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Introduction: From Partners to Parents: Toward a Child Centered Family Law Jurisprudence

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SYMPOSIUM

INTRODUCTION

FROM PARTNERS TO PARENTS: TOWARD A CHILD CENTERED FAMILY LAW JURISPRUDENCE

Modern family law has undergone a revolution. Lenore Weitzman heralded its initial stages in her examination of the fall of fault-based divorce.¹ The Supreme Court ushered in the second stage when it dismantled the distinctions between marital and non-marital children.² The third stage involves rebuilding family obligation on the basis of the ties that remain: those between parents and their children.

The Family and Juvenile Law Section of the Association of American Law Schools devoted its 1999 annual program to the exploration of a child-centered family law jurisprudence. The program focused on two initial questions:

1. Are children's interests better served by securing the involvement of both parents or by support for their primary caretaker?
2. Are children's interests better served by state intervention designed to vindicate children's rights independently of their parents or by state support for the family unit?

Karen Czapanskiy and John Gregory were invited to address the first issue; James Dwyer and Peggy Cooper Davis the second issue.

The program then included Greer Litton Fox's "Report from the Social Sciences" and a panel discussion that I

1. LENORE WEITZMAN, *THE DIVORCE REVOLUTION* (1985).

2. See Janet L. Dolgin, *Just a Gene: Judicial Assumptions about Parenthood*, 40 UCLA L. REV. 637 (1993).

moderated with Cynthia Price Cohen, David Chambers, Martha Fineman, Marty Guggenheim, Fran Olsen, and Suellyn Scarnecchia, which explored national and international perspectives on children's rights and interests.

Karen Syma Czapanskiy, John DeWitt Gregory, James Dwyer and Greer Litton Fox accepted our invitation to present the papers they prepared for the program in this symposium. Karen Czapanskiy's article, *Interdependencies, Families and Children*,³ argues that recognition of interdependency is necessary to give content to the child's best interests standard that governs modern custody adjudications. She maintains that children are necessarily dependent on their caregivers, and that the law promotes children's interests when it supports those who have assumed responsibility for their care. When parental interests conflict, Czapanskiy would give priority to caregiving; supporting the continued involvement of both parents when it strengthens, but not when it undermines, the quality of care.

John DeWitt Gregory's response, *Interdependency Theory—Old Sausage in a New Casing: A Response to Professor Czapanskiy*,⁴ questions Czapanskiy's conclusions. First, Gregory maintains that a case by case determination of caregiving relationships would be just as indeterminate in practice as the best interest test that it would replace. Second, he objects that interdependency theory ignores the conventional wisdom that a continuing relationship with both parents is important to children's well-being.

James Dwyer's paper, *Children's Interests in a Family Context: A Cautionary Note*,⁵ agrees that children's interests must necessarily be determined in the context of the web of existing family relationships, but then goes on to examine the ways in which family court decision-making systematically privileges parents' perspectives over those of their children. Dwyer notes, in particular, that the judges often identify with the adults, overemphasize parental "deservedness" at the

3. Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957 (1999).

4. John DeWitt Gregory, *Interdependency Theory—Old Sausage in a New Casing: A Response to Professor Czapanskiy*, 39 SANTA CLARA L. REV. 1037 (1999).

5. James G. Dwyer, *Children's Interests in a Family Context: A Cautionary Note*, 39 SANTA CLARA L. REV. 1053 (1999).

expense of children's needs, and recognize rights overwhelmingly on behalf of parents. Dwyer proposes greater judicial willingness to recognize that there are some cases, especially in the newborn context, where the child may be better off without a relationship with a biological parent, more sensitive case specific decision-making rather than reliance on bright line rules, and a greater ability to identify parental interests *with* the provision of counseling, parenting classes, and other forms of state intervention rather than with autonomy alone.

Greer Fox, in *Children's Well-Being: Clues and Caveats from Social Research*,⁶ presents an overview of family research from the perspective of the social sciences. Much of the current discussion of children's well-being proceeds from a set of questions lawyers look to social scientists to answer: are children always better off with two parents rather than one? What is the role of conflict in children's well-being? How harmful is divorce to children's life chances? Are some parenting styles, whether parents parent together or apart, more successful than others? How advisable is joint custody, and are some forms more advisable than others? Greer cautions us to beware of those claiming definitive answers to these questions, that the most rigorous studies are likely to be those with the greatest qualifications. In the process, she reviews the different measures of children's well-being, the changing context of family life—the increasing absence of fathers, reliance on multi-generational families, growing income inequality, and greater ethnic diversity—and concludes that a child-centered social policy must make families central to the process.

Finally, in the last paper, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*,⁷ I present an overview of the changes that have redefined family ties. I argue that where family once depended on the relationship between the adults, with fault providing the framework for divorce, and clear distinctions drawn between marital and non-marital relationships, that the new family law regime ties family rights and

6. Greer Litton Fox, *Children's Well-Being: Clues and Caveats from Social Research*, 39 SANTA CLARA L. REV. 1075 (1999).

7. June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091 (1999).

responsibilities to parenthood. I further maintain that, while the shift is now largely complete, the missing piece of the puzzle is a parental partnership ideal. Particularly in the custody context, the law can effectively recognize both parents' ties to a child, where the two are in conflict, only if it also develops a partnership model capable of identifying those parents who fail to qualify. I examine the recent custody cases involving both divorce and unmarried parents to show, first, the shift that has occurred, second, the growing body of social science literature that ties child's well-being to a cooperative model of parental support, and, finally, the ways in which resolution of the "hard" cases involving adoption and moves needs to be tied to an understanding of the parents' relationship with each other. The result is not a reinvention of the "unitary family,"⁸ but rather a new definition of parenthood capable of embracing parenting apart.

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8. See Dolgin, *supra* note 2.