INTERNATIONAL SOCIETY OF FAMILY LAW

10TH WORLD CONFERENCE

FAMILY LAW: PROCESSES, PRACTICES AND PRESSURES

FUTURE DIRECTIONS IN FAMILY LAW

by

The Honourable Justice Alastair Nicholson
Chief Justice
Family Court of Australia

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Introduction

Thank you for inviting me to speak to you this morning. I am a keen supporter of the International Society of Family Law and am happy to be attending my third world conference. On this occasion it is particularly pleasing to welcome guests to Australia. I hope you enjoy Brisbane and what it has to offer, as well as any other areas of Australia you may have a chance to visit during your stay.

International conferences provide valuable opportunities to exchange ideas and learn from each other across many jurisdictions. Such conferences rescue us all from the threats posed by parochialism, and what we hear at them can serve to reassure us that we are not alone in facing the apparently insuperable problems that come before us – whether as judges, academics, practitioners or in some other role.

The program compiled by the organising committee offers a wide range of interesting topics and, as usual, the greatest dilemma for many of us will be which concurrent sessions should we choose to attend!

Family Law is particularly suited to international discussion because its problems are common to all societies and, in children's cases at least, the best interests test is widely applied. At the same time there is no one solution to the problems presented by family law and the sharing of experiences and ideas that a conference like this provides is invaluable.

Western societies have struggled for many decades with the reality, the rhetoric and the politics of marriage and latterly, relationship breakdown. What the sociologist William Goode referred to several decades ago as the 'divorce phenomenon' will obviously continue unabated into this new century, perhaps to be tempered only by the decline in marriage rates we see, particularly in the Scandinavian countries. But of course, family law is far more than marriage and divorce law. The lives of many mothers and children are blighted, even endangered, by the violence they experience directly or witness in the home. Relationships between unmarried heterosexual and homosexual couples continue to increase in proportion to traditional marriages, and medical technology provides us with ways of creating life that were unheard of even a decade ago. Definitions of 'family' become ever more complex as a consequence of these factors. Policies, programs and laws have attempted to cope with all these challenges, with mixed results. Much of the debate during the International Year of the Family in this country at least, centred around what a family was. The word "family" is all too often hi-jacked by persons and organisations seeking to preserve an idealised and conservative view of what a family is or should be.

Disputes involving family members not only generate deep emotional responses, but on a wider plane they frequently lay bare issues of power, gender, public and private responsibility and concepts of ownership. Marriage and relationship breakdown is an issue of great public concern because of its perceived de-stabilisation of society and its effects on children. Issues of family autonomy and State intervention intersect with each other, as what was originally a private relationship becomes the subject of public scrutiny. Moral beliefs may be challenged, as issues such as the recognition of same sex relationships, surrogacy and in vitro fertilisation become significant.

The use of the word 'direction' in the topic of this address poses something of a dilemma for me. Because 'direction' implies a point on a continuum, which presumably moves forward, whereas considering family law developments – particularly in an international context - I see a scattering of various issues, but no clear patterns or trends.

At the risk of over generalising or being too Antipodean in outlook, I would like to suggest a number of areas in which family law in its broadest sense seems to be at something of a cross roads. Some of these may resonate with you, and the conference program suggests that some have relevance, at least to the extent to which they have prompted conference papers.

What is 'Family Law'?

First I would like to comment briefly on the breadth of family law, and of how seeking to limit it to divorce and associated matters runs the risk of creating inconsistent laws, processes, practices and pressures. All too often lawyers, particularly in the wider general law sphere, tend to stereotype family law into a compartment and dismiss it as irrelevant to their considerations. This is inherently dangerous because family law impacts upon the community to a much greater degree than the general law. This becomes even more obvious when it is appreciated that family law covers a much wider field than decisions about the disposition of children, the breakdown of marriage and the disposition of property. Coming from a general law background as I did before I accepted my present appointment, one of the first observations that I made was how simplistic such a compartmentalised approach was. In Australia the Family Court is called upon to consider issues involving the interpretation of the Australian Constitution, the impact of international treaties upon domestic law and the special position of Aboriginal and Torres Strait Islander people to name just a few falling outside a compartmentalised view of family law.

I know that Professor Finlay will be speaking to you later in the conference on the jurisdictional aspects of Australia's family law system, so my remarks this morning on this aspect will be brief. But it must be said that I preside over a Family Court which cannot resolve the legal problems of many Australian families.

Australia is a Federation which next year will celebrate its centenary. Its Constitution which accompanied it and which has been amended on very few occasions and only with

great difficulty, divides legislative powers between the Federal Parliament on the one hand, and the various State and Territory Parliaments on the other. We have no Bill of Rights. The Constitution pays very little attention to private law issues, and none at all to what would have been considered non-traditional or 'aberrant' family relationships at that time. The Constitution was written in the context of a male dominated society and control of the family was very much men's private domain.

Limitations on the types of matters about which the Commonwealth can make laws naturally restrict the areas over which the Family Court can adjudicate. The fact that these limitations in no way reflect the circumstances of peoples' lives (and probably never did) is an historical legacy which is not easily rectified[1]. Essentially the Federal Parliament is given power to legislate in respect of specific matters identified in the Constitution, with State and Territory Parliaments empowered to legislate without such restrictions, providing their laws are not inconsistent with any federal law.[2]

Our Constitution **does not** contain a power permitting the Federal Parliament to make laws concerning children or their protection - what may be generally termed "public family law matters". Such matters are left to the States and Territories, which have developed their own children's courts and laws governing child protection and juvenile justice. These laws are certainly not uniform and are not necessarily even consistent. As you can imagine, many parenting disputes which find their way into the Family Court involve allegations of child abuse which precipitate the separation or arise out of subsequent parenting disputes. Indeed such cases have been described as the Court's core business[3].

The Constitution **does** provide that the Federal Parliament may legislate in respect of what may be termed "private" family law matters, that is: marriage, divorce and related parental rights, custody and guardianship of infants.[4] These are the areas, which in text books and university curricula are generally considered to be 'family law' (together with nullity, breach of promise of marriage etc and other arcane areas). Excluded from this list - and therefore the responsibility of States and Territories – are (in addition to child protection and juvenile justice) issues arising from relationships between unmarried couples, whether heterosexual or homosexual, and adoption. However the legal regulation of families –whether they be intact or separated - extends far further than this. Taxation and social security systems, pension schemes and entitlements under tort laws provide various benefits and exemptions to those living in particular relationships,

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1 Northern Territory of Australia v GPAO and Ors [1999] HCA 8 per Gleeson CJ and Gummow J at para 87, per McHugh and Callinan JJ at para 162. As to the distinction between "jurisdiction" and "power" see Harris v Caladine (1991) FLC 92-217 per Toohey J at 78,493.

2 The Australian Constitution s109.

3 Thea Brown, Margarita Frederico, Lesley Hewitt and Rosemary Sheehan (1998) *Violence in Families: the Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia,* Monash University..

4 The Australian Constitution s 51 (xxi), (xxii).

intestacy laws do the same. Many are predicated upon a number of assumptions about dependency and gender roles within relationships that may, or may not bear any relevance to reality.

Unlike 1988 disputes about children born to unmarried parents were also excluded from Commonwealth jurisdiction, as there was no head of power to support such legislation. As just under 30% of all Australian children are born out of marriage their exclusion from the Family Court and its counselling and other services was patently discriminatory. Fortunately all States and Territories (except WA) referred their powers in this area to the Commonwealth between 1988 and 1989.

As a result I think Australia is one of very few common law countries, which now makes no legal distinction between children born to married and unmarried parents. Assuming paternity is not an issue – and modern medical technology has largely removed what was frequently a major dilemma – each parent has parental responsibility for their children unless there is an order to the contrary. Moreover section 60B(2)(a) of the Family Law Act provides that *children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together* (underlining added). Child support obligations also take no account of the nature of the parental relationship.

In Australia the Family Court has no jurisdiction to make child support orders. Since 1989 the assessment and payment of child support has been the responsibility of the Child Support Agency, an administrative agency that calculates liabilities according to a formula. Put very simply this formula is a percentage of the taxable income of the liable parent, the percentage going from 18% for one child up to 36% for 5 or more. The Court's role is restricted largely to applications to depart from the formula (which require special circumstances) enforcement and determining whether a child is the child of a person from whom support is sought

Because of its bifurcated children's jurisdiction Australia unfortunately cannot have or benefit from comprehensive legislation such as the English Children Act. Unlike New Zealand our Family Court judges cannot deal with both public and private child disputes. Like Canada, we suffer at the hands of an unwieldy Constitution, which is reinforced by the politics that goes hand in hand with Federation. Fortunately however our founding fathers (they *were* all male!) criticised the fragmented marriage and divorce jurisdiction of the United States, and the debates of the time reflect the decision that Australia would have Commonwealth marriage and divorce powers.

So I'm afraid that the Family Court of Australia is doomed to fail the Roscoe Pound test. Pound observed in the 1950's that a court that treats a range of family problems as " *a series of single separate controversies may often not do justice to the whole or to the*

several separate parts. The several parts are likely to be distorted in considering them apart from the whole"[5].

But apart from the inherent jurisdictional problems, family law in this country – and undoubtedly elsewhere - often becomes enmeshed in the political process, as pressure groups lobby for changes to rectify the many problems they consider the system to be riddled with. Whether these are directed at joint custody provisions, protective legislation for gay couples, or a more effective enforcement of child support and court orders, they often strike a sensitive note with politicians. And if the politicians' interest starts to flag the media will often ensure that the embers are stirred again. But being a fairly fragile jigsaw, trying to 'fix' one area of family law runs the risk of creating unintended consequences and contradictions in other areas. And Australia does not have the benefit of a children's commissioner, Ombudsman or Office of the Family which can co-ordinate legislative and other reforms in a family focussed way.

Unfortunately a couple of recent examples of unintended consequences come readily to mind. One is in the area of child support. As I mentioned earlier, the child support scheme operates separately from the Court. Given the complexity of its legislation and the hostility it generates, the Court is grateful for this respite, although I should say that, (particularly when compared with other schemes), the Australian system seems to work quite well.

But child support assessments and payments are an important aspect of family life for many parents and children. In December 1999 the Child Support Agency had nearly 540,000 active cases on its books, and in mid 1998 more than 700,000 children were, (at least theoretically), receiving child support because of the Agency's involvement[6].

However part of the budget 2000/2001 budget package included several significant proposed amendments to the child support scheme. One of these would allow less child support to be paid when the child spends particular periods of time with the contact parent (ostensibly to recompense that parent for additional expenditure). Specifically when the period is between 10 and 19 per cent of the child support year the formula percentage of taxable income on which the amount payable is levied will reduce from 18% to 16% where there is one child, and proportionate amounts where there are more children[7]. Where contact occurs between 20% and 29% of the year the percentage payable will reduce by another 1% for one child. This goes far beyond the previous provision in which allowances were made in the formula only when there was substantial contact (30% - 40% of the year) with the contact parent. It also adds to the existing parenting

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Roscoe Pound (1959), *The Place of the Family Court in the Judicial System,* 5 National Probation and Association Journal 161 @164. Quoted in Ross Family Law Quarterly no. 1, Spring 1998 at 7.

[6] Child Support Scheme, Facts and Figures 1998-99.

[7] The 'usual' formula percentages are: 1 child 18%, 2 children 27%, 3 children 32%, 4 children 34% and 5 children 36%.

arrangements recognised by the Child Support Scheme - 'major care' (60-70% of the year) and 'shared care' (40-60%).

One doesn't need the wisdom of Solomon to realise that these provisions will create a climate ripe for parental disputation and litigation. To be in any way effective they will also require some bureaucratic monitoring and oversight to determine which parent's calculations are accurate should there be a disagreement about the actual number of nights spent with each. It is not too far-fetched to suggest that logbooks will be an important addition to many separated parents' households.

But fundamentally and more importantly this measure seems to be primarily about parents, not about children whose best interests may be ignored by it. It also links contact and child support together in a way not previously contemplated – indeed previously considered on a number of occasions to be highly inappropriate. The changes were part of a package of measures prepared by the Department of Family and Community Services and I am fairly confident that the Attorney-General's Department was not privy to them beforehand. Certainly the Family Court was not.

Meanwhile the stated objectives/principles of the significant 1996 amendments to the Family Law Act were to encourage parents 'to agree about matters concerning the child rather than seeking an order from a court"[8]. A primary objective was to minimise litigation wherever possible …

Inconsistencies and contradictions can also be found *within* a statute. One of the papers to be presented later at this conference examines the findings of a research project, which asked whether the objectives of those 1996 amendments had been achieved.

<u>The delivery of Family Law Services – what is a Family Court?</u>

Having tried to establish exactly what it is we are talking about, I would like next to consider just how family law services may best be delivered. And in this context I would make it very clear that I am not looking solely at legal outcomes, because the Australian experience is that an integrated multi disciplinary approach to family disputes is by far the most appropriate.

Whichever country we come from, the 1970s was a very different decade (and indeed a very different century!) from the one in which we now find ourselves. Australia had experienced years of stability during the 1950's and 1960's with very high marriage rates, high fertility and low rates of marriage breakdown. However during the 1960s the contraceptive pill was introduced, women's educational levels and levels of workforce participation increased considerably in conjunction with equal pay entitlements and anti discrimination legislation pressed for by the women's movement which began to seriously question the traditional sexual division of labour in the home and elsewhere. A

[8] Section 63B(a).

number of previously uncontested ways of behaving and thinking began to be challenged. One of these was undoubtedly the permanence of marriage for both men and women living in unsatisfactory, and possibly violent, relationships. The concept of divorce as being something that one had to earn by good conduct and by proving the commission of one or more matrimonial offences by one's spouse, came to look quite primitive. It was also expensive, undignified and time consuming. Also questioned was the appropriateness of a wigged and gowned male judge who sat in the matrimonial division rarely (and disliked doing so intensely) and who spent much of that time pontificating and criticising people for leaving their spouses or having an adulterous relationship. Its true, of course, that one way to avoid the horrors of fault-based divorce was to falsify or embellish the facts somewhat, which is what occurred increasingly, as the fault based legislation became more and more anachronistic.

This questioning of the status quo was taking place in a number of jurisdictions, albeit somewhat later than Australia in many cases. John Mortimer was certainly aware of it and he wrote amusingly of his life as a matrimonial barrister in England in the 1950's and 60's.

'Our staple diet, our legal bread and butter, was the uncontested divorce case known simply as "the undefended". The "undefended" was the way in which consenting married couples, anxious to be free of each other's company as expeditiously as possible, obtained their order for release. Such people, it might be thought, should be allowed to go their separate ways in peace. Fortunately for those who earned their living by doing "undefendeds", this was not so. Freedom was only possible if the complexities of an unhappy life could be fitted into the neat pattern of a divorce law still founded, to a large extent, upon the morality of the medieval Bishops ... it was possible to build a career in "undefendeds" and avoid any major disaster, provided you could learn to fit each and every marriage into the three immutable categories of adultery, cruelty and desertion.'[9]

Australia abolished no fault divorce and established the Family Court with the passage of the Family Law Act in 1975. It was a bold experiment in having a separate superior court dealing exclusively with family law. Its judges are, as the Act requires, appointed for their suitability to deal with matters of family law by reason of training, experience and personality[10] It also has jurisdiction throughout the country, except the state of Western Australia which in 1975 elected to establish its own specialist State Court. The Family Court is also a service provider. Co-located with its adjudicative functions are counselling, conciliation, mediation and forensic assessment services. This is a multi-disciplinary, not a 'multi-door', approach.

The Court also provides, free to the public, a number of explanatory pamphlets (in a range of languages), videos and audio tapes which explains its jurisdiction and services, and it maintains a comprehensive web site.

[9] Mortimer, J (1982), *Clinging to the Wreckage.*
[10] Family Law Act section 22(2)(b).

There are obvious arguments for and against the establishment of specialist family courts. I would argue that it is bewildering, costly and inefficient to deliver services through a plethora of courts, tribunals and social welfare agencies. Australia has just added another, the Federal Magistrates Court, exercising largely concurrent jurisdiction with the Family Court. The reasons for this are obscure. It was always sensible to introduce a summary level of jurisdiction into family law but one wonders why it was necessary to establish yet another court and one which does not exercise exclusive family law jurisdiction. Unfortunately from a family law point of view, this new court exercises jurisdiction over other areas of Federal Law such as bankruptcy and trade practices. One wonders what the increasingly unrepresented member of the public faces with a family law dispute makes of such a situation.

It is also very apparent that in a generalist jurisdiction many judges and magistrates do not like family law work and will either deal with it last or avoid dealing with it. Others have no empathy for it. A divisional structure is a slight improvement, but judges working in the family law area tend to be transferred into other areas if they are thought to be competent, or a rotation system is employed which has the effect of removing the best family law judicial officers after they have attained competence in the area. Because some senior judges and magistrates in a generalist court regard family law as less important than other areas of their jurisdiction, when there are budget cuts and workload climbs, the family law area tends to suffer.

Experience both in Australia and overseas also suggests that where a family court is a division of a generalist court or where family law cases are simply assigned to judges or magistrates in a generalist court, the quality of performance suffers greatly.

The principal argument that can be advanced against a specialist family court is that because of the nature of family law, the court is never a popular institution. It will be constantly attacked by disaffected persons on the basis that it is gender biased, that it shows no understanding of the needs of children and their parents, and that it shows systemic bias in the distribution of matrimonial property. Because nearly all of its decisions are discretionary, it is not difficult to produce what is asserted to be evidence of alleged inconsistencies of approach and also difficult to rebut such allegations. Although this is as a result of the relevant legislation and not of any court policy it is easy to criticise the court in this regard

At the same time it is isolated from the so-called legal mainstream and thus is not defended with the same vigour from attack, as it would be if it were one of the generalist courts.

Family Courts are commonly the subject of complaint to politicians who hear only one side of what is often a complicated story. I often receive complaints from politicians about the Court in which they do not hesitate to draw adverse inferences about what the Court has supposedly done. Yet when the complaints are examined they are found to be absolutely without substance.

Similar complaints find their way into the media as was apparent in the Sunday papers as late as yesterday. I understand that Professor Graycar will discuss the influence of the media during this Conference. By and large, the media give a negative spin to family law and the Family Court and often fall into the same trap as do politicians.

Family Courts are inevitably high volume courts. This means that they have a greater need for appropriate financial support from Government. The experience of the Family Court of Australia suggests that the contrary is likely to be the case and Governments tend to punish the Court financially, while spending lavish amounts upon other untried initiatives. Indeed a considerable amount of time is spent fending off attacks by politicians and Government. This tendency has been exacerbated in the Australian context by the present Attorney General's decision not to undertake the traditional role of defending the Courts from attack.

Further, throughout the common law world at least, there is a highly vocal, small but disproportionately powerful so called "fathers movement" which seems to exercise a disproportionate influence upon politicians. Much of their venom is directed at family courts. Indeed in Australia we have even had a political party describing itself as the "Abolish the Family Court and Child Support Party".

One of the difficulties facing a Chief Justice of a Family Court is that if he or she states this obvious fact they will also be accused of bias against fathers. This proposition and the attacks that are made on family courts involve a fundamental misunderstanding of what it is that a judge does when faced with a family law case. The judge does not start with any gendered preconceived view about the outcome but rather deals with the people involved and makes judgments on the evidence as to the appropriate outcome. Some of these judgments are very difficult and involve fine balances as to outcome. In nearly thirteen years as a Family Court Judge I can say that the gender of the parties has never of itself been relevant to my determination. Unfortunately the losing party in such a dispute looks for someone to blame and who better than the judge and the Court.

All of this would not matter if there were some appreciation by Government of these difficulties. Unfortunately, in Australia at least the response of Government seems to be for quick fix solutions coupled with rhetoric supporting dispute resolution solutions long used by the Family Court.

This perhaps should not be seen as a condemnation of Government, but rather as a recognition that the issues posed by family law are not easily resolved and the pressures upon Government tends to cause it to act without forming a full appreciation of the nature of the relevant problems.

Perhaps there needs to be more dialogue and research about these issues and less dogmatism or gendered discussion.

I have been concentrating upon my own experiences in heading a family court in this country. Much of what I have just said may give rise to qualms about the wisdom of setting up specialist family courts.

However I believe that the advantages of specialist courts far outweigh the disadvantages. Most of the disadvantages to which I have referred are those of perception, whether it be by Government, the media or the public. Family Courts nevertheless have to be robust and independent. Governments, the media and the public need to be reminded of their crucial role.

This is not an easy road and the financial pressures employed by Governments do not make it easier. I think that we must remember what it is we are trying to do in such courts and I think that this is best summed up in the object adopted by my Court of resolving and determining family disputes and putting children and families first in that process.

International developments relating to specialist family courts suggest that there continues to be significant interest in them. New Zealand followed Australia in setting up such a court although it did not follow the Australian example of creating a superior court of record. Israel also followed the Australian example. There is current interest in setting up such courts in Canadian Provinces such as Alberta and Ontario has already done so. There is a strong move in the USA towards setting up what are there described as "Unified Family Courts", exercising both public and private law family jurisdiction and even including juvenile criminal jurisdiction and jurisdiction in relation to crimes against juveniles. Other countries showing interest in the setting up of family courts include South Africa, Egypt and until recently at least, Fiji.

While I see such unified family courts as a possible future direction and one that I would applaud, I think that the Australian Family Court approach of including under the roof of the Court other relevant professionals such as psychologists, social workers and mediators is also one that is worth repeating. I also think that the Australian system of having a specialist appellate division within the Court is highly desirable. All too often in other countries having specialist courts, the particular problems of family law are not appreciated by generalist appellate judges who produce judgments that detrimentally affect the operations of the specialist court.

Turning to other areas, a significant factor that bedevils the family jurisdiction is the vast increase in the number of unrepresented litigants involved in family law matters. This does not appear to be only an Australian phenomenon as States such as Florida in the USA report up to 80% of cases in which one or both parties is unrepresented. Professor Dewar and Barry Smith will be discussing the Australian problem in this regard during the Conference.

Some common law countries and some civil law countries have historically had quite extensive systems of legal aid. Australia used to be one of them. Others like the USA have not had such systems. We are now seeing an overall reduction of legal aid in most

countries, which means that Courts are required to find new ways to deal with such litigants.

I believe that this development has great significance for those countries that, like Australia, have an adversarial system. The adversarial system is very much predicated upon the proposition that a just result is likely to emerge from the presentation by skilled advocates of the case for the parties and the testing of the other party's case by such advocates. Lawyers carefully prepare each party's case. Lawyers make submissions as to the law to the judge and from the competing presentations, the judge is assisted both in the correct application of the law and findings of fact. When those lawyers are not there, as is increasingly happening in family courts, then the adversarial system breaks down

In an Address to the Judges Conference of my Court this weekend, Mr Justice Davies of the Court of Appeal of the Supreme Court of Queensland suggested that it was inevitable that the civil and common law systems will move together. He said that increased communications, the fact that none of us have perfect systems and a move towards best practices made this inevitable.

It seems to me that this is particularly apt in relation to international family law. As I said at the outset of this address there is universality about family law. Arguably there has always been a need to look beyond the purely adversarial approach. It has always been a matter of concern to me that children's cases are conducted along adversary lines. I think that there is an implicit recognition of this in our emphasis upon the value of conciliation and mediation in such cases and provisions for the appointment of child representatives.

The rise in the number of unrepresented litigants in family law cases makes a change of approach even more imperative. One of the more recent Australian initiatives by the Family Court of Australia, about which Justice Linda Dessau will be speaking later in the conference, involves the special case management by a judge of cases involving allegations of child sexual abuse. When you hear her presentation I am sure that you will see that this approach lies much closer to an inquisitorial than an adversary system.

Another area where the adversary system tends to break down in family law is in the area of the presentation of expert evidence. Courts and above all children are rarely assisted in their task by the production of hired experts called to support the case of one or other party. The Family Court of Australia has long employed its own specialist staff to enquire into and report to the court about the dynamics of families involved in children's disputes. Where a higher degree of specialty is required the Court has the power, which I would like to see used more often, to appoint its own expert. We are currently considering the extension of this approach into other disputes over matrimonial property.

I consider that much more work needs to be done to develop better methods of dealing with family law disputes and I believe that one of the values associated with conferences such as these is to provide an opportunity upon a world basis to achieve this.