WHY TWO JURISDICTIONS?

SOME ASPECTS OF THE HISTORICAL CONTEXT OF THE DECISION TO MAINTAIN SEPARATE COURTS FOR MARRIED AND UNMARRIED PARENTS IN RELATION TO PARENTAL RIGHTS IN VICTORIA

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Many professional people working with families are frustrated by the fact that there is still a marked differentiation made between children of married parents and children of non-married parents in the courts. This division has persisted in spite of legislation to remove the status of illegitimacy and the reasons for this are far from obvious to those who are not lawyers. This paper traces the historical background of this split in jurisdiction between State and Federal Courts (i.e., the Family Court) and concludes that it is based on an anachronistic view of State's rights which no social group or political party would support today.

INTRODUCTION

Many professional people are concerned about the fact that the socio-legal consequences of family disorganisation are dealt with in the Family Court if the parents are married, and in State Courts if they are not. It is well known that the underlying reason of this concerns the division of legislative powers between Federal and State authorities, as set out in the Commonwealth Constitution.

This article examines the historical context of the decision, which seems so incongruous to us today, to separate powers dealing with matters concerning parents and children, and attempts to explain why the constitutional provisions governing relationships between, on the one hand unmarried parents and their children, and on the other hand, married parents and their children, were split off so decisively from one another.

The main Federal legislation is the Family Law Act 1975. Several Victorian Acts dealing with parents and children is contained in Section 51 (XXI) and (XXII) of the Commonwealth of Australian Constitution Act 1901 which provide that:

> the Parliament shall, subject to this Constitution, have powers to make laws for the peace, order and good government of the Commonwealth with respect to:
> (XXI) Marriage
> (XXII) Divorce and Matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.

An implication of the words 'in relation thereto' is that children whose parents are not, or have not been married to one another, do not come within the ambit of federal power.

The consequences of this decision to separate jurisdictions first became apparent in the early sixties when the Commonwealth Parliament began to exercise its powers with regard to marriage under S.51 (XXI) of the Constitution, and with regard to divorce and matrimonial causes under S.51 (XXII).

In this paper the division just mentioned is explained in terms of the circumstances which influenced legislators' attitudes at the time the Australian Constitution was drafted. As a consequence, the provisions of the Act, whose effect was to distinguish between unmarried and married parents, do not fit the new circumstances and attitudes about marital status which developed in the twentieth century.

Much of the debate about the division of State and Federal powers in the Constitution took place in the short period beween 1880 and 1900. At this stage most States had already enacted legislation about parents and children. By 1890 Victoria, for example, had a reasonably developed framework of laws in this area and this paper will focus on that States' legislation.

LEGISLATION ABOUT PARENTS AND CHILDREN IN NINETEENTH CENTURY VICTORIA

Matrimonial Disputes

At the time of separation of Victoria from New South Wales in 1851, the rights of a father to custody of his child under common law still prevailed, although this had been slightly modified for children under seven by the Custody and Infants Act 1839.

Divorce could only take place by means of a private act of parliament. Shortly after the first British divorce legislation in 1857, Victoria sought to introduce its own Act which included provision for divorce on the grounds of desertion.

This was not, however, acceptable to the Imperial government, and a statute similar to the British Act was passed in 1861 limiting the grounds for divorce to adultery. This confined the relief available for many. Divorce remained an expensive procedure, available only in Melbourne, and it was considered a very serious affair, (for instance, three judges were needed for a divorce but only one for a murder trial). Children whose custody was at issue tended therefore to belong to prosperous families and to be in little need of state protection.

The 1889-90 Marriage Act (Sheil's Act) widened access to the divorce law. It allowed divorce on grounds of desertion,

drunkenness and cruelty (s.74) and made specific provision for the benefit of children in case of separations and divorce (Part X). The court could order custody or access to the mother where the child was under 16 (s.31), in which case the father could be odered to pay maintenance (s.32). But it was not until 1898 that divorce could be obtained more cheaply. The number of divorces increased during the decade, but since the numbers averaged merely150 per annum only a few children were affected (Burns & Goodnow, 1979, pp 21-1). What is important to note is that the children of divorced parents were still considered to be legally connected to their parents and were not charges on the state.

Child Welfare Legislation

The legislation concerned with children for whom the government had to accept responsibilty and who were charges on the state developed quite separately, although it was enacted over the same period. Even before the passing of the first divorce law in Victoria, the need for the government to act to protect abandoned, exploited or neglected children became imperative. The attempts to include desertion among the grounds for divorce in 1859 may have been designed to cope with some of these problems, but by and large the protective legislation was quite different in its aims from divorce legislation. It set out to save children from dissolute adults by instructing them in 'habits of virtue and industry' (Gandevia, 1975, p.109).

Before 1860 neglected children were supported in orphan schools supplemented by public funds but run by voluntary associations. Melbourne had three such orphanages in the 1850s. The Government would have liked to have maintained this model but the gold rushes left many more children abandoned and the system of dual control broke down under pressure. By 1858 a large of number of children had to be housed in gaols (Gandevia, 1975, p.110).

Some of these children were orphans but many more were children of deserted wives or single women. Occupations open to women were on the whole very poorly paid, and although there was a high demand for domestics, children could not accompany their mothers into service (Burns & Goodnow, 1979, p.29). The Deserted Wives and Children Act, 1940 inherited from New South Wales, extended some protection to illegitimate children (4 Vict. No.5, s.8) but had proved inadequate by 1860. The Neglected and Criminal Children Act, 1864, set up more extensive orphan institutes, industrial schools and reformatories (ss.3,4). A definition of 'neglected children' was provided and such children could be brought before magistrates and committed to the care of the State (s.13),

The number of children committed immediately following the 1864 Act exceeded all expectations; a quarantine station, a warship and Royal Park Receiving House were needed to house them. Death and disease ravaged the inmates of these institutions, among whom were a significant number of children of unmarried unions (Gandevia, 1975, p.131). Even though the Act provided for minimal standards of care for children, in reality single mothers faced a grim choice. The Argus reported in 1872 an inquest on a 2 year old child who was born 'healthy' but put out to nurse at 10/- per week. The mother removed it from foster care when it failed to thrive but the child died soon after. The cause of death was found to be starvation (30.4.1872). Again, the Australian Sketcher reported the discovery of the bodies of three dead infants in Eaglehawk, Carlton and Hotham all on one day in 1873 (9.8.1873). The Age commented on the situation as follows: "Infanticide no longer holds an exceptional place in the ordinary calendar of modern times. It occurs so frequently that society has ceased to think of it in the same category as murder". (18.1.1873).

Thus the 1864 Act was regarded as a failure. Following a Royal Commission in 1872, the Act was amended in 1874 to allow children to be boarded out with families (Neglected and Criminal Children's Amendment Act (1874). Severe penalties for ill-usage of boarded-out children were imposed (s.16).

This scheme was so successful that by 1880 large children's institutions fell into disuse. But not all neglected children were cared for under the auspices of the Neglected Children's Department which had been set up to administer the new scheme. Commercial baby farmers were beginning to set up in business and a number of children of unmarried mothers died through accident or deliberate neglect. The Victorian Infant Asylum (later Berry Street Foundling Hospital) was set up by volunteers in 1877 to protect such children and rescue mothers from further degradation. This home and others like it were criticised as encouraging immorality. However, the obvious evidence of increasing infanticide (Hyslop, 1980, pp. 206-210), forced the passage in 1883 of the Public Health Act which provided inter alia that not more than one child, or two if twins, under two years of age, could be placed for care for more than 24 hours without registration (s.61). The Victorian government had perforce become deeply involved in child welfare by this stage, and in 1887 The Neglected Children Act and the Juvenile Offenders Act were also passed. These effectively separated children in trouble into two categories: those in need of protection and those guilty of crimes. It seemed, however, that the Government was not anxious to make the grim circumstances of these children a public issue. The Hon. T. Sargood, M.L.A. claimed, for instance, 'we have little experience of what is known as baby farming'. He said further that it was a good idea to enact suitable legislation on the British model in order to prevent future social ills (Victorian Parliamentary Debates, 18th October, 1983).

Contemporary commentators disagreed. The Bulletin pointed out the dire results of forcing unwed mothers to conceal maternity, thus leading to their placing children where they have been 'strangled or exposed, as part of ordinary business of the establishment' (8.10.1887). By 1890, Mr. Sargood had apparently changed his mind since he now referred to infanticide as a 'growing evil' (V.P.D., 17.8.1890), and the Hon. D. Melville, M.L.A. quoted figures to show that in certain foundling hospitals, only 4% lived to adulthood (V.P.D., [L.A.], 26.8.1890).

In the course of the consolidation of legislation which took place in 1890, the Victorian Government amended and extended much of the law relating to child welfare. The Health Act 1890 contained a section on Infant Life Protection and this was extended and separately enacted later in the same year in the Infant Life Protection Act 1890. This Act made more detailed provision for state supervision and provided severe penalties for various categories of neglect (s.17). Special attention was paid the protection of illegitimate children and the occupiers of houses where illegitimate children were born were required to register the birth within three days (s.18). The Neglected Children Act 1980 also required that provision of care for older children be more exigent and comprehensive. The Marriage Act 1890, which was mentioned above in connection with children of private families, also made special provision for maintenance and affiliation procedures of direct benefit to illegitimate children (ss. 32-37).

The view was still expressed by some members of the Victorian Legislative Assembly that the provision of higher standards of public care could actually increase the number of children abandoned (V.P.D. [L.A.], 18.12.1890), but the idea which prevailed was that "the state must have a place for abandoned children" and that Victoria would provide an example to other countries in this regard (V.P.D. [L.A.], 26.8.1890).

One is left to conjecture whether this comparatively elaborate system could have achieved its aim had not Victoria been hit by severe depression in the 1890s. Victorians had good reason to think they were beginning to cope with their problems but were not anxious for their failures to be publicised at the time the early debates on federation were getting under way.

In 1893 the problems of economic depression, unemployment, sweated labour and the indigent aged were so great that the plight of children was almost a minor consideration (Hyslop, 1980, p.207). Sir Henry Wrixon, for example, spoke despairingly about "a large number of improvident persons who were always seeking to throw their children on the state" (V.P.D. 7.10.1859).

What did arouse public outrage was a series of scandals concerning baby farming. In 1892 the Makin case in Sydney caused The Age (3.4.1893) to castigate the Chief Secretary for laxness in registering baby homes. In 1894 Melbourne had a bad case of its own in Brunswick. The bodies of

three "infants were discovered buried in the yard of a house near the corner of Moreland Road and Lygon Street. This house was surrounded by vacant houses" with broken windows which crowded the vicinity with their 'to let' notices and general appearance of dropping to pieces" (Brunswick had been the centre of the now quite defunct building industry) (The Age 6.9.1893). A Mrs. Thwaites, the former tenant, was identified as Mrs. Frances Knorr and was later convicted of murder and hanged.

The impetus to make better provision for children was stirred by the knowledge that the Makins and the Knorrs were only the bunglers among a large class of baby farmers whose business it was to relieve parents of the charge of their legitimate and illegitimate children (the Age 11.9.1893). The story of Miss Ada Hicks, charged with abandoning her son, bears this out. She explained in court how she could not get work if she kept her son and she could not pay anyone else sufficient money to take over his care. She took the advice of her employer (she was a domestic servant), and left the child under a street light in Orrong Road near High Street in order to get him cared for by the state, seeing this as the best alternative available to her (R. v. Kowbcke, 1894, V.L.R. 373).

The newspapers continued to denounce the inertia of the authorities and to invite readers' comments, and the question was debated at regular intervals until the end of the century.

The statistics on infant mortality confirm the impression that the young fared badly between 1890 and 1900 in Victoria. In 1894 there were 29.2 deaths per 1000 female children under five years of age, and in 1898 there were 41. The comparable figures for male children were 34.6 and 46.9 respectively (Victorian Year Book [V.Y.B.] 1895-98, 689).

The children in the worst position were those born to unmarried parents. By 1901 deaths among illegimate children were 25.5 per 100 births as against deaths among legitimate children of 9.39 per 100 births (V.Y.B. 1901, 191).

The immediacy of the problems, State pride and the obvious need for local actions all tended to keep these issues away from the Federation Debates agenda. This was in spite of the fact that the participants included the same men who had debated the 1890 child welfare legislation in the Victorian Parliament, for example, Sir James Service, Mr. A.J. Peacock, and Dr. Mononey (Quick, 1893, p. 28). At that time (1890), Victorian politicians assumed that the legal needs of illegitimate children were to be met by including them in the category of neglected and abandoned children.

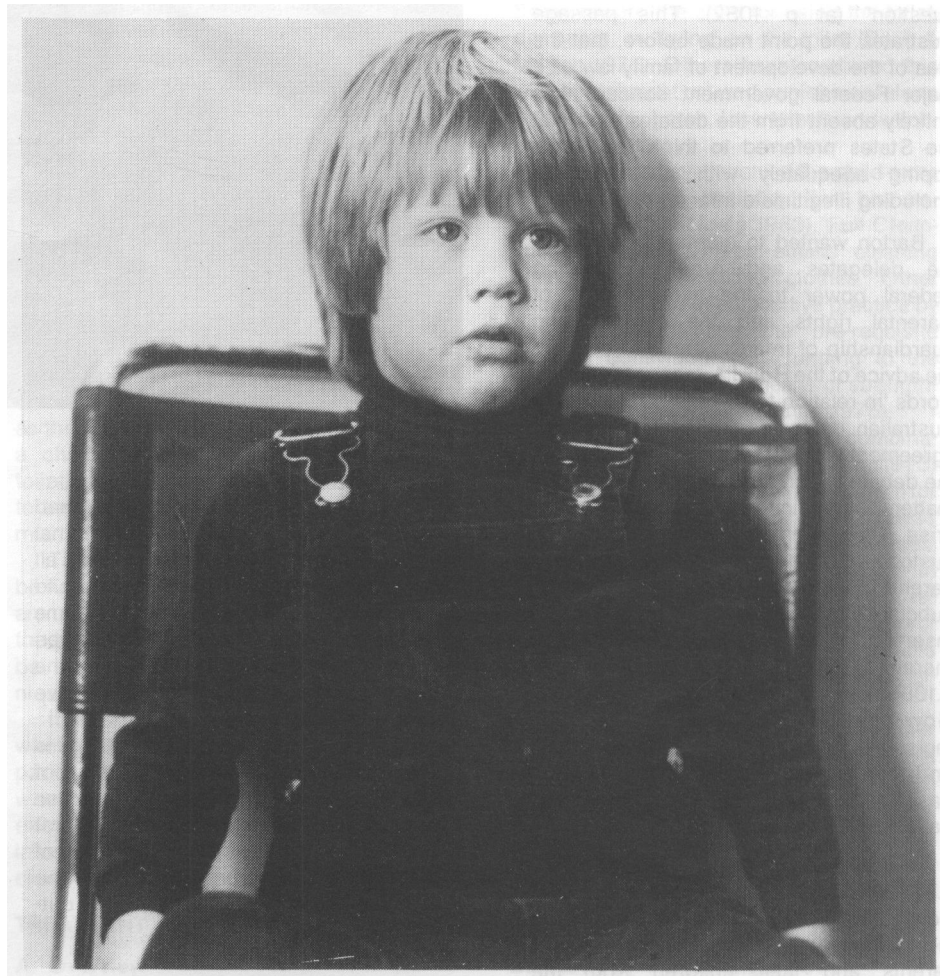
The Federation Debates

When the issue of children's welfare was raised in the Federation debates it was mostly in self congratulatory terms by delegates talking about their own State governments' achievements. In spite of the intensity and coverage of the debates on Federation, little time, comparatively speaking, was given to the discussion of parental rights and children's welfare.

None of the founding fathers was interested in handing over State powers with regard to parents and children to some national body. Nor, for that matter, were local politicians willing to reveal the skeletons in State cupboards.

For most people the aspirations of Federation were directed to the ideals of new nationhood, not to the intractable and seamy problems of ill-used children. In the words of Sir Henry Parkes, quoted by Sir John Quick in 1892: "Federation was so lofty and sublime; its teaching so essentially grand, that this country would never have a second opportunity to do work of equal glory and magnitude. The making of a nation was a thing done only once; it was never done a second time". *Marriage, or at least the rules for its celebration and recognition, as well as a universal divorce law, were envisaged as eventually being a national concern if only to avoid the inconvenience of one person being married in one state and not married in another. The number of divorces was still very small in 1900. Only 1,489 divorces had taken place in the 30 years prior to 1890 (V.Y.B. 1902).

The Federal Council of Australasia had listed marriage and divorce as a possible future item for Federal legislative power. The topic was not included in discussion at the Federation Conference in Melbourne in 1890 although the Sydney Convention in 1891 included a Federal Marriage Power in its draft. In the Adelaide Convention in 1897, marriage and divorce were allotted separate subsections but were not qualified in any way (C1.52 [XXI] and [XXIV]). But later in the same year in Sydney, the South Australian Legislative Assembly delegates wanted the divorce subclause omitted, as they disapproved of the liberal divorce law in Victoria and New South Wales. They were supported by the Tasmanian delegates: "We want to allow communities themselves to decide on such a sensitive moral issue". They also hastened to point out how much more moral the citizens of South Australia and Tasmania were than their counterparts in other States (The Australasian Federal Convention Official Record of Debates Second Session Sydney 1897, 1077, 1078). In this context it is not hard to imagine what their reaction would have been to a proposal to hand over power to the proposed national government to legislate



for abandoned or illegitimate children, had such a proposal been raised!

The Sydney Federation Convention had an additional subclause (24) "Parental rights and the custody and guardianship of infants" to consider. The Hon. E. Barton (later the first Prime Minister) remarked: "This may not be a matter of as great importance as other matters in the clause". (i.e. the legislative powers of the Commonwealth, then set out in clause 52). But Barton foresaw, nonetheless, that there might be great inconvenience in separating other matrimonial causes from the divorce jurisdiction.** Some South Australian and Tasmanian delegates were strongly opposed to the inclusion of subclause 24. Thus the Hon. J.H. Carruthers (S.A.) said: "If the power in this subclause were exercised at all, a strong argument would be offered for the state taking over the whole of the benevolent institutions in the various colonies which have to deal with children, and they would become federal institutions . . . Now there is a decided objection in this colony to any federal interference with what most people conceive to be sacred to the family . . . The question of parental rights is one which opens up a large range of questions. We may have all sorts of interference between parents and their children under a proposal of this character. The State laws have been perfectly effective to deal with this question" (at p. 1082). This passage illustrates the point made before, that the idea of the development of family law as a major Federal government concern was entirely absent from the debates, and that the States preferred to think they were *coping adequately with child neglect* (including illegitimate infants) themselves.

Barton wanted to quieten the fears of the delegates and proposed limiting Federal power to the minor matter of 'parental rights and the custody and guardianship of infants', and he accepted the advice of the Hon. I.A. Isaacs to add the words 'in relation to divorce'. Other South Australian delegates, although not in full agreement with one another, pointed out in the debate that in non-matrimonial custody matters, jurisdictional problems could arise. They referred to guardianship, not custody of illegitimate children by their parents. Finally Barton moved that: "The subclause 24 be omitted with a view to insertion of the words 'and in relation thereto'". This amendment was agreed to (at p.1085). In other words, the Federal Government failed to gain the power to legislate on parental rights and the custody and guardianship of infants, except in those cases where divorce and matrimonial causes were also involved.

It was this subclause which became S.51 (XXI) and (XXII) of the Australian Constitution in 1901 and which has split off *the jurisdiction dealing with married* parents and their children from the jurisdiction which deals with unmarried parents and their children, in relation to parental rights.

In retrospect we can see that, had subclause 24 been included in its original form, or had it been altogether omitted, all disputes over parental rights could potentially have come under the same jurisdiction. As the matter stands, however, the jurisdiction is split between the Commonwealth and the States and we have the worst of both worlds.

In sum, this placitum as it now stands is no mere historical accident, nor the result of an effort to reach a rational compromise solution in the course of a debate. Rather it reflects prevailing views at the beginning of the century about parental rights and the law, views which are now completely outmoded.

*Sir John Quick was born in Bendigo in 1852, left school at 10, worked in a foundry, by strenuous self-education became a journalist, studied at Melbourne University in 1874, became a State Parliamentarian, lost his seat and worked successfully for his LLD in 1882. His 'Commentaries on the Constitution' with Sir Robert Garran, constitute the definitive work on the topic to the present time. His diary gives a very different picture of colonial life from the one presented in this paper.

****Ibid.,** 1085. It is of interest to note that there is an error in Quick and Garran's reference to this debate which took place in Sydney, not Adelaide, as reported on p. 612, paragraph 204.

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