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Introduction to the 25th Anniversary Issue

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Introduction to the Anniversary Issue

SANFORD N. KATZ*

Twenty-five years ago the American Bar Association established a new section to reflect the growing complexity of a legal area and the increasing specialization necessary in the field: the Section of Family Law. That Section has grown from a handful to its current membership of close to 14,000, an increase which itself comments on the growth of activity in family law and its importance to American society.

Near the end of its first decade, the Section established a journal, the *Family Law Quarterly*, to create a bridge between scholarship and practice. Robert F. Drinan, S.J., then Chairman of the Section and Dean of the Boston College Law School, was the first editor and held the position until 1970, when he became a member of Congress. The Section leadership passed the torch to me.

Those twenty-five years have seen enormous changes—in American mores, in the condition of women, in the attitudes toward children, fathers, toward the law itself. Women are no longer merely modest, self-effacing sanctuaries for their energetic spouses who daily attack the economic domain to earn provision for their homes, but equal partners in an ongoing relationship, which even if it terminates in divorce leaves them with rights unheard of twenty-five years ago. Fault in divorce is almost a dead issue. Marriage itself is only one of the choices for cohabitation, and recently even cohabitants of the same sex have been claiming rights if the parties break up or if one of them dies. Marital property has been redefined to include pensions, work benefits, professional gains, and even reputation. Children are no longer only pawns between battling parents, but in-

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dividuals whose needs and temperaments must be considered in custody cases. Illegitimate children are legally almost co-equal to the offspring of marriage. The changes in family law are too numerous to list here in their entirety, but the quarterly has kept abreast of the state of the art with carefully researched studies by scholars and practitioners from all over the world.

This issue, which commemorates the twenty-five years since the founding of the Section of Family Law, presents articles on important currents in the turbulence of today's family law. They were written by some members of the quarterly's Board of Editors and by other leading writers in the field, and they deal with problems hotly argued and with decisions frequently criticized. Professor Carol S. Bruch of the University of California at Davis in her article, "Of Work, Family Wealth and Equality," begins the issue with a description of the revolution in family property law. Beginning with California and the passing of the Uniform Marriage and Divorce Act in 1970, the antipathy toward the concept of fault in divorce cases, which had been increasing for almost a decade, led one state after another to pass no-fault laws that resulted in more rapid and less emotionally painful divorce. During the same period, with the new awareness of the different forms of economic contributions and family wealth, of the change in family patterns and the financial results of divorce for both spouses, many of the states reformed and recast their support and property laws. Professor Bruch recounts the optimistic assumptions by state legislatures that the changes would produce equitable results after the years of inequity, an optimism which events have not always or fully justified. Today, both the philosophical bases of marital property law and the economic significance of contemporary marriage and divorce are being newly scrutinized for more valid approaches to the problems of a society highly mobile both physically and psychologically.

Another changing and intricate problem in family law, child support, is discussed by Professor Harry D. Krause of the University of Illinois. The federal child support enforcement legislation of 1975, designed to lower the frightening costs of the Aid to Families with Dependent Children program, met with heated opposition from several sides. The privacy issue was often invoked: the mother's, especially if she was a welfare recipient; the father's, rather fantastically, to exercise the "American" right to start a new life with a

clean slate. Against these Professor Krause, in balancing the issues, feels that the rights of the child should and must take precedence—the child's far greater interest in knowing its father's identity and whereabouts must supersede the rather debatable privacy rights of its parents. The other question frequently raised about child support enforcement pertains to the bottom line: can it be "cost-benefit effective"? A bottom line in this procedure, however, is difficult to assess, certainly if dollars obtained against dollars expended are put on a cut-and-dried balance sheet. This article suggests a much broader approach to child support enforcement—the "reach" of each program, which, while difficult to calculate exactly, has an important bearing on defining the point where enforcement procedures should be brought to a halt.

The rights of the child enter also into the next article, "Child Custody and the Adversary Process," by Professor Henry H. Foster and Dr. Doris Jonas Freed. One of their main theses is that, with all the attacks upon it, with all the necessary mutations in its practice, and with all the support it does and will receive from other disciplines, the adversary process is here to stay. Most parties to custody disputes write their own "ticket," and mediation is becoming increasingly popular; but the courts retain the final authority if a settlement meets opposition later from one of the parties, or if mediation results are not permanent. The use of testimony from such nonlegal experts as social workers and psychiatrists is an important input into child custody cases; it is called upon now, and it will be increasingly pertinent; but recommendations that custodial issues be removed from the courts and entrusted to panels of specialists ignore the American emphasis on judicial supremacy. What the authors do suggest, however, is the need for independent counsel for the child in custody cases, ideally in every case but at the very least when they are contested, to serve as "watchdog" for the child's interests. More and more voices are declaring today, not only in this country but in most of the industrialized nations of the world, that the judge, who was often called the natural protector of the child, is neither suited by training nor adequate in the role and that the child in a disputed custody case needs its own advocate devoted entirely to the child's welfare.

The child is considered again in Professor Douglas J. Besharov's article, "Child Protection: Past Progress, Present Problems, and

Future Directions." For centuries child abuse and neglect have been almost ignored by the general public and the law-makers, although an occasional particularly shocking instance would explode through the media into the consciousness and conscience of the nation. Child abuse reporting was so haphazard that the grossest instances of maltreatment, sometimes even including murder, went unrecorded. At last in the early 1960s Dr. C. Henry Kempe, with the aid of a few other physicians, persuaded the national Children's Bureau to prepare and promulgate a model law making it mandatory for physicians to report "battered children," and in the surprisingly short span of four years all fifty states passed reporting laws based on the model law. Mandatory reporting has now been broadened to apply to many other child-involved professionals—teachers, social workers, care center supervisors, law enforcement agents, all must report on known or even suspected cases of physical abuse or emotional damage, under threat of civil and criminal penalties. Relatives, friends, neighbors are encouraged to make reports as well. The number of reported cases has proliferated as child abuse and neglect seem to have become even more frequent in the last few years, perhaps partly because of the psychological toll of unemployment on parents. In this same period, however, because of economic cuts in the national budget, services of social workers especially have been curtailed, and some particularly horrifying instances of harm to children have been picked up by the media and used to criticize the agencies. Even aside from such inadequacies there is the fundamental issue of the possible conflict between unwarranted interference with family privacy and the protection, sometimes the very life, of abused and neglected children. Professor Besharov sees the need for programmatic and jurisdictional refinements which will protect children while leaving families some rights and privacy against the increasing encroachments of the state.

Professor Ruth-Arlene W. Howe of Boston College Law School deals with a less painful field of family law, adoption, where, however, changes have been frequent and drastic in the past quarter-century. She outlines adoption's historical roots that reach back into antiquity, and notes interesting parallels between the laws of American adoption, which began in the early Pilgrim days, and the changing laws of the Roman Empire. During the late fifties and sixties of this century many issues were sharpened and many new prac-

tices and theories were applied, although some of them have since been abandoned. Race and religion, for instance, were leading factors at first: the social agencies made every effort to "match" children to adoptive parents, even physically (a Roman concept). A period followed during which transracial adoption was increasingly popular; this popularity has also greatly declined in the past decade. The one factor that remained constant was the importance of the role of the social agencies in their "home studies" of the adoptable child and of the personalities and environment of the would-be adopters and of the overwhelming agency opposition to private placement, whether for financial gain by "baby sellers" or by well-meaning but untrained intermediaries. Several states did outlaw such private arrangements. In this decade there has been criticism of the undisputed governance of the social agencies in adoption; private adoption continues to be recognized in many states. Professor Howe covers the whole field of adoption in the twenty-five-year period of this Anniversary Issue, documenting and stressing the important role of the Family Law Section in adoption law reform. She concludes with an analysis of ongoing and suddenly emerging issues in the field of adoption, up to and including the newest and most controversial, surrogate motherhood.

In their article, "*In Vitro* Fertilization and Embryo Transfer," Professor George J. Annas and Dr. Sherman Elias describe medically and discuss legally this new method of producing a child for a barren couple. This unprecedented form of producing a child, so-called surrogate motherhood, has raised knotty legal as well as medical and social problems. In 1979 a study by the Ethics Advisory Board of HEW concluded that a uniform law was needed to clarify the legal status of children born as a result of *in vitro* fertilization (IVF) and embryo transfer (ET). Legislation has now been introduced in several states and rulings have been promulgated: the attorney general of Kentucky has written that surrogate contracts are illegal and unenforceable in Kentucky, and the Michigan courts have ruled that the Michigan Adoption Code prohibits payment to surrogates for "uterine services." The authors feel that, while professional standards regarding research in IVF should continue to be developed, much further public discussion is vital before surrogate motherhood becomes commonplace. They see too little potential benefit to outweigh the potential problems and are convinced that before legisla-

tion in this field becomes widespread in the states, the issues must be sharpened and the protection, not only of the possible offspring of such a technique but of society itself, must be assured. Above all the rights of the would-be child, who does not actually exist when any surrogate mother contract is drafted, must be protected in any future legislation. For instance, the child's "right to know" its biological mother must be taken into account and should be part of such a contract even though the right would not be viable until the child's legal majority. Another point that has aroused keen debate is the possible commercialization of surrogate motherhood: should the surrogate come under the "black market baby" statutes, which forbid money payment to the birth mother in baby cases? The affirmative Michigan ruling has already effectively outlawed the process of acquiring a child through IVF and ET in that state. Thus an awesome scientific breakthrough has again confronted the law with the task of dealing justly and humanely with members of society involved in problems that have never before arisen.

In our world, which would have been unrecognizable twenty-five years ago when the Family Law Section began, family law is struggling valiantly to keep pace with the sometimes stupendous changes wrought both by science and a whole new psychological climate. Law schools and practicing attorneys have their homework cut out for years. The *Family Law Quarterly* will, we hope, continue to offer the latest, the most carefully studied, and the sharpest presentations of our current problems and practices.

Let me conclude this introduction with a personal note. I am resigning my post as editor-in-chief, and the fall issue will be the last for which I hold responsibility. I am honored to have nurtured the quarterly during its infancy and youth, and I hand its charge to my successor with high hopes.

As editor-in-chief I have been assisted by an excellent and active Board of Editors, each of whom is a specialist in specific areas of family law, and to each of whom I am personally grateful. To those Section Chairpersons listed before this introduction I give special thanks for their support through the years of the quarterly's growth and for their commitment to the scholarship and practicality of this Section publication.