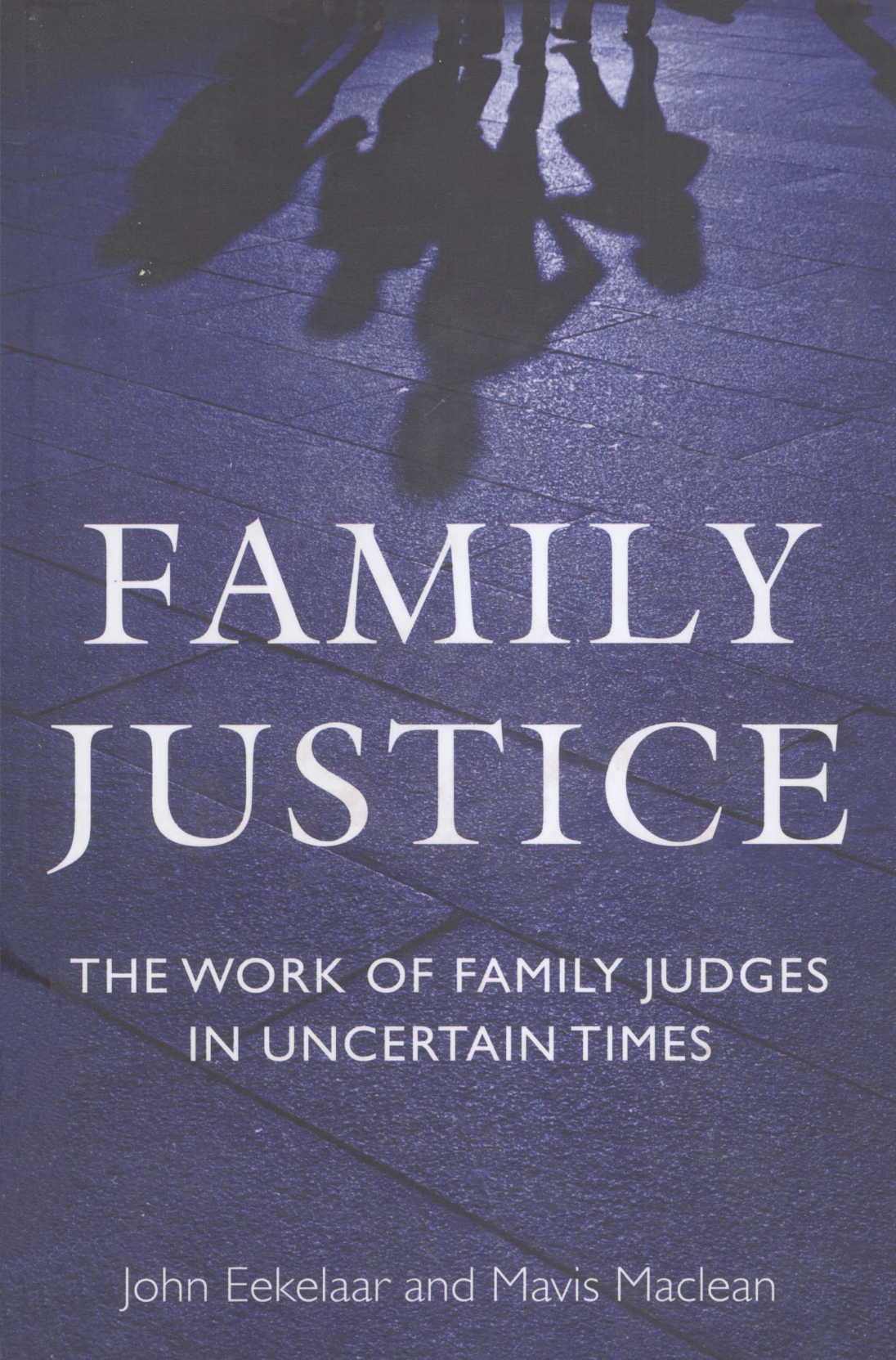

FAMILY JUSTICE

THE WORK OF FAMILY JUDGES IN UNCERTAIN TIMES

John Eekelaar and Mavis Maclean

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and
Mavis Maclean

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FAMILY JUSTICE

This book is about the delivery of family justice in England and Wales, focusing on the work of the family judiciary in the lower courts. The policy context is moving so rapidly that the authors have gone beyond presenting their empirical findings to offer a broader consideration of the nature and role of the family justice system, as these are in danger of being lost amid present reform proposals.

The first four chapters are historical and comparative, examining assumptions about family justice and offering a defence of the role of legal rights in family life, and the importance of good policy-making balancing outcome- and behaviour-focused approaches to family justice. Comparative examples from the US and Australia show how new approaches to family justice can be successfully deployed. The next three chapters are empirical, including a typology of the roles played and tasks addressed by the judges, overturning the commonly held assumption that the central judicial role is adjudication, emphasising the extent to which judges integrate outcome- and behaviour-focused approaches to family justice, and giving a detailed account of the daily work of Circuit and District Judges and Legal Advisers.

The conclusion is that there is a trend across jurisdictions, driven by technological innovation and by economic constraints, to reduce the role of courts and lawyers in favour of individual choices based on private or government-funded information sources. While these developments can be beneficial, they also have dangers and limitations. The final chapter argues that despite the move to privatised forms of dispute resolution, family justice still demands a sound judicial structure.

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Mavis Maclean
John Eekelaar

TABLE OF CONTENTS

1

The Family Justice System

I. Introduction

This book is about the delivery of family justice. It does not deal, except in a limited way, with the substantive law nor even with the social issues that mark the terrain covered by family law. Of course a full examination of 'justice' in relation to families would require such coverage, and those issues are the subject of much public debate and academic literature. But 'family justice' can be taken in a more specific way as referring to the system or systems through which the law is applied. The Review Panel chaired by David Norgrove established by the UK government in 2010 to examine the family justice system in England and Wales entitled its report the *Family Justice Review*. This is the way we employ the expression in this book. We too concentrate specifically on England and Wales, although we draw on information from other jurisdictions.

Within these parameters, the core of the book has a more precise focus. This is on the work of the family judiciary, in particular, the judges working in the lower courts, where the bulk of family litigation occurs. In this way, we complete the work begun in 2000 when we published our research on the divorce work of solicitors in this jurisdiction (Eekelaar, Maclean and Beinart 2000), followed in 2009 with a study of the practice of family law barristers (Maclean and Eekelaar 2009). However, the policy context in England and Wales is developing in a manner which impels us to do more than simply present empirical findings. This is dominated by two major events. The first was the major overhaul of the legal aid system by the Coalition government formed in 2010, presented first in a Consultation Paper in that year (Ministry of Justice 2010a), affirmed in 2011 (Ministry of Justice 2011a) and enacted in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, to become effective in April 2013. The second was the publication of the report of a Panel, also set up in 2010, under the chairmanship of David Norgrove to review the operation of the family justice system in England and Wales. This published an Interim Report in 2011 (Ministry of Justice 2011b) and a Final Report later that year (Review Panel 2011). The government's response to the Review Panel's report was published in 2012 (Ministry of Justice and Department for Education 2012), in which it accepted a central recommendation that the separate levels of court that dealt with family matters should be combined into a single court structure. The legislative framework for implementing this was

provided in the Crime and Courts Bill 2012.[1] Further recommendations of the Review Panel, in particular concerning the conduct of public law cases concerning children, and 'co-operative' parenting between separated parents, are expected to be included in legislation to be enacted in 2013.[2]

It therefore appears that in 2012 family law is on the cusp of what could be a significant repositioning of the role of the law in family matters. There is a danger that, in the mass of practical, detailed issues that arise, insufficient attention may be given to larger issues. For example, the proposals concerning legal aid appeared to question the part that law should play in family disputes at all. This is, we think, only partly a question about the use of resources in difficult economic times. Similarly, serious questions arise about the extent to which the value of fairness should be followed in public law cases. Equally profoundly, the relationship between legal processes and alternative forms of dispute resolution, and the way helplines and information technology may be used to convey information and advice, raise significant issues about the place law should have in confronting family disputes. Finally, possibly most importantly, it seems to be thought that the role of judges should change, although there are worrying signs that the way they presently work in family matters is little understood. When we consider how these events may interact with each other, for example, the desire to accelerate care proceedings[3] together with the possible consequences of reductions in legal aid,[4] their cumulative effect could be considerable.

For these reasons, we have broadened the theme of this book beyond giving an account of empirical evidence about the work of family judges, though it remains central to it. There appear to be more fundamental issues at stake, resulting often in contentious, and sometimes contradictory, policy responses. These raise broad questions of justice which concern the nature and role of the family justice system. It is these matters, rather than the minutiae of the changes, with which we are mainly concerned. We therefore start by considering these issues in general, somewhat abstract, terms, in order to provide a framework for the later discussion of the empirical data. But we return to these conceptual and ideological issues at the conclusion.

II. Assumptions and Misperceptions

In March 2010 the Panel appointed by the government to review the family justice system in England and Wales began its work. Its terms of reference were expressed in this way (Review Panel 2011: Annex A):

[1] cl 17.
[2] Children and Families Bill 2013.
[3] See ch 7, section III.
[4] See ch 3, section VI.

The Secretaries of State for Justice and Education and the Welsh Assembly Government Minister for Health and Social Services have commissioned a review of the family justice system in England and Wales.

The following guiding principles have been identified which are intended to provide a framework within which the Review's work should be undertaken:

The interests of the child should be paramount in any decision affecting them (and, linked to this, delays in determining the outcome of court applications should be kept to a minimum).

The court's role should be focused on protecting the vulnerable from abuse, victimisation and exploitation and should avoid intervening in family life except where there is clear benefit to children or vulnerable adults in doing so.

Individuals should have the right information and support to enable them to take responsibility for the consequences of their relationship breakdown.

The positive involvement of both parents following separation should be promoted.

Mediation and similar support should be used as far as possible to support individuals themselves to reach agreement about arrangements, rather than having an arrangement imposed by the courts.

The processes for resolving family disputes and agreeing future arrangements should be easy to understand, simple and efficient and be transparent both to those involved and wider society.

Conflict between individuals should be minimised as far as possible.

The review should assess how the current system operates against these principles and make recommendations for reform in two core areas: the promotion of informed settlement and agreement; and management of the family justice system.

Specifically, this will include examination of the following issues.

The extent to which the adversarial nature of the court system is able to promote solutions and good quality family relationships in private law family cases and what alternative arrangements would be more effective in fostering lasting and positive solutions.

Examination of the options for introducing more inquisitorial elements into the family justice system for both public and private law cases.

Whether there are areas of family work which could be dealt with more simply and effectively via an administrative, rather than court-based process, and the exploration of what that administrative process might look like.

How to increase the use of mediation when couples separate as a preferred alternative to court processes.

How to promote further contact rights for non-resident parents and grandparents.

Examination of the roles fulfilled by all of the different agencies and professionals in the family justice system, including consideration of the extent to which governance arrangements, relationships and accountabilities are clear and promote effective collaboration and operational efficiency. This will include looking at the roles carried out by Cafcass in England and by Cafcass Cymru.

The 'guiding principles' set out for the Panel make a number of assumptions about family justice. In 2000, PSC Lewis examined evidence of the nature of assumptions that policy-makers appeared to make about lawyers, as revealed in a variety of policy documents (Lewis 2000). Lewis pointed out that, while all argument to some extent proceeds on the basis of assumptions, it can be important to test what they are. It may often be the case that they are not supported by research evidence. For example, 'an assumption that negotiating through lawyers is associated at getting the "best deal" at the other party's expense is not generally supported by research' (Lewis 2000: vii). Lewis points out that arguments in policy documents may be better regarded as forms of rhetoric, and that this must have its place in policy formation (Lewis 2000: 3). Nevertheless, assumptions can also reflect certain stereotypical 'myths' or 'themes', and that 'care should be taken to see in what circumstances they are or are not true' (Lewis 2000: 5–6). We will examine and present evidence about some of these themes in the context of family justice throughout this book. At present we will consider what some of them are.

A. The Child's Welfare

The first guiding principle is that the interests of the child should be paramount in any decision affecting them (and, linked to this, delays in determining the outcome of court applications should be kept to a minimum). (Review Panel 2011: Annex A).

This assumption is embodied in statutory form in section 1(1) of the Children Act 1989, which applies the principle to any question with respect to the 'upbringing of a child', or 'the administration of a child's property or the application of any income arising from it'. The Family Justice Review reiterated that children's interests should be central to the operation of the family justice system (Review Panel 2011, para 2.24). This would appear to be uncontroversial. We have followed this in the central position we have given to children's issues in the presentation of our material in this book. The assumption about 'delays' is less clear. While at first sight it may seem obvious that 'delays' are undesirable, the word 'delay' is a loaded one, suggesting untoward behaviour with undesirable consequences. Some processes, however, may in their nature take time to complete properly, so the lapse of time can be appropriate and beneficial.

B. Protecting the Vulnerable

The next assumption is that 'The court's role should be focused on protecting the vulnerable from abuse, victimisation and exploitation and should avoid intervening in family life except where there is clear benefit to children or vulnerable adults in doing so'. (Review Panel 2011: Annex A).

While this statement undoubtedly refers to one role that courts play, the conceptualisation misses the perspective that adjudication may also be necessary to

resolve disputes about people's legal rights, irrespective of their 'vulnerability'. The distinction could perhaps be overcome by taking a broad view of 'vulnerability', for example, by holding that anyone whose legal rights are at risk, and who can protect them in no other way than through the justice system, is a 'vulnerable' person. It might be argued that this is particularly so in family disputes, about which the European Court of Human Rights has observed: 'marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court' (*Airey v Ireland*[5]; Miles 2011).

But that was not the way the succeeding Coalition government saw it. In response to objections to its proposal that legal aid for representation in court for people who are *accused* of domestic violence or child abuse in private law proceedings should be removed, the government stated:

> In considering whether alleged perpetrators should receive legal aid in these cases, it is important to remember that we are seeking to protect the most vulnerable in society. Alleged perpetrators do not necessarily fall into this category in the way a victim of abuse would. (Ministry of Justice 2011a: para 45).

So the fact that someone was faced with allegations that could have affected the right to visit his or her child was not seen as in itself making them vulnerable (Eekelaar 2011a).

C. Promotion of Positive Involvement of Both Parents Following Separation.

The statement that 'The positive involvement of both parents following separation should be promoted' (Review Panel 2011: Annex A) appears to articulate an uncontroversial approach to the way parents should relate to their children if they separate, but in fact conceals some intricate issues concerning the way law operates. These will be considered in chapter eight[6] which deals with contact and residence disputes concerning children.

D. Adversarial Nature of the Court System

The statement that specific attention will be given to

> The extent to which the adversarial nature of the court system is able to promote solutions and good quality family relationships in private law family cases and what alternative arrangements would be more effective in fostering lasting and positive solutions (Review Panel 2011: Annex A)

[5] App No 6289/73) (1979–80) 2 EHRR 305, para 24.
[6] See particularly ch 8, section V.

reflects the commonly accepted view that common law civil procedures can generally be described as 'adversarial'. 'Adversariality' in this context has been defined as a method of adjudication characterised by (i) an impartial tribunal of defined jurisdiction; (ii) formal procedural rules and (iii) 'assignment to the parties of the responsibility to present their own cases and challenge their opponents' (Luban 1988: 57). However, this is by no means necessarily true with regard to family proceedings. Indeed, the origins of the family jurisdiction are found in the practice of the ecclesiastical courts, which was predominantly 'inquisitorial', in the sense that they did not rely solely on what the parties told them but sought out information about their behaviour and passed moral judgement on it. Until 1971, a government official, the King's (or Queen's) Proctor existed to investigate whether a litigant's claims were true, and courts could dismiss divorce petitions even though one party offered no defence.[7] While this no longer happens in divorce cases, the overriding requirement that in decisions regarding the upbringing of children the child's welfare is paramount[8] means that family courts do not necessarily see themselves as doing no more than deciding which adult party has presented the best case. Penny Darbyshire, who spent 57 days observing 21 family judges between 2003 and 2007 in a general study of the judiciary in England and Wales, noted that family law procedures appeared to be different from other areas of the law:

> In an otherwise adversarial legal system, the (family) judge's job is to dissipate the natural adversarialism that has arisen between estranged parties. To this end, the judge cannot be passive. Some describe their role as inquisitorial. It is frequently interventionist (Darbyshire 2011: 263).

It is not only the interests of the children that undermine the adversarial element in family proceedings. It seems that the nature of the issues themselves, which usually concern sensitive personal relationships, may lead the judges to adopt a more proactive approach in family cases than in most others in a quest to find solutions that are optimal for the parties. The way they do that is explored in chapters five and six. The central message of this book is that, while adversarial procedures in the sense described here can occur in family courts, they form but a part, and by no means the largest part, of the way these courts operate.

E. Mediation Should Be Used as Far as Possible

The final significant assumption in the terms of reference is found in the sentence: 'Mediation and similar support should be used as far as possible to support individuals themselves to reach agreement about arrangements, rather than having an arrangement imposed by the courts' (Review Panel 2011: Annex A).

This repeats a perception long expressed by government that sees the only ways of resolving family disputes as being either through solutions 'imposed' by courts

[7] See further ch 4, section II.

[8] Children Act 1989, s 1(1).

or agreed through mediation. This will be reviewed in chapter three. At this point, it will simply be noted that the statement disregards the evidence the government had itself produced in its Consultation Paper on Proposals to Reform Legal Aid (Ministry of Justice 2010a) that:

> 4.71 Since the requirement to consider mediation was made mandatory for the legally aided sector in 1997, the number of publicly funded mediations has risen year on year from 400 to almost 14,500 in 2009. This indicates clearly that by improving knowledge about mediation and the benefits it offers, the take-up of these services increases. The full and partial success rate of publicly funded mediations now stands at 70%.
>
> . . .
>
> 4.157 The evidence also suggests that these cases can often be resolved by the parties reaching an agreement between themselves. In 2008, 73% of ancillary relief orders were not contested, indicating that the majority of individuals are able and willing to take responsibility for organising their own financial affairs following relationship breakdown. We propose to fund mediation in these cases, to support individuals to reach an agreement without recourse to the courts (as set out in paragraphs 4.69 to 4.72 above).

This information shows that, while 'the full and partial' success rates for publicly funded mediation stood at 70 per cent in 2009, 73 per cent of *all* ancillary relief orders in 2008 had been reached by agreement. Since mediation take-up is currently extremely low, almost all of these settlements would have been achieved through negotiation by lawyers and not through mediation. In fact, the actual settlement rate of all issues by lawyer-led negotiation will be *much higher than 73 per cent* because many agreements will not result in any order at all. The contrast with mediation is the more striking when it is remembered that lawyer-negotiated outcomes include resolutions to *all* disputes, even the most highly conflicted, whereas mediation cases undergo preliminary screening and are likely to be used only by parties who have some disposition to agree and both are willing to engage in the process.

Despite this evidence, the Coalition government proposed to remove the provision of legal aid in most private law family cases (the most notable exclusion being where there was 'objective evidence' of child abuse or domestic violence), except where legal work was done 'in connection with' mediation (Ministry of Justice 2011a: para 57), and this was enacted in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 9(1) and schedule 1, part 1, clause 12(2). Yet our account of the work of the family judges presented later in this book is fully consistent with that evidence.

III. What Is the Family Justice System?

It may be helpful to clarify how a family justice *system* should be understood. It is suggested that a family justice system can be described as comprising those

institutions whose primary purpose is to define, protect and enforce the legal rights family members have *as family members* and to resolve conflicts between family members concerning those rights. The institutions include the court system (comprising the judiciary, court staff and court-based agencies), the legal profession and mediators in so far as mediation seeks settlement or compromise of legal rights and information providers on these matters. Groups, such as associations of experts who can be called upon to give evidence in family courts, could also be included. Furthermore, where assessment and enforcement processes concerning those rights are conferred on agencies outside the judicial system (such as the Child Maintenance and Enforcement Commission, and even the police, to the extent that they may be involved), these too must be included in the family justice system. But it excludes counselling, medical and psychotherapeutic services, social services, parental education or advisory services, financial advisers or other individuals or institutions designed primarily to support or improve the well-being of individuals or the functioning of their relationships since they are not directed at resolving legal issues or enforcing legal rights.

However, such services are of great importance *in support of* the family justice system, so the interaction between such services and the family justice system needs to work well. In fact, some of the things those services do can be performed within elements of the family justice system itself. It is a central argument in this book that there is no sharp delineation of functions between these various actors. For example, judges and lawyers can be very concerned about the personal relationship between the parties. So, while the *primary* roles of the institutions of the family justice system are those described above, the evidence shows that these functions can sometimes be blended with approaches more fully adopted by the support services. The way this occurs is complex and not always well recognised.

Cases are dealt with, and if they involve disputes, disposed of (successfully or otherwise), in various parts of the system. Disposition can take a number of forms. Two dominant approaches, 'outcome-focused' and 'behaviour-focused', are outlined in this book.[9] These approaches can appear in a number of contexts. Either of them might underpin an agreed settlement, an administrative determination or a result achieved through judicial decision. Although most issues are disposed of elsewhere in the family justice system, the judiciary remains at its core. This is because, quite simply, the purpose of a justice system is ultimately to safeguard people's legal rights. This does not, of course, mean that legal rights should be pursued or defended come what may. There may be many occasions when the responsible thing to do is to compromise, or even abandon, one's legal rights. This could be said to be inherent in a full concept of responsibility (Eekelaar 2007: ch 5). But it is one thing to take a responsible decision to compromise or abandon your legal rights; it is another thing to yield without any knowledge of what your rights are, or, if you know them, to yield under undue pressure, or because you lack the means to protect them. The justice system is

[9] See especially ch 2, section IV.

there to try to prevent those things happening. And a justice system is anchored in the judiciary.

Yet the role of the judiciary has not always been well understood. The Review Panel observed, in its Interim Report (Ministry of Justice 2011b: para 74), that 'The judiciary remain central to the successful management of cases. We need to equip them to take firm control of a case and manage it efficiently, enabling them to take difficult decisions in challenging circumstances'.

The Review maintained this position in its Final Report, and made extensive recommendations about how the 'leadership and management' role of the judiciary might be strengthened (Review Panel 2011: paras 2.106 ff). This perception of the judiciary as *managers*, not only of individual cases but also of a branch of the judicial system itself, is at odds with the usual public image, and indeed government perception, of the aloof and somewhat detached judge, who 'holds the ring' in an adversarial contest between the parties and imposes a decision at the conclusion. But it is, we believe, closer to the reality than the more common perceptions, and the evidence presented later[10] will demonstrate why this is so. But we need to complete this opening chapter by explaining why we think that legal rights are important in family matters.

IV. Family Matters and Legal Rights

It might seem strange to have to defend the idea that legal rights have a role, often a significant role, in family life. But this has become necessary because statements in important Coalition government documents suggest that this idea might not be held by all policy-makers.

In November 2010 the government issued a Consultation Paper on proposals it was making with regard to the provision of legal aid in England and Wales. It set out what it considered were 'first principles' for prioritising funding of access to the justice system (Ministry of Justice 2010a: para 2.8). It expressed one of them like this:

> there is a range of other cases which can very often result from a litigant's own decisions in their personal life. . . . Where the issue is one which arises from the litigant's own personal choices, we are less likely to consider that these cases concern issues of the highest importance (ibid: para 4.19).

Since family disputes clearly originate in circumstances arising initially from a person's 'own decisions in their personal life' (such as getting married to a particular person) this principle led to a proposal to remove legal aid from all private law family disputes except in the case of applications for orders relating specifically to domestic violence involving physical harm or where such orders had been made. Some funding would be available for mediation.

[10] See ch 5.

As an analytic tool, the criterion for deciding whether a case resulted from a litigant's 'own decisions in their personal life' was inconsistent with other principles proclaimed in the Consultation Paper. For example, it was proposed that priority would be given to judicial review and criminal cases. The 'principle' that an issue 'which arises from the litigant's own personal choices' is likely to be less important than others is illustrated in the Consultation Paper by reference to 'immigration cases resulting from a decision about living, studying and working in the United Kingdom'. Yet an immigration decision could be challenged through judicial review, or an individual might be prosecuted for an immigration offence. Would the fact that such a case arose out of a 'personal' decision to live in the UK deprive it of its priority status? Surely the circumstances that led to the cases would be irrelevant. Similarly, one could ask why, if a person is the victim of fraud or other wrongdoing (for example, in buying or renting a house), should it matter that it arose out of a decision about where to live; or if a student brings judicial review against a university, why could it matter that the action arose out of a decision about where to study?

In fact, it seems that the alleged 'principle' was really intended to establish that cases arising from private *family* disputes are inherently less serious than those involving other areas of the law, even though family disputes do not always arise out of one's 'personal choices' because most family members do not choose one another, yet can be seriously affected by decisions and behaviours of other family members. It might even be hard to describe certain kinds of behaviour by one partner to the other as being a consequence of 'personal choice' in any morally relevant sense if it is unexpected and unwanted. Despite objections from 90 per cent of persons responding to the Consultation Paper (and support from only 3 per cent), in its final response the government maintained its stance on the low importance given to respecting legal rights in family issues. Indeed, it sharpened that perception in its reaction to fears that the withdrawal of legal aid would result in many more people having to conduct their own cases in court as 'litigants in person'. The government regarded this with equanimity because it was unconcerned about the outcome of such cases:

> We do accept, even if there is no conclusive evidence of this, the likelihood of an increase in volume of litigants-in-person as a result of these reforms and thus some worse outcomes materialising. But it is not the case that everyone is entitled to legal representation, funded by the taxpayer, for any dispute *or to a particular outcome in litigation* (Ministry of Justice 2011a: para 140, emphasis supplied)

It is indisputable that not everyone is entitled to publicly funded representation for any dispute. But to suggest that some people may not be entitled to a *particular outcome in litigation* implies that legal entitlements are of no relevance in litigation. While of course the content of the legal entitlements might be disputable, it cannot be that the adjudicator can decide on a whim and that litigation is no more than a lottery (Eekelaar 2011a).

Is it possible to make a sensible assessment of how important family matters are if compared, for example, to cases where a person wishes to challenge a decision