

FOREWORD

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It is an honor to have been invited to introduce the *Duke Journal of Gender Law and Policy*'s issue on gender issues in the American Law Institute's *Principles of the Law of Family Dissolution*. A journal published on gender issues in U.S. family law would have been all-inclusive at any point in our history prior to the 1970s, since virtually the entire field was gendered. Marriage was—and at this writing remains—limited to one man and one woman. Although either spouse could seek a divorce, some of the fault-based grounds for divorce, such as non-support, were available only against husbands, who had the primary duty of support. In practice, if not as a matter of statutory language, proof of adultery as a ground for divorce reflected the double standard of morality; a wife who engaged in an act of intercourse with a man not her husband could be divorced, while a husband's comparable act of adultery was an insufficient basis for divorce unless his conduct had made the marriage intolerable.

Moreover, gendered rules applicable to marriage dissolution extended far beyond the grounds for divorce. At one time, only wives could seek alimony. At different times, fathers, then mothers, enjoyed priority in receiving custody of children. At all times, fathers remained primarily liable for child support. Finally, as the manager if not always the owner of the family property, the husband's financial position relative to that of his wife often made it impossible for her to obtain the wherewithal to seek a divorce. Even today, securing the necessary funds to engage counsel remains a problem for many wives.

In the 1960s, when the law of divorce underwent serious scrutiny in both the U.S. and England, the examination of its underlying gendered structure was not made an express part of the reformers' agenda. Not only the Uniform Marriage and Divorce Act (UMDA) and its predecessor, the path-breaking California no-fault divorce law, but also the English marriage breakdown proposal concentrated on reformulating the theory of divorce so that it became an action granting the legal termination of a relationship that had ceased to function in fact rather than an action granting relief to an innocent spouse for the marital wrongdoing of a guilty spouse. That such a novel approach to the grounds for divorce might also require a paradigm-shifting breakthrough in the formulation of the accompanying financial and child placement decisions was not fully recognized when these reforms became effective in the early 1970s.

Twenty years of litigation, judicial experimentation, and academic criticism in the U.S. were enough, however, to uncover the unresolved issues, including gender issues, that remained embedded in the law and practice of family disso-

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lution. To its credit, the ALI undertook, in the 1990s, to complete the divorce law reforms begun in the 1960s. Hammered out over a period of ten years, the *Principles* accepted as given the concept of no-fault divorce that had been adopted in some form in every state by the mid-1980s, and focused on setting out a sound and coherent framework for the financial and child placement aspects of the proceedings. Throughout, the effort was designed to bring theoretical clarity and to create workable solutions that could, as far as possible, achieve fairness for all parties. As the commentaries included here make plain, the *Principles* receive both criticism and praise and inspire further proposals for change.

One of the first points to notice about the *Principles* is that they are not limited, as was the UMDA, to “marriage” dissolution. Rather, they speak more broadly to “family” dissolution, intentionally extending to families living in non-marital cohabitation and including both heterosexual and same sex couples who have formed domestic partnerships. This advance over former law is applauded, albeit not without some criticism as to scope and detail, by Professors Mary Coombs, who notes that the *Principles* “open up a range of possibilities limited only by the imagination and creativity of lawyers and their clients,”¹ and Martha M. Ertman, who, while preferring a recognition of “polyamorous” relationships as well as *Marvin*-style cohabitation, concludes that if these provisions “bring to domestic relations law an increased measure of uniformity and fairness, those things alone will mark the project as a resounding success.”²

Participants in this issue find more controversial the financial provisions applicable between the spouses. This is not surprising, for a prominent critique of no-fault divorce was the charge that, in practice, it left women and children financially impoverished as compared with men. Professor Marsha Garrison, who had earlier conducted a systematic empirical study of the economic consequences of divorce under prevailing legal standards, here offers a commentary on the likely outcomes of financial awards under the *Principles*. She observes that the shift from need-based discretionary spousal support to loss-based entitlements of spousal compensation is “the most notable divorce law innovation contained in the *Principles*.”³ She concludes that, while a specified formula for the compensation awards, like that set out in the Uniform Probate Code, would have been preferable to allowing each state to set its own formula, use of the *Principles* “in many, if not all, case categories . . . should enhance the equity of divorce outcomes.”⁴

Garrison’s preference for the greater certainty afforded by the Uniform Probate Code model is shared by Professor Cynthia Lee Starnes, who praises the *Principles* for their “frank realism and bold effort to restructure the law of alimony,”⁵ but objects to their reconceptualization of alimony which she argues re-

1. Mary Coombs, *Insiders and Outsiders: What the American Law Institute Has Done for Gay and Lesbian Families*, *infra* p. 106.

2. Martha M. Ertman, *The ALI Principles’ Approach to Domestic Partnership*, *infra* p. 117.

3. Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?*, *infra* p. 129.

4. *Id.* at 135.

5. Cynthia Lee Starnes, *Victims, Breeders, Joy, and Math: First Thoughts on Compensatory Spousal Payments Under the Principles*, *infra* p. 139.

casts women from “beggars” to “victims.”⁶ In particular, she is critical of Section 5.06 which compensates the career loss of a spouse who has been the primary caretaker of the couples’ children. She rejects this section in part because of its distinction among women who suffer career losses because of childcare obligations (“breeders”) and women who suffer such losses for other reasons, such as playing golf or volunteering for humanitarian causes (“non-breeders”), arguing that “a woman’s right vis-à-vis her husband depends on whether she has borne him a child.”⁷ Professor Tonya L. Brito, on the other hand, describes Section 5.06 as containing “important information for working mothers,”⁸ calling it “the most creative and innovative portion of the proposed law.”⁹ She notes that it enables these women to recover from the disadvantages of having been relegated to a slower “mommy track”¹⁰ at their jobs, and more broadly that it “recasts caretaking of children and financial support of the family as the joint responsibilities of the husband and wife.”¹¹ The contrast between these two commentaries provides a valuable insight into the construction of gendered critiques of family law; the one applauding, the other denouncing the same provision based on their authors’ differing assessments of its underlying implications for the image of women as well as its more immediate impact on their post-dissolution financial situation.

Several authors, including Garrison, who notes that the definitions of property found in the *Principles* “could easily have been contained in a Restatement,”¹² point out that the treatment of property division closely adheres to current law. Some find this aspect unfortunate. Thus, both Professors Allen M. Parkman and Penelope Eileen Bryan take the *Principles* to task for failing to champion the human capital approach to property. As applied to family dissolution, this approach treats as property the enhanced income stream that is the expected result of professional or vocational training undertaken during the marriage. A spouse who invests in the development of the other spouse’s human capital by providing financial support during the period of professional or vocational training would be entitled to a share in that property upon dissolution. Parkman calls the lack of recognition of human capital at divorce “a major omission in state law” and pointedly observes that “[t]he ALI had an opportunity to correct that omission in the *Principles* and it elected not to do so.”¹³ Bryan agrees, and argues that the *Principles* “offer weak justification for these exclusions,”¹⁴ going on to point out that remedies could have been found for the inequitable results foreseen by the Reporters as following from a recognition of human capital as property. The *Principles*’ choice to reimburse the investor

6. *Id.* at 140.

7. *Id.* at 142-43.

8. Tonya L. Brito, *Spousal Support Takes on the Mommy Track: Why the ALI Proposal Is Good for Working Mothers*, *infra* p. 151.

9. *Id.* at 153.

10. *Id.* at 156.

11. *Id.* at 155.

12. Garrison, *supra* note 3, at 124.

13. Allen M. Parkman, *The ALI Principles and Marital Quality*, *infra* p. 162.

14. Penelope Eileen Bryan, *Vacant Promises?: The ALI Principles of the Law of Family Dissolution and the Post-Divorce Financial Circumstances of Women*, *infra* p. 177.

spouse with a compensation award rather than a property award, while in agreement with prevailing state law, does not satisfy these critics.

Parkman joins Professor Alicia Brokars Kelly in calling for an approach to family dissolution that will reward sharing behavior during marriage rather than individualistic, self-interested behavior. But while Parkman sees the recognition of human capital as the most effective way of encouraging sharing behavior during marriage that results in earning capacity losses, Kelly is less concerned about strategic behavior and more focused on creating a clear and compelling theory of wealth allocation at dissolution. She credits the *Principles* with grounding post-divorce financial obligations on “a model of marriage defined by pervasive commitment, interdependence and sharing that rejects a strict cost-benefit accounting,” and concludes that this stance means that they have taken “a strong position” in the debate over individualism and community as the ideal form of marriage by recommending “the policy choice that sharing principles and community norms be the prime values in the law of marriage and its dissolution.”¹⁵ She believes, however, that the *Principles* fail to advocate forcefully enough for this view and fears that this failure may lessen the chances that the proposed reforms will be adopted.

In their commitment to the no-fault philosophy, the *Principles* rigorously reject the use of fault factors in determining the financial awards and decline to take account of non-financial losses. Professors Katharine B. Silbaugh and Peter Nash Swisher question this position, the former arguing that refusal to take account of non-financial losses systematically undervalues women’s contributions to the marriage, and the latter justifying the use of fault factors in financial awards to punish “egregious” marital misconduct. Silbaugh believes that taking account of non-financial contributions does not require the use of fault factors,¹⁶ while Swisher points out that many states have continued to use fault in determining financial awards and have done so in a responsible manner. His definition of “egregious” misconduct is not limited to physical and emotional abuse, but also includes “adultery that substantially contributes to the dissolution of a marriage.”¹⁷ Neither author is satisfied with the suggestion put forth in the *Principles* that redress or punishment for this kind of marital behavior should be relegated to tort or criminal law.

The *Principles* permit the parties to enter into premarital agreements to alter the financial provisions that would otherwise govern their family dissolution. Professor Brian H. Bix examines these sections, compares them with existing law (which includes the Uniform Premarital Agreement Act in many states), and offers his assessment of their effect. For example, as he points out, the *Principles* require that the party seeking enforcement of a premarital agreement bear the burden of showing the absence of duress upon the party against whom enforcement is sought, rather than adopting the more traditional contract treatment of duress as an affirmative defense. In part this choice was motivated by

15. Alicia Brokars Kelly, *Explaining Intuitions: Relating Mergers, Contribution, and Loss In the ALI Principles of the Law of Family Dissolution*, *infra* p. 199.

16. See Katharine B. Silbaugh, *Gender and Nonfinancial Matters in the ALI Principles of the Law of Family Dissolution*, *infra* p. 203.

17. Peter Nash Swisher, *The ALI Principles: A Farewell to Fault – But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, *infra* p. 228.

the Reporters' view that the default financial provisions contained in the *Principles* themselves are fair to both parties and that premarital agreements are not necessarily an improvement on those provisions. Thus, while the approach taken does not discourage the parties from entering into premarital agreements, neither does it offer many positive incentives to do so. Although he does not put the matter in quite that way, Bix does conclude that "[u]nder the *Principles*, premarital agreements are to be enforced to the extent that they are procedurally fair *and* do not impinge on the obligations that marital partners owe one another—both during and after marriage."¹⁸

The child support provisions of the *Principles* are the subject of two commentaries. Professor Leslie Joan Harris analyzes the policy choices made in these provisions and concludes that they are "a substantial improvement over the child support guidelines in most states today because they offer a principled structure for deciding how much child support a non-residential parent should pay, as well as powerful arguments for increasing support levels."¹⁹ She notes, however, that the *Principles* "provide little help to children with poor non-residential parents, and residential parents who need to work to maintain a modest standard of living would not be able to take advantage of the choices the *Principles* offer."²⁰ Professor Karen Syma Czapanskiy expands upon the latter point to offer a critique of the 1996 federal welfare reform. She argues that application of the *Principles* to a family of two, a working mother earning \$800 per month living with one child, while more generous than the previous Guidelines, cannot produce a child support payment sufficient to fulfil the claim of welfare reformers that "the mother's wages, when combined with child support paid by the child's father, would be enough to ensure that children would survive after their families stopped receiving cash from the government."²¹ She expresses the hope that Congress will take the lesson of the *Principles* to heart when it next considers welfare reform in 2002.

The child support and custody chapters of the *Principles* have several significant overlapping provisions. One of these, the definition of a parent by estoppel, is discussed in two commentaries. Focusing on its use in the child support chapter, Professor Theresa Glennon argues that the concept lacks clarity, fails to provide adequate guidance for judges, and does not offer sufficient protection to a child who has been brought up in the mistaken belief that the mother's husband is the father, only to discover upon dissolution that this man has no legal responsibility for the child. She proposes instead a formula for determining who is a parent by estoppel that is designed to prevent more men from denying their financial responsibility for the child under these circumstances.²² Professor Sarah H. Ramsey, who examines the *Principles*' concepts of parents by estoppel and de facto parents from the child custody perspective, concludes that both confer important new rights on stepparents in both hetero-

18. Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, *infra* p. 231.

19. Leslie Joan Harris, *The ALI Child Support Principles: Incremental Changes to Improve the Lot of Children and Residential Parents*, *infra* p. 246.

20. *Id.* at 255.

21. Karen Syma Czapanskiy, *ALI Child Support Principles: A Lesson in Public Policy and Truth-Telling*, *infra* p. 259.

22. See Theresa Glennon, *Expendable Children: Defining Belonging in a Broken World*, *infra* p. 269.

sexual and same sex cohabitation relationships, noting that these proposals “provide a cautious mechanism for recognizing expanded, informal family forms and moving beyond the constraints of the nuclear family model.”²³

Three commentaries discuss the child custody provisions of the *Principles*. Professor Margaret F. Brinig praises them as “feminist” in their concept and implementation. She identifies four distinctive ways in which this chapter differs from existing law: 1) its emphasis on parental agreement; 2) its use of a factual marital function “approximation” default rule in the absence of a parenting plan; 3) its broadened definition of “parents”; and 4) its placing the goal of serving the child’s best interests above the goal of achieving fairness to the parents.²⁴ She concludes that men as well as women should support this approach, for if it becomes law, “families are assured that they will go on regardless of the disruption of the adult relationships. So no parent loses, and children win.”²⁵ Professor Kathy T. Graham contends that the custody provisions will help eliminate gender and sexual orientation bias first by providing strong incentives to parents to agree upon a parenting plan that will suit their family’s circumstances, and second, by providing default rules that expressly forbid the decision maker from considering factors such as gender and sexual orientation. She believes that the *Principles* “create a structure in the law that is more nuanced and complex and which gives the decisionmaker an opportunity to better replicate the roles and responsibilities of both parents post-divorce.”²⁶ Finally, Professor J. Thomas Oldham focuses on the relocation provision, noting that it gives the primary caretaker substantial freedom to relocate with the child, even when the move will have a significant effect on the ability of the other parent to maintain regular contact with the child.²⁷ He compares the *Principles*’ position on this issue with that taken in the child support provisions, which accord the child support obligor substantial freedom to change careers or pursue education or training, even though these decisions will lower the ability to pay child support, without imputing the previously higher income to the obligor. He points out that in taking these positions, the *Principles* are in accord with the trend of modern law on the relocation issue, but not on the income imputation issue. He concludes that the ALI’s position is consistent from the standpoint of parental autonomy, while that of current law is inconsistent.

This discussion of gender issues in the *Principles* has amply demonstrated that modern family life has evolved far beyond the traditional model of a married man working outside the home to support his homemaker wife and their children and that it now embraces a variety of family forms, including same sex partners, dual career couples, and non-marital cohabitants. But here, as elsewhere, the core distinction between gender and sex is relevant. Although sex is

23. Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents under the American Law Institute’s Principles of the Law of Family Dissolution*, *infra* p. 299.

24. Margaret F. Brinig, *Feminism and Child Custody under Chapter Two of the American Law Institute’s Principles of the Law of Family Dissolution*, *infra* pp. 301-02.

25. *Id.* at 318.

26. Kathy T. Graham, *How the ALI Child Custody Principles Help Eliminate Gender and Sexual Orientation Bias from Child Custody Determinations*, *infra* p. 331.

27. See J. Thomas Oldham, *Limitations Imposed by Family Law on a Separated Parent’s Ability to Make Significant Life Decisions: A Comparison of Relocation and Income Imputation*, *infra* p. 333.

essential to the conception and birth of children, the division of labor based on sex within the family is not essential to the rearing of children. Moreover, today even reproduction can be accomplished outside the uterus of the legal mother and with the sperm of a man not the legal father. Family life that includes children requires sexual reproduction at some point, but family law does not require the use of gender stereotypes that have limited the aspirations of both men and women. Separating sex from gender is always difficult, and the traditional patterns of family life have obscured the distinction for centuries. But the effort is necessary if law reform in this area is to achieve lasting success.

I had the opportunity to participate in all three of the twentieth-century divorce reform efforts that occurred in the U.S. roughly between 1960 and 2000. I served as one of the drafters of the California no-fault divorce statute, as a co-Reporter on the UMDA, and as an Advisor to the ALI project. As we enter the twenty-first century, the *Principles of the Law of Family Dissolution*, taken as a whole, will provide a wholesome and welcome framework for the often unwelcome, but more often than not wise, decision to end a family relationship that has become dysfunctional or intolerable for at least one of the adult participants. If, at the end of the legal process of termination, all of the participants, both adults and children, can take up their new lives and fulfill their altered responsibilities with a sense of fair treatment and equitably shared burdens, the ALI will have performed a valuable service to the legal profession and to the public.