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# Five Decades of Family Law

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# Five Decades of Family Law\*

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SANFORD N. KATZ\*\*

## I. Introduction

On May 15, 2008, the Supreme Court of California issued its opinion in *In re Marriage Cases*<sup>1</sup> in which that court held that the state law restricting marriage to a man and a woman was a violation of the Equal Protection Clause of the California Constitution. Thus, California became the second state in the United States to permit same-sex marriages to be performed in its state. Five years earlier, the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*<sup>2</sup> declared its state's marriage law unconstitutional under the Massachusetts Constitution, making Massachusetts the first American state to allow same-sex marriage.

Who would have thought fifty years ago when the Section of Family Law of the American Bar Association was established that the institution of marriage, which Justice Field in the 1888 United States Supreme Court case of *Maynard v. Hill*<sup>3</sup> described as “creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature,”<sup>4</sup> would be redefined not by a state legislature, but by an American state supreme court? *Goodridge* made history, and deservedly so. In addition to its holding becoming an issue in the 2004 presidential election, there was the additional question in that presidential campaign of whether

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1. 183 P.3d 384 (Cal. 2008). While this article was in press, on November 4, 2008, the people of California voted to amend the state constitution to ban same-sex marriage.

2. 709 N.E.2d 941 (Mass. 2003).

3. 125 U.S. 190 (1888).

4. *Id.* at 205.

such a fundamental change in the social institution of marriage should be a matter for the courts to determine or for the people through the actions of the legislatures or through their own actions in the ballot box.

The opinion in *Goodridge* was praised by those who regarded the challenge to the limitation of marriage to a man and a woman as an infringement of a civil right. It was attacked and defiled by those who saw the redefinition of marriage as an affront to morality and religion and the actions of Chief Justice Margaret Marshall, the author of the opinion and those who joined her, as “activist judges” who had not followed “the law” but had “created” it. Often overlooked by those who attack the substance of Chief Justice Marshall’s decision is her constant reference to “civil marriage” in her opinion. In so doing, she seemed to be respectful of those who regard marriage as something more than a civil status and the marriage ceremony as more than a civil act.

The twenty-first century thus opened with the Supreme Judicial Court of Massachusetts making the most revolutionary family law decision in the history of America, followed by the Supreme Court of California five years later. Perhaps some might say that the redefinition of marriage from its being a union of one man and one woman to its being a union of two adult persons was inevitable because during the last half of the past century, gender roles and hierarchy in marriage have been lessened or eradicated and a new and more egalitarian model of marriage has taken the place of the traditional one.<sup>5</sup> That Massachusetts should have been the state where a test case challenging the conventional definition of marriage would be brought was not unusual because the highest court in Massachusetts has a history of interpreting its constitution more broadly than the United States Supreme Court interprets the federal constitution insofar as the protection of individual rights is concerned. In addition, that court has not rigidly adhered to conventional definitions of family relationships<sup>6</sup> and perhaps more importantly has been mindful of changes in

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5. Elsewhere I have written before *Goodridge* was decided:

The theme that seems to describe contemporary laws regulating the marriage relationship is the emphasis on individual rights, the right of each partner to a marriage to define her or his role within certain legal boundaries. In the past when marriage was considered a union of a man and a woman in which the couple became “one,” the reality was that the husband dominated the relationship at the expense of his wife.

The modern concept of marriage as a special kind of partnership has given rise to the idea that marriage as partnership means marriage as a contract between two individuals who maintain their individuality, psychologically, socially, and legally.

SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 75 (2003).

6. For example, in *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999), Justice Ruth Abrams, writing for the majority of the Supreme Judicial Court of Massachusetts, recognized the status of “de facto” parent in a same-sex couple’s custody case. She wrote:

A child may be a member of a nontraditional family in which he is parented by a legal parent and a de facto parent. A de facto parent is one who has no biological relation to the child, but has participated in the child’s life as a member of the child’s family. The de facto parent resides with the child, and, with the consent and

social mores.<sup>7</sup>

Whether the Supreme Judicial Court of Massachusetts was ahead of where society is on the question of same-sex marriage or whether it merely reflected changing attitudes in the new century remains to be seen.<sup>8</sup> From 1958 to 2008, there have been substantial changes in family law, all recorded in the pages of this *Quarterly*, in which the U.S. Supreme Court, state supreme courts, state legislatures and the federal congress have all played a role.

## II. The Fifties and Sixties

At the close of the 1950s and in the decade of the 1960s, America saw the beginnings of the great civil rights movement that brought changes in American life and in American law. The movement raised the consciousness of the courts and legislatures on individual rights and laid the groundwork for reforms that were to occur in the 1970s, especially with regard to the rights of individuals in the family and their relationship to the State. In addition, it was in the 1950s and the 1960s that the great divorce reform occurred. New York, for example, abolished adultery as the sole ground for divorce during that period, bringing that state in line with the rest of the country.<sup>9</sup> In the 1950s, Judge Paul W. Alexander sought to humanize the divorce process in Toledo, Ohio, and his court became a prototype for family law courts that stressed an informal setting and the introduction of

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encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. *Id.* at 891.

7. For example, in *Wilcox v. Trautz*, 693 N.E.2d 141 (Mass. 1998), the Supreme Judicial Court of Massachusetts upheld an expressed contract between two unmarried adults living together. Justice Greany, writing for the court, held that “unmarried cohabitants may lawfully contract concerning property, financial, and other matters relevant to their relationship.” *Id.* at 146. He stated, “Social mores regarding cohabitation between unmarried parties have changed dramatically in recent years and living arrangements that were once criticized are now relatively common and accepted.” *Id.* at 144. It is important to note, however, that Justice Greany makes clear that there is still an important distinction between the legal rights of married couples imposed by law and those of cohabitants, who, for example, without an express contract are not entitled to the equitable distribution of property upon the termination of the cohabitation, and no right to court-ordered separate support or alimony. *See id.* at 146.

8. Following *Goodridge*, a number of state legislatures enacted statutes not only banning same-sex marriages but stating that out-of-state same-sex marriages would not be recognized. While this article was in press, the Connecticut Supreme Court issued its opinion in *Elizabeth Kerrigan et al. v. Comm’n of Pub. Health et al.* (SC 17716). The highest court in Connecticut held that the state’s statutory scheme, which regulated marriage and banned same-sex couples from marrying, violated the equal protection provisions of the state constitution. In addition, on November 4, 2008, Arizona, California, and Florida amended their state constitutions through referendums banning same-sex marriage.

9. For a discussion of divorce reform in the 1960s, see generally Henry H. Foster, Jr., *Current Trends in Divorce Law*, 1 FAM. L.Q. 21 (1967). The article was published in the second issue of this *Quarterly*.

nonadversarial methods such as mediation and arbitration to help resolve family conflicts.<sup>10</sup>

Substantive laws of divorce were the subject of material changes in the late 1960s when California enacted its no-fault law. During the next decade, state after state reviewed its divorce laws, in many instances with the guidance of the Uniform Marriage and Divorce Act, and within decades, almost all the jurisdictions had adopted a no-fault divorce law either as the only basis for divorce or in addition to fault grounds.<sup>11</sup> With the changes that occurred with grounds for divorce came inevitable changes in defenses and procedure. Emphasis in no-fault divorce shifted from proving grounds to determining questions pertaining to the assignment of property with new theories about marital property<sup>12</sup> and the determination of child custody with expanded alternative arrangements.<sup>13</sup> The Uniform Marriage and Divorce Act provided standards for consideration of both of those incidents of divorce.<sup>14</sup>

It was during the decade of the 1960s that the federal government, primarily through the efforts of social welfare specialists on the staff of the Children's Bureau of the then U.S. Department of Health, Education, and Welfare, became interested in the plight of abused and neglected children.<sup>15</sup> The Model Mandatory Child Abuse Reporting Act, thought to be radical at the time because it was alleged to have infringed on family privacy, was proposed to the states. It fulfilled two purposes: (1) it raised the issue of child abuse and neglect, not as a social issue for community planners, but as a matter for legal intervention into the family by some state agency and (2) provided a model act for the states to either adopt or modify. With the interest of the federal government and the work of those

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10. The Section of Family Law took an active role in setting standards for mediators in divorce disputes. An issue of the *Family Law Quarterly* was devoted to articles on mediation. See 17 *FAM. L.Q.* 451, 451-540 (1984).

11. See KATZ, *supra* note 5, at 76-86. By 1978, only Illinois, Pennsylvania, and South Dakota retained the "fault only" grounds for divorce. Thirty-five states had irretrievable breakdown as a ground, of which seventeen had it as the sole ground and eighteen had it added to traditional fault grounds. Doris Jonas Freed and Henry H. Foster, Jr., reported these facts in their annual survey. See Doris Jonas Freed & Henry H. Foster, Jr., *Divorce in the Fifty States: An Overview as of 1978*, 13 *FAM. L.Q.* 105, 109 (1979).

12. In this regard, Professor Mary Ann Glendon's article, *Modern Marriage Law and Its Underlying Assumptions: The New Marriage and the New Property*, 13 *FAM. L.Q.* 411 (1979), had a profound impact. It was Professor Glendon who first wrote about the changing nature of property in marriage and how one's job generates one's property, not one's family name. The ideas of her article were later published in MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981). I discussed Professor Glendon's theory in KATZ, *supra* note 5, at 91.

13. See generally David J. Miller, *Joint Custody*, 13 *FAM. L.Q.* 345 (1979).

14. See UNIF. MARRIAGE & DIVORCE ACT §§ 307-08 (Disposition of Property), § 402 (Best Interest of the Child), in KATZ, *supra* note 5, at 185-203.

15. See KATZ, *supra* note 5, at 140-43.

who had developed the Model Mandatory Child Abuse Reporting Act, child protection became a matter of public concern and a whole body of child protection law was developed.<sup>16</sup> Child maltreatment became a major concern of social workers, sociologists, pediatricians, child psychiatrists, and psychologists who provided a great deal of rich literature on the subject.<sup>17</sup>

At the same time that child abuse and neglect were given attention by lawmakers, another problem arose: what disposition should be made for abused and neglected children who were unable to return to their homes after court intervention? Foster care and adoption then became a central issue for social workers, social planners, lawyers, and federal and state legislators.<sup>18</sup> Out of that concern came federal model acts dealing with termination of parental rights and subsidized adoption.<sup>19</sup>

The area of law now described as domestic violence has its origins in the child abuse laws. Once the protection of children in the home was recognized as trumping the privacy of the parent-child relationship, it was not difficult to expand that protection to adult members of the family, especially wives. Further is the matter of the child sexual abuse of children by Roman Catholic priests that occurred in the 1970s. Those abuses were not acknowledged at that time because of the taboo attached to discussing such events with anyone. Nor were they reported to the police or any other public authority because of the protection priests received in reporting laws. It took thirty years for that to change. Since 2008, because of the child-sexual-abuse scandal, many Catholic priests are in prison<sup>20</sup>

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16. See generally SANFORD N. KATZ, *WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN* (1973); Michael S. Wald, *State Intervention on Behalf of Neglected Children*, 27 *STAN. L. REV.* 985 (1975); JOHN E.B. MYERS, *CHILD PROTECTION IN AMERICA* (2006). Professor Myers's 2006 book is an excellent study of this era and his footnotes are a rich source of references.

17. See generally ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, *CHILDREN OF THE STORM—BLACK CHILDREN AND AMERICAN CHILD WELFARE* (1972); DAVID FINKELHOR, *SEXUALLY VICTIMIZED CHILDREN* (1979); GEORGE GERBNER ET AL., *CHILD ABUSE: AN AGENDA FOR ACTION* (1980); JEANNE M. GIOVANNONI & ROSINA M. BECERRA, *DEFINING CHILD ABUSE* (1979); RAY E. HELFER & C. HENRY KEMPE, *CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY* (1976); RUTH S. KEMPE & C. HENRY KEMPE, *CHILD ABUSE* (1978).

18. For a discussion of the issues in adoption that were of concern in the 1960s, see generally Felix Infausto & Mildred A. Shanley, *Annual Review of Decisions and Statutory Revisions Affecting Adoptions—1965–66*, 1 *FAM. L.Q.* 10 (1967); Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958–83*, 17 *FAM. L.Q.* 173 (1983).

19. For a discussion of the Model Act to Free Children for Permanent Placement and the Model Subsidized Adoption Act, see KATZ, *supra* note 5, at 143–44. The Act is reproduced in Sanford N. Katz, *Subsidized Adoption in America*, 10 *FAM. L.Q.* 3, 11 (1976). For a discussion of the development of the Model Act to Free Children for Permanent Placements, see generally Ruth-Arlene W. Howe, *Development of a Model Act to Free Children for Permanent Placement: A Case Study in Law and Social Planning*, 13 *FAM. L.Q.* 257 (1979).

20. Elsewhere I have written:

and many Catholic archdioceses have been sued successfully. Several have gone bankrupt.<sup>21</sup>

### III. The Seventies and Eighties

Before the 1960s, the U.S. Supreme Court decided relatively few cases that had direct bearing on family law; the most notable, decided in the 1940s, were the *Williams v. North Carolina*<sup>22</sup> cases concerning divorce jurisdiction. In the 1960s and 1970s, that changed, I believe because of the concern for the protection of individual rights of adults and of children, both in terms of their relationship with the State and in court proceedings.<sup>23</sup> It was in the 1970s that the U.S. Supreme Court recognized and to

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At the close of the twentieth century and the beginning of the new century, the vulnerability of children, especially, but not exclusively, prepubescent boys, was brought to the attention of the American public by the front page news reports of the sexual abuse of those children by Roman Catholic priests. Indeed, according to a study commissioned by the United States Conference of Catholic Bishops, from late 1999 to 2002, nearly 4,392 priests were reported to have sexually abused 10,000 children over approximately fifty years by four per cent of diocesan priests in ministry during that time. Through 2006, the numbers have continued to increase so that the number of credible victim reports has exceeded 12,000, and nearly 5,000 priests have been implicated.

The sexual abuse scandal in the Roman Catholic Church has led to thousands of legal claims, at least hundreds of which remain unsettled as of 2006. Through April 2006, United States dioceses had spent over \$1.38 billion in settling sexual abuse claims, leading to concern that the Church will not be able to afford the full economic consequences of the sexual abuse scandal. Many plaintiffs in Massachusetts, California, Kentucky, and the Pacific Northwest, the areas hardest hit by the scandal, have already settled their claims for staggering sums. Some claimants, concerned about the ability of local dioceses to compensate the abuse victims have even attempted to seek damages directly from the Vatican.

Sanford N. Katz, *Protecting Children Through State and Federal Laws*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW* 309, 310 (Bill Atkin ed., 2007).

21. In the article cited above, *supra* note 20, I have the following footnote references (form revised for this article) to support my statements about legal claims against certain archdioceses:

5. Richard Willing, *Church Battling Plans to Ease Abuse Lawsuits*, USA TODAY, Apr. 13, 2006, at A2. Some lawsuits have been held up as claimants battle judicially and legislatively to extend the statute of limitations on abuse claims dating back to 1950. Others' claims have been extended as a number of Archdioceses have declared for bankruptcy. Ashbel S. Green & Steve Woodward, *Portland Settles Abuse Suits, to Leave Bankruptcy*, NAT'L CATH. REP., Dec. 22, 2006, at 10; see also Constance F. Fain & Herbert Fain, *Sexual Abuse and the Church*, 31 THURGOOD MARSHALL L. REV. 209, 227 (2006).

6. The Archdiocese of Boston, Massachusetts settled with over 500 claimants for roughly \$85 million in September 2003. Stephanie Ebbert, *Diocese Property Deals Net \$90M; Unused Real Estate Being Liquidated*, BOSTON GLOBE, Nov. 6, 2005, at A1.

7. The Dioceses of Orange, Orange County, California settled with 87 claimants for \$100 million, and the Los Angeles Archdiocese in Los Angeles, California settled with 45 claimants for \$60 million, though hundreds of claimants remain. Jill Leovy & Jessica Garrison, *Priests' Victims are Emboldened*, L.A. TIMES, Dec. 4, 2006, at B1; Associated Press, *Catholic Church's Costs Pass \$1 Billion in Abuse Cases*, N.Y. TIMES, June 12, 2005, at A33.

Katz, *supra* note 20, at 310–11.

22. 317 U.S. 287 (1942) (Williams I); 325 U.S. 226 (1945) (Williams II), *reh'g denied*, 325 U.S. 895 (1945).

23. See generally *Bellotti v. Baird*, 443 U.S. 622 (1979) (abortion); *Orr v. Orr*, 440 U.S. 268 (1979) (sex discrimination in Alabama alimony statute); *Parham v. J.R.*, 442 U.S. 584 (1979) (civil commitment and juveniles); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (jurisdiction in support); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (rights of foster parents); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (parental consent in abortion); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (limits on confinement in civil commit-

a certain extent protected the rights of unwed fathers who had for so long been shadow figures in the lives of their children and indeed invisible in terms of the adoption of those children at least insofar as social service and child welfare agencies were concerned.<sup>24</sup>

Also, the 1970s was a decade in which two state supreme courts changed two long-standing legal doctrines that ultimately found affirmation in other state supreme courts and in state legislatures. These doctrines concerned the legal implications of cohabiting adults and the enforcement of prenuptial agreements.

*Marvin v. Marvin*<sup>25</sup> stands out as a high watermark in family law in the 1970s because of its recognition of the rights that may attach to two adults who are living in a marriage-like relationship upon their termination of that relationship. Before *Marvin*, lawyers who had as a client a person who had been living in a nonmarital intimate relationship and had terminated it, and who sought money damages, would have had to be artful in terms of describing the facts of the case and try to fit their client's claim for relief into an acceptable legal construct, often a fiction. That was a difficult challenge because romantic friendship is not legally recognized and there is abhorrence to providing a legal or equitable remedy for nonmarital relationships with sexual overtones. In addition, courts tended to think in terms of dichotomies: either one was married or not. With the decline in the recognition of common-law marriage, the former was not available for argument.

Even though Michelle Marvin ultimately received nothing,<sup>26</sup> the following principle was established: legal consequences may result when

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ments); *McNeil v. Dir.*, 407 U.S. 245 (1972) (contempt and self-incrimination in civil commitment proceedings); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (rights of parents regarding their refusal on religious grounds to send their children to school under a state compulsory school attendance law); *In re Winship*, 397 U.S. 358 (1970) (burden of proof in juvenile proceedings); *In re Application of Gault*, 387 U.S. 1 (1967) (procedural rights of juveniles in court proceedings); *Kent v. United States*, 383 U.S. 541 (1966) (due process in juvenile court proceedings); *Armstrong v. Manzo*, 380 U.S. 545 (1965) (notice in adoption proceedings); *Ford v. Ford*, 371 U.S. 187 (1962) (full faith and credit and child custody); *Lynch v. Overholser*, 369 U.S. 705 (1962) (insanity defense in civil commitment proceedings).

24. See generally *Caban v. Mohammed*, 441 U.S. 380 (1979) (adoption rights of unwed fathers); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (adoption and unwed fathers); *Gomez v. Perez*, 409 U.S. 535 (1973) (support obligations for unwed fathers); *Stanley v. Illinois*, 405 U.S. 645 (1972) (rights of unwed fathers in termination of parental rights hearings). The famous case in the 1980s was *Lehr v. Robertson*, 463 U.S. 248 (1983) (notice to the unwed father in adoption proceedings). Professor Jerome A. Barron was the first constitutional law scholar to recognize the legal complications resulting from the U.S. Supreme Court case of *Stanley*, and his seminal article was published in this journal. See generally Jerome A. Barron, *Notice to the Unwed Father and Termination of Parental Rights Implementing Stanley v. Illinois*, 9 FAM. L.Q. 527 (1975).

25. 557 P.2d 106 (Cal. 1976).

26. See *Marvin v. Marvin*, 176 Cal. Rptr. 555 (Ct. App. 1981).

two adults live together in a marriage-type relationship but without a formal marriage ceremony and without conforming to common-law-marriage requirements. The principle has been modified and clarified by other state supreme courts and state legislatures through the years.<sup>27</sup> Some have limited it by requiring agreements to be expressed, even in writing, while others have been less restrictive.

Contract cohabitation has found acceptance by being the predicate for registered-domestic-partnership legislation<sup>28</sup> and the basis for the American Law Institute's proposal for domestic partnerships.<sup>29</sup> Contract cohabitation has been highly criticized in literature.<sup>30</sup> A number of critics view contract cohabitation as a poor substitute for marriage and, in comparing it to marriage, determine that it falls short in almost all aspects of what makes marriage sound in terms of an individual's happiness, health, fidelity and commitment, and the basis for family formation. After reviewing the empirical data comparing cohabitation to marriage, Professor Garrison concluded:

The first significant fact established by recent research is that cohabitation is usually a short-lived state. Although the likelihood that cohabitation will lead to marriage is declining, approximately 60 percent of all U.S. cohabitants and 70 percent of those in a first, premarital cohabitation marry within five years. More tellingly, only about 10 percent of all U.S. cohabitants who do marry are still together five years later. By contrast 80 percent of first marriages survive five or more years and two-thirds survive for at least ten years. Cohabitation thus represents, for most couples, a brief transitional stage on the way to either marriage or separation.

Cohabitants tend to be younger and less prosperous than married couples. More importantly, they do not typically follow the relational norm associated with marriage. Cohabitants are much less likely than married couples to have children together, to pool their resources, to feel secure and unconflicted in their relationships, to value commitment, or to express commitment to their partners. They are more likely than married couples to be in a physically abu-

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27. See J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 1.02 (2002) for a full discussion with references of the rights of unmarried cohabitants and the various legal constructs available to cohabiting couples that are often imposed by courts after there has been a termination of the relationship. See also Joel E. Smith, Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 69 A.L.R. 5th 219, 226-36 (2005), for an extraordinary compilation of material on cohabitation contracts as well as a limited bibliography.

28. For a discussion of registered domestic partnerships, see KATZ, *supra* note 5, at 17-23.

29. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.01-6.06 (2002) [hereinafter ALI PRINCIPLES].

30. Professor Marsha Garrison has done extensive research and writing about contract cohabitation and is critical of the American Law Institute's domestic partnership proposals. See generally Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 305 (Robin Fretwell Wilson ed.,

sive relationship, and less likely to demonstrate sexual fidelity.<sup>31</sup>

A major question is whether contract cohabitation should be the functional equivalent of marriage. For the most part, that question has been answered in the negative through case law, especially in states that have either reluctantly recognized a cohabitation contract or imposed many restrictions. For example, in a state that makes a meaningful distinction between the legal status of legitimate and illegitimate children, children born to a nonmarital cohabiting couple are illegitimate, requiring some affirmative action by the birth father if he wishes to have any legal control over his child. Failing that, if the couple terminated their arrangement and the birth father sought custody, a court would have to apply the concept of *de facto* parent if it was available in the state to give the father any rights. Unless there were specific provisions in a written agreement regarding the financial consequences of the cohabitation or oral promises that could be proven or implied were made during the cohabitation, most courts have refused to apply the incidents of divorce, like equitable distribution of property or alimony, upon the termination of a cohabitation arrangement.<sup>32</sup> To do so would have the effect of reviving common-law marriage, which has been abolished in most American jurisdictions.

In the same decade that the California Supreme Court broke with tradition and sanctioned contract cohabitation, the Florida Supreme Court decided *Posner v. Posner*,<sup>33</sup> which upheld a prenuptial agreement. That court recognized the change in social mores, especially that divorce was an event that occurred with enough frequency that it should be the subject of planning. The court was therefore willing to expand the enforcement of a prenuptial agreement that went beyond the private ordering of wealth upon death to allowing individuals to privately order the allocation of their wealth upon divorce.

Before *Posner*, the position of most state courts was that any mention

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2006). That article has a wealth of social science data comparing cohabitation with marriage. Volume 76, No. 5, 2001 issue of the *Notre Dame Law Review* was dedicated to the topic of unmarried partners and the legacy of *Marvin*.

31. Garrison, *supra* note 30, at 307–09 (footnotes omitted).

32. See *Collins v. Guggenheim*, 631 N.E.2d 1016 (Mass. 1994), where Justice Nolan wrote, “Cohabitation in Massachusetts does not create the relationship of husband and wife in the absence of a formal solemnization. . . . We have not permitted the incidents of the marital relationship to attach to an arrangement of cohabitation without marriage.” *Id.* at 1017 (citation omitted). But see *DeVanney v. L’Esperance*, 949 A.2d 743 (N.J. 2008), where the Supreme Court of New Jersey held that cohabitation was not an indispensable element of a palimony action.

33. 233 So. 2d 381 (Fla. 1970). The Oklahoma Supreme Court had upheld prenuptial agreements more than twenty-five years earlier and continued to sanction it. See generally *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960); *Clark v. Clark*, 202 P.2d 990 (Okla. 1949); *Talley v. Harris*, 182 P.2d 765 (Okla. 1947); *Pence v. Cole*, 205 P.172 (Okla. 1922).

of divorce in a prenuptial agreement might have the effect of encouraging a termination of the marriage and thus, the whole agreement might be held unenforceable. Prenuptial agreements often are regulated by state statute, which sets out requirements such as mandating (1) a writing to conform to the Statute of Frauds; (2) a time frame in which the parties sign the document before the wedding ceremony, minimizing the suggestion of undue influence; (3) a disclosure of each party's finances; and (4) legal counsel for both parties.<sup>34</sup> In addition to the question of whether the time of executing the agreement or the time of divorce determines enforcement, the other major question in prenuptial agreements is whether they are part of the law of contracts and should be treated as any other contract, or whether they are special contracts reflecting a certain public policy that protects individuals from making bad bargains. The second question is particularly relevant when considering the substantive terms, such as the waiver of alimony or any property distribution. The hard-line approach is to assume an arm's length transaction, in a sense disregarding the real context, which is not commercial, and say that adults should be able to privately order their own lives and give up alimony and property if they are fully aware of the consequences of their actions. The other approach is to take into account the context and ask whether it is in the public interest to allow an adult to contract away her rights, which might mean that if she waives all her economic rights at the time of entering into the agreement for whatever reason and with all the statutory safeguards, she might be left either destitute or nearly destitute upon divorce, which could be years after the agreement was signed.<sup>35</sup> This is particularly serious given that public welfare in the United States is now very limited in terms of who qualifies for any welfare relief.

#### IV. The Eighties, Nineties, and the New Millennium

Twenty-five years ago, the Section of Family Law celebrated its silver anniversary by dedicating its Summer 1983 *Family Law Quarterly* issue to looking backward and forward. In the Introduction to the issue, I wrote:

Those twenty-five years have seen enormous changes—in American mores, in the condition of women, in the attitudes toward children, fathers, toward the law itself. Women are no longer merely modest, self-effacing sanctuaries for their energetic spouses who daily attack the economic domain to earn provision for their homes, but equal partners in an ongoing relationship, which even

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34. The American Law Institute has set thirty days before the wedding as the appropriate time frame, stating that signing in less than thirty days raises the rebuttable presumption of duress. See ALI PRINCIPLES, *supra* note 29, § 7.04.

35. This issue and others pertaining to prenuptial agreements are discussed in KATZ, *supra* note 5, at 30–34.

if it terminates in divorce leaves them with rights unheard of twenty-five years ago. Fault in divorce is almost a dead issue. Marriage itself is only one of the choices for cohabitation, and recently even cohabitants of the same sex have been claiming rights if the parties break up or if one of them dies. Marital property has been redefined to include pensions, work benefits, professional gains, and even reputation. Children are no longer only pawns between battling parents, but individuals whose needs and temperaments must be considered in custody cases. Illegitimate children are legally almost co-equal to the offspring of marriage.<sup>36</sup>

During the past quarter of the century, not only has progress been made in terms of advancing the rights of women and children in a variety of contexts, but also marriage has undergone major changes, both in terms of the definition of marriage (already discussed) and individuals maintaining their own legal identity in that relationship. Women no longer lose their legal identity when they marry. The old fiction that marriage is “one” and that one is the husband has been abolished. Laws have been enacted to protect women from the brutality of their husbands. Contract cohabitation now is a legally protected alternative relationship to marriage. There has been a definite constitutionalization of family law as well as a recognition that the international aspects of family law are playing more and more of an important role in domestic law. The federal government has continued its involvement in child welfare legislation, but there are signs that it will expand into areas traditionally reserved to the states. It is too early to determine the extent to which the American Law Institute’s *Principles of the Law of Family Dissolution* will have on state legislatures and in court opinions, but certainly there is a move toward uniformity in state laws regulating the establishment, administration, and termination of family relationships.

The institution of adoption has changed. The secrecy that defined the adoptive relationship and the fictions that were associated with adoption, often reflected in the matching process, have been replaced with new practices by child welfare agencies who place children for adoption and new state laws that reinforce the practice. There has been a recognition that there are two domestic adoption processes, one involving children whose legal bonds with their parents have been judicially terminated because of neglect or abuse, and the other concerning the release of newborns and placing them with prospective adoptive couples. Each process has its own legal issues and at least one of them, which concerns both processes, is the role of race in attracting prospective adoptive families and in the placement process.<sup>37</sup>

36. Sanford N. Katz, *Introduction to the Anniversary Issue*, 17 FAM. L.Q. 99, v (1983).

37. See KATZ, *supra* note 5, at 153–182. See generally Ruth-Arlene W. Howe, *Transracial*

A new term, "open adoption," has entered the legal lexicon. It refers to the practice of allowing a birth parent to have post-adoption visitation rights. Such practice would have been unheard of twenty-five years ago when the idea of adoption required a full termination of the rights of birth parents in their children placed for adoption and the complete integration of adoptive children into their adopted families. A second term, "open records," which refers to allowing adopted children and birth parents to gain access to their adoption records, has also become part of adoption law in certain states.<sup>38</sup>

Adoption has been the traditional method of establishing a family when married couples were unable to have their own children by natural means. For years, artificial insemination was considered the only alternative. Then came *In re Baby M*,<sup>39</sup> and the phenomenon of surrogate motherhood was recognized, although in that case the surrogacy contract was invalidated. Science, through genetics and assisted reproductive technology, has changed family formation. Questions arose such as whether assisted reproduction should be regulated and, if so, by whom; who is an heir, and when does one become an heir; who is a male, and who is a female; who is a mother, and who is a father? These questions were thought to be answered by traditional science, law, and custom, but are now being litigated without uniformity. Traditional presumptions about family relationships are being abandoned or at least questioned.

The titles of each chapter in *Assisted Reproductive Technology* by Charles P. Kindregan, Jr., and Maureen McBrien and published in 2006 by the Section of Family Law of the American Bar Association reveal the extent to which this incredible scientific advancement has an impact on family law, decedents' estates, contracts, torts, and public policy: "(1) The Modern Family and Reproductive Technology; (2) Intrauterine Insemination; (3) In Vitro Fertilization; (4) Cryopreserved Embryos; (5) Surrogacy; (6) Government Regulation of Assisted Reproductive Technology; (7) Posthumous Reproduction; (8) Reproductive Cloning; (9) Standards of Care: Law, Liability and Assisted Reproductive Technology; (10) Assisted Reproduction Contracts and Documents."<sup>40</sup>

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*Adoption (TRA): Old Prejudices and Discrimination Float under a New Halo*, 6 B.U. PUB. INT. L.J. 409 (1997); Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131 (1995).

38. I have discussed "open adoptions" and "open records" in KATZ, *supra* note 5, at 167-70. An excellent nonlegal study of secrecy in American adoption practice is E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* (1998).

39. 537 A.2d 1227 (N.J. 1988).

40. See CHARLES P. KINDREGAN, JR., & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE* (2006).

In 1983, I concluded my introduction to the anniversary issue:

In our world, which would have been unrecognizable twenty-five years ago when the Family Law Section began, family law is struggling valiantly to keep pace with the sometimes stupendous changes wrought both by science and a whole new psychological climate. Law schools and practicing attorneys have their homework cut out for years. The *Family Law Quarterly* will, we hope, continue to offer the latest, the most carefully studied, and the sharpest presentation of our current problems and practices.<sup>41</sup>

Many of the issues that were covered in the Silver Anniversary issue are still with us today and discussed in this issue, twenty-five years later. But there are new areas that have been added as family law itself has expanded and new questions have been asked. The authors of the articles in this special issue are all experts in their field and have had a major impact on the area of their specialization.

In 1967, Father Robert F. Drinan, S.J., was both chairman of the Section of Family Law and editor in chief of this journal. In his preface to the first issue of this journal he wrote, "When the Section of Family Law was established in 1958, the leaders of the American Bar Association referred to the new Section as 'the conscience of the bar.'"<sup>42</sup> Through the years, the section has provided the American Bar Association with its views and positions on family law issues that have had both a direct and indirect impact on national public policy and the legal profession. At age fifty, the Section can be proud of its record of leadership in advancing family law reform and for fulfilling the aspiration of leaders of the American Bar Association stated at its birth.

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41. Katz, *supra* note 36, at x.

42. Robert F. Drinan, S.J., *Chairman's Preface*, 1 FAM. L.Q. 1, 1 (1967).