



What Insight can a Family Lawyer Bring to a Discussion about the Future of Our Society?

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Abstract

Family lawyers are at the coal face of the constantly free changing nature of the concept of family in western society. In the three decades that I have been in practice there have been some significant shifts in the way we understand the concept of family and those shifts have had major ramifications on the way we organise our society. In 1982 when I entered legal practice in Australia it was very rare for young couples to live together before they married. There was seismic shift in attitudes to cohabitation and by the late 1980's the large percentage of Australia couples who decided to marry lived together for at least 6 months prior to their wedding. As the decade progressed it also became more common for couples to make the decision not to marry but to live together in permanent de-facto relationships. In this opinion piece the author examines this circumstance from a family law practitioner perspective.



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With the advent of same sex relationship recognition by the culture there was an increasing examination through the 1990's as to what constituted a family. We saw in the early to late 1990's the first public recognition that same sex couples could raise children either biological children that they brought to the relationship from prior families or children born through surrogacy or assisted reproductive technology. What does this all mean? The media has been keen to document the progress of the changing nature of families in Australia. The topic is endlessly fascinating to the public. The problem is that many of the families that constitute the new wave of families are operating in environments where children are well cared for and nurtured.

The public's fascination on the "new" families have left the great bulk of children in more traditional families operating outside of public scrutiny. There has been an alarming increase in the rate of child abuse in our culture and we are struggling to even talk about the issue.

We know that children who are raised in environments where dysfunction is present will not reach their potential. On all standard indicators, such as, education attainment, mental health, physical health and financial security, children exposed to dysfunction in childhood fail to meet the same level of functioning as their nurtured peers. These children experience childhoods characterised by uncertainty, violence and neglect.

Why is it that the broken child protection system in Australia is still struggling to even investigate cases that have been reported by professional notifiers.

WHAT HAS CAUSED THIS IMPOTENCE IN THE WAY WE AS A CULTURE LOOK AFTER OUR MOST VULNERABLE?

In the 60's when I was a child Australia prided itself on its egalitarian nature and the fact that the gap between the wealthiest and the poorest in our nation was narrow. That gap has started to widen in Australia and there has been an indication from statisticians that the gap is increasing at a rapid rate. The impact of that change in the way our culture is organised is evident in most Western countries. Australia and the US have both faced the inevitable result of wealth distribution being characterised by a small percentage of the population controlling a large percentage of the capital. Recent riots in the US have again heightened the gap between those who have access to a level of comfort and those who are marginalised. In a Family Law practice the impact of wealth distribution being skewed is apparent on a daily basis. Many of the children that we come into contact with are living in households where their basic physical needs are not met. The product of this marginalisation is evident again in the way that those children operate



in the broader culture. Those children that we see whose parents are not able to meet their basic needs are usually educationally challenged, they have learning difficulties, they have early interface with the Criminal Justice System, they are prone to have mental health crisis during adolescence and poor overall health. The breaking down of their families means that their childhoods are often characterised by chaos in terms of stability of housing peer group and community. They are shifted from one side of the country to the other and we often see children who have 6 or 7 schools in their first 2 or 3 years in formal education.

How do we change things? It strikes me as archaic that in crowded syllabus that we expose our children to there is very little attempt to give the children the keys to launching themselves out of their background into a different way of viewing the world. Intergenerational transmission of poverty and violence is becoming more obvious. As the school system slides into a 2 tiered system where the haves and have nots are separated in the playground it becomes increasingly difficult for children to understand the connection between educational attainment and freedom to direct your own life as an adult.

In both the child protection jurisdiction and the Family Law jurisdiction, there are very inconsistent approaches to the way we assess parental capacity. Social Science has moved rapidly to understanding the way the brain functions and this has important learnings for our assessment of initially whether parents have the capacity to look after their children in the long term and increasingly, it allows us to understanding the impact on children if they are left in sub-standard arrangements with parents who are not able to meet their basic needs.

The plethora of problems facing parents who are ill-equipped to nurture children range from mental illness to suffering disorders and uncontrolled violence issues.

In both legal systems, courts are asked on a daily basis to determine whether individual parents have the capacity to meet the needs of children in the short and long term. The resourcing of the system means that access to appropriate expert evidence is becoming increasingly rare. Best practice suggests that if capacity is an issue, there needs to be a multi-disciplinary approach to the initial assessment as to capacity and the assessment as to a model for restitution if a child is to be removed on an interim basis.

Currently, both the state and federal governments are failing to make provision for even basic increases to meet increases in the costs of provision of expert evidence to the courts. Increasingly, its user pays. We know that the children who are most at risk lie in the families that do not have the capacity to pay for proper expert evidence and accordingly, the needs of our most vulnerable children are often assessed in an inadequate way or merely ignored.

The return to a best practice system involves the appropriate funding of child psychiatrist, clinical psychologist and neuroscientist specializing in issues facing families to be able to provide judges with timely, thorough and expert advice.

The Commodification of Children

As the fertility rate started to fall in Australia the need to investigate remedies for infertility became more pressing. The declining fertility rate occurred almost simultaneously with the shift away from adoption in the culture which meant that couples who traditionally looked to form a family through the adopting of children were put into an increasingly commercialised market place that looked at the remedy coming from reproductive technology or surrogacy.



The commodification of children has been brought into the public's consciousness in the last few months with the baby Gammy case and more recently the press conferences held by the Chief Justice of the Family Court and the Chief Judge of the Federal Circuit Court raising concerns about overseas surrogacy and the way Australia is dealing with these issues.

We have become a society that increasingly deals with social problems by buying our way out of them. Many couples have travelled overseas to enter into commercial surrogacy arrangements in unregulated Third World countries. The moral and ethical issues surrounding overseas surrogacy is only just starting to be examined in Australia. Hand-in-hand with this phenomenon is the realisation that the outcomes for children in long-term foster care in Australia are appalling. We have struggled to assess parental capacity at the time that children are relinquished to foster carers and our aversion to adoption has meant that hundreds of children are left in a legal limbo where they are not given the security that researchers now know comes from adoption into a nurturing family unit.

We know through the Royal Commission investigating institutional sexual abuse that we cannot return to that model. We have lost now 2 or 3 generations of children who have been removed from their parents in the child protection system but placed in unstable foster care arrangements that do not offer permanency. Recent studies confirm that outcomes for children who are adopted are far superior to children who are left to the vagaries of the State run foster system.

SOLUTIONS

If we are to truly revolutionize outcomes for Australian children, there needs to be a concerted approach to the identification of children at risk in early childhood. The solutions to the current mess should include the following:

- Early assessment of children at risk
- A multi-disciplinary team to assess parental capacity
- If parental capacity is assessed as not being good enough, then the children should be quickly moved to an open adoption program
- Education on infertile couples about the benefits of adoption versus surrogacy or assisted reproductive technology
- An examination as to the commercialization of surrogacy to combat trafficking of babies and surrogate mothers in the third world
- A better resourcing of both the Family Law system and the child welfare protection system to enable co-ordination between the two systems to ensure that children do not slip under the radar
- A proper examination of the falling, declining resourcing of public education to ensure that children who are from economically disadvantaged families are able to access high quality education at all levels.