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Prologue

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Family law came of age during the last half of the twentieth century. Earlier, in practice, scholarship, and legal education, it was given little attention or respect. Perhaps the reason for the low status of family law practice, defined narrowly as domestic relations and almost exclusively concerned with divorce, was that it dealt with human conflicts and real people in distress, not legal abstractions. It should also be remembered that divorce, opposed by some religions, was a taboo subject, and the status of a divorced person carried with it a social stigma. Therefore, it was natural that the reputation of divorce lawyers would suffer. Major law firms rarely accepted divorce cases, leaving them to be handled by lawyers in small firms or single practitioners who were not members of prestigious firms because of their religion, ethnicity, race, or sex. Indeed, women were neither represented in large law firms nor admitted to many law schools.

Even though family law was almost exclusively statutory, it had the reputation of being essentially discretionary. Interpretations of phrases like "in the best interests of the child" or "cruel and abusive conduct" were thought to be more dependent on the mood of the judge than on case law. In fact, judges who heard divorce cases were usually considered low-level. Perhaps the reason for that reputation was that divorce trials were carried on with little regard for procedure or rules of evidence. Basically, they were side bar discussions with the judge. A negative criticism of decisions in family law cases was that they were fact-driven—as if decisions in other kinds of cases were not. Appeals in

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family law cases were infrequent so that the trial judge was basically the final decision-maker. It was rare for the U.S. Supreme Court to hear a family law case.

In mid-century family law was stagnant. Little law reform occurred in the 1940s. For one thing, few legislators were thinking about family law during World War II and immediately afterwards. In 1945 the country was concerned with rebuilding its economy and providing opportunities for veterans to enter colleges and return to their jobs. Reentering the work force meant displacing women who had been an important and vital part of industry during the war years. During that period children of servicemen were raised by their working mothers, a fact soon forgotten. After the war, women who lost their jobs resumed their traditional role in the family. It is interesting to note what little permanent impact World War II had on family organization. Looking back it is hard to believe that the single parent family headed by a wife and mother, thought to be noble and portrayed by Hollywood as heroic, would be denigrated fifty years later by politicians.

During the decades of the 1940s and early 1950s, law schools were not educating students to practice family law. Indeed, if a course in family law was offered at all, it was a basic course, often taught by a part-time lecturer. The casebook that dominated the field was *Domestic Relations* edited by Albert C. Jacobs, president of Trinity College, and Julius Goebel, Jr., professor of law at Columbia University Law School. The major hornbook which was national in scope was Professor J. Warren Madden's *Handbook of the Law of Persons and Domestic Relations.* Unlike the law faculties at British and European universities, which had renowned family law scholars, and where family law was considered a serious intellectual study, American law schools had very few major family law professors. Mostly they were senior scholars with European backgrounds and interests in other disciplines, which they related to family law.

The period of major changes in family law began in the late 1950s and early 1960s. The latter decade and the one following might be considered the most important era in the last half of the twentieth century for the field. After almost ten years of lobbying efforts, the American Bar Association recognized family law as a specialty in 1958 and established the Family Law Section. Judge Paul W. Alexander of Ohio, the father of therapeutic divorce, was its first chair. Almost a decade later, the *Family Law Quarterly* began publication.

Through the years the Family Law Section of the American Bar Association has been a major force in reflecting the views of the practicing lawyer, yet from time to time, its leadership has consisted of

family law professors. The *Family Law Quarterly* was established by Rev. Robert F. Drinan, S. J., who was dean of Boston College Law School and Chair of the Section. Its first Board of Editors had ten members, eight of whom were law professors, one was an administrative judge in a family court and another was a lawyer. The latter two were women. The make-up of the Board was consistent with the *Quarterly's* goal of bridging the gap between scholarship and practice. Since its inception in 1967, articles in the *Quarterly* have been relied on in major family law decisions, thus fulfilling its original mission.

Although it is hard to discern any consistent national family policy, during the late 1950s and 1960s in both state capitals and in Washington, D.C., there seemed to have been a willingness to look at the family in realistic terms and to address issues that had been dormant for years. The civil rights movement left its imprint on family law with respect to law reform and in raising consciousness about the protection of individual rights. At the same time through the efforts of governmental programs and private foundations, people of limited income were given access to legal services, which provided lawyers for family law cases in court as well as for representation at federal and state administrative hearings. A number of cases that have made major changes in family law were the result of the work of legal services lawyers.

The legislative movement to recodify state family law, particularly divorce law, began in mid-century. For example, attempts to change the divorce law in New York can be traced back to 1945. New York's recognition of adultery as the sole ground for divorce prompted lawyers to engage in deceptive practices. In response to the reform efforts of leaders of the New York Bar, the New York State Legislature broadened the grounds for divorce in 1966, thus bringing New York into line with other enlightened jurisdictions.

In 1969, California became the first state to enact a divorce law without fault-based grounds. As state after state began to enact no-fault divorce laws, the emphasis in divorce litigation shifted from proving grounds for a fault-based divorce to rethinking the purpose of alimony, and determining who should be awarded what property, and who should be the custodian of the children. The concept of rehabilitative alimony grew out of the discretionary powers of the judge in the 1960s, and was adopted by courts who began to award alimony as a temporary device to aid the dependent spouse (usually the wife) in becoming self-supporting. This was a major change in alimony, which was a method of spousal support after divorce, frequently for the wife's life, based on her needs and the husband's ability to pay. In the 1970s states began to examine their residency requirements for divorce jurisdiction, and

slowly these requirements were shortened bringing some uniformity in the country and lessening the need for a couple to leave their home state to seek a divorce elsewhere.

An important influence on divorce reform were the efforts of the Commissioners on Uniform State Laws who had been working on divorce law for seventy-five years. Although the Uniform Marriage and Divorce Act, promulgated in 1970, was adopted in part only by eight states, it should not be considered a complete failure because it succeeded in alerting lawyers that the time had come to replace the old order with new ideas about marriage, divorce and child custody. Some state bar associations responded by backing changes in their divorce laws.

The Act introduced the concepts of irretrievable breakdown and equitable division of property, and enumerated factors for determining both. Although it can be said that listing factors that judges must consider in assigning property in divorce or in any other area of family law decision-making is a legislative attempt at limiting a judge's discretion and in a way controlling judicial power, there are advantages both for lawyers and judges. Factors are enormously helpful to lawyers in organizing the amorphous amount of material in child custody and matrimonial property litigation. Also, they can provide a judge with a checklist for monitoring the presentation of evidence during trial as well as for writing findings of fact.

The hesitation of some lawyers to advocate for the adoption of the Act may well have been based on their belief that the Act would end the kind of divorce practice to which they had become accustomed, and basically complicate what was to them a simple process. After all, under the title theory of property subscribed to in many states, he who held property got it. What was more simple than that? With equitable division of property, lawyers would have to ask the following questions in preparing a divorce case for settlement or litigation: What is separate and what is marital property? What factors should be used to determine the characterization? What is its value? When should it be valued? Little did lawyers realize when equitable distribution was first introduced how complex it would be, and that they would need help from other professions like accountants, pension and actuarial experts, and real estate, business, and other valuators.

In child custody also, the Act brought clarity. The best interests of the child which had been and continues to be the basis for determining custody decisions was often criticized for being vague. The Act did more than just state that a decision should be in the best interests of

the child. It provided factors that judges were to consider in awarding custody. This meant that judges were required to focus on, among other matters, the environment in which the child was raised, the child's relationship with her parents, friends, and others, as well as inquiring into the child's own wishes and the mental and physical health of those involved in the child's life. Just as experts in other fields were important in marital property issues, they were also necessary in child custody. Thus, psychiatrists, social workers, psychologists, educators and pediatricians were consultants in child custody cases, both to lawyers in preparation of their cases and to judges in reaching decisions.

At the time some states were reviewing their divorce laws and procedure, they were also considering court reform. Humanizing the divorce process by utilizing alternatives to the adversary system in an informal setting became a goal. Judge Paul W. Alexander had accomplished such procedural and court reforms in Toledo, Ohio, in the 1950s, but that has long been forgotten. In a way, Judge Alexander was ahead of his time. Today we speak of negotiation, arbitration and mediation as if they were entirely new concepts. Lawyers educated in rules of procedure and evidence and trained to argue find it difficult to think of alternative methods of dispute resolution in family matters. But as litigation becomes extremely expensive, as it is today in major metropolitan areas, middle class divorcing couples may be forced to choose mediation for purely economic considerations and failing that, to represent themselves in court, now seen more and more.

The bar's reluctance to promote the establishment of family courts known for their informality and often providing social services to litigants may be based on lawyers' belief that to do so would be retrogressive. To some, it would represent a return to the days of lax procedure, and perhaps turn courts into social service agencies. In addition, the bar may believe that divorce practice, especially with regard to marital property, is so complex that only the techniques derived from the formal adversary process are appropriate. Yet, the bar has been more receptive to the establishment of juvenile courts perhaps, because their jurisdiction deals with the behavior of children, not with economic matters.

In 1960, through the efforts of child welfare specialists at Children's Bureau of the U.S. Department of Health, Education, and Welfare, the federal government focused on the condition of children. That agency set up a working group to study the findings of a Denver, Colorado pediatrician, Dr. C. Henry Kempe, and those of the Los Angeles Police Department dealing with children who had been physically abused. The

product of that group's deliberations was the Model Mandatory Child Abuse Reporting Act.

Looking back, it is hard to imagine that developing a child abuse reporting act would be controversial, but it was. Family privacy was deeply rooted in American life and law. To invade it was thought to be an infringement on fundamental parental rights. Requiring certain professional people to report abuse would be a breach of confidential relationships. Every aspect of the Act was criticized, from who was to report, what was to be reported, and the penalties for not reporting. It took time for the concept of reporting child abuse to an appropriate state agency to be accepted, but eventually it was. The national concern for the protection of children in their homes in the 1960s raised the issue of the safety of others in the family. The reporting laws, greatly expanded from the original model law, and now found in all jurisdictions, may have laid the foundation for family violence laws that were to follow.

A curious paradox may have resulted from the enactment of laws meant to protect children. Mandated reporting of child abuse caused significant increase in the foster care rolls, a disproportionate number of whom were Black children. Was this just the result of overzealous child welfare workers whose first response was removal? Or, had abuse been occurring, but just had not been detected? For whatever reason, the impact of state intervention on the family during the decade of the 1960s was most disruptive for poor urban Black families. It has been said that their economic status made these families, forced to use public rather than private facilities, more highly visible, and thus more vulnerable. All the major problems of the poor, especially the lack of employment and educational opportunities, inadequate housing and health care, were stressors on urban Black families. But, these families suffered the additional burden of racial and social prejudices within their communities and in the child protection system.

During the 1970s and 1980s, the federal government began to suggest solutions to the problem of foster care drift. It was then that the idea of "permanency planning" was first promoted, and ultimately later became part of child protection practice and law. The Children's Bureau supported development of two model acts, the Model Act to Free Children for Permanent Placement and the Subsidized Adoption Act. They were designed to overcome barriers identified as preventing children from being adopted and to encourage suitable couples, especially foster parents, to adopt "hard to place" children. During these decades, the plethora of negative social and economic conditions in many urban

Black communities worsened. But there was no comprehensive national family policy that acknowledged the depth of the problems and need for long-range planning to solve them. The piecemeal approach was, and is, essentially applying small bandages to a major social wound.

The federal government made more attempts to deal with child protection during the 1980s and 1990s. To that end it undertook a number of initiatives, which had the effect of basically taking control of state child protection systems. It promulgated regulations for foster care, to which states had to adhere if they wished to secure funding for their foster care and adoption programs. In addition it introduced the concept of child support guidelines for states to adopt in order to bring some sense of uniformity and fairness to the system, once again using economic incentives as a method of encouraging use of the guidelines.

During the 1960s and 1970s the law school world began to realize the importance of family law issues. Professor Homer H. Clark completed his first edition of *The Law of Domestic Relations in the United States* in 1968, a development that greatly stimulated family law scholarship. Casebooks appeared, mostly influenced by Jacobs and Goebel, at least in the order of the presentation of cases and materials. A book that broke new ground, *The Family and the Law,* written by Professor Joseph Goldstein and Dr. Jay Katz, a law professor and psychoanalyst of Yale Law School, was published in 1965. Their 1,200 page volume departed from the traditional family law case book in providing an overall theoretical framework in which they asked fundamental questions about substantive family law and the legal process that handles family law issues. Influenced by the approach of Yale law professor Harold Laswell and the language of bankruptcy, they divided the family law process into questions dealing with the establishment, administration, and reorganization of family law relationships. In addition, Professors Goldstein and Katz brought Freudian psychology to bear on family law. The seeds of *Beyond the Best Interests of the Child,* written by Professor Joseph Goldstein, Dr. Albert Solnit, and Anna Freud in 1973 were planted in *The Family and the Law* eight years earlier.

A nonlegal work that has had great influence on child custody is *Beyond the Best Interests of the Child,* which applied Anna Freud's theory of child development to decisions about child placement. The authors' focus was on a child's physical and emotional well being rather than on other values or on parental rights. Based on years of clinical experience, they concluded that a child needs continuity of care with an adult who wants the child and can provide him or her with affection,

stimulation, nurturing, and an assurance of safety and protection. In a divorce case where the parents cannot resolve their child's custody, Goldstein, Solnit and Freud wrote that the judge's job is to determine who, among the claimants for custody, can fulfill those needs. They introduced new terms like "psychological parent" and "least detrimental alternative," which have become part of the legal lexicon. Their emphasis on continuity of care has been thought to be the basis for the primary caretaker doctrine, which has found support in some jurisdictions. The idea of minimizing modifications in child custody cases is reflected in the Uniform Child Custody Jurisdiction Act.

By 1970, the complexities of family law were becoming even more visible. A spate of U.S. Supreme Court decisions are illustrative of that. During the decades of the 1960s and 1970s, the list of U.S. Supreme Court cases that dealt with family relationships and children in the judicial process was impressive: *Ford v. Ford* (1962), *Armstrong v. Manzo* (1965), *Kent v. United States* (1966), *In re Gault* (1967), *In re Winship* (1970), *McKeiver v. Pennsylvania* (1971), *Gomez v. Perez* (1973), *Smith v. Organization of Foster Families* (1977), *Quilloin v. Walcott* (1978), *Kulko v. Superior Court of California* (1978), *Bellotti v. Baird* (1979), *Caban v. Mohammed* (1979), *Orr v. Orr* (1979), and *Parham v. J. R.* (1979). With these decisions, the Supreme Court was not just setting down guiding principles, it was changing a culture.

A decade later it became clear that family law could no longer be studied separate from constitutional law, contracts, torts, property, business associations, trusts and tax. Because family law practice had become so complex, it was not possible for lawyers to keep current in every aspect of family law. As a result, sub-specialties developed. To be an effective divorce lawyer one had to have a sophisticated knowledge about the latest developments in tax and marital property, the latter having been influenced by Professor Charles Reich's concept of "the new property." Child protection lawyers needed to learn about the child welfare system including the latest congressional enactments regulating certain aspects of foster care and adoption. Knowledge about international conventions being developed by The International Conference at The Hague, and the ability to work with foreign law materials were essential for international family law practice.

In the past twenty-five years major social and political movements and advancements in reproductive technology have had a direct impact on family law. The movements have not necessarily been successful in making changes in the law although some have, but they have forced legislators, judges, lawyers, and scholars to rethink the bases for laws

relating to family life. Indeed, the American Law Institute, one of the most prestigious law groups in the United States, which produces the *Restatement of Law* series, has undertaken the job of drafting principles of family law, which reflect the most current thinking in the field.

The legal landscape of today is shaped by many factors: the movement for racial equality, children's rights, women's rights, gay and lesbian rights, and the social and legal agenda of certain religious groups. Marriage, for example, has undergone fundamental changes because of its being considered a partnership, which a couple can almost define themselves by a prenuptial agreement. No longer does marriage mean that a wife's identity—her name and her domicile, for example—is totally linked to her husband's. Nor does marriage give a husband license to violate his wife's bodily integrity. With these and other changes, one can begin to see a movement reducing what was clearly state-imposed inequality and dependency in marriage.

The institution of adoption is no longer monolithic. The traditional model of adoption involves termination of a birth parent's parental rights. The process is clothed in secrecy, and both adoption agency and court records are sealed. A second model being developed by adult adopted persons, some birth parents and lawyers is called "open adoption" and has two meanings: open adoption records and post-adoption visitation rights for birth parents.

Adult adopted children, suing in court, relating their individual stories to legislative committees and writing about them in the popular press, have sought reform of adoption laws. Their aim was (and is) to have access to their adoption records, not at the discretion of a judge (the law in many states), but as a matter of right. Their efforts in the 1970s were unsuccessful both in the courts where they argued that they were denied their constitutional right to equal protection of the law, and in state legislatures.

The traditional model of adoption that does not allow the releasing of identifiable information about birth parents to either the adoptive couple or the child is actually only about seventy-five years old. Before then, the confidentiality of adoption records was meant to prevent the public, not the immediate parties, from inspecting them. Adoption agency social workers introduced secrecy in the 1920s. They based agency practice on the child development theory that a successful adoption of an infant voluntarily relinquished at birth, required the complete integration of the infant into her new family. One of the major arguments against opening adoption records at the request of an adult adopted person is that to do so would give priority to the interests of

one member of the adoption triad over others. Opponents of open records claim that changing the law would have serious consequences if the new law were made retroactive since it would negate promises of confidentiality given to the birth mother at the time of the child's relinquishment or at the adoption placement. There are signs, however, that proponents of open adoption are having some success. One court recently held that opening adoption records does not violate a birth parent's right of privacy.

The traditional model of adoption severs the parent-child relationship, which results in terminating both custodial and inheritance rights. The modern view has been that if an infant were to have continuous contact with her birth parents, she would have difficulty bonding with her adoptive parents, and as she matured would be confused about her loyalties and the objects of her affection. It was also believed that a conditional relinquishment would not bring closure to a birth mother's decision about adoption. Those theories, translated into agency practice, have prevailed until about the 1970s. Another argument used to defeat post-adoption visitation rights has been that allowing it would blur the distinction between foster care and adoption.

Granting a birth parent post-adoption visitation rights is finding some receptivity in both the psychiatric literature and in the law. The major legal advocates for this modification in adoption law, which is occurring in some states, have been lawyers in the child protection system representing either a social service agency or a birth parent. They see an open adoption agreement as a useful legal strategy for facilitating a settlement of a termination of parental rights case either before trial or at appeal. To prevent the misuse of an open adoption agreement, Massachusetts regulates it by statute. For the agreement to be judicially approved, a judge must be satisfied that the agreement was entered into freely, was fair and reasonable, and furthers the child's best interests.

As the century ends, established principles in family law are increasingly being challenged. The historic definition of marriage as a union of a man and a woman is now seriously questioned. Recent legislation has been enacted establishing two types of marriages, the choice being determined by the kind of divorce a couple agrees to in advance. An effort is now under way to make marriage-like relationships the legal equivalent of marriage. No-fault divorce is being reconsidered, and a return to fault-based divorce is seriously proposed. Finally, we are now confronting the legal issues presented by a child conceived months after the death of the child's father.

Future legal historians will have to determine what label to attach to the twentieth century. Early on some called it the "Century of the

Child." Others suggested the "Century of the Woman." In naming the century in that way, are the authors stating that the most significant event in family law has been the change in status of the child or of the woman? If so, one must agree that some changes have occurred, particularly for married women. Without the advantage of hindsight, one might consider the twentieth century as the "Century of the Person." Such a description is broader in scope and encompasses both children and women, but perhaps best describes the major concern in family law at least during most of the last half of the century. Focusing on the self de-emphasizes relationships, and reflects the American legal tradition dating back to the founding of the country. On an individual level, it can have deep sociological and psychological significance possibly leading to isolation, loneliness, and selfishness and threatening the family itself. If indeed we have been living during the "Century of the Person," we will have come full circle. In the beginning of the century what we now refer to as family law was called the law of persons, later it became the law of domestic relations and then family law.

The family is being continuously redefined. Who will define it, and the issues in family law that will provide substance for that evolving definition is the task in the next century. One challenge will be to balance the progress we have made in protecting individual rights without weakening the family and the supporting relationships on which it is based. If the last half of the century is any prologue for the future, the next generation of lawyers, judges, legislators and law professors is in for a future that we can neither predict nor imagine.