"...Which Comforts While it Mocks..."[1] *Some Paradoxes in Modern Family Law*

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1. The Basal Paradox: Family Law as Law

The Shorter Oxford English Dictionary defines[2] *paradox* as, *inter alia*, "A phenomenon that exhibits some contradiction or conflict with preconceived notions of what is reasonable or probable". Although much of the law at large may manifest aspects of the phenomenon,[3] it is suggested at the outset that family law involves a great many such paradoxes - some at a fundamental level. It is the purpose of this paper to identify and comment on some of the major instances whilst bearing in mind another purported definition to be found in the same source[4] that a paradox is "...a seemingly absurd or self-contradictory statement or proposition which when investigated or explained may prove to be well founded or true".

The first basal paradox is, in fact, to be found in the label attached to the topic to be discussed. The question to be asked is whether family law is truly law. Before attempting to answer the question, it is worth exploring why the question should have been asked in the first place. The first reason, for the academic at any rate, is that, as a discipline it is of relatively recent origin: thus, Stone noted,[5] as late as 1955, that six English

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1 The title is taken from Robert Browning, *Rabbi Ben Ezra, stanza 7*: "For thence, - a paradox Which comforts while it mocks – Shall life succeed in that it seems to fail".

2 L. Brown (Ed.) The New Shorter Oxford English Dictionary on Historical Principles, Oxford: Clarendon Press, 1993 at 2093

3 One supposes that a specific instance in relation to evidence law and the trial process at common law may be found in the works of the Australian journalist Evan Whitton in his books, *Trial by Voodoo: Why the Law Defeats Justice and Democracy*, Milsons Point (NSW): Random House, 1994 and *The Cartel: Lawyers and Their Nine Magic Tricks*, Sydney: Herwick, 1998. For a critical review of the former, see F Bates "Review of Evan Whitton, *Trial by Voodoo: Why the Law Defeats Justice and Democracy*" (1996) 1(2) *Newcastle Law Review* 122

4 Above n 2

5 OM Stone, "Family Law" in Symposium on the Teaching of Various Subjects (1955) 3 *Journal of the Society of Public Teachers of Law* 107 at 113

law teachers had met, "...to consider this strange if not exactly esoteric subject". Five years later, this same distinguished commentator was still seeking to justify[6] the teaching of family law in English law schools and was concluding[7] that, "...university law faculties can make contributions of analysis, rationalisation and integration which this branch of the law so urgently needs". However, particularly since family law is now an established part of the law school curriculum throughout the common law world, any novelty which it might have had has long since dissipated. The fact that, as will be seen, the discussion continues must be due to some other factor, or combination of factors.

Of course, there is considerable argument to like effect in other areas of legal activity; the most obvious of these being the case of public international law. However, as is well known, a deal of the view that public international law is not "law" in the strict sense is derived from the writings of Austin and Hegel. The former regarded[8] public international law, not as positive law, but as positive morality and that, "...so-called law of nations consists of opinions or statements current amongst nations generally. It is therefore not law properly so called". Similarly, there was no equivalent to Austin's necessary sovereign or sanction. Hegel adopted a similar approach,[9] taking the view that sovereign states were not answerable to any external authority and, thus, even the principle of *pacta sunt servanda*, said to be fundamental to international law, was, in reality, only normative rather than positive.

Arguments against family law being regarded as law, though, seem to have different bases. In 1986, O'Donovan wrote[10] that the view that family law was not really law appeared to be gaining credence. That, though, has little to do with the Austinian or Hegelian attitudes earlier mentioned, it rather, "...asserts that the law cannot deal with family disputes and behaviour, and that law's instrumental functions of conflict resolution and behaviour-guidance are not applicable to personal and family life". She goes on[11] to state that that particular attempt to illustrate family law's deficiencies as law is tripartite in its attack. First, it posits inability - put another way, the law is not in a position to tell people how to behave in their own homes because they will not obey such instruction and, hence, any such rules become unenforceable because necessary information is unobtainable. It is, therefore, better not to attempt to legislate.

There were some respectable advocates of that view: both Watson[12]

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6 OM Stone, "University Teaching of Family Law" (1960) 5 *Journal of the Society of Public Teachers of Law* 130

7 Ibid at 139

8 J Austin, *The Province of Jurisprudence Determined* (1832), 2nd ed, New York: B Franklin, 1970

9 GWF Hegel, Outlines of the Philosophy of Right (1821) para. 331.

10 K O'Donovan "Family Law and Legal Theory" in *Legal Theory and Common Law*, Oxford: Blackwell, 1986

11 Ibid at 185

12 A Watson, *The Nature of Law*, Edinburgh: Edinburgh University Press, 1977 at 96

and Stein and Shand[13] have expressed the view generally that family relationships are an area from which the law both does, and should, seek to distance itself. However, in the modern climate, it is an approach which is continually harder to justify, both as fact and policy. Community knowledge and awareness of the internal dynamics of family life - especially the unhappier ones - is increasing and, in turn, that is manifested in curial decisions. Thus, in *M v M*,[14] the High Court of Australia decided that an "unacceptable risk" of child sexual abuse was sufficient to justify a finding in cases involving residence and contact,[15] as they are now known in Australian law. Whatever one may think of that test, and it has been the object of critical comment[16] as well as judicial attempts to mitigate its consequences,[17] it demonstrates that, at a high level, courts are prepared now to take cognisance of what goes on within the family. Similarly, in every Australian jurisdiction, there is legislation aimed at mitigating the effects of family violence.[18] These items of legislation are all derived from a United Kingdom model.[19] Those are facts and, although some commentators might suggest[20] that the response has been insufficient, few would question the interventionist premise on which they are based.

The second group of arguments noted by O'Donovan[21] suggests that the law is an unsuitable (or "wrong") mechanism for dealing with personal behaviour and feelings or emotions. The law is perceived as cold, antagonistic, adversarial and alienating, whereas families are concerned with love and trust. "What" she writes, "is being expressed here is a statement about the limits of law in the resolution of disputes". This is a point which has been directly taken up by McClean, who states[22] that, "Whenever law is dealing with family relationships, it is at best a clumsy

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13 P Stein and J Shand, *Legal Values in Western Society*, Edinburgh: Edinburgh University Press, 1974 at 21

14 (1988) 166 CLR 69

15 See *Family Law Act* 1975 Part VII, as amended in 1995. Prior to these amendments the legislation referred to "custody" and "access". For the reasons for change, see Family Law Council, *Patterns of Parenting After Separation* (1992) at 29 *ff*

16 For such comment, see F Bates, "Evidence, Child Sexual Abuse and the High Court of Australia" (1990) 39 *International and Comparative Law Quarterly* 413. See also below, text at n 152 *ff*

17 See, for instance in Australia, *D v Y* (1995) FLC 92 - 581; *G v M* (1995) FLC 92 - 641. In England, see the decision of the House of Lords in *Re H (Minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1

18 See, Family Law Act 1975 (Cth) s 114AB; Crimes Act 1900 (NSW) ss 562A-562R; De Facto Relationships Act 1984 (NSW) ss 53-55; Crimes (Family Violence) Act 1987 (VIC); Domestic Violence (Family Relationships) Act 1989 (Qld); Summary Procedure Act 1921 (SA) ss 99; Domestic Violence Act 1994 (SA); Restraining Order Act 1987 (WA); Justices Act 1959 (Tas) ss 106A-106F; Domestic Violence Act 1992 (NT); Domestic Violence Act 1986 (ACT)

19 Domestic Violence and Matrimonial Proceedings Act 1976

20 See, for example, J Behrens, "Ending the Silence, But...Family Violence under the Family Law Reform Act" (1996)10 *Australian Journal of Family Law* 35

21 Above n 10 at 185

22 JD McClean, "The Battered Baby and the Limits of the Law" (1978) 5 *Monash University Law Review* 1 at 15

instrument. Law cannot make people be wise or responsible or happy or good". The flaw in that almost self-evident statement is that, were that the sole goal of legal intervention, a great deal of legal intervention would be declassified. A major function of legal activity is to prevent people being unwise, irresponsible, unhappy or, more particularly bad. That is surely the case when the law is dealing with family relationships as it is, say, with crime. Indeed, in the areas of domestic violence and child abuse, the analogue with crime is especially apposite. The second approach noted by O'Donovan is, in reality, a variation of the first, and is just as easily refuted.

The third of these approaches seeks to point to the bad effects of using law on the family, in that law operates only as a negative force which destroys what it is intending to help. Once again, this argument represents another aspect of the thesis that the law is somehow limited in this context. However, the truth of the matter is that it is the family circumstances which lead up to the intervention of the law, rather than the law itself which has caused the damage. To take but one instant example, in the Australian case of *In the Marriage of Schwartzkopff*,[23] the parties had married in 1981, there being three children of the marriage. They separated on March 21st 1991, when the wife and children left the matrimonial home and went to a refuge. The following week, consent orders were made at a Magistrates' Court regarding guardianship, custody and access. More particularly, orders were made under s 114 of the *Family Law Act* 1975 which sought to restrain the husband from assaulting, harassing, threatening or interfering with the wife and from attending at or near any premises where she might be living, working or visiting. Between 29 March and 3 April, the husband committed a number of breaches of those orders and, on 9 April, the wife applied, under s 112AD of the Act,[24] to the Family Court for the husband to be dealt with for those breaches. On 15 April, the Family Court made orders which were similar in terms to those which had been made earlier.

On 3 May, the wife's application under s 112AD was heard and the Family Court found that the husband had breached the orders made on 28 March. He was ordered to enter into a recognisance that he be of good behaviour for twelve months and comply with the Family Court orders. However, the husband continued to breach the orders, so that, by 20 July, there were twenty further breaches, including two serious ones. On 3 July, the wife applied to the Family Court in respect of those breaches and, in consequence, the husband was arrested and remanded in custody until 5 July when he was released on his own recognizance on a number of

[23] (1992) FLC 92-303. For comment on the aftermath of that decision in the later case of *Fitzgibbon v Barker, Gardner and Leader Associated Newspapers; Re Schwarzkopff* (1993) FLC 92 - 381, see F Bates "Scandalising the Court: Some Peculiarly Australian Developments" (1994) 13 *Civil Justice Quarterly* 241

[24] This provision sets out the sanctions which are available to the courts in dealing with contraventions of orders made under the Act

conditions. Nonetheless, his breaches of the orders continued, including two more serious incidents later in the month. As a result, the wife made further application under s 112AD which led to the husband's being arrested and remanded in custody until his trial, which began on 22 August. The trial judge found the husband guilty of 29 of the 32 alleged breaches of the orders and sentenced him to two years imprisonment. The husband appealed to the Full Court on the grounds that the sentence was excessive.

The Full Court[25] dismissed the appeal and, in so doing, commented generally[26] that,

> "One of the fundamental purposes of a legal system in a civilized society is the protection of members of the community from acts of violence. Until recent times the criminal law, which makes acts of this kind an offence, was not properly enforced in cases where violence occurred within the family. Such violence was considered private in nature and beyond the reach of the law except in the most serious cases. However, in the last 20 years increasing attention has been focussed on the prevalence of crimes of violence within the family and attitudes which tolerate family violence are now condemned by the law".

After referring to the various legislation which had come into force in Australia between 1982 and 1989, the Court further emphasised the law's public role when it was said that,

> "Personal relationships, especially within the family, are rightly protected by privacy, but that privacy must not be allowed to hide violence. Family violence is not a private matter and must be treated seriously by the Courts, not only when prosecuted as a criminal offence in the ordinary way, but also where violence is an element of a breach of an order of the Family Court".

As regards the facts of the case at hand, the Court regarded the sentence as being far from excessive and appropriate as meeting the circumstances of the case. "The fact", their Honours stated,

> "is that over a period of three months the husband subjected his wife to a campaign of terror and violence during which the wife was justified in feeling that her life was in serious danger. She faced this campaign of terror with considerable fortitude. She repeatedly sought the aid of the Courts and the police to protect her as a citizen from this conduct".

The Court went on to say that a particularly serious aspect of the case was that it was clear that a part of the husband's intention during the latter series of breaches was to terrorise the wife into abandoning the legal proceedings. "The Court," they said,

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[25] Barblett DCJ, Fogarty and Moore JJ
[26] (1992) FLC 92-303 at 79, 291

> "has an obligation to the wife who seeks its protection. Society is entitled to expect that the Court will meet conduct of this type in an appropriate way and the Court has an obligation to itself to ensure that orders which it has made are complied with and that persistent, deliberate and serious breaches are dealt with in a firm and clear way".

Although it is quite clear that the sentence passed on the husband was very likely to bring the marriage to a formal end, it surely cannot reasonably be argued that it was the law's intervention which destroyed the relationship. The cause of the breakdown was the behaviour of the husband, which was of such a kind that, as the Full Court pointed out, the law could not properly ignore it as a matter of both fact and policy.[27]

However, there is a further issue raised by O'Donovan[28] which is altogether more serious, more difficult to refute and which has, more recently, been taken up by Dewar.[29] This issue, she states arises from

> "...the conferral on the judiciary, and on administrators, by Parliament of discretion in deciding matters of custody, childcare, divorce, maintenance, matrimonial property and inheritance. Discretion permits the individualisation of justice according to the particular facts of each case. Criticism of this laments the loss of law's hortatory function in laying down rules for the future, lack of predictability, universality or generality of the law, the undermining of the moral authority of the judiciary, and the expansion of litigation as each case seeks its individual adjudication".

The matter has been expressed rather more strongly by Dewar, who writes[30] that academic colleagues regard family law as inherently inferior because it represents, "...a falling away from the rigorous discipline of common law reasoning, or a mutation into a discretionary gloop that is beneath serious intellectual endeavour".

Once again, it may be possible to answer these comments by reference to factual developments: thus, for example, in areas where discretion is so conferred, it may well be that time has seen the steady circumscription of that discretion. For example, in 1976, s 79(4) of the *Family Law Act*, which sets out the factors which courts are required to take into account when altering interests in property, there were five such factors. In 1998, there were seven. Again, in s 64(1), which dealt with the powers of courts in custodial proceedings, in 1976 all the courts were required to take into account was that the welfare of the child should be the paramount

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[27] For a Canadian case involving both children and an analogous factual situation, see the decision of Carr J of the Manitoba Court of Queen's Bench (Family Division) in *Plesh v Plesh* (1992) 41 RFL (3d) 102. For comment, see F Bates, "Finding the Truth in Child Sexual Abuse Cases: Some Comparative Developments" (1993) 5 *Journal of Child Law* 178. Also below text at n 154

[28] Above n 10 at 186

[29] J Dewar, "The Concepts, Coherence and Contact of Family Law" in *Examining the Law Syllabus: The Core*, Oxford: Oxford University Press, 1992 at 81

[30] Ibid at 83

consideration[31] and that courts should not make an order contrary to the wishes of children who have attained the age of fourteen years unless it is necessary by reason of special circumstances to do so.[32] Subject to those provisions, courts might make such order as it thought proper.[33] In 1995, in determining the best interests of the child, as "welfare" had now become,[34] courts are required to take into account twelve such factors.[35] Some of these are extremely specific, such as, "...the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and daily contact on an individual basis"[36] or, "...the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant".[37] In addition, as Dewar has pointed out,[38] aspects of public law are continuing to encroach on traditionally private law aspects of family law. Thus, for example, the *Children Act* 1989 in the United Kingdom, seeks to provide a code in relation to both public and private matters as they relate to children.[39] Of course, a code of that comprehensive nature is, except in the case of the State of Western Australia,[40] not possible in Australia for constitutional reasons.[41]

At the same time, there are other areas where public law significantly intrudes into the traditional private law domain and where discretion is of scant relevance. The first of these is child support, the basis of which, in both Australia and England, is, in the words of the Australian legislation, to, "...ensure that children receive a proper level of support from their parents".[42] Within that broad primary objective is contained a particular objective that the, "...level of financial support to be provided by parents for their children should be determined in accordance with the legislatively fixed standards."[43] Similarly, there is a further objective,

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31 *Family Law Act* 1975 (Cth) s 64(1)(a)
32 Ibid s 64(1)(b)
33 Ibid s 64 (1)(c)
34 *Family Law Act* 1975 (Cth) (as amended in 1995) s 68E(1)
35 Ibid s 68F(2)
36 Ibid s 68F(2)(d). See *B and B: Family Law Reform Act 1995* (1997) FLC 92-755
37 Ibid s 68F(2)(f)
38 Above n 29 at 81
39 The preamble to the Act is as follows: "An Act to reform the law relating to children; to provide for local authority services for children in need and others; to amend the law with respect to children's homes, community homes, voluntary homes and voluntary organisation; to make provision with respect to fostering, child minding and day care for young children and adoption; and for connected purposes".
40 See *Family Court Act* 1975 (WA). Western Australia was the sole jurisdiction to take advantage of the provision contained in s 41 of the *Family Law Act* 1975 which encouraged the various States to create their own Family Court systems.
41 See HA Finlay, R J Bailey-Harris, MFA Otlowski, *Family Law in Australia*, 5th Ed, Sydney: Butterworths, 1997 at 74*ff*
42 Child Support (Assessment) Act 1989 (Cth) s 4(1)
43 Ibid s 4(2)(b)

> "...that persons who provide ongoing daily support for children should be able to have the level of financial support to be provided for the children readily determined without the need to resort to court proceedings".[44]

Hence, child support is calculated through administrative assessment according to a formula both in Australia[45] and in England.[46] At the same time, as Oldham,[47] a United States commentator has pointed out, some curial discretion in departure from the formula is both necessary and desirable. In Australia, the grounds for departure are set out in the legislation[48] and have been considered by the Full Court of the Family Court in *In the Marriage of Gyselman.*[49] Each of the major grounds[50] (each of which possess a number of sub-categories and may interact and overlap to a significant degree) are prefaced by the phrase, "...in the special circumstances of the case.".. In *Gyselman,*[51] the Court commented that, whilst it was not possible to define the phrase with any degree of certainty,

> "...it is intended to emphasise that the facts of the case must establish something that is special or out of the ordinary. That is, the intention of the Legislature is that the Court will not interfere with the administrative formula result in the ordinary run of cases".

The other area of legal intervention in family matters which impinges on the notion of family law as a discretionary regime represents another paradox. That area is social security law. That is itself a paradox because an avowed aim of child support systems is to reduce the social security budget: thus, the Joint Select Committee on the Family Law Act, comprised of representatives of both Houses of the Australian Parliament, stated[52] that,

> "...the law should reinforce the policy that, wherever possible, families should be supported by private rather than public means. In furtherance of this policy, relatives should not be in a position to transfer their obligations to support

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[44] Ibid s 4 (2)9c)

[45] Ibid s 117

[46] See *Child Support Act* 1991 Schedule 1

[47] JT Oldham, "Lessons from the New English and Australian Child Support Systems" (1996) 29 *Vanderbilt Journal of Transnational Law* 691 at 732 writes, that, "...some amount of discretion must be retained: an automatic formula with no flexibility is perceived as unfair. Also a system with no discretion will inevitably be either excessively arbitrary as too complex if it tries to incorporate into a formula some concern for an individual's circumstances".

[48] Child Support (Assessment) Act 1989 (Cth) s117(2)

[49] (1992) FLC 92-279

[50] These are: first, significantly reduced financial capacity of either party; second, the costs of maintaining the child are significantly affected; third, the administrative assessment would result in an unjust and inequitable determination because of financial factors.

[51] (1992) FLC 92-279 at 79, 065 *per* Nicholson CJ, Fogarty and Nygh JJ. See also *In the Marriage of Savery* (1990) FLC 92-131

[52] Joint Select Committee on the Family Law Act, *Family Law in Australia* (1992) para 5.29

> relatives to the community at large where they are, financially, in a position to contribute to the support of those relatives".

That view had been reinforced[53] in an explanatory memorandum on the, then, proposed legislation.

The *Social Security Act* 1991 is nothing if not legalistic in its scope and operation: as the Full Court of the Federal Court of Australia put the matter in the case of *Re Blunn v Cleaver*,[54]

> "The area of social services legislation is a complex one as the terms of the previous legislation and judicial decisions upon it have demonstrated. That is what the draftsman of this legislation may have sought to overcome. Regrettably, the replacement consists of a maze of provisions made the more complex by prolix definitions, provisos and exceptions. Both those who claim entitlements under it and those responsible for its administration will not always find it easy to discover whether or not a benefit is payable. It may be expected that the Administrative Appeals Tribunal and the courts will continue to be troubled by difficult problems of construction which will be thrown up by a variety and factual circumstances which, in an increasingly complex community, will not be few".

As regards family issues, the finding that a person (usually a woman) is living in a family like relationship, referred to in the legislation as a "marriage like" relationship[55] may have important financial consequences. If such a relationship is found, it frequently means that benefits will not be payable and those benefits often relate to family support.

A worthwhile instance is provided by the decision of O'Laughlin J of the Federal Court of Australia in *Staunton-Smith v Secretary, Department of*

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[53] Explanatory Memorandum on the *Child Support Bill* 1987 (Cth) at 2

[54] (1993) 11 9 ALR 65 at 83 *per* Sheppard, Neaves and Burchett JJ

[55] *Social Security Act* 1991 (Cth) s 4(2)(iii). Section 4(3) sets out the matters which are required to be taken into account and provides: "In forming an opinion about the relationship between 2 people for the purposes of paragraph (2)(a) or subparagraph (2)(b)(iii), the Secretary is to have regard to all the circumstances of the relationship including, in particular, the following matters: (a) the financial aspects of the relationship, including (i) any joint ownership of real estate or other major assets and any joint liabilities; and (ii) any significant pooling of financial resources especially in relation to major financial commitments; and(iii) and legal obligations owed by one person in respect of the other person; and (iv) the basis of any sharing of day-to-day household expenses; (b) the nature of the household, including: (i) any joint responsibility for providing care or support of children; and (ii) the living arrangements of the people; and (iii) the basis on which responsibility for housework is distributed; (c) the social aspects of the relationship, including; (i) whether the people hold themselves out as married to each other; and (ii) the assessment of friends and regular associates of the people about the nature of their relationship, and (iii) the basis on which the people make plans for, or engage in, joint social activities; (d) any sexual relationship between the people; (e) the nature of the people's commitment to each other, including; (i) the length of the relationship; and (ii) the nature of any companionship and emotional support that the people provide to each other; and (iii) whether the people consider that the relationship is likely to continue indefinitely; and (iv) whether the people see their relationship as a marriage-like relationship".

Social Security.[56] There, the applicant had lived with her second husband for some eight months, but the parties separated in 1981. However, in March 1981, she returned to live in her husband's house as a matter of convenience and because of his assistance in caring for a disabled child.[57] That led to the cancellation of her sole parent's pension which was defined, as the legislation then stood,[58] as including a married person who is living separately and apart from her spouse. The first issue which faced the judge was that the Administrative Appeals Tribunal, which had found against the applicant, had failed to provide reasons for its decision in breach of the relevant legislation.[59] O'Loughlin J first noted[60] the decision of the Full Court of the Federal Court in *Dornan v Riordan,*[61] which, in turn, relied on the judgment of Megaw J in *Re Poyser and Mills' Arbitration,*[62] which emphasised that substantial failure of a Tribunal to state reasons for its decision could constitute an error of law. Thus, a family related matter is directly involved with a fundamental matter of administrative law and process.

As regards the substantive issue of whether the applicant should have had her pension cancelled, O'Loughlin J remitted the case for rehearing by the Tribunal on the grounds that they had fallen into error by assessing her circumstances as if she had been living in a *de facto* relationship with her husband, rather than inquiring whether she had been living separately and apart. In so doing, his Honour referred to a variety of cases which had been decided on social security legislation.[63] Ultimately, O'Loughlin J's conclusion,[64] derived from those cases, was that,

> "...in every case it will be necessary to have regard to the particular circumstances of the people whose lifestyles will be affected by the decisions of the

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[56] (1991) 32 FCR 164

[57] Provision of benefits for children with disabilities has been long productive of difficulty: see F Bates, "Benefits for Handicapped Children in Australian Social Security Law: A Disaster in Statutory Interpretation and Reform" (1990) 11 *Statute Law Reform* 108, "Social Security Law and Children with Disabilities: Change and Decay in Australian Statute Law" (1997) 18 *Statute Law Review* 215; "Benefits for Children with Disabilities in Australia: A Light at the End of the Tunnel (1999) 20 *Statute Law Review* 154

[58] *Social Security Act* 1947 (Cth) s 43(1)

[59] *Administrative Appeals Tribunal Act* 1975 (Cth) s 43 (2B) which provides that, "Where the Tribunal gives in writing the reasons for its decision, those reasons shall include its findings on material questions of fact and reference to the evidence or other material on which those findings were based".

[60] (1991) 32 FCR 164

[61] (1990) 24 FCR 564 at 573 *per* Sweeney, Davies and Burchett JJ

[62] [1964] 2 QB 467 at 477

[63] Re Tang and Director-General of Social Services (1981) 3 ALN N49; Lambe v Director-General of Social Services (1981) 57 FLR 262; Lynam v Director-General of Social Security (1983) 1 AAR 197; Re Kingston and Secretary, Department of Social Security (1985) 8 ALN N315; Re Tilley and Secretary, Department of Social Security (1988) 15 ALC 77; Re Stoilkovic and Secretary, Department of Social Security (1985) 9 ALN N33; Re Ivovic and Director-General of Social Security (Unreported, 17 September 1984); In the Marriage of Pavey (1976) 25 FLR 450

[64] (1991) 32 FCR 164 at 175

> Department; it is wholly inappropriate to fall back on standards, conventions or 'role models'".

The processes by which that conclusion was reached are entirely the same as those involved in the interpretation of any complex statute, and the role of public law as a source of family law will, hence, be readily apparent.

It is, though possible to go one stage further: as I have elsewhere written,[65] family law does not have an Atiyah[66] or a Gilmore[67] to outline its philosophical bases. However, even that might be changing. O'Donovan, in another publication,[68] has referred to writings in the area of what might generally be described as critical legal studies.[69] There have been various other attempts to relate critical legal studies to family law,[70] to which O'Donovan refers. She also points[71] to a post modernistic approach to family law and to autopoeic theory as it relates to family law. Hence, although the volume of theoretical writing may not be as great as in some other areas, it cannot properly be regarded as absent.

2. Reality and the Rhetorical Paradox

A useful starting point for any consideration of the paradox which apparently exists between rhetoric and reality in family law matters is s 43 of the Australian *Family Law Act* 1975.[72] It is initially provided in s 43(a) that courts exercising jurisdiction under the Act must have regard to, "...the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life". That, of course, is, of itself, quite unexceptionable and is to be found in the landmark judgment of Lord Penzance in *Hyde v Hyde and Woodmansee*[73] as well as in the Australian *Marriage Act* 1961 s 46(1), which requires civil celebrants to bring the notion of marriage as understood in Australia, to the attention of parties about to marry. However, s 43(b)

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[65] F Bates, "Some Theoretical Aspects of Modern Family Law" (1983) 100 *South African Law Journal* 664 at 665

[66] PS Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford: Oxford University Press, 1979

[67] G Gilmore, *The Death of Contract*, Columbus: Ohio State University Press, 1974

[68] K O'Donovan, *Family Law Matters*, London: Pluto Press, 1993 at 25

[69] For a very general comment on this movement, see JW Harris, *Legal Philosophies*, 2nd ed, London: Butterworths, 1997 at 108 *ff*

[70] JM Eekelaar, "What is Critical About Family Law" (1989) 105 *Law Quarterly Review* 244; MDA Freeman, "Towards a Critical Theory of Family Law" (1985) 38 *Current Legal Problems* 153. In Australian context, see S Parker and P Drahos, "Closer to a Critical Theory of Family Law" (1990) 4 *Australian Journal of Family Law* 159

[71] Above n 68 at 26 *ff*

[72] For a general comment on the operation of this provision, see F Bates, "Principle and the Family Law Act: The Uses and Abuses of Section 43" (1981) 55 *Australian Law Journal* 181

[73] (1866) LR 1 P & D 130 at 133

enjoins courts to take account of,

> "...the need to give the widest possible protection and assistance to the family as the *natural and fundamental group unit of society,*[74] particularly while it is responsible for the care and education of dependent children" (author's own emphasis).

Of course, s 43(a) and (b) are not the only instance in legal terms of such emphatic statements: thus, Article 41(1)(1) of the *Constitution of Ireland* provides that, "The State recognises the Family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and impressible rights, antecedent and superior to all positive law". Article 41 (1)(2) goes on, in consequence, to say that, "The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and State".[75] There are, inevitably, too many non-legal statements to like effect to need documentation. It also seems that the family which the law in both jurisdictions is seeking to nurture and protect is the family which is constituted by marriage: in Australia, s 43(a), which deals with marriage, is placed before s 43(b) which deals with the family. The law is also constrained by constitutional considerations.[76] In Ireland, the constitution, by reason of Article. 41(3)(1), is yet more emphatic when it provides that, "The State pledges itself to guard with special care the institution of Marriage on which the Family is founded and to protect it against attack".

Therein lies one paradox: as a matter of fact, and allusion has been made to this issue indirectly,[77] many people elect to live together, for whatever reason, without the formalities of marriage. The informal family, just as the formalised family, requires a legal response. This response has been both legislative[78] and curial,[79] but, once again, a response which addresses the totality of the situation is hard to achieve because people, as has been documented,[80] live together without formalities for many different reasons. At the same time, it could very well be argued that the fact that a couple have made a public commitment should mean that their relationship falls

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[74] Emphasis added

[75] For discussion of some of the implications of these constitutional provisions, see F Bates, "Law as Culture: Global Thoughts from a Small Island" (1988) 21 *The Law Teacher* 263

[76] Section 51 (xxi) of the Australian Constitution gives the Commonwealth power to legislate in relation to marriage and matrimonial causes.

[77] Above text at n 56 *ff*

[78] In Australia, see De Facto Relationships Act 1984 (NSW); Property Law Act 1958, as amended in 1987 (Vic); Family Relationships Act 1975 (SA), De Facto Relationships Act 1996 (SA); Domestic Relationships Act 1994 (ACT); De Facto Relationships Act 1991 (NT); De Facto Relationship Act 1999 (Tas)

[79] See, particularly, *Calverley v Green* (1994) 155 CLR 242 and *Muschinski v Dodds* (1985) 160 CLR 583

[80] See D Oliver, "Why Do People Live Together?" (1982) *Journal of Social Welfare Law* 209, F Bates, "Contracts and Extramarital Cohabitation - Some New Developments" 1978 *SLT (News)* 133

into a particular class and is deserving of special attention and protection (Indeed, Deech has argued[81] a cogent case against the recognition of unformalised relationships). However, if that is to be done, it places the legislator or judge in another paradoxical situation in that it cannot easily be done without some discrimination against some people who have not formalised their relationship. It could be that that course of action may be justified in the case of a couple who have obviously, consciously and deliberately rejected marriage as a social institution or as being irrelevant to their needs or aspirations. But it is harder to do so in cases where, say, a couple are precluded from marriage, for whatever reasons, or were using the period as a precursor to marriage.

Yet even within s 43 of the *Family Law Act* itself, there is an even more obvious paradox. After having stated that the family is the "...fundamental group unit of society" in s 43(b), s 43 (ca), as inserted in 1995, states that courts must have regard to, "...the need to ensure safety from family violence". This emphasis on family violence is reinforced by various paragraphs in s 68F(2) of the Act. That subsection sets out the factors which courts must consider in determining what is in a child's best interests which, of course, are the paramount consideration.[82] These factors include;

> "...the need to protect the child from physical or psychological harm caused, or that may be caused, by: (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person"[83] and, "...any family violence involving the child or a member of the child's family".[84]

Thus, the message received by the public from this legalisation, even before any contextual matters are taken into account, is quite immediately paradoxical. On the one hand s 43(b) tells the potential litigant that the family is the fundamental group unit of society, whilst s 43(ca) and s 68F(2) tell them that the family is an innately dangerous entity characterised by violence, ill-treatment and related behaviours. It should be said that the provisions contained in s 68F(2), at least, are nothing especially new: prior to the 1995 amendments, Australian judges had been taking account of the effects of a generally violent environment on children, even when the violence had not been immediately directed towards them. Thus, in the case of *In the Marriage of JG and BG*,[85] Chisholm J commented that,

> "For children to grow up in a climate of potentially violent and dominating relationship between their parents seems to me to be an unacceptable model

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[81] RL Deech, "The Case Against Legal Recognition of Cohabitation" (1980) 29 *International and Comparative Law Quarterly* at 480

[82] *Family Law Act* 1975 (Cth) s 65E

[83] Ibid s 68F(2)(g)

[84] Ibid s 68F(2)(i)

[85] (1994) FLC 92-515 at 81, 317

> of family relationships, and would be very likely to create a situation of stress and fear that may well be damaging over a period,"

That view was taken up more specifically by Baker J, in the decision of the Full Court of the Family Court of Australia in *In the Marriage of Patsalou*,[86] who stated that,

> "The making of derogatory or denigrating remarks by one party to another and the inflicting of physical violence by one party on the other are, in my view, relevant matters to be taken into account in cases concerning the custody of and access to children. Any person who indulges in such behaviour, in my opinion, presents a poor role model indeed for children, and his or her suitability as a custodial parent must be very much in doubt".

Yet appreciation of family violence goes back considerably further than case law decided shortly before the 1995 amendments to the *Family Law Act*. In Australia, State legislation seeking to deal with the issues sometimes significantly predates the amendments to the Commonwealth legislation.[87] That legislation, though, is far from the beginning of the story: in 1878, the feminist writer Frances Cobbe had written[88] of public indifference towards wife-beating. In Australia, during 1974 and in the debates leading up to the passing of the *Family Law Act* 1975, Senator Martin of the State of Queensland had stated[89] that,

> "A conservative assessment is that approximately 5,000 families in Australia are currently in a situation where the husband habitually batters the wife".

It has, therefore, taken a considerable time for appropriate notice to have been taken of a clearly documented phenomenon in a major item of legislation. Even within the realisation of inter-spousal violence, another paradox can instantly be found: it has been eloquently enunciated by Scarman LJ, as he then was, in the Court of Appeal's decision in *Bradley v Bradley*[90] where a wife had obtained two non-cohabitation orders on the grounds of persistent cruelty, but, paradoxically, the local council had refused to rehouse her until she had obtained a divorce. Scarnan LJ stated that,

> "There are many, many reasons why a woman will go on living with a beast of a husband. Sometimes she may live with him because she fears the

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[86] (1995) FLC 92-580 at 81, 752; Kay and Tolcon JJ agreed with Baker J

[87] See Crimes Act 1900 (NSW) ss 562A-562R; De Facto Relationships Act 1984 (NSW) ss 53-55 (NSW); Crimes (Family Violence) Act 1987 (Vic); Domestic Violence (Family Protection Act) 1989 (Qld); Summary Procedure Act 1921 (SA) s 9; Domestic Violence Act 1994 s 4 (SA); Restraining Orders Act 1997(WA); Justices Act 1959 ss 106A-106F (Tas); Domestic Violence Act 1986 (ACT); Domestic Violence Act 1992 (NT).

[88] F Cobbe, *The Contemporary Review* 57, (1878) 32. For more detailed discussion, see F Bates, "The Family and Society: Reality and Myth" (1980) 15 *Irish Jurist* 195 at 200-202.

[89] Weekly Hansard (Senate) (1974) at 2504

[90] [1973] 3 All ER 750 at 753

> consequences of leaving. Sometimes it may be physical duress, but very often a woman will willingly make the sacrifice of living with a beast of a husband because she believes it to be in the true interest of the children. Is such a woman to be denied the opportunity (which, of course, is what has happened here) of calling evidence to show that, although she is living with him, yet the family situation is such and his behaviour is such that she cannot reasonably be expected to do so?"[91]

The situation as regards children is still more confusing and contradictory. The broad phenomenon of child abuse is too well known to need documenting and it has been recognised in the 1995 amendments to the *Family Law Act.*[92] At the same time a paradox is instantly apparent: in December 1990, Australia ratified the *United Nations Convention on the Rights of the Child.* In effect, according to Article 4 of the Convention, this meant that Australia would, "...undertake all appropriate legislative administrative, and other measures for the implementation of the rights recognized in the present convention". It should be said that, although some individuals were enthusiastic supporters of the Convention, others, in the words of Otlowski and Tsamenyi,[93] represented,

> "...a vociferous dissenting voice, with concerns that this will have for law and practice in Australia with regard to children. Claims have been made that the convention is anti-family and particular concerns have been expressed about the creation and elevation of 'children's rights' and the resulting erosion of parental rights and interference with family life".

This is itself paradoxical, because Article 5 of the Convention states that,

> "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention".

That Article is the more pertinent to Australia as it appears that it was inserted at the behest of the Australian delegation to the United Nations.[94]

At the outset, the Convention (unlike, say, *The Hague Convention on Civil Aspects of International Child Abduction*)[95] has not been adopted

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[91] The Court of Appeal ultimately decided that the fact that the wife was living in the same house as her husband did not preclude her from petitioning for divorce under the legislation as it existed in England.

[92] Above text at n 82

[93] M Otlowski and BM Tsamenyi, "Parental Authority and the United Nations Convention on the Rights of the Child: Are the Fears Justified?" (1992) 6 *Australian Journal of Family Law* 137 at 137

[94] Ibid at 142

[95] See *Family Law (Child Abduction Convention) Regulations* 1987. For comment, see generally PE Nygh, *Conflict of Laws in Australia,* 6th ed, Sydney: Butterworths, 1995 at 440 *ff*

specifically into Australian Law, that does not mean that it is wholly irrelevant. In the, by now notorious case of *Minister for Immigration and External Affairs v Teoh*,[96] a majority of the High Court of Australia[97] held that ratification of the Convention was an adequate foundation for a legitimate expectation that, in the absence of statutory or executive indications to the contrary, administrative decision makers would act in conformity with the Convention. Without seeking to rehearse the *Teoh* decision, as that has been done substantially by other commentators,[98] the significance of the decision must very well depend on the standpoint of the critic. Thus, a strong supporter of the Convention, such as Turner,[99] would applaud the decision, whereas a person looking at it from an administrative law perspective might be more attracted to the view to be found in the dissenting judgment of McHugh J.[100]

As regards the Convention itself, although Otlowski and Tsamenyi have concluded[101] that many of the concerns which have been raised by the Convention's opponents are without foundation and that Australia's participation in the Convention will not significantly change Australian family law, the controversy goes on nevertheless. In the context of this paper, it might be said that attitudes towards both the Convention at large and towards particular Articles are so profoundly disparate that the Convention itself might be regarded as a legal paradox.

A recent and critical commentator on it is Maley,[102] who has adopted extreme stances in regard to other areas of Australian family law. Thus, he has urged[103] that the benefit of marriage, as opposed to cohabitation,

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[96] (1995) 183 CLR 273

[97] Mason CJ, Deane, Toohey and Gaudron JJ

[98] See, for example, M Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's* Case and the Internationalisation of Administrative Law" (1995) 17 *Sydney Law Review* 204; M Taggart, "Legitimate Expectations and Treaties in the High Court of Australia" (1996) 112 *Law Quarterly Review* 50; E Handsley, "Legal Fictions and Confusion as Strategies for Protecting Human Rights" (1997) 2 (1) *Newcastle Law Review* 56. Assenting view on *Teoh's* Case.

[99] See JN Turner, " Panic Over Children's Rights" (1996) 1 (2) *Newcastle Law Review* 56

[100] In the judge's own words, (1995) 183 CLR 273 at 316: "If the result of ratifying an international convention was to give rise to a legitimate expectation that that convention would be applied in Australia, the Executive government of the Commonwealth would have effectively amended the law of this country. It would follow that the convention would apply to every decision made by a Federal official unless the official stated that he or she would not comply with the convention. If the expectation were held to apply to decisions made by State officials, it would mean that the Executive government's action in ratifying a convention had also altered the duties of State government officials. The consequences from administrative decision-making in this country would be enormous. Junior counsel for the Minister informed the Court that Australia is a party to about 900 treaties. Only a small percentage of them have been enacted into law. Administrative decision-makers would have to ensure that their decision-making complied with every relevant convention or inform a person affected that they would bet be complying with those conventions".

[101] Above n 93 at 159

[102] B Maley, Children's Rights: Where the Law is Heading and What it Means for Families, St. Leonards (NSW): Centre for Independent Studies, 1999

[103] B Maley, *Marriage, Divorce and Family Justice*, St. Leonards (NSW): Centre for Independent Studies, 1992 at 19

lies in the presumption of its permanence. That benefit would include

> "...continuity of exclusive sexual enjoyment, constant companionship, mutual care, a jointly supported household, the advantages of some division of labour, children, cooperative and stable rearing of children, and joint endeavours to advance their interests. None of this is possible without emotional commitments and joint investments of time, effort and money".

That much is largely unexceptional and, initially at least, is what most married couples would aim for; however, Maley continues by saying that,

> " One partner's investments can be rendered nugatory by failures of performance, or the active hostility, of the other partner. Such risk may be reduced, if not eliminated, by marriage vows carrying enforceable penalties or compensation for non-performance".

He later seeks to explicate[104] this comment by stating that marriage must be taken seriously as a contract and contract-breaking behaviour penalised.[105] Without seeking to canvass the issue of the legal nature of marriage, it is fair to say the Maley's contractual model is, in all probability, at odds with most individuals' perception of marriage and is, therefore, unlikely to appeal to legislators.

As regards the *United Nations Convention on the Rights of the Child,* Maley concludes[106] his study by stating that the rights attributed to children by the Convention,

> "...would undermine parental prerogatives and the authority necessary for adequately managing children and preparing them for adulthood and social living. Children would suffer because they could be authorised (even encouraged) to struggle against their parents, and more easily, immaturely and incompetently to follow paths in defiance of their parents that would work against their own interests. All would be losers, including the wider society. The dependency of children is a stubborn, "natural" fact and problem to which the "natural" family has always been the answer. Measures which could reduce or handicap the parental response to their children's needs, while increasing the child's dependency upon the state and its functionaries, are a course from which we should hastily withdraw".

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[104] Ibid at 51

[105] Maley, ibid at 27, seems to base this aspect of his views on N Barry, "An Individualist's View of Marriage and the Family" (1988) 4(6) *Centre for Independent Studies Policy Report* 37, who has written (at 39) that, "Marriage should be governed by the common law of contract and divorce treated as a type of breach of contract. The form of marriage contract that people can make should be limited only by statutory provisions to protect children and laws to outlaw such things as bigamous marriage contracts. Just how property should be distributed, questions of the care and custody of children and future maintenance payments would be settled by prior agreement".

[106] Above n 102 at 84. There is, inevitably, journalistic support for Maley's view; see F Devine, "UN Must be Kidding" *The Australian*, 1 February 1997

With that view may be compared that of Turner, who writes[107] that,

> "It is the most important social instrument since the *Declaration of Man*. It has a beautiful and poetic rubric. It should be known by every teacher, every social worker, every lawyer, every health professional and every parent, and above all it should be taught to every child. Every household should possess a copy".

It will readily be apparent that it is highly unlikely that any genuine intellectual currency is likely to be transacted between those positions or those commentators!

Although it is beyond the scope of this discussion to seek to analyse the Convention article by article, given the thrust of the paper as a whole, it is worth examining particular articles and the reaction of various writers towards them. Even at a fundamental level, however, rhetoric and reality are at primal odds: Article 42 of the Convention specifies that, "States Parties undertake to make the provisions of the Convention widely known, by appropriate and active means, to adults and children alike". Yet Brewer and Swain,[108]comment that the apparent ignorance across the community of the Convention's existence, and of the role which it could, and should, play in determining the shape of children's services, strongly suggests that both State and Commonwealth governments have not taken their obligation under Article 42 seriously. Turner states[109] that the Convention is unknown to most Australians, which itself represents a breach of the Convention. Maley, perhaps not surprisingly, is silent on that Article.

Article 12.1 of the Convention provides that, "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". Maley immediately argues[110] that the article lacks

> "...objective criteria of competence....Although it is clearly the case that children do vary in the ages at which they achieve various kinds of competence and maturity, it is one thing to take this into account and exercise appropriate discretion within the home or school, but quite another thing to universalise, in the law, a process which is inherently subjective, and to commit the courts to making an indefinite succession of individual, customised, subjective judgements of maturity if petitioned to do so".

He goes on to say that, conversely, an age-based criterion is an objective marker signifying a child's access to a variety of prerogatives previously

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[107] Above n 99 at 73.
[108] G Brewer and P Swain, Where Rights are Wronged: A Critique of Australia's Compliance with the United Nations Convention on the Rights of the Child (1993) at 55
[109] Below n 99 at 74
[110] Below n 102 at 22

unavailable and masking the formal end of parental control. Article 12, thus, undermines parental authority from the very beginning because it is open to constant challenge and increases the scope for interference in functioning families. On the other hand, Turner regards[111] Article 12 as being the centre-point of the Convention and as being the most significant right accorded to children by the Convention.[112] Otlowski and Tsamenyi consider[113] that the Article, including Article 12.2 should be read as a whole: Article 12.2 states that,

> "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

From a strictly interpretative point of view, the nexus they propose is clearly correct and they also argue that the Article is,

> "...clearly not intended to provide children with a carte blanche right to express their views in any matter whatsoever, and certainly it is not aimed at creating rights in children which they can, with the assistance of the state, assert against their parents".

They do go on to say, and this is seized on with some alacrity by Maley,[114] that such proceedings might, "...conceivably involve the child in direct conflict with his parents...". Maley seeks to emphasise that any such conflict could exist in circumstances where there was no evidence that the parents were abusive or neglectful or unfit in any way to direct or control the child. However, Maley has been highly selective in his use of Otlowski and Tsamenyi, in that they continue by saying that the more usual situation where Art 12 is applicable is where the child is involved in proceedings involving the State or where the child is indirectly involved in proceedings between her parents.

Maley does not deal directly with Article 12.2, which, given the context of the *Family Law Act* at large is perhaps just as well: in s 68F(2) of the Act, which sets out the matters which courts must consider when determining the best interests of the child,[115] s 68F(2)(a) requires courts to consider, "... any wishes expressed by the child and any factors (such as the child's level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes". In addition, as is well known, s 68L provides for courts to order that children be separately represented: that provision, as Turner notes,[116] has been explicated by the Full Court of

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[111] Below n 99 at 81
[112] For comment on Article 12.2, see below text at n 115 *ff*
[113] Below n 93 at 150
[114] Above n 102 at 24
[115] See *Family Law Act* 1975 (Cth) s 68F(1)
[116] Above n 99 at 82

the Family Court of Australia in *Re K*,[117] in which specific reference was made[118] to Article 12 of the Convention.

At the same time, Turner is strongly of the view that, although considerable progress has been made, particularly in the area of family law, its importance has not been perceived in the community at large. For instance, he states[119] that children are rarely represented at case conferences with regard to alternative care arrangements and are expelled from school without a hearing.[120] He goes on to say[121] that Article 12.2 requires the establishment of children's legal centres, the education of specialist children's lawyers and a much greater sensitivity to children's needs and visions.

Although Article 12 provides, perhaps, the most immediate instance of conflict of opinion, it is clearly by no means the only article which is likely to give rise to radical disagreement. Thus, Article 16.1 states that, "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, not to unlawful attacks on his or her honour and reputation". Article 16.2 then states that the child has the right to the protection of the law against such interference or attacks. Maley considers[122] that the Convention has made no attempt to indicate limits to its generality or the part, if any, that parents may legitimately play over the course of rearing, instruction and directing their children, in intruding on the children's privacy. "The nature of parenthood is such," he opines, "that the role could scarcely be carried without constant intrusions into a child's 'private' affairs".

Otlowski and Tsamenyi consider[123] that the generally accepted view of Article 16 is not concerned with trivial forms of interference with

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[117] (1994) FLC 92-461

[118] Ibid at 80, 776 *per* Nicholson CJ, Fogarty and Baker JJ. Turner, above n 99 at 82, considers that *Re K* has expanded the situations where representation should be ordered.

[119] Above n 99 at 82

[120] Deprivation of education, Turner argues , ibid, is a breach of Article 28 of the Convention. This article states that, "1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates. 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. C. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries".

[121] Above n 99 at 83

[122] Above n 102 at 27

[123] Below n 93 at 157

privacy, but more substantial breaches, such as unwarranted exposure by the media or the indiscriminate release of information about a child which might lead to the child being unfairly labelled and discriminated against.[124] Turner's view[125] is that it would be interesting to find out how children themselves perceive compliance with the article and cites evidence[126] to the effect that children, girls especially, do not enjoy a great deal of privacy. Inevitably, and properly, he refers to the landmark decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*[127] (a case, incidentally, not mentioned by Maley), in regard to the provision of contraceptive advice to young women and wonders how far medical practitioners, Lord Fraser's judgment in that case notwithstanding, comply with Article 16!

By way of conclusion to this part of the discussion, it is clear, from whatever standpoint one takes, that the extreme disagreement about the Convention at large, as well as particular Articles, suggests that it may not be a perfect document. Thus, Hogan and others,[128] as noted by Otlowski and Tsamenyi,[129] have made two specific criticisms of the Convention; first, they argue that the content of the Convention is frequently expressed in vague and general terms and lacks sufficient detail to provide any real guidance. Second, they suggest that the conditional language and qualified terms contained in many of the Articles undermine any rights which may have been created and leave too much scope for differing interpretations of what the obligations under the Convention involve. Paradoxically, and there is more than some truth in those criticisms, this might lead to a more ready acceptance of the Convention by writers such as Maley and a more cautious one by writers such as Turner!

3. Joint Parenting and the Protection of Children

The history of this fundamental paradox in Australian child law is central to any attempt to understand it. In 1976, when the *Family Law Act* 1975 first came into effect, s 64(1), as it then stood, provided very little in the way of guidance for judges; the court was to regard the welfare of the child as the paramount consideration,[130] to take the wishes of any children

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[124] The authors refer to a child infected with the AIDS virus.

[125] Below n 99 at 84

[126] P Boss, S Edwards and S Pitman, *Profile Of Young Australians - Facts, Figures and Issues*, Melbourne: Churchill Livingstone, 1995 at 167

[127] [1986] 1 AC 112. For comment, see JM Eekelaar, "The Emergence of Children's Rights" (1986) 6 *Oxford Journal of Legal Studies* 161, "The Eclipse of Parental Rights" (1986) 102 *Law Quarterly Review* 4

[128] M Hogan, D Munro, K Cronin and M Young, "The Draft Convention on the Rights of the Child - Social Security, Welfare and Juvenile Justice" (1989) 14 *Australian Journal of Early Childhood* 8 at 9

[129] Below n 93 at 160

[130] *Family Law Act* 1975 (Cth) s 64(1)(a)

over the age of fourteen years into proper account[131] and, subject to those matters, could make such order as it thought proper.[132] However, in 1983, the discretion of courts was significantly limited by reason of s 64(bb) which required them to take six additional matters into account. These, subject to the paramountcy principle and the wishes of the children[133] were: the nature of the relationship of the child with each of the parents of the child and other persons; the effect on the child of separation from either parent of the child or any child or other person with whom the child has been living; the desirability of, and the effect of any existing arrangements for the care of the child; the attitude to the child and to the responsibilities and duties of parenthood demonstrated by each parent of the child; the capacity of each parent, or of any other person, to care adequately for the child and, finally, any other fact or circumstance which, in the court's opinion, the welfare of the child requires to be taken into account. Thus, the discretion of courts is both restricted and structured.[134]

In addition, s 61(1) of the Act originally provided, and this survived until 1995, that "Subject to any order of a court for the time being in force, each of the parties to a marriage is a guardian of any child of the marriage... and those parties have joint custody of the child". The impact of this provision is that, in Graycar's words,[135]

> "...joint custody, at least as a rhetorical notion, has been placed squarely on the Australian agenda and has become much more frequently discussed in the family law and social work literature, though critical consideration of the issue has been scarce".

There are, of course, some aggressive adherents of the notion: thus, for instance, Lehmann has written[136] that

> "Joint custody would appear to benefit children and parents. It is a script for equality. We are proud of our anti-discrimination laws, yet continue to discriminate against non-custodial mothers and fathers. We harass the latter for maintenance payments for children but deny them a normal parental relationship".

Lehmann was, of course, writing before the child support system[137] came

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[131] Ibid s 64(1)(b)

[132] Ibid s 64(1)(c)

[133] The requirement of the wishes of children over fourteen years being taken into account was extended to all children, ibid s 64(1)(b)

[134] For general comment on discretion, see below text at n 29 *ff*

[135] R Graycar, "Equal Rights *Versus* Father's Rights: The Child Custody Debate in Australia" in *Child Custody and the Politics of Gender*, London: Routledge, 1989

[136] G Lehmann, "The Case for Joint Custody" (1983) 27 *Quadrant* 60 at 66. The thrust of his commentary can be discussed from the following, ibid at 62: "If men can have their children confiscated from them irrespective of their own moral worth and effort, then they will be obliged to avoid marriage, vasectomize themselves, become narcissistic and use women as sexual objects".

[137] Above text at n 46

into operation, but the same arguments continue to be rehearsed. The reality is that the two issues are, and ought not to be otherwise regarded, unconnected: the fact that a father may be liable to pay child support has no relevance to the issue as to whether he is a fit person to have contact with children he has fathered. To suggest otherwise is surely paradoxical in itself!

There is, it seems to this commentator,[138] though, an altogether more realistic approach to the notion of joint custody that than espoused by Lehmann and which can be found in an early decision on the *Family Law Act*: in *In the Marriage of Dyason,*[139] Emery J stated that,

> "To order joint custody to continue can in some circumstances reduce tensions for, on the face of it, it means that neither party has lost his or her claim for custody. This type of order must however be used with great care and always remembering that the Court must treat the welfare of the children as the paramount consideration. Such an order can create more problems than it solves for when the parties have separated, particularly because of serious incompatibility, then it will be difficult as a committee of two to reach a majority decision".

Graycar, as might have been expected, is critical[140] of the move towards any presumption of joint custody on the grounds that it is based heavily on the ideology of equality but, at the same time, ignores the realities of matters such as the daily caretaking practices of divorced men and women and the relative economic situations of men and women in Australia.

Yet what was to come was still more graphic: in 1992, the Australian Family Law Council produced its report *Patterns of Parenting After Separation.*[141] After an initial literature review, the report's first conclusion[142] was that,

> "Most children want and need contact with both parents. Their long term development, education, capacity to adjust and self-esteem can be detrimentally affected by a long term or permanent absence of a parent from their lives. The well being of children is generally advanced by their maintaining links with both parents as much as possible".

The report went on to note[143] that the joint custody notion had been tried and abandoned in one major jurisdiction (that being California[144]) and

[138] See also, F Bates, "Joint Custody in Australian Law: A Broad Perspective" (1983) 57 *Australian Law Journal* 343

[139] (1976) FLC 90-026 at 75, 119

[140] Above n 135 at 185

[141] The author must state his interest in the matter: he was, at most relevant times, a member of both the Family Law Council and the sub-committee which prepared the report. For his own views on the report, see F Bates, "New Views of Parenting". (1995) 19 (4) *Children Australia* 15

[142] Family Law Council, Patterns of Parenting After Separation (1992) at 17

[143] Ibid at 37

[144] Ibid at 36

had several major problems in that it retains the language of ownership and was frequently perceived as meaning equal time, when equal time with each parent was frequently unworkable. The report also urged[145] that that terminology be changed. The report also recommended that the focus of the debate and concluded that parenting plans between separating parents should be encouraged as they,

> "...have, at their basis, a language that recognises the needs of children and the responsibilities of parents. Parenting plans have been shown to provide a useful framework to guide future relationships between parents and their children".

The report formed the basis[146] of the *Family Law Reform Act* 1995, which introduced a wholly new Part VII into the 1975 Act. Indeed, s 60B of the amended Act sets out the objects of the new Part and the principles which underlie it. Thus, it is stated[147] that,

> "The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children".

The provision goes on to state that the principles underlying those objects are, first, that children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together.[148] Second, the Act states[149] that children have a right of contact on a regular basis with both their parents and with other people who are significant to their care, welfare and development. The Act also requires[150] that parents share duties and responsibilities regarding the care, welfare and development of their children and that parents should agree about the future parenting of their children.[151]

However, the provision does state that those doubtless, laudable, objectives will not apply when it is, or would be, contrary to the child's best interests and, it is in that context, that contradiction and paradox arises. An especial instance arises in relation to allegations of sexual abuse of children - an obvious area where it is undesirable for parents to have contact with their children if there is evidence that such has taken place.

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[145] Ibid at 30 *ff*

[146] A criticism of the new Part has been made by R Chisholm, "Assessing the Impact of the Family Law Reform Act 1995" (1996) 10 *Australian Journal of Family Law* 177 at 184 on the grounds that there was no "reform" background. The present writer cannot agree: the Family Law Council's record in relation to matters of reform in the area has been clearly documented; see B Hughes, *The Family Law Council 1976-1996: A Record of Achievement*, Canberra: Australian Government Publishing Service 1996 at 50

[147] *Family Law Act* 1975 (Cth)s 60B(1)

[148] Ibis s 60B(2)(a)

[149] Ibid s 60B(2)(b)

[150] Ibis s 60B(2)(c)

[151] Ibid s 60B(2)(d)

But what of the qualitative and quantitative nature of the evidence involved? Reference has already been made to the "unacceptable risk" test enunciated by the High Court of Australia in *M*.[152] At the same time, there can be little doubt that that subjective and open-ended test[153] is quite inadequate to cope with the collateral damage which unfounded or malicious allegations may cause.

It would be struthious indeed to pretend that baseless allegations are not made: thus, for graphic instance, a baseless allegation provoked a Canadian judge to comment[154] that;

> "It is patently obvious from the evidence and the manner in which it was given that the mother thereafter set out to punish the husband for the embarrassment he had caused her. The only ways she knew of were to deprive him of property and their son. Her motivation was revenge pure and simple".

There, on the basis of what seemed to have been a chance remark, the wife had made, and persisted in, an allegation of sexual abuse and, in so doing, had effectively destroyed any relationship between the child and his father.[155]

However, the upshot of the *M* test is that risk of abuse taking place should be no more than "unacceptable"; thus, in practical terms, the court will have to decide its unacceptability subjectively and in individual cases. It will be quite clear that, in an area which is as emotionally charged as this one, that is not an especially satisfactory state of affairs, in that so much will depend on the initial approach of particular judges. As, if it is applied at face value, it will be easy to use the risk of abuse as a means of severing a parental tie. That, though, is precisely what the new Australian legislation is seeking to avoid. In these circumstances, it is hardly surprising that the courts in Australia - and, indeed, elsewhere - are seeking to escape from it. Some illustrative instances must suffice, as the development has been documented elsewhere by this commentator.[156] Thus, first, in *In the Marriage of D and Y*[157] it was stated that,

> "The fact that the child's allegations are found to be groundless, as these were, is little consolation to those who have been affected by them. In saying this we attribute no blame to the child who, even before her fourth birthday, was making allegations of abuse".

The Court were of the view that the child's imagination had been

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[152] Above text at n 14
[153] Above n 16
[154] *Plesh v Plesh* (1992) 41 RFL (3d) 102 at 103 *per* Carr J of the Manitoba Court of Queens Bench [Family Division]
[155] Ibid at 104
[156] F Bates, "New Developments in Child Sexual Abuse and the Fact-Finding Process" (1998) 5 *Canberra Law Review* 111
[157] (1995) FLC 92-581 at 81, 765 *per* Nicholson CJ, Baker and Tolcon JJ

"nourished", in their own words,[158] by unknown people, but the Court could, "...only hope that the adults in this child's life receive proper assistance so as to redress any damage caused to date and prevent any further psychological harm". Although it is not quite clear to which of the various adults who were involved - the victims or the nourishers of the child complainant's imagination - the unsatisfactory state of affairs will readily be apparent. The more so as the allegations made by the child were, of themselves, most unusual: as the Court put the matter,[159] they involved,

> "Satanic rituals and a murder of a child by a local doctor in Rockhampton and identified various other members of a witchcraft group which (*inter alia)* included the wife's uncle and aunt and the wife's solicitor..."

Were the *M* test to be uncritically applied, it seems to this writer that the more outrageous the allegations made then the more likely courts would be to take account of them (itself a startling paradox). That strange situation seems to have been, at least in part, dissipated by *D and Y.*

The dilemma, or paradox, which is raised by the phenomenon of child sexual abuse and its relationship with the1995 reforms was raised by Fogarty J, in a dissenting judgment in *N and S and the Separate Representative.*[160] After having said [161] that it was impossible to overstate the importance of protecting children from child sexual abuse and its consequences, he continued by pointing out[162] that a healthy parent child relationship could bring to the child a

> "...unique richness and warmth of experience which is vitally important to the child's future development. The forced severing of ties between a non-abusive loving parent can have profound effects".

It followed that a dilemma arose as to whether the Court should take the step of terminating or limiting that relationship when it is not known whether the alleged events took place. In addition, because of the very nature of the acts themselves any real degree of certainty maybe impossible to achieve and, of course, the ultimately dominant factor is the welfare of the child. Cases involving child sexual abuse were effectively unique in the judicial process because the possibilities involved were not, "...future possibilities whose evaluation derives from a known factual basis, but possibilities with relate to an unestablished series of facts".

Awareness of the existence of a paradox does not, instantly, mean that it is capable of immediate resolution, although in the House of Lords, in

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[158] Ibid at 81, 766
[159] Ibid at 81, 761
[160] (1996) FLC 92-655
[161] Ibid at 82, 709
[162] Ibid at 82, 711

Re H and others (minors)(sexual abuse: standard of proof),[163] Lord Nicholls noted a tendency on the part of judges who were faced with conflicting evidence in the area,

> "...to 'play safe' in the interests of the child. Sometimes judges wish to safeguard a child whom they fear may be at risk without at the same time having to fasten a label of very serious misconduct onto one of the parents".

So, even an attempt to resolve the paradox, has resulted in yet another, secondary, paradox!

4. Some Tentative Conclusions

Although this article does not seek definitively to describe all of the paradoxes to which modern family law gives rise, those which have been discussed lie at the heart of issues which govern law and policy. There are, inevitably, other views of family law, so that Dewar has written[164]

> "That family law should be in a chaotic state is perhaps scarcely surprising, given the social facts with which it routinely deals. Family law engages the passions as no other part of our legal system does; and it is the hallmark of passion that it must exceed rationality".[165]

He also comments[166] that it is diffuse and de-differentiated and must accommodate a certain level of contradiction.

A partial resolution of any such contradiction, it is submitted, may be achieved by accepting that family law does have a theoretical base and does represent more than unstructured discretion. Indeed, the history of family law, in one jurisdiction at any rate, has been the history of structuring discretions. The history of discretions in relation to custody/residence has already been discussed,[167] there have also been changes in relation to s 79 of the *Family Law Act*, which deals with the matters which courts are required to take into account in making adjustments of property.[168]

However, structuring of discretion does not remove the paradoxes which have been described in the body of this paper. Internal contradictions can be found even at the most basic level. There are some clearly

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[163] [1996] 1 All ER 1 at 22

[164] J Dewar, "The Normal Chaos of Family Law" (1998) 61 *Modern Law Review* 467 at 484

[165] Dewar continues, ibid at 485, by urging a higher status for family law on the basis that it is not solely directed at judges and litigants and offers a range of rhetorical structures for resolving issues which cannot be resolved by other means.

[166] Ibid at 485

[167] Above text at n 130

[168] In 1975, there were five such matters which were required to be taken into account; in 1997, there were seven couched in more detail.

perceptible reasons for this state of affairs: first, ultimately, laws are put into effect by politicians who continually fear embarrassment (of whatever kind) and family matters are especially likely to generate the kind of embarrassment feared by politicians. Second, in relation to family matters, the influence of pressure groups in relation to particular issues - such as the relationship between access / contact and child support[169] - may lead to politically contradictory responses. Third, the need for discretions will inevitably continue as, as a matter of fact, people organise their family arrangements in different ways and the law must take cognisance of that. Similarly, the law is being required to take cognisance of new forms of family organisation[170] which, in turn, may be productive of further paradoxes.

In the end, in the totality of all these circumstances, the paradox is alive and well in modern family law and there seems little doubt that, while family matters continue to generate heat, without corresponding light, it will continue to thrive.

[169] See above n 23
[170] See above n 78