

# LAW AND CONTEMPORARY PROBLEMS

---

---

VOLUME X

SUMMER, 1944

NUMBER 5

---

---

## FOREWORD

Children of divorced parents present problems to be solved by members of the various professions. In each profession preventive and remedial devices are available. Many of the problems presented are so complex that the preventive and remedial devices in a single field are not adequate to meet the demands made upon them. Divorce—a legal concept—may dissolve a legal status; but the results are a broken family. The home to which the child previously looked for security is materially—perhaps completely changed. The resulting bewilderment calls for the best possible professional skills. Often it calls for an interprofessional cooperation in working out for the child a well-integrated program for finding a new and sufficient security.

An interprofessional approach to problems of the modern family has been a matter of concern to the Committee on Law and the Family of the National Conference on Family Relations. Proposed plans of this Committee center about a suitable point of departure. Obviously up-to-date information on the subject is an element of that point of departure.

Three steps have received approval by the members of the Committee. The results of taking such steps should be a valuable accumulation of information. They are:

1. A plan for a model code of laws relating to the family. This should help to crystallize thinking with respect to the rules of statutory law we ought to have.
2. A collection of selected readings from the voluminous material on the general subject of the family. There is not time to read everything available. The results would appear in a series of volumes. One of these volumes dealing with selected readings in law is now in process of preparation by a committee of the Association of American Law Schools.
3. A series of special studies focusing attention on various phases of the field. Examples of symposia of this sort are: "Alimony"—the Spring 1939 issue of *LAW AND CONTEMPORARY PROBLEMS*; "A Symposium on the Law of Divorce"—the January 1943 issue of the *IOWA LAW REVIEW*; and the present volume.

The topic in the instant issue was selected because comparatively little had been written about it. No attempt has been made to summarize the notable exceptions

to this statement. Other aspects of child care have received attention. Here it is planned to inspect the field, taking as an observation post a divorce. Divorce is only one element which may disturb a child and it can hardly be isolated or studied in a vacuum. But some consideration of what is being done or should be done with children of divorced parents is certainly in order.

The law has dealt with two major problems in this complicated field of human difficulties—custody and maintenance.

Vernier in Vol. II of his *AMERICAN FAMILY LAWS* devotes a section to the effect of Divorce on Custody and Maintenance of Children. He points out how the harsh common-law rule giving paramount right to the father in the custody and control of his minor children has been ameliorated by statute. Then, at page 192, he says:

“The question of custody and support of children is frequently a perplexing problem in divorce cases. Jurisdiction in such cases is either statutory, or derived from chancery, never having been exercised by the ecclesiastical courts. In a few jurisdictions the power to act seems to be regarded as solely dependent upon statutes. Today (1932) all of the fifty jurisdictions which grant absolute divorce, with the exception of Pennsylvania, have some statutes in the matter. . . .

“Without exception, the statutes make the court’s power a discretionary one, though using quite a variety of terms to suggest how the discretion should be exercised. Often these differ as among action pending suit, action after a divorce is decreed, and revision of the decree. The commonest type of statute provides that the court may make such orders as are necessary and proper, just and proper, reasonable and proper, expedient, etc., or as the court may deem necessary and proper, etc. . . .”

In the exercise of this broad statutory discretion the judge is faced with serious questions. His goal is often expressed in terms such as the “welfare of the child” but the responsibility seldom is completely discharged by answering the specific questions of law involved. The fields of medicine, psychiatry, economics, and social work have resources which if expertly employed and interrelated may aid many children to attain a more normal life in spite of the immediate domestic catastrophe.

A brief statement of the framework of the issue may aid the reader to see the relation of the articles to each other. Three major sets of questions were posed—what is the law doing about problems of custody and maintenance; what are some of the other professions and groups interested in the general subject doing about the children; what further light on the subject is available from other fields of law.

The introductory question, of course, relates to the size of the problem. How many children of divorced parents are there? Professor Davis answers this by explaining divorce as a serious factor in families of the western civilization. He then proceeds statistically to calculate the actual numbers.

The query as to what contributions the law is making to custody and maintenance matters calls for five separate responses. Each centers its attention upon the judicial “discretion” exercised at the time decisions are made in actual cases. Judge Weinman from an Ohio background deals with the thinking of the trial

court in custody cases. Mr. Bronson follows with a discussion of the action of the appellate courts in reviewing decisions of the trial court in custody cases. Judge Turrentine from a California point of view takes the reader upon the bench with the trial court judge passing upon maintenance litigation. Mr. Whitmire submits a collection of legal authorities expressing the opinions of appellate courts on the decisions of trial courts in maintenance cases. Mr. Pokorny with experience as a Michigan Friend of the Court tells us of the perplexities of the court called upon to modify a decree for maintenance or custody previously made and now alleged to be inequitable.

Limitations of space permitted the inclusion of only two articles describing the topic through the eyes of non-legal groups. General Benedict comments upon the complications intensified by the war in families of service men. Dr. Plant shows how the psychiatrist as contrasted with the judge sees the problems which need solution.

In the final group of articles we are concerned with further problems. Dean Stansbury takes up the difficulties to be surmounted when the decree as to maintenance or custody of a child of divorced parents in one state comes up for consideration before the tribunals of another state. Dr. Lemkin presents a comprehensive comparison of what other countries are considering or doing.

Lack of space has prevented the inclusion of a number of interesting topics. The clergyman, the marriage counsellor, the family physician, the parties themselves all could make important contributions. What appears, however, is a beginning.

The reader will recall that none of the authors had an opportunity to confer with any of the others while their articles were in preparation. This has given us perhaps a less closely integrated volume. But it has also allowed each contributor a greater freedom of expression.

JOHN S. BRADWAY.