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Book Review

Modern British Family Law in One Accessible Volume by Mary Welstead & Susan Edwards, *Family Law* (Oxford University Press 2006) (available at www.bn.com for \$35.00 (\$31.50 for members plus shipping))

Reviewed by Robert E. Rains*

Professors Mary Welstead and Susan Edwards have produced a lucid and lively explanation of British family law in their concise (358-page) new book, simply titled, *Family Law*.¹ This book is must read for anyone who wants a good understanding of modern British family law. Additionally, any law student, professor, or family lawyer who simply wants a better understanding of American family law and the forces that are shaping and reshaping it would do well to read this work.

Evolving from the same Anglo-Saxon common law traditions, Great

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1. MARY WELSTEAD & SUSAN EDWARDS, *FAMILY LAW* 1-7 (Nicola Padfield ed., Oxford University Press 2006).

Britain and the United States face many similar issues in domestic relations matters in the early Twenty-First Century: large numbers of children born out of wedlock, high divorce rates, single parent households, demands of gays and lesbians for legal recognition of their unions countered by cries of moral indignation from certain quarters, underreporting and overreporting of child abuse, and the sometimes life-and-death issues of the autonomy of teens to make medical decisions.² Both the United States and Great Britain have become state parties to certain international agreements relating to domestic relations matters, notably: the Hague Convention on the Civil Aspects of International Child Abduction,³ and the Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption.⁴ Both of our countries have become increasingly multi-cultural over the past few decades, creating difficult issues of recognition of family relationships outside of prior norms.

Of course, there are also substantial differences between the two legal landscapes. For instance, Great Britain has state religion.⁵ Although the legal fact is not universally accepted by certain politicians today, the United States does not,⁶ and individual states do not, have any official religion.⁷ Moreover, Great Britain is more multicultural than many regions of the United States, and consequently must give legal recognition to family relations beyond our norm, partly as a result of the Commonwealth which evolved out of its Empire. Thus, for example: “[b]igamous or polygamous marriages may, in certain circumstances, be recognized by English law. Such marriages are also socially accepted; the Queen invited the Sultan of Brunei and both his wives, as her guests, to the wedding of her youngest child in 1999.”⁸

Like all countries except Somalia and the United States, Great Britain has joined the United Nations Convention on the Rights of the Child (UNCRC) 1989.⁹ While this Convention is largely aspirational

2. *See generally id.*

3. Hague Convention on the Civil Aspects of International Child Abduction, Dec. 23, 1981, 1342 U.N.T.S. 89.

4. Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, *reprinted in* 32 I.L.M. 1134. Technically, the United States has signed this Convention, and the Senate has authorized its ratification. *See* U.S. Department of State, *Hague Convention on Intercountry Adoption and the Intercountry Adoption Act of 2000: Background*, http://www.travel.state.gov/family/adoption/convention/convention_2290.html?css=print (last visited Apr. 10, 2007).

5. WELSTEAD & EDWARDS, *supra* note 1, at 15-16.

6. *But see* Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) (stating that “[t]his is a Christian nation”).

7. *See* Wallace v. Jaffree, 472 U.S. 38, 49 (1985).

8. WELSTEAD & EDWARDS, *supra* note 1, at 11.

9. United Nations Convention on the Rights of the Child, Nov. 20, 1989, *reprinted*

and unenforceable, Great Britain has also adopted its Human Rights Act (HRA) 1998,¹⁰ thereby effectively incorporating the European Convention on Human Rights (ECHR) 1950¹¹ into British Law:

The implementation of the Human Rights Act 1998 requires that family law complies with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR 1950). Challenges and fears of challenges under the Convention are a constant theme throughout the case law. They have also triggered reviews of law, and brought about dramatic changes in legislation such as the Gender Recognition Act 2004 and the Civil Partnership Act 2004, both of which have given significant rights and responsibilities to previously excluded familial partners.¹²

Family Law is divided into sixteen chapters. The first eight focus on adult rights and responsibilities, while the remaining eight focus on children.¹³ Topics range from “state intervention in personal relationships,”¹⁴ to “nullity and its consequences,”¹⁵ to “acquisition of rights in the family home,”¹⁶ to “domestic violence,”¹⁷ to adoption and children’s welfare.¹⁸ Each chapter ends with a list of recommended readings. Most chapters also have self-test questions for readers to test their understanding of key concepts.

The work is up-to-date, incorporating such significant new legislation as the Gender Recognition Act (GRA) 2004¹⁹ and the Civil Partnership Act (CPA) 2004.²⁰ It is particularly useful that both of these statutory initiatives are integrated throughout the text, rather than treated as merely specialized or peculiar subjects.

American readers will find *Family Law* highly accessible because it is written for both lawyers and educated lay people. The reader comes across many familiar names, people whom he may or may not admire, who nevertheless enrich the tapestry of family law. There are cameo appearances by Prince Charles and the Duchess of Cornwall,²¹ Woody

in 28 I.L.M. 1448.

10. Human Rights Act, 1998, c. 42 (Eng.).

11. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

12. WELSTEAD & EDWARDS, *supra* note 1, at 7.

13. *See id.* at 7.

14. *See id.* at 9-22.

15. *See id.* at 26-45.

16. *See id.* at 48-67.

17. *See id.* at 71-86.

18. *See id.* at 161-186; 191-216; 219-244; 247-265; 271-291; 295-318; 321-340; 343-357.

19. Gender Recognition Act, 2004, c. 7 (Eng.) (enacted July 1, 2004).

20. Civil Partnership Act, 2004, c. 33 (Eng.).

21. WELSTEAD & EDWARDS, *supra* note 1, at 15.

Allen and Soon Yi Previn (with Mia and Andre Previn lurking in the background),²² Mick Jagger and Jerry Hall,²³ and, of course, Angelina Jolie.²⁴ Welstead and Edwards draw not only upon legal sources, but also upon past and current sociological and economic texts, novels, and movies. Sources range from Engels' *The Origin of the Family, Private Property and the State*,²⁵ to the German poet Rainer Maria Rilke,²⁶ to Alice Walker's *The Colour Purple*,²⁷ to films such as *Kramer v. Kramer*²⁸ and *Bend It Like Beckham*.²⁹ Helpfully, the authors frequently provide websites for accessing primary and updated information.³⁰

Of course, there are Britishisms, most of which are readily understandable. The authors use "whilst"³¹ for while, "humour"³² for humor, and "hotchpotch"³³ for hodgepodge. Occasionally, a British usage may stymie, or intrigue, the American reader. In a case involving an award of periodic payments to an ex-wife, the reader is told that Arsenal footballer (soccer player) Ray Parlour subsequently played for England and was capped ten times.³⁴ It took further research to ascertain that when an English footballer plays for the mother country (as against such traditional enemies as Wales, Ireland and Scotland), he receives a cap, much as an American footballer might receive a Superbowl Ring.

This text is a serious and important description of current British family law, but the authors do not hesitate to critique (sometimes harshly) the state of that law. The reader encounters such criticisms as the "court suggested, rather bizarrely and almost certainly incorrectly" that "a violent petitioner can reasonably be expected to live with a violent respondent"³⁵ and, elsewhere, that a certain judge held, "rather obtusely," that a Hindu ceremony created something which was "not a marriage of any kind at all, not even a marriage which was void."³⁶

Part of the joy of reading this serious work is the authors' recognition (and sometimes retelling) of the fascinating stories of family life and the black humor that, so frequently, is to be found in them.

22. *Id.* at 29.

23. *Id.* at 31.

24. *Id.* at 198.

25. *Id.* at 162.

26. *Id.* at 159.

27. *Id.* at 333.

28. *Id.* at 248.

29. *Id.* at 226.

30. *See, e.g., id.* at 39.

31. *See, e.g., id.* at 37.

32. *See, e.g., id.* at 1.

33. *Id.* at 109.

34. *See id.* at 118-19 (discussing *Parlour v. Parlour* [2004] 2 FLR 893).

35. *Id.* at 95-96 (discussing *Ash v. Ash* [1972] Fam 135).

36. *Id.* at 31 (discussing *Gandhi v. Patel* [2002] 1 FLR 63).

There is the wife who convinced the Ontario Supreme Court that the family yacht was an alternative family home so that she was entitled to an order giving her periods of occupation subject to the vagaries of weather at sea.³⁷ Another wife claimed that for fourteen years she did not know that her husband was a transsexual who had been using a sexual prosthesis to simulate intercourse with her; after all, she said, he always backed out of the shower.³⁸ Then, there is the husband whose “genius and stellar qualities extended to the manufacture of plastic bin liners which revolutionized the collection of household waste, and to a certain creativity in his dealings with the Inland Revenue.”³⁹ There is the court faced with a contract between two male cohabitants whereby one (a wealthy businessman) agreed to give the other (an airline steward and male prostitute) all of his financial assets to become his sexual slave.⁴⁰ Not surprisingly, the court found the contract to be unenforceable.⁴¹

As in the United States, many British family law cases involve situations tinged with tragedy where there are competing interests that can never be satisfactorily resolved by the legal system. Consider the following case of in vitro fertilization gone awry where the British court endeavored to create a Solomon-like solution:

[T]he ruling that “the legal relationship of parenthood should not be based on a fiction” in cases of artificial insemination was not followed in *Leeds Teaching Hospitals NHS Trust v. Mr. and Mrs. A and others* (2003), a case where a white couple were undergoing IVF treatment and gave birth to mixed race twins, because there had been a sperm donor mix up. Dame Elizabeth Butler-Sloss, President, ruled that the black sperm donor was to be the legal father, although the twins would actually live with their white mother and her husband. This apparently bizarre outcome . . . perpetuated a fiction, albeit that the HFEA rules had been correctly applied, since parental status could not be conferred on a husband whose wife had given birth after in vitro fertilization treatment because he had neither consented to the placing in his wife of the embryo which was actually placed in error nor had the couple undergone treatment together within the meaning of the Human Embryology and Fertilisation Act 1990.⁴²

Often, *Family Law* holds a mirror up to American law and society.

37. *See id.* at 66 (discussing *Clark v. Clark* (1984) 26AWCS (2d) 275).

38. *Id.* at 134 (discussing *J v S-T* (formerly *J*) (Transsexual: Ancillary Relief) [1995]).

39. *Id.* at 132-33 (discussing *Cowan v. Cowan* [2001] 2 FLR 192).

40. *See id.* at 139 (discussing *Sutton v. Mishcon de Reya and Gawor & Co.* [2004] 1 F.L.R. 837).

41. *See id.*

42. *Id.* at 174-75 (discussing *R (A Child) (IVF: Paternity of a Child)*, Re [2005] UKHL 33).

As with most American states, the United Kingdom does not recognize the concept of common law marriage. Indeed, England abolished common law marriage over two-hundred and fifty years ago, in 1753.⁴³ Yet, as in the United States, the word has been slow to spread about the abolishment of common law marriage. Welstead and Edwards cite a report from 2001-2002 in which 57% of British people were found to believe that common law marriage still exists in Great Britain and that it bears the same rights as a formal marriage.⁴⁴ (If this is what a majority of the British population believes two-and-a-half centuries after Great Britain abandoned common law marriage, how long will it take most Pennsylvanians to realize that their General Assembly likewise has abolished common law marriage for any such relationship entered into after 2004?)⁴⁵

The book also explores many issues of British family law that have direct parallels in American family law. For instance, just as the United States has struggled with issues of matching adoptive children with adoptive parents of their same ethnic background,⁴⁶ so has the United Kingdom. Consider the Adoption and Children Act (ACA) 2002⁴⁷ and the troublesome case of a child identified in court only as “C”:

The ACA 2002 places emphasis on the importance of religious persuasion, racial origin and cultural and linguistic background in the process of matching adoptive parents to children placed for adoption. Perfect matching is not an exact science and it is clearly impossible to match the several variables.

In *Re C (Adoption: Religious Observance) (2002)*, a child of a mixed background with Jewish, Irish Roman Catholic, and Turkish-Cypriot Muslim elements was placed for adoption with a Jewish couple. The guardian for the child issued proceedings for judicial review of the local authority’s decision to place the child with the Jewish couple, arguing that the couple was unsuitable on the basis that they were too Jewish and that C should be placed in an essentially secular home. The court held that where a child’s heritage was very mixed, it would rarely be possible for this heritage be reflected in the identity of the adoptive home. Judge Wilson explained:

As society becomes increasingly complex with children often having diverse ethnicity and cultures in their background, it is

43. *Id.* at 17.

44. *Id.*

45. *See* 23 Pa.C.S. § 1103 (2004).

46. *See* 42 U.S.C. § 1996(b) (2007).

47. Adoption and Children Act, 2002, c. 38 (Eng.).

even more important that social workers should avoid labeling a child and ignoring some elements of his background. Children of mixed origin should be helped to understand and take pride in all elements in their racial heritage and feel comfortable about their origins.⁴⁸

Welstead and Edwards explore the famous *Gillick* case of 1986,⁴⁹ in which the House of Lords ruled that a competent child's right to determine her own treatment (in that case oral contraceptives) prevailed over her parents' right to determine the issue on her behalf. American lawyers and law students will surely recognize echoes of the United States Supreme Court's 1977 decision in *Carey v. Population Services*,⁵⁰ striking down New York's ban on distribution of contraceptives to minors. There is also a fascinating discussion of post-*Gillick* cases in which British courts have struggled to determine whether a child is "Gillick-competent" to make certain critical decisions, such as refusing consent to life preserving medical treatments.⁵¹ Again, this parallels the line of American cases on a minor's right to an abortion in a judicial bypass proceeding if the court deems her to be competent to give informed consent.⁵²

Sometimes the prose literally sparkles. Consider the following passage concerning the Law Reform (Miscellaneous Provisions) Act 1970:⁵³

The symbol of any committed relationship is often a ring. Although an engagement ring is normally a gift given in contemplation of marriage, § 3(2) of the Act provides that it may only be recovered by the donor if it was made on the express or implied condition that it must be returned if the engagement is ended by either party.⁵⁴

This concept is illustrated by the case of *Cox v Jones* (2004):⁵⁵

Mr. Jones and Miss Cox, who were both barristers, became engaged in 1998. Mr. Jones claimed that he told Miss Cox that, if their engagement came to an end, she must return the ring, which was valued at around £10,000. After the engagement ended, Miss Cox

48. *Id.* at 202 (discussing *C* (Adoption: Religious Observance), Re [2002] 1 FLR 1119).

49. *Gillick v. West Norfolk and Wisbech Health Authority* [1986] A.C. 112.

50. *Carey v. Population Services*, 431 U.S. 678 (1977).

51. WELSTEAD & EDWARDS, *supra* note 1, at 183-84, 188, 227, 229-34, 236-37, 239-40, 242-43, 244-45, 251-53, 268, 314-15.

52. *See, e.g., Hodgson v. Minnesota*, 497 U.S. 417 (1990); *In re L.D.F.*, 820 A.2d 714 (Pa. Super. 2003).

53. Law Reform (Miscellaneous Provisions) Act 1970, c. 33 (Eng.).

54. WELSTEAD & EDWARDS, *supra* note 1, at 141.

55. *Cox v. Jones* [2004] 2 FLR 1010.

requested a jeweler to set the stone from the ring into a pendant which was valued at £18,000. The court had little difficulty in rejecting Mr. Jones' version of events. It found it implausible that any fiancé could express such an unromantic remark.⁵⁶

This ambivalence of British family law regarding return of the engagement ring is reflective of the dispute within and among American jurisdictions on the subject. In 1999, the Pennsylvania Supreme Court split 4-3 on the subject, with the majority ruling that an engagement ring is a conditional gift, conditioned on the marriage actually taking place, so that the ring must be returned—no questions asked—if the wedding is called off by either party for any, or no, reason.⁵⁷ The majority called this no-fault approach “the modern trend.”⁵⁸ Three years later, however, the Supreme Court of Montana rejected this approach *in toto*, reasoning as follows:

Albinger (the ring giver) urges the Court to adopt a conditional gift theory patterned on the law relevant to a gift in view of death. Under Montana law, no gift is revocable after acceptance except a gift in view of death. While some may find marriage to be the end of life as one knows it, we are reluctant to analogize gifts in contemplation of marriage with a gift in contemplation of death. This Court declines the invitation to create a new category by judicial fiat.⁵⁹

As in the United States, in Great Britain one of the great issues of family law is the appropriate role of fault in the divorce process. Great Britain was a catalyst for the no-fault divorce revolution with the 1966 report for the Archbishop of Canterbury entitled *Putting Asunder*, which recommended marriage breakdown as the sole ground for divorce.⁶⁰ Nevertheless, four decades later, divorce, according to Welstead and Edwards, is one of the more stress-inducing experiences of life and may be exacerbated by the primarily fault-based nature of the divorce process.⁶¹ The authors walk the reader through both the special procedure for divorce in which the parties are able to resolve their differences amicably, and contested petitions in which the parties are unable to agree. Despite the fact that irretrievable breakdown is the only grounds for divorce, a host of interesting rules apply even where the

56. WELSTEAD & EDWARDS, *supra* note 1, at 141 (discussing *Cox v. Jones* [2004] 2 FLR 1010).

57. *Lindh v. Surman*, 742 A.2d 643 (Pa. 1999).

58. *Id.* at 646.

59. *Albinger v. Harris*, 48 P.3d 711, 719 (Mont. 2002).

60. *See, e.g.*, LYNNE CAROL HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 237 (1980).

61. WELSTEAD & EDWARDS, *supra* note 1, at 90.

parties are in agreement as to the divorce.⁶² They must have been married at least one year.⁶³ The petitioner must establish one of five facts laid down in the Matrimonial Causes Act (MCA) 1973.⁶⁴ Three of these facts are clearly fault-laden: adultery, unreasonable behavior and desertion.⁶⁵ Two are no-fault: two years living apart with both parties consenting to the divorce and five years living apart without the respondent's consent to divorce.⁶⁶ Even this last stopgap basis for divorce may be blocked where the respondent demonstrates that divorce will result in grave financial or other hardship to her, and that in all the circumstances it would be wrong to dissolve the marriage.⁶⁷ As Welstead and Edwards point out, however, no respondent pleading non-financial grave hardship has ever succeeded.⁶⁸

Depending on one's point of view, some aspects of British family law are more advanced, or more radical, than American law. The Gender Recognition Act 2004⁶⁹ allows transsexuals to obtain gender recognition certificates from the government, officially recognizing (for almost all purposes) their acquired gender. There is no comparable legislation in any American state, and most state appellate courts which have addressed the subject have refused to recognize a marriage between a post-operative transsexual and a person of his or her original gender.⁷⁰ The Civil Partnership Act (CPA) 2004 allows same-sex couples to be married in all but name. (Sir Elton John and his long-time partner were among the first to take advantage of the CPA.).⁷¹ The CPA is akin to the law for civil unions in Vermont,⁷² but does not go as far as Massachusetts' recognition of same-sex marriage *per se*.⁷³ However, the CPA provides far more protection for same-sex couples than that granted by the United States government with its Defense of Marriage" Act,⁷⁴ or

62. *See id.* at 93.

63. *Id.*

64. Matrimonial Causes Act, 1973, c. 18 (Eng.).

65. *Id.* at §§ 1(2)(a)-(c).

66. *Id.* at §§ 1(2)(d)-(e).

67. *Id.* at § 5(1).

68. WELSTEAD & EDWARDS, *supra* note 1, at 101.

69. Gender Recognition Act, *supra* note 19.

70. *See* Robert E. Rains, *Legal Recognition of Gender Change for Transsexual Persons in the United Kingdom: The Human Rights Act 1998 and "Compatibility" with European Human Rights Law*, 33 GA. J. INT'L & COMP. L. 333, 405-07 (2005).

71. *See Stars Pack Elton 'Wedding Party'*, BBC News, Dec. 22, 2005, available at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/entertainment/4546670.stm> (last visited Apr. 10, 2007).

72. *See* 15 V.S.A. §§ 1201 et seq. (2007)

73. *See generally* Opinions of the Justices to the Senate, 802 N.E. 2d 565 (Mass. 2004).

74. An Act to Define and Protect the Institution of Marriage (Defense of Marriage Act), Pub. L. No. 104-199 (codified at 1 U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006)).

by most American states with their state "Defense of Marriage" Acts.⁷⁵

As Welstead and Edwards note, "[a]lthough the Government has refuted strongly the idea that civil partnership is equivalent to same-sex marriage, it has been unable to give any satisfactory explanation as to how it differs from marriage; the explanations given lack any credibility."⁷⁶ Indeed, the Gender Recognition Act 2004⁷⁷ does not require a transsexual person to have undergone gender reassignment surgery, if such surgery would be medically inappropriate, in order to obtain a gender recognition certificate.⁷⁸ Thus, a pre-operative male-to-female transsexual, possessing a valid gender recognition certificate, may lawfully marry a male. This makes the U.K. Government's continued insistence that it does not favor or allow same-sex marriage especially difficult to comprehend.

In other areas, British family law appears to lag decades behind American trends. The Matrimonial Causes Act 1973 still makes void any agreement to restrict the right of the court to determine financial relief on divorce.⁷⁹ American jurisdictions have long since generally abandoned the notion that contracting adults cannot enter prenuptial agreements setting forth their rights and duties upon divorce.⁸⁰ Yet, despite the Matrimonial Causes Act, *Family Law* demonstrates that British courts are slowly inching their way in recent years toward recognition of such agreements.⁸¹

Family Law can be read and enjoyed on a number of levels. It can help American readers examine or reexamine American family law and the explicit or implicit assumptions underlying it. It can help readers question ideas which they might believe to be self-evident. It can introduce American readers to a system of family law and of government which is like ours, yet maintains many differences from the American system. While it is not a manual for British family law practitioners, it provides great detail in parsing key British family law statutes and cases, so that an experienced American family lawyer can readily understand how the British family law systems operate. This is a wonderful, lively book, which may well have an impact not only on British family law, but on the future development of family law in the United States as well.

75. See, e.g., Pennsylvania Act 124 of 1996, 23 Pa.C.S. §§ 1102, 1704 (2006).

76. WELSTEAD & EDWARDS, *supra* note 1, at 20. One supposes this is in the very nature of political compromises on hot-button issues. See 10 U.S.C. § 654 (discussing the military's "Don't Ask Don't Tell" policy on homosexuality).

77. Gender Recognition Act, *supra* note 19.

78. WELSTEAD & EDWARDS, *supra* note 1, at 21.

79. Matrimonial Causes Act, *supra* note 64.

80. See *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970).

81. WELSTEAD & EDWARDS, *supra* note 1, at 136-37.