

BOOK REVIEWS

Child Custody and Divorce, by SUSAN MAIDMENT, Senior Lecturer in Law, University of Keele. (Croom Helm Ltd, London & Sydney, 1984), pp. 1-324, with Table of Cases, Tables of Statutes, Bibliography, Name Index and Index. Cloth recommended retail price \$38.95 (ISBN 0 7098 1737 6), limp recommended retail price \$20.50 (ISBN 0 7099 1798 8).

Susan Maidment's purpose, as stated in the Preface, is "to put the law of child custody in its social context". This involves presenting the social science evidence which is relevant to child custody law "simply to widen the horizons of the lawyer and make him [sic] aware that he was not operating in a social vacuum". This is not all; Maidment writes that she "wanted to believe also that a greater social understanding of the legal process surrounding child custody would actually positively contribute to the legal decision-making process". The purpose is restated in different and rather wider terms in the last chapter. It is to investigate the social sciences knowledge of marriage, divorce, the family and parent-child relationships, and use the insights so obtained to explore "the current dilemmas of child custody law and practice" (page 269).

Maidment is therefore seeking to improve the quality of decision-making in custody cases; indirectly, by increasing our awareness of the content of social science and its relevance to custody cases, and also directly, for the book includes arguments for a change of emphasis in legislation, to encourage more frequent use of joint custody.

Although writing in family law has for many years drawn on social science research, this book is a valuable addition to the literature. It is the most thorough and up to date treatment available, and will provide teachers, practitioners and students with a very useful reference point. The relevance of the research evidence is well related to issues in custody law, and the discussion is stimulating, and on occasion (notably in relation to joint custody) persuasive and satisfying.

The material used by Maidment is mainly research on aspects of child development, such as the effect of children being brought up in single parent families, and the significance of access by the other parent. But she also cites research on the operation of the legal system, such as statistical studies of the results of custody agreements between the parents.

How helpful is social science in custody cases? Maidment correctly points to two limitations. First, social science does not speak with one voice: current experts clash on many aspects of children's development, and a glance at the history of research on child development shows that yesterday's truisms are today's heresies. Nonetheless, "[d]espite the rise and fall in theories, it can be claimed that there have been real advances of knowledge and thinking"; and "there are now certain well-established understandings concerning children's needs for emotional attachment to adults which are

adhered to by proponents of disparate theoretical perspectives” (page 11). Moreover, if judges study the conclusions of those who have approached the matter from a research orientation they might be better able to articulate and question their own assumptions about children (pages 10-11).

Maidment also points out that while social science might provide us with reliable generalities about children, it cannot easily tell us whether the generality applies to particular cases: “[f]or example, access may be of critical importance to the healthy adjustment to divorce of children generally, but in the particular case the child may be damaged by it” (page 270). Maidment considers that while social science cannot answer the question for particular children, it is nevertheless valuable for judges to be aware of its general conclusions when they examine the facts of each case (pages 270-271).

It would be difficult to disagree with any of this. But the discussion would have been more complete if Maidment had taken into account another major limitation of the value of social sciences, namely the need for the courts to make judgments about values and policies when deciding custody cases. Such judgments lie at the heart of many custody decisions. Suppose the parents are in very different financial positions, or one lives a rather carefree and relaxed lifestyle and the other is a member of a fundamentalist religion with a strict code of discipline. Should the court regard wealth as an advantage? Should it prefer one lifestyle to another? Even more difficult, how should a court approach a dispute between parents of different racial or cultural groups, which have different conceptions of child-rearing and even different conceptions about desirable qualities in adults? In so far as the task involves not only predicting outcomes, but attaching values to them, social science would appear to be of little or no assistance.

Custody decisions also involve question of legal policy. A classic case is the parent who ‘kidnaps’ a child, and establishes a close relationship by the time the case comes to court. Should the court adhere strictly to the task of doing what is best for the particular child no matter what? If so, the kidnapper is likely to get custody, a result which in other legal contexts would be seen as a wrongdoer benefitting from his or her own wrongdoing. Or should the court lean in favour of the ‘innocent’ parent, either to achieve justice between the parents, or to discourage other parents from kidnapping? Again, should a court make decisions about which school a child should go to, or should it regard that as being within the responsibility of the parent having custody?

It is not clear what Maidment thinks about such issues. At some points, for example at page 149, she seems aware of the value judgments inherent in custody cases. At others she suggests that in the past courts have used the child’s welfare as a smokescreen for decisions aimed at advancing some social policy such as preserving the father authority or punishing guilty wives. The implication seems to be that if the courts stopped doing this, and in a morally divided society they just might, the gap could, at least in principle, be filled by the social sciences (see pages 270-271).

The uncertainty about Maidment’s view of policy issues is deepened by

the strangely bland presentation of much of the recent case law. An example is the treatment of *Re D*¹ (for which, incidentally, the citation is incomplete). In that case the House of Lords upheld a decision ordering the adoption of a child against the wishes of a father on the ground that since he was a homosexual, he "had nothing to offer his son at any time in the future". Maidment offers no criticism of this dreadful decision, and does not cite any of the numerous Australian cases on this question,² even though she regards the subject as sufficiently important to warrant a discussion of the research evidence suggesting that children develop normally in the care of homosexual parents (pages 181-182).

Although Maidment is careful not to make extravagant claims for the value of social science, she nevertheless does not indicate very clearly where the limits might lie. It is not a fair criticism that Maidment has not canvassed all aspects of custody law, for she does not claim to do so. But her failure to define clearly the role of social science in custody decisions weakens the force of her argument, and lays her open to the charge that despite her protests, she does unwittingly overstate the case for the value of the social sciences in custody cases.

While the main focus is on the role of social science, the book ranges widely over custody law. Chapter 2 is a summary of the law of child custody, and deals admirably with the nightmare of English legislation relating to the nature of custody and parental rights, the courts' jurisdiction, adoption, legal consequences of a custody order, and such matters. Chapter 3, "The Law in Practice", draws well on empirical studies in a valuable account of the practical operation of the system, looking at settled as well as contested cases, and setting out the law and practice relating to welfare reports, judicial interviews of the child, the role of expert witnesses, and other procedural aspects of the custody jurisdiction.

These chapters read as if they were part of a good text book on custody law; it is not at all clear that they "illustrate how interpretation of the 'welfare of the child' have changed and how they might change in the light of current social science knowledge", as had been foreshadowed on pages 11-12.

The next two chapters, on "the law in historical perspective" seek to relate judicial and legislative developments to prevailing social values. Section 1 of the English Guardianship of Infants Act 1925 embodies two principles: the elevation of the child's welfare into the central position in child custody, and neutrality as between fathers and mothers in custody applications. These principles, and the relations between them, are the subject of this part of the book.

Chapter 4 tells the familiar story of the judicial creation of the principle that the child's welfare is to be the paramount consideration. It includes a well-written section (pages 101-105) relating the development of this principle to the wide-ranging development of child protection laws and services, stimulated by concerns about the welfare of children and the

protection of society, the latter being a major factor in the area of juvenile delinquency.

Chapter 5 is fascinating. It traces the connection between the welfare principle and the struggle for equal rights for women. The first weakening of the father's 'sacred rights' of guardianship came in England with the Custody of Infants Act 1837, which empowered the Court of Chancery on the petition of the mother to award her access, and custody of children under seven. This Act was largely a response to the evident injustice done to Mrs Carolyn Norton, a granddaughter of the writer Sheridan, and "one of the most fashionable London hostesses".³ Mrs Norton protested in several pamphlets at being denied access to her children, and the connection between her cause and the Bill was so close that at one point the Bill was withdrawn because she and her husband appeared to be reconciled! From this point, the pressure for reform came largely from feminists and their supporters. (Ironically, Carolyn Norton was far from being a feminist. She protested in a letter to the *Times* that she believed in "the natural superiority of man"; feminist views about equal rights and equal intelligence were "wild and stupid theories".⁴)

The chapter goes on to trace judicial and legislative developments and place them in their social and political context. The women's movement pressed for equal rights during marriage, not merely equal rights to apply for custody. This claim was effectively deflected in the 1925 legislation by subjecting it to the principle of the child's welfare. Maidment argues that this gave the courts power to incorporate values about the rights of fathers into their assessment of what was for the benefit of the children: "it is clear that the law was concerned with the enforcement of patriarchal authority and not with the practice of child care" (page 144). Nevertheless, the welfare principle came to take on 'a life of its own', and this is the subject of the following chapters.

I found Chapter 6, "The Law in Social Perspective: The Welfare Principle", very confusing. The welfare principle is said to constitute an indeterminate standard for judicial interpretation of the needs of children. From this truism we are somehow taken to the position that the principle is only "ostensibly", or "apparently" child-centred. This is said to be because the decisions are "made by adults for adults about adults. When a court makes a custody decision it may attempt to heed the child's needs, but it is essentially making a decision about which available adult . . . is to care for the child" (page 149). There are some references to separate representation for children and the adversary process, and then we are off into a discussion of whether the approach should be individualistic or family-centred: the latter is apparently favoured, though its ramifications are not explored. There is then a rallying call about the importance of the social sciences, and suddenly, under the unhelpful heading "The nature of judicial discretion" we are back into the case law: how judges have linked children's welfare with punishing guilty wives, or with a preference for mothers, or with preserving continuity of care for children. We learn at page 160 that "[t]his historical

review was intended to illuminate the nature of judicial interpretation as firmly located in the social structure”, but this ties up only a few of the threads. The chapter proceeds to a consideration of how far divorce puts children “at risk”. This section (pages 161-176) makes interesting reading, but its connection with the rest of the chapter is not obvious.

Chapters 7 to 11 systematically explore central custody issues in the light of social science research. Should mothers get custody rather than fathers? How important is the ‘status quo’? How important is the child’s relationship with members of the wider family, such as grandparents? Is access as beneficial to children as judges assume it is? These chapters are generally well written and make excellent use of the non-legal materials. Chapter 11, on joint custody (a term whose ambiguities Maidment lucidly explains), is the best treatment of that topic I have read. Here Maidment is at her best: the chapter is systematic, thoroughly researched, and convincingly argued. Her conclusion, that there should be mandatory consideration of joint custody in all cases, will be of particular interest in Australia, where the courts have generally been lukewarm about joint custody.⁵

The short concluding chapter makes frustrating reading. After some general comments on the role of social science, there is a discussion (which I found difficult to follow) about protection and self-determination as the basis for children’s rights, and the need to see children’s interests in terms of the interaction of family members. There is a useful though inconclusive discussion of the relevance of children’s wishes. Finally, under the heading “Towards a concept of responsible divorce”, an interesting argument is begun. We should not ask “which parent?” or think in terms of parental rights. The weight of expert evidence suggests that the critical factor is the child’s interaction with both parents, and we should see the child as having a right to retain contact with both parents after divorce. This could be promoted by making access a “mandatory consideration and a presumption in all children of divorce cases, whether contested or not” (page 279). To lower the stakes of custody cases, and move away from notions of winners and losers, the court should not make a custody order but a “children’s residence order”. These are interesting ideas, but unfortunately the author stops short just when the debate is at its most interesting, namely at the question how to translate such ideas into the procedures and principles of the legal system (pages 281-282).

My main difficulty with this book is its structure. Its main contribution, the survey of social science research, occupies only about half the book. The other half consists of an introduction to custody law (Chapters 2 and 3) and the history of custody law (Chapters 4 and 5). These sections, while of interest in themselves, are more of a distraction than an illumination of the arguments that form the stated purpose of the book. It is a pity they were not compressed to a small fraction of their existing length, leaving more space for a development of the ideas sketched so tantalisingly in the final chapter.

The book is not well presented. The printing appears to be some form of

photographic reproduction of typescript, and the text is cluttered with references, there being no endnotes or footnotes. There are, however, tables of statutes and cases, an excellent bibliography, and a name index as well as a general index. There are a few typing errors, and some dubious usages, such as “less visits” for “fewer visits” at page 240. At times the writing is clumsy or ugly, but it is usually clear and often displays considerable skill in summarising research and highlighting key points. Maidment often shows a sure grasp of her material, as where she correctly describes the views of Goldstein, Freud and Solnit⁶ on access as “idiosyncratic” (page 253). She also has an eye for a good quote (even when it is against her argument), such as Wilkinson’s comment⁷ that “when a joint custody order works it is unnecessary and when it is necessary it is unworkable” (page 261).

Despite what appear to this reviewer to be significant structural flaws and some lapses in writing, *Child Custody and Divorce* is a valuable addition to the family law literature. It makes available to students of this subject a useful treatment of the history of custody law and a thoughtful and well-documented discussion of the relevance of social science research to many of the difficult issues in custody law.

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FOOTNOTES

- 1 *Re D (An Infant) (Adoption: Parent's Consent)* [1977] 2 WLR 79.
- 2 *E.g. In the Marriage of Schmidt* (1979) FLC 90-685. Although this and other decisions of the Family Court relate to custody rather than adoption, the issues relating to homosexuality of a parent are very similar.
- 3 R. Strachey, *The Cause* (1928) 36, cited at p.113.
- 4 W. F. Neff, *Victorian Working Women* (1929) 239, cited at p.115.
- 5 *E.g. Marriage of Foster* (1977) FLC 90-281; *Marriage of Cullen* (1981) FLC 91-113.
- 6 J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child* (1973).
- 7 M. Wilkinson, *Children and Divorce* (1981) 35.