

## **DIVORCE LAW REFORM HEALING THE MURPHY MISTAKES**

The Family Law Act introduced in 1974, and passed by just one vote in the House of Representatives, severely damaged the traditional concept of permanent monogamous marriage, particularly the element of lifelong commitment. At the time, its supporters believed it would strengthen marriage. Since then divorces have trebled to 49,000, and divorce afflicts almost half of all marriages (46%). It is said it is easier to divorce your husband or wife of 25 years than to sack an employee of 25 days.

The Family Law Act has been described as one of the most divisive and hated pieces of legislation on the Commonwealth statute books (Ross Cameron). Others claim that the Family Court of Australia is not a court of law but a political and ideological forum (Dr A E Gyory).

### **All power to the initiator**

The source of the bitterness is the harm done to innocent parties in a divorce. They have been stripped of their legal protection. Even when one spouse desperately wants to keep the marriage together, he or she has no legal recourse, and may have to spend thousands of dollars in legal fees for an unwanted divorce. **All the power belongs to the initiator of the divorce** (Elizabeth Schoenfeld, Policy Review, May/June 1996). The timing and convenience belong to the initiator. In the USA, 80 per cent of divorces are unilateral rather than truly mutual decisions (Policy Review, May/June 96).

### **Child support**

An indication of the mayhem caused by family break-up was revealed when a Joint Standing Committee of the Federal Parliament inquiring into family law issues in 1993, opened a telephone hotline for two days, to hear complaints from separated parents over the child support system. The response was enormous compared to almost any other inquiry held by a committee of Parliament. It was estimated that over 150,000 calls were attempted over the two-day period. Some callers who were placed in a queue waited for up to two hours to speak to the committee. Anger was felt by both custodial and non-custodial parents, although the two groups for the most part had different complaints. The message from non-custodial parents was clear. The child support scheme:

- was unjust
- did not allow the non-custodial parent the opportunity to re-establish themselves after separation
- was generally inflexible
- and was unable to accommodate individual circumstance (Thanks for Listening, Joint Select Committee on Certain Family Law Issues, August 1993, p.3).

Almost ten years later in 2002 at the time of writing, the level of grievance has not diminished if the level of complaints made to MPs electoral offices is taken as a measurement.

It is no wonder that a recent study of 20-29 year olds in the USA found that 88 per cent believed the divorce rate was too high, with young women more likely to hold these views than young men. A significant 43 per cent believed laws should be changed to make divorce harder to obtain (Janet Albrechtsen, SMH).

The cost of divorce is estimated at \$3 billion per year in court and personal costs. It is estimated that another \$3 billion per year is lost in work productivity (Australian Information and Support Services for Men). The key to the 1974 divorce law reform (Family Law Act) was the principle of **irreconcilable differences**, of at least one of the couple, as the sole ground for divorce. It eliminated the consideration of fault on the part of either partner. This changed the effect of marriage from a permanent monogamous arrangement to a purely temporary contract. The drive to make divorce more humane inadvertently denuded marriage of any commitment.

Despite the problems similar family law reform has caused worldwide, the no-fault concept (no-fault no-responsibility marriage) has not been repealed in any jurisdiction anywhere in the world (so far as I know). Most attempts to limit the damage have focussed their attention on front-end programs such as pre-marriage education.

## **COVENANT MARRIAGE**

An exception to this is the development of a Covenant Marriage, recently passed into legislation in three states in the USA, where marriage law is governed by state law. The states are Arkansas, Arizona and Louisiana. So far, three per cent of marrying couples have chosen Covenant marriages.

Covenant marriage runs parallel to the no-fault divorce laws, but to some extent restores a fault basis for those who choose a covenant marriage. The covenant marriage law gives couples the option of designating their marriage a covenant marriage, or following the existing no-fault law. Covenant marriage makes it more difficult to break a marriage.

For those who enter into a covenant marriage, divorce is allowed only after a two-year separation and if there are no children produced by the marriage, or two and a half years if there are children, A divorce may be granted at any time if a spouse established that the marriage relationship has been ruined by:

- adultery
- abandonment
- imprisonment of a spouse
- physical or sexual abuse of a spouse who is seeking the divorce
- or physical or sexual abuse of a child of one of the spouses.

Other conditions of covenant marriage include as requirements 12 hours of premarital education, and counselling for couples whose marriages are in trouble.

Couples enter into a covenant marriage by declaring their intent to do so on their marriage license application, and executing a declaration of intent to do so under the terms specified in the legislation. The contract also states that, before seeking a divorce, the couple, if they experience difficulties commit themselves “to take all reasonable efforts to preserve their marriage including marital counselling”.

Professor Katherine Spaht of the Louisiana State University school of law is the best legal/academic contact on covenant marriages, She is the co-author of Louisiana’s covenant marriage law. Several of her articles are on the Divorce Reform website. Her e-mail address is [Imspah@unix1.sncc.lsu.edu](mailto:Imspah@unix1.sncc.lsu.edu).

Australia’s falling birth-rate, partly attributable to no-fault divorce, and the consequent greying of Australia, is a major economic threat to the future well-being of Australians, and to a stable multicultural Australia. The birth-rate has now reached 1.7 per cent far below the 2.1 per cent needed to support a static population.

## **OTHER DOWNSIDES OF NO-FAULT DIVORCE**

There are other downsides to no-fault divorce:

**Its detrimental affect on children socially and materially.** In Australia there are about 1.3 million children who live apart from one of their natural parents. About 200 children go through the family courts system every day. Statistically, these children are ten times more likely to be abused or neglected, and twice as likely to have a mental health problem (Joint Parenting Association). Although having two parents does not guarantee that children will be brought up in a loving and secure home any more than having only one determines that they will not, there is a solid body of evidence that children are generally better off in their physical and mental health, education and socialisation if brought up by both of their natural parents. There is an avalanche of research in the USA, Britain and Australia – from researchers spanning the ideological spectrum – underlying the adverse affects of divorce on children. Divorce is rarely a one-off event followed by a return to a peaceful family life. For many children it is the start of a series of disruptions which include the departure of one parent often followed by new partners being introduced to the family household, new siblings in the form of stepchildren, relocation from home and school, and remarriage for one or both parents (Janet Albrechtsen). Long-term studies have shown that children of divorced parents have their most serious trouble as adults. In particular, they have a harder time forming and sustaining long-term relationships (CQ p.34).

**It is a source of poverty.** The most significant pockets of poverty in Australia are those connected with single-parent families, following separation and divorce. Married-couple families have the lowest poverty rates among all family types, while divorce and single-parenthood is one of the greatest causes of child poverty (Pell, Quadrant). The proportion of lone parent families has gone from 5.7 per cent in 1974 to 15.4 per cent in 2001. A father’s support, or lack of support from absent fathers, has become a significant factor in public and private welfare commitments. Parents who stick together and raise children well are doing all of us an enormous service (Pell, Quadrant).

**It is a source of crime.** The separation and divorce of Australian parents is a major cause of serious and violent crime among their children. Also, children born outside marriage, and those of working mothers, are also more likely to commit serious and violent crimes (State of the Nation, statistical indicators of Australian well-being, Canberra times 5 July 1997).

**Childhood depression.** As well as childhood depression and low self esteem (Pell Quadrant), children from divorced families are twice as likely to suffer depression in adulthood than those from intact homes (Dr Bryan Rogers, ANU, Canberra Times 23 Nov 99). Ninety per cent of children react to divorce with strong feelings of fear, anxiety and abandonment. The children seemed to conclude that if their parents could walk away from each other, they could walk away from them, too (Pell Quadrant).

**Its effect on older women.** Women on their own in old age have always been vulnerable to poverty. But until the mid 1990s, most older women were widows who inherited the home and their husband's savings and superannuation, and could get the age pension at 60. But the increased number of divorced women in their 50s – about 145,000 – have missed out on a share of their former husband's superannuation, may lack their own because of a broken work history, and have to wait longer to the age pension. For example, women now aged 55 will not be eligible for pension until they are 65. They get a one-off settlement at divorce, usually the house, but now they are asset-rich and income poor (Professor Brian English, Deputy vice chancellor, Newcastle University). (The proposed superannuation bill may alleviate this problem in time).

**Women's health.** Divorced women have higher rates of depression and suicide and are more likely to be stressed in parenting than married women (CQ Researcher, p.35, Jan 19 2001).

**Stolen fathers generation.** There are harmful effects on fathers who are forcibly removed from contact with their children.

**Grand-parenting.** Deprivation of grandchild-grandparent relationships. Many grandparents are not able to see their grandchildren due to family/marriage breakdown or family conflict, and cannot afford high legal costs to seek access. Grandparents contribute to the well-being of their extended families and reinforce the positive effect that relationships between younger and older people have on society. They also suffer the stress, trauma and anxiety inflicted upon the family by divorce (Australian Information and Support Services for Men). It destroys extended family modelling.

**Cost of divorce borne by marriages.** The increases in family taxes, which have helped to pay for a five fold increase in welfare payments, are a factor in causing marriage breakdowns, and which in turn increase welfare payment and taxes (Maley).

**Encourages bad behaviour.** By removing the stigma attached to divorce, the no-fault system has allowed spouses to behave badly in marriage with impunity, In a recent case under Canada's Divorce Act, a woman was convicted of attempted murder for shooting her husband in the face. Now out of jail, she is demanding spousal support

from her victim. Because the Divorce Act prohibits a court from taking into account any misconduct of the spouse, it must disregard her conviction for attempted murder.

## **REFORM PROPOSALS**

There are a number of reforms, in addition to covenant marriage, currently being proposed:

**Providing choice.** Providing the choice of a civil-type contractual arrangement that was breakable by either party at will but attracting no benefits, or entering into a marriage for life, an indissoluble arrangement that would attract economic benefits, such as tax incentives (Ross Cameron).

**Review custody decisions.** Re-open custody hearings if a father is denied court-ordered access (Babette Francis, Endeavour Forum).

**Boys with Dad girls with Mum.** In custody settlement, maximise the time a child spends with the parent of the same sex (Professor Richard Warshak, University of Texas).

**Joint parenting laws.** Amend family law to enshrine the fundamental human right of every child to have and maintain an equal relationship with both parents following separation and divorce. Joint parenting laws have had the effect in the USA of lowering the divorce rate by up to a factor of eight, lowering litigation and increasing child support compliance to around 98 per cent (Dr Shane Kelly, Joint Parenting Association).

**Reintroduce a limited form of fault.** Link fault not to divorce but to settlements (Janet Albrechtsen, SMH).

**Eliminate unilateral no-fault.** For couples with dependent children, we should eliminate unilateral no-fault where one person can readily obtain a divorce without the other's consent – and return to an updated fault-based system, with the alternative of a five year waiting period (New York Times editorial, Dec 96).

**Contested divorces.** Place some minimal power back into the hands of the spouse who is being deserted. Imposing a five to seven year waiting period for contested no-fault divorces (as do many European jurisdictions) would serve the ends of both justice and prudence (Policy Review, May/June 1996).

**Misconduct and settlements.** If a case of serious misconduct can be proved then it should effect the settlement (Barry Maley, Center for Independent Studies).

**Better scrutiny by courts.** There should be more effort by the courts in determining whether marriages have truly broken down (Maley).

**Mediation to include children.** There should be compulsory mediation for both parents, including children's views, from the date of separation (Australian Information and Support Services for Men).

**Financial incentives.** Make marriage and family more financially attractive. “I do not see why marriage should be the only contract people can walk away from without penalty.” (Pell Quadrant).

**Reduce involvement of lawyers.** No lawyers or court action for at least twelve months after the date of separation (Australian Information and Support Services for Men).

**Maternity leave.** Provide paid maternity leave (Goward, Federal Sex Discrimination Commissioner).

**Provide benefits.** Both France and Norway offer parents a mix of paid parental leave, child payments and subsidised child care when the child is aged one or two; and free, high-quality early childhood education after the child reaches two, as in France, or three as in the case of Norway.

**Bonuses.** France offers a bonus to parents who have a third child.

**Distorted research.** Three years ago, in his book, *Men Mateship and Marriage*, a founding member of the Institute of Family Studies, Don Edgar, admitted that research in Australia had been produced that showed many divorced families could be better off than intact families, and their children could thrive. Apparently, research has often been distorted to ‘justify’ divorce as a good thing and counter evidence has often been ignored or attacked.

**A culture of divorce.** Change the divorce culture to a marriage culture.

## **DOMESTIC AND APPREHENDED VIOLENCE ORDERS**

A related issue is changes to domestic violence orders (DVO) as they are called in some states, or apprehended violence orders (AVO) as they are called in others, and their destructive effect on families once they are applied, and their corruption of justice when their use is abused. Under the present arrangements, magistrates lack the ability to refuse what seem likely to be frivolous, false or misleading claims at an early stage of the process.

At least since 1951, local courts have been able to make orders to prevent the fear of violence before it occurred. A magistrate had the power, on request, to either make such an AVO, or decide not to. This system was reformed in the belief that it was weighed against women. In the 1980s and 90s, a rash of legislation was passed expanding the scope of AVOs far beyond their original intention, and sweeping away checks and balances, opening them up to easy abuse. It is now argued that the system is weighted against men. As a result, in divorce settlements, the female partner is receiving the greater part of the matrimonial property and an overwhelming proportion of custody of children (Lone Fathers Assoc).

Today, in all states and territories, striking the balance between protecting female spouses from physical abuse and protecting innocent male spouses from malicious AVOs has been lost. The winners are lawyers, women’s support services, and female

spouses genuinely in need of protection, and the losers are innocent male spouses, children, overworked magistrates, and police burdened with the paperwork of domestic, relational problems.

An allied problem is the operation of Domestic Violence Crisis Centres. Historically, the establishment of these facilities and support networks were promoted, established and mostly staffed by feminists, with biases against men. They were a driving force behind the changes to AVO requirements. The DVCC quickly became expert in AVO procedures, and have been a major factor in influencing women to obtain them, regardless of justification.

It is now well established that the extent of domestic violence against women has been grossly exaggerated for decades, and that the false statistics have become official truth (John Coochey). According to criminal law practitioner and adjunct professor at Sydney's University of Technology, Trevor Nyman, in the NSW Law Society Journal, there is no evidence the dramatic growth in apprehended violence orders has reduced the level of violence.

Three reforms are needed:

- Discretion needs to be returned to the magistrate
- There needs to be a judicious increase in the standard of proof before a court issues an AVO
- And domestic violence crisis centres need to be phased out and family crisis centres, with a mandate for the interest of both partners and children, phased in.

Some of the most significant changes to the old AVOs were:

- The magistrate has no discretion to refuse an application
- Police are compelled to become the informant, instead of the complainants appearing before the magistrate
- The magistrate does not need to be satisfied of the truth of the complaint. Outrageous complaints are never tested. They remain on the record as an allegation that was never denied.
- The defendant may consent to an order without admitting the truth of the complaint. Police, court officers, prosecutors and some magistrates, emphasise the convenience of this provision as it often gives the bewildered defendant who is outraged at the allegations a sense that it is OK to go quietly.
- When a defendant refuses to consent to an order and insists on testing the truth of the allegation, it is not hard to prove, on the balance of probabilities, that the person seeking protection apprehended some sort of misconduct within the statutory definition of violence.
- Interim orders are the rule, not the exception. Consequently, a significant number of cases commence by arrest and not by summons.
- It is not necessary for violence to be feared, Harassment, intimidation or stalking is sufficient to come within the definition of "apprehended violence".
- A police prosecutor appears for the complainant, because the proceedings are initiated by a police officer.

- A defendant who successfully defends a case will get costs only if he can prove the proceedings were frivolous or vexatious, Extraordinary circumstances would need to exist for such a finding in a lower court.
- Breach of an AVO is a very serious offence, and a magistrate must take special steps in order not impose a jail sentence,
- If a complainant out of renewed affection, guilt over inflicting injustice, or welfare of children, initiates or encourages a new communication and the defendant responds, he will be committing a criminal offence.
- If a child becomes subject to an illness or accident emergency and the defendant attends the bedside, with the complainant present, it may constitute a break of the AVO.
- The opportunity for breaching at the access to children handover is limitless. Spiteful or foolish complainants, or defendants, can create or provoke a situation that constitutes a breach of the AVO.

Remorseful complainants who wish to withdraw their complaint face difficult obstacles in doing so.

- The prosecutor will still go ahead with any substantive charge.
- The common law right of a wife to not give evidence against her husband, is specifically removed by the legislation.
- If she fails to appear at court the case may still survive for fear that she may have been prevented.
- If she appears and says she wants the case dropped because she exaggerated, police frequently threaten her with public mischief prosecution.
- If she says she loves him and wants to try again, the police will advise her to get the AVO anyway “as an insurance”. He can be breached at any time for any reason whether it be trivial or imagined.
- If she goes into the witness box and says she has no current fears it will end proceedings. But if she has even little fears she will be committing perjury. Any lawyer who advises her to do so is in breach of professional duties and is possibly an accessory before the fact to her felony. The lawyer will be high on her blame list if the reconciliation is a failure.

(Trevor Nyman, adjunct professor University of Technology Sydney, foundation member of the Criminal Law Committee and supervising editor of the College of Law papers on crime and advocacy. [www.mensright.com.au](http://www.mensright.com.au)).

## **CONCLUSION**

Critics of divorce reform say that it will cause women to be trapped in unsafe marriages. But this argument ignores the fact that most domestic violence occurs outside of marriage. According to the US Justice Department, more than one-third of all family violence is committed by boyfriends and girlfriends: only 24 per cent is attributed to spouses. Also, the violent victimisation of women separated from their husbands is 25 times higher than that of married women. Violence is not the reason that most marriages end. According to US research only one-third of marriages end because of violence, and most divorces occur in low-conflict, but unhappy marriages (CQ).

The old slogan that divorce is better for both parents and children than staying in an unhappy marriage no longer has any credibility. The evidence now makes it clear that separation is only a benefit in cases of actual physical violence. In most other cases it is better for the well-being of everyone concerned – mother, father and children – to stick to it (Pell Quadrant).

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