

Introduction

Ideas and Debates in Family Law

How would you end the sentence, ‘Family law is . . .’? Here are some suggestions. Family law is important. Family law is exciting. Family law is interdisciplinary, complicated, fast-moving and challenging. Family law is part of a bigger picture – it is part of the broad web of the law in general, interacting with property law, criminal law, contract law and administrative law amongst many others; but it is also part of a bigger debate which goes beyond the law and into policy. *Ideas and Debates in Family Law* is designed to help you move from learning about family law as it is now, to thinking critically about *why* the law is like that and whether it *should* be like that.

There are many ways in which this aim could be pursued. The material contained in *Ideas and Debates in Family Law* is intended only as a start, as one way of exploring some less obvious ideas about family law and some less conventional approaches to thinking about these issues. You need some basic prior knowledge of family law before you can use this book to your best advantage, because although I have endeavoured to make it reasonably free-standing it does not contain a general statement of the law itself.¹ You will also find that the topics chosen for discussion are sometimes quite narrow, and so it will help you if you know enough about the law to be able to place

¹ Good family law textbooks include: A Diduck and F Kaganas, *Family Law, Gender and the State*, 3rd edn (Oxford, Hart Publishing, 2012); J Herring, *Family Law*, 5th edn (Harlow, Longman, 2011); N Lowe and G Douglas, *Bromley’s Family Law*, 10th edn (Oxford, Oxford University Press, 2007); B Hale, D Pearl, E Cooke and D Monk, *The Family, Law and Society*, 6th edn (Oxford, Oxford University Press, 2009); S Harris-Short and J Miles, *Family Law: Text, Cases and Materials*, 2nd edn (Oxford, Oxford University Press, 2011); J Masson, R Bailey-Harris and R Probert, *Cretney’s Principles of Family Law*, 8th edn (London, Sweet and Maxwell, 2008).

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these ideas in context. The aim of the book is to help you to start thinking critically about family law, not to offer you easy answers. In fact, I offer few ‘answers’ at all here. This is a book of questions, not a book of answers.

Some of the ideas in the book may seem odd – for example, chapter five introduces the idea of a ‘fixed-term marriage’, and chapter seven suggests that the main aim of the welfare principle in child law² might be to make parents argue about better things, rather than to make the outcomes for children better. These are not the conventional ways in which family law issues are debated. When you read them, I suggest that you take nothing at face value, and keep in mind two points. First, the ideas in this book are not ‘suggestions’, and it is important to note that I do not agree with all of the opinions expressed here. (This is not my vision for family law!) But second, there is a reason why I have focused on the issues addressed here, and each chapter is designed to illustrate an idea. Often, my examples are a little ‘tongue in cheek’, intended to highlight concerns about family law issues by pushing apparently sensible arguments to their (il)logical conclusions. So, while the points which I am making are serious, the examples given are not always made seriously.

Because the aim is to help you to think about issues, I ask a lot of questions. Some are purely rhetorical, but most are worthy of thought. Many of them are questions to which I do not have any ready answers, and it should not concern you if you find them hard – they *are* hard! As with many things, the answer which you ultimately reach is probably less important than what you learnt along the way by asking the question in the first place.

Ideas and Debates in Family Law is written in three broad sections. The first three chapters are about *overarching themes* which affect all of family law in one way or another. Chapter one (‘Family Law and Family Justice’) is about the idea of justice in the family context, and the vision of family justice presented in that chapter is something of a recurring theme as the book goes on. Chapter two (‘Rights and Responsibilities’) is the most jurisprudential chapter in the book, asking about the role of rights and responsibilities in families and in family law disputes. The increasing internationalisation of family law is addressed in Chapter three (‘International Family Law’), which considers the ways in which family life and family law are becoming increasingly regulated at a supra-national level.

The second section of the book is about the *regulation of adult relationships*. Chapter four (‘Regulating Adult Relationships’) is about the ways in which the law regulates different types of intimate adult relationships in general, while Chapter five (‘The Meanings of Marriage’) is about marriage specifically, asking what marriage is and whether it should be re-conceptualised. Financial orders in the event of relationship breakdown are the subject of

² Children Act 1989, s 1(1): ‘When a court determines any question with respect to the upbringing of a child . . . the child’s welfare shall be the court’s paramount consideration.’

Chapter six ('Fairness in Family Finances'), where we deconstruct the increasingly prevalent focus on 'fairness'.

The final two chapters of the book focus on the *law relating to children*. Chapter seven ('The Values of Welfare') is about the welfare principle, discussing the varied ways in which that principle might be interpreted and offering a defence (of sorts) of its continued use. The book closes, in chapter eight ('Parental Responsibility, Parenting and Status'), with discussion of parental responsibility and court orders about children's residence.

It is obvious that many important family law issues are not covered in any of these chapters. Discussions of public family law, to do with the protection of children from abuse or neglect,³ and of domestic violence,⁴ are the most obvious omissions. The reason for omitting these topics is primarily that, although they are clearly parts of family law – and important parts at that – they are also different from much of family law, in that they interact to a great extent with criminal law, tort law and public law more generally.⁵ That is, of course, not a reason to ignore child protection or domestic violence, but it may be a reason to think about them slightly differently from the way I approach the family law topics which are addressed in this book.

Leaving those topics aside, it will also become clear that the topics which are covered in *Ideas and Debates in Family Law* could have included a number of sub-issues which are either omitted entirely, or which receive only passing mention. For example, an important issue relating to 'marriage' in the UK is whether same-sex couples should be able to marry (specifically) or whether civil partnerships are a sufficient equivalent. I have views on that question,⁶ but it is not an area that I focus on. The reason for their omission is simple enough: this is a small book, and there is not room for everything, so in general I have tried to focus on issues which are less frequently addressed elsewhere. Moreover, the approaches suggested in this book should help you to think about all issues of family law critically, so the fact that a topic is not covered here specifically does not mean that it cannot be thought about in similar ways.

The illustrations and case authorities cited in the book are primarily drawn from the legal jurisdiction of England and Wales. From time to time, I give examples from other jurisdictions for comparison, and a fair amount of the secondary literature used is not from England and Wales. Despite this focus, most of the ideas discussed are not specific to any one jurisdiction, and I

³ See, eg, L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford, Oxford University Press, 2007).

⁴ See, eg, *Yemshaw v London Borough of Hounslow* [2011] UKSC 3, [2011] 2 FLR 1614; J Herring, 'The Meaning of Domestic Violence' [2011] *Journal of Social Welfare and Family Law* 297.

⁵ For example, in L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford, Oxford University Press, 2007), only around 100 of the 934 pages of text are about family law; the rest of the book is about criminal law, tort law, human rights and civil procedure.

⁶ See ch 5 below, 'The Meanings of Marriage', n 2.

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hope that they will be of interest to students and scholars of family law far beyond the borders of the English and Welsh legal system.

Finally, for the avoidance of doubt, I do not anywhere purport to set out ‘the law’ on any of the topics discussed, even though I sometimes give brief introductory overviews. However, insofar as it is relevant, I have endeavoured to make any references to the law accurate as at 1 January 2012.