This book provides a critical examination of and reflection on the American Law Institute's Principles of the Law of Family Dissolution: Analysis and Recommendations, arguably the most sweeping proposal for family law reform attempted in the U.S. over the last quarter century. The volume is a collaborative work of individuals from diverse perspectives and disciplines who explore the fundamental questions about the nature of family, parenthood, and child support. The contributors are all recognized authorities on aspects of family law and provide commentary on the principles examined by the ALI – fault, custody, child support, property division, spousal support, and domestic partnerships, utilizing a wide range of analytical tools, including economic theory, constitutional law, social science data, and linguistic analysis. This volume also includes the perspectives of U.S. judges and legislators and leading family law scholars in the United Kingdom, Europe, and Australia.

Robin Fretwell Wilson is a Professor of Law at the University of Maryland School of Law. She is the co-editor of The Handbook of Children, Culture & Violence and has published articles on the risks of abuse to children in the Cornell Law Review, the Emory Law Journal, the San Diego Law Review, and the Journal of Child and Family Studies. Professor Wilson has testified on the use of social science in legal decision-making in Joint Hearings before the Federal Trade Commission and Department of Justice. A member of the Executive Committee of the Family and Juvenile Law Section of the Association of American Law Schools, Professor Wilson frequently lectures on violence to children, including presentations at Yale University’s Edward Zigler Center for Child Development and Social Policy and the National Society for the Prevention of Cruelty to Children in London, England.
Reconceiving the Family

Critique on the American Law Institute’s
Principles of the Law of Family Dissolution

Edited by

Robin Fretwell Wilson

University of Maryland School of Law
In Memory of Our Colleagues,

Lee Teitelbaum and David Westfall
## Contents

Acknowledgments  page xi  
Foreword, by Mary Ann Glendon  xiii  
List of Contributors  xvii  

### Introduction
Robin Fretwell Wilson  1

### PART ONE. FAULT

1 Beyond Fault and No-Fault in the Reform of Marital Dissolution Law  9  
   Lynn D. Wardle  
2 A City without Duty, Fault, or Shame  28  
   Scott FitzGibbon  

### PART TWO. CUSTODY

3 Partners, Caregivers, and the Constitutional Substance of Parenthood  47  
   David D. Meyer  
4 Custody Law and the ALI's Principles: A Little History, a Little Policy, and Some Very Tentative Judgments  67  
   Robert J. Levy  
5 Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents  90  
   Robin Fretwell Wilson  

### PART THREE. CHILD SUPPORT

6 Asymmetric Parenthood  121  
   Katharine K. Baker  
7 Paying to Stay Home: On Competing Notions of Fairness and the Imputation of Income  142  
   Mark Strasser  

### PART FOUR. PROPERTY DIVISION

8 The ALI Property Division Principles: A Model of Radical Paternalism?  163  
   John DeWitt Gregory
## Contents

### Unprincipled Family Dissolution: The ALI’s Recommendations for Division of Property  ............................................................ 176  
David Westfall

### You and Me against the World: Marriage and Divorce from Creditors’ Perspective .................................................. 195  
Marie T. Reilly

### PART FIVE. SPOUSAL SUPPORT

#### Back to the Future: The Perils and Promise of a Backward-Looking Jurisprudence  ........................................ 209  
June Carbone

#### Money as Emotion in the Distribution of Wealth at Divorce ............. 234  
Katharine B. Silbaugh

#### Postmodern Marriage as Seen through the Lens of the ALI’s “Compensatory Payments”  ........................................ 249  
Katherine Shaw Spaht

### PART SIX. DOMESTIC PARTNERSHIP

#### Domestic Partnership and Default Rules  ...................................... 269  
Margaret F. Brinig

#### Private Ordering under the ALI PRINCIPLES: As Natural as Status  ........ 284  
Martha M. Ertman

#### Marriage Matters: What’s Wrong with the ALI’s Domestic Partnership Proposal ........................................ 305  
Marsha Garrison

#### Domestic Partnerships, Implied Contracts, and Law Reform  .......... 331  
Elizabeth S. Scott

### PART SEVEN. AGREEMENTS

#### The PRINCIPLES and Canada’s “Beyond Conjugality” Report: The Move towards Abolition of State Marriage Laws  ............. 351  
Jane Adolphe

#### The ALI PRINCIPLES and Agreements: Seeking a Balance between Status and Contract  ........................................ 372  
Brian H. Bix

#### The PRINCIPLES on Agreements: “Fairness” and International Human Rights Law  ........................................ 392  
Barbara Stark

### PART EIGHT. JUDICIAL AND LEGISLATIVE PERSPECTIVES

#### A Formula for Fool’s Gold: The Illustrative Child Support Formula in Chapter 3 of the ALI’s PRINCIPLES  ......................... 409  
Maura D. Corrigan
Contents

22  A Response to the Principles’ Domestic Partnership Scheme ........ 425
Jean Hoefer Toal

PART NINE. INTERNATIONAL REFLECTIONS

23  Empowerment and Responsibility: The Balance Sheet Approach
in the Principles and English Law ............................. 433
John Eekelaar

24  The Past Caretaking Standard in Comparative Perspective .......... 446
Patrick Parkinson

25  Compensating Gain and Loss in Marriage: A Scandinavian Comment
on the ALI Principles ..................................... 472
Tone Sverdrup

Afterword: Elite Principles: The ALI Proposals and the Politics of Law Reform, by Carl E. Schneider 489

Index 507
Acknowledgments

I am grateful to Mary Ann Glendon for believing in this project, for chairing the October 2004 Workshop entitled “Critical Reflections on the American Law Institute’s Principles of the Law of Family Dissolution” at Harvard Law School at which many of us refined our chapters, and for her quiet cheerleading throughout. I am also grateful to Carl Schneider for letting me take a page from his Workshop playbook. It is entirely appropriate that Mary Ann and Carl form the “book-ends” for this volume since it could not have happened without either of them.

I am indebted to the University of Maryland School of Law for providing a team of research assistants without whom this volume could not have been completed within my lifetime. Michael Clisham, Kevin Madagan, and Mikaela Rossman devoted an entire year to this project, while Tamiya Baskerville, Asher Chancery, Kristen King, Jennifer Martin, Rahul Narula, Mona Shah, Amy Siegel, and DeYvonne Whitehead poured themselves into refining the final manuscript. Susan McCarty, Susan Herrick, and the late Ryan Easley of the University of Maryland Law Library provided citation verification and legal research. Yvonne McMorris provided tireless secretarial assistance and, more importantly, moral support throughout this project. Jack Duncan provided expert assistance during the editing cycle, which was made through support from the Institute for American Values. My former colleagues at the University of South Carolina also provided support and encouragement for this volume, both while I was with them at USC and well after I left. David Owen provided invaluable guidance on publishing an edited collection.

I am thankful for John Berger’s advice in the formative stages of this project and for Ken Karpinski’s careful, thoughtful copy-editing. I was especially sorry that Lee Teitelbaum could not join us at Harvard as originally planned, but am thankful to him for his warm support of this project and his mentoring.

I am indebted to the Family Law Council of the Institute for American Values for its generous support of the October 2004 Workshop, out of which came the corpus of this volume. I am especially grateful to David Blankenhorn for his commitment to bringing together interesting people who have something interesting to say, and letting them say it. Finally, I am indebted to and admiring of the American Law Institute and the reporters for the Principles of the Law of Family Dissolution, Professors Ira Ellman, Grace
Acknowledgments

Blumberg, and Katherine Bartlett, for what is arguably the most significant family law reform attempted in generations.

This is for the Dream Team: Mark Ancell, Michael Clisham, Jack Duncan, Jennifer Hilker, Pamela Melton, and Ken Wilkinson. I could not have done it without you. And, of course, this is for Glen.
Foreword

Mary Ann Glendon

The late twentieth century was a time of unprecedented changes in family behavior, family law, and ideas about marriage and family life. Starting in the mid-1960s, in North America, Europe, and Australia, a quake erupted across the whole set of demographic indicators. It came on so rapidly that it caught even professional demographers by surprise: birth rates and marriage rates fell, while divorce rates, births of children outside marriage, and the incidence of nonmarital cohabitation rose steeply. The director of the French National Demographic Institute characterized the changes as widespread, profound, and sudden: widespread, because so many nations had been affected; profound, because the changes involved increases or decreases of more than 50 percent; and sudden, because they took place in less than twenty years. Along with changes in family behavior came less quantifiable but no less momentous shifts in the meanings that men and women attribute to sex and procreation, marriage, gender, parenthood, kinship relations, and to life itself.

These developments were part and parcel of social processes that Francis Fukuyama has described collectively as “The Great Disruption”: rising affluence, accelerating geographical mobility, increasing labor force participation of women (including mothers of young children), more control over procreation, and greater longevity. By the 1990s, the demographic indicators had more or less stabilized, but they have remained near their new high or low levels, registering only modest rises or declines since then. The legal and social landscape had been utterly transformed. Familiar landmarks had disappeared. We were living in a new world.

With hindsight, the question arises as to whether those years of turbulence provided a favorable climate for law revision. The fact is, however, that family law systems were completely overhauled, often very hastily, in the 1970s and 80s. Family law became a testing ground for various ways of reimagining family relations, and an arena for struggles among competing ideas about individual liberty, human sexuality, marriage, and family life. Many unforeseen developments, notably a sharp increase in poor, fatherless families, now seem to have been influenced by legal changes that were often presented as merely “adapting the law to social reality.” Relatively little attention was paid to the ways in which law also helps to shape social reality.

Of the legal developments that have transformed family law, several represent pronounced departures from past arrangements: the reconceptualization of marriage and the family under the influence of ideas about gender equality, individual rights, and neutrality toward diverse lifestyles; the trend toward lessened state regulation of marriage formation and dissolution as such (i.e., fewer restrictions on entry into marriage and fewer obstacles to terminating marriage); and, despite the rise of “children’s rights,” the creation of a more adult-centered system of family law.

When the entire complex of changes is viewed together, it is apparent that the story the law tells about family life has been substantially rewritten. The legal narrative now places much more emphasis on the rights of individual family members than on familial responsibilities. Marriage is treated less as a necessary social institution designed to provide the optimal environment for child rearing than as an intimate relationship between adults. This historic transition has taken place through piecemeal changes, with little deliberation concerning the likely social consequences of weakening the connections between marriage as a couple and marriage as a child-raising partnership.

In short, the affluent western nations have been engaged in a massive social experiment—one that has opened many new opportunities and freedoms to adults, but one that presents new risks where children and other dependents are concerned. By ratifying many changes in the sexual mores and marriage behavior of large numbers of adults, the law has played its role in transforming the very experience of childhood. An unprecedented proportion of children are now spending all or part of their childhoods in fatherless homes, often in poverty. In fact, female-headed families created by divorce, desertion, or single parenthood now constitute the bulk of the world’s poverty population. As for intact child-raising families, their standard of living is generally lower than that of childless households, especially if the mother stays home to care for the children.

The political obstacles to more child-oriented policies, moreover, have increased. For, as the proportion of childless households grows, the culture has become ever more adult centered. With declining birth rates, children are less visible in everyday life; adults are less likely to be living with children; and neighborhoods less likely to contain children. Support for measures that might address the needs of child-raising families becomes harder to rally. As the old saying goes, “Out of sight, out of mind.”

It thus seems evident that among the most pressing issues for family law and policy in the future will be those arising from the impaired ability of families to socialize the next generation of citizens, and the diminished capacity of society’s support institutions (families, government, mediating structures of civil society) to furnish care for the very young and other dependent persons. Even advanced welfare states still rely heavily on families for the care of the young, the frail elderly, the sick, and the severely disabled, but the capacity of families to perform these functions has been dramatically reduced everywhere. No society, for instance, has yet found a substitute for the care, services, and support formerly furnished by the unpaid labor of women. As the baby boom generation approaches retirement age, it is becoming apparent that the combination of declining birth rates, greater longevity, and shortage of caretakers has brought health care and pension systems to the brink of crisis.

---

Foreword

What makes all these problems especially thorny is that their resolution will require finding a just balance among competing goods. After all, many of the developments that have weakened legal and social family ties are unintended consequences of freedoms that modern men and women prize. No one, for example, wants to roll back the clock on women's rights. The challenges are thus formidable: How can society take account of children's needs (and the preferences of many, perhaps most, mothers) while still providing equal opportunities to women? How can society respond to the needs of persons in broken or dysfunctional families while strengthening, or at least not undermining, the stable families upon which every society depends for the socialization of its future work force and citizenry? How can policy makers develop adequate responses to families currently in distress while shifting probabilities so that fewer families will find themselves in distressed circumstances in the future? When do the advantages for individuals of unprecedented freedom begin to be outweighed or nullified by the social costs of the cumulative effects of individual choices on social and family life?

By the time the American Law Institute completed its Principles of the Law of Family Dissolution in 2002, family law had already been substantially transformed in all western legal systems. The Principles consolidated many of the transformative trends and recommended further, far-reaching changes. Thus, the present volume, with its comprehensive appraisal of that ambitious undertaking, could not have appeared at a more propitious moment. Now that we are in a period of relative demographic equilibrium, the time is ripe for analysis of how various innovations have worked out in practice, for evaluation of their consequences, and for charting future directions that will benefit individuals, families, the dependent population, and society as a whole. These are matters that need to be widely discussed and deliberated, not only among specialists, but among the people most directly affected. How fortunate we are, then, to have this rich collection of essays by so many distinguished judges, practitioners, and scholars. Their diverse viewpoints will surely raise the level of the national conversation about where family law has been, where it is now, and where it ought to be headed.
List of Contributors

Jane F. Adolphe is an Associate Professor of Law, Ave Maria School of Law. Her research largely concerns issues pertaining to the family and international law.

Katharine K. Baker is a Professor and Associate Dean at Chicago-Kent College of Law. She is the author of numerous articles on family law, feminism, and sexual violence.


Margaret F. Brinig is the William G. Hammond Professor of Law at the University of Iowa College of Law. She has written a number of books, including From Contract to Covenant: Beyond the Law and Economics of the Family (2000), and many articles on family law.

June Carbone is the Associate Dean for Professional Development, and a Professor of Law at Santa Clara University. She served as Presidential Professor of Ethics and the Common Good at the University's Markkula Center for Applied Ethics from 2001 to 2003. She is the author of From Partners to Parents: The Second Revolution in Family Law (2000) and the third edition of Family Law (2005) with Leslie Harris and the late Lee Teitelbaum.

Justice Maura D. Corrigan was elected to the Michigan Supreme Court in 1998 and was the Chief Justice of that Court from 2001–2004. She currently serves on the Pew Commission on Children in Foster Care and on the U.S. Department of Health & Human Services’ Advisory Task Force on Child Support. Previously, while a member of the Conference of Chief Justices, she co-chaired the Problem Solving Courts Committee.

John Eekelaar is a Fellow of Pembroke College, Oxford and was Reader in Family Law at Oxford University until 2005. He has written and researched on family law for many years. He is co-director of the Oxford Centre for Family Law and Policy, and a Fellow of the British Academy. He is now Academic Director of Pembroke College.

Martha M. Ertman is a professor at the University of Utah’s S.J. Quinney College of Law. She is the author of a number of law review articles bridging commercial and family law, and edited the book Rethinking Commodification: Readings in Law & Culture (2005) with Joan Williams.

Scott FitzGibbon is a professor at Boston College Law School, a member of the American Law Institute, and a member of the International Society of Family Law. One of his major scholarly interests is jurisprudence and legal philosophy, with special attention to friendship and marriage in the Aristotelian tradition.

Marsha Garrison is Professor of Law at Brooklyn Law School. She is the coauthor of Family Law: Cases, Comments and Questions (5th ed. 2003) and has written many articles on a diverse range of family law issues.


John DeWitt Gregory is the Sidney and Walter Siben Distinguished Professor of Family Law at Hofstra University. He is the author or co-author of several books, including Property Division in Divorce.
Contributors

She is the author of a treatise on community property and three textbooks on family law and successions. She has authored numerous articles and chapters in books on the subject of marriage.

Barbara Stark. Professor of Law at Hofstra Law School, is the author of International Family Law: An Introduction (2005), editor of Family Law and Gender Bias: Comparative Perspectives (1992), and the author of over fifty articles and chapters on family law and human rights law.

Mark Strasser is the Trustees Professor of Law at Capital University Law School in Columbus, Ohio. He is the author of several books including On Same-Sex Marriage, Civil Unions, and the Rule of Law: Constitutional Interpretation at the Crossroads (2002) and Legally Wed: Same-Sex Marriage and the Constitution (1997).

Tone Sverdrup is Professor of Law, Faculty of Law, University of Oslo. She is the author of several books, including one on co-ownership in marriage and unmarried cohabitation, and the standard family law textbook in Norway (co-authored with Professor Peter Lodrup).

Jean Hoefer Toal is the Chief Justice of the Supreme Court of South Carolina and a former member of the South Carolina House of Representatives. She is the author of numerous law review articles and other scholarly works.

Lynn D. Wardle is a Professor of Law at the J. Reuben Clark Law School of Brigham Young University. He is a past president of the International Society of Family Law, and the author, co-author, or co-editor of many books and law review articles mostly addressing issues of family law, including Marriage and Same-Sex Unions: A Debate (Lynn D. Wardle et al. eds., 2003).


Robin Fretwell Wilson is a Professor of Law at the University of Maryland School of Law and a member of the Executive Committee of the Family and Juvenile Law Section of the Association of American Law Schools.