

Family Law: The Most Irrational and Dysfunctional Branch of Law

by David Shackleton

I recently saw, in a memo from a family lawyer, the comment, "A child should be entitled to share in his parents' wealth." To most people, I think that this feels right. Yet I think it is not. Please bear with me while I lay some groundwork before speaking to it directly.

We are basically irrational when it comes to children. Evolution has selected for this irrationality very strongly. If a person rationally considered what would be involved in raising a child, the largely one-sided commitment and sacrifice, they would probably drown their infant at birth. Such an attitude would, of course, result in that person leaving no offspring, so such genes would swiftly be bred out of the race. Instead, we have received a legacy of feelings and meaning, psychological attitudes, that make us protect and nurture our children, that convince us that it is all worth every pain and sacrifice. I have no argument against human nature. I accept the way that we are, and find pleasure, just like others, where it has been planted by the inexorable process of evolution. We are what we are. However, it is important to me to tell the truth about it, including the truth that our attitudes towards children, especially towards our own children, are highly irrational in certain basic respects.

This attitude has shown up in family law, which is basically civil law adapted to the issues of divorce. The largest example of this irrationality in family law is connected with the notion that "the best interest of the child" should be the pre-eminent consideration in a divorce proceeding. Let me explain.

All other branches of law observe the dictum that rights should always trump interests. This dictum is a worthy foundational legal principle. Rights are absolute entitlements that are strictly limited in scope. The right to free speech, free assembly, property, tort (contract) etc. are clear and circumscribed, and are essentially injunctions against others interfering with a person's basic entitlements. The business of law, both criminal and civil (except for family law), is mostly the business of balancing one party's rights against those of another. For example, your right to freely swing your fist ends where my nose begins (your right to freedom of movement versus my right to integrity of my person). This is as it should be.

Family law, it seems to me, has lost sight of this basic principle because it operates in the realm where our whole society is determinedly irrational, the realm of our relationship to our children (and to a lesser extent the relationship between men and women, about which we are also pretty irrational for similar reasons). And so in family court, the interest(s) of the child(ren) trump the rights of the parents, in particular their rights to their property (which rights do exist in law) and their rights to associate with their offspring (which rights have never been legally constituted).

The problem is compounded because, unlike rights, interests are essentially unbounded. No matter how much money I have, it is always in my interest (for most people, at least) to have more. But interests should always surrender to rights: although it is in my interest to take all of your money, your property right trumps my interest, as indeed it should. If it didn't, burglary wouldn't be against the law. And indeed, the moral equivalent of burglary (actually, of robbery since it is done by force rather than by secrecy) is the rule in family court.

The problem is that the irrationality of family court is covered over by very strong feelings that we have about what is right action when it comes to children, feelings shared by most of the population, including judges, feelings that support the basic ideas that are currently implemented in family court, and that make us blind to the fact that it violates the most basic principle of legal morality.

What do I think a rational family court would do?

I think that we come closest to seeing what is reasonable when we look at intact families. Let us consider the claim that I started this little essay with, Gene's claim that "A child should be entitled to share in his parents' wealth." What happens in intact families is that most children do indeed get to share in their parents' wealth. However, this is not an entitlement (a right) but rather a gift: the property is shared by the owner (the parents) with the child as a matter of choice. It is clear that this is the case because the state is not entitled to barge into a family and say "You are not sharing enough of your wealth with your children." The issue the state can, quite rightly, intrude into a family about is if a child's basic necessities of life are not being met by the parents. This is the child's right, and the parents' moral and legal obligation: to meet the basic necessities of life. Anything beyond that is a gift, and although it may be in the child's interest to receive more of a parents' (or of anybody's) wealth, the state should not be

empowered to compel a person to part with any particular proportion of their wealth. Such compulsion does not happen in intact families, and it should not happen in divorced families either.

Now, I do not intend to get into what exactly constitutes the basic necessities of life: my interest here is in elucidating the principles involved.

Similar considerations apply to the issue of spousal support, alimony, etc. In the business of family law, as I said, we have completely lost sight of legal principle, and elevated interests over rights. We have never even noticed that what we did was irrational and harmful, such is the depth of our irrationality. Even most lawyers and legal scholars have failed to notice this bizarre inversion of the hierarchy of rights and interests in family law.

Moreover, my experience in attempting to speak with legal professionals (lawyers, judges, social workers) about it is usually that they don't get it. Some acknowledge that the system has flaws, but then suggest that it's the best we can do at present. My judgment is that most of them are sincere. The power of the feeling in their psyches that children's interests must be protected, overwhelms their rationality, and they don't realize. The issue of what to do about it as an advocate for legal change is thus very troublesome. I confess that I have not even begun to solve that challenge, nor do I know if a solution exists. The fact is, we have no great tendency, as a species, towards rationality. Feelings, drives and instincts are much older, and much deeper in our psyches, and it is those, for the most part, that have been shaped by evolution to make us want to protect children at almost any cost. Rationality is a very weak competitor when it is in competition with what *feels* right.

David Shackleton

david@integraldesign.org