FIFTY YEARS IN FAMILY LAW

ESSAYS FOR STEPHEN CRETNEY

Edited by
Rebecca PROBERT
Chris BARTON

intersentia
Cambridge – Antwerp – Portland
FOREWORD

I have had the privilege to be the first to read this book of essays, in proof, from soup to nuts. It is a great collection. For a great man.

Stephen Cretney’s modesty, so widely acknowledged in these pages, would lead him to downplay the significance of his contribution to the beneficial development of family law during the last 50 years. In fact, however, its significance is hard to overstate. It goes much wider than the quality of his contribution as a Law Commissioner, important though that was. Prior to 1970, as Stephen has demonstrated in his towering History, family law was deeply impoverished. One important reason was the lack of academic interest in it. The two rival manuals for use by practitioners – Rayden and Latey – expounded it but were (as one would expect) largely uncritical of it. Writers like A.P. Herbert had lampooned its most egregious absurdities. But there was little intellectual analysis of it, in particular of its archaic and futile hunt for matrimonial ‘guilt’ and ‘innocence’ as the determinants of legal rights.

But things changed with the advent in the 1960s of family law as a subject of undergraduate study. The fascinating complications inherent in the application of law to family relationships led many students to exercise the option to study it. Generations of them began to read and write about it. Then they moved on. Many became lawyers; some later became judges. A few became politicians. But, whatever they were doing, these graduates helped to widen the debate. Family law became a matter of national discussion. The result was that over the years beneficial changes in it were wrought both by legislation and also, massively if imperceptibly, by judicial decision. Legal academic study had discharged one of its most important functions: it had fertilised the law. Today family remains the area of law which attracts about the highest level of public interest – up there with criminal sentencing and the reach of Article 8 of the European Convention.

Credit for the achievement of putting family law on the map as an important subject for academic study must go to quite a few people, including – very definitely – some of the writers of these essays. Here, however, Stephen’s insistence on fairness, hovering over me, guides my pen to identify the seminal contribution of the late Peter Bromley. You must read the essay on the great case of Cretney v. Bromley in 1974: it’s riveting. Yet no one would object to my identification of Stephen himself as perhaps the most influential single
contributor to this achievement. His contribution was by his inspirational book *Principles*; by his lectures; by the breadth of his other legal activities and the energy with which he pursued them; by the respect for family law which his intellectual stature engendered among lawyers in other fields; and by his profound and stimulating expositions of issues in family law, never too hard to understand, which, like a magnet, drew those who read and heard them into a real and lasting interest in them.

This collection of essays is worthy of Stephen. They fall across a wide spectrum of subjects relating to family law and are written with astonishing clarity, originality and intellectual sophistication. Above all, however, they exude the warmth of one of those glorious English summer days of which we have about six each year. This, says each page, is for Stephen. The affection for the man is palpable.

Nicholas Wilson  
Candlemas, 2 February 2012  
The Supreme Court
ACKNOWLEDGEMENTS

We are grateful to Baroness Ruth Deech for arranging the planning meeting at the House of Lords and to Warwick Law School for providing funding for participants’ travel. Similar thanks are due to Dr Susan Jenkinson of Staffordshire University Law School and to All Souls College for the launches at Stoke-on-Trent and Oxford respectively. Finally, much is owed to Ms Cheryl Morris for taking time off work and to Mrs Joan Morris for coming out of retirement to proof-read this book and to Ms Ann-Christin Maak of Intersentia for not allowing her honeymoon to interfere with the vital assistance she provided. We thank them all.

We are pleased to say that, at Stephen Cretney’s request, all profits from the sale of this book will go to the National Association for the Care and Resettlement of Offenders (NACRO), and we are deeply indebted to Intersentia for their generosity in taking no profit from the publication themselves.

Rebecca Probert
Chris Barton
March, 2012
CONTENTS

Foreword ................................................................. v
Acknowledgements.................................................. vii
List of Authors .................................................... xi

Introduction
Rebecca Probert and Chris Barton ............................... 1

Collective Responsibility: Law Reform at the Law Commission
Brenda Hale ............................................................. 7

A Paean for the Law Commission: A View from the Inside
Joanna Harwood and Penny Lewis ............................... 21

Simon Rowbotham .................................................. 39

‘Why Should They Cite Us?: Lessons from an ‘Uncommon’ Family Lawyer’s Influence on the Common Law
Stephen Gilmore ..................................................... 57

Child Focused Legislation: For the Sake of the Children?
Christine Piper ....................................................... 71

The Illegitimacy Saga
Andrew Bainham .................................................... 83

Marital Agreements: ‘The More Radical Solution’
Joanna Miles .......................................................... 97

Buggers and Broomers: Have They ‘Been Practising Long Enough’?
Chris Barton .......................................................... 107

Civil Rites
Rebecca Probert ..................................................... 121

Towards a Matrimonial Property Regime for England and Wales?
Jens M. Scherpe ..................................................... 133

ix
Contents

Holding Onto the Past? Adoption, Birth Parents and the Law in the Twenty-First Century
Sonia Harris-Short .................................................. 147

Inherently Disposed to Protect Children: the Continuing Role of Wardship
Nigel Lowe .......................................................... 161

The Law of Succession: Doing the Best We Can
Elizabeth Cooke ....................................................... 175

Divorce, Internet Hubs and Stephen Cretney
Jonathan Herring .................................................... 187

The Co-Respondent’s Role in Divorce Reform after 1923
Sue Jenkinson ........................................................ 201

Simple Quarrels? Autonomy vs. Vulnerability
Gillian Douglas ....................................................... 217

Shapeshifters or Polymaths? A Reflection on the Discipline of the Family Mediator in Stephen Cretney’s World of Private Ordering
Neil Robinson .......................................................... 231

Family Law – What Family Law?
John Eekelaar .......................................................... 247

Regulating the Bar
Ruth Deech .............................................................. 265

A Failed Revolution: Judicial Case Management of Care Proceedings
Judith Masson ........................................................ 277

Mavis Maclean ........................................................ 297

Sanford N. Katz ....................................................... 303

A Royal and Constitutional Affair: the Second Marriage of H.M. King Leopold III of the Belgians
Walter Pintens ........................................................ 317

Index ................................................................. 329
LIST OF AUTHORS

Andrew Bainham is a barrister of the Middle Temple and a tenant at 14 Gray's Inn Square, representing local authorities, parents, children and other family members in public law and private law children cases. He has been at the University of Cambridge since 1993 where he is Reader in Family Law and Policy and a former fellow of Christ's College. For over a decade he was editor of the International Survey of Family Law published on behalf of the International Society of Family Law. He is author of many publications in family law, especially the law relating to children, including Children: The Modern Law (3rd edition, 2005) to which Stephen Cretney contributed when in its first edition in 1993.

Chris Barton is Emeritus Professor of Family Law (Staffordshire University), Academic Door Tenant at Regent Chambers, an Emeritus Member of The Society of Legal Scholars and a Vice-President of the Family Mediators Association. He has taught family law since before the Divorce Reform Act 1969 and is author, co-author and part-author of a number of books. He has also published in learned and professional journals and in broadsheet newspapers. Stephen Cretney, who gave him the honour of being the England and Wales Law Commission’s first researcher (1982/83), has since been his major source of professional inspiration and advice.

Elizabeth Cooke is a Solicitor; she qualified in 1988. In 1992 she became a lecturer in law at the University of Reading, and was awarded a personal chair in 2003. She has published on many topics within family law and land law, and particularly on land registration and on family property. In 2008 she was appointed a Law Commissioner for England and Wales, for a five-year term until 2013, which has now been extended to 2016; as a Commissioner she has particular responsibility for family and property law projects.

Ruth Deech, now Baroness Deech of Cumnor DBE, started her career as an assistant to the family law team at the Law Commission; then she taught law at Oxford University, where she was for a while a colleague of Stephen Cretney’s. They are fellow honorary benchers of the Inner Temple. Baroness Deech was Principal of St Anne’s College Oxford from 1991–2004, a pro-Vice-Chancellor, and is now an Honorary Fellow of the College. She was chair of the Human Fertilisation & Embryology Authority from 1994–2002, a Governor of the BBC from 2002–2006, a trustee of the Rhodes Scholarships from 1996–2006.
List of Authors

After retiring from Oxford she became the first Independent Adjudicator for Higher Education, resolving student complaints from all the universities in England and Wales. She is Gresham Professor of Law 2008–2012 and chair of the Bar Standards Board from 2009. In 2005 she was created a Life Peer and sits as a crossbencher in the Lords.

Gillian Douglas obtained her LLB at the University of Manchester and her LLM at the University of London (LSE). She became a Lecturer in Law at the University of Bristol in 1978, and spent a year as a Visiting Teaching Fellow at the National University of Singapore in 1983/84, before moving to Cardiff University in 1989 where she has remained, becoming Professor of Law in 1998 and serving as Head of the Law School between 2005 and 2010. She had the great good fortune to work with Stephen Cretney during her time at Bristol University, sharing the teaching of Family Law with Stephen and Nigel Lowe, and becoming, with the two of them, a Case Reports Editor for the journal, Family Law, an association which Stephen initiated in 1986 and which Gillian continues. She is co-author (with Nigel Lowe) of the 9th and 10th editions of Bromley’s Family Law (1998, 2007) and (with Chris Barton) of Law and Parenthood (1995) and has written numerous other works, including An Introduction to Family Law (2001, 2004). She was awarded an LLD by Cardiff University in 2011 for her contribution to scholarship in the field of Family Law.


Brenda Hale is the first, and so far the only, woman Justice of the Supreme Court of the United Kingdom. She joined the top court in the country in 2004 when it was still a committee of the House of Lords, after a varied career as an academic, law reformer and judge. In all three capacities, her primary interest has been in Family and Social Welfare Law. In 1978, she was due to collaborate with Stephen Cretney in writing a book which he inspired (later published as *The Family, Law and Society – Cases and Materials*), when he had to withdraw because of his appointment as a Law Commissioner. When he left the Law Commission in 1984 to become a Professor at the University of Bristol, she replaced him as the Commissioner in charge of Family Law. And in 2007, as Chancellor of the University of Bristol, she was delighted to be able to honour his achievements in Family Law by conferring upon him the degree of Doctor of Laws, *honoris causa*.

Sonia Harris-Short is a graduate of Christ Church, Oxford (and was a family law student of Stephen Cretney's whilst an undergraduate) and has an LLM (by research) from the University of British Columbia, Canada. She currently holds the position of Professor in Family Law and Policy at Birmingham Law School, University of Birmingham where she is also the Director (Research) of the Centre for Professional Legal Education and Research. She is the author of a recent monograph examining aboriginal child welfare and self-government in Canada and Australia and the co-author (with J. Miles, University of Cambridge) of *Family Law: Text, Cases and Materials*, a major family law text for OUP. She has published extensively in leading journals on a range of family law issues including adoption, the interaction between family law and human rights, shared parenting and gender and the law. She also serves as a Deputy District Judge (Civil) on the Northern Circuit.

Joanna Harwood graduated from the University of Warwick in July 2010. It was at Warwick that she developed her interest in family law and when she first became aware of Stephen Cretney’s immense contribution to this area of law. In the year following her graduation, Joanna worked as a volunteer for her local women’s refuge and Citizens Advice Bureau. She also worked as a researcher for Rebecca Probert and as a seminar tutor at the University of Warwick, an experience which enabled her to study family law from the other side of the seminar desk. Joanna has delivered two papers at Soroptmist International study days held at the University of Warwick, both papers focusing on family law and domestic violence; these papers have recently been published in *Optimistic Objectives* and *Tackling Domestic Violence*. She is currently working as a research assistant at the Law Commission and hopes to return to Warwick in the future to do a PhD.

Jonathan Herring is Professor of Law and a Fellow of Law at Exeter College, University of Oxford, where Stephen Cretney was once a Fellow. Jonathan is the author of several textbooks including *Criminal Law: Text Cases and...*
List of Authors

Materials (4th ed. 2010); Criminal Law (6th ed. 2009); Family Law (5th ed. 2011) and Medical Law and Ethics (3rd ed. 2010). He has also written monographs on the law and older people (Older People in Law and Society (2009)) and family law and human rights (European Human Rights and Family Law (with Shazia Choudhry) (2010)). He has written widely on criminal law, family law, medical law and ethics, and elder law. He was lectured by Stephen Cretney as an undergraduate and has learned an enormous amount from his writing.

Sue Jenkinson, formerly a businesswoman in property development, returned to education in 1995, and obtained her LLB, LLM and PhD from Staffordshire University where she is now a senior lecturer and Director of the Staffordshire University Centre for Family Law and Policy. Her teaching and research interests focus on divorce and its legal history, very much inspired by Stephen Cretney’s work.

Sanford N. Katz holds a Doctor of Laws degree from the University of Chicago Law School and was U.S. Public Fellow at Yale Law School. He is the Darald and Juliette Libby Millennium Professor of Law at Boston College Law School where he teaches Family Law and Contracts. He served as Editor-in-Chief of the Family Law Quarterly from 1970 to 1983 and now serves as an Overseas Editorial Adviser for the International Journal of Law, Policy and the Family. He is the author of Family Law in America (2011) and co-editor (with John Eckelaar and Mavis Maclean) of Cross Currents (2000). He was a Visiting Fellow at All Souls College, Oxford in 1997 while Stephen Cretney was a Research Fellow. He also was a Visiting Fellow at Pembroke College, Oxford in 2000 and 2006. A founding member of the International Society of Family Law, he was President from 1982 to 1985 and now serves on its Executive Council.

Penny Lewis graduated from the University of Warwick in July 2010, having spent part of her final year working as a research assistant in both company law and family law. Since joining the Law Commission as a research assistant in September 2010 she has primarily been working in the area of socio-legal history and now in her second year she is assisting in the preparations for the Statute Law (Repeals) Bill for introduction into Parliament in 2012. Penny has written for the Child and Family Law Quarterly and has delivered a paper at the Waseda-Warwick Joint Seminar in Tokyo which examined human rights and criminal and family law in an international comparative context. She hopes to do a PhD in the future in the area of family law and literature and continues to take inspiration from the books and articles written by Stephen Cretney which have added colour and texture to the otherwise black letters of law.

Nigel Lowe LLB, LLD, Barrister of the Inner Temple is a Professor of Law and head of Cardiff Law School, Cardiff University, Wales. He specialises in Family


Judith Masson is Professor of Socio-Legal Studies at Bristol University, specialising in child law and socio-legal research. Whilst she was working on a commentary on the Children Act 1989, she was invited to join Stephen Cretney as co-author of *Principles of Family Law*, and has written the chapters on child law from the fifth edition onwards. Judith Masson has undertaken numerous studies on the application of child law including step parent adoption – *Yours, Mine or Ours* (1983); representation of children in care proceedings – *Out of Hearing* (1999); partnership with parents of children looked after long term – *Lost and Found* (1999); and emergency intervention in child protection – *Protecting Powers* (2007). Her most recent research examines care proceedings quantitatively – *Care Profiling Study* (2008), qualitatively *Just following instructions?* (2011) and the pre-proceedings process *Families on the edge of care proceedings* with grants from the ESRC. Judith was a specialist adviser to the Constitutional Affairs Committee Inquiry into Cafcass (2002–3) and the Justice Committee Inquiry into the Family Courts (2010–11). She has been a member of the Judicial Studies Board and Academic Member of the Family Justice Council.

Joanna Miles is a Fellow of Trinity College and Senior University Lecturer in Law at the University of Cambridge, and an Academic Door Tenant at 1 Hare Court, Temple, London. She is the co-author, with Sonia Harris-Short (see above), of *Family Law: Text, Cases, and Materials* (2nd ed. 2011). In preparing to
write each of her chapters for the first edition of that book, she made a point of first reading the relevant chapters of Stephen Cretney’s *Family Law in the Twentieth Century* in order to ensure that her account of the contemporary material was connected to the broader historical narrative. She has written extensively on financial and property issues in family law, including marital agreements, and was seconded to the Law Commission for England and Wales to work on its Cohabitation project.

**Walter Pintens** is Professor of Law at the University of Leuven, Belgium; Honorary Professor at Saarland University, Germany; Secretary General of the International Commission on Civil Status (Strasbourg); and Member of the Organising Committee of the Commission on European Family Law (CEFL). On his publication list are several books and more than three hundred articles in the fields of family law, succession law, comparative law and private international law. He is the editor of the volume *Family and Succession Law* in the *International Encyclopaedia of Laws*, member of the editorial board of the *Rechtskundig Weekblad*, corresponding editor of the *Zeitschrift für Europäisches Privatrecht*, co-editor and chairman of the International Advisory Council of the *Zeitschrift für das gesamte Familienrecht* and co-editor of the *European Family Law Series*. He had visiting positions in Berlin, Cambridge, Freiburg and Pretoria.

**Christine Piper** is a Professor at Brunel Law School. After graduating from Bristol University with a history degree she taught in schools before she undertook further study and doctoral research. Her research and teaching interests are focused on family and child law and policy, sentencing and youth justice. Her books include: *Investing in Children, Policy, Law and Practice in Context* (2008), *Sentencing and Punishment, The Quest for Justice* (2005, 2008, 2012) (with S. Easton), *How the Law Thinks About Children* (1990, 1995) (with M. King), and *The Responsible Parent* (1993). She is a member of the Editorial Board of the *Child and Family Law Quarterly*, an associate Director of the Brunel Law School’s Criminal Justice Research and Family Law Research Centres, and a member of the Parent Abuse Research Network. She met Stephen Cretney at many seminars and is grateful for his historical research which she has used for postgraduate teaching and her own research.

**Rebecca Probert** studied law at Oxford, where her interest in the history of family law was first engaged by Stephen Cretney’s lectures. She worked as a research assistant at the Law Commission and then taught family law at the University of Wales, Aberystwyth and at Sussex before moving to Warwick, where she is now professor of law. She took over responsibility for *Cretney’s Family Law* in 2003 and contributed to the eighth edition of *Cretney: Principles of Family Law* in 2008. Her other major publications include *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (2009), *The Rights and
Wrongs of Royal Marriage (2011) and The Legal Regulation of Cohabitation, 1600–2010: From Fornicators to Family (2012).

Neil Robinson is Director of The Mediation Centre. In a former life, as child care lawyer, he was Legal Aid Family Lawyer of the Year 2007. He is currently Vice-Chair of the Family Mediators Association, and a member of the Resolution and Family Justice Council ADR Committees. He chairs the Stoke on Trent LFJC ADR Committee. He has recently been Consulting Editor to the second edition of Lisa Parkinson’s Family Mediation textbook, and has been a contributor to the Resolution ADR Handbook, Family Law Protocol, and Family Law. A much longer time ago as an Oxford undergraduate, he benefitted from Stephen Cretney’s wisdom, even if not much of it rubbed off. He is a trainer for the Family Mediators Association and Resolution, an experienced family lawyer, family and civil mediator and Professional Practice Consultant, and a Mental Health Tribunal Judge. Neil has a particular enthusiasm for developing creative mediation practice that will meet the needs of entrenched, complex and mixed civil/family conflicts.

Simon Rowbotham was called to the bar on 28 July 2011 by the Honourable Society of the Middle Temple. He is undertaking his family law pupillage at Deans Court Chambers under the supervision of Bansa Singh Hayer and Francesca Fothergill. He studied Law at Hughes Hall, Cambridge, under the encouraging eye of his Director of Studies, John Hopkins, in the course of which he studied Family Law under the enthusiastic eye of Dr. Jens M. Scherpe and with the invaluable assistance of Cretney’s Principles of Family Law (8th ed.). This chapter is his first work to be published.

Jens M. Scherpe is a University Senior Lecturer in Law at the University of Cambridge, a Fellow and Tutor of Gonville and Caius College in Cambridge, an Honorary Fellow of St. John’s College in Hong Kong and an Academic Door Tenant at Queen Elizabeth Building (QEB) in London. Previously he was Research Fellow and Head of the Department for the Law of the Nordic Countries at the Max Planck Institute for Comparative and International Private Law in Hamburg, a member of the Legal Advisory Group of the Law Commission of England and Wales’ Cohabitation Project and has held visiting positions in Belgium, Germany, Australia, Spain, New Zealand and Hong Kong. Jens also is a member of the International Advisory Board of the Zeitschrift für das gesamte Familienrecht (FamRZ) and member of the Wissenschaftliche Vereinigung für Familienrecht e.V. His recent publications include comparative studies on the legal status of cohabitants, legal issues of transsexuality, financial relief upon divorce and marital agreements.