

“Family Law for the Next Century”: Background and Overview of the Conference

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I. The Process and the Product

The Family Law Section of the American Bar Association and the University of California’s Earl Warren Legal Institute jointly sponsored a conference among practitioners and academics held at Berkeley’s Boalt Hall Law School in December 1992. This introduction and the five articles that follow are the report of that conference. “Family Law for the Next Century” brought together not only leaders from the Family Law Section and prominent professors of family law from across the nation, but also distinguished scholars of the family and family law from a range of other disciplines including sociology, psychology and psychiatry, history, and anthropology. About fifty participants worked together over three days, largely in small group discussions led by Georgetown’s Judy Areen, Michigan’s David Chambers, and Brooklyn’s Marsha Garrison to see what could be learned from each other and what common ground might be shared over several difficult issues that are central to the direction family law might take in the year 2000 and beyond.

The conference addressed three broad themes:

- What should be the rights and the responsibilities of “extended” family members, such as step-relatives, grandparents and cohabitants?
- To what extent should substantive family law be rule-based, in contrast to a system seeking to achieve individualized justice in every case?

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- As among lawyers, mediators, social welfare professionals, secretarial services, and judges (whether specialized or not), who does and who should be doing the work of family law?

These sweeping topics permitted the participants to gain some distance on several hotly contested questions of the moment by confronting the issues in a more generalized form; at the same time, the topics required facing up to what may appear to be inconsistent contemporary developments. For example, in recent years, whereas child and spousal support obligations on divorce are increasingly formula-driven, divorce custody disputes are increasingly resolved on the basis of individualized determinations of the child's "best interest;" and the principle governing the division of marital property on divorce is either highly "equitably" based or dominated by a 50-50 presumption depending upon the jurisdiction. What are we to make of these conflicting patterns? Do they make any sense? If there should be a more unifying approach to these divorce allocation issues, for example, what should it be?

A. *Rapporteurs' Reports*

The first three articles that follow this overview present commentary from the conference's rapporteurs—UCLA's Grace Blumberg, Minnesota's Robert Levy, and Michigan's Carl Schneider—on each of the broad themes. The rapporteurs followed their topics around from small group to small group as they were discussed during the conference and reported to the whole conference on the final day in a plenary session moderated by Stanford's Robert Mnookin. Their articles here present accounts of the broad themes, having now been prepared with the benefit of a bit more time for reflection.

In his article, Professor Levy explains that law traditionally gives stepparents virtually no chance of gaining custody of their spouses' children (say, on the death of the spouse or on their divorce); nor has it imposed any real legal obligation on stepparents to support those children (say, following the stepparent's divorce from the children's biological parent). He goes on to demonstrate that grandparents traditionally have had neither legal rights to visit, nor legal obligations to support, their grandchildren. As the nuclear family breaks down, however, and as it appears in individual cases that children would be well served by awarding rights to, and imposing duties on, extended family members, the instinct to change the law may be difficult to resist. Indeed, here and there, the old rules now are being breached, sometimes by courts, sometimes by legislatures, and with the support of some scholars.

In the midst of this modest trend to include extended family members within the circle of the legally recognized family, the conferees (both practitioners and scholars), by and large, voiced considerable resistance to those developments. As Professor Levy observes, their fear, simply put, seems to be that legalizing the rights and obligations of extended family members might, in the end, do children more harm than good. This fear, I sense, reflects a skepticism about the competence of family law judges to determine what is best for an individual child even in the best of circumstances, and a cynicism about the mischief and obfuscation that all too many zealous lawyers and their clients are able to bring to the process if they want to.

Professor Blumberg reports that the conference participants came at the question of who should do the work of family law in such different ways (at least in part) because they themselves play such distinct roles in the system—as lawyers, legal scholars, clinical therapists, judges, social scientists, and so on. This disparity in life experience causes people to view the functioning and competence of other professionals dissimilarly, to see the shortfalls of family law in diverse places, and to consider specific proposed reforms differentially promising and/or threatening. Participants also expressed contrasting aspirations, some seeking ideal solutions, others being more content to identify changes that promise a little more good than harm. Nonetheless, in the end it is hard to resist the conclusion that in the United States today we have a two (or three) tier system of family law justice for those different levels of income and wealth. Yet in response to this disparity, unlike our outlook toward medical services perhaps, it is by no means clear that we can identify a single set of legal services to which we might want families at all income levels to have equal access.

As Professor Schneider comments, although legal rules and legal discretion may be seen as ideal types, with contrasting advantages and disadvantages, in the real world of family law (as elsewhere) we always find a mix of both, a continual shifting between them, and elements of one always embedded in the other. Moreover, reforms intended strongly to embrace either rules or discretion are inevitably at least partly undermined on implementation by the continuing allures of the pole from which the reform has fled. Professor Schneider points out that the conferees recognized that the dangers of discretion are blunted (and its advantages perhaps amplified) the higher the calibre (and lack of bias) of those exercising it. Alas, in discussions throughout the conference, quite varying appraisals were made (some quite negative) of those exercising discretion in family law today. At the same time, however, Professor Schneider relates the gloom expressed by many participants over the

growing federal bureaucratization of family law. For me, this portends a continuation of the difficult and contentious times that we in family law have been experiencing.

B. The Plenary Sessions

Two of the conference plenary sessions considered what we have learned from recent important empirical work. Maryland's Karen Czapanskiy spoke about the implications for family law of the many new studies from around the nation on "Gender Bias in the Courts," which was followed by a discussion of those implications led by ABA Family Law Section Chair Marshall Wolf. In addition, Jessica Pearson of Denver's Center for Policy Research showed how her studies and those of others have exposed "Ten Myths of Family Law," after which Family Law Section Chair-Elect James Podell led a discussion about those myths.

Professor Czapanskiy addresses the double problem identified by several examinations of gender bias in the courts:

1. The legal system has traditionally paid little attention to and showed little sympathy towards victims of domestic violence (the overwhelming majority of whom are women), and
2. Male legal professionals (both judges and lawyers) have traditionally displayed considerable hostility towards female attorneys.

Professor Czapanskiy's message is that, given the reality that women victims of domestic violence are usually represented by women, this class of victims is unlikely to receive real justice (nor will female lawyers receive the respect they deserve) until both problems are solved. Identifying an obstacle and overcoming it are, of course, two different matters; but Professor Czapanskiy argues that at least a start on both problems may be made through judicial and attorney education that seeks, among other things, to identify biased behavior arising from inattention and indifference.

Dr. Pearson shows that many things popularly believed about family law and family law reform (at least in some circles) are simply not supported by the data. For example, there is just not a great deal of unsavory legally strategic behavior surrounding divorce—such as unjustified assertions of physical abuse or demands for child custody really intended to be traded for reduced financial payments. Nor has mediation per se had the widespread negative consequences often claimed about it; rather, it is all a question of "which sort" of mediation and "what" mediators, and, in the best of circumstances, mediation actually carries several advantages (although rarely all those claimed for it by its most ardent supporters). Nor have the many seemingly sweeping changes in child sup-

port law and procedure of the past two decades yielded anything like the dramatic claims made for them (although modest achievements, measured by certain criteria, have occurred). And so on. Dr. Pearson's conclusion is not that family law reform matters little, but rather that we need both reasonable expectations at the outset and a willingness to support careful empirical research aimed at finding out to what extent those expectations are actually being met.

II. On the Importance of Family Law

As we contemplate the desirable shape of family law for the future, I want to use the remainder of this introduction to emphasize a variation on Dr. Pearson's theme. I also argue that we should not be overly ambitious about the role that family law can play in "solving" socially identified problems with "the family." As I will try to show through one extended example, any family law our society will plausibly enact almost certainly will not be "the answer" to what many see is an urgent problem—that divorce hurts kids. Laws that might have a powerfully positive effect on the problem are imaginable, but are unlikely to be adopted because of overriding concerns about their simultaneous negative consequences.

Many observers of the family have been raising loud alarms about the harmful consequences of divorce on minor children. I do not resist these findings. For my purposes here I am quite prepared to assume that, on average, children of divorced parents seriously suffer psychologically, educationally, and socially as compared with those who spend their childhood living with their married parents. What can we expect the law to do to turn around that result? Probably not much.

A. Marriage Controls?

One sweeping strategy would be to control entry into matrimony, discouraging or preventing marriage by those who are likely later to divorce with minor children in their care. In furtherance of this goal we might, for example, raise sharply the minimum age of marriage. Or we might require successful completion of a parenting training course as a condition of marriage. Or we might require premarital counseling and screening, after which those who appeared destined to divorce with minor children were then barred from (or at least strongly dissuaded from) marrying.

It is by no means clear, however, that this approach would have any significant positive effect. How many people would be kept from living together and having children merely by their inability to get over the newly created marriage hurdle, whatever it may be? Moreover, effec-

tively blocking marriage by those unable to get past the new barrier could have a negative effect on those very children I have just assumed they would bear anyway. That is one reason why the traditional strategy that has dominated the law has been quite the opposite—to make it extremely easy to enter into marriage. In other words, if many women are going to get pregnant in any event, and if children generally benefit at least somewhat from being born to married parents, it can be seen why the law would want to facilitate marriage (rather than discourage marriage) for the sake of children.

Other conventional justifications for easy marriage include promoting sexual relations within, instead of outside of, marriage and promoting a higher birth rate for the purpose of furthering some societal goal such as a larger army, more workers, etc. How well easy entry into marriage actually effectuates those goals is another matter, but it illustrates the point that the decision to make getting married easy or difficult will not be determined solely by considerations of the best interest of children. As a further example of the point, today many couples wish to marry planning not to have children, and surely they would argue that any regime that restricted their right to do so in order to discourage them from having children they do not intend to have anyway is highly unsuitable.

Finally, it is, of course, by no means clear that marriage hurdles such as those earlier suggested would at all accurately screen out those who would and would not otherwise later divorce with minor children, thus making such barriers highly objectionable on procedural due process grounds.

B. *Procreation Controls?*

If marriage control is an implausible strategy to prevent later harm to children after divorce, what about the narrower tactic of making it more difficult to have children if it looks like the parents would later divorce before those children are grown? In this vein, some years ago it was suggested that we put the (imaginary) contraceptive “Lock” in the water supply—a parallel to our putting the tooth decay preventative “fluoride” in the water supply. After receiving “Lock” a person (male or female) would be unable to conceive until later obtaining the antidote “Unlock.”

These days it is not unimaginable that a long-lasting contraceptive (along the lines of “Norplant”) could indeed be included as part of the battery of “immunizations” given to children. (And if a contraceptive were included, it is possible that school authorities would far more effectively insist on compliance with the required immunization laws than they do today).

Told to assume that this strategy is technologically feasible, a substantial majority of Americans might well favor the idea of mandatory contraception for minors (although some would surely object vigorously on the ground that this would promote teenage sexual activity). But if "Lock" did not automatically wear out on one's eighteenth birthday, surely the proposal would run into a political firestorm.

There would in the first place be grave concern that individualized administration of "Unlock" would be carried out invidiously—discriminating against unpopular race, ethnic, or religious groups. Decentralized control over procreation activity is often viewed as an important hedge against various forms of "genocide."

Moreover, even if administrators could be counted on to act in good faith, would not the anticipated number of false positives and false negatives make it intolerable that some third party would be deciding who could become pregnant and who could impregnate? Imagine, for example, that all a person had to do to get "Unlock" was to obtain counseling about parenting; even then, there is good reason to believe that the counselors would have considerable difficulty in deciding who to encourage to decline "Unlock." If nothing else, the experiences of being pregnant or knowing that you made someone pregnant, and then of having your child born, can be transforming for many people in unpredictable ways—making irresponsible those who it was anticipated would have coped well.

The actual "Unlock" proposal imagined a requirement that people would have to go through a parenting education course in order to get it. But there is little reason to believe that any formal parenting education that would be required would have an important positive effect on those subject to it—given, for example, the evidence on the lack of effectiveness of mandatory formal driver's education as a condition of obtaining a driving license. Its main tendency, rather, would probably be to screen out those who generally do not do well in school.

C. Divorce Controls?

If we abandon the indirect, prevention-oriented strategies of restricting marriage or parenthood, what about directly trying to reduce the incidence of divorce where there are minor children? One idea might be to have couples themselves make promises to each other in advance not to divorce while their children are young. This could be accomplished through either premarital or pre-pregnancy agreements. Yet it is by no means clear that merely making a formal commitment would have any effect. Surely, most people already enter into marriage and into parenthood hoping their relationship will last indefinitely. How

would a formal agreement by itself keep many couples together who would not stick together otherwise?

1. PENALTIES

One answer, of course, is that penalties could be attached for breaking those formal promises, and those penalties might have some impact. But then what we are really talking about is burdening divorce generally as a way to keep people married. How promising is that strategy?

Suppose, for example, the state were to impose a tax on divorce for the purpose of discouraging it. This would be parallel to other "sin" taxes such as those imposed on the consumption of alcohol and tobacco products. If the divorce tax were a significant sum, this could indeed have some dampening effect. A serious problem would arise, however, in many of the cases where people would actually pay the tax and divorce anyway. When most people divorce today, there is already too little money to go around—given the lost economies of scale that occur when a single household breaks into two. Hence, taxing divorce would exacerbate the existing problem, probably leading to even further reduced living standards for children whose parents divorce.

Of course, if the divorce tax were made very high, it might almost fully eliminate divorce. But this strategy is likely to backfire, for in that event couples are likely to live apart without divorcing, and then later cohabit with someone else without marriage. That is hardly the sort of behavior that high tax proponents would have had in mind. Indeed, this probable human response is one obvious shortcoming of the even stronger proposal one sometimes hears simply to make divorce unavailable to those with minor children—which response could be combatted only if mutually agreed upon separation or abandonment were also made a crime.

Instead of having the divorce tax paid to the government, what about having it paid by one spouse to the other? But which one would be the payor? First assume the tax would fall on the party seeking the divorce. But this seems altogether unfair in some situations. Consider, for example, the case where the moving party is a victim of spousal abuse or abandonment. One might reply that there would be exceptions in which the tax could be waived in certain circumstances. However, this would probably bring us right back to the unhappy days before no-fault divorce, embroiling courts in the unfathomable questions of who is really to blame for the marriage going awry and who is really (not merely formally) causing the couple to divorce.

2. AGREEMENTS

As a fall back proposal, what about conditioning divorce on the parents agreeing to child custody arrangements? The idea here first

would be to slow down the divorce process when couples have not worked out their children's futures; and, in turn, there may be reason to hope that the likelihood of damage to children after divorce will be reduced if the couple has made an amicable child custody settlement.

Requiring an agreement would also give each party a veto, thus permitting either one to block the divorce. Alas, along the lines earlier discussed, it would again probably be thought quite unfair if a party who had acted intolerably during the marriage, then vetoed a divorce sought by the other. Moreover, the veto right gives one spouse the potential to extort what may be viewed as excessive concessions from the other spouse in cases where the latter is eager for divorce.

A further alternative is to impose a rather long waiting period before a couple with minor children could obtain a divorce, both to discourage the initiation of divorce proceedings in the first place and to provide a kind of cooling off period during which the waiting couple might decide to reconcile. But, as with so many of the potential policies already discussed, one needs to be concerned about both the effectiveness and possible unexpected consequences of the proposal. For example, would not couples merely separate during the waiting period with little or no beneficial consequences for the children; or worse, might children actually suffer during the waiting period because it is their very existence that prevents parents wanting a prompt divorce to obtain one?

D. Smoothing the Divorcing Process?

If restrictions on obtaining a divorce do not seem very promising, what about at least trying to make the experience of the divorce process less painful? To be sure, even though many divorced couples talk about how horrible their dealings with each other were once the lawyers became involved, in terms of impact on the children, the conduct of the parents toward the children and each other as the marriage is breaking up is ordinarily much more important than are any details of the legal process.

Nonetheless, a smoother divorcing process would almost surely be desirable from the perspective being addressed here. (It must be very rare that people actually remain married because they anticipate that dealing with courts and lawyers will be nasty, thereby discounting the rather perverse idea that divorce process aggravation is actually good for children because of its deterrent effect on divorce).

Unfortunately, it is not at all evident that we know how to make the divorcing process less painful. Mandatory mediation, for example, has both its proponents and its critics. The same goes for the creation of

very clear rules governing the allocation of children and money at the time of divorce in the hope that the couple will have little in the way of legal issues to fight over.

E. Reducing Post-Divorce Conflict and Promoting Harmony?

Finally, could the distress suffered by so many children of divorced couples at least be diminished by legal changes designed to produce better post-divorce relationships among the children and their parents? By now we have clearly abandoned the idea of discouraging or preventing divorce, and instead are trying to deal more head on with some common harms to children in the post-divorce period.

One idea here is to adopt formula-driven adjustments in spousal and child support obligation and clear rules concerning stepparent adoption and the right of a custodial spouse to move out of town with the children. Once more the strategy would be to reduce conflict by limiting the legal issues over which the former spouse can fight. But yet again we are confronted with the difficulty of forging a consensus over just what those firm rules might be; and, in any event, clear rules alone may well not preclude conflict among parties in regular dealings with each other if one of them feels that the rules governing their relationships are unfair.

Coming at the problem from the other side, we might try affirmatively to promote identifiable and desirable post-divorce parent-child relationships. Just what the law can actually do to inspire such behavior is another matter, however. For example, even though regular visitation by noncustodial parents is usually thought to be beneficial, it hardly seems promising to allow children (or custodial parents) to sue noncustodial parents for specific performance in order to force them to exercise their visitation rights (i.e., to turn those rights into obligations).

A carrot approach to this same problem would be to financially reward the noncustodial parent who remains involved. But this too seems highly problematical. What precisely would the policy be? Many would plainly find it perverse to reduce the noncustodial parent's child support obligation, in effect allowing attentive noncustodial parents to satisfy part of their financial duty with time instead of money. If, instead, a public subsidy were to be offered as an incentive for noncustodial parents to stay involved with their children, the subsidy, in the end, would probably be paid primarily to those who would have fulfilled their duty anyway. Because of that assumption the subsidy idea would likely be rejected on grounds of both cost and morality. Moreover, those parents who only visit for financial reasons generally will not

have the sort of beneficial involvements with their children that are actually being sought.

Some children would clearly consider themselves better off with less, rather than more, involvement with their noncustodial parents—and not only in cases where the noncustodial parents are abusive or indifferent. Teenagers, for example, may simply prefer the company of their peers to that of their absent parents. One possible legal change, therefore, would be just to terminate visitation rights once the child becomes, say, fourteen, leaving it from then on to the child to decide whether he or she wants to visit.

Letting the teenager decide whether to visit, however, is objectionable for at least two reasons. First, there is a considerable risk that the custodial parent would manipulate the teenager's decision so as to exclude contact with the noncustodial parent despite the child's "true" preference. Second, this approach repudiates the idea that the noncustodial parent has independent rights, a conclusion that legislatures are unlikely to embrace. After all, in two parent households, teenager preferences are often violated. For example, the child may be forced to go on vacations, to visit relatives, and the like, and short of abuse or neglect, the state simply does not interfere.

Why have a different rule for children of divorce? That is, so long as the noncustodial parent is not abusing the child, how politically plausible is it that the child's desires will suddenly trump? (Nor is a strategy that relies on forfeiture of legal rights to visitation likely significantly to curtail divorce in the first place—although it might possibly generate more custody battles or joint custody settlements).

In short, in the post-divorce context, children are probably just as well off being left to push their interests informally as they would be if judges or legislatures were to become involved in deciding, say, that they do not have to visit their fathers on weekends. To be sure, some parents will be insensitive to their teenagers' best interests, and that is sad. But using the law to try to turn that insensitivity around is quite another thing; in the end, people are not sensitive parents because they have a legal duty to be.

III. Summary

To summarize then, although we do not lack for possible policy interventions of all sorts, it remains exceedingly perplexing how we might truly do something positive about the problem that so many children suffer after their parents have divorced.

My pessimism here does not mean that family law and procedure are irrelevant. To the contrary, for many individuals subject to their reach, the provisions and procedures of family law can have life-shaping consequences. Often the clearest consequences will be for parents. Other times the rules may matter greatly for individual children, even if the outcome for children as a class is uncertain. For example, let us first assume that increasing (and collecting) the child support obligation of noncustodial parents will generally benefit noncustodial fathers' biological children (putting aside for now the possibility that increased resentment by fathers may undermine much of this advantage). Even so, the social desirability of that change for children generally is rendered highly ambiguous if the further consequence is either to discourage these fathers from remarrying women with young children of their own or to make the lives of those children meaner when their mothers marry men with preexisting burdensome child support obligations.

All of this is to say that, even if there are broader and more powerful cultural forces at work in our society that will influence family life in ways that plausible laws are largely too weak to resist or redirect, and even if we sometimes will not be able to tell whether children generally will benefit from a particular change in the law, nevertheless those of us concerned with the shape of family law for the next century do have important responsibilities. It is my hope that conferences like that recently held in Berkeley will encourage professionals and academics to work to discharge those responsibilities together.

FAMILY LAW FOR THE NEXT CENTURY
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