THE RIGHT TO PROTECTION FROM POVERTY OF CHILDREN OF DIVORCED COUPLES

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Introduction

In this paper I intend to examine ways in which the problem of child poverty might be remedied by legislative reform. The legislative activity taking place at present means that this is a matter of current, as well as social, importance (1). The paper is not intended as an arid academic exercise, but as a contribution to the debate about the future direction of reform in this area. The emphasis of the paper is on the effect of legislative provisions outside the court-room. When more than 90% of divorce disputes are not resolved by judicial adjudication, it is vital to an understanding of the law to examine its out-of-court operation (2). This demands that we consider how the provisions of the Family Law Act are used in negotiations, and the effect of the relationship between parents' rights against each other, and parents' rights against the State. But therefore considering ways in which the interests of children might be protected on divorce, it is necessary to give a brief introduction to the nature of the problem of child poverty and its relationship with matrimonial breakdown.

Child poverty and divorce: the nature and extent of the problem

The inadequacy of child support, and the consequent impoverishment of children who are victims of divorce, is a feature of many western societies. In the United States, Weitzman (3), and in the United Kingdom, Maclean and Eekelaar (4) have arrived at conclusions striking for their similarity to those found by the Institute of Family Studies in Australia (5). Levels of child support in court orders and private agreements are inadequate to compensate for the economic costs of child-care (6); these orders and agreements are rendered even more inadequate by their non-performance. Although matrimonial breakdown is not the only cause of poverty, there is overwhelming evidence that it is a contributory factor to the problems encountered in a substancial number of households living close to the poverty line (7). Are there ways in which the problems of child poverty on divorce might be redressed by reforms to the support scheme set out in the Family Law Act?

What are the rights if children on divorce?

Discussing the problem of child poverty in the context of the Family Law Act highlights one of the most important points in any discussion of children's rights – the paradox of the centrality we accord, or try to accord, to the welfare of the child, while simultaneously denying the child full legal capacity (8). The child's interests usually come before the court through the agency of the parental relationship. This paradox is not unique to the law of divorce. But what is the manifestation of this paradox in the law governing child maintenance? The general framework of post-divorce support arrangements is that the financial provision for the child is decided between the custodial and non-custodial parents. Although this decision may be made by a judge, it is more likely to be decided by the parties themselves, perhaps with the aid of their legal representatives. The role of the court is more likely to be that of providing precedents as some sort of guide to negotiations, and of ratifying the agreement to give it the effect of a court order.

Allusions to illusions in the debate over child support

The first way in which amendments to the present framework might improve the position of children would be to abolish the duty of the court to terminate the financial relationship between the spouses wherever this is possible. The Family Law Act draws a distinction between child support, governed by sections 75 and 81. What must be questioned is the internal consistency of the statute. Section 81 imposes a duty on the court to terminate the financial relationship between the spouses. Yet if the children are to live in the same house, and eat off the same table as their custodial parent, how can a distinction be made between the welfare of the child and the welfare of the child-carer (10)?

One of the rationales for section 81, and its equivalent in other jurisdictions, was the notion that without a provision to that effect, a swarm of alimony drones would devastate impoverished ex-husbands (11). The arguments based on the problems of such drones are remarkably unemcumbered by any empirical evidence as to their existence. The empirical evidence as to the nature of the post-divorce financial relationships seems overwhelmingly to the effect that the limited amounts of money which do change hands are associated with child-care responsibilities (12). If section 81 was designed to resolve a non-existent problem, then this of itself should give us no more concern than any other of the anomalies so beloved of ivory-towered academics.

Yet such a provision might have an impact on the living standards of children by weakening the strategic position of child-carers. If there is a presumption that child-carers are not be awarded support for themselves, their strategic position in negotiations is less strong than were they to be in position of a bargaining chip in favour of support (13). Section 81 may be one of the factors which has led to the creation of a climate where non-support appears to be the norm. Negotiating parties may not necessarily draw the same distinctions as the legislature between spousal support and child support. (Though some solicitors in the writer's sample tried to persuade their clients to make payments by pointing out that monies were for tihe children rather than for their spouse.) From the writer's research into out-of-court negotiations in England, which took place immediately after the enactment of the equivalent to section 81 (14), it was clear that some clients had the impression that the effect of the amendments was to remove post-divorce liabilities generally.

Therefore I would argue that the effect of section 81 outside the court-room may be to validate the illusion of the alimony drone, and in so doing, to threaten the position of child-carers, and the welfare of their children. In other words, section 81 may violate the right of children to have their future welfare considered by their non-custodial parent. I now plan to consider another way in which the current statutory framework threatens the welfare of children by reason of its impact on out-of-court processes.

The implications of discretion for the rights of children

One of the most striking characteristics of family law is the breadth of the discretion accorded to trial judges by the Family Law Act. It is often stated to be a virtue of discretion that it maximises the possibility of doing justice in every case (15). Yet if we accept that most cases are **not** decided by judges, this particular advantage if discretion seems limited to the small proportion of the totallity of divorces which are resolved by judicial adjudication. The effect of the discretion in the 95% of cases resolved outside the court-room seems to be the precise opposite of the purported justification for discretion. The discretion in the level of child maintenance seems to be little more than a discretion for the non-custodial parent not to provide adequate support for the children of the marriage. I would argue that this discretion operates against the interest of the children, not only because of the lack of legislative guidance as to the proper levels of child-

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support, but also because the consequence of discretion, that is, the uncertainty of the probable outcome of the case was to be litigated, is prejudicial to the interests of child-carers. The argument here is over the question of child maintenance, but could also be applied to the law governing matrimonial property (16). The question is the same: is the maximisation of the possibility of justice inside the court-room achieved at the expense of minimising the possibility of justice outside?

Discretion and out-of-court negotiations

From the writer's research into out-of-court negotiations, one of the most important findings was that negotiations must be seen as taking place on two levels. The parties are working towards a final settlement; but at the same time as this is taking place, they must negotiate their day-to-day survival. If one of the parties has income from employment, then that party will have less need for a settlement than a party who depends on the settlement itself for economic security. The need for a settlement puts pressure on the economically weaker party to settle. And the pressure to settle is increased to the extent that the possible outcome in court is more uncertain (17).

One way of lessening this pressure is to provide the economically weaker party with some form of security during the negotiations, by making the outcome of a contested hearing more certain. The presence of so much discretion in matrimonial law means that the only security, or entitlement, of the non-custodial parent, can be reduced to the right to apply to the court for a discretion to be exercised (18). The uncertainty of the result of this application is another pressure to settle for what has been offered. In other words, economically weaker parties are not well-placed to withstand the emotional and financial transaction costs involved in applying to the court. Yet the main cause of this economic weakness is the interuptions to women's earning capacities caused by child-care responsibilities (19). The interests of children, whose welfare we apparently deem to be paramount, is threatened because the people who care for them are economically disadvantaged by having cared for them. In what way could the effect of the inequalities be removed, or to put the question in another way, how could the welfare of children and those entrusted with their care be advanced in the law governing matrimonial breakdown?

Formulae as an alternative to judicial discretion

One technique of making outcomes more certain is to employ mathematical formulae. The objections to the use of such formulae are usually based on the ground that they remove the discretion of judges, and may cause injustice by their inflexibility (20). But as the flexibility of discretion seems to have been lacking in its ability to deliver justice to the children of divorce, formulae are worthy of at least our consideration. There have been attempts by judges in both Australia and England to impose mathematical formulae on the schemes comprised by the Family Law Act and its equivalent, the Matrimonial Causes Act (21). In Australia, these attempts have been cut down by the High Court, on the ground that they fetter the discretion of trial judges in a manner authorised by the statute (22). Yet if we return to the theme of this paper, that law can only be fully understood if we examine its full operation outside **and** inside the court-room, it could be argued that formulae have the advantage of providing stronger entitlements for custodial parents.

The research of McDonald and Weston at the Institute of Family Studies indicated that effect of the provisions currently in operation appears to be that there is a 'going rate' of about $20 per week per child (23). This rate has two stark features. First, it is inadequate. Second, is unauthorised by the statute. The rate itself can be partially explained on the ground that it falls just below the level at which supporting parents' allowances would be curtailed (24). This illustrates the point made earlier, that looking at the way the law operates outside the court-room draws attention to the interaction between public and private law entitlements. In the writer's research, it was clear that lawyers treated the two sources as different means to the same end, that is the meeting of the client's needs. The close links between social security and post-divorce support have led to calls for a re-assessment of the relationship between the two (25). It may be that the level of maintenance would increase if this particular aspect of the poverty trap was removed (26), but it seems unlikely that child poverty is caused solely by this.

Although the average level of maintenance seems to fall just below the level at which payments have an impact on social security entitlements, it falls far, far below the level of what constitutes the real cost of child-care. Research carried out by Lovering at the Institute of Family Studies shows that the cost of child-care is significantly greater than $20 per week (27). These figures were updated in a recent issue of the Law Institute Journal. The cost of a teenage child, and this is only the cost of basics such as food and clothing, is calculated at 90.64 for a middle-income family (28).Lovering's figures took into account variables of income and of the age of the child. Her figures are strong evidence for the proposition that the costs of child-care are not being met by non-custodial parents under the present system. The poverty of children of divorced couples therefore represented by the gap between the cost of child-care and levels of child support. This underlies the call for formulae to be used in the calculation of child support. As the Cabinet Sub-Committee's discussion paper states, 'The Government has decided that the use of a standardised formula would ensure that maintenance payments better reflect the non'custodial parent's capacity to pay' (29).

The impact of formulae on out-of-court settlement

In order to understand the potential advantages of formulae, let us imagine the impact of a formula in the period constituting the immediate aftermath of the separation. When a custodial parent visits her solicitor, one of her main concerns is likely to be the security of her position as the custodial parent. Financial security is an important element of this. There is a world of difference between on the one hand, a right to a certain amount of money, calculated with reference to the child's needs and the non-custodial parents ability to pay, and on the other , a right to apply to the court for an exercise of discretion with the understanding that the going rate for agreements is $20 per week. It may be that an application to the court which is carried through to a contested hearing will lead to a figure higher than $20 (30), but it must be remembered that one of the last things which clients wish to face in the immediate aftermath of matrimonial breakdown is an application to the court. A formula would give security outside the court-room and would put the burden on the non-custodial parent to argue for the non-application of the formula.

Of course, the effective operation of such a formula would depend on reliable enforcement mechanisms. This paper does not permit a full consideration of all the proposals being discussed at present, other than to say that collection of maintenance through the tax system (31), is undoubtedly more effective than relying on the discretion of the non-custodial parent after the wage packet has been received. The current system relies on the custodial parent to enforce the obligation; wage attachment involves the state in what is, after all, a matter of public policy, the welfare of children of divorced couples. Looking at formulae from the point of view of their impact outside the court-room gives us a perspective with which to consider what sorts of formulae might be most suitable for the protection of children from poverty.

The simpler the better?

Since the objections to formulae are based on the injustices which might be caused by their application, it is not surprising that some of the proposals are

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very detailed, to take into account as many exceptions as possible (32). My comments are simply as follows. The more straightforward the formula, the more effective it is likely to be as security for the non-custodial parent. This is because the more complicated formulae are closer to the recent system of discretion than the more simple ones. The greater the demand for external help in the application of the formula, the greater the discretion for the non-custodial parent to avoid payment. My proposals for a formula are as follows. Stage one of the process should be the payment to the custodial parent of what are deemed to be the costs of child-care. The custodial parent is entitled to that figure as of right. Stage two should be the resolution of any disputes arising (i) between the child support agency, whoever this is, and the non-custodial parent; and (ii) between the custodial parent and the agency if the custodial parent is able to contribute. There are two characteristics in this formula. One, it is simple. Two, it puts the interests of children first, before the interests of non-custodial parents. The onus would be on the non-custodial parent to prevent payment of child support to the relevant agency. The custodial parent need do nothing more than claim the relevant sum.

Conclusion: What price the welfare of the child?

I accept that these are not likely to receive wholesale approval. It might be argued that some children of divorced parents would be better off than children of married parents, because there is no scheme for guaranteeing the transfer of resources of the custodial parent within marriage. (The logical extension of this scheme would be for it to cover all families, i.e. that the state should assume total responsibility for allocating the costs of child-care.) I accept also that consideration would have to be given to the relationship between this scheme and the social security framework.
But these problems should be addressed after the problems of child poverty have been removed. In other words, the welfare of the child should be the first consideration, the welfare of non-custodial parents, of revenue and the social security system, second considerations. These proposals are suggested as an indication of how far we have to move from the present system in order to safeguard children from poverty. Whether or not they are implemented will be a measure of whether children's rights are a meaningless political slogan, or a genuine concern of the legislature.

The Right to Protection from Poverty of Children of Divorced Couples: Notes

1. Howe (1986)

2. Mnookin (1979); Ingleby (1986) p262; Howe (1986) p10.

3. Weitzman (1985).

4. Maclean and Eekelaar (1983); Eekelaar and Maclean (1986a)

5. McDonald (ed) (1986)

6. McDonald and Weston (1976) pp4-8; Maclean and Eekelaar (1983) p34; Howe (1986) p8; McDonald (ed) (1986) p122, p264.

7. McDonald and Weston (1986) p13; Howe (1986) pp11-13!

8. Freeman (1983) chapter 1.

9. The importance of this principle was recently stressed by the Full Court of the Family Court in *Mee and Ferguson* (1986) FLC 91-716.

10. Ingleby (1986) p258.

11. Ingleby (1986) pp261-2.

12. Maclean and Eekelaar (1983) p23; Ingleby(1986) p261 and the authorities there cited; McDonald (ed) (1986) p261.

13. Ingleby (1986) pp263-4.

14. The research was carried out at the Centre for Socio-Legal Studies, Wolfson College, Oxford. It is present in further detail in Ingleby (1988).

15. See, for example the speech of Mason and Deane JJ in *Norbis* (1986) FLC 91-712 at 75,166.

16. Ingleby (1989 forthcoming).

17. Ingleby (1989 forthcoming).

18. Ingleby (1986) p261, p265.

19. Martin and Roberts (1984); McDonald (ed) (1986) chapter 5.

20. A striking contrast with the speech at note 15 is that of Wilson and Dawson JJ in the same case at 75,174.

21. *Wardman and Hudson* (1978) FLC 90-466; *Wachtel* (1973) Fam 72.

22. *Mallet* (1984) FLC 91-507; Ingleby (1989).

23. McDonald and Weston (1986) p26; McDonald (ed) (1986) p261.

24. McDonald and Weston (1986) p43; Maclean and Eekelaar (1983) pp21-27.

25. Maclean and Eekelaar (1983) p35; Eekelaar and Mclean (1986) pp124-31.

26. Welfare Rights Unit (1987) p8.

27. Lovering (1984).

28. *Law Institute Journal* (1987) 1062.

29. Howe (1986) p15.

30. An example being the custodial parent in *Mee and Ferguson* at note 10.

31. Howe (1986) p15.

32. Eekelaar and Mclean (1986a) pp115-37; Eekelaar and Maclean (1986b) pp838-9; McDonald (ed) (1986) p321; McDonald and Weston (1986) pp27-42.

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