

Book Review

Family Justice: The Work of Family Judges in Uncertain Times by John Eekelaar and Mavis Maclean (2013)

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With *Family Justice: The Work of Family Judges in Uncertain Times*, distinguished academics John Eekelaar and Mavis Maclean build on their earlier research studies of family law solicitors¹ and family law barristers² in England and Wales.

As the book's subtitle indicates, the authors' empirical research focused on judges and the process of judicial adjudication within the family law system, but the scope of the work is broader. Thus, while later chapters draw on the research — concerning the 'daily work' of judges — the lead-up to these chapters and the conclusion develop wider ideas about the family justice system at a structural level.

The authors are deeply concerned about the direction of current policies and proposed (in some instances, now actual) reforms regarding family justice. Predominant are changes to legal aid resulting in the deprioritising — or indeed exclusion — of family matters, along with recommendations by a government-appointed Review Panel set up to examine the operation of the family justice system, and the governmental response to the Panel's findings. In the face of a mass of (sometimes contradictory) policy goals, the authors return attention to some 'fundamental issues' for the system, as well as examining and questioning some of the assumptions inherent in current policy discourse.

To this end, the authors seek to give both historical and comparative context to the current British situation. The historical aspect works well; the comparative perhaps slightly less so. As the authors note, 'an attenuated historical memory can diminish understanding of the significance of values that may be at stake when present institutions are evaluated'.³ The importance of that background comes through strongly. Meanwhile, the discussion of other jurisdictions serves as a counterpoint, particularly to identify alternative systems in use, but it is not within the book's scope to include an in-depth comparative analysis. Nevertheless, many of the themes arising will resonate with Australian readers.

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¹ John Eekelaar, Mavis Maclean and Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart, 2000).

² Mavis Maclean and John Eekelaar, *Family Advocacy: How Barristers Help Victims of Family Failure* (Hart Publishing, 2009).

³ John Eekelaar and Mavis Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart Publishing, 2013) 153.

Chapter 2 introduces the key concepts of ‘behaviour-focused’ and ‘outcome-focused’ approaches to family justice, and related ideas about the role of the state. A behaviour-focused approach assumes that any agreement reached by the parties is acceptable, thus prioritising the preservation of relationships. An outcome-focused approach examines outcomes (and the processes used to arrive at them) and assesses them against a standard of fairness — a standard provided by the family justice system. The authors posit that the tension between these approaches is a recurring theme in any examination of the system.⁴ However, a strong case is made for the importance of having an accessible legal framework to turn to.

Chapter 3 discusses the role of family lawyers and of family mediators. Like earlier (indeed, some of the earliest) studies of family lawyers, which are discussed in this chapter, the point is made that not everything family lawyers do is adversarial; moreover mediation is not a panacea. Perhaps more importantly, as other studies emphasise, labelling the practices of lawyers as either adversarial or conciliatory is simplistic and leads to inaccuracies. Nevertheless, the ‘false dichotomy’ of mediation versus adjudication retains a stranglehold on government thinking.

Following this chapter, which skilfully draws together and explains a number of research studies of family lawyers, ch 4, ‘Courts: Changing Structures and Functions’, continues to set the scene for the research findings through a discussion of the courts hearing family matters. This analysis of the origins, structures and functions of the courts and associated ‘support services’ is a useful one. For those outside the jurisdiction, the system seems fragmented and confusing. Some roles, such as the Legal Advisor to the lay bench in the Family Proceedings Court, appear to have no equivalent in Australian law.

The following chapter sets out the court ‘framework’ and something of the process before introducing the research study. The description of the methodology begins with a note that the preceding discussion, while informative, ‘does not convey the realities of day-to-day judicial activity in family law cases’.⁵ This is undoubtedly so, and discussion narrows suddenly from ‘big-picture’ structural concerns to the day-to-day reality of judicial officers. A key point is that the *breadth* of activities in which judicial officers are engaged is considerably greater than that suggested in popular understanding of an adversarial process. Nevertheless, of course judges operate within the framework of the *Children Act 1989* (UK) c 41 and the authors take issue with Darbyshire’s characterisation of the family courts as a ‘law-free zone’.⁶

The methodology used results in what is almost a series of case studies, largely descriptions of matters coming before the court and how they are disposed of. This makes for interesting reading, though there is, perhaps, not much that would be startling for professionals regularly appearing in the family courts. The

⁴ Ibid 22.

⁵ Ibid 77.

⁶ Ibid 98, citing Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing, 2011) 289.

conclusion drawn is that judges have multiple roles, described here under the umbrella headings ‘legal activity’, ‘management’ and ‘help’ (including facilitating an outcome and providing information). It is observed that judges trod ‘a fine line’ between the outcome- and behaviour-focused approaches, yet were also in a position to ‘reconcile’ them.⁷

A discussion of the research findings is also integrated into chs 7 and 8, which examine public and private law children’s cases respectively (in Australia, matters determined under state child protection legislation and federal family law legislation). This results in a detailed and thoughtful analysis of current issues for the system, particularly around the perpetual concern with ‘delay’ and its elimination. Not all periods of time taken in the finalisation of a case are necessarily negative. Time is required to gather the information needed to ensure that the legal process is fair and that decisions arrived at are in children’s best interests. It may also provide opportunities for caregivers to redress problems and, thus, for family reunification or to trial care arrangements. Further, given the complex problems of those involved in the most intractable cases, the process is unlikely to be sped up simply by the enactment of new laws or guidelines.⁸

In terms of private law cases, the phrase ‘the enforcement paradox’⁹ is a neat encapsulation of seemingly perennial issues of the harms of litigation (particularly for children) as against parties’ inability to avoid involving the court. Here, the importance of a behaviour-focused approach — for example, pursuing therapeutic rather than legal avenues — is explained. There are limits, however, to what can be achieved via such methods. Thus, the need to integrate both forms of approach is emphasised.

The final chapter brings together some bigger themes about the contemporary role of the family justice system. In this ‘late modern’ period, the authors explain that ‘individuals are encouraged to seek their “own” solutions to their problems’.¹⁰ Yet they are doubtful about both information provision as a substitute for quality advice and the privatisation of justice — relying on agreements devised between the parties — in this area.

In large part, *Family Justice: The Work of Family Judges in Uncertain Times* is an argument for the family justice system and particularly the court system, and of course the work of the judges within it. It illustrates the authors’ ability to make a sophisticated and wide-ranging argument that is nonetheless supported by closely observed detail. Its overarching themes regarding the role of the state in its citizens’ personal and family lives should be of interest to all those concerned with this area of law.

⁷ Ibid 120–1.

⁸ Ibid 154.

⁹ Ibid 176.

¹⁰ Ibid 184.