



## **Four Jurisdictions Conference**

### **Family Law - Past and Future**

The Hon. Mr Justice MacDonald

1 February 2020

#### **INTRODUCTION**

It is a great honour to give the keynote address at this event, and all the more so on the twenty-fifth anniversary of the Four Jurisdictions Family Law Conference. I must also confess to some trepidation in speaking to such an esteemed audience, although I suppose it is better to fall into Mark Twain's first category of public speakers, the nervous, than his second, the liars.

Anniversaries are apt to cause reflection. Reflection on the years that have passed, and reflection on what may come to pass as the years continue to roll on. Within that context, and having regard to the theme of the conference, "Twenty Five Years of Family Law", it seemed appropriate on this anniversary to reflect on the past twenty five years of family law and to peer through a glass darkly in an attempt to perceive what challenges the next twenty five years may hold, and how we may begin to think about addressing them.

This year also marks another, somewhat less auspicious, silver jubilee. Namely the twenty-fifth anniversary of my call to the Bar of England and Wales in October 1995. I have spent the vast majority of that quarter century dealing with cases concerning children. Whilst I now also deal with financial remedies cases and cases in the Court of Protection, I hope you will forgive me if this address concentrates on the law concerning children.

#### **THE PAST TWENTY-TWENTY FIVE YEARS**

Looking back over the past twenty five years of family law what is immediately apparent, at least from my perspective in England and Wales, is the relative stability of the cardinal legal principles that we bring to bear on the myriad of problems encountered by children.

It is true that we have seen significant pieces of legislation that have influenced the manner in which we *apply* those cardinal principles, not least the Human Rights Act 1998 and the Adoption and Children Act 2002, significant decisions of the Supreme Court that have had the same effect, not least the seminal decision on proportionality in *Re B*, and fundamental procedural reform which, in my jurisdiction, comprises the Family Procedure Rules 2010. But the cardinal principles themselves have withstood the test of time largely unchanged.

In England and Wales this is testament to just quite how good a piece of legislation the Children Act 1989 is. It is also a function of the universality of those cardinal principles, which can be seen in broadly common form across each of our four jurisdictions and across the wider world and which find expression in the United Nations Convention on the Rights of the Child.

We have come a very long way from Plato's dialogues, in which children were considered to be objects to be moulded rather than people in their own right and the Aristotelian concept of the child as "important not for himself but for his potential", via Locke, Rousseau, Korczak and Jebb, to the UNCRC and the rights of the child to autonomy, participation and self-expression in a free society. Within this context, the best interests principle remains the bedrock on which the administration of the law in relation to children rests in the four jurisdictions and across many parts of the world.

What has however, undergone *fundamental* change over the past twenty five years is the nature and scope of the problems to which these stable legal principles must be applied in order to try to achieve resolution for children and families. This is a function of the central role played by family law in the life of a nation, touching as it does on a myriad of social, scientific, philosophical and religious aspects of life and, accordingly, necessarily always part of the vanguard in addressing the impact of societal changes nationally, regionally and globally.

These national, regional and global changes over the past twenty five years that have influenced the type of issues the family justice systems in our jurisdictions are required to deal with are well known and contrast sharply with the relative stability of the cardinal family law principles.

The continuing march of technology has encompassed all fields of human endeavour, from communication to reproduction. Developments in the field of access to, and exchange of information have impacted on the way we conceive the concept of privacy and have allowed children increasingly easy access to adult material, both legal and illicit, that was previously out of reach. The globalisation of communication through technology has allowed social, political and religious influence to be exerted across borders with far greater ease than in the days of the political pamphlet or the local television or radio broadcast. Technological advances in the field of human reproduction have led to changes in the way in which children emerge into the world and the legal relationships that surround them when they do. Advances in life saving medical technology mean it is possible to save and sustain new life where previously there would have been death. As noted by Brennan J in the US Supreme Court decision in *Cruzan* these developments have transformed social conditions of death, involving professionals and institutions where previously the shadow of death descended on a child in an intimate family environment.

As the world advances confidently, for better or for worse, beyond its technological dawn, by brutal contrast war and conflict continues to be a blight on the community of nations. The nature of the conflicts currently being fought are different from the world and regional wars of the 20th Century in degree and in nature. They tend not to be fought between national

armies along clearly defined extended frontlines and according to the normative rules of war, but by amorphous groups fighting in the towns, in the streets and in the homes occupied by the civilian population, without reference to the rubrics of the Geneva Conventions. Within this context, the world has witnessed the growth of new forms of religious extremism that exist far outside the moderate norms of the religions they claim as their foundation and far outside the moderate norms of modern liberal democracies.

Seismic economic perturbations have occurred at what, without the benefit yet of a historian's perspective, has appeared a dizzying pace. The economic upheavals of the early part of the 21st Century, manifested in the global financial crisis of 2008 and the Great Recession that followed, have seen the spectre of slow economic growth and issues of wealth inequality coming to the fore.

The consequences of the march of technology, ongoing conflict, the rise of religious extremism and economic upheaval are many and complex. However, one consequence that is well recognised is that of large population movements. Those moving populations comprise refugees from conflict and war, refugees from religious extremism and intolerance and migrants reacting to changes in regional and local economic conditions. This issue is now brought into even sharper focus by environmental changes that appear to be accelerating towards the tipping point at which entire populations will see their living conditions become far more challenging.

Finally, within this seemingly epic maelstrom, domestic social change, that for some is uncomfortably fast paced and for other's glacially slow, has seen societies increasingly recognising the importance of individual choice, the importance of equality and diversity and the validity of relationships and identities that transcend historical binary views of human partnerships and gender. The moving populations of which I have spoken bring with them cultural, linguistic and social inheritances that introduce multiple further and different perspectives on these complex issues.

Within this context and because, for the reasons I have given, family law is the cut glass prism through which society comes to view so many of the seminal social, scientific, philosophical and religious issues of our age, the epochal changes I have summarised have, over the past quarter of a century, driven new and complex problems before the family courts in our four jurisdictions. Problems that often stand at the very limits of the current law.

I only have to look back at the issues that I dealt with as a young barrister practising on the Midlands Circuit and compare them with the issues that I deal with now, some twenty five years later, as a judge of the Family Division to see the power that the changing world of the late 20<sup>th</sup> and early 21st Centuries has exerted.

Thus, over the past quarter century, the lists in the Family Courts of England and Wales, and I have not doubt the lists in all four jurisdictions, can now be found cases that concern new conceptions of 'family'. Within this context, judge's, practitioners and professionals are increasingly charged with cases that concern surrogacy arrangements between individuals and litigation, that concern advances in IVF treatment, including cases in which one of the parents involved is no longer living, and in which parental identity that transcends binary

views of gender must be weighed against religious orthodoxy and tradition. In medical cases enormous advances in life saving medical technology present us with questions centring on the value and quality of a human life, with cases in which a dispute has arisen between a child's parents and the doctors treating that child about where his or her best interests lie in the context of life limiting conditions becoming ever more common.

War and conflict has required the courts to consider new forms of harm, including cases in which the allegations centre on the risk of radicalisation at home or abduction to zones of armed conflict. It is now common to see in the daily court list cases involving allegations of child trafficking and modern slavery, cases of alleged child sexual and criminal exploitation, and applications for orders designed to protect children from female genital mutilation or forced marriage. As for technology and social media, applications with respect to adoption, once taken for granted as a permanent placement insulated entirely from unregulated contact with the child's birth family, now regularly concern the problem of maintaining confidentiality in the face of social media.

These changes have also present new challenges for those deciding these emerging issues. To take the question of identity as but one example. Identity is the condition of being a specified, distinguishable person both as a unique separate individual and as a recognised member of a group. Identity also has an important cultural content and is essential for relationships between each individual child or young person and the rest of society, for his or her understanding of the outside world, and his or her place in it.

But the global upheavals I have recounted may mean that a child will be separated in space and time from the place where he or she formulated a personal history from birth and the place of his or her race, culture, religion and language. This means that those who are seeking to implement the child's right to identity, from social workers to lawyers to judges often do not have first-hand knowledge of the social, geographical, cultural, religious and linguistic traditions that underpin the child's identity. In so far as the State may, in accordance with the law, intervene on the grounds welfare through the medium of the family justice system or social care provision to ensure the physical, emotional and educational development of the child for the benefit of the child and society, how do we properly locate within this paradigm children who do not share the same cultural, linguistic and social heritage as the system making decisions in respect of them.

A further, and fundamental, example is the application of the best interests principle. This seminal welfare principle will provide relatively clear answers in cases where harm is manifest in the context of universally accepted normative standards, such as cases of physical abuse, child sexual abuse and forced marriage. However, as I had cause to observe recently, in cases concerned with issues at the boundary between different social, philosophical and religious traditions and perspectives, the answer to the objective best interests test must be looked for in more subjective or value laden ethical, moral or religious factors. In this context, it may be much harder to separate, as we must, issues of child welfare, in which the court may legitimately intervene under the statutory regime laid down by Parliament, from social, cultural and religious aspects of a child's life in which the court, however fair, impartial and enlightened it may be, has no business interfering.

## THE NEXT TWENTY-FIVE YEARS

So what of the next twenty five years? It is the great conceit of each generation to assume that we alone stand on the mountain top, at the end of human history. But the only thing that the passage of the past twenty five years in fact predicts with certainty is that the next twenty five will continue to produce new and complex problems for family law to consider and solve. Within this context, any attempt to squint through the looking glass will yield results that are, necessarily, highly speculative. Some things though, can perhaps be anticipated.

The baffling and tragic human capacity, over our long history, for violence that ignores our common humanity and our claims to civilisation, the capacity for hate and fear and for making false distinctions between one and other will almost certainly continue to compromise the welfare of children and drive new types of harm. We are already seeing new categories of maltreatment emerge to threaten the welfare of children that we failed to anticipate. The most recent example, the roots of which are at present hard to divine but are likely to lie somewhere amongst the upheavals of which I have spoken, is the systematic exploitation of children by criminal gangs. More widely, adverse changes in climate, economies, population and labour will mean that economic and social human rights, and specifically economic and social children's rights that at present feature little in our deliberations may come increasingly to the fore, together with arguments as to their validity and enforceability.

Against these bleak scenarios, the better angels of our nature and the wonder of human ingenuity will, it is earnestly to be hoped, continue to advance children's quality of life, but perhaps with consequences that we do not always foresee.

Medical and genetic research will likely continue to challenge our conceptions of biological heritage, identity and the nature of family life. Well publicised research raises the possibility of ever increasing treatability of childhood cancers and of children whose genetic heritage is born of more than two parents in order to address genetic conditions, but also of children whose genetic makeup is manipulated at conception to produce characteristics considered socially desirable by a commissioning parent. The ethical questions that will fall to be considered where a dispute arises on these questions between parents in private law contexts will be highly complex.

In addition to interventions in human biology at a cellular and genetic level, biomechanical modifications and biotechnical interfaces for humankind must now be a real possibility. Initially these developments will likely be for medical purposes, to address inherited and traumatic disability, but perhaps later the case will be made by children compiling lists for Father Christmas for biomechanical modifications and biotechnical interfaces aimed at simple social convenience and enjoyment. Again, the potential for complex ethical questions coming before the court where parents are unable to agree is manifest. The advance of life saving medical technology will mean it is possible to save the lives of more children with life limiting conditions but will present the courts with more cases requiring the resolution of intricately complex ethical questions. Within the context of the current fierce debate, it is to be

anticipated that further arguments will be had with respect to the nature and significance of gender.

It is to be anticipated that the march of technology and social media in particular will continue to challenge historic concepts of privacy. Within this context, the sustainability of traditional closed adoptions must be increasingly in question in a world of extremely interconnected lives. In the context of emerging concerns about the use by children of technology, will screen time become a welfare issue? We might also contemplate whether the emergence and acceptance of entirely self-driving vehicles will see the end of disputes as to who supervises the handover of children as between separated parents.

Finally, if one peers even deeper into the rabbit hole, we may imagine future generations of family lawyers who will be tasked with considering not only the mediation of human relationships and disputes but the very nature of humanity itself, as biology and technology achieve singularity. Before that seminal event occurs, the use of the term android can be traced back to at least 1728, where it was used to refer to the legend of the automaton said to have been built by Saint Albertus Magnus in Cologne in the 1200s. Looking forward, it is interesting to contemplate whether we will one day face the question of whether, in a country short of foster cares and adopters, a sentient, self-consciously aware android capable of emulating well beyond good enough parenting should be permitted to care for looked after children who need permanent families. Will we at that point also face the question of whether that sentient, self-aware machine should ultimately benefit from the right to respect for family life, or other cardinal rights such as equality before the law? But, perhaps, this is looking a little too far.

## **MEETING THE CHALLENGES**

For now the pressing question is how will we move to address the challenges the future will throw up? In seeking an answer, it is important first to remember that, as I have observed before, there is no inevitable link between the arrow of time and the virtues of increasing enlightenment and justice. Martin Luther King Jr. provides a sobering lesson in the continuing need for simple hard work, and one that perhaps rings true now more than ever, when he reminded us that:

“Human progress is neither automatic nor inevitable... Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals.”

Perhaps even more importantly, we must remember what we have learnt from that simple hard work over the past quarter of a century, and before that. The tireless exertions and passionate concern of dedicated individuals in family law over the past twenty five years have bequeathed us with principles that will remain essential for next.

To demonstrate this one only has to think about applying the principles of s.1 of the Children Act 1989 to potential futures. On their face, disputes between parents as to whether to allow their child the addition of a biotechnical interface to supplement the child's memory capacity, or to remove the child not only from the jurisdiction but also from the planet appear new and

exotic to us. But the essential question remains the same. Namely, which of the diverging choices advanced by the parents as a legitimate exercise of their parental responsibility is in the child's best interests, having regard to the child's wishes and feelings, characteristics, physical, emotional and educational needs, any risk of harm, the capabilities of the parents and the powers of the court. The best interests test and, in my jurisdiction, the welfare checklist constitute supremely malleable tools, sufficiently flexible to last us long into the future.

This is emphatically *not* an argument for stasis. Just as it is important to recognise childhood is not a single, fixed and universal experience between birth and majority, but rather one in which at different stages of their lives children require different degrees of protection, provision, prevention and participation, so too it is important to recognise that different *generations* of children will have different experiences. In seeking to ensure we continue maintain the efficacy of our family laws, we must locate children properly in the context of their own era and to develop strategies that recognise the realities of children's experiences in their own time.

To return, by way of example, to exploitation of children by criminal gangs, contrary to the welfare paradigm that public family law traditionally addresses this new harm locates risk and significant harm *outside* the family, with perfectly capable parents watching helplessly as their children are preyed on in the community by criminal gangs. Within the context of this example, the future will require us to think about how we re-tool a system to deal with risks extrinsic to the family when that system is set up primarily to deal with risk emanating from the family, whilst at the same time continuing to address traditional forms of harm.

## **CONCLUSION**

I like to think of the Four Jurisdictions as an extended family, dispersed geographically but sharing in a common heritage, with different cultural, legal and social outlooks but shared common values. In the melee of historical reflection and future prediction I have set out, is it possible to locate common strategies for family law as we depart into next quarter century?

It will, of course, be vital that we work together through gatherings such as this to meet the new challenges that inevitably lie in our collective futures, with original thinking born of the tireless exertions and passionate concern of dedicated individuals. But equally, and perhaps more important will be the careful husbanding, retention and sharing re of the long institutional memory we have built up in each of our family law jurisdictions.

Institutional memory is the collective knowledge and learned experience of a group. If the group in question is not static over time, as human society is not, then collective knowledge and learned experience must be passed on from generation to generation if the group is to continue to benefit from its accumulated institutional memory. In his foreword to the RCPCH guidance, *The Physical Signs of Sexual Abuse*, the President of the Family Division observed that:

“The ability of a society to acknowledge and begin to understand unpalatable truths about how life is lived by some of its members is a sign of maturity that only comes with time and as a result of a long road carefully travelled”.

And yet, in a recent case of alleged inter-generational, intra-familial sexual abuse I heard over the course of seventeen weeks, none of the professionals or police officers who were asked had heard of a vital waypoint on that road, the Cleveland Enquiry, much less the lessons it taught us.

Institutional or organisational memory is fragile. Knowledge degrades. It is a truism that those who forget their history are condemned to repeat it. Over the past twenty-five years, and longer, innumerable people in each of our jurisdictions have worked hard to set reliable signposts on the long road as its course has been carefully mapped, often through bitter experience. We will only be able to continue to address the challenges that face us in the future if, as societies, we ensure that what we have learnt over the past quarter century is passed down effectively from generation to generation. Within this context, education must play a central role in sustaining the advances we have made over that time. We cannot forget those hard won lessons if we are successfully to meet the challenge of the future, the challenge of the next twenty five years in family law.

Thank You.