

# AVOIDING UNNECESSARY DIVORCE AND RESTORING JUSTICE IN MARITAL SEPARATIONS - REVIEW OF THE FAMILY LAW ACT 1975 (FLA)

CHRISTOPHER BROHIER\* AND AUGUSTO ZIMMERMANN<sup>+</sup>

## ABSTRACT

*The concept of no-fault divorce which became law in Australia in 1975 was part of a revolution in divorce law reform which swept through the western world in the late 1960s and 1970s. It was predicated on a notion that the law should aim to buttress marriage, but if the marriage was finished in fact, the law should “enable the empty legal shell to be destroyed with the maximum fairness, and minimum bitterness, distress and humiliation.” Property would be divided on a “once for all” basis, the children, though not physically divided, would be apportioned between a “custodial” parent and an “access” parent, and the parties could start afresh. However, the last 40 years have shown that the assumption that the parties could be autonomous after divorce was wrong. The development of family law has shown that while a marriage may be dissolved, parenthood is indissoluble. The idea of the “enduring family” has emerged. However, there has not been a corresponding re-evaluation of concept of no-fault divorce or of the basic grounds for divorce. It is time this was done.*

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\* LLB (Hons), Adelaide, GDLP, S.A.I.T.

<sup>+</sup> LLB, LL.M, PhD (Mon.); Professor of Law (adjunct), The University of Notre Dame Australia Sydney; Senior Lecturer in Constitutional Law and Legal Theory, Murdoch Law School.

## I INTRODUCTION

The concept of no-fault divorce which became law in Australia in 1975 was part of a broader revolution in divorce law reform which swept through the western world in the late 1960s and 1970s.<sup>1</sup> It was predicated on a notion that the law should aim to buttress marriage, but if the marriage was finished in fact, the law should ‘enable the empty legal shell to be destroyed with the maximum fairness, and minimum bitterness, distress and humiliation’.<sup>2</sup>

Regrettably, many countries, Australia included, became part of this revolution without properly considering the financial consequences.<sup>3</sup> Writing perceptively in 1985, a British academic Pamela Symes noted that amidst all the debate in relation to divorce law reform, a question that was not considered was how was it all to be paid for?<sup>4</sup>

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<sup>1</sup> FLA section 48-irretrievable breakdown on marriage if the parties have lived separately and apart for a continuous period of not less than 12 months.

<sup>2</sup> Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* 10, CMND 3123 (1966).

<sup>3</sup> Patrick Parkinson, *Another Inconvenient Truth: Fragile Families and the Looming Financial Crisis for the Welfare State*, Sydney Law School Legal Studies Research Paper 12/05 January 2012  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1992740](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1992740)> accessed 21 July 2014.

<sup>4</sup> P. Symes, *Indissolubility and the Clean Break*, 48 *Modern Law Review* 44 (1985); referred to in Patrick Parkinson, *Family Law and the Indissolubility of Parenthood*, Sydney Law School Legal Studies Research Paper No. 06/31 October 2006 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=938020](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=938020)> accessed 21 July 2014.

Further, a philosophical underpinning of the no-fault revolution was that after the divorce, the parties could make a fresh start to their lives. There would be, in addition to the divorce, a once for all settlement of property matters and even in relation to matters involving children. The courts not only allocated property, but children, and that on a binary basis. One parent was granted “custody” and the other limited visiting rights or “access.” Once those issues were settled, the parties could be autonomous.<sup>5</sup>

The past 39 years have shown that the rise in divorce has thrown a significant and probably unsustainable burden on the public purse in the areas where the Australian (and other western nations) budgets are most vulnerable – namely the issues of aged care, health and youth affairs. Those years have also shown that the assumption that the parties could be autonomous after divorce was wrong. The development of family law has shown that while a marriage may be dissolved, parenthood is actually indissoluble. The idea of the “enduring family” has emerged.<sup>6</sup> However, there has not been a corresponding re-evaluation of concept of no-fault divorce or of the basic grounds for divorce. It is time this was done.

This paper discusses the costs of divorce and the imperative that those costs have created for government policy to be aimed at avoiding unnecessary divorces. It then discusses the reality of the enduring family and the impact that should have on family policy. Finally, it discusses some ideas for avoiding unnecessary divorces, including a deviation from the concept of no-fault divorce.

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<sup>5</sup> Parkinson, above n 3, 4.

<sup>6</sup> Irène Théry, ‘*The Interest of the Child’ and the Regulation of the Post-Divorce Family*, 14 Int’l. J. Soc. L. 341 (1986), referred to Parkinson, above n 3, 5.

## II THE COSTS OF DIVORCE

Divorce is a matter of private law. Why then should governments be interested in lessening divorces? The answer, which may not have been appreciated at the start of the no-fault revolution, is that the costs imposed by family breakdown are being borne by the public purse. According to Professor Patrick Parkinson:

A British study found the costs of family breakdown were £41.74 billion in 2011, or £1,364 for every taxpayer. A Canadian study, published in 2009, estimated the costs in that country as 7 billion Canadian dollars per year. A US study estimated the costs of family breakdown and unmarried parenthood in 2008 as being at least \$112 billion per year. There is of course plenty of scope for argument about the detail, but the broad picture is clear. Such calculations do not include the less measurable costs such as the intergenerational impacts considered in this Article. The human costs are, of course, immeasurable.<sup>7</sup>

No doubt the same order of costs, *per capita*, will apply in Australia. Accordingly, and especially in times of budgetary constraints, where all sides of politics accept that there need to be structural savings in Australia's budgetary situation (a matter which is in common with all western nations) it is eminently proper that avoiding unnecessary divorces becomes a public policy objective.

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<sup>7</sup> Parkinson Above n 4, 23.

There are tremendous costs all around when marriages break up. First, divorce increases economic vulnerability of adults and children, reducing many of them to poverty and deprivation.<sup>8</sup> According to Matthew Bambling, a relationship expert from the University of Queensland, divorce is a primary source of poverty among the working people. Because of divorce, Dr Bambling explains, ‘people may be required to rely in greater part on the social welfare system, [and] there is the potential for court costs borne through the government-funded system’.<sup>9</sup>

Indeed, figures from Monash University’s *Centre for Population and Urban Research* reveal that family break-up constitutes the *primary cause* of the current rise in poverty levels in Australia.<sup>10</sup> The Centre’s research has found an undeniable link between single-parent families and the prospect of poverty.<sup>11</sup> This is fully confirmed by Canberra University’s *National Centre for Social and Economic Modelling*, which carried a research concluding that divorce generally leaves both partners much

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<sup>8</sup> See, for example, P J Smock, W D Manning and S Gupta, ‘The Effect of Marriage and Divorce on Women’s Economic Well-Being’ (1999) 64(6) *American Sociological Review* 794. See also R Finie, ‘Women, Men and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data’ (1993) 30(2) *Canadian Review of Sociology and Anthropology* 205; T A Mauldin, ‘Women Who Remain Above the Poverty Level in Divorce: Implications for Family Policy’ (1990) 39(2) *Family Relations* 141.

<sup>9</sup> Lauren Wilson and Lisa Cornish, ‘Divorce is costing the Australian economy \$14 billion a year’, News Corp Australia, July 6, 2014, at <<http://www.theaustralian.com.au/news/divorce-is-costing-the-australian-economy-14-billion-a-year/story-e6frg6n6-1226979027353?nk=1db67301adc56c5b7c22cb13b14ae7a5>>.

<sup>10</sup> M Seccombe, ‘Break-ups the Main Cause of Poverty’, *The Sydney Morning Herald*, 22 September 1997, 6.

<sup>11</sup> B Birrel and V Rapson ‘More Single Parents Equals More Poverty’, *News Weekly*, Melbourne, Vic, October 18, 1997, 8.

worse off economically, although women tend to experience the biggest fall in disposable outcome.<sup>12</sup>

There are therefore significant economic consequences of the ‘divorce revolution’. Social indicators released by the *Australian Bureau of Statistics* indicate that more than half of all the single parents in the country live on government welfare. In other words, they depend on the state’s financial assistance to maintain their most basic living standards.<sup>13</sup> According to the information released by the federal Attorney-General’s Department, in conjunction with the Department of Human Services and the Department of Social Services, in the last financial year alone the Commonwealth Government spent \$12.5 billion on support payment to single parents, including rent assistance and other government-funded benefits.<sup>14</sup> These family breakdowns cost the Australian economy more than \$14 billion a year, with each Australian taxpayer paying about \$1,100 a year to support families in crisis.<sup>15</sup>

This article now examines 3 areas where costs are imposed on the public purse by divorces: the areas are aged care, health and youth affairs.

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<sup>12</sup> S Anon, ‘Divorce Shrinks Income’, *The Herald Sun*, Melbourne, April 6, 2005, 29.

<sup>13</sup> Quoted from S Baskett, ‘Half of Single Parents on Welfare’, *The Herald Sun*, Melbourne, June 20, 2000, 8.

<sup>14</sup> Lauren Wilson and Lisa Cornish, ‘Divorce is costing the Australian economy \$14 billion a year’, News Corp Australia, July 6, 2014, at <http://www.theaustralian.com.au/news/divorce-is-costing-the-australian-economy-14-billion-a-year/story-e6frg6n6-1226979027353?nk=1db67301adc56c5b7c22cb13b14ae7a5>.

<sup>15</sup> Lauren Wilson and Lisa Cornish, ‘Divorce is costing the Australian economy \$14 billion a year’, News Corp Australia, July 6, 2014, at <http://www.theaustralian.com.au/news/divorce-is-costing-the-australian-economy-14-billion-a-year/story-e6frg6n6-1226979027353?nk=1db67301adc56c5b7c22cb13b14ae7a5>.

### III AGED CARE

The *Australian Institute of Family Studies* paper entitled ‘The Consequences of Divorce for Financial Living Standards in Later Life’<sup>16</sup> found that; ‘on average, having been divorced has negative consequences for income and financial circumstances in older age. However, the negative financial impacts of divorce are substantially reduced by remarriage’.<sup>17</sup> However, as the rates of re-marriage have fallen significantly,<sup>18</sup> the ameliorative impact of remarriage may not be available to many divorced people.

The adverse financial impacts of divorce were reflected in lower rates of home ownership for those who have been divorced as against those who have never divorced, and in a finding that ‘divorced singles were more reliant on the public pension than those who had not divorced...’.<sup>19</sup> Further, the study found that the increased reliance on the pension by divorced singles ‘has important implications for the financing of retirement incomes in Australia in coming decades and the extent to which the taxpayer will have to bear the costs of providing for retirement incomes’.<sup>20</sup>

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<sup>16</sup> David de Vaus, Matthew Gray, Lixia Qu and David Stanton, Research Paper N.38, February, 2007.

<sup>17</sup> Ibid (ix).

<sup>18</sup> Kevin Andrews, *Maybe I do*, Connor Court Publishing 2012, 171–172.

<sup>19</sup> Above n 7, (xi).

<sup>20</sup> Ibid.

The lower rates of home ownership will also impact on the costs of providing aged care, as it increases the likelihood of those person having to be cared for in institutions at greater cost to the community and decreases the number of persons who are able to pay bonds to aged care institutions, to make some contribution toward the cost of institutional care. These findings are obviously unsurprising since the inevitable effect of divorce is that two households are created when before there was one. As Professor Parkinson points out:

People cannot go from one household into two households, with a duplication of housing costs, furnishings and appliances, and other such expenses, without suffering a significant loss of living standards.<sup>21</sup>

Professor Parkinson also points to another aspect in which divorces increase the costs of aged care, albeit in a hidden way. That is that divorce reduces the capacity of adults in mid-life to care for the older generation. The support given to elderly parents is multifaceted and of common knowledge. It takes to form of assisting with shopping, cleaning, paperwork, finances and medical appointments to name but a few. Such informal support is vital in ‘reducing the necessity for the elderly to go into institutional care, or in delaying that eventuality’.<sup>22</sup>

This burden of care for the elderly has often fallen on women.<sup>23</sup> However, as separated and divorced women have taken an increased role in the workforce in the last two decades to be the sole breadwinner for the family (as well as caring for the children), their capacity to care for their

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<sup>21</sup> Parkinson, above n 4, 11–12.

<sup>22</sup> Ibid 19.

<sup>23</sup> L. Brewer, *Gender Socialization and the Cultural Construction of Elder Caregivers*, 15 J, Aging Stud. 217 (2001).



elderly parents has decreased. Finally, of course, divorce also removes much of the sense of obligation one party may have had to care for their parents-in-law.<sup>24</sup>

This means that the burden of providing the services to keep people in their own homes, or the greater burden of providing institutional care, falls more on the public purse. At a time when the costs of aged care including the pension are one of the largest items in the budget,<sup>25</sup> it is imperative that efforts be made to ameliorate these financial impacts of divorce.

#### IV HEALTH

Australian research has found that there are large health differences between married men and women and men and women who are separated or divorced or widowed.<sup>26</sup> The latter have greater mortality rates, more acute symptoms and mental health problems than the former.<sup>27</sup> As one researcher said:

I'm pretty sure that one reason men live approximately eight years longer if they are married (and are otherwise healthier in various ways) is that their wives tell them what to do and they do some of what their wives tell them.<sup>28</sup>

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<sup>24</sup> Parkinson, above n 4, 20–21.

<sup>25</sup> Speech by the Treasurer Mr Joe Hockey reported in Sydney Morning Herald 23 April 2014 <<http://www.smh.com.au/federal-politics/political-news/nothing-is-free-joe-hockey-warns-of-budget-pain-with-pensions-in-the-firing-line-20140423-zqyag.html>> accessed 21 July 2014.

<sup>26</sup> 'Married Live Longer-new Australian data' (2008) *Threshold* 94: 3, citing Australian Bureau of Statistics, Causes of death, 2006, SH Lee *et al* (1987) Health differences among working age Australians [Canberra: Australian Institute of Health]-referred to in Andrews note 11 above at notes 127 and 128.

<sup>27</sup> *Ibid.*

<sup>28</sup> Scott M Stanley (2005) What is it with men and commitment anyway? *Threshold* 83:4-11; noted in Andrews above n 11, 36.

No doubt this operates *vice-versa*. There are considerable health issues for women caused by marriage breakdown. Researchers affiliated with the University of New South Wales, the University of Sydney and Griffith University have concluded that, compared to their married peers, single mothers are almost twice as likely to report health conditions.<sup>29</sup> After reviewing 111 relevant studies conducted between 1999 and 2010, these researchers empirically determined that both divorce and sole motherhood are directly associated with higher levels of depression and poor health among women. These researchers conclude that awareness that women who have experience divorce and sole motherhood are most at risk of depression, 'is vitally important'.<sup>30</sup> Whilst stating that depression is often attributable to financial stress provoked by marriage dissolution, they observe that being in a stable relationship provides women a much better protection against depression and poor health. According to them:

For all age groups and stages of life, trauma and stressful life events were consistently associated with depression. ... In addition findings concluded that separation and divorce is associated with depression; as is sole motherhood. However, being in an intimate relationship provides protection against depression.<sup>31</sup>

Similarly, a 2009 study has linked lower blood pressure readings to being married, compared to those who are not married.<sup>32</sup> The differential is particularly evident in suicide rates. Kate Fairweather-Schmidt et al in their significant study 'Baseline factors predictive of serious suicidality at

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<sup>29</sup> J R Rich, J M Byrne, C Curryer, J E Byles and D Loxton, 'Prevalence and Correlates of Depression Among Australian Women: Systematic Literature Review, January 1999 – January 2010' (2013) 6 *BMC Research Notes* 1, 13.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid 4.

<sup>32</sup> 'Aisle lowers the blood pressure' (2009) *Threshold* 97:4; referred to in Andrews above n 11, 34.

follow-up: findings focussing on age and gender from a community based study<sup>33</sup> found that the risk of suicide among the divorced, separated and widowed is about 75% more than for the married. Such findings are common in the research field determining whether ‘relationship breakdown is one of the major causes of suicide worldwide’.<sup>34</sup>

Again, these findings are unsurprising since the emotional trauma associated with divorce means that the parties are often under severe distress. Further, the adverse financial impact caused by divorce inevitably means that those involved have less to spend on health and related matters.

## V YOUTH AFFAIRS

There is now widespread consensus that children who live with their two biological married parents do better across the board than children in other forms of families. An American academic, Professor Susan Brown recently reviewed the evidence and concluded:

Over the past decade, evidence on the benefits of marriage for the well-being of children has continued to mount. Children residing in two-biological-parent married families tend to enjoy better outcomes than do their counterparts raised in other family forms. The differential is modest but consistent and persists across several domains of well-being. Children living with two biological married parents experience better educational, social, cognitive, and behavioral outcomes than do other children, on average. Variation in well-being among children living outside of two-biological-parent married families (e.g., married step, cohabiting, and single-parent families) is comparatively low and often

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<sup>33</sup> (2010) *BioMed Central Psychiatry* 12:41 referred to in Andrews above n 37.

<sup>34</sup> F McAllister (ed) (1995) *Marital breakdown and the Health of the Nation* [London, One plus One] referred to in Andrews above n 11, 36.

negligible. The benefits associated with marriage not only are evident in the short-term but also endure through adulthood.<sup>35</sup>

According to Professor Paul Amato, a leader in this field of research, ‘research during the last decade continued to show that children with divorced parents, compared with children with continuously married parents, score lower on a variety of emotional, behavioral, social, health, and academic outcomes, on average’. According to him, ‘[a]lthough many of these studies replicate earlier findings, they are useful in showing that the links between divorce and forms of child well-being have remained relatively constant across decades’.<sup>36</sup> In a seminal 2005 study entitled ‘The Impact of Family Formation Change on the Social, Cognitive and Emotional Well-Being of the Next Generation’, Professor Amato commented:

In 2002 there were about 29 million children in the United States between the ages of twelve and eighteen—the age range covered in table 1.68 Table 2 indicates that nearly 7 million children in this age group will have repeated a grade. Increasing the share of adolescents living with two biological parents to the 1980 level... suggests that some 300,000 fewer children would repeat a grade. Correspondingly, increasing the share of adolescents living with two biological parents to the 1970 level... would mean that 643,264 fewer children would repeat a grade. Finally, increasing the share of adolescents in two-parent

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<sup>35</sup> S. Brown, *Marriage and Child Well-Being: Research and Policy Perspectives* 72 J. *Marriage and Family* 1059, 1062 (2010) (references omitted).

<sup>36</sup> P. Amato, *Research on Divorce: Continuing Trends and New Developments*, 72 J. *Marriage and Family* 650, 653 (2010). McLanahan and Percheski have reported that: “A large body of research indicates that living apart from a biological parent (typically the father) is associated with a host of negative outcomes that are expected to affect children’s future life chances or ability to move up the income ladder.” Sara McLanahan and Christine Percheski, *Family Structure and the Reproduction of Inequalities*, 34 *Annual Rev. Sociology* 257, 264-265 (2010). Notes 25-27 are referred to in Parkinson above n 4, 27.

families to the 1960 level suggests that nearly three-quarters of a million fewer children would repeat a grade. Similarly, increasing marital stability to its 1980 level would result in nearly half a million fewer children suspended from school, about 200,000 fewer children engaging in delinquency or violence, a quarter of a million fewer children receiving therapy, about a quarter of a million fewer smokers, about 80,000 fewer children *thinking about suicide*, and about 28,000 fewer children attempting suicide. Seen from this perspective, restoring family stability to levels of a few decades ago could dramatically affect the lives of many children.<sup>37</sup>

These statistics raise great concern once it is realised that they represent young lives. These lives are fully documented in the landmark 25 year study of children of divorce by Professor Judith Wallerstein et al entitled ‘The Unexpected Legacy of Divorce’.<sup>38</sup> One such ‘child of divorce’ stated:

We define ourselves as children of divorce. ... I guess you might say that our parents’ divorce was the formative event of our lives...The divorce is a permanent part of me and in some ways I’ll never get over it.<sup>39</sup>

The effect of divorce in these young people is not only in relation to issues like school performance, but in their ability to enter into solid relationships in their own adult lives. The same young person said:

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<sup>37</sup> (2005) *The future of Children* 15:88-89  
<<http://www.princeton.edu/futureofchildren/publications/journals/article/index.xml?journalid=37&articleid=107&sectionid=693>> accessed 22 July 2014.

<sup>38</sup> Judith Wallerstein et al, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* (New York/NY: Hyperion, 2000).

<sup>39</sup> *Ibid* 291.

Look at it this way. I grew up unprepared for adult relationships especially for being a woman with a man. No one taught me what I could expect or ask for.<sup>40</sup>

Professor Wallerstein is a psychologist and a leading authority on the long-term effects of divorce on children in the United States. She began her empirical research in the early 1970s, initially assuming that the effects of divorce on children were short-lived. To her own dismay, her empirical study led Professor Wallerstein to conclude that serious emotional problems follow the children from divorced parents throughout their adolescence and even adulthood. Indeed, almost half of these children are ‘worried, underachieving, self-deprecating and sometimes angry’.<sup>41</sup> She sobbingly concluded:

National studies show that children from divorced and remarried families are more aggressive toward their parents and teachers. They experience more depression, have more learning difficulties, and suffer from more problems with peers than children from intact families. Children from divorced and remarried families are two to three times more likely to be referred for psychological help at school than their peers from intact families. More of them end up in mental health clinics and hospital settings ... Numerous studies show that adult children of divorce have more psychological problems than those raised in intact marriages.<sup>42</sup>

As with the other issues discussed above, these findings should not surprise anyone. They are the logical result of legal and sociological

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<sup>40</sup> Ibid.

<sup>41</sup> Judith Wallerstein, ‘The Long-Term Effects of Divorce on Children: A Review’, (1991) 30 *Journal of the American Academy of Child and Adolescent Psychiatry* 349-60.

<sup>42</sup> Above n 38, xxvii.

theories coming into conflict with the irreducible realities of our human nature or the natural law. In such a conflict the natural law must always prevail. Accordingly, efforts to ease these consequences by coerced child support regimes, while ameliorative to some extent, do not address the issue. First, because they are costly (in Australia it costs 34.6 cents to the Government for every dollar collected in child support through the Child Support Agency).<sup>43</sup> Second, because most of those who have to pay child support are on moderate to low incomes and often cannot contribute much if anything.<sup>44</sup> Third, because maintaining two homes from an income that previously had to support one, inevitably means there is less for all and so less opportunities for the children and finally, and most importantly, the natural biological benefit of a father and mother both present is irreplaceable. As Justice Paul Coleridge, a senior Family Division Judge in the United Kingdom has stated:

What is a matter of private concern when it is on a small scale becomes a matter of public concern when it reaches epidemic proportions.... I am not suggesting that all relationship breakdown and termination can be avoided in all cases. Of course it cannot. ...The time has come for a major examination of all the issues surrounding family life, its support and maintenance, and especially the mechanisms and laws for its termination.<sup>45</sup>

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<sup>43</sup> Child Support Agency, Facts and Figures, 2008-09, 1 (2009) referred to in Parkinson above n 4, 18.

<sup>44</sup> 'In Australia, for example, about 20% of all those with an obligation to pay child support are themselves on welfare benefits. The incomes of other non-resident parents are not high. In June 2009, the median income of all parents liable to pay child support was only \$31,000. Taking account only of those who had a taxable income, the median was \$40,677. In May 2009, full-time adult earnings were over \$64,000 per year for the population as a whole (footnotes omitted).' Parkinson above n 4, 17.

<sup>45</sup> Daily Mail 17 June 2009 <<http://www.dailymail.co.uk/news/article-1193545/Only-marriage-mend-broken-Britain-says-judge.html>> accessed 22 July 2014.

## VI THE ENDURING FAMILY AND THE INDISSOLUBILITY OF PARENTHOOD

The assumption that divorce would dissolve the family unit, which was fundamental to the no-fault divorce revolution, has now been abandoned. Emeritus Professor Margo Melli has said what many Australians have proved in the crucible of living with divorce, ‘[t]oday, divorce is not the end of a relationship but a restructuring of a continuing relationship’.<sup>46</sup> Marriage may be dissoluble by law but family is indissoluble in fact.

Australia has been at the fore front in recognising this truth by legislative reform; i.e. by the 2006 amendments to the FLA which require courts to consider shared care arrangements in relation to children.<sup>47</sup> Section 60B of the FLA now provides: ‘Children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child’. Shared care or shared parenting is now common and the old “custody” and “access” regime is over.<sup>48</sup> This movement towards some form of shared care has also occurred (or is being debated) across the western world.<sup>49</sup> As Professor Parkinson has said:

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<sup>46</sup> Marygold S. Melli, *Whatever Happened to Divorce?*, WIS. L. REV. 637, 638 (2000) referred to in Parkinson.

<sup>47</sup> Patrick Parkinson *The Payoffs and Pitfalls that Encourage Shared Parenting: Lessons from the Australian Experience* University of Sydney Law School Legal Studies’ Research Paper No. 14/47 May 2014.

<sup>48</sup> *Ibid* 5.

<sup>49</sup> *Ibid* 1 and 6-8.



Legal systems throughout the Western world have not created the indissolubility of parenthood. Slowly, painfully, and through much conflict in the legislatures and the courts, legal systems have had to come to terms with the reality of parenthood's indissolubility. Positive law has had to become realigned with natural law. Having sought freedom from the pain of broken relationships, people have had to come to terms with the limitations on that freedom. Autonomy is limited by the connectedness of parenthood for as long as each parent desires that close connection with his or her children, and insofar as the law will refuse to sever or attenuate that connection.<sup>50</sup>

Having been forced to recognise the indissolubility of the family, and so the error of the assumption that underpinned the no-fault divorce revolution, it is submitted that it is now time to examine again the concept of no-fault divorce on the basis of a 12 month separation.

## VII SUGGESTIONS FOR REFORM

Why should the law deal attempt to reduce the number of divorces and keep families together? This article has shown that the impact of the public purse and the reality of the enduring family require such an attempt. It is also clear that the rise in divorce was aided and abetted by the no-fault divorce revolution:

In Australia, the divorce rates started to climb from the mid-1960s and rose very sharply following the introduction of the Family Law Act 1975 that introduced no-fault divorce. The sharpness of the divorce peak in 1976 was

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<sup>50</sup> Parkinson above n 4, 36.

partly due to a backlog of long-term marital separations for which the end of the marriage was formalised as soon as the new Act came into effect. Following the 1976 peak, the divorce rate subsequently declined and has since been stable, but at a much higher level than prior to the introduction of the new Act.<sup>51</sup>

If the increase in the divorce rate was aided and abetted by a change in the law, it is legitimate that the law attempt to reduce that rate. As a matter of public policy, the legislative efforts will yield most benefit in supporting marriage. After all, unmarried cohabiting relationships break up at a far higher rate than marriages. Indeed, An Australian study has found that the chances of a cohabiting couple with children breaking up are greater by a factor of seven than a married couple who had not lived together before marriage, and greater by a factor of four than a married couple who had cohabited before marriage.<sup>52</sup> Accordingly, the benefits to the public purse flow from supporting marriage rather than any variant thereof.

Three propositions for reform are suggested:

A *Revisiting the 1 year period of separation as proof of an irretrievable breakdown of the marriage*

The period was selected arbitrarily. For instance, some European countries require a 3 year waiting period.<sup>53</sup> Requiring a greater period of separation, say 2 years, will force couples to give greater consideration to

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<sup>51</sup> Above n 9, 3.

<sup>52</sup> P. Butterworth, T Oz, B Rodgers, and H Berry, 'Factors Associated with Relationship Dissolution of Australian Families with Children', Social Policy Research Paper No 37, 22 and 29, tbl 9 (2008) referred to in Parkinson above n 4, 8.

<sup>53</sup> William J Doherty and Leah Ward Sears (2011) *Second Chances: A Proposal to reduce unnecessary divorce* p23 [New York: Institute for American Values] <<http://americanvalues.org/catalog/pdfs/second-chances.pdf>> accessed 22 July 2014.

staying together and resolving their conflicts. Alternatively, the grounds for filing for divorce may be period of separation for 1 year, but the court may be precluded from granting the application for a further year. The period may be abridged to 1 year if a court finds there are special circumstances which require it. Special circumstances may be left to the courts' discretion but an inclusionary descriptor like the following may assist:

When the respondent has been convicted, during the marriage, of a violent or sexual [offence] against the [applicant] or a minor child; or  
When a court has made a final, non-preliminary civil protection order against the divorce respondent, based on a final determination that the respondent committed or threatened physical violence against the divorce petitioner or a minor child of the divorce [applicant], where the respondent had advance notice and an opportunity to participate in an evidentiary hearing.<sup>54</sup>

The evidence suggests that longer waiting periods are associated with lower divorce rates.<sup>55</sup> This complements the other evidence that at nearly half of divorcing couples are from low conflict relationships, which could survive with help.<sup>56</sup> Recent research shows that about 40% of American couples who are already in the divorce process say that one or both of them would be interested in pursuing reconciliation.<sup>57</sup> There is therefore good evidence to consider extending the period before parties may obtain a divorce.

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<sup>54</sup> Ibid 42.

<sup>55</sup> Ibid 23.

<sup>56</sup> Ibid 19.

<sup>57</sup> William J. Doherty, Brian J. Willoughby, and Bruce Peterson, "Interest in Marital Reconciliation among Divorcing Parents," *Family Court Review* 49, no. 2 (April 2011): 313–21 referred to in above n 41, 14.

## B *Mandatory reconciliation counselling*

Australia has already legislated for mandatory mediation to resolve issues such as parenting orders before an application may be filed.<sup>58</sup> This proposal would entail refining these provisions to require counselling specifically directed at the possibility of reconciliation. Matter to be addressed may be:

- *Questions to help individual spouses reflect on their potential interest in reconciliation;*
- *The potential benefits of avoiding divorce for children and adults;*
- *Resources to assist with reconciliation; and*
- *Information on when the risk of domestic violence should rule out working on reconciliation at this time.*<sup>59</sup>

Aligned to such counselling may be a requirement for a formal notice before action process. Such a process is widely used in civil courts. In the Family Court this may take the form of a formal notice by one party to another that their marriage faces serious difficulties and suggesting that they undertake counselling together.<sup>60</sup> Such a procedure may overcome the common situation that one party first knows of the issues in the marriage when the other announces they are leaving.

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<sup>58</sup> Parkinson above n 47, 21.

<sup>59</sup> Doherty *et al* above n 41, 33.

<sup>60</sup> Ibid 28–30.

C *Providing the right for a court to award damages for a breach of the marriage contract*

The law gives a right to claim damages for breaches of contract in the civil and commercial arenas. Why should marriage be the only contract, which may be breached with impunity? The law, by means of ascribing consequences to actions, signals to us what we as a community hold important.

Marriage is a contract. It is clear, however, that the no-fault revolution, in allowing the marriage contract to be breached without any legal consequences (though as this paper has demonstrated there are serious and unavoidable consequences in fact) has undermined the value we place on marriage to the detriment of Australian society.

It is time to change and give new value to marriage. The courts must be given the power, on application, to award damages to a party who has breached the marriage contract namely of a union between a man and a woman for life to the exclusion of all others.<sup>61</sup>

Clearly this will involve the courts having to make awards of damages for intangible losses. However, courts routinely do so in awarding damages for non-economic loss in personal injury claims and damages for loss of reputation in defamation claims. This may be by means of an actual award of damages or by weighting any division of property to account for the fault. The benefit to assisting the longevity of marriages is that, once it is known that damages may flow, parties may be more inclined to abide

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<sup>61</sup> *Marriage Act 1961* section 5.

by the marriage contract. Such a reform is likely to find widespread community support.<sup>62</sup>

## VIII CONCLUSION

Four decades after the no-fault divorce revolution in Australia, our society has experienced the massive financial and human costs of a legislative reform that was enacted without adequate forethought. As Professor Parkinson has stated, ‘fragile families lead to broken hearts. They also threaten the wellbeing of the community as a whole. Turning this around will require a herculean effort, but we cannot afford not to make the attempt’.<sup>63</sup>

Indeed, the cost of fragile families that has ensued is now significant. Naturally, as noted in this article, children are the principal victims of this ‘no-fault revolution’. Professor Judith Wallerstein has argued that ‘[f]or every Little Engine That Could there is a Little Engine That Couldn’t’.<sup>64</sup> Those Little Engines are young people and we cannot afford to delay helping them. Now it is the time to start.

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<sup>62</sup> Barry Maley, *Reforming Divorce Law* (2012) *AFA Journal* 33 (1), 7 <<http://www.family.org.au/afa-journal/114-afa-journal-vol-33-no-1-2012/190-reforming-divorce-law>> accessed 17 July 2014.

<sup>63</sup> Parkinson above n 4, 30.

<sup>64</sup> Wallerstein above n 39, 266.