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“Village People”

Introduction to the Family Law Symposium on Parent and Child in North American Family Law

*Lynn D. Wardle**

This issue of the *BYU Journal of Public Law* contains selected papers that were presented at the North America Regional Conference of the International Society of Family Law, held June 13-15, 1996, in Quebec City, Quebec, Canada. To introduce these papers, editors of the *Journal of Public Law* invited me to tell a little about the Society, the Quebec Conference, the papers published in this symposium, and to add some reflections about the conference.

I. THE INTERNATIONAL SOCIETY OF FAMILY LAW

The International Society of Family Law (ISFL) is an international scholarly organization dedicated to the study and discussion of problems of family law. The objectives of the International Society of Family Law are to facilitate the study and discussion of family law by sponsoring and promoting the following: (a) international cooperation in research on family law subjects of world-wide interest; (b) periodic international conferences on family law subjects of world-wide interest; (c) collection and publication of information in the field of family law including a survey concerning developments in family law throughout the world, and papers presented at conferences of the Society; (d) cooperation with other international, regional or national associations having the same or similar objectives; (e) fostering interdisciplinary contacts and research; and (f) advancement of legal education in family law by all practical means including furtherance of exchanges of teachers, students, judges and practicing lawyers.

The Society is truly international in its composition as well as its work, having more than 500 dues-paying members (mostly legal scholars, judges, other government officials, lawyers, and other professionals) in 48 different countries around the world.¹ The current President of the

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1. To join the Society, contact the Treasurer, Dr. Paul Vlaardingerbroek, at Den Hooiberg 17, 4891 NM Rijsbergen, The Netherlands or by fax at 31-13-466-3143, or by e-mail at

Society is a distinguished German Professor, Dr. Rainer Frank. I, an American, am Secretary-General. The Treasurer is Dr. Paul Vlaardingerbroek, from the Netherlands. The Editor of *International Survey*, Dr. Andrew Bainham, is from England, and our Immediate Past President, Anders Agell, is Swedish. Our six vice-presidents are from France, Japan, Norway, Switzerland, the UK, and the USA, and the Executive Council has members from 17 different nations.

The Society itself publishes three kinds of materials. An *International Survey* is published annually reporting developments in family law in selected countries around the world, and growth in international law regarding the family. During the past decade, reports from 80 different countries have been published in the Annual Survey. Martinus-Nijhof now publishes the survey in book form. The Society also publishes *The Family Letter*, a newsletter announcing forthcoming conferences of professional interest, noting publications of interest, and conveying news of the Society. Third, selected papers presented at the triennial world conferences are published in volumes edited by officers of the Society. Reflecting the themes of recent world conferences, these volumes focus on specific subjects, such as the dilemmas of aging for families, parenthood in modern society, and families across frontiers. Additionally, many papers that are written by members and presented at the Society conferences are published in other respected scholarly and professional journals.

The Society sponsors world and regional conferences. World conferences are held every three years; most recently in 1994 in Cardiff, Wales, in 1991 in Opatija, Croatia, and in 1988 in Tokyo, Japan. The next world conference is planned for July 1997 in Durban, South Africa.² Regional conferences have been held periodically in North America, Europe, Africa, and Asia. Within the past year and a half, regional conferences of the ISFL have been held in Seoul, Korea (October 1996), Quebec City, Quebec, Canada (June 1996), and Lyon, France (October 1995).

II. THE QUEBEC CONFERENCE ON PARENTS AND CHILDREN IN NORTH AMERICAN FAMILY LAW

The North America Regional Conference of the ISFL, held in Quebec, Canada on June 13-15, 1996 was the second regional conference

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2. For further information about the Ninth World Conference to be held in July in Durban, South Africa, contact either John Eekelaar, Pembroke College, Oxford University, Oxford OX1 1DW, ENGLAND or Professor Thandabantu Nhlapo, South Africa Law Commission, Private Bag X668, Pretoria 0001, REPUBLIC OF SOUTH AFRICA.

held in North America by the Society.³ The conference was planned at the initiative and under the direction of a committee of distinguished Canadian and American members of the Society.⁴ The subject of the conference was "Parent and Child in North American Family Law." Sixteen different sessions were offered over two days involving fifty-four presentations. Specific topics included medical decision-making for minors, child support, visitation, international child support, adoption, reproductive technology, domestic violence, and many other topics. In addition, two plenary presentations were made, one by the President of the ISFL, Professor Dr. Rainer Frank from the University of Freiberg in Germany, about comparative family law, and another by Justice Claire L'Heureux-Dube of the Supreme Court of Canada, about equality in family law. Most of the participants were from the USA (about 80) and Canada (about 20), but some presenters came from as far away as Japan, Russia, and Germany.

Of the fifty-four papers presented in Quebec, more than twenty were submitted as possible publications. Some of the papers are being published in Canadian journals.⁵ The symposium section of this issue of the *BYU Journal of Public Law* contains three papers that were presented at the Quebec Conference. This is the second time the *BYU Journal of Public Law* has published papers presented at the North American Regional Conferences of the ISFL.⁶

In this issue, Martha Bailey analyzes whether the Hague Convention on the Civil Aspects of International Child Abduction provides for the return of a child removed by a custodial parent from a jurisdiction in which a non-removal order has been entered.⁷ Professor Bailey thoroughly reviews the text and purpose of the Hague Convention and the case law from around the world interpreting it, persuasively concludes that the Convention does provide the remedy of an order of return when the custodial parent violates a non-removal order, and cogently explains

3. The first North America Regional Conference of the ISFL was held at the Jackson Lake Lodge of the Grand Teton National Park near Jackson, Wyoming in June, 1993.

4. The committee included Nickolas Bala (Queens University Faculty of Law), Edith DeLeury (Laval University Faculty of Law), Marsha Garrison (Brooklyn Law School), Dominique Goubau (Laval University Faculty of Law), Sanford N. Katz (Boston College Law School), Donald J. MacDougall (University of British Columbia Faculty of Law), Marygold S. Melli (University of Wisconsin Law School), and myself.

5. Laura W. Morgan, *Child Support and the Anomalous Cases of the High-Income and Low-Income Parent: The Need to Reconsider What Constitutes "Support" in the American and Canadian Child Support Guideline Models*, 13 CANADIAN J. FAM. L. 161 (1996); Nicholas Bala, *Spousal Abuse and Children of Divorce: A Differentiated Approach*, 13 CANADIAN J. FAM. L. 215 (1996); Martha Bailey, *The Right of a Non-Custodial Parent to an Order for Return of a Child Under the Hague Convention*, 13 CANADIAN J. FAM. L. 287 (1996).

6. See Lynn D. Wardle, *Foreword: Family Restructuring at the End of the Twentieth Century - Issues for a New Century*, 8 BYU J. PUB. L. 1-21 (1994) (introducing seven papers presented at the first North America Regional Conference).

7. Martha Bailey, *"Rights of Custody" Under the Hague Convention*, 11 BYU J. PUB. L. 31 (1997).

why two recent rulings of the Supreme Court of Canada denying return orders were erroneous. Laurence Nolan expands upon the paper analyzing "posthumous conception" she presented at the Quebec Conference.⁸ Swimming against the stream of current commentary and case law that views assisted reproduction as a purely private matter (protected against undue state regulation by constitutional privacy doctrines), Professor Nolan argues against using a pigeon-hole, bi-polar (public or private) analysis when the subject is so uniquely a hybrid, and emphasizes the public interest in protecting the quality of life of children. Allen Parkman continues his application of economic analysis to family law with a provocative analysis of how government support programs for children in single-parent homes provide disincentives for responsible parenting.⁹ Professor Parkman argues that the high costs and limited success of collecting child support from absent fathers, and the easy option to provide direct government subsidies to single parents create incentives for irresponsible parenting, and that government policies should emphasize more child removal from irresponsible parents, for the sake of the children.

III. IMPRESSIONS AND REFLECTIONS ABOUT THE DIRECTION OF IDEAS ABOUT PARENT-CHILD LAW

The Quebec Conference manifested scholarly and professional concerns about many different facets of the legal relations of parents and children in North American family law. There was no mandatory focus, and the papers covered an eclectic range of topics. However, three clear impressions remain in my mind from the conference, impressions that have been deepened as I reviewed the conference programs and abstracts nearly six months later.

The first general impression relates to the extent of concern for protecting the physical safety and the financial necessities of children. Eight of the fifty-four presentations related to child support economic issues. Sixteen presentations concerned the physical safety of children, including four addressing violence against children, six others concerned child abduction, and six more covered medical decision-making or intervention on behalf of minors. Thus, twenty-four of fifty-four presentations concerned state protection of either the physical or economic safety of children.¹⁰ Concern for the welfare of children is an historic function of the

8. Laurence C. Nolan, *Posthumous Conception: A Private or Public Matter*, 11 BYU J. PUB. L. 1 (1997).

9. Allen M. Parkman, *The Government's Role in the Support of Children*, 11 BYU J. PUB. L. 55 (1997).

10. I compiled these figures based on a review of the titles of the presentations as recorded in the *ISFL North America Regional Conference*, Quebec, June 13-15, 1996, Book of Abstracts,

courts in common law jurisdictions. The *parens patriae* power of the state to intervene for the protection of children is the basis for child physical protection,¹¹ and while child support doctrines mainly derive from other theoretical grounds, since financial support of children is necessary for their basic survival, there is common conceptual basis for both of these state actions in traditional child-protection precedents.

The disturbing impression left from the Quebec Conference (and many other conferences around the country and the western world), however, is the intractable and growing nature of the problems of child protection and provision. Historically, the primary protection for children was their parents' marriage, and the law protected children by safeguarding and supporting marriage.¹² Having children out of wedlock was heavily stigmatized in law, which established the legal standard of marriage-for-life, imposing expectations of support and nonabuse upon married parents, and making it difficult for their parents to dissolve their marriage.¹³ Today, however, those standards have been eroded. Nearly one-third of all children in the United States are born out-of-wedlock,¹⁴ unilateral no-fault divorce on demand is available throughout the United States,¹⁵ and the proportion of divorced persons in America (previously quite stable) has quadrupled in little over one generation, as each year nearly half as many people get divorced as get married.¹⁶ Thus, their parents' marriage is no longer a reliable source of protection for American children.

Instead, today the law provides a number of *substitute (legal) protections* for children. For example, paternity causes of action "protect" the right of children to have an identified father, and "protect" the

Program at I-viii.

11. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 335, 787 (2d ed. 1988). *Parens patriae* is the power of the ruler "to protect those of the Crown's subjects who were unable to protect themselves." *Id.* at 787.

12. The common law did not (at least originally) impose such duties on fathers of children born out of wedlock. *See generally id.* at 1 at 149-150. Clark points out that recent research suggests that a moral/religious duty to support illegitimate children could be enforced in ecclesiastical courts prior to 1576. *Id.* at 150 n. 7.

13. *See generally* MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* (1972); Homer H. Clark, *supra* note 12 at 405-407.

14. In 1990, it is reported that 1,165,400 children were born to unmarried women in the United States, representing 28% of all births in the United States. Statistical Abstract of the United States 1993, *supra* note 54, Table No. 101 at 78, and Table No. 1380 at 848. Another table in the same publication reports the percentage of children born out of wedlock at 26.6% for 1990, *id.* at Table No. 98 at 77. But using the raw data about the number of births out of wedlock and the total number of births in 1990, the percentage is 28%. *Id.* at Table No. 101 at 78, and No. 1380 at 848.

15. *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79.

16. *Id.* at 139-142, apps. 2-5, *see also* U.S. Department of Commerce, Statistical Abstract, 1996, at 74, Table no. 90 (since 1976, annual rate of divorce has been approximately 50% of annual rate of marriage; in 1994, for example there were 2,362,000 divorces and 1,191,000 marriages).

child's right to a court order requiring the unwed father to pay child support. The law also "protects" children of divorce by requiring their divorced fathers to pay child support. All states have adopted child support guidelines,¹⁷ which "protect" children by reducing the discretion of courts in determining how much child support should be awarded in particular cases, and generally raising the amount of child support awards. Also, public programs and agencies which collect child support have increased during the past decade to "protect" children's right to recover unpaid support. Public programs to prevent and "protect" children from abuse also have increased. Children are "protected" by laws requiring all persons having information about suspected child abuse to report that information.¹⁸ State "child protection" agencies are required to promptly investigate all reports of possible child abuse. Laws allow the immediate removal of a child from a home if an immediate danger exists, to "protect" children.¹⁹ Juvenile courts "protect" children by hearing actions brought by child protective agencies to intervene in ongoing families to protect children who are victims of abuse, neglect and dependency.²⁰ The agencies are represented by state attorneys, the parents are generally represented by private attorneys,²¹ and guardians ad litem are appointed to "protect" the interests of the child.²²

Yet despite all of these new and multiplying legal "protections," more children in America today are not protected from and suffer more from physical child abuse and economic harm than ever before. For example, 42 percent of all children living with a single parent have no support order, and of the 58 percent with child support orders, about one-fourth go entirely unpaid, and another one-fourth are paid only in part.²³ Child abuse²⁴ and juvenile delinquency²⁵ have also increased. Legal programs established to respond to child abuse, child support and juvenile delinquency have failed to slow the tremendous increase in child abuse, nonsupport and juvenile crimes. We are witnessing first-hand the irrefut-

17. 42 U.S.C. §§ 651 (1988 and Supp. 1992).

18. 42 U.S.C. §§ 5101.

19. See e.g., UTAH CODE ANN. §§ 62A-4-409(8) & §78-3a-301 (Supp. 1994).

20. See e.g., UTAH CODE ANN. § 78-3a-16 (Supp. 1994).

21. See e.g., UTAH CODE ANN. § 78-3a-306 (Supp. 1994). If the parents cannot afford an attorney, the state will provide one for them.

22. See e.g., UTAH CODE ANN. § 78-3a-44.5(2) (Supp. 1993).

23. U.S. Dep't. of Health and Human Servs., Admin. for Children & Families, Office of Child Support Enforcement, Child Support Enforcement, Fifteenth Annual Report to Congress 6 (1990).

24. For instance, in 1990 there were 801,143 "substantial and indicated" cases of child abuse in the United States, while in 1993 that number rose to 1,057,255. U.S. Department of Commerce, Statistical Abstract, 1995, at 215, Table no. 346.

25. For instance, in 1970 there were 54, 860 juvenile arrests for violent offenses, and 71,517 arrests for drug possession, sale, and manufacturing, while in 1993 those number respectively rose to 122,434 and 90,618. U.S. Department of Commerce, Statistical Abstract, 1995, at 206, Table 323.

able proof that the law cannot adequately compensate for the extent of marital and parental failure in our society. Children suffer in more ways than the law can competently remedy.

The second impression concerns the growing number of children that experience childhood in homes in which there is the absence of their mother, or their father, or both natural parents. At least ten of the papers presented at Quebec addressed custody or visitation, five concerned adoption, three addressed nontraditional families (including two on same-sex couples parenting) and three concerned assisted reproduction. Thus at least twenty-one of fifty-four papers dealt with children being raised outside of their complete, nuclear, biological family.

This scholarly concern reflects a growing trend in North American societies at the end of the twentieth century. Increasing numbers of children are being raised in homes in which one or both of their biological parents are absent.²⁶ Childhood is not the same for many of these children who are abandoned by their father or mother or who have been driven out of their parents' homes and lives by divorce. There is often an anomie, a distrust, a sense of loss and sadness, and sometimes rage, in the spirits of many of these children. We are right to be concerned about the society and the families that make full or partial orphans of so many of their children.

The third impression relates to both of the above impressions and grows out of them and other papers presented at the Quebec Conference. It is of growing concern that many people in our profession have become "village people" — that is, they seem to believe not merely that "it takes a village" to *help* parents raise children well, but that "*all it takes is a village*" to raise children well without parents.²⁷ It is true that parents are not the only influences in the lives of their children and that most children go through a stage or stages of development in which some person (or several persons) other than parents have greater influence on them than their parents. Peers, teachers, coaches, extracurricular activity advisors, counselors, religious leaders, police, various cultural celebrities, the media, etc., powerfully influence children, for better or for worse. It is tragic, however, that recognition of the importance and potentially positive value of those influences has caused some people in our profession to forget and to undervalue the fundamental importance and critical con-

26. In 1980, for example, 39,523,000 children lived with both their biological father and mother, while in 1990 that number dropped to 37,026,000. *Id.* at 64, Table 77. In 1980 5,355,000 children lived with their biological mother and a step-father, while in 1990 that number rose to 6,643,000. *Id.* Additionally, the number of children living with only their mother increased from 13,700,000 in 1989 to 16,334,000 in 1994. *Id.* at 65, Table 78, and U.S. Department of Commerce, Statistical Abstract, 1991, at 52, Table 69. Finally, in that same period the number of children living only with their father increased from 1,793,000 to 2,257,000. *Id.*

27. This metaphor is taken from HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US* (1996).

tribution of parents and immediate family, and to believe that extra-familial support systems (i.e., "the village") can adequately substitute for real parents and real families.

Some of the Quebec papers reflected a tragically misplaced faith that the solution to this problem is more "village" — that is, more law, more legal programs, and more law-persons. But laws, lawyers, judges and legal programs are no substitute in a child's life for parents. Children need committed parents, and social institutions that convey the importance of both mother and father in a child's life, and that cultivate the social expectation that for the sake of society, if no other reason, parents will not abandon the relationships that are the basis of the children's world. Tinkering with the laws and doctrines to provide substitutes for marriage and families will not provide what these children need.

I am concerned about the "cult of rights" that is growing among "village people," especially among family law scholars. By "cult of rights" I mean the almost mystical belief in the magical power of laws, courts, lawyers, and government to right all wrongs and do all good in society.²⁸ And I am especially concerned because this excessive faith in the ability of public institutions to perform basic, private, family functions usually is accompanied by an attitude of cynicism about families, by denying the importance of and devaluing the contributions of "ordinary" husbands and wives, parents in intact-families, to the health, welfare and happiness of their children and generations that follow, and by an increased preference for "alternative" relationships. Together, this misplaced faith in government-issued "substitutes" for parents, marriages, and families foreshadows tragedy not only for a generation or more of children, but also for our society that will be afflicted with the consequences of a generation short-changed by substitutes for family, parents, and love.

In his celebrated commencement address at Harvard University, Alexander Sholtzenitsyn noted the flaws of overvaluing the curative capacities of the law when he declared:

I have spent all my life under a communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is not quite worthy of man either. A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity, paralyzing man's noblest impulses. And it will

28. See generally Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L. J. 321 (1996).

be simply impossible to stand through the trials of this threatening century with only the support of a legalistic structure.²⁹

Likewise, anthropologist Stanley Diamond has observed: "We live in a law-ridden society; law has cannibalized the institutions which it presumably reinforces or with which it interacts."³⁰ He lamented the "progressive reduction of society to a series of technical and legal signals, the consequent diminution of culture, that is, of reciprocal, symbolic meanings"³¹ Sociologist Jack Douglas has noted: "The bureaucracies may begin with fervent expressions of intentions to aid the family, but regardless of good intentions, they must wage war on the family in order to build their own power."³²

I am concerned that these warnings have been ignored by family law professors and professionals. Perhaps professional self-interest blinds us. But motive aside, I am greatly concerned that so many family law professionals are willing to disregard struggling families, parents, and marriages, and turn to alternative relationships, the law, and the agencies of the law for substitutes — inadequate substitutes that are merely artificial prosthetics for patients whose limbs often need not have been amputated.

It would be misleading, however, to end this introduction on a gloomy note. Clearly, the legal scholars and professionals who gathered in Quebec for the conference were persons of great ability and good will. Some, like Laurence Nolan and Martha Bailey manifested great awareness of the importance of the family and argued persuasively for legal doctrines which protect the natural relations between parent and child against the premature or aggressive intervention, even from well-intentioned extended family members. Others, like Allen Parkman, recognize the importance of legal reforms to provide stability in societies that are destabilized. Their contributions have been selected for publication in this symposium by the student editors of the *BYU Journal of Public Law*. Perhaps that is the best sign of all — that bright, young law students on the brink of entering the profession recognize the importance of the family and have independently selected for publication these excellent papers that likewise recognize the value and importance of family. That gives hope that professionals in the rising generation will appreciate the great value of families that so many of the previous generation have overlooked and neglected.

29. Alexander Solzhenitsyn, Commencement Address, *HARVARD UNIVERSITY GAZETTE*, June 8, 1978.

30. Stanley Diamond, *The Rule of Law Versus the Order of Custom*, 38 *SOC. RES.* 42 (1971).

31. *Id.* at 72.

32. Jack Douglas, *The Ultimate Costs of the Retreat from Marriage and Family Life*, in *THE RETREAT FROM MARRIAGE* 55, 57 (Bryce Christensen ed. 1991).