

Maurice A. Deane School of Law at Hofstra University

Scholarship @ Hofstra Law

Hofstra Law Faculty Scholarship

7-2002

Special Issue: Papers Celebrating the 25th Anniversary of The Family Court of Australia

Andrew Schepard

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Andrew Schepard, *Special Issue: Papers Celebrating the 25th Anniversary of The Family Court of Australia*, 40:3 Fam. Ct. Rev. 273 (2002)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/747

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

EDITORIAL NOTES

SPECIAL ISSUE: PAPERS CELEBRATING THE 25TH ANNIVERSARY OF THE FAMILY COURT OF AUSTRALIA

In July 2001, I participated in one of the most perspective-enhancing experiences of my professional life. Chief Justice Alastair Nicholson invited me to attend the 25th Anniversary Conference of the Family Court of Australia in Sydney. My wife Debra and I spent several weeks getting to know this remarkable institution and its people and the country they serve. I came away impressed with the Family Court's commitments to professionalism, innovation, global communication, and humane values. I also came away with the impression that the Family Court of Australia was grappling with the same problems facing family courts everywhere.

This special issue was born out of those impressions. I thought it would be wonderful to share some of the sophisticated learning and dialogue at the 25th Anniversary Conference with *FCR* readers. Chief Justice Nicholson, his senior legal advisor Margaret Harrison, and an *FCR* editorial board member readily agreed. Their help in organizing this special issue was, in a word, indispensable. *FCR* readers owe them and their colleagues whom they persuaded to make a contribution to this issue a special debt. Chief Justice Nicholson, Ms. Harrison, and many other members of the Australian Family Court community have long and strong ties to AFCC and *FCR*. This special issue expands a special relationship that I hope will continue to grow and strengthen.

The Family Court of Australia was born in an era of optimism in family law in the Westernized countries and at a time of great change in their political and social life. Traditional views of marriage and divorce and gender roles were in flux, and new institutions were needed to cope with the results. The resulting social upheaval sparked strong passions. The no-fault divorce legislation to which the creation of the Family Court of Australia was tied passed the Australian House of Representatives by a small margin on a conscience (nonparty) vote. Though a larger majority created the court itself, the controversy at the time of birth foreshadowed a challenging future for the new institution. Its early history was scarred by horrible violence. Political scrutiny and budgetary battles have resulted in continuous changes and developments in substantive law and judicial administration.

From the beginning, the Family Court of Australia was premised on two particularly distinctive features, at least to this American's eye. First, the court interpreted and enforced a national law for divorce and its associated child-related and financial issues. In contrast, the law of divorce in the United States is highly decentralized and different from state to state. Divorce in California is not the same as divorce in Alabama or New York. There are no differences between divorce in New South Wales, Queensland, and Victoria. The national divorce law enforced by the Family Court is part of what makes Australia a unified political and social entity. The Australian experience shows that it is possible to have a uniform divorce law in a huge country that embraces democracy and diversity.

The second distinctive feature of the Family Court of Australia is that from the beginning, the court was conceived of as an interdisciplinary enterprise, a blend of law, counseling, social, and dispute-resolution services constantly evolving to meet the needs of Australia's

parents and children. The Family Court is a court in that judges decide cases and structure the administration of the enterprise around legal disputes. The court, however, goes beyond an umpiring function. It fully recognizes that family disputes have emotional and social service dimensions that must be proactively addressed, and it tries to structure its interventions and services to provide maximum benefit to families.

The papers in this issue demonstrate that the Family Court of Australia has not only survived its tumultuous birth and adolescence but is today a leading citizen of the family court world. Its distinctive features remain and evolve. The court is constantly trying to adapt its processes to new challenges presented by the Australian people.

Chief Justice Nicholson's article in this issue, based on his address to the 25th Anniversary Conference, describes the court's beginnings, evolution, and challenges for the future. Readers will find in Chief Justice Nicholson's article parallels to the past and present of family courts in their own states. It also demonstrates one of the most important attributes that have made the court what it is today—professional and thoughtful leadership.

Chief Justice Sian Elias of New Zealand next graces this issue with her address to the 25th Anniversary Conference. Her address introduces *FCR* readers to a first-rate judicial intellect with insight and understanding of the importance of family law and courts in a nation's judicial system. Chief Justice Elias notes that the family courts in New Zealand and Australia were created in "therapeutically optimistic times," but experience has shown that the "Family Court remains a Court." The family court has been a healthy influence on other courts of general jurisdiction, inspiring, for example, courts to dispense with unnecessary formality and to adapt litigation alternatives.

Chief Justice Elias's address also symbolizes the importance the Family Court of Australia places on cooperation and communication with its colleagues in other countries. The close relationship between the Family Court of Australia and the Family Court of New Zealand is a model of cooperation for courts in other states to emulate. The presence of judges and others interested in family courts from countries around the world at the 25th Anniversary Conference (including the United Kingdom, Bangladesh, East Timor, Singapore, the Philippines, Italy, and the United States) is further testimony to how much the Family Court of Australia both teaches and learns from others.

Carol Smart's paper on the importance of listening to children on their postdivorce and postseparation parenting arrangements was also first presented at the 25th Anniversary Conference and illustrates the importance the Family Court of Australia places on interdisciplinary input into its work. Smart and her colleagues at the Centre for Research on Family, Kinship and Childhood at the University of Leeds in the United Kingdom interviewed many children about their postdivorce and postseparation custody arrangements. They found that the children were generally able to adjust to the changes of physical location involved in joint parenting arrangements. The change in emotional location, however, that results from shifting homes on a regular basis was more problematic. Some children supported a rigidly equal postdivorce parenting arrangement. Other children resented the imposition on their time and desires that such arrangements require and felt it did not take their wants and needs into account. Smart thus reminds us of how individual and unpredictable children's reactions to their parents' divorce and separation can be and how difficult it is to formulate general rules about what is in their best interests. She also reminds us of the importance of considering children's voices in the process of formulating postdivorce parenting plans.

The final two papers in the special issue describe and evaluate important current program initiatives of the Family Court of Australia that will be of interest to the family court community worldwide. Thea Brown's paper on Project Magellan provides an overview of how the

court is experimenting with ways to manage divorce- or separation-related parenting disputes in which one parent makes an allegation of child abuse and neglect against the other. Courts everywhere face an increase of these terribly troublesome cases that cross the border between private custody disputes and state child-protection matters. Project Magellan shows that a combination of strong judicial case management and carefully structured family conferencing forums in which all stakeholders participate can speed up resolution and promote better outcomes for children.

Finally, Stephen Ralph and Stephen Meredith describe the work of the Aboriginal Family Consultants who provide assistance to the Family Court of Australia's counseling staff in undertaking mediation with Aboriginal and Torres Strait Islander families. A sometimes tragic history makes the relationship between the formal state institutions of Australia and the Aboriginal communities particularly challenging. The Family Consultants Project is an important initiative of the Family Court of Australia to create a bridge between cultures and over the past. The Consultants make the Family Court aware of the special perspectives of the Aboriginals who are involved with it and the Aboriginals more knowledgeable about the court and its work. Ralph and Meredith describe how the Consultants work with the court's mediation staff and provide several case studies of how their efforts resulted in more understanding and better outcomes. Family courts that serve diverse cultural communities can draw inspiration from this effort.

I hope that *FCR* readers get almost as much out of this special issue as I did from attending the 25th Anniversary Conference. Before our trip, Bill Howe, an AFCC stalwart and *FCR* editorial board member who had recently been to Australia, told Deb and me that our visit there would be one of the most memorable events of our lives. Bill said that Americans and citizens of other countries should take advantage of every opportunity to become better acquainted with the land, the people, and its institutions. Bill was absolutely right. Deb and I second his advice. The Family Court of Australia is a great institution, a good colleague, and a gracious host in a wonderful country.

FAMILY MEDIATION TRAINING FOR THE HMONG COMMUNITY OF MINNESOTA

James Coben, clinical professor and director of the Dispute Resolution Institute at Hamline University in St. Paul contributes what I hope will be the first of many articles to *FCR* on a remarkable subject—the family mediation training he and his colleagues organized for the Hmong community of Minnesota. Jim and I had a long conversation about this project at a recent American Association of Law Schools Conference, and I strongly encouraged him to write an article on his experience.

The underlying impulse for the Hmong community mediation training program is the same as for the Aboriginal Consultants project of the Family Court of Australia. Both programs use mediation to help people whose culture and traditions are based on different values coexist with a modern family law system. The Hmongs were transported from the mountains of Laos to the winters of Minnesota after the Pathet Lao Communist takeover of their country in May 1975. They are a distinct minority and cultural group, indigenous to China, that settled in Laos. Jim describes their history and their social structure, which is clan-based and patriarchal. The Hmongs fought with the United States against the communists in Laos, suffering incalculable losses. They resettled in the United States after the war. Following the INS's policy of dispersal, many Hmong immigrants found their way to Minnesota. Their

community found itself rocked by incidents involving domestic violence, suicide, divorce, and child support disputes.

Jim describes the mediation training for the Hmong community that he and his colleagues organized at their request. His article is a thoughtful description of how mediation training can be a valuable tool for cultural awareness for trainers and participants alike. The trainers offered an introduction to mediation and family law. Participants provided an introduction to Hmong traditions and the challenges of assimilation. Each learned from the other in ways that will enlighten *FCR* readers.

THE ALI'S APPROXIMATION RULE AND SOCIAL SCIENCE RESEARCH

Recently, the American Law Institute (ALI) completed work on its *Principles of the Law of Family Dissolution* and proposed significant reforms in the “best interests” standard traditionally used to resolve child custody disputes in family courts. The ALI (disclosure—I am a member, though I was not involved in the *Principles of the Law of Family Dissolution*) is an influential organization of judges, practicing lawyers, and law professors founded in 1923 “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific work.” The ALI’s *Restatements* have been highly influential in developing the law of contracts, torts, and other areas and the *Principles of the Law of Family Dissolution* promise to be of similar influence. The ALI Principles cover all aspects of family dissolution—grounds, support awards, property distribution, child support, and so on—with sophisticated and complex proposals. They will be of great interest to AFCC members as they are likely to shape the direction of family law reform here and elsewhere.

The ALI’s proposed decisional rule for physical custody is an “approximation standard.” Under it, “the court should be required to allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the time each parent spent performing caretaking functions for the time prior to the parents’ separation.”¹ The operation of the approximation standard is well explained by Professor Katharine Bartlett, the reporter for the *Family Dissolution Principles*:

In effect, it amounts to a primary caretaker presumption when one parent has been exercising a substantial majority of the past caretaking, and it amounts to a joint custody presumption when past caretaking has been shared equally in the past.²

Professors Robert Kelly and Shawn Ward of LeMoyne College contribute an article reviewing the social science research evidence on the proposed “approximation” rule. We welcome them to the community of *FCR* authors. Kelly and Ward cautiously conclude that “social science research is supportive of the approximation rule in that little, if any, of the research counter indicates the use of the rule, while a significant body of research moderately supports its use.” They call for more research to assess the rule and its impact. Their article frames what will no doubt be a lively debate within and without the family court community on the wisdom of the ALI’s proposals.

COURTS' PERCEIVED OBSTACLES TO ESTABLISHING DIVORCE EDUCATION PROGRAMS

Jack Arbuthnot of Ohio State University, one of our most prolific developers and researchers of court-affiliated divorce education programs, writes on a major question that those who try to promote innovation in family courts constantly ponder: What will get the court to adopt a new program? Arbuthnot notes with pride the massive growth in court-affiliated divorce education in recent years. He then asks, incisively, if so many courts have created parent education programs in recent years, what is holding up the rest? Arbuthnot reports on his survey of nonadopting counties, which reveals that funding and expertise are the most often stated barriers. He does not, however, leave his exploration of the subject at that. Instead, Arbuthnot applies theories of organizational innovation to explore what conditions are more likely to bring about change in a court. Readers who want to influence court systems will benefit from considering his checklist and reasoning.

MODELS OF EFFECTIVE REPRESENTATION OF CHILDREN

The proper role of counsel for children is a major subject of discussion in the family court community. Michael Drews and Pamela Halprin of the *FCR* student staff contribute a note comparing and contrasting different standards of practice that provides guidance for children's lawyers. The focal point of their note is a case study of representation of children from Hofstra Law School's interdisciplinary Child Advocacy Clinic. The case presents difficult ethical issues of when a child's preferences should guide a lawyer's advocacy in the courtroom. The children in the case study want to achieve an objective that may not be in their best interests and have mental capacities that lead adults to question their judgment. Halprin and Drews examine how the sometimes contradictory standards promulgated by the American Bar Association, the American Academy of Matrimonial Lawyers, the Fordham Conference on the Representation of Children, and scholar Jean Koh Peters would guide the conduct of the lawyers for the children in the case study. They conclude by advocating the Peters Model. They also advise that, whatever standards of practice states adopt for lawyers to represent children, they should also set up an interdisciplinary board similar to that which exists in Quebec to which lawyers for children can turn for guidance in these ethically complex matters.

BOOK REVIEWS

One book reviewed in this issue is by a member of of the *FCR* Editorial Board and an Editorial Board member reviews another. Michael Lang reviews Woody Mosten's *Mediation Career Guide*. Mary O'Connell continues her stream of book reviews on family law legal practice with a review of Pauline Tesler's *Collaborative Law*. *FCR* thanks her for helping to keep our readers informed of important works for the family court community.

—Andrew Schepard
Hempstead, New York

NOTES

1. ALI FAMILY DISSOLUTION PRINCIPLES TENTATIVE DRAFT NO. 4 § 2.09 (1).
2. Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLIAMETTE L. REV. 467, 480 (1999).