FAMILY LAW IN THE LOOKING GLASS

Opening Address

2001 Annual Family Law

One-Day Seminar

Sydney

NSW YOUNG LAWYERS

10 MARCH 2001

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INTRODUCTION

Addressing young lawyers is always a dangerous task for those of us who are "chronologically challenged" – but of course not "old" lawyers.

It is however nice to know we have at least some anthropological value in the new millenium.

I was a young lawyer some forty years ago before anyone even thought to question when the new millenium started. In our twenties, who could contemplate being old enough to be invited to offer some introductory comments at such an impressive program.

I am very flattered by the organisers' invitation to be here today and I don't plan to traverse the detail that your distinguished speakers will address. Rather, I would like to touch on some wider contextual matters that might be thought-provoking as you take a forward look at family law. I will leave some time for questions or discussion before my allocated half hour is up and would welcome your responses to my remarks.

LOOKING BACKWARDS

Like all historical specimens, I am grounded in the past and I ask you to indulge a few moments of reminiscence because I thought that it may be of some interest to you to make the comparison between young lawyers of now and then.

Getting to be a lawyer was very much different for a young "wannabe" when I was at Melbourne University in the late 1950s and then commenced articles in Melbourne in 1960.

So far as family law was concerned, in Melbourne, the university subject was quaintly known as “domestic relations” and was taught, like many subjects, by practicing barristers in the role of part-time teacher.

I feel that there were marvellous advantages in the practicality of their approaches. They would weave their daily travails into the curriculum in a way that gave the study a real life edge. Their skills in persuasion were well-applied and well-received by our young (mainly male) minds.

There was however a downside. Because of the barristers’ client conference and court commitments, their classes were either uncomfortably early or uncomfortably late in the day for students with a host of other sporting and other extracurricular activities on their agenda.

These barrister teachers were anything but slouches. We had a silk, later a Supreme Court Judge for the subject Executors and Trustees, and another for Evidence. We were taught by luminaries such Sir Zelman Cowen, Sir David Derham, and of course one of my tutors, Sir Daryl Dawson, is a former High Court Judge.

In my view, the mix between bar and academia meant that these complementary domains were closer and that both were pedagogically better. But of course the exercise was smaller in those days and the greater interest on the part of the bar reflected a stronger emphasis on the duty to participate in teaching the law.

Also, the presence of practising barristers as part-time university teachers was less of an exception than it is now. And with due respect to the teachers of today, I think that their real life stories and dilemmas gave an edge to the content of teaching that is perhaps less appreciated by the administrators that are more concerned with research grants, important though I very much think they are.

I speak of the value of empirical research particularly in the area of law with some commitment behind me. It has long concerned me that the family law arena lacks the necessary research input that it deserves and for that reason I have been keen to support studies such as the examination of the impact of the *Family Law Reform Act* 1995 about which I will have some things to say in a few moments.

It was also very different as you went to leave the university.

Speaking about my home turf – Victoria – being a summer clerk was unheard of. One did not go near a law office until you were about to graduate and thought that it might be a good idea to get a job. We did obtain employment during university vacations but that was to obtain money, something not readily available from law firms.

When you did start doing the rounds, it was as much a case of interviewing law firms as it was about them interviewing you. The question of your religion – Roman Catholic or Protestant - or whether you were a Communist, would usually arise in the process. You could pretty much make your own selection but were then paid the equivalent of only $20 per week

In the early sixties, something like a quarter of law students were women but the concept of women as partners in firms was extroadinarily limited and those women who were partners tended to practice only in family law. Firms were much smaller. The practice with which I did articles was described as a middle sized firm – 5 partners and 15 staff.

In 1963 when I went to the bar in Victoria there were only two female barristers one of whom later became the first Victorian female silk in 1972.[1] There was one

[1] Chambers have recently been named in honour of Joan Rosanove QC.

woman who came to the bar with the group I started with but she lasted only a few months due to a lack of briefs.

At that time, when you went to the bar, you actually had to pay the barrister with whom you read 50 guineas and you occupied his room for six months. Briefs were a matter of luck or sometimes patronage, and it was normal to wait six months to get paid.

A Magistrates Court brief fee in those days was about 10 or 12 guineas and the clerk received an additional 5% from the client. A brief in the Supreme Court was about 35 guineas and a County or District Court fee was approximately 30 guineas.

For those you who have only ever known the decimal currency system, a guinea was one pound one shilling.

I well remember my first Supreme Court brief which I obtained by accident. The plaintiff for whom I was <u>not</u> acting, later complimented me on my performance after receiving a substantial verdict from the jury. The Judge took a less sanguine view and later, at a social gathering, asked if I was related to my instructing solicitor.

It may interest you to know that before taking up my present appointment as Chief Justice, I was not what you would call a “family law” specialist. My practice as a barrister and later as a silk at the Victorian bar covered a wide array of civil and criminal practice. Then as a Judge of the Supreme Court of Victoria, I had the extensive diet of practice court and trial work that face all superior courts.

Interestingly, with more than a dozen years as Chief Justice now under my belt, and more than a little interest in legal education, I realise how strange it is that

family law is not regarded as a subject which should be compulsory in university curricula.

LOOKING AT "FAMILY LAW"

Every member of our community is directly or indirectly caught up in a family law matter at some stage of their lives and I venture to say that the prevalence and intensity of discussion about the law and the courts that apply the law is ill-matched when it comes to levels of knowledge and understanding both in the community generally and the legal profession specifically.

Yet my experience in the jurisdiction leaves me without out a doubt that it is exceptionally challenging in a range of respects.

Taking the so-called "black-letter law" as a foundation, I am continually stimulated by the diverse range of complex subject matters that inevitably arise for argument and determination. I am also frequently disappointed that those who would seek to disparage family law fail to appreciate what it encompasses and the frequent need to apply advanced legal skills.

A scan of reported decisions highlights that courts and practitioners are called upon to delve into:

- the intricacies of constitutional law,
- the application of international treaties,
- nice questions of statutory interpretation,
- the problems of wills, trusts and valuations,
- tax and superannuation matters, and

- a host of evidentiary questions, not the least of which is the treatment of expert evidence in a wide range of disciplines.[2]

Next we have to factor in the human dimension and the emotional intensity that inevitably accompanies family disputes and their aftermath. To these difficult substantive issues must be added the further challenges that arise in a jurisdiction that is beset by strictures on the funding of legal representation in a field of litigation which is powerfully charged by the often volatile emotions associated with the breakdown of intimacy. It is a confronting jurisdiction because it is always associated with people and often with their most cherished relationships, being that with their children.

There are also very tangible consequences for the capacity for courts to give the service that is required in such a highly charged jurisdiction.

In a more broadly directed remark, the Chief Justice of Australia reflected my own thoughts about courts administering family law when he said in an address to the 1999 Australian Legal Convention:-

> "Legal aid is a controversial subject, with political implications ... There is, however, one point that judges are well-placed to make. The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid."[3]

So far as family law is concerned, that has not only been an issue under the present Commonwealth Government. In an address that I gave to a forum on Legal Aid held at Old Parliament House in April 1999 I said:-

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[2] For reported cases since 1998 see the Family Court of Australia website available at http://www.familycourt.gov.au.

[3] Gleeson, M. (1999) 'The State of the Judicature', an Address to the Australian Legal Convention, 10 October 1999 available at http://www.hcourt.gov.au.

> "The decline in the availability of legal aid to family law began prior to the election of the Coalition government in 1996 although there can be no doubt that the Coalition greatly accelerated the process. Before then however, the family law share of the legal aid 'pie' had steadily declined and I made a number of protests to the former government about that fact, without success."[4]

In thinking about these and other practical and human dimensions to family law, we need to also recognise that decisions in the family law jurisdiction are only sometimes about bringing an end to a justiciable dispute.

Yes, we settle the property at the end of a marriage but when it comes to matters concerning children, finality is a mercurial and indeed elusive goal.

We may hope that people can be partners no longer but parents forever. But such a slogan masks the fact that a significant number of those who end up seeking a judicial determination are likely to continue to have conflicts in the future as circumstances change, and that they are prone to become familiar names within the listings.

There is yet a further aspect to the human dimension. In my view, more so than other jurisdiction, family law attracts public interest and perspectives that are polarised along gendered lines.

This is not necessarily unhelpful. A good example is the critical attention that was paid during the last decade to the treatment of family violence in both children's matters and financial cases. In my view, the quality of discourse was an important prompt for the thoughtful revisiting of earlier jurisprudence so that community expectations were better melded with the obligation to apply the law both on the statute books and as declared.

In this regard, the capacity now lost, to utilise cross-vested jurisdiction was of great assistance.[5] It is for me a matter of ongoing regret that the loss of such a facility remains a significant impediment to doing justice. It is a financial burden to those who would otherwise have had all related matters dealt with in a single set of proceedings.

On the other hand, family law and in particular, the Family Court has become the focus for some very destructive attention. This is particularly a consequence of the formation of lobby groups that, curiously, portray a Court which is largely comprised of male Judges and Judicial Officers as part of concerted effort to deny rights to fathers and other men. Sometimes it is necessary for the head of a jurisdiction to address these matters, although traditionally that would not have been necessary where an Attorney-General viewed it as part of his or her role to advance such arguments.

LOOKING AT DEFENDING THE FAMILY COURT

In relation to speaking out about courts such as the Family Court of Australia, I have maintained the conviction that a Chief Justice must defend public attacks on his or her Court.

My public engagement with controversies is not unknown. Nor is it without a degree of controversy including among my fellow judges. I was therefore pleased to read the remarks in the High Court's 1999 decision in *Re Colina; Ex parte Torney*.[6]

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[4] Nicholson, A. (1999) 'Legal Aid and A Fair Family Law Justice System', an Address to the Legal Aid Towards 2010 forum, Canberra, 21April 1999, at 7 available at http://www.familycourt.gov.au/papers/html/nicholson6.html.

[5] *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839.

That case arose following contempt proceedings that had been brought against a man for scandalising the Family Court by demonstrating outside the building in Melbourne, distributing written material to members of the public, and making abusive remarks about the Family Court and its members. His alleged conduct was described in the following way:-

> "Some of the comments attributed to Mr Torney were expressed in very strong terms, blaming the court and its judges for the deaths of people and for instances of child abuse, describing the judges as being "terrorised" by women's organizations, and claiming that "decisions are being made on a daily basis destroying the lives of innocent children". The literature said to have been handed out by [the alleged contemnor] complained of bias against men. It asserted that if people knew the nature of orders made by judges, the likely consequence would be violent action towards the judges. Judges were said to make decisions "based on their twisted morals" and are "protected by … secrecy".[7]

The alleged contemnor claimed that my public comments about unfounded attacks on the court by men's groups had, in some way, made it impossible for him to receive a fair trial on the contempt issue before another judge of the Family Court. In the High Court's judgment, Gleeson CJ and Gummow JJ, with whom McHugh and Hayne JJ agreed, said as follows:-

> "The speech made by Nicholson CJ, and his remarks in media interviews, conveyed an emphatic response to allegations that the Family Court manifests a systemic bias against men. It is not surprising that the Chief Justice saw it as his right, and his duty, to make such a response. In the course of his defence of the court, Nicholson CJ addressed the merits of the allegations made against the court, and answered such allegations with detailed argument.".[8]

With respect, their Honours have captured with precision, the motivation for my comments – defence of the Court. Our judicial system provides avenues for complaints against decisions, principally through appeal provisions. Legal aid restrictions do, however, impair the reality of being able to invoke such means.

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[6] (1999) 166 ALR 545.
[7] At para 7.

They remain an access to justice issue that needs attention not just for the Court, but for public confidence in a jurisdiction that lends itself to politicisation – in all senses of that word.

It must be said that family courts are never going to be the most popular institutions in the community. Nevertheless, it is important that the public should have confidence in the fairness, impartiality and efficiency of the family law system, like any other part of the court system. If it does not do so, for example, one of the consequences that may be expected to follow is a refusal or failure to comply with orders of the Court.

It seems to me that the politicians who so readily attach themselves to concern about matters of compliance with orders and who think that new legislative directions to explain orders will address the problem, might be well-advised to reflect upon how their other comments and actions work against the adherence they purport to want to see. Quite frankly, I have difficulty seeing how the recently amended enforcement provisions of the Act as they relate to children can be expected to meet the identified mischief of non-compliance.[9]

What is not understood is that an order to pay money, deliver, goods or to do or refrain from doing a single act can usually be enforced efficiently and effectively. It is a very different proposition to enforce a recurring order for the provision of contact with children week-in and week-out.

The variables are enormous. There may be a high level of conflict between the parties involving threats and actual violence, and allegations of sexual or physical abuse. The contact parent may not turn up or only do so sporadically and may be under the influence of some substance when they do so. The residence parent may be poisoning the mind of the child against the contact parent or the

[8] At para 28.
[9] *Family Law Amendment Act* 2000 (Cth).

contact parent may be trying to "bribe" the child from the residence parent. Questions of distance or money or lack of it may make the ordered contact difficult or impractical. The attitude of new partners of the former couple may also affect the issue.

At the same time, there are limited remedies. The ultimate sanction of imprisonment may be quite inappropriate whereas community service orders may aggravate the problem. Fines are often useless.

While I recognise that the new provisions are an attempt to address some of these problems, I doubt their efficacy.

These are not simple orders and there are no simple solutions.

How we may come to know the effectiveness or otherwise of such amendments is a question of research and I would like to now turn my attention to the recently published evaluation titled *The Family Law Reform Act 1995: the First Three Years* – by Ms Helen Rhoades now of the University of Melbourne, Professor Reg Graycar of the University of Sydney, and Ms Margaret Harrison who is my Senior Legal Advisor.[10]

LOOKING AT EVALUATING THE LAW

Before speaking about the content of that report which I was delighted to be asked to launch on 21 February, there are two introductory comments I think are necessary to make about how the report has been construed, at least in some quarters.

[10] Available at http://www.familycourt.gov.au/papers/html/fla1.html.

First, I would like to make it clear that the Court is very proud to have been a partner with the University of Sydney in the grant that enabled the research. Harking back to my earlier comments about the value of collaboration between the practice of law and academia, I am absolutely committed to ensuring that the Family Court of Australia works together with universities on relevant projects to generate empirical pictures of the law in action. It remains my impression that unlike many other areas of law, the family law arena is lagging when it comes to the collection of data about the impacts of so-called reforms. That gap is all the more concerning given how significant – personally and politically – family law matters are for the Australian community.

Secondly, I would like to underline that support for research by my Court in no way curtails the academic independence of project researchers. I note that one commentator at least has made criticisms of the integrity of the research findings, and I must say that I find it no less offensive than if unsubstantiated attacks had been made on the impartiality of a Judge or Judicial Officer of my Court.

Unfortunately, these attacks have come from the quarter associated with so called “men’s rights” groups and their acolytes. These people seem to want to introduce irrelevant and unfounded gender issues into what should be a dispassionate discussion.

Slights of that kind are nothing short of insulting. They unwarrantedly assume a frailty on the part of independent academics and indeed my own staff, that ignores the robust and constructive criticisms my Court is prone to receive from time to time from those who collaborate in research with the Court – and frankly, from within my Court as well.

They fail to recognise that several of the findings are critical of Family Court practices and that the authors were uncompromising in their analysis of those practices and their consequences.

LOOKING AT RECENT EMPIRICAL RESEARCH

With those preliminary comments in mind, we should recall that the major objectives of the so called Reform Act were as follows:

- to encourage both parents to share the parenting of their children after separation,
- to give prominence to children's rights,
- to emphasise parents' responsibilities,
- to reduce disputes over children and
- to protect children and other family members from violence.

As part of the changes, the words 'custody' and 'access' were replaced by 'residence' and 'contact', in the hope of removing concepts of parents 'winning' or 'losing' their children.

The main message of the report is that despite such aims, many of these objectives have not been met and that the law has become more complex and unclear for both the families themselves, for the lawyers advising them, and for judges, Court staff and others in the system.

Let me point out some of the main Report findings:

- Encouraging shared parenting after separation is not a realistic option for Family Court clients in dispute over their children. Families with workable shared parenting arrangements tended to arrive at them without resort to the law and indeed, did not know that the law had changed to encourage these arrangements. For those in the system for whom co-operation is impossible, often because of family violence, the shift in emphasis to shared parenting

has increased the opportunities for dispute and affected children's welfare and often, their safety.

- The inclusion in the *Family Law Act* of a child's 'right of regular contact with both parents' has created a climate where judges and lawyers are more likely than before to agree to contact, sometimes in circumstances where there are serious concerns about the safety of children and their carers. Orders suspending contact have rarely been made at interim hearings since 1996, despite the high rate of allegations of violence and child abuse in these matters. However, at final hearings, where all the evidence is heard, the number of 'no contact' orders has not changed, suggesting that children are spending periods of time in situations subsequently determined to be unsafe for them.

- There is confusion about the relationship between the 'right of contact', the need for all decisions about children to be made by reference to their best interests, and new provisions that require judges to ensure that parenting orders do not expose children or their carers to 'an unacceptable risk of violence' or conflict with existing family violence orders.

- There has been an increase in the numbers of applications for parenting orders and for enforcement of those orders, particularly by non-residence fathers who see the 'right to contact' as belonging to them rather than their children.

- There is no general understanding of what 'shared parenting' actually means and contact parents have unrealistic expectations that it means <u>equal</u> time, or at least regular input into day to day and other decision making

- Changes in terminology have not been widely accepted and have made little or no difference to the behaviour of parents or their lawyers. As one lawyer

commented: the only people who know the new language are the 'voracious litigators'.

- Those who enter the litigation stream - even if they do not go very far along it - are not the people for whom these amendments are (or should be) addressed. They are actually the group who will seek to manipulate and distort the issues that distracts attention from the children. Unnecessary specific issues orders are one outcome of this, sought by a controlling parent. Increases in the number of applications for parenting orders and enforcement illustrate the heightened emphasis on disputation in this area. The traditionally small percentage who proceed to a defended hearing has definitely not been reduced by the amendments.

It is important to note that the authors make it clear that their study was an exploratory one and limited in sample size. Nonetheless, its methodology of gaining responses from a range of separating partners, including those who have not accessed any Court services, and counsellors, lawyers and Court staff and Judges, means that the concerning results need to be taken very seriously.

The systems and structures by which family law is administered is no less important than the law itself. In this regard, it is important to note that the changes to the *Family Law Act* were followed by the introduction of a separate court administering family law jurisdiction – the Federal Magistrates Service.

LOOKING TO STRUCTURES

As most of you will know, I have always supported the concept of federal magistrates with the capacity to exercise final jurisdiction in family law matters. Yet I have been critical of the current Federal Government's preferred approach

of further fragmenting jurisdiction for family law by the establishment of a separate Magistrates Court, especially in a time of scarce funding resources.

What is perhaps most irksome though, is that such a policy flies in the face of developments in the rest of the world so far as family law is concerned. There is a strong move in the United States, supported by the American Bar Association, in the direction of what are there described as “unified family courts”, exercising all types of family jurisdiction, including criminal jurisdiction. New Zealand and Canada are moving in the same direction while here in Australia we have further fragmented the system.

My colleague, Justice Linda Dessau has described the concept of a unified family court system eloquently:-

> "... it is clear that if one were blessed with the luxury of starting with a blank canvas, the only sensible way to ensure the most streamlined and best outcome for children, would be to design one single unified family court. To avoid duplication and fragmentation, that is the optimal design.
>
> It should be a national court with the integrated services presently existing in the FCA. It should incorporate all care and protection matters, adoption and civil and criminal cases where children are victims. But a unified family court must also include juvenile crime. Otherwise, those children charged with offences would be dealt with as the junior part of an adult criminal justice system. To follow that course would be to marginalise those children, who in reality are mostly indistinguishable from the children who are in need of care and protection or suffering family breakdown, family violence or other family problems."[11]

Those of us on the Bench who are convinced that unified family courts are the way to go will continue to advocate the logic of such a holistic and child-centred structure. In the meantime, improvements to access to justice through inter-

[11] Dessau, L. 'Children and Family Violence Laws in Australia' Paper presented to the conference In the Mainstream: Contemporary Perspectives on Family Violence, September 1999, Belfast. See also Dessau, L. ‘Children and the Court System’ Paper presented to the Australian Institute of Criminology Conference, 17 June 1999, Brisbane, available at http://www.familycourt.gov.au/papers/html/dessau.html.

agency and inter-court protocols will have to continue even though, while they are worthwhile they are, by comparison, band-aid solutions.

While the practice of family law can sometimes be depressing and frustrating, it can also be a strengthener of resolve and tenacity. My personal view is that it is in the nature of political and policy changes to find models ignored during one phase of governance come back into consideration.

It is my hope and I would even venture, it is my optimistic expectation, that unified family courts will return to the agenda. When that happens, I hope that some of you here to day have taken it upon yourselves to learn more about the notion of unified family courts and can assist in advocating for its adoption.

I hope that you will still be young lawyers when that day comes.

LOOKING AT OURSELVES

By way of conclusion, may I leave you with the thought that the practice of law is at a crossroads.

There are increasing litigation pressures from an increasingly litigious community. There is, as I have said, a real problem with legal aid. The increasing tendency for practicing lawyers to merge and become yet another part of the business community has led to a loss of the concepts formerly associated with the values of law, professionalism and duty. The problem of excessive legal costs will not disappear. The Bench and practitioners are under increasing attack from ill-informed politicians and the media. Populists call for increasingly harsh punishments for offenders.

However, all is not lost. There is a great strength in the law and its practitioners can overcome these problems. You as young lawyers are part of the solution.

We can improve our practices and we must strive to do so. We must be careful to protect and guard our heritage of an honourable profession and hold fast to a vision of access to justice and equality before the law.

Perhaps more so than any other field of law, our success in the field of family law will be the most incisive reflection of such efforts.

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