

The background of the cover is a photograph showing the silhouettes of a child and two adults holding hands, set against a bright sunset or sunrise sky. The child is in the center, with their arms raised and holding the hands of the adults on either side. The sun is a bright, glowing orb positioned behind the child's right arm, creating a lens flare effect. The sky transitions from a deep blue at the top to a warm orange and yellow near the horizon where the sun is. The overall mood is peaceful and familial.

Family Law and the Indissolubility of Parenthood

Patrick Parkinson

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The University of Sydney



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Preface

Families in modern, developed societies take many different forms. There are heterosexual couples with and without children, married couples, those who live together outside marriage, couples who live “together apart,” single parents, separated parents who share care, same-sex couples with and without children, blended families, stepfamilies, and grandparents who are primary carers of young children. Even such a long list is not at all exhaustive.

In recent years, perhaps disproportionate attention has been focused in the academic literature on less traditional and emerging family forms. Issues such as same-sex marriage engage the attention of many, as do other matters that give people a sense that they are exploring the frontiers of progress in terms of recognition and regulation. There is a natural human inclination to gravitate to the excitement of the new and to place most importance on those issues that fit with one’s values and beliefs. However, many of these family law issues, interesting and important as they are, only affect a very small proportion of the population in modern societies.

The vast majority of those who are personally affected by family law, who seek the advice of lawyers on these matters, and who have cases before the courts, are heterosexual men and women who have had children. It is with the vast majority of people who are affected by family law rules and processes that this book is concerned.

There was a time when an analysis of issues and conflicts arising from the breakdown of heterosexual relationships would be primarily an analysis of marriage breakdown. The historical reflections in the first part of the book are, for that reason, focused on the assumptions and expectations that surrounded divorce some forty years ago. Marriage no longer has the central place it once did, at least in western countries – that is, those countries in Europe, North America, and beyond with a shared heritage derived from

Greek, Roman, and Judeo-Christian thought. These days, many parents who have family law disputes after separation have lived together without marrying or have never lived together at all. The thesis of this book is that whatever the status of the relationship between the partners prior to their separation, they are tied together by the bonds of parenthood and these bonds are more enduring than the ties that marriage once involved.

For these reasons, although the focus of this book is on issues arising for the biological parents of children born from heterosexual relationships, it is not only about marriage and divorce. In many countries, the majority of those who have children together in heterosexual relationships do at some stage marry. Yet even those who have never lived together may find themselves tied to one another by the bonds of parenthood. There may well be aspects of this analysis that apply to separated same-sex couples who have had the care of children as well, and to family law disputes between biological parents and stepparents. The extent to which such disputes are similar to, or different from, those between heterosexual, biological parents might be the subject of other research.

The idea for this book was first conceived ten years ago, as I contemplated the raging gender war in Australia surrounding parenting after separation, and the way in which complex issues about parents and children seemed to be reduced to forms of analysis that allowed people to raise flags, dig trenches, and find common cause against somewhat imaginary enemies. Analyzing issues in terms of the interests and perspectives of just one gender did not seem to hold out much promise for resolving the conflicts between the genders. Further reflection on the issues, coupled with analysis of developments in other countries, suggested to me another explanation for the seemingly intractable problems of gender conflict within family law: that the issue was not necessarily about gender, but about two irreconcilable conceptualizations of the meaning of separation and divorce.

That is the theme of this book. A first version of the thesis, as it was applied to parenting after separation, was published by the *Family Law Quarterly* in 2006, and further aspects were included in a chapter in Robin Wilson's edited book, *Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution*, published by Cambridge University Press in the same year. The thesis was further developed in the ensuing years and was the subject of the second International Family Law Lecture, given in London in 2009.

People will no doubt react in many different ways to this thesis. There will be some who will welcome the analysis contained in the book because it fits with what they perceive the law ought to be. There will be others

who will wish that the trends I identify are not so, just as we may wish a diagnosis of a serious illness is not so.

Discerning international trends is different from endorsing them as positive developments. Yet whether one welcomes them or not, the argument of this book is that we need to come to terms with the profound implications of the shifts in law and society that have occurred over the last forty years and that have so fundamentally changed the meaning of separation and divorce. There are no doubt some who would like to turn back the clock to another age when divorce meant the end of the family unit, with only vestigial ties remaining between parents, and when the family formed by unmarried parenthood was a mother-child dyad; but the argument of this book is that the old order has irretrievably disappeared.

Although the pace of change has been much faster in some jurisdictions than in others, I would argue that legal systems across the western world will sooner or later follow the same patterns. In the book, I seek to show how issues such as family violence and relocation can be addressed in a context of accepting those trends. Too many, however, are still stuck in a polarized rhetoric based on a refusal to accept that the world has changed. Canutian zeal might be admirable in some respects, but trying to hold back the waves is futile. It is better to learn to surf them.

In the years since the idea for this book was conceived, I have had the privilege of being able to help shape the family law system in Australia in very practical ways. Although this has delayed the writing and publication of the book, it has also meant that its ideas do not remain purely theoretical. The concept of Family Relationship Centers, which formed the centerpiece of the Australian government's reforms to the family law system in 2006, emerged from this thinking; so too did some aspects of the reforms to the Child Support Scheme, which came into effect in 2008, implementing recommendations from a committee I chaired. Other ideas that made their way into legislation, and which had their origins in submissions to parliamentary inquiries or advice to the Australian government from the Family Law Council, also stem from the same reflections on both the causes and possible solutions to the complex problems of our day.

Along the way, I accumulated a great debt of gratitude to many. Numerous research assistants have worked on this project at various stages, finding materials not only in English but in a variety of other languages, which they were able to translate for me. My thanks in particular to Heidrun Blackwood, Sophie Crosbie, Alex Daniel, Edwina Dunn, Antoine Kazzi, Severine Kupfer, Tharini Mudaliar, Annett Schmiedel,

and Kari Theobald for their excellent research assistance and translation work. Antoine Kazzi did a large amount of work in the final stages of the project and also prepared the index.

Particular mention should be made of Kari Theobald. Kari was a Canadian student who came on exchange to Sydney for a semester and worked with me on this project during that time, translating materials from French. Tragically, she passed away in 2006 at the age of 29, from ovarian cancer. Kari was an exceptionally bright, vivacious, and optimistic young woman who took a great interest in issues concerning family life. She graduated with a master's degree from Yale and a law degree from the University of Toronto. Her life was full of promise and was tragically cut short before she could experience the joys and travails of parenthood. This book is dedicated to her memory.

I am grateful also to many friends and colleagues in the International Society of Family Law who have assisted me along the way. Judge Svend Danielsen helped me understand the system of County Governors' Offices in Denmark and arranged meetings with government officials in Copenhagen. Associate Professor Eva Ryrstedt of the University of Lund provided great assistance on issues concerning the law in Scandinavia generally. Professor Bea Verschraegen of the University of Vienna was kind enough to read the whole manuscript in draft and made many helpful comments. I am most grateful also to many colleagues in North America with whom I have discussed issues over the years. Any inaccuracies in the recording or analysis of these legal and social developments remain my responsibility alone.

My thanks also go to my colleague at the University of Sydney, Dr Judy Cashmore, with whom I have done much of my empirical research in family law, as well as much other work in the field of child protection. Her support and encouragement over many years have been invaluable. Judi Single and other members of the research team at the University of Sydney have also played an important part in shaping the ideas in this book as issues have emerged from interviews with parents, children, and professionals who experience the practice of family law in their different ways.

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Sydney, Australia
October 2010

In memory of Kari Theobald

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PART ONE

Family Law and the Meaning of Divorce

Family Law and the Issue of Gender Conflict

FATHERS, MOTHERS, AND THE GENDER WAR

Family law is largely about distributing loss. Of course, it is rarely described as such. When judges make decisions about where children will live and how much contact the other parent will have, their decisions are cloaked in the optimistic language of the "best interests" of children. Similarly, when making decisions about property, courts may use the language of equitable distribution of assets, as if what is being divided are the gains of the marriage. In one sense it may be so. Yet in divorce, as is often said, there are no winners. When it is not possible for the children to live in the same household with both parents, neither parent will usually have as much time with the children as he or she had during the intact marriage. When one household is divided into two, neither party to the marriage can keep as much of the property as they enjoyed during the marriage. The courts must endeavor to split the loss equitably between them.

Because marriage breakdown involves so much loss, it is also a period of grieving. Anger is a natural stage in grieving, and whereas in the death of a loved one, the grieving person may be able to rail only against the heavens, in the death of a marriage, there are far more tangible targets. There is the ex-spouse, his or her solicitor, men's groups, the feminist movement, the courts, or perhaps the family law legislation itself.

It is not surprising, then, that family law is continually being "reformed." Family law is in a state of flux in many countries. Pressure builds up in the system as one group feels more keenly a sense of grievance than another; dissatisfaction finds its expression in the political sphere, and a Committee is established or another report is commissioned.

Family law is thereby politicized in a way that is not true of most other areas of private law. Indeed, there can be few areas of law or public policy

where there is as much conflict and turbulence as in family law. This conflict arises in most aspects of family law, including issues about the nature of marriage, what legal consequences should flow from cohabitation, legal responses to domestic violence, the rules concerning property division and spousal support, and of course, the issue of what level of child support should be paid by nonresident parents.

The greatest conflict – at least in English-speaking countries – concerns parenting arrangements after separation. These debates are often presented in terms of a gender war.¹ Lobby groups abound – some representing single mothers, others representing nonresident fathers – campaigning for changes to the law on issues that matter most to each gender.

As with other social issues, the war is waged on many levels, not least the semantic level. Some groups promote shared parenting, but these largely reflect the agendas of the men's groups.² Around the English-speaking world, groups representing men are often characterized by those opposing them as “father's rights groups”;³ but this reflects the semantic

¹ MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLES AND WHAT WE CAN DO ABOUT IT* (1999); Nicholas Bala, *A Report from Canada's 'Gender War Zone': Reforming the Child Related Provisions of the Divorce Act*, 16 CAN. J. FAM. L. 163 (1999); Richard Collier, *From Women's Emancipation to Sex War? Men, Heterosexuality and the Politics of Divorce*, in UNDERCURRENTS OF DIVORCE 123 (Shelley Day Sclater & Christine Piper eds., 1999); Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L. Q. 815 (1999); Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L. Q. 27 (2002); Helen Rhoades, *Children's Needs and 'Gender Wars': The Paradox of Parenting Law Reform*, 24 AUSTRALIAN J. FAM. L. 160 (2010).

² In the United States, groups include the American Coalition for Fathers and Children, (<http://www.acfc.org>), Fathers for Equal Rights (<http://www.fathers4kids.com>), the Alliance for Non-Custodial Parents Rights (<http://ancpr.com>), and a range of other, more local organizations. For a list, see <http://themenscenter.com/National/nationalo6.htm>. In Great Britain, the lead organization is known as the Equal Parenting Council <http://www.equalparenting.org>. In Canada, there is also an Equal Parenting Council (<http://www.canadianepc.com>). See also the Canadian Equal Parenting Groups Directory (<http://www.canadianequalparentinggroups.ca>). In Australia, there is the Shared Parenting Council (<http://www.spc.org.au>).

³ In the United States, see Leora Rosen, Molly Dragiewicz, & Jennifer Gibbs, *Fathers' Rights Groups: Demographic Correlates and Impact on Custody Policy* 15 VIOLENCE AGAINST WOMEN 513 (2009). In Australia, see Miranda Kaye & Julia Tolmie, *Fathers' Rights Groups in Australia and Their Engagement with Issues in Family Law*, 12 AUSTRALIAN J. FAM. L. 19 (1998); Miranda Kaye & Julia Tolmie, *Discouraging Dads: The Rhetorical Devices of Fathers' Rights Groups*, 22 MELB. U. L. REV. 162 (1998); Michael Flood, “Fathers' Rights” and the Defense of Paternal Authority in Australia, 16 VIOLENCE AGAINST WOMEN 328 (2010). In Britain, see Richard Collier, *Fathers' Rights, Gender and Welfare: Some Questions for Family Law*, 31 J. SOCIAL WELFARE & FAM. L. 357 (2009); FATHERS' RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE (Richard Collier and Sally Sheldon eds., 2006).

war. Such groups would not generally characterize themselves as being motivated by a concern for their own rights, although in practice, those rights often feature prominently. Rather, they present their concerns as being about the best interests of children. They are supported in this by organizations that promote shared parenting in the context of a wider concern for children's rights.⁴

June Carbone has provided a good summary of the competing claims of these interest groups:⁵

[T]he battle lines in the custody wars at divorce are so well drawn that they can better be described as opposing trenches. On one side are those who would identify children's wellbeing with continuing contact with both parents. They favor joint custody, liberal visitation, and limitations on custodial parent's autonomy that secure the involvement of the other parent. In the other camp are those who argue that genuinely shared custody approaching an equal division of responsibility for the child is rare, and that children's interests lie with the well-being of the parent who assumes the major responsibility for their care. This group favors primary caretaker provisions to govern custody, greater respect for the custodial parent's autonomy (including greater freedom to move), and greater concern for both the physical and psychological aspects of domestic violence.

With politicization often comes an oversimplification of the issues. Complex problems are reduced to propositions that may readily be articulated within an adversarial political framework. When that adversarial contest has been expressed in terms of gender, the vastly different experiences of women from different backgrounds and circumstances are homogenized into a common experience of separation and divorce, which is often fitted into a victim framework. Men's groups also compete for the status of being aggrieved, and the courts exercising family law jurisdiction are attacked on all sides for "bias" without any common or agreed-upon view of what "neutrality" might look like. When debates are conducted in these terms, it is no wonder that the result is either insufficient consensus to achieve reform or unsatisfactory compromises that lead to laws filled with contradiction.

⁴ One such organization in the United States is called the Children's Rights Council: <http://www.crckids.org>. It proclaims its mission as being to assure a child "the frequent, meaningful and continuing contact with two parents and extended family the child would normally have during a marriage." It has an equivalent in Canada: www.canadiancrc.com.

⁵ JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW*, 180 (2000).