The Family Court of Australia:

A Triumph or Disaster?

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The Family Court was introduced in Australia in 1976, almost by legislative **legerdemain**. There had been little debate about it beforehand. There was no Royal Commission, no Law Reform Report. There was little public agitation or debate about its merits. It was suddenly upon us, as part and parcel of the reform of the divorce laws.

How this differs from the position in other countries! In England, the Law Commission invited submissions on Family Courts as early as 1970.[1] The Finer Committee in 1974 strongly recommended them![2] Numerous commentators since have advocated them in one form or another. The debate continues! But none has yet been set up! France and Germany have established tribunals loosely akin to our Family Court. But they are pallid imitations only. Other countries have tried some experiments. But I know of no country, save possibly Japan, that has established such a radical reform as Australia.

The only prototype for the Family Court of Australia was a short-lived experiment in Adelaide. There, a division of the Magristrates' Court was set up which took jurisdiction over a few family matters (not, however, including divorce), and acted in a rather informal way. The experiment was a success, and attracted some favourable comment.[3] Nevertheless, it was as nothing compared to the remarkable tribunal that was set up at Federal level to deal with divorce and ancillary matters under the Family Law Act 1975.

As is well known, the Family Law Act was introduced to Parliament by the late Senator Lionel Murphy, the then Attorney-General. But the *eminence grise* was Ray Watson Q.C., a Sydney barrister of great vision and forceful personality — and a man of exceptional humanity. He travelled the world, looking at tribunals handling family matters. He virtually drafted the Family Law Act single-handed.

The way in which Ray Watson and Lionel Murphy were able to convince Parliament to expend a huge sum of money to establish a completely new court structure is a story that deserves a book in itself. Amongst international family lawyers, the Family Court of Australia is the envy of the world. Numerous visitors from overseas have come to inspect it over the years. Whenever I have attended international conferences on Family Law, I have been struck by the admiration shown by foreign scholars and practitioners for the Australian system.

The vision of Ray Watson can be simply stated as being the creation of a new, humane court, treating victims of broken marriages in a sympathetic, non-adversarial way, and leaning heavily on the wisdom of behavioural disciplines. When he himself became a judge of the Family Court, he found that he was in some trouble with some of his brethren because of his zealous efforts to jettison adversarial techniques and practices which he thought were inimical to the humane functioning of his court. The High Court of Australia severely reprimanded him for his "inquisitorial approach".[4]

And yet, for the most part, the Family Court **has** revolutionised lawyers' approaches to this discipline. Of course, there are still barristers of the "old school", whose idea of practice is to win a victory for their client at all costs. In some types of case, this crusading approach is desirable and indeed necessary. A wife, the victim of brutal domestic violence, may well need a strong and unyielding advocate to secure for her an injunction to expel her husband from the matrimonial home. But, on the whole, a spirit of conciliation **has** prevailed at the Family Law Bar. My own experience of modern Family Law practitioners is that they tend to represent a different type of lawyer from the traditional commercial or criminal law advocate. Here I speak generally, of course, but it is my observation that most family lawyers do care about the human element of their clients' predicament. They **do** attempt to be fair to both parties and the children — or, at least, they make an effort to see the other party's point of view. And, above all, they appreciate that their professional reputation is not enhanced by devious and underhand tactics, which may triumph in one individual case, but which will establish a dubious reputation for the future.

What is more, the Court has encouraged family lawyers to cooperate with experts in other disciplines. A knowledge and understanding of child psychology is indispensable for a lawyer dealing with a custody dispute. How else can he credibly cross-examine an expert witness, or intelligently assess a welfare report?

The new spirit engendered by the court has spilled over into legal education, at least in some institutions. It is, however, rather unfortunate that few other law schools have established courses such as the Diploma in Family Law, which is available at a post-graduate level at Monash University. Subjects such as "Forensic Family Law", "Family Counselling" and "Comparative Family Law" have been taught jointly by law teachers and those of other behavioural disciplines, and the classes occasionally contain non-lawyers whose skills have been utilised in the Family Court.

Despite these advances and advantages, the Family Court has come under steady criticism. Its history has certainly had some turbulent moments, the most sad and spectacular of which were the assassination of Mr Justic Opas, and the murder of Mr Justice Watson's beloved wife, Pearl, by a bomb most probably intended to kill the judge himself.

Criticism of the court seems to have increased of late.[5] And it has prompted certain changes which, in my view threaten the visionary nature of the court, and almost amount to a confession of failure. It is also not unlikely that there will be further pressure for a return to more traditional practices and procedures in order to "restore the dignity of the court". The recent reversion to wigs and gowns, a gesture not merely symbolic to legal minds, is a clear sign that the unique characteristics of the Family Court have, in the minds of many, been found wanting.

THE UNIQUE CHARACTERISTICS OF THE FAMILY COURT

What, then, are the characteristics of the Family Court that distinguish it from traditional tribunals?

First and foremost is the nature of the buildings and the conduct of the proceedings. "Informality" is the keynote. There has been some criticism of this concept. It has been argued that it is impossible to achieve informality in a court setting, so that the use of this word is deceptive.[6] This criticism seems misguided. The mandate of the court is to conduct its proceedings with such informality as is consistent with a dignified but humane court.[7] And so, wigs and gowns were not to be worn by either judges or barristers. Stentorian "ushers" were replaced by polite "court orderlies". Witnesses were allowed to sit. The police, omnipresent in other courts, were to be absent.

The court buildings were to be modern, the registries bright and the staff cheerful and helpful. In some registries, Muzak might be heard. Hearings were to be in closed courts, so that parties would be spared embarrassment. Cases were not to be reported in the press, and, when they were made available to the legal profession, the cases were to be cited: *Smith and Smith,* or *In the Marriage of Smith,* as opposed to the universal practice in common law countries of citing even family cases, *Smith* v. *Smith,* that is to say, *Smith* versus *Smith.* Thus was the adversarial nature of the case to be de-emphasised. (So far as I am aware, this method of citation is still unique in the common law world.)

Perhaps the most significant innovation related to the choice of judges. Usually, in countries in the British tradition, judges are chosen from the most eminent of barristers, Queen's Counsel. It has always been the custom to choose senior members of the bar regardless of the nature of their practice, and to assign them to a variety of judicial work. In practice, many judges would have established a reputation in commercial work, and might

then, for the first time in their life, be confronted on the bench with a divorce case! The merit of this was said to be that its very lack of specialisation encouraged versatility, and prevented a judge from becoming bored. In practice, it resulted in very few specialist family lawyers attaining judicial office, for most barristers with aspirations to eminence would shy away from "sordid" divorce cases in favour of more lucrative and prestigious areas of law.

The appointment of Family Court judges was to be on a new and revolutionary basis. They were to be appointed from those who by virtue of their experience in family law, and by their wisdom and humanity, were suitable to administer Family Law.[8] They were to be younger than the average Supreme Court judge, and were required to retire at the age of 65, that is, five years earlier than other judges.[9] As it has turned out, some (albeit very few) solicitors have been appointed to the Family Law bench, thereby causing the most fearful ructions at the Bar. And even some (albeit fewer still) academic lawyers have been appointed, causing a degree of apoplexy amongst senior barristers. But the solicitors and the academic lawyers in my view have proved to be amongst the most outstanding judges of all!

APPRAISAL OF THESE FEATURES

The above features were seen to be so manifestly beneficial that it is small wonder that they excited the admiration of the rest of the world.

But the legal profession, as readers of Rumpole's exploits well know, is a very conservative profession. "The law is the true embodiment of everything that's excellent; it has no kind of fault or flaw."[10] The Family Court has, most unfortunately, been regarded with much disdain by some of the legal profession. An early constitutional challenge was made to the Act.[11] The provisions abolishing robes and wigs and providing for hearings in closed court were both attacked. Although both provisions were deemed to be *intra vires,* that is to say, within the powers of Parliament (at least as far as the new Family Court was concerned), there was much judicial tut-tutting in high places. A court in which judges did not wear wigs? Doubt was expressed as to whether it justified the title of court!

Some members of the public may well think that this is a trivial issue. It has been said that lawyers are actors at heart, and the charade of dressing is given exaggerated importance by them. Was this just another example of lawyers' preoccupation with their own dignity? No, indeed. Barwick C.J. saw robing as an integral part of the traditional heritage of the common law, not to be lightly tampered with.[12]

The issue of a closed court raised even more hackles. For at stake was the principle enshrined in the maxim, "Justice must not only be done but also must manifestly be seen to be done." The Family Court's deviation from this was viewed with the greatest suspicion by some members of the High Court.[13]

From the start it seems that the more conservative elements of the judiciary looked with some scorn on their brethren in the Family Court. It is possible that they resented the title of "Mr Justice" being accorded to them. Questions were asked discreetly for the most part, but openly on occasions, about the legal calibre of the men and women who were being appointed. For their part, some Family Court judges felt sensitive and perhaps jealous of their own status.

It is a sad, but true, state of affairs that both in practising circles and in the academic world, Family Law does not enjoy high prestige. There is some irony in the fact that, in an avowedly egalitarian society, a subject which penetrates the intimate lives of every citizen is regarded as an inferior subject for study and practice than a topic such as Company Law, whose ramifications affect a select and privileged minority.

THE DISCRETION OF JUDGES

The qualms of the profession were seen to be even more justified when it began to be realised that the new Family Law Act had vested in judges a most powerful and seemingly unrestrained discretion. They could, apparently according to their whims and prejudices, deprive a man of the custody of his children, despite the fact that he had been guilty of no matrimonial misconduct.[14] Worse still, they had power to cut across established proprietary rights.[15] They could destroy legal and equitable interests in property. They could subsume a jurisdiction over companies and partnerships which previously had unequivocally been the province of state courts. They were even attempting to issue injunctions preventing litigants from pursuing their legitimate claims in Supreme Courts![16] There were a few unseemly jurisdictional wrangles reminiscent of the great seventeenth century battles between My Lords Coke and Ellesmere in the King's Bench and Chancery Courts.[17] And, little by little, the Family Court **did** establish hegemony over the State Courts.[18] More and more jurisdiction came its way.

CRITICISMS OF THE FAMILY COURT

While the Family Court was establishing itself as a force to be reckoned with, the criticisms were becoming more and more vocal. Some spectacular cases raised the spectre of a sort of Star Chamber arbitrariness operating behind closed doors. Men's groups thundered that the judges were all feminists. Women's groups classed them all as misogynists.

The Federal Parliament felt obliged to command an enquiry into the Family Law Act less than five years after it came into effect. This Joint Select Committee on the Family Law Act reported, on the whole, favourably.[19] But one or two changes were recommended which were brought into effect in 1983, and immediately changed the nature of the court.

One of these was the "re-opening" of the court.[20] What had seemed to be an essential element of the court — the protection of the privacy of people in distresss — was suddenly perceived as the harbinger of arbitrariness.

There has followed a Report on Matrimonial Property which has recommended a considerable reduction on the judges' discretion in reallocating the parties' matrimonial resources.[21] (Unfortunately that Report peremptorily rejected the submission of the Children's Bureau of Australia that greater provision should be made for the children of the broken marriage, by allotting them shares in their parents' property.[22])

The discretion of the Family Court in custody determination has, on the surface, been curtailed by the inclusion in the legislation of specific factors to be taken into account.[23] It is doubtful whether this makes a great deal of difference in practice. It may, however, be cited as an example of a tendency to be suspicous of the "wisdom and humanity" of Family Court judges.

Magistrates' Courts, whose jurisdiction in family matters was originally intended to phase out, have recently been given a more extended jurisdiction.[24]

Suggestions have now been made that the Family Court should lose its independent status, and become a part of the Federal Court of Australia.

I am, myself, at a loss to see how amalgamation with the Federal Court would seem to threaten the Family Court's uniquely informal character. I am also of the view (though I am aware that there is a cogent counter-argument) that Family Law is a specialist area, and is becoming more specialised. My own view is that Family Law is a unique area, callng for very special and rather rare skills. I am not sanguine about the prospect of judges handling Trade Practices cases on Monday and custody cases on Tuesday.

The suggested removal of restrictions of the reporting of cases seems to me to be diametrically opposed to the high ideals of the framers of the Act, and would possibly result in the revival of salicious reporting of divorce cases.

The restoration of wigs and gowns[25] also represents a reversal of philosophy that pervaded the initiation of the Family Court.

CONCLUSION

The developments, actual and proposed, in the Family Court of Australia must be viewed with some qualms. On their face, they suggest a complete *volte face,* an abrogation, of all the features of that Court that have won international acclaim. It is hard to see how men and women in distress, and their children, can possibly benefit from these retrograde moves.

FOOTNOTES

1. A Working Party was set up in 1971, but abandoned its deliberations when the Finer Committee (see note 2) took over the issue.
2. Finer Report: Report of the Committee on One-Parent Families, Cmnd 5629 (H.M.S.O., London, 1974).
3. See J. Neville Turner, Family Courts: The Adelaide Experiment, 1 Legal Services Bulletin (1974).
4. R.V. Watson; Ex parte Armstrong (1976) 136 C.L.R. 248.
5. See Patrick Tennison, Family Court: The Legal Jungle (1983).
6. J.H. Wade, The Family Court of Australia and Informality in Court Procedure, (1978) 27 International and Comparative Laws Quarterly 820.
7. Family Law Act 1975, s. 97(3): "In proceedings under this Act, the court shall proceed without undue formality . . ."
8. Family Law Act 1975, s. 22(2)(b): "A person shall not be appointed as a Judge unless — . . . by reason of training, experience and personality, he is a suitable person to deal with matters of family law."
9. Id., s. 23A.

10. The Lord Chancellor in W.S. Gilbert, Iolanthe.
11. Russell v. Russell (1976) 134 C.L.R. 495.
12. See J. Neville Turner, The Commonwealth Family Law Act 1975 — The First Challenge (1976) 1 Australian Child and Family Welfare 51.
13. Ibid.
14. Family Law Act 1975, s. 64.
15. Id., s. 79.
16. See e.g. Sieling and Sieline (1979) 4 Fam. L.R. 713.
17. See Smith and Saywell (1980) 6 Fam. L.R. 245.
18. See, e.g. Ascot Investments Pty Ltd v. Harper (1981) 148 C.L.R. 337.
19. Report of the Joint Parliamentary Select Committee on the Family Law Act (1980) Vol. 1.
20. Family Law Act 1975, s. 97(1), amended by Family Law Amendment Act 1983, s. 52.
21. Australian Law Reform Commission: Report on Matrimonial Property (The "Hambly Report", 1987).
22. See Submission of Children's Bureau of Australia (1985).
23. Family Law Act 1975, s. 64(1)(bb), inserted by Family Law Amendment Act 1983, s. 72.
24. This change was wrought by the Family Law Amendment Act 1988. For a criticism of the Magistrates' Courts as fora for Family Law Cases, see J. Neville Turner, Family Law and Magistrates, 4 Legal Service Bulletin 88 (1979).
25. Family Law Act 1975, s. 97(4), was repealed by Family Law Amendment Act 1988.