Australian Journal of Family Law

Volume 37 Part 1

(Editorial, Foreword, Articles and Response article included in this part are linked to the LexisNexis platform)

CONTENTS

two key factors contributing to these perceptions: the discretionary nature of judicial decisions and the personal assumptions litigants bring to family disputes. While it is tempting to dismiss public criticism of family law on the basis of inaccuracy or misunderstanding, this article argues that there is, nevertheless, value in exploring the ways in which members of the public come to form negative views about family courts.

To do this, I introduce an interdisciplinary approach of procedural justice, drawn from social psychology, which holds significant promise for our capacity to explore and learn from the experiences and perceptions of lay court users, and the extent to which they perceive the family law system as fair. Using the phenomenon of self-represented litigants as an example, I explore five key principles of procedural justice: neutrality, respect, understanding, helpfulness and voice. In doing so, I demonstrate how family courts operate in ways that can either undermine or amplify perceptions of fairness, which can in turn support or diminish public trust in the family law system. I conclude by re-emphasising Chisholm's invitation to the family law community to begin paying greater attention to the consequences of perceived unfairness within family courts, and advocate for the use of procedural justice as a lens through which to achieve these important insights.

Beyond function: State scrutiny of family relationships

— *Claire Fenton-Glynn* 48

In recent years, many jurisdictions have shifted towards a more functional approach to family law, recognising family relationships based on what they do, not what they are. Australia has been at the forefront of this functional revolution, both through legislation and judicial interpretation. This article considers two contributions made by Richard Chisholm — first as a judge, and second, as an academic writer — relating to this functional revolution. First, it analyses the decision of Re Kevin (Validity of Marriage of Transsexual), contrasting the 'essentialist' (formal) criteria adopted by previous authorities with Chisholm's progressive functionalist approach and the advantages it brings. Second, it discusses Chisholm's academic analysis of the case of Masson v Parsons, in which he highlights. possible legal reforms to which the functional approach to parenthood opens the door. The article concludes by considering the possible disadvantages of a functionalist approach to family law and explores how the law might move forward in a more equitable — and predictable — fashion.

Individualised couple finances: A new source of inequality and post-separation economic disadvantage?

— *Belinda Fehlberg* 63

In this paper, I explore a growing disjuncture between the 'partnership' ideal that has predominantly influenced Australian family property case law in 'standard' cases, and a shift reported in social sciences research in the way couples manage their finances away from joint to 'individualised' approaches. I suggest that further research is needed to determine the impacts of this shift on post-separation property settlements, and whether it may be adding to post-separation economic disadvantage commonly experienced by women and their dependent children.

Rethinking 'best interests': A 'children's needs' approach to post-separation parenting disputes

— *Lawrence J Moloney and Bruce M Smyth* 83

What would family law look like if its primary attention was directed to children's immediate and short term 'needs' rather than to the 'best interests' of the child, and would children and their parents be

better off? In this article, focused on private post-separation parenting disputes, we argue that because of its chronically indeterminate nature, (a) the 'best interests of the child' principle promises an outcome that cannot be credibly delivered; and (b) negotiations conducted and submissions made in the face of such significant indeterminacy are likely to increase costs and exacerbate existing parental conflict. We note that for many families, costs are an important determinate of their post separation welfare, whilst increased parental conflict is associated with a well-recognised range of negative outcomes for children, regardless of what parenting time-related agreements are agreed to or ordered. By contrast, we suggest that by being more definitive and more modest in its aspirations, 'children's immediate and short-term needs' offers a principle which is more grounded, less time-consuming, less costly to negotiate and more likely to facilitate parental cooperation. With no capacity to define or predict 'best interests' in these cases, we suggest that the standard (and perhaps only) question that should be asked in these cases is: 'What are your child's immediate and short-term needs?'

Response article