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978-1-107-00680-5 - The Future of Child and Family Law: International Predictions

Edited by Elaine E. Sutherland

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## THE FUTURE OF CHILD AND FAMILY LAW

Child and family law tells us much about how a society operates, since it touches the lives of everyone living in that society. In this volume, national experts examine child and family law in thirteen countries – Australia, Canada, China, India, Israel, Malaysia, the Netherlands, New Zealand, Norway, Russia, Scotland, South Africa and the United States. Each chapter identifies the imperatives and influences that have prevailed to date, and offers informed predictions of how the law will develop in the years to come. A common chapter structure facilitates comparison of the jurisdictions, and in the Introduction the editor highlights common trends and salient differences. *The Future of Child and Family Law* therefore provides practitioners, academics and policymakers with access not just to an overview of child and family law in a range of countries around the world, but also to insights into what has shaped it and options for reform.

ELAINE E. SUTHERLAND is Professor of Child and Family Law at the School of Law, University of Stirling, Scotland, and Professor at Lewis and Clark Law School, Portland, Oregon, USA.

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# THE FUTURE OF CHILD AND FAMILY LAW

International Predictions

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Dedicated to Professor Eric M. Clive

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human reproduction for governmental bodies, courts and law firms. She is the author of *Marriage and Divorce in Western Family Law* (1998) (in Russian) and of numerous articles on family law published in Russia and abroad. She is a regular speaker at international conferences, symposia and workshops. Her latest book, *The Art of Legal Writing* (2011) (in Russian), was written in collaboration with White & Case LLC. Olga has been a British Academy Visiting scholar and was awarded a Fulbright Program scholarship (USA). She is a member of the Executive Council of the International Society of Family Law. She participated in the drafting of the Russian Family Code 1995 and is currently an expert at the Committee on Child and Family Matters of the Russian Parliament.

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RANJIT MALHOTRA was the first Indian lawyer to be awarded the prestigious Felix Scholarship to read for the LLM degree at the SOAS, University of London, obtaining his degree, with merit, in 1993. He is a member of the IBA, IAYFJM, ILPA in London, AILA in Washington, Reunite Child Abduction Agency in London, the Indian Council of Arbitration, the IPBA in Tokyo, CLA, ILA in London and Lawasia in Australia. He is also the Deputy Chair of the Family Law Committee of Lawasia. He regularly presents papers at conferences in India, America, England, Canada and Australia. In 2007 he was elected to the International Academy of Matrimonial Lawyers. He specialises in private international law, appears as an expert witness on Indian family law issues in courts in England, renders expert analysis and testimony for family law and immigration cases, advises foreign lawyers, conducts trust and probate litigation and

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Support: Thinking Through *Miglin*' (2003), and 'The Canadian Law of Spousal Support' (2004). She is also the executive editor (with Macklem) of *Canadian Constitutional Law*, 4th edn (2010).

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ELAINE E. SUTHERLAND is Professor of Child and Family Law at the Law School, University of Stirling, Scotland, and Professor of Law at Lewis and Clark Law School, Portland, Oregon, USA, spending six months of the year researching, writing and teaching at each. She has lectured on child and family law around the world and has served on the Family Law Committee of the Law Society of Scotland for many years. The author of some eighty articles and book chapters, she contributes the chapter on Scotland for the *International Survey of Family Law* and her books include *Child and Family Law*, 2nd edn (2008), *Family Law*, 2nd edn (2008), (with Cleland) *Children's Rights in Scotland*, 3rd edn (2009), (with Grant) *Scots Law Tales* (2010), and (with Goodall, Little and Davidson) *Law Making and the Scottish Parliament: The Early Years* (2011).

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## P R E F A C E

The stimulus for this volume was the realisation that a tribute to the contribution of Professor Eric M. Clive to child and family law – in Scotland and internationally – was long overdue.

Like many with outstanding talent and accomplishments, Eric is modest, preferring to get on with the project at hand with energy and dedication, but without the fanfare that often accompanies the work of those with larger egos. If anything, Eric's very modesty made it all the more important to recognise his contribution. However, it also presented a dilemma: would he be comfortable with a tribute? In the attempt to resolve the dilemma, I approached Eric's wife, Kay, seeking her advice. Her insight proved invaluable since she suggested that he would want any tribute to be 'useful'. Building on that test – usefulness – the idea began to take shape for a book that would assist scholars, policymakers and practitioners around the world in understanding the imperatives and challenges that have driven child and family law to its present position and to offer insights into what was likely to drive it forward in the future.

Happily, such a volume reflects many aspects of Eric's own work: his scholarship; his commitment to law as an instrument for improving the lives of those it serves; his involvement in law reform; and the national and international nature of his contribution.

### **Eric M. Clive: a brief biography**

Born in Stranraer, Scotland, Eric graduated MA, LLB (with distinction) from Edinburgh University and joined the legal profession in Scotland as a solicitor. However, the call of academia was strong and, after an LLM at the University of Michigan Law School, he took up his first appointment in the Faculty of Law at the University of Edinburgh in 1962, becoming Professor of Scots Law in 1977. During this time at Edinburgh, he gained a reputation as a fine scholar, motivating teacher and delightful colleague. He also deepened and broadened his study of law, travelling to the United

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States with Kay and their children to earn an SJD from the University of Virginia Law School. It was at Edinburgh that he wrote the first edition of his seminal work, *The Law of Husband and Wife in Scotland*.<sup>1</sup>

As many of his early publications reflect,<sup>2</sup> Eric has a passion for improving the law, something signalled in ‘Scottish Family Law’, which appeared in a volume of essays, *Independence and Devolution: The Legal Implications for Scotland*,<sup>3</sup> in 1976, when a devolved Scotland was only an aspiration. In his essay he envisaged ‘a family law code that would be the envy of the Western world’, being secular, egalitarian and consumer-oriented.

In 1981 Eric was appointed to the Scottish Law Commission, where he worked for nineteen years, becoming its longest serving commissioner. It would be no exaggeration to say that, during this time, he transformed the face of Scots child and family law, crafting his ideas for law reform into draft legislation, much of which made its way onto the statute book. His work ranged widely and included reform of the law on illegitimacy, capacity of children and young people, parental responsibilities and parental rights, marriage, cohabitation, aliment (maintenance), matrimonial property and divorce.<sup>4</sup> Particularly noteworthy, not least because it is viewed with such admiration in Scotland and abroad, is the approach he devised to financial provision on divorce (now applied to civil partnership dissolution as well). While his dream of codification has yet to be realised fully, the blueprint for a child and family law code that he drafted will doubtless be used as the foundation of the code that will, in all likelihood, emerge in the fullness of time.

It was while he was at the Commission that Eric was able to pursue another passion – improving the content and operation of the law in the

<sup>1</sup> 1st edn with John G. Wilson, 1974; 2nd edn 1982; 3rd edn 1992; 4th edn 1997, Edinburgh: W. Green.

<sup>2</sup> Two examples are offered by way of illustration. In ‘Legal Aspects of Illegitimacy in Scotland’ 1979 SLT (Notes) 233, Eric demonstrated the injustice and absurdity of classifying children as legitimate or illegitimate, something that was to prove instrumental in the eventual abolition of the status of illegitimacy in Scotland. ‘Marriage: An Unnecessary Legal Concept?’ in John M. Eekelaar and Sanford N. Katz (eds.), *Marriage and Cohabitation in Contemporary Societies* (London: Butterworths, 1980), pp. 71–81, questioned the legal system’s need for a concept of marriage, a radical idea in 1980, making this work an essential reference point for subsequent scholarly discussion around the world.

<sup>3</sup> John P. Grant (ed.), Edinburgh: W. Green, 1976, pp. 162–74.

<sup>4</sup> This work resulted in Discussion Papers and Reports published by the Scottish Law Commission and they can be found at: [www.scotlawcom.gov.uk/about-us/](http://www.scotlawcom.gov.uk/about-us/). Many of Eric’s recommendations led, of course, to legislation.



international arena. Again, this aspect of Eric's interests was signalled early in his career when he became a founder member of the International Society on Family Law, contributing the chapters on Scotland for the early volumes of the *International Survey of Family Law* and presenting thought-provoking papers at the Society's international conferences. While at the Scottish Law Commission, Eric also headed the United Kingdom delegation to the Hague Conference on Private International Law, working on what became the Hague Convention on Children<sup>5</sup> and the Hague Convention on the Protection of Adults.<sup>6</sup>

Thus far, Eric's contribution to child and family law has been highlighted, as befits this volume. However, his interests were never confined to these fields and his work has always ranged very much more broadly. In 1965 he had the foresight to realise that journalists might benefit from an accessible explanation of the law and how it affected them and, along with a journalist, he published the first edition of *Scots Law for Journalists*,<sup>7</sup> now in its eighth edition.<sup>8</sup> Nor was his work at the Scottish Law Commission confined to child and family law and he drafted law reform proposals on such diverse matters as contract, succession (inheritance), evidence, sale of goods, unjustified enrichment and leases. He also found time to work on *A Draft Criminal Code for Scotland with Commentary*.<sup>9</sup>

After retiring from the Commission, 'retirement' was simply not an option for Eric and he became a member of the Commission on European Contract Law and chair of the Editing Group for Part III of its 'Principles of European Contract Law'.<sup>10</sup> This led to membership of the Study Group on a European Civil Code where Eric ended up playing a leading role in the drafting and editing process.<sup>11</sup> More recently Eric has been a member of

<sup>5</sup> Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, HCCH No. 34.

<sup>6</sup> Convention of 13 January 2000 on the International Protection of Adults, HCCH No. 35.

<sup>7</sup> With George Watt, Edinburgh, W. Green, 1965. Eric was involved in four further editions of the book.

<sup>8</sup> Rosalind McInnes, *Scots Law for Journalists*, 8th edn (Edinburgh: W. Green, 2010).

<sup>9</sup> With Christopher Gane, Pamela Ferguson and Alexander McCall Smith, published as a consultation paper by the Scottish Law Commission, September 2003, at: [www.scotlaw.com.gov.uk/publications/consultation-papers-and-other-documents/](http://www.scotlaw.com.gov.uk/publications/consultation-papers-and-other-documents/).

<sup>10</sup> See Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann, *Principles of European Contract Law Part 3* (Alphen aan den Rijn: Kluwer International, 2003).

<sup>11</sup> See Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitions and Model Rules of European Contract Law (Draft Common Frame of Reference)* Interim Outline edition (Munich: Sellier, 2008); Christian von Bar, Eric Clive and Hans

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PREFACE

the European Commission's Expert Group on Contract Law whose work has formed the basis for the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law published by the European Commission on 11 October 2011.<sup>12</sup>

Eric is a fellow of the Royal Society of Edinburgh and, in recognition of his services to law reform, he was made a CBE (Commander of the British Empire) in 1999. He was awarded an honorary doctorate by the University of Osnabrück in 2008. Eric is currently a visiting professor at the School of Law, University of Edinburgh, and continues to research and write. Always a person to move with the times, he is a major contributor to the European Private Law News blog.<sup>13</sup>

### The goals and methodology of the volume

The goal of this book, then, was not simply to provide a discussion of the content of child and family law in the various countries and jurisdictions. Rather, contributors were invited to identify the imperatives and challenges that have driven the law to its current position and to offer insights into what is likely to drive it forward in the future. Thus it was that I approached a number of the leading child and family law scholars from around the world, many of them long-standing friends of Eric – in Australia, Canada, China, England and Wales, India, Israel, Malaysia, the Netherlands, New Zealand, Norway, Russia, South Africa and the United States. All welcomed the opportunity to contribute to a volume honouring Eric.

In order to aid comparison between jurisdictions (again, part of being 'useful'), it was important that each chapter should adopt a broadly similar approach. Yet it is a fundamental feature of child and family law that it reflects the society in which it operates and, indeed, one goal of the book was to highlight different imperatives and different solutions to similar challenges, as well as common ground. Accordingly, each contributor was provided with a template, outlining chapter structure and content,

Schulte-Nölke, *Principles, Definitions and Model Rules of European Contract Law (Draft Common Frame of Reference)* Outline edition (Munich: Sellier, 2009); and Christian von Bar and Eric Clive, *Principles, Definitions and Model Rules of European Contract Law (Draft Common Frame of Reference)*, 6 volumes (Munich and Oxford: Sellier and Oxford University Press, 2009).

<sup>12</sup> COM (2011) 635 final.

<sup>13</sup> The blog is located on the School of Law, University of Edinburgh website, at: [www.law.ed.ac.uk/epln/](http://www.law.ed.ac.uk/epln/).

and a worked example of its application in the form of the draft chapter on Scotland, being Eric's (and my own) native jurisdiction. The request to contributors was to aid comparisons by following the template, subject to a degree of latitude that would enable each to exercise discretion in reflecting developments and priorities in the particular jurisdiction. Since academics tend to be fiercely independent, if not downright rebellious, this approach involved something of an act of faith. Any (slight) fears proved to be unfounded since the contributors accepted the reasons behind the *modus operandum* and embraced the task enthusiastically. Sadly, personal circumstances prevented completion of the chapter from England and Wales.

### Thanks

My heartfelt thanks go to all the contributors for giving of their time and very considerable talents in writing chapters that I hope will be landmarks in their own countries and serve the international community well. That they did so with such grace and efficiency is a tribute to their professionalism.

I am enormously grateful to all the staff at Cambridge University Press and, in particular, to Finola O'Sullivan for having faith in the project and for her support and guidance throughout the process of bringing it to fruition.

For my part, it has been a privilege and an honour to have the opportunity to pay tribute to one aspect of Eric's career to date and to do so in cooperation with such a wealth of talent from around the world. In the process I have learned an enormous amount, not simply about the substantive law in the respective jurisdictions, but, perhaps more significantly and in line with the goals of the volume, have gained valuable insights into how it came to take its present form and the imperatives that are likely to shape it in the years ahead.

Doubtless there will be other tributes to Eric's work in the future. For now, I hope that he will regard this volume as recognition of his work in a field to which he has made such an enormous contribution and that he will judge it as passing the crucial test: that it is 'useful'.