

Symposium: The Parent-Child Relationship and the Current Cycle of Family Law Reform

Prologue to the Symposium

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The law regarding domestic relations has undergone far greater change during the past fifteen years than it experienced during the half century, perhaps even the entire century, before. Domestic relations law somehow was ignored in reform movements that reshaped private law doctrine in other contexts during those earlier periods. The resulting lag between the law on the books and in the cases and the drastic transformation of various patterns of social conduct can be offered to explain why the legal change has been so great in some quarters. The speed at which major law revision went forward, once it had begun, can be attributed to both a pent-up demand for reform caused by past reluctance of legislators to confront potentially divisive issues about changing values and lifestyles that they considered politically threatening and a long overdue shift by courts away from unwillingness to entertain constitutional challenges to even the most anachronistic and discriminatory state law provisions. Not until the Supreme Court of the United States rendered its decisions in *Griswold v. Connecticut*¹ and *Loving v. Virginia*² less than twenty years ago was it evident that courts would apply a constitutional yardstick to gauge the validity of state laws on marriage and the family in other than very special circumstances.³ By creating an awareness that long-ignored statutes had become vulnerable to judicial challenges,⁴ *Griswold*, *Loving*, and decisions that soon followed in their wake further served as a catalyst for legislative review and reform. Many state legislatures adopted statutory changes quickly once their individual members realized that modernization of domestic relations laws to reflect contemporary mores could be a political asset rather than the liability they once feared it would be.

Because of the speed at which change has taken place and because legislative action often focused at first on such specific targets as divorce grounds and, more recently, matrimonial property, some areas were late in receiving adequate attention of a structured nature. Special problems were created through inadequate advance assessment of the potential impact that changes in an area such as divorce grounds

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1. 381 U.S. 479 (1965).

2. 388 U.S. 1 (1967).

3. Some persons at first chose to regard *Loving* as distinguishable because it dealt with discrimination based on race, *id.* at 2. See, e.g., *In re Goalen*, 30 Utah 2d 27, 512 P.2d 1028 (1973). Thus, they questioned whether a trend toward constitutionalizing domestic relations law would develop. Such a limited reading of the *Loving* opinion since has proved wrong. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978).

4. For an example of the scholarly commentary that helped foster this awareness, see Drinan, *The Loving Decision and the Freedom to Marry*, 29 OHIO ST. L.J. 358 (1968).

might produce in other areas such as child custody. The parent-child relationship provides a number of illustrations of this. For example, today's high incidence of both divorce and remarriage (anticipatable as a logical result of shifting to "breakdown grounds" for divorce⁵) almost inevitably increases problems of initial child custody decisionmaking and subsequent contests over modification.

Development of ways to accommodate the rights and interests of children as well as their divorced parents in such an environment has been especially perplexing. A movement toward increased latitude in private ordering by divorcing parties has raised fear that children might become pawns to be sacrificed in the process of making economic tradeoffs. Further concern has focused on whether and how to eliminate the vestiges of long-standing sexual stereotypes from an earlier day that still are mirrored in the presumptions that judges apply to reach child custody determinations in some jurisdictions. Substitutes proposed for dealing most effectively with custody disputes vary considerably in approach. Some reformers would remove virtually all custody issues, including visitation, from further judicial review once an initial determination has been made, except in those extreme cases when children obviously should be shifted for their protection, when there is justification for terminating parental rights, or when a new parent-child relationship has been established *de facto* if not *de jure*.⁶ Others would come as close as possible, both physically and psychologically, to the alternative proposed by Solomon.⁷ An important factor sometimes ignored, both in past use of presumptions and some of the solutions now being proposed, is the need to balance the interests of all parties—including the children involved—to reach a satisfactory result. Joint custody is regarded by some as a possible answer, but by others as a dangerous form of experimentation with children. Whatever the pros and cons, some thirty states now have statutes dealing with this latest popular approach, most of them adopted within the past three or four years. In *Rethinking Joint Custody*, Professor Elizabeth Scott, a law teacher, and Dr. Andre Derdeyn, a child psychiatrist, analyze the various categories of joint custody statutes and examine what we know (and do not know) about the practical effects of joint custody on children. The authors express concern about moving too far too fast on the basis of our present limited understanding of this approach, and they raise important questions about the possibility that the new laws may inappropriately influence determination of judicial awards to one or the other competing parent in lieu of joint custody.

Problems stemming from lack of attention to the interests of children in changes ostensibly made to protect individual rights or to facilitate reform in accord with

5. One of the tenets of the movement shifting from "fault" to "breakdown" grounds was that by making divorce a less traumatic experience, the new grounds would overcome the reluctance to remarry for fear of repeated exposure to the bitterness, recrimination, or dissembling that too often characterized contested divorce proceedings under the former system. See, e.g., Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 84 (1966).

6. The most widely discussed proposal along these lines is contained in the seminal work, J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973). The "Selected Provisions for the Child Placement Code of Hampstead-Haven," *id.* at 97-101, embody the concept of "Final Unconditional Disposal," *id.* at 101. In a subsequent work the same authors set forth a proposal that would narrowly limit intervention in the parent-child relationship. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 187-96 app. (1979).

7. See 1 Kings 3:16.

current norms have not been restricted to the fallout from legislative action or inaction. Courts have caused confusion by not understanding or anticipating the potential stare decisis impact of their decisions on children, particularly when the issues have been unbriefed, unargued, and thus never presented adequately to them for consideration. The Supreme Court's decision in *Stanley v. Illinois*⁸ produced chaos for the nonrelative adoption process in many states even though *Stanley* was not an adoption case. The Court's language in the now celebrated footnote nine of its opinion⁹ made clear that the decision would have an impact on adoption, although the scope of the rights of unwed fathers and the extent to which interests of their children could be taken into account in the legislative responses that the decision made necessary were left with few, if any, meaningful guidelines.¹⁰ Three major decisions dealing with these issues have been decided by the Court in the eleven years since *Stanley*.¹¹ *Lehr v. Robertson*,¹² the most recent of them, may have provided better keys to understanding the nature of the unwed father's parental rights and the circumstances under which they can be denied. Professor Elizabeth Buchanan, in *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, carefully examines the rationale of these opinions and the framework in which the issues with which they dealt arose. After examining the interests that are at stake, she seeks to establish a constitutional basis for protecting parental interests of unwed fathers in establishing and continuing relationships with their children.

As noted earlier, gaining access to the courts was essential in launching the recent cycle of family law reform. High in relative significance among recent constitutional decisions dealing with the parent-child relationship have been those concerned with insuring that procedural due process is afforded those whose interests may be affected in peremptory decisions such as termination of parental rights.¹³ (Among issues still unresolved is the minimum standard of parenting that can be required in a proceeding characterized by appropriate procedural safeguards.) As major attention shifts from divorce and matrimonial property reform to issues about the permissible degree of state intervention in the family, availability of fora to entertain questions about the exercise of authority by governmental agencies again will be a major concern. Of special interest is whether federal courts will be available to hear such causes, a question addressed in different contexts by two imaginative articles in the Symposium. In an early series of decisions that some consider to be of questionable validity today, federal courts developed a policy of abstaining in the vast bulk of family law cases, including those dealing with divorce and child custody, even when the usual requisites for jurisdiction based on diversity of citizenship were

8. 405 U.S. 645 (1972).

9. *Id.* at 657 n.9.

10. See Note, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517 (1973).

11. *Lehr v. Robertson*, 103 S. Ct. 2985 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

12. 103 S. Ct. 2985 (1983).

13. See *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981).

present.¹⁴ Federal courts more recently have played an important role in cases raising constitutional challenges to state statutes addressing issues ranging from regulation of abortion and contraception to limitations on capacity to marry.¹⁵ Habeas corpus has been the vehicle used to mount some of these attacks, particularly in criminal cases.¹⁶ In *Lehman v. Lycoming County Children's Services Agency*,¹⁷ the Supreme Court limited use of this writ as an avenue for federal court review in child custody cases. Professor Martin Guggenheim, a veteran litigator in the field (and one of the attorneys in *Lehman*) reviews the current problems and possibilities of getting into federal court to challenge child protection laws in *State Intervention in the Family: Making a Federal Case Out of It*.

Professor Joan Krauskopf, in *Remedies for Parental Kidnapping in Federal Court: A Comment Applying the Parental Kidnapping Prevention Act in Support of Judge Edwards*, analyzes the considerable legislative attention that has been paid to one set of contemporary problems of the parent-child relationship: interstate child custody disputes. The Uniform Child Custody Jurisdiction Act (UCCJA)¹⁸ at first languished for almost a decade after its promulgation in 1968 and then finally achieved widespread adoption among the states over a period of several years. Late in 1980 the United States Congress adopted the Parental Kidnapping Prevention Act (PKPA),¹⁹ which in some ways complements and in others arguably conflicts with UCCJA, depending on one's interpretation.²⁰ Professor Krauskopf develops the thesis that as a result of the PKPA, federal courts should entertain requests to enforce prior custody decrees of another state in actions based on diversity of citizenship jurisdiction. The goal of this and other suggestions that she makes for increasing the availability of federal jurisdiction of interstate custody disputes would be to assure national application of uniform jurisdictional standards in enforcement and modification of child custody decrees and thereby decrease the incidence of child abduction.

Ohio has adopted a modified version of the Uniform Parentage Act (UPA),²¹ another uniform law that may be destined to receive greater legislative acceptance eventually. The Ohio version of the UPA²² omits section five of the Act, a provision that takes a first step toward dealing with the vexing legal problems of heterologous artificial insemination (AID) by defining the status of a child conceived through the process by a married woman with her husband's consent. Susan Eisenman, in *Fathers, Biological and Anonymous, and Other Legal Strangers: Determinations of Parentage and Artificial Insemination by Donor Under Ohio Law*, describes the

14. See *In re Burrus*, 136 U.S. 586 (1890); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509 (2d Cir. 1973). For a copiously annotated opinion on the subject, see *Spindel v. Spindel*, 283 F. Supp. 797 (E.D.N.Y. 1968).

15. See generally *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1157 (1980).

16. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

17. 458 U.S. 502 (1982).

18. 9 U.L.A. 116 (1968).

19. Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3567 (1980) (codified at 28 U.S.C. § 1738A (1982), 42 U.S.C. § 663 (Supp. V 1981), 18 U.S.C. § 1073 (1982)).

20. See Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711 (1982); Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297 (1981).

21. 9 U.L.A. 587 (1973).

22. OHIO REV. CODE ANN. §§ 3111.01-.19 (Page Supp. 1983).

consequence of omitting section five of the UPA and analyzes pending remedial legislation. She also looks at some of the legal problems that can result from using AID in other situations—for example, usage for surrogate parenting or for providing children for single women—that are not addressed by the UPA or present legislative proposals in Ohio.²³

With the amount of recent activity in this area, it is not surprising that law school teaching materials are being updated frequently and new books are being published. The Symposium closes with Professor Lynn Wardle's review of *American Family Law in Transition*, a recent innovative addition to the field produced by two veteran scholars, Professors Walter Weyrauch and Sanford Katz.

The hallmark of this symposium is its presentation of a collection of articles that, although varied in scope, are all especially timely and relevant for assisting in the resolution of major contemporary issues concerning the parent-child relationship.

23. Ohio is not alone in its apparent unwillingness to enact legislation to deal with these issues. See Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 482 (1983).

