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978-0-521-11610-7 - Family Law and the Indissolubility of Parenthood

Patrick Parkinson

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FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD

There are few areas of public policy in the western world where there is as much turbulence as in family law. Often the disputes are seen in terms of an endless war between the genders. Reviewing developments over the last forty years in North America, Europe, and Australasia, Patrick Parkinson argues that, rather than just being about gender, the conflicts in family law derive from the breakdown of the model on which divorce reform was predicated in the late 1960s and early 1970s. Experience has shown that although marriage may be freely dissoluble, parenthood is not. Dealing with the most difficult issues in family law, this book charts a path for law reform that recognizes that the family endures despite the separation of parents, while allowing room for people to make a fresh start and prioritizing the safety of all concerned when making decisions about parenting after separation.

Patrick Parkinson is a Professor of Law at the University of Sydney and an internationally renowned expert on family law. He has played a major role in shaping family law in Australia. His proposal for the establishment of a national network of family relationship centers, made to the prime minister in 2004, became the centerpiece of the Australian government's family law reforms. He was also instrumental in reforming the child support system and has had extensive involvement in law reform issues concerning child protection. He was made a Member of the Order of Australia for his services to law, legal education, policy reform, and the community. Parkinson has published widely on family law and child protection, as well as other areas of law. His most recent books include *Tradition and Change in Australian Law* (4th edition, 2010) and *Australian Family Law in Context* (4th edition, 2009), among many others.

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CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org

Information on this title: www.cambridge.org/9780521116107

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First published 2011

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Parkinson, Patrick.

Family law and the indissolubility of parenthood / Patrick Parkinson.

p. cm.

Includes index.

ISBN 978-0-521-11610-7 (hardback)

1. Domestic relations. 2. Divorce – Law and legislation.

3. Custody of children. I. Title.

K670.P375 2011

346.01'5–dc22 2010043976

ISBN 978-0-521-11610-7 Hardback

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In memory of Kari Theobald

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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

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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

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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,

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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.

This research was supported by a Discovery Project Grant from the Australian Research Council, DP0450827. The research on relocation, referred to in Chapter 7, was supported by two Discovery Project Grants from the Australian Research Council, project numbers DP0665676 and DP0988712. I am most grateful to the Council for this financial support.

Sydney, Australia

October 2010