FUTURE DIMENSIONS IN FAMILY LAW

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The future of family law is inseparable from the future of the family itself as a social institution, and of law in the formal sense as an authoritative statement of enforceable rights. Whether this claim will be perceived as mere sophistry, or given the benefit of the doubt as sophistication, will depend largely upon how you regard my honest confession that I know virtually nothing about family law. Let me only ask that you not dismiss my case on the pleadings, and permit me to tender proofs and argument for your consideration.

What seems clear, at a minimum, is that law and the family do not walk easily hand in hand. "Law", at least in the formal sense, implies authority, conflict, and if necessary, coercion. "Family" implies partnership, compromise and ultimately love. "Law" is general, applying to all citizens within a state. "Family" is particular, and is shaped for each of us by our own individual personalities, and by the very different and complex interplay of religion, ethnicity, class and culture. "Law" is form: due process, precision, predictability. "Family" is substance: traditionally home, children and loyalty or, in a more modern idiom, sharing and caring. "Law" is expertise: technical knowledge of statutes and caselaw and, hopefully, the social sciences. "Family" is intuition, inarticulate and inarticulable discourse; it is humane and, above all, human in the most elementary sense, rather than scientific.

Much of the literature of family law, and many of the papers delivered at this conference, bear witness to an awareness of this tension between "family" and "law", and to a desire to resolve it. On the one hand, some propose to

change the nature of "law", by transforming it into a sensitive, helping instrument of reconciliation and solace, or at least by minimizing its impact as an independent source of strife and misery. On the other hand, some propose to change the nature of "the family", by redefining it in a legal charter which will guarantee to its members certain rights of property and of association, and the freedom not to be deprived of either without due process.

I do not, to be honest, see much to be hopeful about in either tendency.

Let me address, first, those who advocate the very lawyerly solution of redefining the family in legal terms. Their solution is well-meant, and has a certain attraction. If wives are kept subservient by the economic power of their husbands, let that power be reduced by the creation of a new regime of joint property. If children are used as pawns by disputing spouses locked in a custody battle, let them be given the right of free choice and the legal means of vindicating it. If husbands are unfairly punished for moral misbehaviour which is merely the precipitating event in a marriage breakdown which has been ten years in the making, let us redefine the legal grounds for divorce, maintenance and custody.

For judges and lawyers who deal with individual cases of social pathology, these solutions must seem progressive and indeed, in a way they are. But a regime of joint matrimonial property hardly helps those who have none at all, or those whose property can only be divided by the forced sale of a house which will drive both parties onto a hostile rental market and deprive children of their familiar surroundings. No doubt children should be able to advocate their own "best interests", but those interests very often amount to no more than a choice between a greater evil and a lesser one, and may even become confused with "the best interests of the child's lawyer", a process which is said to occur, for example, in the area of plea bargaining. No doubt a single act of adultery should be largely disregarded as we sort through the debris of a

broken marriage, but disregarding it does not either mend the marriage or help the parties to put together for themselves a new, separate and better life. In short, prospects for redefining social relationships through formal adjudication or legislation are limited, and such efforts do relatively little to advance or even preserve the social values of the family.

However, when we deal with proposals to alter the nature and function of law in this context, we confront equally modest prospects for success. If adjudication tends to emphasize adversarial attitudes at a moment when they least need emphasis, let us have conciliation and pre-trial procedures. If legally-trained judges are unable or unwilling to evaluate the psychic impact of their decisions upon children, let the judges be guided by those professionally qualified to do so. If legislatively-established rules for the apportionment of family property are likely to prove inappropriate, let the parties contract in advance for other arrangements.

These are proposals which may, perhaps, improve the social consequences of legal rules and decision-making processes; at least that is what they aim to do. But here again, one has the sense that the gains will fall short of expectations. Pre-trial and conciliation have much to contribute in terms of shortening or eliminating the agenda of conflict between the parties. But it must be remembered that the process leaves the external realities unaltered: a woman who has been out of the workforce for some years will still have some difficulty in reentering it, even if she and her former spouse can agree upon financial arrangements; parents will still feel the strain of a child's separate but equal loyalties under an arrangement for joint custody. Deference to psychiatrists or psychologists will improve the quality of some decisions, but they are no more likely than lawyers to be infallible, although perhaps marginally more at ease with ambiguity, and less prone to moralistic solutions. Marriage contracts may be the logical

recourse for modern lovers contemplating matrimony if they are propertied and prudent, but many will be only one of these, and many neither, and many simply unwilling to begin a relationship by cataloguing the consequences of its collapse. Thus, the future of family law as benign, helpful and accommodative seems to be no more satisfying than that of law in its more familiar role.

In expressing misgivings about reforms which seek either to change the nature of law, or to redefine family relationships, I am well aware of two questions, both of which I must now speak to: if neither tendency, however well-intentioned, offers genuine hope to enhance the happiness of family relationships or decrease the misery of their dissolution, what will? and - whatever the "solution" - what can the individual judge be expected to do to help to fashion it and to make it effective?

I wish my pessimism about current trends in family law reform was rooted in a belief that law had something useful to say about the subject; I would then be confident that some of the able people involved in the field would improve upon the current state of the art. Unfortunately, I am not persuaded that law does, or can, shape events in any significant way. The law did not launch the economic, social and demographic trends which have helped to transform family life - the industrial revolution and contraception, literacy and liberation, the welfare state and psychoanalysis. And the law cannot contain or deflect these trends. The law, at best, can play a peripheral role in dealing with some of their remote effects, and even here largely in the relatively few cases where people have something to disagree about and can afford the money, time and emotional energy to do so. While none of us would care to return to the situation of only a few decades ago, I remind you that when the law in Canada made divorce virtually unobtainable, rich people were able to bring parliamentary petitions or sue for annulment; later, middle class

people were able to preserve their respectability by going to Michigan or Nevada for worthless divorces, or suing on the basis of adultery in the grand tradition of legal fictions such as "Doe on the demise of Roe". Poor people simply took leave of the spouse to whom they were legislatively bound and lived "common law" with someone else. The reform of divorce law created a new legal form, but how many lives did it actually alter?

Please do not misunderstand me. I am not arguing that all existing law, however archaic or oppressive, can safely be ignored because life will simply flow around it. Obviously, some relationships were blighted by the unreformed law of divorce, as others were deeply affected by modern changes. I am only cautioning against the tendency of judges and lawyers to assume that law shapes life, or even worse, that law <u>is</u> life. It doesn't and it isn't.

The future of family law over the next ten or twenty years will be written neither by those who wish to purge law of its adversarial content, nor by those who believe that a charter of rights will solve everything nor, indeed, by any contest or compromise between them. It will be shaped by the success of the daycare movement or the convulsions of the labour market, by the dilution of strong, sexual stereotypes or the accession to power of the moral majority. It is forces such as these which will ultimately determine what kinds of marriages people will have, what opportunities will exist for their children, and whether, and to what extent, they will require the assistance of a judge to tell all family members how to behave towards each other, either during a marriage or after its breakdown.

This brings me, finally, to the role of the judge in the family law of the future. To avoid any misunderstanding, when I speak of "judge" in this context, I mean the judge who is sensitive to litigants as individuals and to social trends, humane and well-read in law and the social sciences, patient

yet professional: in short, I speak of the sort of judge who attends conferences such as this. What is the role of such a judge?

A judge functions in two roles in family law, as in most other matters. He is, on the one hand, a humble cobbler, repairing the wear and tear of relationships, or making the definitive judgment that they are worn beyond repair. And he is, on the other, a Michaelangelo, sustained by the belief that life wi imitate art, fashioning a wonderful universe of cherubs and loving couples, in whose nether reaches a few sinners suffer appropriate torments for cruel, unconscionable or contemptuous conduct.

In the nature of things, the higher up in the hierarchy one goes, the more frequent are the opportunities to perform the Michaelangelo role, to develop new principles of law, although it should be noted that the nearer one is to the ceiling of the Cistine Chapel, the less one is intruded upon by the harsh realities of the world. But any good judge, wherever located in the hierarchy, must surely wish to play Michaelangelo: how else does one satisfy one's creative impulses and the need to feel one is making a contribution?

I only wish therefore, that I could urge that you indulge your Michaelangelo instincts in creating the family law of the future. Alas, I cannot. In the first place, even the most conscientious judge lacks the time to develop expertise in non-legal aspects of family life, without which innovation is likely to be inappropriate. Second, he lacks a mandate to make, implement, and pay for large assumptions about social policy and to define new points of departure; this is the business of the legislature. And third, it is a rare individual who can thrive on a steady diet of fundamental moral dilemmas. Judges like clergymen and doctors, tend to retreat into maxims, rules and standard responses to typical situations precisely because they cannot stand the sustained pressure

of having to distinguish right from wrong, even better from worse, each hour of each working day.

So what I do commend to you, in the end, are the attractions of what will anyway come to preoccupy most of you: the cobbler's role.

To be a good cobbler, of course, you must master the modest technology of shoe repair - the legal rules which represent the limits beyond which you cannot stretch. And you need the practical judgment that tells you whether the solution proposed will work for the particular individuals who will have to wear the boots. Technological skill and practical judgment of a high order will no doubt bring, to a fortunate few amongst you, the opportunity to ply your art for the custom trade - you will be asked to serve on study groups, law reform projects, educational or experimental programmes. But the best cobbler is the one who most thoroughly appreciates the difficulty of even measuring the very thing he deals with daily - the human soul. And it is the fundamental impossibility of making this calculation that leads me to my final remarks.

I am no mystic. I do not believe that if the judge can somehow commune with the human soul by a spiritual or religious process, he will get his decisions right every time. I do not even believe that something called "a spirit of our times" or "a community standard" can be captured with sufficient precision to evaluate the behaviour of particular human souls in particular cases. On the contrary, because the soul is so inaccessible and unknowable, I believe when you are confronted with people in trouble, you should avoid judging them, if that option is open to you, and encourage and assist them to resolve their own differences. If the option of settlement is foreclosed, if you must judge, do so as a humble cobbler - grudgingly, reluctantly, constructively and, if at all possible, in language and with a result which help to ease the pain and restore the civility and self-respect of the people in

front of you. Try to ensure that "family law" for them somehow reflects the best of the values and norms developed by that family for itself.

To end where I began, the future of the family and the future of law itself both seem to be unclear and tentative, pragmatic and pluralistic. The future role of the judge in family law should be no different.