SEEKING BALANCE AND PRIORITIES IN FAMILY LAW AND IN FAMILY LIFE
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The theme of this Twelfth World Conference of the International Society of Family Law is “Family Law: Balancing Interests and Pursuing Priorities.” That theme reminds us of two simple but important principles. First, in all family policy issues and procedures, multiple interests need to be identified, recognized, understood and considered, because wise and effective family policies usually strike a balance among those legitimate but diverse interests. Second, in setting family policies and in resolving family disputes priorities must be identified, protected and vindicated.

I. Recognizing Interests and Establishing Priorities in Family Dispute Resolution Processes

The historic model for resolving disputes in the western legal tradition has been to determine a winner and a loser, to find the one right answer, to determine which is to be the prevailing party. With that model, it is no surprise that even our family courts tend much too often to deliver toggle-switch justice: on-or-off, granted-or-denied, right-or-wrong, winner-or-loser. That rigid structure of thinking and judging can work well enough in many situations that the law faces such as criminal law, torts, contracts, where deadlines and bottom lines are the dominant concern. But families are not like corporations or automobile accidents. While in

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specific, limited contexts a few useful parallels can be drawn, for the most part analogizing families to, and analyzing family relationships from the perspective of, commercial enterprises usually misses most of what makes families unique and uniquely valuable to individuals and to society.²

Families consist of multiple varieties of human interests and multi-faceted relationships; they are living communities, more like delicate ecosystems than individual monolithic rights-holders. Application of individual rights-based analysis in adversary proceedings designed to give all-or-nothing solutions has the capacity to distort and damage the complex interwoven relationships and interests that we call families.

The experience of legal systems that are based on different models such as those that focus on restoration of good relations, peace, harmony, and balance may have something important to contribute to our study of family dispute resolution systems and procedures. Dispute resolution systems processes that have long experience in Asian societies such as China, Korea, and Japan,³ and in some Native American tribal systems,⁴ provide examples of alternative


China, and mediation-oriented systems in Japan and Korea); Misasha Suzuki, Note, The Protectionist Bar Against Foreign Lawyers in Japan, China and Korea: Domestic Control in the Face of Internationalization, 16 Colum. J. Asian L. 385, 387-388 (2003) (“It has been widely acknowledged that the legal tradition of East Asia is rooted in a very different foundation than the liberal history of the West. Instead of prioritizing values such as individual rights and self-determination, the Confucian paradigms of mediation in dispute resolution, a moral foundation for government, flexible enforcement, and a focus on reform, rather than isolation, for offenders provide the reasoning behind the lack of individual legal rights and a developed legal profession in East Asia, and especially in China.”); Anne K. Subourne, Comment, Motivations for Mediation: An Examination of the Philosophies Governing Divorce Mediation in the International Context, 38 Tex. Int'l L.J. 381 (2003) (describing, inter alia, historical and philosophical basis for divorce mediation in China and Japan).

methods which give greater emphasis to resolving the disputes and reconciling the feelings of the parties (even if the family relationship is changed) rather than declaring winners and losers. The tremendous growth of alternative dispute resolution (such as mediation, negotiation, arbitration, and private adjudication) in many nations in recent years is evidence of the recognition that the traditional legal institutions and processes that have been used to decide family law disputes have room for improvement.  

This does not deny or undermine the individual rights premise and foundation of legal systems, for the individual is of ultimate importance and only individuals can make the decisions that bring solutions to social problems. But all human beings have a significant yearning for family connections, for real and meaningful parental and spousal relationships (whatever called and however denominated). To view the individual without recognizing that important facet of his or her human identity is to strip the individual of much that gives meaning and value to human life. Similarly, families are mediating institutions that come between the vulnerable

individual and more powerful forces in societies, such as government, economy, media, and many strong and potentially harmful cultural influences. To ignore the contributions of families in general to the health, happiness and success of the individual is to overlook and devalue a significant resource.

II. Recognizing Interests and Establishing Priorities in Family Policy

Just as the legal structures and processes used to decide family law disputes may distort and damage family relationships, so also family policies can be inadequate and harmful because they fail to account for the multitude of intertwined interests in families. If those relationships, needs, and contributions are overlooked, discounted, or devalued, injustice will be done. For example, we in America and in other legal systems based on the English Common Law saw that in the last 150 years, when the inequities and inadequacies of the common law disabilities of married women became painfully apparent in the emerging system of individual economic, legal and political rights and responsibilities. Many other examples could be given to illustrate the point that as we recognize previously neglected interests and relationships of families and family members, significant changes occur in our family laws and policies.

Of course, not all legal changes are improvements. Not all proposed reforms are progressive. Family relationships are extremely significant forces in society. Marriage is a powerful social institution that not only shapes the parties who enter into that special relationship, but its form and content convey powerful messages to society that create social expectations and influences social behavior. Likewise, the status and influence of parenthood are profound and profoundly appealing to many desiring to influence future generations. For
that reason marriage and parenting have long been attractive targets for political movements desiring to effectuate radical social reconstruction by redefining the meaning, conditions, and requirements for those basic family relationships.

Two examples come to mind. In 1917 when the Bolsheviks came to power in Russia, they enacted a series of radical family law reforms designed to effectuate the “withering away” of marriage and formal parenting relationships. Those policies remained in effect for nearly two decades until the imminent threat of a major war, and the costs of those major social upheavals (including the millions of parentless, starving street children) forced a return to much more traditional, family-supporting, family-encouraging policies. The story of the 1917 Bolshevik family law policies and of the dramatic and tragic consequences they produced in Russia is a fascinating and sobering tale about the painful consequences that can result from the hasty adoption of radical family policies.\(^6\)

The second example is from my own country, the United States of America. Laws forbidding inter-racial marriage (specifically with “colored” races) were enacted in a few states

before, but in most states after the Civil War, during a period of heightened racism and under the influence of the White Supremacy ideology and political movement. By the end of that century that movement had morphed into the scientific racism of “eugenics” movement, which attempted to provide a “scientific” basis for racial and social hierarchy, including anti-miscegenation policies. As the Supreme Court of the United States indicated when it invalidated those invidious inter-racial marriage restrictions had nothing to do with marriage, and were wholly irrelevant to any legitimate interest in regulating marriage, but were enacted solely to promote and institutionalize the ideology of a popular political movement of the day.

Today, various political and social movements still seek to “capture” and redefine

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7 Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297, 1345 (1998) (“During Reconstruction, anti-miscegenation laws, which had assumed a relatively minor position in Southern slave codes, spread to a number of Southern states for the first time.”).


marriage for the purpose of promoting their ideological, social, and political goals. One might ask whether the current movements to redefine marriage by legalizing same-sex marriage and to legalize adoption of children by same-sex couples or partners are the successors to those earlier attempts by special interests to capture and redefine legal marriage and parenting for political and social ends.\textsuperscript{10} I only raise that question here, and in the interest of time (and of avoiding a brawl) I will forego further discussion of it.

Regardless of the conclusion that one might reach on these contemporary policy issues, history provides ample examples to remind us that the most successful policies regulating family relations recognize the multiplicity, diversity, interconnectedness, uniqueness, and unique value of family relationships for individuals and for society. Nevertheless, effective family policies must establish clear priorities among the interests, and while those priorities may change as society and circumstances change, they must be clear, and must reflect the realities and importance of family institutions such as marriage and parenting.

When family relationships are neglected or devalued, investment in families is reduced and families begin disintegrate. When the basic social unit of society fails or falls apart, it takes a heavy toll in human suffering and social instability.

\textit{IV. Balancing Family and Other Interests By Giving Priority to Family}

Historically, legal principles and social attitudes regarding investment-of-time-and-commitment towards family have gone through four phases. For most people through most of recorded history (especially in undeveloped economies and primitive cultures) family duties

\textsuperscript{10}See Monte N. Stewart & William C. Duncan, _____ 2005 B.Y.U. L. Rev. ____.

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required essentially \textit{total commitment} of time and attention to provide adequately and responsibly for the family and to fulfill family functions. It required virtually the full-time effort of both spouses and usually there was a gender-based division of labor, but the full-time commitment of both husband and wife, and usually a significant commitment of time from the children, was required to meet the subsistence needs of the small, self-contained, family economic unit.

Later, as economic standards improved and educational and social opportunities became more accessible, family members time, interest, and energy were divided among the competing responsibilities of family, self, and community. Labor-saving devices, wealth, education, media, communications, trade, and travel opened many other areas for personal investment of time and interest. Total commitment gave way to \textit{balanced commitment} ideal of balancing multiple equally important commitments. This stage was charicaturized, if not characterized, by the “supermom” and “superdad” ideal of spouse-parents (and their “superkids”) who tried to give at least 12 hours a day to each of multiple interests – to their career, to their family, to the development of their personal talents and interests, to their community, etc..

This led to the \textit{optional interest} model of family commitment in which both the quantity and quality of investment in marriage and family are reduced. The market and/or the state increasingly are seen as able to provide (and increasingly attempt to provide) most of the family functions historically performed by spouses, parents, and children. Functional equality is the watchword, and family relations are deemed just one of a smorgasbord of interests and commitments available to choose from. Family responsibilities are no more than equivalent to the other options, and usually of secondary or tertiary importance. Family relations are viewed from
a consumer or exchange perspective, and are deemed changeable and interchangeable. Marriage and parenting are accessorized; they are just one of many optional interests; their value depends entirely upon individual taste or preference. This model of family relations seems to be the dominant image today in the American media (though not necessarily in family life of ordinary Americans), and it reflects the comprehensive devaluation of marriage and family relations.

The fourth model overlaps all of the other models; it may never dominate but it reflects a commitment to family relationships and responsibilities that many families have followed throughout history, despite the prevalence in theory and perception at various times of the other models. It may be called the family priority model. Husbands and wives order their lives upon this model make family their top priority. The family is not the whole of their lives, but it is their primary interest and responsibility. It does not take all of their time or resources, but it comes first.

V. Justice Sandra Day O’Connor - An Example

The announcement earlier this month by Justice Sandra Day O’Connor that she is retiring from the Supreme Court of the United States is both an excellent example of, and a good reminder of a very successful professional life that followed this family priority model of striking the balance of competing demands we face in our lives. Justice O’Connor had served for almost twenty-four years as an Associate Justice when she announced her retirement. Both Justice Stevens (with nearly thirty years of service) and Chief Justice Rehnquist (with over thirty-three years of service) have served significantly longer Justice O’Connor had served when she retired. The average length of service of the last four justices who retired before Justice O’Connor was more than twenty-eight years, so her retirement comes more than four years (15%) earlier than
that average. She was only seventy-five years of age. That is a relatively young age for a Justice of the Supreme Court. When she announced her retirement, two of her eight colleagues were older than she was: Justice John Paul Stevens is 85 years old (born April 20, 1920); and Chief Justice William Rehnquist is 80 years old (born October 1, 1924). The average age of the last four justices to retire before her was 82 years old, so Justice O’Connor was a significant seven years younger at time of retirement than that recent average age. She is younger than any of the last five justices to retire. She was in better health than both Justice Stevens and Chief Justice Rehnquist, and her health to all appearances was as good as almost all of her other Associate Justice colleagues, and better than several others, yet she retired first.

Because of the enormous power and prestige of the Justices of the Supreme Court in American law and government, most people hold on to those positions as long as they can. Justice O’Connor had an additional reason to remain: As the first woman appointed to serve on the Supreme Court, Justice O’Connor she was a living legend, a revered and highly honored model for millions of young women generally, and especially for young women lawyers. She had risen to the top overcoming significant social obstacles, pioneering and blazing the trail for professional women. She was identified as the influential “swing vote” in many cases, and her recent judicial opinions continue to receive great attention and significant respect.

So why did Justice Sandra Day O’Connor give it all up while she was relatively young, in good health, in great favor, and in good form as a legal professional? The answer appears to be that her husband of 53 years, John O’Connor, a very successful lawyer in his own right, is in the early stages of Alzheimers, and she chose to retire in order to be with him and help attend to his
This is not the first time that Sandra Day O’Connor has chosen to put aside and sacrifice personal career opportunities in order to tend to the needs of her family. She started working as Deputy County Attorney of San Mateo County, California in 1952. Her career was disrupted first when she her husband was assigned to Germany on military duty, and she went with him. She was able to pick up her career in Germany and worked as a civilian attorney for the military quartermaster office in Frankfurt, Germany for three years. She and John returned to the United States and settled in Arizona, where she practiced law as a private attorney from 1958-1960. Then she left the practice of law for five years, from 1960-1965, to devote her time primarily to caring for her children and young family.\(^\text{12}\) (I have heard her speak about how many more demands she had from volunteer community, charitable and service organizations during those years, and how the return to the office was almost a refuge from those demands that are faced constantly by many wonderfully patient full-time homemakers.) In 1965 she returned to practice as an Assistant Attorney General for the State of Arizona, then went on to serve in the state Senate, then was appointed to be a trial judge on Superior Court in Phoenix, Arizona (where I first met her when I appeared before her several times as a young lawyer), then to the Arizona Court of Appeals, and finally, in 1981, to the Supreme Court of the United States. While no one

\(^{11}\) O’Connor to resign from supreme court, Law Center, CNN.com (July 1, 2005), at http://www.cnn.com/2005/LAW/07/01/resignation.supreme/ (Seen July 8, 2005) (“Her husband of more than 50 years, John J. O’Connor, has been suffering from the early stages of Alzheimer's.”).

\(^{12}\) Her three sons were born in October, 1957, in 1960, and in 1962.
can deny that these choices to postpone or delay or walk away from professional opportunities involved some real sacrifice by Justice O’Connor, no one can say with a straight face that she did not have an extraordinarily successful, important, profoundly significant career in her chosen profession despite her (and I would argue at least in part because of her) commitment to and sacrifices for giving priority to her family.

Justice O’Connor’s resignation to care for and be with her declining husband is a profoundly powerful nonvocal statement “that, in a family crisis, it can be the right choice to put aside one’s career.”

As lawyer Edward Lazarus wrote: “O’Connor has blazed yet another trail in walking away from the Court, as no other justice has.”

I agree with Mr. Lazzarus that her resignation from one of the most powerful and celebrated positions in American government to care for a dependant family member validates the choices that many other unfamous, uncelebrated, ordinary moms and dads and spouses and children have made “who choose to leave professional life for the career of parenthood, or to become a caretaker for a family member, without pause or apology.”

VI. Conclusion: Recognizing the Importance and Priority of Families


14 Id. at 3.

15 Id. at 3.
On the historic occasion when she was sworn in as the first woman Associate Justice of the Supreme Court of the United States, Sandra Day O’Connor she said something that foretold the decision she would make this summer to retire to care for her husband. It is something that bears repeating today. She said: “Marriage is far more than an exchange of vows. . . it’s the hope of the world, and the strength of our country.” On another occasion, Justice O’Connor said: “The family unit plays a critical role in our society and in the training of the generation to come,” and “[w]e pay a price when we deprive children of the exposure to the values, principles, and education they need to make them good citizens.”

Those remarks certainly provide a glimpse into the priority commitment that family has in Justice O’Connor’s constellation of values. They also are reminiscent of something another prominent American mother, Barbara Bush, said in a commencement address to the graduates of Wellesley College in 1990. The First Lady (wife of the then-President George W.H. Bush) told the graduates of that prestigious, historically women’s college:

For several years, you’ve had impressed upon you the importance to your career of dedication and hard work, and, of course, that’s true. But as important as your obligations as a doctor, lawyer or business leader will be, you are a human being


first and those human connections --- with spouses, with children, with friends --
are the most important investments you will ever make.

At the end of your life, you will never regret not having passed one more
test, not winning one more verdict or not closing one more deal. You will regret
time not spent with a husband, a child, a friend or a parent.

. . . .

. . . [O]ur success as a society depends not on what happens in the White House,
but on what happens inside your house.  

How true it is that no professional or business or social success we have in life is
ultimately worth or can ultimately compensate for the failure of families and family relations.
That is not just true for individuals, but it is also true of societies and nations. As goes the family
so goes the nation. Disintegration of families foretell the disintegration of the society (starting
with juvenile delinquency, through domestic violence, through drop in educational achievement,
to increased health costs, depressed longevity, etc.)

It is said (as Senator Hillary Clinton has noted) that it takes a village to raise a child, meaning that community needs to support the enterprise of parenting, to support and reinforce that very demanding endeavor. And the community benefits when the child is well-raised and becomes a responsible and contributing member of the next generation to protect and provide for

\footnote{18Wellesley College Commencement, Remarks of Mrs. Bush at Wellesley College Commencement, http://www.wellesley.edu/PublicAffairs/Commencement/1990/bush.html (seen July 8, 2005).}

\footnote{19Hillary Rodham Clinton, It Takes a Village 1 (1996).}
the earlier generations and the legacy they left them. So also it takes the support of the community, of good laws and wise policies, to sustain a marriage and to build a family. And so also the entire community benefits when marriages are stable, healthy, and happy. That may be why so many nations and states have adopted public policies and programs to encourage, strengthen, support and improve marriage and marriage quality.\textsuperscript{20}

But, ultimately, the success and happiness of families depends upon individual efforts, not government programs. Nurturing family relationships takes individual time, patience, commitment, gentleness, self-discipline, sacrifice, desire to improve, willingness admit mistakes and to get up and try again, and again, and again, – in short, it takes love. Family-building and sustaining love is manifest over the long-term, in action and deeds, and not just in transitory feelings and passing sentiments.

As convener, I can report that several of our colleagues from around the world who had planned to come and present papers at this conference, withdrew at the last minute in order to give needed service to family members. Without naming names, I will mention just two examples. One of the officers of the International Society of Family Law from Europe, who is concluding a decade of extraordinary and distinguished service to the Society that has been of great benefit to all of us, reluctantly decided not to come to the world conference this year in order to stay at home to be of service to his wife who has recently gave birth, and to their child who was born just three weeks ago. Another example: just ten days before the conference began,

\textsuperscript{20}See Lynn D. Wardle, \textit{Fragile Families and Family Law} in Fragile Families ___ (in press) (describing welfare reform marriage initiatives of President Clinton and President Bush, and various state marriage initiatives).
a highly respected American law professor sent me an email message withdrawing from the
panels on which he was scheduled to present and to moderate due to the need for him to be with
his aging mother, to help her move from her home in one city to a care center near another
family member in another city. To each of these messages of regretful withdrawal I responded
that if there is any scholarly organization that understands and supports the decisions of its
members to miss a triennial world conference in order to give service to spouse, children,
parents, or siblings in a time of need, it is the International Society of Family Law. I am honored
to be associated with the ISFL not only because it is the leading scholarly organization in the
world dedicated to the study and discussion of domestic, comparative, and international family
law, but because in its operations it reflects so often and so well what it says about the
importance of the family.

As we conclude another world conference and look to the future, wondering what
challenges and changes the next three years will bring, may we remember that families matter,
that families interests are real, and that families deserve priority in our personal relations and in
our public policies. May we work to give families the priority they need and deserve in the
balance of interests reflected in our laws and in our lives.