



Review of Ideas and Debates in Family Law by Rob George, Hart Press, Oxford, 2012, 178pp, ISBN 9781849462549, RRP£17.95 (paperback).

This English book, which states at the outset that it is specifically written for family law students both undergraduate and beyond, would not suit as a text for an undergraduate course on family law in Australia, due to the significant differences in the legal positions in the two jurisdictions. Developed from materials prepared for an undergraduate course at Oxford, nor is the book likely to be of much interest to many Australian family law practitioners. However, for anyone interested in thinking *about* family law, this book provides an invaluable and thought provoking read. George captures and succinctly explains much of the modern debate about family law. While his examples may be drawn from the United Kingdom, the issues raised are equally apposite to an Australian setting.

In the first chapter, George explains something of the English family law system and how it works. In particular, he notes that the role of lawyers is more important than is sometimes assumed. Rather than being the awful alternative to mediation, he draws on evidence which highlights the important conciliatory role played by lawyers. This may be more of a surprise to academics than it is to practising lawyers; however, the focus on the role of family dispute resolution generally in Australia and the consideration of involving lawyers in mediation highlight the universal importance of thinking carefully about alternatives to judicially ordered outcomes. George goes on to consider the fundamental question of why family law is important. Against a somewhat different policy background, he argues that the UK government does not see family law as involving matters of law or justice. It is difficult to make a similar argument in Australia, though a cynic might suggest that the Australian government favours quick-fix legislative changes because it is cheaper than providing greater resources. One might draw some parallel, however, with the treatment of family law by the High Court at times, where matters of great import to family law can be afforded rather modest consideration.

The second chapter explores the notions of rights (and expectations) and responsibilities (and obligations) in the context of their particular relevance to family law. While the more practically focused might consider the discussion esoteric, in fact the chapter touches on an issue of fundamental concern to Australian family law. In the United Kingdom, where legislation protects human rights, a natural debate has emerged about how this sits with the welfare principle. As the Australian approach to the welfare principle has highlighted, at its heart is the premise that children's interests must *always* ultimately trump the conflicting interests, and indeed rights, of all other family members. Using relocation as his example (and indeed it is the obvious choice, though it is obviously an area of special interest to George) George explains how family law in that jurisdiction has balanced the welfare principle with competing rights and explores how the law might go further if it were to pay more heed to (the weaker) notion of expectations. The chapter only touches on this most complex of issues (George returns to the topic in Ch 7),

however, it is instructive in highlighting how different outcomes might result if the law took greater account of the rights of other family members in reaching its decisions. Further, it raises the very important issue of terminological ambiguity. As in the United Kingdom, Australian family law legislation abounds with ambiguous — but very important — terms. In exploring in detail what one might mean by the word ‘responsibility’, for example, George highlights the significant statutory interpretation challenges facing the family law judiciary; and one of the key causes of the widespread misunderstanding of modern Australian family laws.

Chapter 3 deals with the topic of international family law, considering the different approaches to resolving cross-border family disputes. For many, parts of this chapter will bring them back to more familiar territory, though of course again there is a very different context for family law in the European setting. However, given parental mobility, and thus the likelihood of having parents in different jurisdictions, these are matters that we must all have in mind. George’s consideration of supranational harmonisation of family law may seem far-fetched — as he rightly notes, if judges within one jurisdiction fail to agree on fundamentals then one is hardly likely to see universal agreement on many, if any, matters — however there is little doubt that individual jurisdictions are increasingly influenced by international trends in family law.

The next chapter raises a topic of particular interest in Australia at the present time — regulating adult relationships. Here questions of same-sex marriage and recognition of de facto relationships are discussed. Australia is of course considerably ahead of the United Kingdom in regard to de facto relationships law, and so the discussion here of the difference in treatment, financially, of married and de facto couples may seem somewhat irrelevant. However, George raises points that are critically important in an Australian context. Do couples in Australia recognise when they are transiting into a legally recognised de facto relationship? Do they understand the consequences of that transition, or the failure to meet that legal test? Given the considerable difficulty Australian judges are having in working out precisely when a de facto relationship exists at law, where does this leave the general public in terms of choosing their relationship form?

Chapter 5 continues with a discussion of what marriage itself means: what are its boundaries, marriage as a status and as a contract. George makes the point in conclusion that in modern society marriage still counts for something, but it is not so clear what that something is, or the extent to which people ought to be able to decide that something for themselves. Again, with the intense debate over same-sex marriage in Australia, the notion of what marriage is, or should be, is particularly germane. As George highlights, so often it is in the desire to regulate couples’ post-separation financial affairs that these questions become important. In that context, as indicated above, Australian family law is grappling with the question of when a de facto marriage arises and when it ends. One of the beauties of marriage is that its formation is certain. Also, once married, it is largely irrelevant how the parties organise their personal affairs; their marriage can look like anything and they can still access the financial remedies. Ironically, however, for Australian de factos to access remedies it may be much more important that their

relationship resembles a more traditional, conservative vision of marriage. Thus, for de factos, there may be less choice in this regard than for married couples; that is, it is important that they model traditional marriage. The argument for equality for same-sex couples in Australia by permitting them to marry has widespread support (except apparently in our federal parliament). The desire to eliminate discrimination in this area is understandable and the arguments against such change flimsy. However, it is notable that, while heterosexual legal marriage may have declined, we seem eager as a society to expand the ambit of this thing called 'marriage'. George considers a number of novel visions of marriage; for myself, I would have liked to have seen an even more fundamental questioning of this so-called 'institution'.

As George reiterates with his next chapter, it is the significant financial disadvantage that marriage-like relationships can generate that results in a great deal of focus on identifying those who should have access to special financial remedies. The discrepancies in the United Kingdom between married/civil partnerships and de facto couples is again a theme in this chapter; and one which has little currency in Australia. However, George discusses the role 'fairness' plays in resolving property disputes in that jurisdiction. After considering what 'fairness' might mean in a general sense, and drawing on feminist perspectives on this issue, George goes on briefly to trace the rise of notions of fairness in decision-making about ancillary financial matters in the United Kingdom. While Australian law has never adopted the 'partnership' model referred to in the UK jurisprudence, nor notions of compensation (although these are approaches that have been evident in some judgments), the judicial references in the United Kingdom to the need for any order to be 'fair' resonate with our s 79(2) which requires that any property order made be 'just and equitable'. As George notes, Lord Nicholls in *White v White*¹ equates the notion of fairness in this context with a principle of non-discrimination between spouses particularly when considering their marital contributions. It is notable that in the recent High Court of Australia decision in *Stanford v Stanford*² — where s 79(2) was a matter of central concern — there is no reference to any UK jurisprudence (though of course as a matter of statutory interpretation that was not required). Very little concrete guidance is provided in that Australian case of what 'just and equitable' means in this context and there is no consideration of a non-discrimination principle; if anything, the High Court exhibits a reluctance to engage with any broader consideration of the question.³ After discussing some arguments more germane to the particular UK context, George concludes with a consideration of whether 'fairness' is a helpful standard in family property decision-making. He reminds us that the precise reason why we have these laws is to remedy unfairness that would otherwise result from the application of general law principles; he thus cautions against a drift, which he explains has been increasingly evident in the United Kingdom, towards viewing family law as a private matter dominated by personal choices. Nonetheless, as George concludes, it is difficult to be confident

1 [2000] 2 FLR 981.

2 (2012) 47 Fam LR 105; (2012) FLC 93-495; [2012] FamCAFC 1; BC201250009.

3 *Ibid.*, at [46].

whether vague statutory notions of fairness interpreted in conflicting ways by the judiciary present a better alternative than greater statutory guidance as to what fairness might encompass, given the changing views of 'fairness' that have been evident following *White*. As in Australia, George notes a parliamentary disinclination to engage in any debate about family property law reform. It may be in Australia, however, that we are at least about to see a fresh flurry of judicial discussion of such matters, as *Stanford* comes to be considered by the Family Court, cases involving financial agreements continue to arise (raising the application of FLA s 90G(1A)(c)) and a new big money case goes on appeal (as George notes, big money cases provide a perfect opportunity to discuss the principle of fairness).

In Ch 7 George returns to the welfare principle, beginning with a brief history of its introduction and interpretation in UK law. In highlighting the non-hierarchical nature of the UK best interests considerations, he contrasts the Australian legislative provisions. George perhaps overstates the presumptive effect of our provisions and has not considered the debate over the extent to which they do, in fact, create a hierarchy of considerations. Having said that, and in light of the most recent amendment to s 60CC which prioritises the 'primary considerations', the contrast between the two styles of drafting nevertheless makes his point. George then picks up again the debate about whether having a child's welfare (in Australia, best interests) as *the paramount* consideration, appropriately recognises the rights and interests of other family members. While acknowledging that there are convincing critiques of the judicial (and perhaps statutory) approach in this regard, George suggests that some critics rely on more of a 'caricature' of the welfare principle, rather than its reality as applied by the courts. From an Australian perspective, it is not at all clear, as George suggests, that the discounting of serious harm to parental rights and interests, at the expense of possibly marginal benefit to children, is 'exceptional'; George goes on to state that harm to a parent *will* be a significant factor in decision-making because the court *will* appreciate that it adversely affects the interests of the child. A later reference to a study on outcomes of hypothetical relocation cases in New Zealand and the United Kingdom provides the context for George's comments; it highlights the very different way that the best interests test may be applied in different jurisdictions and the difference between likely UK and NZ (and Australian) outcomes in relocation cases. George concludes with one argument in favour of retaining the paramountcy principle in parenting decision-making: 'the welfare of a child is a better thing to argue about' (p 127). The brevity of George's book does not allow him time to support his suggestion that alternative approaches do not offer any better way of resolving parenting disputes (and that important topic is something he might like to consider in a later edition). His position is hardly novel and is intuitively attractive; however, echoing his own words, those who would advocate retaining the welfare principle in its current form should keep in mind the convenient 'tool' it has provided over the last century to justify diverse and concerning value-laden outcomes and the fact that, in different jurisdictions, it is used to justify widely divergent outcomes in similar cases. In this regard, there may be some parallels with concerns about how notions of 'fairness' are interpreted in property cases.

George's final chapter looks to issues to do with parental responsibility as it is understood in UK law and the making of orders about day to day parenting matters. George concludes by returning to the idea that family law is necessary, to ensure justice for families who cannot resolve their issues by negotiation. The unjust distribution of power within many families, he says, highlights the need to 'provide a framework and a forum for the fair adjudication of disputes on a level playing field' (p 146). As he says, 'families are such a core part of society . . .' (p 146). Laws of this kind are, of course, ultimately about providing fair and just dispute resolution mechanisms. It might be nice, however, at this point in George's book, if some mention were made of the possibility that it is the very nature of what we accept as 'family' life which both generates many disputes and creates difficulties for courts in resolving them. That is, court processes are not a solution to problems that ultimately require radical, structural societal change.

As an academic with a practical bent, I found this book an engaging read; not just because it discusses a swag of topical and complex issues in modern family law, but also because George eschews the dry writing style that academia promotes. He makes complex ideas simple and keeps his writing style light (see n 63 in Ch 2!). It is not possible for George to engage with all these ideas in detail, but that is not his aim. Perhaps the most important contribution this book makes — for academics, the judiciary and reform minded practitioners — is to remind us that there are different ways of thinking about family law and to provoke us into thinking more deeply about the underpinnings of family law. It is all too easy to see the reform of family law through the narrow prism of past experience rather than thinking about it from first principles. Family law rightly has many critics. In responding to this critique, George invites us to explore and question the fundamentals that underpin what it is we are seeking to achieve by regulating family relationships — it is a very successful, and timely, reminder.

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