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Understanding Family Law

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UNDERSTANDING FAMILY LAW

Fourth Edition

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Chapter 1

AN INTRODUCTION TO FAMILY LAW

§ 1.01 GENERAL INTRODUCTION

In its traditional sense, family law, also called domestic relations law, involves the legal relationships between husband and wife and parent and child as a social, political, and economic unit. In recent years, the boundaries of family law have grown to encompass legal relationships among persons who live together but are not married — so-called nontraditional families. The legal aspects of family relationships, whether traditional or nontraditional, necessarily include principles of constitutional law, property law, contract law, tort law, civil procedure, statutory regulations, equitable remedies, and, of course, marital property and support rights.

Increasingly, the theoretical and practical implications of family law have been shifting from moral to economic issues, and accordingly, a general practitioner or business lawyer must now understand and master important family law concepts and principles, separate and apart from any divorce litigation. For example, the validity or invalidity of a marriage has far-reaching social, legal, and economic implications in wrongful death actions, since most state wrongful death statutes limit economic recovery to the legal spouse as statutory beneficiary, rather than the de facto spouse. Other areas of the law, including intestate succession and probate law, workers' compensation awards, social security benefits, pensions and retirement plans, medical benefits, insurance payments, loss of consortium actions, state and federal tax law, and marital property and support rights, are also directly affected by the validity or invalidity of a marriage, although some of these benefits are also being covered through domestic partnership legislation in some states and municipalities. American family law currently is in a state of flux and transition based upon the dynamic interplay of three interrelated factors: (1) state and federal legislatures that regulate by statute many important family relationships; (2) courts that interpret these statutes or determine equitable remedies in the absence of such statutes; and (3) family law practitioners who must ultimately decide what strategic alternatives exist in favor of their clients, and who must persuasively plead and prove these alternate remedies before the courts, and increasingly before the legislatures, based upon the law, facts, and social need in each particular case.

1 See infra § 1.02[A].
2 See infra § 1.02[B].
3 See generally infra § 2.05(D).
4 See generally infra §§ 2.05(D), 2.10(C), 3.01-3.14.
5 See infra § 2.02(C).
[A] Legislative Regulation of Family Law

State legislatures traditionally have regulated important family law relationships such as marriage and divorce based upon the state's important nexus with the family unit, and based upon the general welfare of its citizens. As the United States Supreme Court stated in *Maynard v. Hill*:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which the parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both . . . and the acts which may constitute grounds for its dissolution.  

However, since marriage and divorce are fundamental rights subject to constitutional protection, a state cannot arbitrarily prohibit or interfere with the exercise of these marital rights without a compelling reason for doing so. Additionally, although the state legislatures continue to regulate many important family law relationships, Congress in its federal capacity has also entered the field of family law regulation, especially in the areas of child custody and child support enforcement remedies, and federal domestic violence legislation.

[B] Judicial Regulation of Family Law

State courts, on the other hand, must interpret and apply state family law statutes to each particular legal controversy, or attempt to find equitable remedies in the absence of such statutory remedies.

Most family law statutes are drafted as general guidelines. Consequently, state court judges normally have broad discretion in resolving many family law disputes, including spousal support and the division of marital property on divorce, and in child custody litigation. However, the extent of such judicial discretion in family law matters has come under increased scrutiny in recent years. For example, family court judges, from their equity heritage as triers of both law and fact, traditionally

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6 125 U.S. 190, 205 (1888). Implicit throughout *Maynard* is the traditional view that marriage is a status relationship involving three parties: Husband, Wife, and the State. See also *Simms v. Simms*, 175 U.S. 162, 167 (1899) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not the laws of the United States.”). See generally infra § 1.03.

7 See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (protecting the fundamental freedom to procreate from state infringement); *Loving v. Virginia*, 388 U.S. 1 (1967) (declaring state statutes prohibiting interracial marriages to be unconstitutional); *Zablocki v. Redhil*, 434 U.S. 374 (1978) (requiring less onerous state enforcement means than prohibiting the marriage of a father who had not paid child support). See generally infra § 1.05.


possess very wide discretion in adjudicating many family law disputes.\(^\text{11}\) However, the American Law Institute's recently proposed *Principles of the Law of Family Dissolution*\(^\text{12}\) argues that since judicial discretion in family law matters can be "inherently limitless," a major theme of the *Principles* is an effort to improve the consistency and predictability of such trial court decisions.\(^\text{13}\)

Moreover, a particular judge's interpretation of family law issues will be guided by the law of the state whose family law governs a particular case, and the underlying law is by no means uniform from state to state. A judge, for example, may be bound to apply a particular state's "traditional" family law statutes and judicial precedents, a more "modern" approach, or a "centrist" combination of the two.\(^\text{14}\) A family court judge's analysis of the relevant facts and law may also be influenced by whether he or she is a judicial "formalist" or a judicial "functionalist."

Under the theory of legal formalism, also known as legal positivism, correct legal decisions are determined by pre-existing legislative and judicial precedents, and the court must reach its decision based upon a logical application of the facts to these pre-existing rules. The functionalist judge, embracing the principle of judicial restraint, must apply the existing law to the particular facts and remain socially neutral. Judging under this formalistic theory is thus a matter of logical necessity rather than a matter of choice.\(^\text{15}\)

Under the countervailing theory of legal functionalism, also referred to as legal realism or legal pragmatism, the formalistic view of legal certainty and uniformity is viewed as rarely attainable, and perhaps even undesirable, in a changing society. Thus, the paramount concern of the legal functionalists is not logical and legal consistency, as the formalists believe, but socially desirable consequences.\(^\text{16}\)

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\(^{11}\) For example, H. Clark, *The Law of Domestic Relations in the United States* 644-45 (2d ed. 1988):

It is axiomatic that the trial courts have wide discretion in determining the propriety and the amount of [spousal support]. The relevant factors are so numerous and their influence so incapable of precise evaluation that the trial court's decision in a particular case will be affirmed unless it amounts to an abuse of discretion or is based upon an erroneous application of legal principles . . . . As a result, claims for [spousal support] are won or lost in the trial courts, which have a corresponding heavy responsibility to deal fairly with the spouses in such cases . . . .

This broad judicial discretion also applies to the classification, valuation, and distribution of marital property on divorce, see id. at 589-94, and to child custody determinations as well, see id. at 796-97:

In most states the award of [child] custody is held to be a matter for the discretion of the trial court, to be upset on appeal only where an abuse of that discretion is shown . . . . Certainly any appellate court should be reluctant to substitute its judgment for that of a trial court in cases so entirely dependent upon particular facts and the subtle differences to be drawn from those facts.


\(^{13}\) Id. at 69-70, 88, 259.


Put another way, where legal formalism is logically-based and precedent-oriented, legal functionalism is sociologically-based and result-oriented to validate society's needs and expectations. According to various commentators, the current transition in family law theory and practice is based upon the need to make American family law more rational and less harsh concerning the reasonable expectations of contemporary society.  

It remains open to debate whether state legislatures should remain preeminent in determining current family law needs and goals, as the formalists generally believe, or whether the judiciary should take a more active role in determining current family law goals and remedies, as the functionalists generally believe. For example, in the 2003 case of Goodridge v. Massachusetts Department of Public Health, the Massachusetts Supreme Judicial Court held in a 4-3 decision that the Commonwealth of Massachusetts had “failed to identify any constitutionally adequate reason for denying civil marriages to same-sex couples” according to the Court's definition of what constituted a “civil marriage,” and therefore recognized the validity of same-sex marriage in Massachusetts. Three dissenting judges in Goodridge, however, opined that “What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts.” Moreover, disagreement persists as to which family law principles should be retained, and which should be changed to meet the needs of contemporary American society.

These questions are of more than academic importance, since although legal functionalism has been the dominant legal theory of American jurisprudence for most of the twentieth century, legal formalism is far from a dead issue, and seems to be enjoying a remarkable resurgence:

Not since the late 1920s and 1930s has there been such widespread interest in American jurisprudence. But it is no longer the [legal functionalists] who are challenging established norms. The victories at the polls of political conservatives like Richard Nixon and Ronald Reagan [and George Herbert

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There is yet a third school of American legal theory, the Critical Legal Studies Movement, which generally calls for the dismantling of existing political and legal institutions in favor of newly empowered forms of social democracy. See, e.g., White, From Realism to Critical Legal Studies, 40 Sw. U. L. Rev. 819 (1986); Comment, Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 96 Harv. L. Rev. 1669 (1982); Tushnet, Critical Legal Studies: A Political History, 100 Yale L. J. 1515 (1991).


18 Compare Hewitt v. Hewitt, 894 N.E.2d 1204 (III. 1979) (“We believe that [family law] questions are appropriately within the province of the legislature, and that, if there is to be a change in the law of this State on this matter, it is for the legislature and not the courts to bring about that change.”), with Frey v. Frey, 471 A.2d 705 (Md. 1984) (“it is within the power of this court to change the common law”).

19 798 N.E.2d 941 (Mass. 2003). See also infra § 2.08[B].

20 See generally K. Llewellyn, Jurisprudence: Realism in Theory and Practice (1982); Rumble, supra note 10; Aichele, supra note 16.
Walker Bush and George W. Bush and a Republican-controlled Congress, and the corresponding ideological commitments of many recent appointments to the [state and] federal bench, now threaten the continued prominence of a theory of judicial interpretation first articulated and advanced by the [legal functionalists]. Impossible only a decade ago, "mechanical jurisprudence" has made a remarkable comeback, and a new legal formalism may [or may not] triumph as the principal mode of judicial interpretation.21 Thus, a family law student and practitioner must be aware of both the dichotomy between “traditional” and “modern” family law statutes and judicial opinions, and how these statutes and opinions will be interpreted by a formalist or a functionalist family court judge.

The role of the federal judiciary in family law matters is discussed later in this chapter.22

[C] The Role of the Family Law Practitioner

The ultimate client-representation role of the family law practitioner is to argue the client's case persuasively before the court. In the court setting, the attorney will employ various alternate remedies and legal strategies to advance the client's interests. Presentation of the client's position, as well as the analysis that went into preparation for court proceedings, will often find the attorney confronting, and deciding upon, an amalgam of theories best suited to the client's case. In each case, the family law practitioner must determine what “traditional” family law principles ought to be retained or abolished, what “modern” family law trends ought to be adopted or rejected, and what ultimate public policy goals are to be achieved through these various laws.

This process of analysis, repeated on behalf of various clients, can ultimately lead the practitioner to pronounced views of how the law should be structured and, once structured, how it should be implemented. In a very real sense, then, the family law practitioner is in the forefront of any movements for reform of the substance and procedure of American family law.23

These interrelated family law problems facing the legislator, the jurist, and the family law practitioner resist easy solution. For example, to remove some of the worst vestiges of long-standing fault-based divorce statutes, most jurisdictions have enacted "no-fault" divorce legislation and marital property distribution statutes. These no-fault divorce statutes currently allow divorces to be granted

21 Aichele, infra note 16, at x. See also Schaier, Formalism, 97 Yale L.J. 509 (1988) (discussing how legal formalism still serves a useful function in limiting judicial discretion and judicial activism); Wehrh, Legal Formalism: On the Imminent Rationality of Law, 97 Yale L.J. 949 (1988) (questioning whether the law is essentially rational as the formalists believe, or whether law is essentially political as the functionalists believe). See generally Symposium, Formalism Revisited, 66 U. Chi. L. Rev. 527-942 (1999).

22 See generally infra §§ 1.04, 1.05.

without regard to fault if the marriage has become insupportable because of discord or irreconcilable differences that destroy the legitimate ends of the marriage relationship and prevent any reasonable expectation of reconciliation. Modern property distribution statutes likewise focus on establishing a roughly equitable "no fault" distribution of marital property based on each party's contribution to the marriage. Although these no-fault procedures arguably are more efficient, and these marital property distribution guidelines have a ring of fairness to them, some commentators have argued that divorced wives and their children may actually be more economically disadvantaged under this "modern" family law legislation than under a more "traditional" approach.24 Likewise, there is still continuing controversy involving what role (if any) marital fault should play in a "no fault" divorce regime.25 Indeed, some commentators have concluded that the no-fault divorce revolution in America "has failed."26

Thus the quest continues to determine which family law principles are obsolete and which family law principles are relevant to the changing needs of our

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24 See, e.g., L. Weitzman, The Divorce Revolution in America: The Unexpected Social and Economic Consequences for Women and Children in America (1985). Although the accuracy of Professor Weitzman's statistical studies have been questioned, other studies have corroborated this "feminization of poverty" resulting from divorce. See also McLendon, Separate But Unequal: The Economic Disaster of Divorce for Women and Children, 21 Fam. L.Q. 351 (1987); K. Winner, Divorced from Justice: The Abuse of Women and Children by Divorce Lawyers and Judges (1996). Minor children also suffer from divorce:

Two-thirds of all divorces involve minor children, and according to Columbia law professor Martha Fineman, author of The Illusion of Equality, the average annual child support payment is only around $3,000. "Equality is being applied with a vengeance against women," she says. Ultimately, the average household income for children of divorce drops thirty percent, while the poverty rate for children living with single mothers is five times as high as for those in intact families.

Elizabeth Gleick, "Holl Hath No Fury," Time Magazine, Oct. 7, 1996 at 84. See also Scott, Rational Decision-Making About Marriage and Divorce, 76 Va. L. Rev. 9, 29 (1990) ("There is substantial evidence that the process of going through their parents' divorce and resulting changes in their lives are psychologically costly for most children"); Judith Wallerstein, The Unexpected Legacy of Divorce: A Twenty Five Year Landmark Study (2000) (discussing the long-term negative effects of divorce on children); Judith Wallerstein & Sandra Blakeslee, Second Chances: Men, Women, and Children a Decade After Divorce (1989) (same).


26 See for example, Council on Families in America, Marriage in America: A Report to the Nation (1995):

The divorce revolution- the steady displacement of a marriage culture by a culture of divorce and unwed parenthood- has failed. It has created terrible hardships for children, incurred unsupportable social costs, and failed to deliver on its promise of greater adult happiness. The time has come to shift the focus of national attention from divorce to marriage and to rebuild a family culture based on enduring marital relationships.

But see Divorce Reform at the Crossroads (Sugarman & Hill ed. 1990) (arguing that serious problems within a no-fault divorce regime need to be corrected, but without abandoning no-fault divorce per se).
contemporary society. But while embarking on this legitimate quest, the legislator, jurist, scholar, and family law practitioner ought not be too hasty, in the absence of sound empirical evidence, to “throw the baby out with the bath water” in assessing and reassessing present and future family law needs and goals.

§ 1.02 WHAT IS A FAMILY?

In order to understand the legal relationships existing in a family law context, we must first define what a “family” is. Narrowly defined, “family” can mean a group related by blood or by marriage, such as a traditional family involving a husband and wife or a parent and child. Broadly defined, a “family” may include a nontraditional family, meaning one of a group living in the same household.

A “family” can also be analyzed under an “organic” model or under an “individualistic” model. An organic family model emphasizes the good of the family unit at the expense of its individual members, and it is frequently associated with a hierarchically-ordered “traditional” family unit. An individualistic family model, on the other hand, views the family as composed of discrete and separate individuals, who are basically complete apart from the family unit.

Regardless of how it has been defined, however, the remarkable resilience of the family unit has been primarily related to its role in the raising and socialization of children, and in the mutual social and economic support of its members.

Arguably, a family is also morally justifiable under a “community” model, where the family finds its justification not only in its function of raising children and contributing to the economic well-being of its members, but also in the beneficence and the psychological satisfactions a family brings. Thus, family law finds its ultimate justification in reducing the uncertainties and inequities that are associated with conjugal relationships without rules, in establishing custody of children, in preventing harm to children, in providing economic rights and obligations for family members, and in establishing rules that will optimize human happiness within a family relationship.  

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27 See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (holding that a single family dwelling for zoning purposes, under a village ordinance, was limited to persons related by blood, adoption, or marriage).
31 Houlgate, supra note 29, at 49.