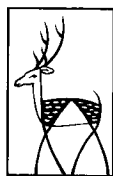


Ideas and Debates in Family Law

Rob George

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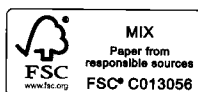
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Foreword

Clifford Geertz, the anthropologist of law, once said that a society's laws are as much a part of its culture as are its language or its poetry. We should acknowledge and appreciate the way that family law in England and Wales has, up until now, been much admired in other countries for the expertise of its judges and lawyers, for the level of access to legal help, and above all for the child-centred pragmatic and comprehensive provisions of the Children Act 1989.¹ But we are entering a time of great uncertainty for Family Law and Family Justice. Following the thoughtful and comprehensive independent Family Justice Review chaired by David Norgrove, published by the Ministry of Justice in November 2011, there were high hopes for more effective organisational structures, more specialist higher profile judges working in better managed courts, resting firmly on continuing support for the established legal framework set out in the Children Act. But the wide-ranging cuts in legal aid expected to follow the passing of the Legal Aid, Sentencing and Punishment of Offenders Bill in Parliament at the time of writing, which will effectively remove private family law from the scope of legal aid funding, are a cause for serious concern about the ability of the system to maintain not just family law but access to family justice. *Ideas and Debates in Family Law* sets out the key questions facing those who work on these matters whether as lawyers or social scientists, as practitioners or scholars. It would have been useful and thought provoking at any time. As we enter this period of austerity, though, it will be more than useful: it will be a key tool in the hands of the next generation of students of family law and family policy, enabling them to ask tough questions, seek effective answers, and defend and develop that part of the legal system which protects the vulnerable and seeks fair outcomes for those engaged in family change or dispute.

The book looks first at the overarching issues of defining and using the concepts of justice, rights and responsibilities, and what happens when family matters cross geographical borders. It then turns to the ways in which intimate adult relationships are regulated and managed, followed by a closer focus on marriage and how it can be ended without unfairness. The final two chapters look at how the law supports children, taking a critical look at the welfare principle which guides all decision making in the courts on child-related matters under the Children Act, and at day-to-day issues of parenting when parents cannot agree. Every chapter moves easily from legal philosophy

¹ See M Maclean et al, 'Family Justice in Hard Times' [2011] *Journal of Social Welfare and Family Law* 319.

to empirical data, across jurisdictions and over time. The erudition is worn lightly, and the language used avoids intimidating technicality or legal jargon.

The author has studied and taught in Oxford, and is a valued member of an interdisciplinary group researching and writing about family law, the Oxford Centre for Family Law and Policy (OXFLAP). His colleagues welcome and congratulate him on this book. Even the most cursory glance at the bibliography will show his debt to John Eekelaar in particular, and his familiarity not only with legal scholars but also with social scientists, demographers and policy analysts working on family issues and with practitioners. The interdisciplinary approach sits well with the international points of reference also. *Ideas and Debates in Family Law* embodies the essential elements of socio-legal studies or empirical legal studies or the sociology of law, whichever term is preferred. The common core is represented by the ability to embrace not only the lawyer's search for an answer but also the social scientist's search for the next question. This book asks good questions, and invites answers. But the questions are so good that it is to be hoped that they will lead not only to today's answers but to the next generation of questions also.

Rob George has recently organised a series of seminars for law students on Family Law and Family Policy. They have attended in unprecedented numbers, together with members of the Law Faculty and visitors from other universities both in the UK and beyond. The meetings were lively, well attended, and set in motion by Rob George with a little background information and a couple of deceptively simple-sounding but sharp, far-reaching and stimulating questions, often accompanied by comment from a visiting expert. The result without exception was fast-moving, intellectually stimulating and original debate. The seminars were so successful that the process is now developed here in book form, retaining the accessibility and freshness of a face-to-face meeting, but adding further materials and examples. I am sure that this exciting and informative account of current questions in family law and policy will be read and enjoyed not only by students of law, but by all those concerned about how we deal with family problems where law has a part to play.

Mavis Maclean

Acknowledgements

Ideas and Debates in Family Law started life as a series of undergraduate seminars in the Law Faculty of Oxford University which ran between 2006 and 2011. I am grateful for the enthusiasm of the students who attended, as well as for the thoughtful comments of my guest speakers, who were: Nicholas Bamforth, Julia Brophy, Alison Diduck, John Eekelaar, Peter Graham Harris, John Haskey, Jonathan Herring, Joan Hunt, Craig Lind, Mavis Maclean, Julie McCandless and Carol Sanger.

Thanks to Richard Hart and Rachel Turner at Hart Publishing for supporting me in this project and for their guidance as it has developed. Parts of *Ideas and Debates in Family Law* draw on my doctoral thesis,² and consequently I owe thanks to the Arts and Humanities Research Council for funding that research (Grant no 135597) and to Mavis Maclean for supervising me while I did it. My understanding of trusts of the family home, discussed in chapter six, improved greatly due to conversations with Michael Ashdown, though he bears no responsibility for my views. Parts of chapters five, six and eight draw inspiration from a number of articles which I co-authored with Peter Graham Harris and Jonathan Herring;³ thanks to my colleagues for their help and to Jordan Publishing for permission to reproduce some of that material here. I have been grateful for constructive feedback on draft chapters from Mavis Maclean, John Eekelaar and Peter Graham Harris.

Special thanks, finally, to Mavis Maclean and John Eekelaar, who encouraged me to write this book and guided me in developing the ideas contained in it. I cannot imagine more generous mentors, and I am grateful for all that they have done to help me.

Rob George
University College, Oxford
January 2012

² R. George, 'Reassessing Relocation: A Comparative Analysis of Legal Approaches to Disputes over Family Migration after Parental Separation in England and New Zealand' (unpublished DPhil thesis, University of Oxford: 2010).

³ R. George, P. Harris and J. Herring, 'Pre-Nuptial Agreements: For Better or For Worse?' [2009] *Family Law* 934; P. Harris and R. George, 'Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations' [2010] *Child and Family Law Quarterly* 151; P. Harris, R. George and J. Herring, 'With this Ring I Thee Wed (Terms and Conditions Apply)' [2011] *Family Law* 367; J. Herring, P. Harris and R. George, 'Ante-Nuptial Agreements: Fairness, Equality, and Presumptions' (2011) 127 *Law Quarterly Review* 335.

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Introduction

Ideas and Debates in Family Law

How would you end the sentence, ‘Family law is . . .’? Here are some suggestions. Family law is important. Family law is exciting. Family law is interdisciplinary, complicated, fast-moving and challenging. Family law is part of a bigger picture – it is part of the broad web of the law in general, interacting with property law, criminal law, contract law and administrative law amongst many others; but it is also part of a bigger debate which goes beyond the law and into policy. *Ideas and Debates in Family Law* is designed to help you move from learning about family law as it is now, to thinking critically about *why* the law is like that and whether it *should* be like that.

There are many ways in which this aim could be pursued. The material contained in *Ideas and Debates in Family Law* is intended only as a start, as one way of exploring some less obvious ideas about family law and some less conventional approaches to thinking about these issues. You need some basic prior knowledge of family law before you can use this book to your best advantage, because although I have endeavoured to make it reasonably free-standing it does not contain a general statement of the law itself.¹ You will also find that the topics chosen for discussion are sometimes quite narrow, and so it will help you if you know enough about the law to be able to place

¹ Good family law textbooks include: A Diduck and F Kaganas, *Family Law, Gender and the State*, 3rd edn (Oxford, Hart Publishing, 2012); J Herring, *Family Law*, 5th edn (Harlow, Longman, 2011); N Lowe and G Douglas, *Bromley's Family Law*, 10th edn (Oxford, Oxford University Press, 2007); B Hale, D Pearl, E Cooke and D Monk, *The Family, Law and Society*, 6th edn (Oxford, Oxford University Press, 2009); S Harris-Short and J Miles, *Family Law: Text, Cases and Materials*, 2nd edn (Oxford, Oxford University Press, 2011); J Masson, R Bailey-Harris and R Probert, *Cretney's Principles of Family Law*, 8th edn (London, Sweet and Maxwell, 2008).