LAYING DOWN THE LAW

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There is a lot of unnecessary mystique about law. It's true that some laws, such as tax, are very technical and complicated. But even tax can be translated into English, and to understand it calls for persistence rather than genius. Most areas of family law have few technicalities, and can be readily understood by anyone who is interested. The **Family Law Act** itself is perfectly readable, for instance.

In this column I will be writing about bits of law — sometimes outlining a particular area, sometimes mentioning recent developments. I hope the column will be a two way process: I would like to draw on your reaction in selecting topics, and pursue controversial issues. In particular, I'd be very glad to hear of specific cases. My job, while very nice, tends to insulate me from a lot of the hustle and hassle of real life legal problems, and I should be able to use anecdotal material to stop this column from getting too abstract.

I'd also welcome any other reactions, whether brickbats or bouquets. Writing a column like this is rather like shooting in the dark, and the more I know about readers' reactions, the more I can make it relevant to their interests.

In this first number I will outline the law relating to custody of children.

CUSTODY OF CHILDREN AND THE FAMILY LAW ACT

When parents separate and cannot agree about the care of their children, the law usually refers to the problem as a dispute about "custody", a word which has overtones of the prison rather than the family. Actually, a number of legal terms must be disinguished: a child's **guardian** is the person who is responsible for him — he has the right (and the duty) to make such decisions as where the child will live and go to school, whether he will undergo serious medical treatment, and so on. Formerly, the father was the child's guardian, but since the **Family Law Act,** which came into force on 5 January 1976, both parents are guardians. They have equal rights, and equal duties. The word **custody** usually refers to the situation after a court has determined a dispute: the parent having custody is the one who lives with and looks after the child from day to day, and makes most of the decisions affecting his life. The other parent usually has **access,** which amounts to the right to visit the child or have him stay with that parent at certain times, typically weekends and school holidays. There is a further complication: sometimes courts order that the parents have **joint** custody, but one parent have **care and control** of the child. This order means both parents have to be involved in the child's life. For example, if a mother has custody and the father access, the mother can decide where the child should go to school. But if the court has ordered joint custody, with the mother having care and control, she would have to consult the father. If they could not agree, either could refer the question to the court.

These technical terms — which even in law are not very clear — do not really give an adequate view of the court's function. In fact, the court has the task of working out an arrangement for the future relationship between the parties family members after the parents have separated. For example, the court might make an order about the name of the child, or might order that the child should not be brought into contact with a certain person. It is more realistic to think of custody orders as a court's ruling about how the children are to be cared for now that the parents have separated. The word custody is used because in most cases the real question is whether the children will live with the mother or father: the 'losing' parent is usually given an order for 'access'.

Which children come under the Family Law Act? Only three groups:
children (1) born to married parents

children (2) born to a couple who subsequently marry and Children (3) adopted by a married couple.
This excludes:
ex-nuptial (or "illegitimate") children and
children (2) of only one party to the marriage.
These children are not within the Family Law Act (a Commonwealth Act) and cannot be dealt with by the Family Court (a Commonwealth Court). They must be dealt with under State Law, by a State Court. This is silly. Jack marries Jill, and they have a child, Fred. Jill dies. Jack marries Mary. They have a child, Ethel. After some years, Jack and Mary separate and cannot agree over the fate of the children. Under the present law, the custody of Ethel is decided by the Family Court, because Ethel is a "child of the marriage"; but the custody of Fred is decided by a State Court, because he is not "A child of the marriage" within the Family Law Act.

As Julius Sumner-Miller is fond of asking, Why is it so? Because of something nearly as basic as the laws of physics — the Constitution. The Constitution gives the Commonwealth Parliament power to legislate about specific things, in particular "marriage" and "matrimonial causes". If it goes outside those powers, the legislation is invalid. In 1976, the High Court ruled that parts of the original Family Law Act, including those which would have included step-children as "children of the marriage", went beyond the constitutional powers. Consequently, the Act was amended so it was within what the Constitution said, or, more accurately, what the High Court thought it said. The High Court gave no considered reason for their decision on this point. Yet the decision is likely to cause inconvenience and distress, and even injustice. The irony of it is that the previous Act, the **Matrimonial Causes Act, 1959,** was the work of the present Chief Justice, Sir Garfield Barwick, when he was Attorney-General, and had contained the **same provision,** which had gone unchallenged since 1961. However, there is a light at the end of the tunnel. A recent constitutional convention recommended that the Commonwealth's powers over family law should be increased, and the Attorney-General of N.S.W., Frank Walker, has indicated his willingness to hand over State power in this area. This would be a good thing.

How are custody cases decided? In a sense, this is easily answered: the law is that in whatever Court a custody matter arises, the Court must regard the child's welfare as "the paramount consideration". This is the rule under the Family Law Act and under the relevant State legislation.

The courts have had surprising difficulty understanding this apparently simple and emphatic phrase. In older cases, the courts often said that the world "paramount" shows that there are other considerations, such as the rights of parents, which must also be given weight. However more recent cases have given full effect to the words of the statute, and it is now accepted by the Family Court that the Court's task is to make the order that best promotes the child's welfare. The same conclusion was reached by the House of Lords in a case in 1973. However, there are still pockets of resistence. In particular, some judges feel that decisions about **access** can give more weight to the rights of the parents; it is a terrible thing, they say, to deny access to a parent who has done no wrong. The leading view now is that the principle is the same as for custody — it depends on what is best for the child. Access is the child's right to maintain contact with the parent, not the parent's right to maintain contact with the child.

Even if the courts have managed to confine their attention to the child's welfare, this does not enable us to predict the result in cases where it is unclear what order will in fact best advantage the child.

Reading the cases, one can identify certain tendencies, or rules of thumb, which the courts tend to follow. It must be stressed, though, that the courts these days try to examine the total picture, and do not always follow these rules of thumb if they would result in the wrong decision. Also, the rules may themselves conflict in particular instances. With these elaborate qualifications, let me unveil what are (in my view) the "top five" rules of thumb at present:-

1. Where children are in an established relationship with a parent or parent substitute, or other adults and children, they should not be moved.

This seems now to be the dominant principle. It is largely the result of writings by developmental psychologists and others to the effect that disruptive change can damage children — in this context, the book **Beyond the Best Interests of the Child,** by Goldstein, Freud and Solnit (1973) has been very influential. It is also based on the view that prediction is very difficult in children's cases, and if the existing situation is satisfactory it should be left alone.

2. Siblings should not be separated.

3. Where children are above ten years or so, boys should be with Dad and girls with Mum.

This is much weaker than the first two.

4. Babies and young children are best with Mum.

This is hotly debated at present, but it is rapidly slipping down the charts. Judges who wish to keep in touch with other disciplines now realise that much water has passed under the bridge since Bowlby's early work led to simplistic talk of "maternal deprivation" (See eg.)

Michael Rutter, **Maternal Deprivation Re-Assessed** (Penguin 1971). The Family Court has recognised that it is now common and more respectable for fathers to look after young children, and stressed that each case must be looked at on its merits. In a sense, the "mother principle" has been replaced by the "continuity principle" (1. above). Fashions change. Maybe in a few years the continuity principle may seem as crude and unsupported as the mother principle now appears to be.

5. "Immoral" parents shouldn't have custody.

After a record run — about two hundred years — this little number is barely making it to the charts. Last century, it was on everyone's lips. Sir Cresswell Cresswell, in a popular version (1862): "It will probably have a salutory effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery, will forfeit . . . all right to the custody of and access to her children". In a revival in 1962, Lord Justice Denning crooned (as he gave custody to a father) "A mother must realise that if she leaves and breaks up her home in this way she cannot as of right demand to take the children from their father". These days the tune is rarely heard, except in a muted form. Recent decisions have given custody to a lesbian mother, as well as "promiscuous" women (we hear less of promiscuous men), and homosexual fathers have successfully resisted the adoption of their children. Any credibility the rule might have had is lost through the absence of evidence of harm to the children, and the peculiar identification of an active sex life with immorality (tax evasion, for example, is never seen as immorality).

There are some other important aspects of the **Family Law Act:**

1. The Court Counsellors. Attached to the Family Court is a team of counsellors. They play a large part in custody matters. They sometimes talk with the parents and children to help them through the experience, sometimes help the parents come to an agreement about the children, sometimes provide background reports to the court. They are rapidly gaining the confidence of the judges and the legal profession, although they are understaffed in many places and there are aspects of their role still to be worked out. Overall the innovation of having counsellors attached to the court is one of the most significant advances in family law in recent years, and holds great promise for future development of the Family Court as a "helping court".

2. Some particular rules:

Children over fourteen can decide who they want to live with, unless the Court is satisfied that this is not in their interests. (i)

The Court can (and often does) appoint separate legal respresentatives for the children. (Formerly only the parents were represented). (ii)

Access orders can be supervised by a welfare officer. (iii)

Custody orders, unlike adoption orders are not final. They can be changed on the application of either parent as the situation changes. (iv)

Legal aid is available (subject to a means test) through the Australian Legal Aid Office. The applicant can either apply to the A.L.A.O. or use the solicitor of his choice and have the solicitor make the application for legal aid. (v)

Custody applications, like applications for maintenance, can be made quite independently of a divorce application: you don't have to wait until you become entitled to a divorce (after twelve months separation). (vi)

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