

## IDEAS AND DEBATES IN FAMILY LAW

Rob George

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Originating from a series of undergraduate seminars in the Law Faculty of Oxford University from 2006-2011, *Ideas and Debates in Family Law* is the latest addition to the ever-increasing body of family law literature available. It is, however, unlike most texts on the market and, although ostensibly a student text book, it offers much food for thought for any individual engaged with matters of family law. What makes *Ideas and Debates in Family Law* different is that it purports to be 'a book of questions, not a book of answers'.<sup>1</sup> As Rob George explains in his introductory chapter, the book is designed to encourage readers to think critically about *why* the law is as it is and whether it *should* be like that.<sup>2</sup> While George puts forward arguments for how the law could be changed or, in certain instances, should be changed, the overriding theme of *Ideas and Debates in Family Law* is the exploration of 'some less obvious ideas about family law' and 'less conventional approaches to thinking' about the issues.<sup>3</sup>

This book is subdivided into three main sections. The first section concerns the overarching themes in family law. Chapter 1 opens with a basic contextual overview of 'Family Law and Family Justice', outlining the core substance of family law and the structures within which it is implemented. George tackles the challenges to the family justice system and explores a number of arguments 'against' family law. In particular, he focuses on the arguments promulgated by the government to justify the severe curtailment of the legal aid budget in family law cases which is due to take effect in April 2013 pursuant to the Legal Aid, Sentencing and Punishment of Offenders Act 2012.<sup>4</sup> The apparent ideological justification advanced by the government, that, as private matters, family law disputes ought where possible be kept out of the courts, is subject to scrutiny and refuted with particular ferocity. The nature and purpose of family law are considered before a clear and succinct argument explaining why family disputes must be seen as a matter of justice is delivered. Drawing heavily from the work of John Rawls, George states 'one main function of family law is to regulate and control the exercise of power so as to ensure that justice is achieved. A key way in which the law controls power is through the protection of rights'.<sup>5</sup> The ability to avail oneself of the legal process to protect rights is, therefore, central to justice and 'any limitation within the law itself, or in access to legal advice and legal remedies, has to be seen as a denial of justice'.<sup>6</sup> Indeed, it is submitted the need to once again reiterate the importance of family justice is of international importance. In times of increasing austerity, it is likely the axe may be wielded over legal aid budgets in many jurisdictions across the common law world. As in England and Wales, family justice is liable to be a heavy casualty in many countries. In such an environment, the logical and concise defence of family justice delivered in this chapter gains particular importance and ought to be considered by governments restricting the availability of legal aid in family law cases. As George rightly concludes, 'If society is to lay claim to

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<sup>1</sup> At p 2.

<sup>2</sup> At p 1.

<sup>3</sup> Ibid.

<sup>4</sup> Note, this Act was awaiting Royal assent when the *Ideas and Debates in Family Law* went to press, hence all references in the book are to the 2012 Bill.

<sup>5</sup> At p 19.

<sup>6</sup> Ibid.

having a basis in fairness and justice, that must mean justice within families to the same full extent as justice elsewhere'.<sup>7</sup> This emphasis on family justice is returned to again in a number of subsequent chapters.

Chapter 2 considers 'Rights and Responsibilities' and is primarily jurisprudential in nature. George discusses a number of debates which have arisen in relation to the role of rights and responsibilities and suggests some ways in which rights and responsibilities interact. Moreover, the issue of how responsibilities and expectations may, perhaps, be linked to a rights and obligations analysis is explored. Conscious of the complexity inherent in such a discussion, practical examples are used to illustrate the points made. The chapter concludes with a number of open questions requiring the reader to consider whether or not it would be helpful to incorporate responsibilities and expectations in the legal reasoning process.

The issues arising from the steady increase in the regulation of families and family law at a supranational level is tackled in Chapter 3, 'International Family Law'. The chapter considers the principal factors which have resulted in family law becoming increasingly internationalised. George then proposes three different approaches to 'internationalising' family law: the 'forum approach'; the 'mutual recognition approach'; and the 'harmonisation approach'. Again, a number of questions are raised in consideration of each of these varying approaches and the reader's attention is clearly drawn to some of the difficulties which will undoubtedly be faced in international family law in the not-too-distant future.

The book then moves into its second section which focuses on the regulation of adult relationships. Chapter 4, 'Regulating Adult Relationships' considers how all interpersonal relationships are, to a greater or lesser extent, regulated by law. The focus is then narrowed down and the spotlight is placed on the legal regulation of personal relationships or 'intimate adult relationships'. George questions what constitutes an intimate adult relationship. Going beyond the obvious categories of marriage, civil partnership and non-marital cohabitation, which are currently regulated by law to varying extents, George poses the question as to why these forms of domestic relationship should be recognised by the law and others not: 'Is sexual, two-person intimacy all that differentiates these from other adult relationships and, if so, why is that important?'<sup>8</sup> Adopting an approach from the law of negligence, George considers how the 'neighbour principle' developed in *Donoghue v Stevenson*<sup>9</sup> would operate in the realm of family law if introduced as an alternative method of considering which relationships the law ought to regulate.<sup>10</sup> However, recognising the difficulties inherent in such a radical approach, George instead concludes the chapter with a return to more conventional analysis. He investigates how people evaluate their intimate relationships and questions why some people chose to marry while others do not.

Chapter 4 leads neatly to Chapter 5 and its exploration of 'The Meanings of Marriage'.<sup>11</sup> In particular, considerable attention is placed on the Supreme Court decision in *Radmacher v Granino*.<sup>12</sup> What,

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<sup>7</sup> At p 22.

<sup>8</sup> At p 58.

<sup>9</sup> [1932] AC 562 (HL).

<sup>10</sup> He notes a similar approach was suggested by Nancy Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law* (Beacon Press, 2008).

<sup>11</sup> Although, as the book reiterates, all references to marriage include civil partnership unless otherwise stated.

<sup>12</sup> [2010] UKSC 42, [2010] 2 FLR 1900.

George asks, does the decision tell us about the nature and scope of the marital union itself? If the decision reflects a more individualistic outlook of marriage where ante-nuptial agreements are presumptively given effect to, how can such arrangements dealing with financial issues be distinguished from other aspects of marriage? For example, could a 'sunset clause marriage' be permissible?<sup>13</sup> The arguments for and against such marriages are considered and although George states he is not advocating such a development in the law, he argues 'the sunset clause marriage may not be as many steps removed from the Supreme Court majority's decision in *Radmacher* as it may first appear...'<sup>14</sup>

The regulation of adult relationships from a financial perspective on relationship breakdown is tackled in Chapter 6, 'Fairness in Family Finances'. First, George addresses the difficult issue of the meaning of fairness and assesses the differing views of Rebecca Bailey-Harris, John Rawls and Alison Diduck. Second, the application of the standard of fairness to divorcing couples is considered. In *White v White*<sup>15</sup> and *Miller; McFarlane*<sup>16</sup> three strands relevant to an assessment of fairness were highlighted: need, compensation and equal sharing. The chapter succinctly illustrates the key difficulties inherent in the application of these strands. In particular, George highlights the significantly different outcomes which may result from the application of these principles to a particular case depending on the order in which they are applied. In order to minimise the potential for injustice, an analysis is undertaken to determine which method of application provides the fairest outcome. Third, George explores the limited application of the standard of fairness to separating cohabitants under the common intention constructive trust in light of *Stack v Dowden*<sup>17</sup> and *Jones v Kernott*.<sup>18</sup> Finally, the chapter comes full circle with a return to the meaning of fairness and poses the question whether fairness is in fact a helpful standard at all. George concludes by questioning 'whether we have done the best that we can within the existing legislative framework.'<sup>19</sup>

The third and final section of the book turns to the law relating to children. Chapter 7, 'The Values of Welfare', details the origins of the welfare principle, analyses the modern interpretation of the principle and considers the application of the welfare checklist pursuant to the Children's Act 1989. The correctness of Mostyn J's interpretation of the checklist in *Re R (A Child: Relocation)*<sup>20</sup> is questioned and a strong argument that 'the welfare approach to decision making may not be as individualistic or blinkered to the existence of others as is sometimes suggested' is advanced.<sup>21</sup> However, it is the contextual capacity and inherent flexibility of the welfare principle which then proves, on George's analysis, to be somewhat of a double-edged sword. In particular, he notes the flexibility of the principle, 'may... create difficulties in an increasingly globalised family law world'.<sup>22</sup> To demonstrate this point, he draws from his previous research on relocation disputes in the courts of England and New Zealand and presents a clear illustration of the differences which can emerge in

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<sup>13</sup> Such clauses provide that a marriage would terminate on a specified date unless specifically renewed.

<sup>14</sup> At p 86.

<sup>15</sup> [2000] 2FLR 981 (HL).

<sup>16</sup> *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 FLR 1186.

<sup>17</sup> [2007] UKHL 17, [2007] 1 FLR 1858.

<sup>18</sup> [2011] UKSC 53, [2012] 1 FLR 45.

<sup>19</sup> At p 111.

<sup>20</sup> [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577.

<sup>21</sup> At p 126.

<sup>22</sup> At p 121.

the application of the welfare principle from jurisdiction to jurisdiction. Nevertheless, the chapter concludes with a defence 'of sorts'<sup>23</sup> for the continued use of the principle.

Finally, chapter 8 entitled 'Parental Responsibility, Parenting and Status' engages in a discussion of parental responsibility – what it is and what, perhaps, it ought to be. The chapter traces the development of parental responsibility from its origins, to its introduction in the Children Act 1989 and culminates with a discussion of its current interpretation. George explains, 'Parental responsibility was designed to separate out parenthood as a question of *fact* from parenting as an on-going child-raising *act*.'<sup>24</sup> However, he observes 'it seems that the courts have changed the meaning of PR so that, at least in some cases, the focus has moved away from the practical effect of having rights, duties, responsibilities and so on, and towards seeing PR as a label, a badge, representing a desired status.'<sup>25</sup> Unfortunately, as a result of this evolution, George notes that increasing pressure has started to mount on residence orders. He also highlights his fears for the success of the proposals made by the Family Justice Review in relation to the introduction of a single 'child arrangements order' to replace residence and contact orders as currently applied. In what is an appropriate ending to the book, the chapter concludes with a return once again to the recurring theme of family justice in order to justify the continued involvement of the courts in determining parental disputes.

*Ideas and Debates in Family Law* is clearly marketed at family law students and would certainly be a great addition to students interested in furthering their knowledge of the key issues and debates in family law and engaging critically with the topic. Rob George has a very clear and direct style in his writing. He employs simple language to great effect in order to explain complex and often very abstract theories while retaining the intrinsic value of the discussion presented. Text boxes, examples, graphs, key questions and sign posts are used throughout ensuring the lively cadence and clear structure of the chapters. However, it would be wrong to assume the text is only of interest to students. It also possesses inherent value for academics and others interested in the family law field. *Ideas and Debates in Family Law* aims to provide 'new and thought-provoking perspectives on family law issues'<sup>26</sup> and it certainly delivers on this promise. It is thoroughly enjoyable and intellectually stimulating, demanding the reader to think outside the box and to endeavour to reconceptualise such fundamental issues as family, marriage and parenthood. Furthermore, many of the issues discussed in this book are highly topical in light of the current review of matrimonial property being conducted by the Law Commission for England and Wales.<sup>27</sup> In particular, the critical analysis undertaken in relation to the idea of family justice, the meanings of marriage, the regulation of finances on marital breakdown and the attempted deconstruction of fairness are timely and may play a very valuable role in informing many of the debates which are at the core of the current review.

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<sup>23</sup> At p 3.

<sup>24</sup> At p 134.

<sup>25</sup> At p 135.

<sup>26</sup> As noted in the blurb.

<sup>27</sup> Law Commission for England and Wales, *Matrimonial Property, Needs and Agreements*, Law Com CP No 208 (2012); Law Commission for England and Wales, *Marital Property Agreements*, Law Com CP No 198 (2011).