard set by the Convention. The presentation of a child's view to a decision-maker is often heavily dependent on, or mediated by, an adult; and the shift towards mediation and other forms of non-judicial dispute resolution may mean that there is no formal process for bringing children's views to light at all. All of this means that giving full and effective force to Article 12 requires a more thorough-going examination of the processes and practices of family dispute resolution than has occurred hitherto. The chapters by Chisholm, Lowe and Murch, Masson, and Tapp et al. address the issue of the extent to which children are currently seen as autonomous agents in the family law system, with views to be respected and properly taken into account

and, to the extent that they are not, how things can be changed so as to give better effect to the spirit of Article 12. The radical implications of adopting a child-centred approach to decision-making are illustrated by Carol Smart's chapter, which offers a clue to what children might really want if asked. Smart's work offers a powerful challenge to some of the assumptions made about how best to resolve parental disagreement over living arrangements for children.

POST-SEPARATION PARENTING

A striking feature of family law policy during the final decade of the twentieth century has been the increased emphasis on the sustenance and management of post-separation parenting. The rise of parenthood as a significant legal status, coupled with increasingly insistent demands that men be treated 'equally' as parents after divorce, has led to new legal frameworks and practices for managing shared parenting over time. Richard Collier's chapter offers a subtle and cogently argued reading of the cultural-legal context of these developments; and Reg Graycar shows how law reform in this area can be driven by anecdote rather than by a consideration of research data. The UK *Children Act* 1989, which introduced the notion of joint but independent parental responsibility, has been copied more or less directly in many countries around the world. The Portuguese experience of such legislation described by Sottomayor will have resonance in those jurisdictions that have followed the path of the *Children Act*. Yet making shared parenting after separation a reality for many families requires more than just a legislative prescription. The sustaining of parental relationships over time, between adults who no longer wish to live with each other, requires innovative service delivery of the sorts described by Bastard and Kelly in their chapters, dealing respectively with contact centres and special Masters programmes for high-conflict couples. Bastard's chapter, however, highlights some of the potential contradictions and uncertainties entailed in attempting to maintain parent–child relationships in these circumstances—in particular, whether post-separation parent–child relations should be regarded as dyadic (ie as existing between the child and each parent individually) or triadic (so that the relation between the child and parents hinges on the relationship *between the parents*).

SHIFTING FINANCES

It is widely acknowledged that family laws have only a limited capacity to control the financial circumstances of divorcing couples after separation. In part, this is because of the rapidly changing economic and financial environment in which family law must operate. The composition of family wealth has changed significantly in the last 25 years—in particular, employment-related assets such as superannuation and stock or share options have, for some families, dwarfed more traditional forms of family investment. Rosettenstein's chapter

considers the implications of the latter for law reform and highlights the complexities entailed in dealing with assets acquired during a marriage but which materialise, if at all, at some point in the future. Bissett-Johnson similarly highlights the broader economic context in which family law functions and argues for a more coherent government approach to macro-economic management that puts greater weight on the needs of family members, especially those divorced or separated.

CHANGING FAMILIES, CHANGING NORMS

The diversity of family life, especially as lived after separation or divorce, and the pressure for legal recognition of gay and lesbian relationships has raised acutely the question of how relationships should be defined for legal purposes and with what consequences. Legislators around the world are grappling with this in a range of constitutional and normative contexts. In her chapter, Mazzotta shows how Italian law has struggled to provide a coherent legal framework for families reconstituted after divorce and separation; and Van Der Burght is critical of the way in which the Dutch legislature has introduced the concept of registered partnership. His chapter is a good illustration of the complexities arising from creating and maintaining a status parallel to marriage within one legal system—let alone in the context of an international community of legal systems. Similarly, Parker and Atkins' account of the history of property legislation for unmarried couples highlights some of the complexities confronting legislators in this area.

LAWYERS AND COURTS

There is a near-universal trend in legal systems away from court-based dispute-resolution towards out-of-court alternatives. At the same time, it is recognised that these alternatives are not well suited to dealing with cases involving family violence or child abuse, and there is a growing trend towards developing specialist interventions or pathways to deal with such cases. Muller-Petersen et al. describe such an intervention in Pennsylvania in the United States; and Field et al. examine the use by magistrates in Queensland, Australia of their powers to make ouster orders under state legislation. The funding environment for family law grows increasingly bleak, and some of the papers examine court-centred and legal professional services in the context of shrinking public resources. Burman et al. provide a history of the development of a specialist Family Court in South Africa, and consider its chances of achieving its objectives in a tight funding environment. Hunter provides a summary of her work on measuring the quality of legally aided services in family law—a body of work that, incidentally, amounts to the most comprehensive survey yet undertaken of the work of family lawyers in Australia.

This summary of themes does not account for all the papers appearing in this collection—others cover adoption, actions in tort, matrimonial property systems, the role of fault and research in children's issues. Even so, the themes listed above will, we hope, assist readers to make sense of the collection.

The papers are divided into three sections: Processes, Practices and Pressures. The section on processes considers legal processes and the institutional structures in which they take place, chiefly the courts; the section on practices looks at changing social behaviour and professional or institutional responses to them; and the section on pressures considers the factors driving change in the law or legal system. Inevitably, these three categories are not watertight, and some papers could have appeared under more than one heading. Nevertheless, the arrangement reflects the manner in which the papers were grouped at the conference itself—a conference widely regarded, like the Sydney Olympics held later in the same year, as the 'best ever' ISFL World Conference!

The editors wish to record their thanks to all the contributors, and to all those who gave papers at the conference but which, for whatever reason, do not appear here; to Richard Hart and Hart Publishing for taking the project on for a second time; and to Susan Jarvis for her hard work in producing a manuscript fit to send to the publishers.

John Dewar
Stephen Parker

Brisbane and Melbourne
July 2002

PART I
Processes

1

Children's Participation in the Family Justice System: Translating Principles into Practice

Nigel Lowe and Mervyn Murch*

INTRODUCTION

This paper examines the increasingly important issue of children's participation in the family justice system, focusing on two key questions.[1] Firstly, what are the value positions underlying the concept of children's participation? Secondly, how might the concept be translated into practice? In considering these issues, particular reference will be made to two recent Cardiff studies, one concerned with adoption[2] and the other with divorce.[3]

New Focus on Children's Participation in the Legal Process

Historically, the great shift in English law governing parent and child was the move from the position where children were of no concern at all to one where their welfare was regarded as the court's paramount concern. This fascinating devel-

* Nigel Lowe is Professor of Law and Director of the Centre of International Family Law Studies, Cardiff Law School, and Chair of the Family Studies Research Centre, Cardiff University, Wales. Mervyn Murch is Professor of Law, Cardiff Law School, Wales.

[1] It should be noted that the questions about whether children should participate and how to weigh children's views when they conflict with those of parents and other adults will *not* be discussed since these have been considered extensively elsewhere—see, eg C Piper, 'Ascertaining the Wishes and Feelings of the Child: A Requirement Honoured Largely in the Breach?' [1997] *Fam Law* 796; C Piper 'The Wishes and Feelings of the Child', and J Roche 'Children and Divorce: A Private Affair' in S Day Sclater and C Piper (eds) *Undercurrents of Divorce* (Dartmouth, 1999), pp 55–98.

[2] 'Adopted Children Speaking' (co-directed by Professors Lowe and Murch). A book entitled *Adopted Children Speaking* by C Thomas and V Beckford with N Lowe and M Murch was published by BAAF in 1999.

[3] 'Children's Perspectives and Experience of the Divorce Process', co-directed by Professors I Butler, G Douglas, FL Fincham and M Murch. This project, known by its acronym 'KIDs' (KIDs in Divorce), was completed in June 2000. The first report was submitted to the Economic and Social Research Council and published in Dec 2000 as *Children 5–16 A Research Briefing No 21.* See n 60 below. See also G Douglas, M Murch, M Robinson, L Scanlan and I Butler, 'Children's Perspectives and Experience of the Divorce Process' [2001] *Fam Law* 373.

opment has been well charted and needs no further elaboration here.[4] Notwithstanding the entrenchment of the welfare principle,[5] traditionally under English law children's futures have been decided upon the views of adults—that is, of parents and professionals. In other words, the welfare principle itself is adult-centred and paternalistic.[6] Even so, what we have been witnessing over the last decade or so is an equally significant cultural shift in which children are no longer simply seen as passive victims of family breakdown but increasingly as participants and actors in the family justice process. In consequence, in various family proceedings it is incumbent upon the courts to ascertain and to take duly into account children's own wishes and views.

Internationally, impetus for this new focus has been given by Article 12 of the United Nations Convention on the Rights of the Child 1989, under which:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child . . . The child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with procedural rules of national law.

In Europe, the European Convention on the Exercise of Children's Rights 1996[7] aims to supplement the UN Convention, inter alia, by providing procedural mechanisms by which the voices of children can be heard in legal proceedings concerning them. In particular, Article 3 provides that a child 'considered by internal law as having sufficient understanding' shall, in the case of judicial proceedings affecting him or her, be granted and entitled to request the following rights:

(a) to receive all relevant information;
(b) to be consulted and express his or her views;

[4] See, eg J Hall, 'The Waning of Parental Rights' [1972 B] CLJ 248, S Maidment, *Child Custody and Divorce* (Croom Helm, 1984), Ch 4, N Lowe, 'The Legal Position of Parents and Children in English Law' [1994] *Singapore Journal of Legal Studies* 332, and N Lowe and G Douglas, *Bromley's Family Law* (Butterworths, 9th edn, 1998), pp 300 *et seq*, and the authorities there cited.

[5] In particular, by the House of Lords' decision in *J v C* [1970] AC 668 and, to a lesser extent, *Re KD (A Minor)(Ward: Termination of Access)* [1988] AC 806. But note the much earlier decision in *Ward v Laverty* [1925] AC 101. For an extensive analysis of these and other House of Lords decisions on the development and application of the welfare principle, see N Lowe, 'The House of Lords and the Welfare Principle', in C Bridge (ed), *Family Law Towards the Millennium—Essays for PM Bromley* (Butterworths, 1997), p 125 *et seq*. But see further below for discussion of whether the paramountcy principle is human rights compliant.

[6] As Maidment, n 4, p 149 commented in 1984: 'The welfare principle, ostensibly child-centered, has also been and probably always will be a code for decisions based on religious, moral, social and perhaps now social science-based beliefs about child rearing . . .' However, she adds that: 'These decisions were in the past and are for the present made by adults for adults about adults. When a court makes a custody decision it may attempt to heed the child's needs, but it is essentially making a decision as to which available adult . . . is to care for the child.'

[7] This convention came into force on 1 July 2000, following ratification by Greece, Poland and Slovenia.